

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

March 1, 2004

1:10 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Tom Anderson, Vice Chair
Representative Jim Holm
Representative Dan Ogg
Representative Ralph Samuels
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 451

"An Act relating to therapeutic courts; and providing for an effective date."

- MOVED HB 451 OUT OF COMMITTEE

HOUSE CONCURRENT RESOLUTION NO. 29

Relating to support for therapeutic courts for repeat driving while under the influence offenders.

- MOVED HCR 29 OUT OF COMMITTEE

HOUSE BILL NO. 468

"An Act relating to the amount of the bond required to stay execution of a judgment in civil litigation involving a signatory, a successor of a signatory, or an affiliate of a signatory to the tobacco product Master Settlement Agreement during an appeal; amending Rules 204 and 205, Alaska Rules of Appellate Procedure; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 385

"An Act relating to awarding child custody; and providing for an effective date."

- MOVED CSHB 385(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 342

"An Act relating to driving while intoxicated; and providing for an effective date."

- MOVED CSHB 342(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 334

"An Act relating to unlawful exploitation of a minor."

- BILL HEARING POSTPONED TO 3/3/04

PREVIOUS COMMITTEE ACTION

BILL: HB 451

SHORT TITLE: THERAPEUTIC COURTS

SPONSOR(S): RULES BY REQUEST

02/16/04 (H) READ THE FIRST TIME - REFERRALS
02/16/04 (H) JUD, FIN
03/01/04 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HCR 29

SHORT TITLE: SUPPORT THERAPEUTIC COURTS

SPONSOR(S): REPRESENTATIVE(S) HEINZE

02/16/04 (H) READ THE FIRST TIME - REFERRALS
02/16/04 (H) JUD
03/01/04 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HB 468

SHORT TITLE: APPEAL BONDS: TOBACCO SETTLEMENT PARTIES

SPONSOR(S): LABOR & COMMERCE

02/16/04 (H) READ THE FIRST TIME - REFERRALS
02/16/04 (H) JUD
03/01/04 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HB 385

SHORT TITLE: AWARDED CHILD CUSTODY

SPONSOR(S): REPRESENTATIVE(S) MCGUIRE

01/20/04 (H) READ THE FIRST TIME - REFERRALS
01/20/04 (H) JUD
02/25/04 (H) JUD AT 1:00 PM CAPITOL 120
02/25/04 (H) <Bill Hearing Postponed>

02/27/04 (H) JUD AT 1:00 PM CAPITOL 120
02/27/04 (H) <Bill Hearing Postponed>
03/01/04 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HB 342

SHORT TITLE: INCREASE DRIVING UNDER INFLUENCE PENALTY
SPONSOR(S): REPRESENTATIVE(S) GATTO

01/12/04 (H) PREFILE RELEASED 1/2/04
01/12/04 (H) READ THE FIRST TIME - REFERRALS
01/12/04 (H) JUD
02/02/04 (H) JUD AT 1:00 PM CAPITOL 120
02/02/04 (H) Heard & Held
02/02/04 (H) MINUTE(JUD)
02/04/04 (H) JUD AT 1:00 PM CAPITOL 120
02/04/04 (H) -- Meeting Canceled --
02/09/04 (H) JUD AT 1:00 PM CAPITOL 120
02/09/04 (H) <Bill Hearing Postponed>
02/20/04 (H) JUD AT 1:00 PM CAPITOL 120
02/20/04 (H) Heard & Held
02/20/04 (H) MINUTE(JUD)
02/27/04 (H) JUD AT 1:00 PM CAPITOL 120
02/27/04 (H) Heard & Held
02/27/04 (H) MINUTE(JUD)
03/01/04 (H) JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

DOUG WOOLIVER, Administrative Attorney
Administrative Staff
Office of the Administrative Director
Alaska Court System (ACS)
Anchorage, Alaska

POSITION STATEMENT: Presented HB 451 on behalf of the ACS.

LEONARD R. DEVANEY III, Judge
4th Judicial District Bethel
Superior Court
Alaska Court System (ACS)
Bethel, Alaska

POSITION STATEMENT: During discussion of HB 451, encouraged the committee to support continued funding of therapeutic courts.

STEPHANIE E. JOANNIDES, Judge
3rd Judicial District Anchorage
Superior Court
Alaska Court System (ACS)

Anchorage, Alaska

POSITION STATEMENT: During discussion of HB 451, related the success she has observed in Anchorage's therapeutic court.

LINDA WILSON, Deputy Director
Public Defender Agency (PDA)
Department of Administration (DOA)
Anchorage, Alaska

POSITION STATEMENT: Testified in support of HB 451.

JON BITTNER, Staff
to Representative Cheryll Heinze
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Presented HCR 29 on behalf of the sponsor, Representative Heinze.

JANET McCABE, Chair
Partners for Progress
Anchorage, Alaska

POSITION STATEMENT: During discussion of HCR 29, reviewed the success of the Anchorage Wellness Court.

KEITH A. TEEL, Attorney
Co-Chair, Legislative Practice Group
and Chair, Tobacco Practice Group
Covington & Burling
Washington, DC

POSITION STATEMENT: Assisted with the presentation of HB 468 and responded to questions.

JENNIFER APP, Alaska Advocacy Director
American Heart Association
Anchorage, Alaska

POSITION STATEMENT: Testified in opposition to HB 468, suggested some alternative language, and responded to questions.

EMILY NENON, Alaska Advocacy Director
American Cancer Society (ACS)
Anchorage, Alaska

POSITION STATEMENT: During discussion of HB 468 provided comments and responded to a question.

PAIGE HODSON
Anchorage, Alaska

POSITION STATEMENT: During discussion of HB 385, related her personal experience which led her to bring this issue to Chair McGuire, sponsor.

ALLEN M. BAILEY, Attorney at Law
Anchorage, Alaska

POSITION STATEMENT: Speaking as a family law attorney and the Vice-Chair of the American Bar Association's Family Law Section Domestic Violence Committee, urged the committee to pass [Version Q of HB 385].

TRACY GOULD
Anchorage, Alaska

POSITION STATEMENT: Testified that HB 385 would be valuable toward changing these [friendly parent] laws.

KIMBERLEE VANDERHOOF, Program Director
Careline Crisis Intervention
Fairbanks, Alaska

POSITION STATEMENT: Urged the committee to pass HB 385.

GIGI PILCHER
Ketchikan, Alaska

POSITION STATEMENT: Requested that the committee pass HB 385.

ROSITA TWAIM
Ketchikan, Alaska

POSITION STATEMENT: During discussion of HB 385, relayed that the laws should be changed to protect children.

DENNIS L. McCARTY, Attorney at Law
Ketchikan, Alaska

POSITION STATEMENT: Testified on HB 385.

KERRY RASMUSSEN
Ketchikan, Alaska

POSITION STATEMENT: Expressed hope that HB 385 would pass.

LANETTA LUNDBURG
Ketchikan, Alaska

POSITION STATEMENT: Her testimony that HB 385 is very important and needs to be closely reviewed was read by Jessica Stone.

CHRISTINE McLEOD PATE, Mentoring Attorney
Alaska Network on Domestic Violence and Sexual Assault (ANDVSA)
Sitka, Alaska

POSITION STATEMENT: Thanked the committee for allowing her to speak in favor of HB 385.

ALVIN CARR

Ketchikan, Alaska

POSITION STATEMENT: Congratulated the committee for its efforts on HB 385.

LAURIE BROWNLEE, court-appointed special advocate (CASA)

(No address provided)

POSITION STATEMENT: Testified in support of HB 385.

CODY RICE, Staff

to Representative Carl Gatto

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Offered comments and responded to questions during discussion of HB 342 on behalf of the sponsor, Representative Gatto.

ACTION NARRATIVE

TAPE 04-30, SIDE A

Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 1:10 p.m. Representatives McGuire, Anderson, Holm, Ogg, Samuels, Gara, and Gruenberg were present at the call to order.

HB 451 - THERAPEUTIC COURTS

Number 0088

CHAIR McGUIRE announced that the first order of business would be HOUSE BILL NO. 451, "An Act relating to therapeutic courts; and providing for an effective date."

Number 0092

DOUG WOOLIVER, Administrative Attorney, Administrative Staff, Office of the Administrative Director, Alaska Court System (ACS), explained that HB 451 was introduced by the House Rules Standing Committee by request of the ACS. Mr. Wooliver paraphrased portions of the written sponsor statement, which read in part [original punctuation provided]:

HB 451 extends the termination dates for two pilot therapeutic court programs until after a planned study of those courts has been completed and reviewed by the legislature. The bill also removes a sunset clause on the Anchorage superior court judge position that was added, in part, to administer one of those therapeutic courts.

In 2001 the legislature passed HB 172, which established felony-level therapeutic courts in Anchorage and Bethel. Each court was set up as a pilot program scheduled to run for three years. The Anchorage court admits those with a felony conviction for driving under the influence of an alcoholic beverage, inhalant, or controlled substance (DUI). The Bethel court admits those convicted of either felony DUI or certain felony drug offenses. The findings section of HB 172 explained the purposes of these courts:

The purposes of therapeutic courts are lasting sobriety of offenders, protection of society from alcohol-related and drug-related crime, prompt payment of restitution to victims of crimes, effective interaction and use of resources among criminal justice and community agencies, and long-term reduction of costs relating to arrest, trial, and incarceration.

MR. WOOLIVER pointed out that these two felony DUI courts were largely modeled after the pioneering work done by Judge James N. Wanamaker, Anchorage District Court, who has a misdemeanor wellness court that deals with misdemeanor alcohol offenders. This therapeutic court grew out of a trial judge's frustration with a system that doesn't work for those with significant alcohol abuse problems. Mr. Wooliver said that Judge Wanamaker has had a great deal of success with his wellness court, adding that the desire of Judge Wanamaker and Brian Porter, former Speaker of the House of Representatives, was to determine whether the success at the misdemeanor level could be replicated at the felony level.

Number 0301

MR. WOOLIVER returned to the sponsor statement and paraphrased the following portions of it [original punctuation provided]:

In order to determine the effectiveness of these courts the Judicial Council was charged with evaluating them and publishing a study for legislative review. Unfortunately, both the Anchorage and Bethel programs sunset long before the evaluation is scheduled to be completed and, because the report is to be published in July, many months more before the legislature has an opportunity to review that evaluation. If the legislature looks at the evaluation study and decides that the programs should continue, it will be too late; both programs would have ended more than a year earlier.

In order to fix this problem, HB 451 extends the termination date of the pilot programs until after the legislature has had an opportunity to review their effectiveness.

House Bill 451 also removes a sunset clause in HB 172 that will terminate the Anchorage superior court judge position that was added by that bill. The new judge was necessary not only to do the work of the therapeutic court but also to help absorb the growing felony caseload in Anchorage. The sunset clause will take effect this summer at the same time the therapeutic court program is scheduled to end. Not only will that mean the end of the felony therapeutic court, it will also mean that Anchorage will have one less judge for other superior court work. The therapeutic court judge in Anchorage spends most of her time on general superior court work unrelated to therapeutic court cases. If we lose the judicial position it will impact all superior court cases in Anchorage.

The loss of a superior court judge in Anchorage will return us to the number of judges initially established in 1984. Since that time the felony caseload in Anchorage has increased approximately 100%. We simply cannot afford to lose a superior court position in Anchorage and to return to a level of judicial coverage that was appropriate 20 years ago.

Number 0540

LEONARD R. DEVANEY III, Judge, 4th Judicial District Bethel, Superior Court, Alaska Court System (ACS), informed the committee that he spends approximately 80 percent of his time dealing with the general superior court caseload. He noted that the Bethel judicial district is the third highest in the state with regard to the number of trials. Judge Devaney noted that his court, which started in June 2002, has had 55 people enter the program, seven of which are to graduate [soon] and another seven are expected to graduate June 1st. The court has experienced wonderful success. About 100 percent of the cases involve alcohol or drugs, he noted. Judge Devaney showcased a recent 65-year-old graduate who had 11 DUIs, three misdemeanor assaults, one felony assault, a couple of criminal trespasses, and a few disorderly conducts. This gentleman has remained sober for two years now and is working. Judge Devaney concluded by encouraging the committee to support continued funding so that the courts can determine whether the therapeutic courts are as successful as is believed.

Number 0716

STEPHANIE E. JOANNIDES, Judge, 3rd Judicial District Anchorage, Superior Court, Alaska Court System (ACS), encouraged committee members to observe these therapeutic courts. She highlighted that judges, prosecutors, and defense attorneys throughout Alaska are constantly frustrated by recidivism. The therapeutic courts are actually working, she related. Across the country there are over 1,000 drug courts, after which the therapeutic courts are modeled, in operation. The results in Alaska are consistent with those in the Lower 48. Judge Joannides related that in Anchorage's therapeutic court, she has seen mothers reunited with their children and pregnant women not drinking during their pregnancy. She recalled that about two-thirds of those in her program are repeat felony offenders. "I could go on and on about the successes and the fact that these courts are really rebuilding the lives of people who have very little hope," she said.

Number 0934

LINDA WILSON, Deputy Director, Public Defender Agency (PDA), Department of Administration (DOA), announced support for HB 451. She said she believes it's important to continue the two [therapeutic courts] until the results of the study are available. Ms. Wilson assured the committee that therapeutic courts aren't an easy way for defendants because a lot of work and commitment is required of the defendant. Ms. Wilson

reiterated support for HB 451, adding that [the PDA] supports therapeutic courts in general.

Number 1030

REPRESENTATIVE ANDERSON moved to report HB 451 out of committee with individual recommendations and the accompanying fiscal note. There being no objection, HB 451 was reported from the House Judiciary Standing Committee.

