

# 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 9, 2012

**SUBJECT:** Prohibition on the use of public funds for abortion  
(Work Order No. 27-LS1441\A)

**TO:** Representative Wes Keller  
Chair of the House Health and Social Services Committee  
Attn: Ernest Prax

**FROM:** Lisa Moritz Kirsch *Pam Gilly for LMK*  
Legislative Counsel

In Jean Mischel's absence, I have drafted the abortion bill you requested. It prohibits the use of any public funds for abortion except in the very limited circumstances required by federal law.<sup>1</sup> The issue of state funding for abortion has been litigated in Alaska, and the Alaska Supreme Court held that under the Alaska Constitution it was a violation of equal protection to fund pregnancy services for women who carried to term through the Medicaid program while refusing to provide funding for medically necessary abortion.<sup>2</sup> "Medically necessary" services under Alaska's Medicaid program include those necessary to protect the health of the woman, not only those necessary to save her life.<sup>3</sup>

The model law you sent to us had a provision that would give legislators the right to intervene in a lawsuit that challenges the Act. I did not include this provision. First, it provided a right to intervene for the sponsor or co-sponsor while in this case the sponsor is a committee. Second, a provision like this that allows an individual legislator to intervene as a matter of right appears to conflict with the court rule controlling intervention. The court rule that controls intervention, Civil Rule 24, would not prevent a legislator who had standing from intervening, but if the legislature wants to allow

---

<sup>1</sup> These are pregnancy resulting from rape or incest or pregnancy that threatens the life of the pregnant woman. This is known as the "Hyde amendment," Pub.L. No. 106-554, §§ 508-509, 114 Stat. 2763 (2000).

<sup>2</sup> *Planned Parenthood v. Perdue*, 28 P.3d 904 (Alaska 2001).

<sup>3</sup> This term is not expressly defined in law. Within certain guidelines, a doctor ordinarily makes the determination of what is medically necessary for a particular Medicaid patient.

Representative Wes Keller

March 9, 2012

Page 2

intervention as a matter of right it would have to amend the court rule. As you know, court rule changes require a two-thirds vote.<sup>4</sup>

I did include the section titled "construction," although I have doubts about its effect and enforceability. If this provision is intended to control a court's interpretation of the statute or the constitution, it may run afoul of the separation of powers doctrine. The courts have independent authority to determine the meaning of law and the constitution.

Finally, I used the definition for "abortion" already existing in statute. However, it is slightly different; for example, it does not exclude abortion to terminate an ectopic pregnancy. I modified the definition of public facility to match our statutory language and to eliminate references to private facilities according to your request. You may want to review the definitions to ensure they are consistent with your intent.

Due to the short time for drafting and the fact that I am drafting outside my usual drafting subjects, I apologize in advance for the fact that this draft may be a bit rough.

LMK:ljw  
12-192.ljw

Enclosure

---

<sup>4</sup> Constitution of the State of Alaska, art. IV, sec. 15.