HCR 29 - SUPPORT THERAPEUTIC COURTS

Number 1055

CHAIR McGUIRE announced that the next order of business would be HOUSE CONCURRENT RESOLUTION NO. 29, Relating to support for therapeutic courts for repeat driving while under the influence offenders.

Number 1067

JON BITTNER, Staff to Representative Cheryl Heinze, Alaska State Legislature, presented HCR 29 on behalf of the sponsor, Representative Heinze, as follows:

Alcoholism in Alaska is a serious and immediate problem. Conventional methods of dealing with repeat offenders under the influence of alcohol aren't effective and are prohibitively expensive.

The largest supplier of mental health care in America today is the correctional system. This is both ineffective and expensive. People with substance abuse problems aren't going to be cured or helped by locking them away with few if any treatment options and then releasing them after they've served their time. The average cost of traditional incarceration is roughly \$113 per person per day. Over an 18-month period, which is the length of the wellness court's treatment program, that adds up to over \$60,000. Compare that with the daily cost of the wellness court which is about \$22 per day or roughly \$11,000 over the 18-month treatment period, about half of which is paid by the state. You see a savings of around \$50,000 per offender.

The best way we have of treating people with addictions are therapeutic courts. While the alcohol-related recidivism rate for a conventional incarceration of alcohol and drug abusers is somewhere around 67 percent nationwide, the recidivism rate of wellness court graduates is about 25 percent. This disparity in success rates is attributed to the use of Naltrexone, a drug that inhibits alcohol cravings, coupled with community-based treatment programs and cognitive-behavioral therapy. In order to treat someone with an addiction, you have to treat the cause. To be most effective, the community as a whole must be involved.

House Concurrent Resolution 29 asks that the legislature show its support for therapeutic courts' effectiveness in dealing with [driving under the influence (DUI)] crime. It also asks the Department of Law and the Public Defender Agency to actively participate in the startup of therapeutic courts in areas with high instances of DUI offenders where there is local support for therapeutic courts. Therapeutic courts are effective, comparatively inexpensive, and easy to implement. I urge your support of HCR 29.

Number 1175

JANET McCABE, Chair, Partners for Progress, announced support for HCR 29 as well as for all therapeutic courts. She noted that the committee packet should include the 2003 update on the Anchorage wellness court run by Judge James N. Wanamaker. There is three years of data compiled by the Justice Center [College of Health & Social Welfare] at the University of Alaska Anchorage. This data illustrates that the [Anchorage] wellness court reverses the pattern typical of those who are sent to jail or treated in the traditional manner. In Anchorage, 75 percent of the those [charged with] felony driving under the influence (DUI) are likely to reoffend and return to jail. The aforementioned is an expensive cycle. However, 75 percent of those who have graduated three years ago from the [Anchorage wellness court] have been successful with avoiding recidivism. Furthermore, of the 13 graduates in 2003, none have reoffended. Ms. McCabe noted that those [who participate in the Anchorage wellness court] are the core repeat offenders for DUI.

MS. McCABE informed the committee that the Anchorage wellness court is a tough program. Participants in the program have to

remain alcohol- and drug-free for 18 months, during which the Anchorage Police Department (APD) monitors them with a bracelet that tests the blood for alcohol. Furthermore, participants take Naltrexone, which quells the craving for alcohol initially. Therefore, participants are able to stop thinking about drinking and actively participate in treatment. The participants are kept busy with the Alcoholics Anonymous (AA) meetings, meetings with others taking Naltrexone, and various other meetings. "By the end of 18 months, they are genuinely changed people," she said. Ms. McCabe said this program produces better citizens and saves the public money. She noted that half of the cost of the program is paid for by the participant, which is viewed as part of the therapy.

Number 1488

REPRESENTATIVE ANDERSON moved to report HCR 29 out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, HCR 29 was reported from the House Judiciary Standing Committee.

HB 468 - APPEAL BONDS: TOBACCO SETTLEMENT PARTIES

Number 1524

CHAIR MCGUIRE announced that the next order of business would be HOUSE BILL NO. 468, "An Act relating to the amount of the bond required to stay execution of a judgment in civil litigation involving a signatory, a successor of a signatory, or an affiliate of a signatory to the tobacco product Master Settlement Agreement during an appeal; amending Rules 204 and 205, Alaska Rules of Appellate Procedure; and providing for an effective date."

Number 1528

REPRESENTATIVE ANDERSON, speaking as chair of the House Labor and Commerce Standing Committee, sponsor of HB 468, said that the tobacco Master Settlement Agreement ("MSA") is vitally important to Alaska and to the other 45 states who are parties to that settlement. It delivers millions of dollars in revenues to Alaska annually, and will continue to do so for years to come. However, the continued receipt of these funds is threatened by the huge judgments being awarded against the tobacco companies funding the settlement. Defendants facing such judgments almost always have a right to appeal and, in many cases, their appeals are successful in obtaining a reduced

judgment or in overturning the judgment entirely. But in order to stay the execution of a money judgment on appeal, a defendant must post a supersedeas - or "appeal" - bond, which, in the diminishing number of states not having limits on appeal bonds, usually equals the amount of the judgment. In Alaska, the bond required is ordinarily the amount of the judgment remaining unsatisfied, plus appeal costs and interest. But Alaska courts are permitted to set the bond in a different amount for good cause shown, meaning judges may set the bond at an amount exceeding the total judgment.

REPRESENTATIVE ANDERSON went on to say that if a company cannot afford to post a bond in the amount set by the court, the end result is that the company may be forced to file for bankruptcy - which carries with it an automatic stay of the debtor's obligation to pay its creditors - in order to stop the plaintiff from taking its assets during the appeal. Such a stay could disrupt payments by the company, including payments to Alaska and the other states under the MSA. This problem has been most vividly demonstrated by the ongoing [Engle v. R.J. Reynolds Tobacco Company] case in Florida, in which a class of smokers was awarded \$145 billion in punitive damages. Had there not been an appeal-bond cap in place at that time, the defendant tobacco companies would clearly have gone bankrupt, resulting in the termination of all MSA settlement payments nationwide, and precluding the ability to pursue a fair and orderly appeal. However, because Florida had previously enacted bond-cap legislation, the settlement payments continued during the appeal, and the appellate court ultimately rejected and reversed the verdict in its entirety.

Number 1669

REPRESENTATIVE ANDERSON remarked that to date, 26 states have recognized the possibility of enormous appeal bonds causing signatory companies to be unable to meet their obligations to the states under the MSA, and these states have passed legislation or amended court rules to limit the size of the required bond in cases involving large judgments. In addition, 5 other states do not require a defendant to post a bond at all during an appeal. Some states have passed legislation applying broadly to all litigants, while other states have passed more limited legislation applying only to MSA signatories, successors, and affiliates. The bond limits range from \$1 million to \$150 million. Nearly all of the statutes include a provision allowing for a higher bond amount, up to the full

value of the judgment, if the court determines that the appellant is dissipating assets to avoid paying a judgment.

REPRESENTATIVE ANDERSON said that HB 468 imposes a limit of \$25 million on the supersedeas bond that MSA signatories, successors, and affiliates must post to stay the execution of a judgment in Alaska. This bond limit would not change any other aspect of the law - for example, the rules by which the trial is conducted, or who ultimately wins or loses the lawsuit - or affect the rights of the plaintiffs to recover the full damages to which they are entitled if the judgment is upheld on appeal. Plaintiffs are also protected by the provision in the proposed legislation that allows the court to require a bond amount up to the value of the judgment if the appellant is dissipating its assets to avoid paying a judgment. House Bill 468 would not, therefore, injure plaintiffs in any way, and it would protect the state by ensuring it will continue to receive its MSA payments while the tobacco companies fully appeal any adverse judgment. In conclusion, he noted that the Senate Judiciary Standing Committee has reported the companion bill out of committee.

REPRESENTATIVE GRUENBERG noted the presence of a typo on page 1, line 7; it currently refers to AS 43.53 but it should instead refer to AS 45.53. He suggested that the drafter correct that error.

CHAIR McGUIRE indicated that there would be a technical amendment to fix that error.

Number 1801

KEITH A. TEEL, Attorney, Co-Chair, Legislative Practice Group, and Chair, Tobacco Practice Group, Covington & Burling, noted that he has been involved "in this effort around the country" for the last three or four years. He said:

I represent the four original tobacco companies that signed the Master Settlement Agreement with Alaska and the other states. And those companies are Philip Morris [Incorporated]; Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; and R.J. Reynolds Tobacco Company. Those companies are quite interested in trying to ensure that the MSA, the Master Settlement Agreement, continues in force - that nothing happens to mess it up, frankly. And that may sound a little strange because they were sued by a lot

of states and, ... under this agreement, they're required to pay a lot of money. But frankly, having lived through the experience, the companies really believe ... it's a better world, with these payments being made and the obligations they made under the [MSA] being honored, than a situation where the states are all suing the industry.

And so ... my clients would very much like to live up to their obligations under the [MSA]. ... For us, this is about the catastrophic situation where a piece of litigation just gets so ... out of control that it produces a verdict that is impossible or at least next to impossible to bond, to post an appeal bond. And while that sounds a little farfetched, it indeed (indisc. - coughing) in the last four years of this industry. Once was in a case called Engle, down in Florida, in 2000, that resulted in a verdict of \$145 billion, and under the then-existing law in Florida, the companies would have been required to post an appeal bond of \$181 billion, which is simply not possible; there is not a commercial market more than about \$10 billion in the world, total, for appeal bonds, and the most any one company could get in the way of a commercial appeal bond is perhaps \$2 billion.

Number 1925

MR. TEEL continued:

So there's simply not a market for appeal bonds of [this] size. (Indisc.) that judgment, as was noted, was completely reversed last May and went away, but had the companies been required to post an appeal bond under the previously existing Florida law, they would have been forced to seek a stay through some other means than posting a bond. And the only other way we know of is to declare bankruptcy, and the problem with a bankruptcy filing is that it does produce an automatic stay of all payment obligations but it's indiscriminate; it wouldn't just prevent us from having to pay a judgment while we appeal, it would prevent us from being able to make payments under the [MSA]. And that would ... present a serious problem for all the states in this country that rely, for a lot of different budgetary reasons, on these funds.

As a result of that concern, the Florida legislature chose to (indisc. - paper rustling) limit of a \$100 million, and that allowed the companies to post a bond and to go ahead and appeal. Last year, the other case arose, which was in Illinois, and that case resulted in a judgment of \$10.1 billion. It was a consumer fraud case; there was all sorts of evidence that was put into the case that suggested that the companies had misled the public in saying that ... so-called "light" cigarettes - low tar and nicotine cigarettes - are safe, and the contention of the plaintiffs was that they were not, or not any safer than regular cigarettes.

And in that case, which was tried not to a jury but to a judge, the judge ordered \$10.1 billion and then ordered that a \$12 billion bond be posted, under Illinois law, in order to prevent the plaintiffs from executing while the defendants sought to appeal the judgment. What happened next was a lengthy dispute that at one point involved 37 attorneys general from other states, including Alaska, filing a petition with the courts in Illinois saying, "Please allow a lower bond." And it ultimately got to the state supreme court before the supreme court allowed (indisc. - coughing) \$6.8 billion. Still a mammoth amount and something that could not be repeated. So that's the history here. There are two cases, that but for, in the one, the legislature reducing the bond, and, in the other, the company somehow scraping together the ability to post a \$6.8 billion bond, there would have been a bankruptcy situation.

Number 2021

MR. TEEL went on to say:

And that bankruptcy would have stopped payments in those states under the [MSA] and in every other state under the [MSA]. The stay, as I say, is indiscriminate. This background ... probably should be augmented by just talking for a minute about what appeal bonds are for anyway. Appeal bonds are a creature of, really, a long history in the United States; they've been around, in some states, since the early 1800s. And ... frankly, when I think of appeal bonds, I think of a time when Abraham Lincoln was

practicing law and a defendant could literally hop on his horse and ride out of town without ... paying a judgment. ... Class actions did not exist in a time when appeal bonds (indisc. - paper rustling); these massive punitive damage judgments didn't exist. And the result was that nobody contemplated the kinds of massive judgments that you now see, that the two cases I've just described are, ... when thinking about appeal bonds.

We now have that situation, and we also have the rather odd situation, the only one I'm aware of, where states around the country are dependant on [MSA] revenues. For that reason, ... 26 states have acted to limit the appeal bond. In addition, 5 other states don't require a bond at all, just the (indisc.) stays of a judgment while it's on appeal. So you've now got 31 states in this country that do not require appeal bonds; that covers about 70 to 75 percent of the U.S. population. Frankly, our desire, our goal, is to try to pass this everywhere because, as these two cases I've described have shown, one bad judgment anywhere can prevent the companies from being able to honor their obligations under the [MSA], and we would rather not see that happen.

Number 2111

MR. TEEL concluded:

Just a couple of final points. First, there's no change in this bill in the substantive law. ... What this bill basically does is allow the companies to get through the appeal process without having their assets taken or being forced [into a] bankruptcy situation. ... If under the law they should lose the trial, presumably that verdict will be sustained on appeal, but at least it will let them get through the [appeal] process. Second, this is not a fix for some case that's hanging out there right now; we are not aware of a case in Alaska ... that currently presents this kind of risk. This is not an effort to try to mess up an ongoing piece of litigation for somebody else, but we feel that we have to do this in every state in order to protect the MSA.

Third, the dissipation-of-assets provision ... is in this bill as it has been in most of the bills. One of the comments I've occasionally heard made about this is, "How does anybody know whether that's going on, whether assets are being dissipated," and I think the answer to that is [that] in some industries maybe that would be hard to see, [but] there's probably not an industry in the United States that is more closely watched by all sorts of people - including 50 state's attorneys general - right now, than the tobacco industry: the four companies I represent. There's a ton of public information available, there's a ton of analysts out there who follow this, and I (indisc. - coughing) pretty easy to see whether a dissipation-of-assets situation was occurring.

Finally, a comment was made in previous hearings on the Senate bill ... [regarding] what happens if ... a truck driven by a Philip Morris employee plows into a school bus in Alaska. There may be a lot of answers one could give to that ..., but the basic answer is: Philip Morris doesn't have any employees in Alaska; its parent company, Altria [Group, Inc.], does not have any employees in Alaska; its sister company, Kraft [Foods], does not have any employees in Alaska. That's not how the chain of distribution works, and so while it's an interesting hypothetical, it's just not something that's likely to happen in Alaska. With that, I will stop, and I'd ... be very happy to answer any questions.

Number 2203

REPRESENTATIVE GRUENBERG turned attention to page 2, line 5, which read in part, "is dissipating assets outside the ordinary course of business to avoid payment", and said he is concerned about a possible loophole. He remarked, "I don't want the defendant to be able to say, 'Well, we're trying to avoid the payment of the judgment, but it's in the ordinary course of business'; so I'd like to eliminate the phrase, 'outside the ordinary course of business". Representative Gruenberg asked Mr. Teel if he would be opposed to eliminating that phrase.

MR. TEEL replied:

That language is in virtually every one of these dissipation-of-assets sections, and the reason it is

there is to try to recognize that the companies involved here are pretty huge companies that are constantly moving money around for all sorts of purposes. What we were trying to get at was something where a pattern emerges of something unusual happening, like ... moving the company out of New York City and into Mexico or something. So we were trying to set up the comparison between what's the normal ... pattern of behavior for these specific companies in their ordinary course. It was not an attempt to create some sort of loophole; it was just an attempt to recognize that there's got to be some ability to move money. If the committee really wants to do that, I recognize that is not the most important language in the bill, but it is language that's in every other state's dissipation section.

REPRESENTATIVE GRUENBERG remarked that he did not want to wind up going before the supreme court on the construction of that particular phrase.

MR. TEEL said that although he would prefer that the phrase be retained, he understands if the committee would prefer to remove it.

Number 2297

REPRESENTATIVE GRUENBERG asked whether anyone else has raised this issue.

MR. TEEL replied that from time to time, during the course of similar discussion in other states, it has been raised, but the end result for the most part has been to retain that language. He noted, however, that there are two or three states that decided not to include "this provision." In response to a question, he said that although there have been slight variations of the provision, it has pretty much said the same thing and included the "outside the ordinary course of business" language.

REPRESENTATIVE GARA asked Mr. Teel if he helped draft the language in HB 468.

MR. TEEL said yes.

REPRESENTATIVE GARA asked what the phrase, "an affiliate of a signatory" means.

MR. TEEL said that typically, the way affiliate is defined in the law, it includes parent corporations and sibling companies.

TAPE 04-30, SIDE B

Number 2393

MR. TEEL went on to say that what he and his clients were concerned about were situations in which somebody throws a parent company into litigation against the party that signed the MSA. In such a situation, a judgment against a parent company could sufficiently weaken the whole enterprise because the parent company would have to seek a stay under the bankruptcy laws and this in turn could potentially result in a stay of its subsidiary enterprises. He went on to say:

We're really trying to prevent that sort of situation. There was [a] little bit of concern ... about the situation where you might have a retailer or a distributor who is named in a lawsuit and goes all the way through judgment ..., and ... for that reason we also put in some language in this bill dealing with appellants collectively. We were trying to keep those people from having to post their own bond.

REPRESENTATIVE GARA offered his understanding that a lot of cigarette companies produce other products as well, for example, cheese.

MR. TEEL acknowledged that the parent company of Philip Morris [Incorporated], Altria [Group, Inc.], also owns Kraft [Foods].

REPRESENTATIVE GARA said that he wants to make sure that the legislation is as narrow as possible because he is concerned about extending "this protection" to any case that involves an affiliate of a tobacco company even if it doesn't involve tobacco specifically. If the real concern is tobacco litigation, he asked, then why is this bond rule applicable to non-tobacco litigation too? Why not limit it to just tobacco litigation?

MR. TEEL replied:

Let's imagine you had something that ... didn't involve tobacco per se, say a big derivative suit brought against the parent company, Altria [Group, Inc.], that somehow dealt with ... some sort of

corporate action that had nothing in particular to do with the sale of cigarettes. If that resulted in a massive judgment, ... you'd still have to bond that, and the process of having to bond it could cause Altria [Group, Inc.,] to have problems continuing to make its obligations under the MSA. It really doesn't have much to do at all with cigarettes; it has to do with the financial health of the company, and any large judgment could weaken the financial health of the company.

Number 2258

REPRESENTATIVE GARA asked why the amount of \$25 million is proposed. Why is that the appropriate amount as opposed to \$60 million or \$80 million?

MR. TEEL replied:

We start with \$25 million. I will tell you there is one state - Idaho - that went with \$1 million; they thought \$25 [million] was outlandish. The way it has worked out around the country, it's really kind of a question of what the legislature is comfortable with, and I think the bill that came out of the Senate side this morning ... [now has an] amount [of] ... \$100 million. And with that, I think some of these other concerns ... they were okay with. ... About 10 to 13 ... states have the \$25-million number; about another 5 or 6 have \$50 million; 1 has \$75 [million]; about 5 or 6 have \$100 million; and 2 have \$150 million.

REPRESENTATIVE OGG asked whether it would be possible for a company like ExxonMobil Corporation to become an affiliate of one of the signatories to the MSA and, under the current language in HB 468, thereby "get out of their \$5 billion bond."

MR. TEEL said no, adding that although it is theoretically possible that any company could make a corporate bid on another company, as a practical matter, there are very few companies in the world that are looking to enter into the tobacco industry, particularly given the recent settlements and litigation. He offered his understanding that much of the Exxon Valdez litigation was taking place in the federal courts, and HB 468 establishes a rule that it would not apply in federal courts. He mentioned that [his firm] had been advised to limit

the legislation proposed for Alaska to just tobacco litigation specifically because of the Exxon Valdez litigation.

REPRESENTATIVE GRUENBERG noted that AS 45.53, which HB 468 proposes to alter, pertains only to cigarette sales.

MR. TEEL pointed out that some of the other states "have broadly applicable caps that they've adopted to these appeal bonds," and so their legislation applies to more than just the MSA. The legislation before the committee, however, is "MSA-specific."

Number 2107

JENNIFER APP, Alaska Advocacy Director, American Heart Association, said that the American Heart Association is concerned about HB 468 because it fails to protect the public health of all Alaskans and is not needed to protect the MSA payments that Alaska receives every year. She noted that because the use of cigarettes is the number one preventable cause of heart disease, the American Heart Association spends a lot of time and energy ensuring that the appropriate amount of the MSA funds actually gets spent on tobacco education and cessation programs. The American Heart Association does not support HB 468. Notwithstanding that the MSA payments are incredibly important to the American Heart Association, the appeal bond limit proposed via HB 468 is nothing more than special legislation for tobacco companies that wish to get out of the current appeal bonds which apply to all companies doing business in Alaska. "This bill essentially would give the tobacco companies a bit of a free ride here, letting them cap the appeal bond limit at \$25 million," she added.

MS. APP said that appeal bonds serve an important role in protecting plaintiffs that have legitimately prevailed in a lower court. This mechanism ensures that defendants don't use repeated frivolous appeals, and also ensures that defendants don't lose their assets or hide them during the appeal process. She noted that Representative Gruenberg has already touched on the American Heart Association's concern regarding subsection (b) of Section 1, specifically the language, "outside the ordinary course of business". She opined that it would be very difficult, perhaps close to impossible, for a plaintiff to show that a company was dissipating assets outside the ordinary course of business, especially in complex litigation against large tobacco companies with widely dispersed assets.

MS. APP predicted that if there ever were to be a large class action lawsuit in Alaska that prevails in a lower court, it could result in a damage award in the billions of dollars, for example, in a case in which cigarette companies are found guilty of marketing cigarettes under false pretenses, such as what happened with the so-called "light" cigarettes, or if a company is found to be directing its marketing toward children. In such a situation, a tobacco company could get away with paying a \$25 million bond on a multi-billion dollar judgment. Even if such is not likely to occur in Alaska, she remarked, it does set a dangerous precedent without necessarily offering protection to those that are harmed by cigarettes, which is the goal of having an appeal bond.

Number 1955

MS. APP offered her belief that provisions ensuring that companies don't go bankrupt are already in place. First of all, companies can file a motion with the court to reduce the amount of the appeal bond, as occurred in the aforementioned Illinois case. The defendant can also work out an agreement with the prevailing plaintiffs to post a smaller bond. She noted that the signatory companies are very big companies; for example, the parent company of Philip Morris Incorporated has total assets of \$87.5 billion, net revenues of \$80.4 billion, and U.S. tobacco revenues of \$18.9 billion. She said she finds it somewhat ironic that the amount of \$25 million was chosen for Alaska as an appeal bond limit, since that is also the amount of money that tobacco companies spend annually in Alaska marketing their "deadly products." Tobacco companies do have money to spend, she remarked, they just don't want to post it on appeal bonds.

MS. APP opined that by lowering nonessential spending, tobacco companies could raise the money to post on appeal bonds without impacting their MSA payments. In conclusion, she said that if [the legislature] is truly concerned about the future of the MSA payments, there are some alternatives to the concept proposed via HB 468 that the American Heart Association would be satisfied with, for example, using language that sets an appeal bond limit at no greater than the total value of a losing defendant's assets, or at no greater than a losing defendant's total revenues for the prior fiscal year. Such alternatives would be legitimate ways of ensuring that tobacco companies are not forced into bankruptcy, while also ensuring that they are not let off the hook too easily. House Bill 468 is being proposed specifically for future large class action lawsuits,

and \$25 million is very small in terms of an appeal bond for such suits.

CHAIR McGUIRE noted that the American Heart Association has also provided written testimony.

REPRESENTATIVE GARA asked what standards the court would use to lower an appeal bond amount.

MS. APP said she did not know what they are specifically but posited that the courts do a balancing test between the amount of the judgment and the amount of the bond.

Number 1741

REPRESENTATIVE HOLM raised the issue of perhaps having an appeal bond limit of 10 percent.

MR. TEEL said that such has been discussed in a number of states, but has not been adopted except in a couple of states and then only in conjunction with a "hard dollar cap" and for all defendants, not just to the MSA signatories. He surmised that the reason a 10 percent limit has not been more favorably received is because no one is "very enthusiastic about the inevitable post-judgment proceeding to figure out what 10 percent of net worth is."

CHAIR McGUIRE noted that in members' packets are handouts provided by Covington & Burling detailing the appeal bond limits enacted by different states; for example, California has a limit of the lesser of 100 percent of the judgment of \$150 million, and Texas has a limit of the lesser of 50 percent of the judgment debtor's net worth or \$25 million. She remarked that some states have opted for having an appeal bond limit that is only applicable to the punitive damages portion of a judgment.

MR. TEEL surmised that those were states that enacted their appeal bond limits at the time of the aforementioned Engle case, and so the focus was very much on the punitive damages aspect of that case. Since that time, he remarked, a couple of states set appeal bond limits applicable to "damages of all kinds."

CHAIR McGUIRE asked how the punitive damages have compared with compensatory damages in these cases.

MR. TEEL said that although there is no "average" case, in every complaint against tobacco companies that he's seen, there is an

assertion of "a punitive damages claim." He mentioned that the tobacco industry probably prevails in most individual personal injury cases, though not all. And in some of the cases that have been lost, there have been punitive damages ranging between 1,000 times more than the compensatory damages to less than the compensatory damages. He added:

I think the world of "compensatories" has changed a little bit, though, in light of the U.S. Supreme Court's decision in 2003 in the State Farm (ph) case, which added a sort of constitutional overlay to the relationship between compensatory and punitive damages. And that has resulted in, not only for the tobacco industry but for other companies, cases being sent back to trial courts to have the "punitives" reexamined.

Number 1498

MR. TEEL remarked that generally, the truly massive portion of these verdicts tends to be punitive damages, adding that he is not aware of an individual "smoking and health case ... where the ultimately awarded compensatory damages to the plaintiff exceeded the \$25 million that's the cap in this bill." In response to a question, he relayed that he practices law in Washington DC.

REPRESENTATIVE GRUENBERG opined that in addition to amending Rules 204 and 205 of the Alaska Rules of Appellate Procedure, HB 468 may also have the effect of amending Rule 62 of the Alaska Rules of Civil Procedure. He asked the committee aide to investigate that issue so that if necessary, he can offer a technical amendment to that effect.

REPRESENTATIVE GARA noted that 25 states do not have limits on appeal bonds.

MR. TEEL indicated that some of those states do have legislation pending, adding that in a few states, the legislature doesn't have the authority to make such a change - instead the court must do it.

REPRESENTATIVE GARA asked whether any states have simply turned down this proposal.

MR. TEEL relayed that in Iowa, although the legislature passed an appeal bond limit twice, the legislation was vetoed by the

governor both times. He also offered his belief that similar legislation didn't pass in New Mexico simply because the legislature ran out of time.

Number 1225

EMILY NENON, Alaska Advocacy Director, American Cancer Society (ACS), said that one of the things about HB 468 that she takes issue with is the proposition that it is in the best interest of Alaska to protect the health of the tobacco industry. She elaborated:

We know that here in Alaska, tobacco annually costs the state \$132 million in annual health care costs directly related to smoking, and an additional \$129 million in lost productivity. What we bring in - that's supposedly in jeopardy, as the argument goes here - is between \$22 [million] and \$27 million from the [MSA]. And I will remind you all that like ... the American Heart Association, the American Cancer Society is active in lobbying to get ... tobacco settlement monies spent on tobacco control programs; that fits right into our mission of eliminating cancer as a major health problem.

But ultimately, the [MSA] was about the tobacco industry repaying the states for the damage [it has] inflicted, not about being a windfall for state budgets. And so around the country, the position of the [ACS] is, and I'm reading this right off the web site, "We believe tobacco companies should be held to the same standard as other industries and should not receive special protection from state legislatures." That is the basis that I'm coming from; I have been looking at this [and] a lot of the other arguments have been brought up, but that's one that I think that we're really missing and that I would like the committee to take seriously in consideration of this bill.

CHAIR McGUIRE asked what would the ACS's position be if the legislation before the committee set appeal bond limits for all types of litigation, not just tobacco litigation.

MS. NENON replied:

I have a personal argument about that, and I would have to ... do some more checking with our national government relations department to find out what the [ACS's] position is on that, [but] the research that I've done shows that the court system is designed to be able to handle setting [appeal] bonds. In the Illinois case last summer, when the judge set the [appeal] bond level at \$12 billion, the court did reduce that ... bond amount ... down to \$6 billion, and I will point out that Philip Morris [Incorporated] was able to post a \$6 billion bond. So my thinking is that the courts have been able to handle this in other cases, ... [and] the courts are uniquely set up to be able to handle these kinds of issues.

Number 1042

REPRESENTATIVE GRUENBERG remarked that the statute pertaining to the MSA stems from one-of-a-kind litigation, and that a supersedeas bond is generally the amount of the judgment plus interest. Such an amount, he opined, could "easily bust the bank," particularly given that bankruptcy is sometimes used as a form of corporate strategy and that "we've already sold 80 percent of the tobacco settlement." "So it's not as simple as all that," he concluded.

CHAIR MCGUIRE asked Ms. Nemon to provide the committee with the ACS's position on an alternative: making the appeal bond limit apply to all litigation. Chair McGuire said she agrees with Representative Gruenberg that the [MSA] presents an unusual situation.

REPRESENTATIVE HOLM asked what it costs to purchase a \$1 billion bond.

MR. TEEL relayed that a \$10 million bond could be purchased for perhaps 1 to 2 percent of that amount, whereas a \$1 billion bond could perhaps be purchased for an amount ranging between tens of millions of dollars and \$100 million, depending on "who you are." He noted that companies that have "a higher perceived risk in the litigation market place" have a hard time buying bonds, adding that the tobacco industry has a little bit of a history in attempting to buy such bonds and has typically not been able to buy them. Instead, the tobacco companies that he represents have had to put money into a bank account in order to get a letter of credit from the bank; that letter of credit is then given to the surety company, which then issues the bond.

"If you can buy them, they're a relatively small percentage of the judgment, but it's not clear everybody can buy them," he concluded.

Number 0813

REPRESENTATIVE GARA asked Ms. Nenon for a copy of the statement she'd read from earlier.

MS. NENON agreed to provide a copy of that to him, adding that the language on the ACS's web site is a lot stronger than her spoken testimony.

REPRESENTATIVE GARA asked of Mr. Teel:

If we're trying to protect the assets of a particular company and we're going to do it with a \$25 million limit or a \$100 million limit, whatever the limit is, why do we also have this provision in the bill that says collectively it can't exceed \$25 million ... [or whatever the limit is], collectively among all defendants put together?

MR. TEEL replied:

What we were worried about there was small defendants being sued with large defendants. In these cases, sometimes ... you get the retailers and the distributors who get named in the lawsuit, and often they are just there for purposes of defeating diversity and keeping a case in state court. ... And ... sometimes they're carried all the way through to the judgment. We just thought it was a little much to ask some of those ... smaller [businesses] ... in this litigation, who are not really the target, to have to, themselves, post the larger bond. And so this was an effort to kind of sweep everybody in on the one bond. Most states that have passed this have kept that "collectively" language, [but] not every state has.

CHAIR McGUIRE indicated that HB 468 would be held over.

HB 385 - AWARDING CHILD CUSTODY

Number 0698

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 385, "An Act relating to awarding child custody; and providing for an effective date."

Number 0622

REPRESENTATIVE HOLM moved to adopt the proposed committee substitute (CS) for HB 385, Version 23-LS1273\Q, Mischel, 2/27/04, as the work draft. There being no objection, Version Q was before the committee.

CHAIR McGUIRE, speaking as the sponsor of HB 385, explained that this legislation would have Alaska adopt the model code of the Family Violence Project of the National Council of Juvenile and Family Court Judges. The legislation attempts to deal with a child custody award when there has been domestic violence in the home prior to the split and eventual award of custody. Chair McGuire opined that the current law is unfair to the parent that has been the subject of abuse. She directed attention to page 2, line 22, and explained that under the current law, the court is required to review which parent is more likely to continue frequent and continuing contact with the other parent. She then directed attention to page 3, line 17, and [explained that under the current law] the court has to review the desire and willingness of each to allow an open and loving relationship, on a frequent basis, between the child and the other parent. However, if the child or one of the parents has been abused by the other parent, the [abused] parent or [non-abusive parent] probably doesn't feel like encouraging a close, loving relationship. Chair McGuire opined that the court's standard is wholly unfair and, in many cases, places the abused parent and/or abused child in jeopardy.

CHAIR McGUIRE explained that this legislation shifts the burden and thus: "We will ask the court to continue to say that unless it's shown to be detrimental to the welfare of the child, considering the factors that are in [AS] 25.24.150(c), ... but we're also saying that you have to consider the rebuttable presumption that's now going to be present in what will be a new subsection (g)." The rebuttable presumption specifies that a child will not be placed in partial or sole custody if there are proven incidents of serious bodily injury and/or a proven pattern of domestic violence. She noted that she has worked closely with Representative Gruenberg, who practices family law. Although there have been some compromises, she stated that she is unwilling to remove the rebuttable presumption language. She

emphasized that the overarching goal is the protection of the child.

CHAIR McGUIRE pointed out that the committee packet should now include an article entitled, "Man suspected in death of toddler also faces child porn charges"; the article relates a real situation that occurred in Ketchikan. The committee packet also includes a petition from adults in Ketchikan who support HB 385. The committee packet also now contains a zero fiscal note from the Alaska Court System.

Number 0179

CHAIR McGUIRE mentioned that there are statistics that review the long-term psychological effects of abuse on children as well as in cases of observing it between parents. In many cases, these children go on to face adverse physical and mental development. In some cases, these children become abusers themselves. Therefore, Chair McGuire said that she didn't want to punish a battered co-parent by awarding custody to the parent who has been the abuser. Reading a quote from the American Judges Association, Chair McGuire said, "Studies show batterers are able to convince authorities that the victim is unfit or undeserving of sole custody in approximately 70% of challenged cases." "Friendly parent" statutes are often used by abusive parents against the protective parent, she noted. Therefore, this legislation attempts to better protect children from the effects of domestic violence by achieving consistency between Alaska child protection statutes and child custody statutes.

CHAIR McGUIRE informed the committee of the following:

Alaska ranks in the top five states in the nation for per capita rates of domestic violence. The rate of Alaskan women being killed by a partner is one-and-a-half times the national average. Alaska has six times the national average of reported child sexual assault. And in three out of four reported cases, the victim knew the offender. The most commonly reported type of sexual abuse [is a father who commits] ...

TAPE 04-31, SIDE A

Number 0001

CHAIR McGUIRE continued:

... incest with his daughter. And those statistics are reported out of the Alaska Department of Health and Social Services.

CHAIR MCGUIRE opined that there are sufficient tools within the court system that have been maintained in this legislation to allow for a person to complete a substance abuse program and an intervention program for batterers, if applicable, the landscape of the case may change.

Number 0091

PAIGE HODSON informed the committee that she is the woman who brought this issue to Chair McGuire. She explained that she is a single mother of two children, ages thirteen and six, a court-appointed special advocate (CASA) volunteer for abused and neglected children in Alaska, as well as a survivor of domestic violence. Ms. Hodson explained that she was in an abusive marriage for 11 years. The physical abuse would happen one to two times a year while the remainder of the time was permeated by a high level of cruelty, emotional abuse, and verbal abuse. She related some of the events that happened, most of which, she said, happened in front of her oldest daughter.

MS. HODSON pointed out that she struggled to obtain help for her family and tried to get her husband to various types of programs, and he did attend four years of marriage counseling. After that four years, she said she realized that things weren't going to change. When the child abuse starting happening, she knew she had to get out [of the relationship]. She was eventually able to file for divorce. Although she thought she was doing all the right things, when she entered the court system she found her world turned upside down. She explained that she thought she and her children would be protected and that reasonable visitation would be put forth. However, she was blamed for the violence equally and her fears of the violence and his parenting were "pathologized."

MS. HODSON said that furthermore, she discovered that [an incident of] domestic violence was used to characterize the divorce as a high-conflict divorce. Moreover, the child abuse was minimized to be a difference in parenting styles. The toll on her eldest child was enormous and she almost failed fourth grade. Ms. Hodson informed the committee that although she ultimately prevailed, it was only after two full custody trials. She said she has full legal custody and primary physical

custody, but her ex-husband is allowed visitation and thus her children are still not protected, she said.

Number 0420

ALLEN M. BAILEY, Attorney at Law, informed the committee that he is a family law attorney who was the [Municipality of Anchorage's] prosecutor for over 10 years. For the last 30 years, he said he has prosecuted batterers or represented victims of domestic violence in his practice. "This is an important issue because it deals with the protection of our children," he said. As mentioned earlier, the National Council of Juvenile and Family Court Judges has recommended this presumption as has the American Psychological Association, the American Bar Association's Commission on Domestic Violence, the American Medical Association, and the United States Congress. Mr. Bailey stated that this proposal isn't gender biased since both men and women commit domestic violence. However, he acknowledged that there is a predomination of male-initiated domestic violence. He relayed the experience he'd had with domestic violence through his practice. Mr. Bailey emphasized the need to protect the children whenever possible.

MR. BAILEY turned to the presumption provision, which was taken from Louisiana's state statutes. He pointed out that there are about 23 other states that have some version of presumption language, adding that at least 20 of those states have strong presumption [language]. Mr. Bailey, speaking as a family law attorney and the vice-chair of the American Bar Association's Family Law Section Domestic Violence Committee, strongly urged the committee to pass this legislation.

CHAIR MCGUIRE turned attention to the first U.S. national policy statement supporting a rebuttable presumption in domestic violence cases, which is H.R. 172. She said, "They passed a sense of Congress that for purposes of determining child custody, credible evidence of physical abuse of a spouse should create a statutory presumption that it's detrimental to the child to be placed in the custody of the abusive spouse." She reiterated that in 1994, the National Council of Juvenile and Family Court Judges released the model code, which included the rebuttable presumption. Additionally, the American Bar Association (ABA) passed a resolution in August 1989 specifying that joint custody is inappropriate in cases in which spousal or child abuse or parental kidnapping is likely to occur. In 1994, the ABA published a report to its president that [recommended] the adoption of statutes that would create a presumption against

custody to batterers. From the William Mitchell Law Review, Chair McGuire related that some of the reasons these policies were implemented is because of the growing body of social science literature showing the often severe and long-lasting effects that domestic violence has on children.

Number 0747

TRACY GOULD informed the committee that this legislation is important to her because her best friend was murdered by her ex-husband four days after being granted a divorce. She recalled that during the course of the divorce hearing, the judge reviewed testimony of eyewitnesses, professionals, and counselors who testified to the ex-husband's abusive nature and obsessive need for his wife. Even when one of the children decided to poison the father, the judge still decided to "throw all that out." The judge also viewed the husband's "excessive" nature with the children to be a difference in parenting styles. The wife repeatedly requested safety measures for herself and her children.

MS. GOULD said, however, that the judge felt that the husband and wife should still be able to co-parent, regardless of their personal feelings and the husband's behavior toward the wife. Consequently, after the divorce was granted, the husband was allowed visitation and it was on those grounds that he forced entry into the wife's house where he stabbed her over 56 times. The children saw their father leave with a knife in his hand covered with their mother's blood. Ms. Gould said that her best friend wasn't the only person that died because of the "friendly parent" provision and she wasn't the last. Three other women in the Fairbanks area were killed during the same time period in which the trial was taking place. Ms. Gould said that HB 385 would be invaluable toward changing these [friendly parent] laws so that these situations don't ever happen again.

Number 0995

KIMBERLEE VANDERHOOF, Program Director, Careline Crisis Intervention, informed the committee that prior to her current position, she worked as the legal advocate for the women's shelter in Fairbanks for five years. During the time she worked with the women's shelter, she said she worked with thousands of victims, most of who had children and were intimidated by the court system. Ms. Vanderhoof stated that she was honored to be the legal advocate for Lisana Burch. In the months before Ms. Burch's custody trial, she requested and was granted protective

orders against her husband. Ms. Burch had expressed concern that she would be viewed as not complying with the "friendly parent" provision of Alaska Statutes if she obtained a protective order during her divorce. Therefore, Ms. Burch decided not to obtain a protective order. Ms. Burch strongly and courageously represented herself through her divorce and custody hearing and throughout the trial she expressed concern for her safety and the safety of her child.

MS. VANDERHOOF said that during Ms. Burch's trial, witnesses testified that Ms. Burch's abuser had a problem with anger, had been diagnosed with a mental health disorder, had been suicidal, self medicated, and could pose a threat to the safety of his children. However, toward the end of the trial, the trial court judge commented that he had heard little that would help him make a decision. In the end, the court concluded that the parties should be flexible and admonished the parties that they needed to agree on important decisions in their child's life. Ms. Burch was granted primary custody, but three days later during a visitation exchange "the spider lured her to his web." If this legislation had been enacted in 2001, it would have provided another tool to enhance the safety of domestic violence victims. Ms. Vanderhoof urged the committee to pass HB 385 because it will eliminate a victim's fear of being seen in an unfavorable light if the victim chooses to use a protective order to enhance his/her safety.

Number 1170

GIGI PILCHER began by thanking the sponsor [for introducing HB 385]. She said it's now time to talk about protecting lives rather than assets. Ms. Pilcher related that on February 2, 2004, a young woman, Nannaput Paul, who had been in the U.S. for a little over three years, placed her trust in the Alaska justice system to protect her child and herself. This woman petitioned the court on behalf of her 22-month-old daughter for a domestic violence restraining order against her husband. Her husband had told her that if she left him, she would be sent back to Thailand and never see her daughter again.

MS. PILCHER said that Ms. Paul wanted her daughter to be safe and thus she placed her trust in the system and "we all told her she was doing the right thing and that everything would be alright." However, on Friday, February 20, 2004, during a hearing, the judge modified the order, based on a court-appointed guardian ad litem, to allow for unsupervised visits between father and daughter. When Ms. Paul's daughter was not

returned to her on time, she called the police [and] the guardian ad litem; her daughter was found dead at the father's residence. Ms. Pilcher said that Ms. Paul did everything right to protect her daughter, but the system failed her and her daughter. Although it's too late to save Ms. Paul's daughter, it's Ms. Paul's wish that no other parent will have to suffer such a great loss. In closing, Ms. Pilcher requested that the committee pass HB 385.

Number 1382

ROSITA TWAIM opined that this legislation should be passed because children are being killed. Ms. Twaim highlighted that when domestic violence is involved, the most dangerous period of time is when the woman decides to leave her husband. She expressed the need for a mother to be able to protect herself and her children. If the father has a criminal background and has shown violence toward the mother and children, the father shouldn't be allowed to see either the mother or the children. Exchanging the children between the parents while the court is determining which parent should have custody shouldn't be allowed unless the mother filing the restraining order agrees to the visitation. Ms. Twaim acknowledged that starting over for a mother and her children can be difficult, but she knows it can be done since she managed to come out of a relationship involving domestic violence. The children are really the victims and the law needs to be changed to protect the children.

Number 1491

DENNIS L. McCARTY, Attorney at Law, informed the committee that he has been an attorney for over 30 years. He also informed the committee that he was the attorney in the earlier mentioned case of Ms. Paul. Mr. McCarty explained that he has always taken on domestic violence cases thinking that he could make a difference. He said, "I'm always hesitant ... to rush forward with a particular instance to [state] ... a reason why something should happen, but this is a law that does need to be changed." The statute proposed in HB 385 would make the presumption not just one of nine factors to be considered by the court. It's most important, he opined, to have this definition in the domestic violence petition area. In a custody [case], the judge seems to be able to more completely explore areas, as it's not an expedited process. Furthermore, this proposed change would be a major factor in how these hearings are handled, especially in rural areas where the magistrate doesn't have extensive legal experience or experience dealing with domestic violence.

MR. McCARTY said he believes there is a conflict between encouraging the parent that's willing to be cooperative and the one that isn't. He pointed out that there is a means of proving domestic violence, and in many cases the definitions come from Title 18, which refer back to criminal statutes. He remarked that the committee may want to consider whether some changes have to be made to Title 18 or whether to refer to other statutes. In the case of Ms. Paul, the involvement of child pornography might be evidence of domestic violence. He noted that there are other statutes that explicitly speak to hitting and threatening. In Ms. Paul's case, the magistrate concluded that there was domestic violence and the long-term order should continue. However, the [difficulty] is in balancing the directive to maximize the contact of each parent with the children while maintaining safety for the children. Mr. McCarty emphasized that [the courts] are driven by the best interest of the children.

MR. McCARTY relayed his understanding that [HB 385] makes it abundantly clear that if there is a determination of domestic violence, it becomes a strong factor in driving the ultimate decision regarding custody. Mr. McCarty said he viewed [HB 385] as a tool, noting that he hoped that those dealing with these type cases are already using [what is laid out in this legislation]. He reiterated that this should be very beneficial in rural areas where the only resource available is a domestic violence petition before a magistrate.

Number 1752

KERRY RASMUSSEN informed the committee she is the grandmother of an eight-year-old whom she feels this legislation will greatly help. She said she hoped HB 385 would pass.

Number 1762

LANETTA LUNDBURG had her testimony read by Jessica Stone [original punctuation provided]:

The reason for my presence today for public comment on House Bill 385 is very interesting. If asked about this bill one week ago I wouldn't have known anything about it, or interest in participating in public comment. The events of last week and a tragedy we have experience has caused pause for thought. HB 385 is very important and needs to be closely looked at.

After a brief review of House Bill 385 I continue to wonder if there is a truly fail-safe way to be a voice for the silent and be a voice for the young innocent victims.

One item that comes vividly to my mind is the need for a "cooling off" period, post ruling in a custody case. As you are aware, cases brought forth always are ridden with emotion. Even though a cooling off period (suggest 30 days) isn't an absolute guarantee, it does provide time for improvement or more thorough assessment.

Cooling-off period means that for a minimum of 30 days any consideration for visitation by the nonawarded custodian parent will only be allowed a visitation with a child under the supervision by a 3rd party court-appointed custodian.

What our community has recently experienced had decisions of tragic consequence. We cannot afford to compromise defending the voice of the silent & innocent young. Thank you.

Number 1847

CHRISTINE McLEOD PATE, Mentoring Attorney, Alaska Network on Domestic Violence and Sexual Assault (ANDVSA), thanked the committee for allowing her to speak in favor of HB 385. She informed the committee that she has been an attorney in Alaska for 10 years and has been working in the field of domestic violence for the past 12 years. She reviewed her work in this area, which includes about 2.5 years as a staff attorney for Alaska Legal Services in Fairbanks and 2.5 years as the executive director of the domestic violence and sexual assault program in Sitka. For the past five years, she has been with ANDVSA running a pro bono program for victims of domestic violence and sexual assault. She explained that in her current position, she screens cases statewide; these victims need representation primarily in divorce, custody, and protective orders. She further explained that she finds volunteer attorneys, whom she trains and mentors, for the aforementioned clients. She noted that she also handles a small caseload herself.

MS. PATE said that once a victim has made the difficult decision to leave the batterer, custody litigation often becomes the new

front for the batterer to exercise control over the victim. Batterers threaten victims that they will lose custody if they leave the relationship. She relayed that Richard D. Cody (ph), a nationally known family law attorney, has summarized this as follows:

After 20 years in the family law courtrooms throughout this country, I can confidently say that no woman, despite very abundant evidence that her child has been molested by her ex-husband or that she has been repeatedly humbled by the violent father of her child, can safely walk into any family court in the country and not face the grave risk of losing custody to the abuser for the sole reason that she dare to present the evidence to the judge and ask that the child be protected.

Number 1947

MS. PATE echoed that some studies show that abusive fathers contest custody up to 70 percent of the time. Furthermore, social science research agrees that domestic violence is about one person's exercise of power and control over the victim. Once the victim decides to leave the relationship, the family court becomes the new arena to exercise power and control. Ms. Pate relayed that there are several reasons abusive parents are winning, the first being money. Frequently, the abusive parent has more control over family assets and has better access to legal representation. The second reason is related to the nature of domestic violence. Characteristics that batterers exhibit, such as confidence, manipulative behavior, denial about battering, can "come across well in a family court arena." In contrast, however, the victim of abuse may be suffering from post traumatic stress disorder or other psychological effects of the battering, and so may come across as irrational, over-emotional, spiteful, and vindictive.

MS. PATE said that the third reason abusive parents are winning is lack of evidence because the nature of domestic violence, along with the shame and denial that often accompanies it, makes it common that there is little evidence or witnesses. The final reason abusive parents are winning is because of the lack of training. Many judges, child custody investigators, and guardian ad litem are sometimes the de facto decision-makers in these cases, but they have little or no training in domestic violence. In fact, there is no requirement that child custody investigators, who are often charged with making expert

determinations with regard to what is in a child's best interest, have training in domestic violence or sexual abuse issues.

MS. PATE said that although society's general understanding of domestic violence has greatly increased over the last 20 years, the evolution of state custody laws has moved away from holding the abusive parent accountable in the family law arena. For example, Alaska's family courts are (indisc.) mediation, joint custody, and friendly parenting. The aforementioned concepts are in sharp contrast to social science literature about domestic violence and the recommendations of several national organizations. Furthermore, Alaska's statutes outside the family law context are set up to protect the safety of victims of domestic violence and the post-separation wellbeing of the children. Social scientists fear that the time of separation is the most critical time for battered women. She informed the committee that separated women are abused at a rate of 14 times higher than women still living with their abuser.

Number 2049

MS. PATE recalled that the committee has heard about the devastating social, psychological, and physical effects of domestic violence on children. She pointed out that there is a strong correlation between parents who abuse their partners and parents who abuse their children. She mentioned that the American Law Institute, in its "2002 Principals of the Law Family Disillusion Analysis and Recommendations", includes the recommendation close to the presumption included in HB 385. Ms. Pate reiterated that Alaska's statutes, save the area of family law, take a strong stance of protecting children from domestic violence. In fact, Alaska law provides an additional criminal charge if a child is present during a domestic assault. Furthermore, domestic violence between parents is grounds for the Office of Children's Services to take custody of children.

MS. PATE said that ironically, a battered mother has to worry that if she leaves the domestic violence, the abuser would take the children, and if she doesn't leave, the state will take the children. Furthermore, there is court precedent regarding the harmful effects of domestic violence on children. She offered that the Alaska Supreme Court has acknowledged that it is well-documented that witnessing domestic violence has a profound effect upon children and that there are significant psychological problems with children who witness domestic violence, especially during important developmental stages.

MS. PATE opined that in HB 385, the rebuttal presumption against a parent perpetrating domestic violence gaining custody takes some discretion away from judges, adding that that discretion has been very harmful. She relayed that she has spoken with hundreds of battered women with regard to the custody awards they may receive in court and she has to explain the great risks that exist under current law. Ms. Pate said that victims are baffled by the court's lack of focus on their safety and thus they lose faith in the court system. Therefore, the victims stop utilizing the system and ultimately choose either to stay in violent relationships, which perpetuates the cycle of violence for future generations, or to take drastic measures such as going underground or into hiding, which is sure to result in the loss of custody when they eventually return to the court system.

Number 2181

MS. PATE turned to joint legal custody or shared decision-making. She informed the committee that courts routinely order an abusive parent to have joint legal custody of children with parents they have abused. Currently, the law contains a presumption that joint legal custody is in the child's best interest. However, the Alaska Supreme Court has found that a history of abuse between the parties should make joint legal custody inappropriate. Despite the aforementioned precedent and the knowledge that it's dangerous for victims to have continuing communication and contact with their abusers, family court judges continue to award joint legal custody orders in domestic violence and sexual assault cases.

MS. PATE spoke in support of amending Alaska's current "friendly parent" factor. She expressed the need to make an exception for victims of domestic violence. The harmonious co-parenting envisioned by the friendly parent factor is impossible and often dangerous in family law cases. If the court doesn't "see" the domestic violence or minimizes it, the protective parent is penalized under the theory that not awarding custody to the abusive parent can create "parental alienation syndrome," a junk science that isn't supposed to be used by Alaska's family court judges.

MS. PATE said that under the current law, she is forced to advise clients that despite concerns regarding their safety and the safety of their children, they have to appear to be friendly to the other parent and sometimes permit visitation or they risk

losing their children. This isn't the message that should be sent to victims of abuse, she said. In closing, Ms. Pate urged the committee to move out HB 385, and stated that the greatest beneficiaries of this legislation are the children.

Number 2282

ALVIN CARR informed the committee that he is a retired law enforcement officer who is currently employed at Ketchikan General Hospital. Mr. Carr congratulated the committee on trying to get HB 385 passed, as it appears to be a good thing for victims of domestic violence. He pointed out that child pornography isn't listed as an abusive behavior in the [statute] being discussed today. Furthermore, child pornography isn't listed in Title 18, the domestic violence statute. Mr. Carr said he suspected that most everyone would agree that coercing children by threat or monetary means to engage in sexual acts for the sake of selling or transmitting those acts is a crime of violence. If the aforementioned is true, then one would surmise that those who buy, sell, distribute, and possess child pornography are included in the crime of violence against children.

TAPE 04-31, SIDE B

MR. CARR said that if child pornography was added to the domestic violence Act or to the Title 25 as an act of abuse, it would go along way toward giving the courts some leeway with regard to providing a satisfactory parent. Mr. Carr, returning to the recent situation in Ketchikan, indicated that court orders should be in hand when individuals leave the court. Mr. Carr expressed concern with regard to the totality of circumstances surrounding investigatory methods for placement of children when there is to be dual custody. He then turned to AS 25.20.090(10), which says "other factors the court considers pertinent." He explained that there are objective factors and subjective factors, both of which should be considered. Mr. Carr again congratulated the committee for its efforts to make the law better in this area, although he said he believes more work can be done to help the courts and its agents in these cases.

Number 2212

LAURIE BROWNLEE, court-appointed special advocate (CASA), began by noting her support of HB 385. As a CASA volunteer, she said she has seen first hand the effects of domestic violence and

abuse on children. More importantly, she informed the committee, she is testifying as a survivor of childhood domestic violence and abuse. She relayed that she grew up in an extremely violent home, and therefore knows how dangerous it is for children to be in such an environment. Such situations are detrimental to a child's sense of safety, trust, and security.

MS. BROWNLEE explained that her mother was abused by her father for more than 17 years. She recalled being 16 years old and calling the police when her father was holding her mother and two of her other sisters at gunpoint. She noted that her father was taken away, no one was harmed, and her parents were eventually divorced. She relayed that although she has recovered from the psychological effects of her situation, her youngest sister has become the victim of long-term domestic violence by her now ex-husband. Her sister struggled with the courts. Despite having to obtain three separate protective orders against her husband, her sister ultimately had to accept the court's custody ruling, which gave her ex-husband substantial unsupervised visitation with her two small children. Therefore, Ms. Brownlee said she hopes that by passing HB 385, the cycle can be broken, because abused children often become abusers as well as victims of abuse by the abuser and the court system. Ms. Brownlee concluded by urging the committee to support passage of HB 385.

CHAIR MCGUIRE, upon determining no one else wished to testify, closed public testimony.

REPRESENTATIVE GRUENBERG said he has heard from people who are concerned that the judges trying these cases need to do justice and if many strictures are placed on the law, it may cause as much harm as good. Having practiced in this area, Representative Gruenberg said that he has viewed it from both sides. He then turned attention to page 4, line 7 of Version Q, which in part states: "The presumption may be overcome only by clear and convincing evidence" He asked if that language is found in any other state other than Louisiana.

MR. BAILEY answered that he believes such language is found [in the law] in North Dakota. In further response to Representative Gruenberg, Mr. Bailey confirmed that the clear and convincing evidence standard is just below the standard of beyond a reasonable doubt; additionally, clear and convincing evidence is the standard for termination.

REPRESENTATIVE GRUENBERG said that he has difficulty with [the clear and convincing evidence] provision in this legislation. The language refers to the successful completion of a batterer's course and that the individual doesn't engage in substance abuse. Furthermore, the legislation specifies that the best interests of the child require that parents participate as custodial parents under very narrow [circumstances]. Representative Gruenberg inquired as to Mr. Bailey's view of changing the aforementioned to language to refer to the normal civil standard of preponderance of the evidence.

MR. BAILEY replied that [the Alaska Bar Association] believes that the rebuttable presumption is appropriate, and noted that the model code contains a preponderance of rebuttable presumptions.

Number 1912

REPRESENTATIVE GRUENBERG related that there is some concern with the current language because it will make it difficult, in some cases, for the courts to determine an equitable solution. Therefore, he said that he had developed a proposal that would add the language "The courts shall [give] additional weight to evidence that the domestic violence was severe, repeated, or recent" to AS 25.20.090(8) and AS 25.24.150(c)(7), as well as language similar to that on page 5, lines 1-3 of Version Q. The similar language would read as follows: "The fact that a parent who was the victim of domestic violence suffers from the effects of the domestic violence does not constitute a basis for denying custody to the parent, unless the court finds that the effects of the domestic violence are detrimental to the parenting abilities of the parent." Representative Gruenberg inquired as to Mr. Bailey's view of such an approach.

MR. BAILEY specified that Representative Gruenberg's proposal doesn't achieve the goal of protecting the children. He explained that the control dynamic in abusive relationships is established over time, and therefore it isn't necessarily the recentness of the domestic violence but rather the abuser's ability to do it again and again in order to maintain control. Many of these abusers are physically abusive and children in their care are 15 times more likely to be abused than children who are not in abusive homes. There is such a significant need to protect the safety [of the child] that the rebuttable presumption is believed to be appropriate.

Number 1760

REPRESENTATIVE GRUENBERG turned to the tactic of obtaining a domestic violence order simply as a way to more easily obtain custody, and opined that the language at the top of page 4 would seem to allow such misuse. Representative Gruenberg asked how this could be guarded against under the current language.

MR. BAILEY cited page 380 of Children Exposed to Marital Violence, which was published by the American Psychological Association. He read the following: "There seems to be a relatively low percentage of allegations of child abuse in divorce cases; less than 10 percent of the cases. And when they do occur, they are substantiated about as often as in the general population." He said the aforementioned is similar to the amount of false domestic violence petitions that are filed, and opined that the masters and judges who hear domestic violence petitions do a good job of fettering out bogus domestic violence petitions.

REPRESENTATIVE GRUENBERG surmised, then, that the factual determination regarding whether the individual has, in the past, committed an act of domestic violence would be a question of fact to be determined by the trier of fact.

MR. BAILEY replied yes, the custody judge would determine whether domestic violence had been committed and whether it gives rise to the presumption. This wouldn't necessarily hinge upon a prior determination by another court.

REPRESENTATIVE GRUENBERG also surmised that the decision would be made in the case at bar rather than as a negligence per se issue for which one simply brings a certified copy of an offense and this gives rise to a higher standard. Therefore, evidence of a court order could be brought in but, in and of itself, that wouldn't establish the fact.

MR. BAILEY agreed.

Number 1580

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 1, as follows:

Page 4, lines 7,
Delete "only"

Page 4, lines 7, after "by"

Delete "clear and convincing"
Insert "a preponderance of the evidence"

CHAIR McGUIRE asked whether there were any objections to Amendment 1. There being none, Amendment 1 was adopted.

REPRESENTATIVE GRUENBERG turned to subsection (k) on page 5, lines 1-2. He explained that he wished to add the following language to subsection (k): "unless the court finds that the effects of the domestic violence are detrimental to the parenting abilities of the parent." Representative Gruenberg said there might be a situation in which the person is so traumatized that they are psychologically or physically unable to parent the child. He clarified that in such a case, he wasn't suggesting that custody be given to the batterer, but rather that the court be able to consider whether a parent is incapable of caring for the child. Representative Gruenberg inquired as to Mr. Bailey's thoughts on including such language.

MR. BAILEY remarked that there is a difference between having a person's parenting ability affected by abuse and having a person's ability to parent so profoundly affected that they are unable to safely parent.

REPRESENTATIVE GRUENBERG specified that he is trying to get at the latter situation.

MR. BAILEY suggested, then, that the language "safely" would be appropriate to use. He further suggested that the appropriate thing would be to obtain services for the abused parent so that he or she can parent effectively. He noted that there are cases in which the judge looks at both parents in order to determine who is worse.

REPRESENTATIVE GRUENBERG then suggested the following language: "unless the court finds that the domestic violence renders the parent unable to safely parent the child". [This was treated as a motion to adopt Amendment 2.]

CHAIR McGUIRE interjected that she would like to include the following language: "so severe".

REPRESENTATIVE GRUENBERG clarified that [Amendment 2] would then read as follows: "unless the court finds that the effects of the domestic violence are so severe that they render the parent unable to safely parent the child".

MR. BAILEY said he believes that language captures the essence of the real problem in families in which there has been significant abuse and problems [stemming from both parents].

MR. McCARTY said [Amendment 2] "is a bad result" when reading the whole of the statute, which addresses which parent is going to have the children. If one accepts the principle that domestic violence is fairly suggestive of parenting skills, then Amendment 2 seems to say "if you've damaged the other person enough, you will get to keep your kids as the battering person." Mr. McCarty opined that Representative Gruenberg's concern would be more appropriately addressed in the context of actions by child protection services. Therefore, Mr. McCarty said he believes [Amendment 2] could create a dangerous situation.

Number 1239

REPRESENTATIVE GRUENBERG withdrew Amendment 2.

REPRESENTATIVE GARA expressed concern because the unamended subsection (k) would still leave a circumstance in which a child wouldn't be safely placed with a parent and the court couldn't consider that. Domestic violence aside, the goal is to place the child in the best situation possible. However, domestic violence must be considered. Representative Gara explained that the problem with subsection (k) is that it says that the court can't consider that the remaining parent is not able to take care of his or her child because of the abuse.

CHAIR MCGUIRE relayed her belief that the court has a variety of tools at its disposal, and these are retained under [subsection] (c) on page 3, Section 4.

MR. McCARTY said that the other factors, as specified in Section 4, clearly direct the court to look at the whole situation for the children. He pointed out that under [current] statute, the courts have the ability to appoint a guardian ad litem, a visitor, or attorneys to represent the children's interest. Mr. McCarty noted his fear of presumptions limiting the abilities of judges to make decisions. The judge is supposed to be reviewing what is in the best interest of the child through the factors listed. If the court determines that neither parent can [have custody of the child], then there are other options such as a guardian ad litem, an attorney, or a referral to child protective services.

MR. BAILEY turned attention to page 4, line 8, and pointed out that [with the adoption of Amendment 1], there is a burden of overcoming the presumption by a preponderance of the evidence. There is also a list of factors that allow the presumption to be overcome, one of which is a diagnosed mental illness in the victim as well as the language "or because of other circumstances that affect the best interests of the child." Therefore, he opined, everything the judge needs is specified already.

Number 1019

CHAIR McGUIRE inquired as to why subsection (k) [on page 5, lines 1-2] is necessary.

MR. BAILEY explained that subsection (k) is necessary because in some cases there has been an assertion that women suffering from posttraumatic stress disorder as a result of the abuse are rendered incapable of safely or effectively parenting. However, that disorder is treatable. He further explained, "We're trying to avoid ... putting our cases into that 70 percent of contested custody cases involving batterers where they fair well enough to present a safety risk to their children."

REPRESENTATIVE GRUENBERG pointed out that since not many judges [in Alaska] are family law practitioners, there are a number of judges who don't have much experience in family law and thus tend to read statutes very literally. Therefore, Representative Gruenberg expressed concern that subsection (k) could be used as an evidentiary rule to exclude evidence, which he didn't believe is the intention. Representative Gruenberg said that he wanted to be sure that [subsection (k)] isn't taken out of context and misread. "I don't want to reward the batterer; that is not my intent," he said.

CHAIR McGUIRE inquired as to Mr. Bailey's opinion of inserting "sole" on page 5, line 2, such that it would read as follows: "does not constitute the sole basis for denying custody to the abused parent."

MR. BAILEY opined that such would be an excellent solution to the problem.

Number 0845

CHAIR McGUIRE announced that the committee [had before it] Amendment 3, as follows:

Page 5, line 2, after "constitute"

Delete "a"

Insert "the sole"

REPRESENTATIVE GARA said he wished there was no need for subsection (k) because all the other provisions of the legislation state the policy that domestic violence can't be used against one parent to the advantage of the other parent during a custody proceeding. By inserting the word "sole" [via Amendment 3], the court is being allowed to weigh the victimized parent's effects from the abuse more heavily than is probably desired. "By using the word 'sole' you would then allow a court that is on the fence as to which parent to grant custody to, [to] use the fact that the victimized ... parent suffers effects from the victimization as the thing that tips the scale and then denies custody to that parent; I don't think you want to do that," he said.

CHAIR McGUIRE remarked, "It's the problem."

REPRESENTATIVE GARA opined that in order to prevent the victimization from benefiting the party engaging in the abuse, it would be best to add the language ", provided the parent is able to safely care for the child" at the end of subsection (k). Therefore, the victimized parent would be awarded custody so long as he/she is able to take care of the child. He reiterated concern that use of the word "sole" would establish a situation in which that factor would be used against the victimized parent.

CHAIR McGUIRE remarked that she didn't support removing subsection (k) in light of the statistics that specify that about 70 percent of the batterers use that argument as a basis for obtaining custody. She said she agrees with Representative Gara and threw it out as a compromise by saying that though it may not be the sole reason, it could be a reason. She opined, however, that Mr. McCarty is correct that including language specifying [the victimized parent] can't parent safely could say to the batterer to beat up the other parent enough so that he/she can't parent and thus the batterer would receive custody.

REPRESENTATIVE GRUENBERG pointed out that the remedy for someone beating up someone is in the criminal sphere. If the intent is to look at the best interest of the child, the child needs to be placed with someone who can safely parent the child rather being held as a reward for the innocent person. Perhaps the child

would have to go to a third party in a situation in which there is a batterer and a victim who are unable to parent the child. He informed the committee that Turner v. Panic (ph) says that to give a child to a third party one must show that the parents have abandoned the child, that the parents are unfit, or that the welfare of the child clearly requires that a third party be given custody of the child.

REPRESENTATIVE GRUENBERG turned attention back to [Amendment 2] and suggested the inclusion of the following language: "unless the court finds that the domestic violence renders the parent unable to safely parent the child".

CHAIR McGUIRE opined that [this latest version of Amendment 2] is probably the best compromise.

Number 0441

REPRESENTATIVE GRUENBERG re-offered Amendment 2, as follows:

Page 5, line 2, after "parent"

Insert "unless the court finds that the domestic violence renders the parent unable to safely parent the child"

Number 0432

CHAIR McGUIRE announced that Amendment 3 was withdrawn that and Amendment 2 was [back before the committee]. She asked if there were any objections to Amendment 2. There being none, Amendment 2 was adopted.

The committee took an at-ease from 4:20 p.m. to 4:21 p.m.

Number 0417

REPRESENTATIVE SAMUELS moved to report the proposed CS for HB 385, Version 23-LS1273\Q, Mischel, 2/27/04, as amended, out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, CSHB 385(JUD) was reported from the House Judiciary Standing Committee.

HB 342 - INCREASE DRIVING UNDER INFLUENCE PENALTY

Number 0388

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 342, "An Act relating to driving while intoxicated; and providing for an effective date." [Before the committee was Version 23-LS1292\H, Luckhaupt, 2/23/04, which was adopted as a work draft and amended on 2/27/04; left pending on 2/27/04 was a motion to adopt a third amendment to Conceptual Amendment 2 - labeled 23-LS1292\D.1, Luckhaupt, 2/21/04 - which had been amended twice on 2/27/04.]

CHAIR McGUIRE noted that new amendments were being distributed to members.

Number 0340

The committee took an at-ease from 4:22 p.m. to 4:23 p.m.

REPRESENTATIVE GRUENBERG turned to Conceptual Amendment 2 [D.1], as amended, which, prior to being amended, read:

Page 1, line 1:

Delete all material and insert:

"An Act relating to driving while under the influence and to the issuance of limited drivers' licenses; and providing for an effective date."

Page 1, following line 2:

Insert a new bill section to read:

*** Section 1.** AS 28.15.201(d) is amended to read:

(d) A court revoking a driver's license, privilege to drive, or privilege to obtain a license under AS 28.15.181(c), or the department when revoking a driver's license, privilege to drive, or privilege to obtain a license under AS 28.15.165(c), may grant limited license privileges [FOR THE FINAL 60 DAYS DURING WHICH THE LICENSE IS REVOKED] if

(1) the revocation was for a misdemeanor conviction under AS 28.35.030(a) and not for a violation of AS 28.35.032;

(2) the person has not been previously convicted or, if the person has been previously convicted, the court or the department requires the person to use an ignition interlock device as described in AS 12.55.102 during the period of the limited license; in this paragraph, "previously convicted" has the meaning given in AS 28.35.030 and also includes convictions based on laws presuming that the person was under the influence of intoxicating

liquor if there was 0.08 percent or more by weight of alcohol in the person's blood;

(3) the court or the department determines that the person's ability to earn a livelihood would be severely impaired without a limited license;

(4) the court or the department determines that a limitation under (a) of this section can be placed on the license that will enable the person to earn a livelihood without excessive danger to the public; and

(5) the court or the department determines that the person is enrolled in and is in compliance with, or has successfully completed the alcoholism screening, evaluation, referral, and program requirements of the Department of Health and Social Services under AS 28.35.030(h)."

Page 1, line 3:

Delete "**Section 1**"

Insert "**Sec. 2**"

Renumber the following bill sections accordingly.

Number 0332

REPRESENTATIVE GRUENBERG noted that one of the amendments that was made to Conceptual Amendment 2 [D.1] at the bill's prior hearing involved a title change to include ", ignition interlock devices,".

CHAIR McGUIRE remarked that that title change would be conceptual in order to allow the drafters to place the aforementioned language in the most suitable place.

REPRESENTATIVE GRUENBERG noted that another amendment to Conceptual Amendment 2 [D.1] that was adopted on 2/27/04 involved the inclusion of language in AS 28.15.201(d)(3) and (4) that would allow a limited license to be granted for "compelling health or safety reasons".

REPRESENTATIVE GRUENBERG went on to note that [these two amendments] that had been made to Conceptual Amendment 2 [D.1] on 2/27/04 had not been incorporated into the amendment labeled 23-LS1292\H.4, Luckhaupt, 3/1/04, which members now have and which read:

Page 1, lines 1 - 2:

Delete all material and insert:

"An Act relating to driving while under the influence, to alcohol-related offenses, and to the issuance of limited drivers' licenses; and providing for an effective date."

Page 2, following line 23:

Insert a new bill section to read:

*** Sec. 2.** AS 28.15.201(d) is amended to read:

(d) A court revoking a driver's license, privilege to drive, or privilege to obtain a license under AS 28.15.181(c), or the department when revoking a driver's license, privilege to drive, or privilege to obtain a license under AS 28.15.165(c), may grant limited license privileges [FOR THE FINAL 60 DAYS DURING WHICH THE LICENSE IS REVOKED] if

(1) the revocation was for a misdemeanor conviction under AS 28.35.030(a) and not for a violation of AS 28.35.032;

(2) the person **(A)** has not been previously convicted **and the court or department requires the person to use an ignition interlock device as described in AS 12.55.102 during the period of the limited license if a provider for the device is located within 100 miles of the residence or domicile of the person; or, (B) has been previously convicted and the court or the department requires the person to use an ignition interlock device as described in AS 12.55.102 during the period of the limited license;** in this paragraph, "previously convicted" has the meaning given in AS 28.35.030 and also includes convictions based on laws presuming that the person was under the influence of intoxicating liquor if there was 0.08 percent or more by weight of alcohol in the person's blood;

(3) the court or the department determines that the person's ability to earn a livelihood would be severely impaired without a limited license;

(4) the court or the department determines that a limitation under (a) of this section can be placed on the license that will enable the person to earn a livelihood without excessive danger to the public; and

(5) the court or the department determines that the person is enrolled in and is in compliance with, or has successfully completed the alcoholism screening, evaluation, referral, and program

requirements of the Department of Health and Social Services under AS 28.35.030(h)."

Renumber the following bill sections accordingly.

Page 5, line 29, following "Act":

Insert ", except that references to prior convictions include those occurring before the effective date of this Act."

CHAIR MCGUIRE suggested to Representative Gruenberg that he withdraw [those two amendments] to Conceptual Amendment 2 [D.1] and offer [them as new amendments] to the amendment labeled 23-LS1292\H.4, Luckhaupt, 3/1/04, which was later referred to as a Amendment 2 [H.4].

REPRESENTATIVE GRUENBERG offered his recollection that [those amendments] to Conceptual Amendment 2 [D.1] had already been adopted and he merely wanted [them] to be included in Amendment 2 [H.4]. He noted that the change regarding "compelling health or safety reasons" would still go to AS 28.15.201(d)(3) and (4)

Number 0220

CHAIR MCGUIRE moved that the committee rescind its action in adopting the [amendments] to Conceptual Amendment 2 [D.1] for the purpose of addressing new amendments to Amendment 2 [H.4]. There being no objection, the committee rescinded its action.

[Although no further discussion took place regarding adding, ", ignition interlock devices," to the title, and no formal motion was made to amend Amendment 2 [H.4] in this fashion, such a change was incorporated into CSHB 342(JUD).]

Number 0150

REPRESENTATIVE GRUENBERG [made a motion to adopt] an amendment to Amendment 2 [H.4] such that in AS 28.15.201(d)(3) and (4), after the language pertaining to "livelihood", the words, "or that there are other compelling health or safety reasons that require the issuance of a limited license" would be added.

Number 0095

REPRESENTATIVE SAMUELS objected for the purpose of discussion. He indicated that he was concerned with how far they would be

opening up the door for repeat offenders, and asked whether health problem would be defined.

REPRESENTATIVE GRUENBERG noted that at the bill's prior hearing, during discussion of Conceptual Amendment 2 [D.1], the issues surrounding his current amendment to Amendment 2 [H.4] had already been debated. He reminded members that at that prior meeting, the proposed change now before the committee was adopted to Conceptual Amendment 2 [D.1]; he was merely offering the language again in the form of an amendment as a courtesy because the committee now has before it Amendment 2 [H.4].

CHAIR MCGUIRE concurred and recapped some of the debate from the bill's prior hearing.

REPRESENTATIVE OGG suggested that perhaps Representative Samuels's specific concerns with this language change were not debated at the bill's prior hearing.

TAPE 04-32, SIDE A

Number 0001

REPRESENTATIVE GRUENBERG acknowledged that at the time of the original debate on the language change now being considered, the committee had not yet began its discussion regarding first time offenders versus repeat offenders. He said he would not have a problem if the committee would like to limit the application of the language in the amendment to Amendment 2 [H.4] to just first time offenders.

REPRESENTATIVE SAMUELS relayed that he did not want to allow judges too much discretion to give repeat offenders limited licenses.

CHAIR MCGUIRE, in response to a question, clarified that the committee was now considering whether to adopt an amendment to Amendment 2 [H.4] regarding granting limited licenses for compelling health or safety reasons. She asked that any amendments to amendments be conceptual for the purpose of giving the drafter the latitude of inserting them in the appropriate locations.

REPRESENTATIVE GRUENBERG said he would consider limiting the application of the amendment to Amendment 2 [H.4] to just first time offenders to be a friendly amendment.

CHAIR MCGUIRE ascertained that such a change to the [conceptual] amendment to Amendment 2 [H.4] was acceptable to members; thus the conceptual amendment to Amendment 2 [H.4] would apply only to first time offenders.

Number 0181

REPRESENTATIVE SAMUELS removed his objection to the conceptual amendment to Amendment 2 [H.4].

CHAIR MCGUIRE, in response to a question, confirmed that Amendment 1 to Version H of HB 342 involved the deletion of, "or by the commissioner of administration" from page 2, line 20. [Amendment 1 was adopted on 2/27/04.] She clarified that the committee was now considering Amendment 2 [H.4] in lieu of Conceptual Amendment 2 [D.1].

Number 0199

CHAIR MCGUIRE relayed that the [conceptual] amendment to Amendment 2 [H.4] was adopted.

REPRESENTATIVE OGG turned attention to proposed AS 28.15.201(d)(2)(B) - located in Amendment 2 [H.4], as amended - which pertains to repeat offenders. He said he thinks there ought to be a limitation on the number of previous convictions one may have during a certain period of time and still qualify for a limited license under this provision.

The committee took an at-ease from 4:35 p.m. to 4:36 p.m.

REPRESENTATIVE GRUENBERG observed that there are three criteria in Amendment 2 [H.4], as amended, to consider: "Number one, whether this is a first conviction; number two, whether there is an ignition interlock on the vehicle; and number three, whether the limited license is going to be allowed only for the last 60 days of the suspension." Under current law, there is no provision for ignition interlocks, a limited license may only be granted in instances of a first conviction, and a limited license may only be granted during the final 60 days of a revocation period. He noted that Amendment 2 [H.4], as amended, removes the 60-day stipulation and requires a first time offender to use an ignition interlock. He offered his belief that Amendment 2 [H.4], as amended, should be altered to allow someone without any prior convictions to get a limited license during the final 60 days without having an ignition interlock.

CHAIR MCGUIRE noted that under Amendment 2 [H.4], as amended, if a person does not have any prior convictions and lives more than 100 miles from a provider of ignition interlock devices, he/she does not have to have an ignition interlock in order to be granted a limited license at anytime during the revocation period.

REPRESENTATIVE GRUENBERG noted, however, that under Amendment 2 [H.4], as amended, if a person without previous convictions lives within 100 miles of a ignition interlock provider, he/she will have to have an ignition interlock in order to be granted a limited license.

CHAIR MCGUIRE offered her understanding that this aspect of Amendment 2 [H.4], as amended, was a policy change supported by the committee at the bill's last hearing; the policy change being that "even [on] your first offense, if you lived within 100 miles of a provider of an interlock, we would prefer you to use the interlock."

Number 0600

REPRESENTATIVE GRUENBERG remarked that he might have missed that point during their discussion of Conceptual Amendment 2 [D.1]. He went on to say:

I would like to see us retain the current law on a policy basis and for another reason also: because I think there's a denial of equal protection. ... And I suppose a court could say, "There's no denial of equal protection because it's a rational basis: if you can do it, ... the legislature wants you to do it." But ... my gut feeling is that it would not be that simple by the time a court got through with it.

[Chair McGuire turned the gavel over to Representative Samuels.]

REPRESENTATIVE GRUENBERG offered a hypothetical example of someone who lives on Kodiak Island with Homer having the nearest ignition interlock device provider. Although Kodiak Island is technically within 100 miles of Homer, it would be virtually impossible to comply with this provision of Amendment 2 [H.4], as amended, he remarked. Therefore, to have to draw a geographical distinction based on just a compass radius could be problematic.

REPRESENTATIVE GARA remarked that they would probably have to change the language to "100 road miles" just to avoid that circumstance.

REPRESENTATIVE SAMUELS agreed that that phrase ought to be worked on. He remarked, however, that the underlying issue is that they are changing the law regarding ignition interlock devices such that it will be dependant on what an offender's blood alcohol concentration [BAC] level is.

REPRESENTATIVE GRUENBERG relayed that his intent regarding his discussion of the language in Amendment 2 [H.4], as amended, is to focus on the issue of those offenders who don't have a BAC level over .16.

REPRESENTATIVE SAMUELS remarked, however, that according his understanding, the language in Amendment 2 [H.4], as amended, won't apply to those that don't have a BAC level over .16.

Number 0766

CODY RICE, Staff to Representative Carl Gatto, Alaska State Legislature, sponsor, offered his belief, on behalf of Representative Gatto, that Representative Gruenberg is attempting to address the issue of those individuals that are not required to use an ignition interlock, for example, first time offenders with a BAC level lower than .16. Currently, he opined, those individuals would not be affected by Amendment 2 [H.4], as amended, and would thus be precluded from seeking a limited license.

REPRESENTATIVE HOLM asked whether equal protection clauses apply to privileges in the same way they do to rights.

REPRESENTATIVE GRUENBERG opined that they would apply to even a privilege if the distinction is on a geographic basis that is improperly drawn; he noted, however, that "it's not as strict a standard if it's not a right."

REPRESENTATIVE HOLM pondered whether the issue is one of equal protection or one of equal access.

REPRESENTATIVE GRUENBERG recalled in that a [U.S.] Supreme Court case, Shapiro V. Thompson (ph), it was ruled that basing whether or not one could obtain welfare payments on how long one lived in a particular area was a violation of equal protection.

REPRESENTATIVE OGG remarked that the language in Amendment 2 [H.4], as amended, pertaining to multiple offenders appears to be more lenient because there is no geographical distance limitation. He opined that the language in Amendment 2 [H.4], as amended, was put together wrong.

MR. RICE said that according to his understanding of Amendment 2 [H.4], as amended, the intention is to allow those offenders that are not egregious offenders to pursue a limited license, and that was why the 100-mile distinction was inserted into the provision pertaining to first time offenders and not into the provision pertaining to multiple offenders. Not having the 100-mile distinction in the provision pertaining to multiple offenders is intended to prevent a loophole that would allow multiple offenders in rural areas to obtain a limited license simply because they hadn't access to an ignition interlock provider.

Number 1000

REPRESENTATIVE OGG noted that in the provision in Amendment 2 [H.4], as amended, pertaining to first time offenders, the language in proposed AS 28.15.201(d)(2)(A), does not specifically address those first time offenders that live more than 100 miles from an ignition interlock provider.

REPRESENTATIVE GRUENBERG offered his belief that those first time offenders are addressed by implication.

REPRESENTATIVE OGG opined that addressing them by implication is not sufficient.

REPRESENTATIVE GRUENBERG posited that it is simply a matter of drafting style.

REPRESENTATIVE OGG offered his belief that regardless of drafting style, the language in Amendment 2 [H.4], as amended, does not clearly state the intent.

[Representative Samuels returned the gavel to Chair McGuire.]

REPRESENTATIVE GRUENBERG offered that according to his understanding of the drafting manual, the language in Amendment 2 [H.4], as amended, sufficiently outlines by implication the intent towards first time offenders living further than 100 miles from an ignition interlock provider.

CHAIR MCGUIRE opined that the language in Amendment 2 [H.4], as amended, is clear and comports with the drafting manual. She offered her interpretation of Amendment 2 [H.4], as amended: "If this is your first offense, you can apply to get a [limited] driver's license, but you have to use an interlock device if ... a provider is within 100 miles." She again requested that any amendments to Amendment 2 [H.4], as amended, be conceptual, and suggested that the committee focus first on the issue of first time offenders. She noted that Representative Gruenberg has expressed concern with how first time offenders will be treated under Amendment 2 [H.4], as amended, and that current law says that first time offenders may get a [limited] license, without having to have an interlock device, if they meet certain requirements. In contrast, under Amendment 2 [H.4], as amended, a first time offender must have an interlock device if a provider is located within 100 miles. She suggested, as a way of keeping the process moving, that members in opposition to that provision offer a conceptual amendment to Amendment 2 [H.4], as amended, to change the language back to how first time offenders are treated currently.

Number 1227

REPRESENTATIVE GRUENBERG made a motion to adopt a second amendment, which would be conceptual, to Amendment 2 [H.4], as amended, "To allow a first [time] offender to be given a limited license - as we've stated, for livelihood or compelling health and safety reasons - without an ignition interlock only during the last 60 days the license is revoked; in other words, to keep that as an option as it is in current law."

REPRESENTATIVE GRUENBERG, in response to a question, offered his understanding that the second amendment to Amendment 2 [H.4], as amended, when considered in terms of how it will fit into Version H - specifically page 5, line 9 - would only apply to first time offenders who have a BAC limit below .16.

REPRESENTATIVE GARA said he thinks Representative Gruenberg's interpretation is incorrect. He elaborated:

These are two different circumstances. The main part of the bill that Representative Gatto brought to us applies after your conviction, after you're sentenced, after your license is returned to you. After your license is returned to you, if you [have a BAC level that is] high, you have to use an interlock device. [Amendment 2 H.4, as amended,] applies before the

period [that] your license revocation expires - this applies if you want your license back early - and so this, therefore, applies to everybody regardless of [their BAC level].

This limited license provision ... says the court is saying to you, "I'm going to give you your license back in advance of when you would otherwise get it back" for work-related reasons or whatever. The [provision in the bill that is based on someone's BAC level] only applies after you get your license back under the normal schedule. [Amendment 2 H.4, as amended] is the early-license provision, so this applies to everybody. And a court, in its discretion, could deny you the early limited license because [your BAC level] is .30, ... but the [BAC] levels don't apply to this early license.

CHAIR MCGUIRE noted that the provisions encompassed in Amendment 2 [H.4], as amended, do contain sidebars: for example, before the court can grant a limited license, it has to determine that the person won't pose excessive danger to the public; that the license revocation has to be for a misdemeanor conviction; and that the license revocation cannot be for a violation of AS 28.35.032 - refusal to submit to chemical test.

Number 1422

CHAIR MCGUIRE asked whether there were any objections to the second amendment to Amendment 2 [H.4], as amended. There being none, the second amendment to Amendment 2 [H.4], as amended, was adopted.

CHAIR MCGUIRE suggested that the committee next focus on the provisions of [Amendment 2 H.4], as amended, that address offenders with previous convictions. She offered her understanding that as long as an offender with previous convictions meets all the criteria laid out in proposed AS 28.15.201.(d), then he/she may be granted a limited license but only if he/she gets an ignition interlock device.

[Following was a brief discussion of the amendments made to Amendment 2 H.4 thus far and the changes that Amendment 2 H.4, as amended, will have to current law.]

CHAIR MCGUIRE suggested that they remove all reference to the 100-mile stipulation, surmising that doing so would give the

courts the discretion of whether or not to require first time offenders to get an ignition interlock in order to get a limited license, but would require that those with prior convictions do have to get an ignition interlock device.

REPRESENTATIVE OGG remarked that those with prior convictions appear to be able to gain the same benefits as first time offenders. He opined that there ought to be "a larger step" for those with previous convictions.

Number 1871

REPRESENTATIVE GARA offered that the provisions in AS 28.15.201(d)(2), located in Amendment 2 [H.4], as amended, could be altered to work as follows:

If we want to delete the 100-mile [stipulation], we say, "If you have not been previously convicted," for the person whose first conviction this is, "in the final 60 days the court has the discretion to give a [limited license] ... without an interlock device." That was Representative Gruenberg's [second] amendment to the amendment. The court also has the discretion to give it to you earlier if -- and the court may order that you have an interlock device, and we're saying the court "may" order that you have an interlock device because you might live in a place where one's not available and we're going to leave it to [the] court to say whether or not you need one. But then, ... for the people with the prior convictions, you have to have an interlock device, and if one's not available, it's just tough, we just don't trust you well enough to let you drive around without an interlock device.

REPRESENTATIVE ANDERSON indicated that such would be satisfactory to him.

REPRESENTATIVE GARA noted again that the courts would then still have the discretion to grant a limited license to a first time offender before the last 60 days of the revocation period without requiring an ignition interlock device. In contrast, a person with previous convictions might be granted a limited license before the last 60 days of a revocation period, but only if he/she gets an ignition interlock device.

REPRESENTATIVE OGG suggested also allowing someone with previous convictions to get a limited license without an ignition interlock device but only during the final 60 days of the revocation period.

REPRESENTATIVE ANDERSON opined that doing so would defeat the purpose [of Amendment 2 H.4, as amended] and indicated that he would be opposed to such a change to Amendment 2 [H.4], as amended, because ignition interlock devices will afford the public an extra measure of safety from those who have been previously convicted.

REPRESENTATIVE OGG opined that those with previous convictions should have some period of time wherein they cannot drive.

REPRESENTATIVE ANDERSON asked Chair McGuire for her interpretation of Representative Gara's suggested changes to Amendment 2 [H.4], as amended.

Number 2061

CHAIR MCGUIRE said she agrees with Representative Gara's suggested changes: It would incorporate Representative Gruenberg's second amendment to Amendment 2 [H.4], as amended; it would provide a second tier for first time offenders such that the court would have the discretion to grant a limited license and may or may not require the use of an ignition interlock device; and it would allow the court, if it determines that all other requirements of AS 28.15.201(d) are met, to grant a limited license to those with previous convictions as long as an ignition interlock device is used.

Number 2113

REPRESENTATIVE GRUENBERG turned attention to the phrase, "as described in AS 12.55.102", which is used twice in Amendment 2 [H.4], as amended. He made a motion to amend Amendment 2 [H.4], as amended, such that, "as described in AS 12.55.102" is deleted. He then withdrew that motion.

Number 2260

CHAIR MCGUIRE made a motion to adopt a third amendment, which would be conceptual, to Amendment 2 [H.4], as amended, such that Representative Gara's suggestion be incorporated: In addition to including Representative Gruenberg's second amendment to Amendment 2 [H.4], as amended, it would provide a second tier

for first time offenders such that the court would have the discretion to grant a limited license before the last 60 days of a revocation period and may or may not require the use of an ignition interlock device, and it would allow the court, if it determines that all other requirements of AS 28.15.201(d) are met, to grant a limited license to those with previous convictions as long as an ignition interlock device is used. She indicated that this third amendment to Amendment 2 [H.4], as amended, would be applicable to proposed AS 28.15.201(d)(2).

Number 2278

REPRESENTATIVE OGG objected.

[This third amendment to Amendment 2 H.4, as amended, was treated as adopted, and the issue of whether to adopt Amendment 2 H.4, as amended, became the subject of the following roll call vote.]

Number 2290

A roll call vote was taken. Representatives Gara, Gruenberg, Anderson, and McGuire voted in favor of Amendment 2 [H.4], as amended. Representatives Samuels, Ogg, and Holm voted against it. Therefore, Amendment 2 [H.4], as amended, was adopted by a vote of 4-3.

Number 2350

REPRESENTATIVE GARA made a motion to adopt Amendment 3, which read [original punctuation provided]:

Page 5 line 14-15, after "the person's breath,"

Delete: "the court shall double the fine imposed under (b)(1) or (n)(1) of this section"

Insert: "the court shall increase the fine imposed under (b)(1) or (n)(1) of this section by the lesser of one-third or \$500"

Page 5 line 21-22, after ""the person's breath,"

Delete: "the court shall triple the fine imposed under (b)(1) or (n)(1) of this section"

Insert: "the court shall increase the fine imposed under (b)(1) or (n)(1) of this section by the lesser of one-half or \$1,000"

Number 2354

CHAIR MCGUIRE objected for the purpose of discussion.

REPRESENTATIVE GARA said that Amendment 3 addresses the provisions in HB 342 related to doubling and tripling fines. He outlined the changes which have recently occurred to the current schedule of fines.

TAPE 04-32, SIDE B

Number 2393

REPRESENTATIVE GARA went on to detail some of the fines currently in place. Given that the amount someone may be fined varies depending upon aggravators, he said he is having difficulty determining just how much a fine might ultimately wind up being, since the language in HB 342 merely talks about doubling and tripling fines and would therefore be requiring the court to double or triple an indeterminate amount. He said he thinks it improper to double and in some cases triple the fines that are currently in place given that they were only just recently raised to their present levels, which, he opined, are very high. He offered his belief that the courts are already providing for higher fines in cases where there are high BAC levels, and characterized Amendment 3 as a compromise that will provide for a modest increase in fines for such cases. He concluded by recapping the language in Amendment 3, and by relaying that doubling or in some cases tripling a \$50,000 fine, for example, seems too extreme to him.

MR. RICE surmised that the question of whether to adopt Amendment 3 comes down to a policy call. He opined, however, that the courts would assign a \$50,000 fine and triple it only in cases where they realistically thought it could be collected. "It seems fair to assume that the judges would be aware of the fact that the fines that they were assigning could be tripled, and would possibly reduce them as such, but they could not reduce them below the minimums," he added.

REPRESENTATIVE HOLM said:

I'm curious as to why we're doing this, and I think Representative Gara makes a good point. Are we trying

to penalize? Are we trying to keep people from doing these egregious acts? Are we trying to maybe just get money for the state? If the reason is to change the fine based upon the ability to pay, I think it's bad public policy because the act has no relationship, in my opinion, [with] whether or not you have an ability to pay If you perform an egregious act against society, [the penalty] should have nothing to do with whether you're rich, poor, or indifferent.

REPRESENTATIVE HOLM indicated that he does not have any problem with raising the fines as a punitive measure, as a way of telling people that if they are going to act in a certain fashion then certain penalties will attach, but he does not want to give the court the discretion to say how much a fine will be based on its perception of whether someone has any assets that can be confiscated.

MR. RICE said he was merely trying to allay members' concerns that doubling or tripling fines might pose too large a burden on working families, adding that he believes that the courts will take that sort of thing into account.

REPRESENTATIVE SAMUELS said he feels that having a BAC level of .08 and having a BAC level of .30 are completely different crimes, and opined that the fines ought to be significantly higher for those individuals who have a higher BAC level because they pose a greater danger.

REPRESENTATIVE OGG suggested that the language on page 5, lines 14-15 and 21-22, after "breath," ought to be changed to read, "the minimum fine imposed under (b)(1) or (n)(1) of this section shall be doubled", and, "the minimum fine imposed under (b)(1) or (n)(1) of this section shall be tripled", respectively. He opined that doing so would eliminate any ambiguity regarding the amount of the fines that are to be doubled or tripled, and would still allow the courts the discretion to impose higher fines.

Number 2062

REPRESENTATIVE OGG made a motion to adopt the forgoing as a conceptual amendment.

CHAIR MCGUIRE announced that that motion is out of order because the committee still has before it the question of whether to adopt Amendment 3.

REPRESENTATIVE GARA mentioned that his concern is not about the burden on working families so much as it is about coming up with a fine that reflects the crime, which is [DUI]. A potential \$150,000 fine for a [DUI] is just way out of line, he opined, adding that his main concern is whether doubling and tripling fines is [reasonable].

Number 2034

A roll call vote was taken. Representatives Gara, Gruenberg, Anderson, Holm, and McGuire voted in favor of Amendment 3. Representatives Ogg and Samuels voted against it. Therefore, Amendment 3 was adopted by a vote of 5-2.

REPRESENTATIVE GRUENBERG surmised that it will take everyone a certain amount of time to conform to the changes encompassed in HB 342, and suggested that the bill ought to have a different effective date.

Number 1939

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 4, which read:

Page 5, line 30:

Delete "July 1, 2004"

Insert "January 1, 2005"

Number 1931

CHAIR MCGUIRE objected for the purpose of discussion.

MR. RICE said that Amendment 4 mirrors an amendment provided by the sponsor.

Number 1910

CHAIR MCGUIRE removed her objection and asked whether there were any further objections to Amendment 4. There being none, Amendment 4 was adopted.

Number 1908

REPRESENTATIVE OGG moved to report the proposed CS for HB 342, Version 23-LS1292\H, Luckhaupt, 2/23/04, as amended, out of committee with individual recommendations and the accompanying

fiscal notes. There being no objection, CSHB 342(JUD) was reported from the House Judiciary Standing Committee.

ADJOURNMENT

Number 1883

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 5:30 p.m.