ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
April 14, 2004
1:45 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. 336
"An Act limiting recovery of civil damages by an uninsured driver; and providing for an effective date."

- MOVED CSHB 336(JUD) OUT OF COMMITTEE

SENATE BILL NO. 344
"An Act relating to the Uniform Probate Code and trusts, including pleadings, orders, nonprobate assets, estates of decedents, minors, protected persons, incapacitated persons, guardians, conservators, trustees, foreign trusts, principal and income, and transfer restrictions; relating to corporate voting trusts; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 427
"An Act relating to guardianships and conservatorships, to the public guardian and the office of public advocacy, to private professional guardians and private professional conservators, to court visitors, court-appointed attorneys, guardians ad litem, and fiduciaries, and to the protection of the person or property of certain individuals, including minors; amending Rules 16(f) and 17(e), Alaska Rules of Probate Procedure; and providing for an effective date."

- MOVED CSHB 427(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 381
"An Act relating to child endangerment."

- MOVED CSHB 381(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 275
"An Act relating to veterinarians and animals."

- MOVED CSHB 275(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 546
"An Act relating to regulation of the discharge of pollutants from timber-related activities under the National Pollutant Discharge Elimination System; relating to waste treatment and disposal permits; making conforming amendments; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: HB 336
SHORT TITLE: CIVIL DAMAGES FOR UNINSURED DRIVERS
SPONSOR(S): REPRESENTATIVE(S) MEYER

01/12/04	(H)	PREFILE RELEASED 1/2/04
01/12/04	(H)	READ THE FIRST TIME - REFERRALS
01/12/04	(H)	JUD
03/31/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/31/04	(H)	<Bill Hearing Postponed>
04/06/04	(H)	JUD AT 1:00 PM CAPITOL 120
04/06/04	(H)	Heard & Held
04/06/04	(H)	MINUTE(JUD)
04/07/04	(H)	JUD AT 1:00 PM CAPITOL 120
04/07/04	(H)	Failed To Move Out Of Committee
04/07/04	(H)	MINUTE(JUD)
04/14/04	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: SB 344
SHORT TITLE: TRUSTS/ESTATES/PROPERTY TRANSFERS
SPONSOR(S): SENATOR(S) SEEKINS

02/16/04	(S)	READ THE FIRST TIME - REFERRALS
02/16/04	(S)	L&C, JUD
03/11/04	(S)	L&C AT 1:30 PM BELTZ 211

03/11/04	(S)	Moved SB 344 Out of Committee
03/11/04	(S)	MINUTE(L&C)
03/12/04	(S)	L&C RPT 3DP 1NR
03/12/04	(S)	DP: BUNDE, DAVIS, SEEKINS; NR: FRENCH
03/17/04	(S)	JUD AT 8:00 AM BUTROVICH 205
03/17/04	(S)	Moved SB 344 Out of Committee
03/17/04	(S)	MINUTE(JUD)
03/17/04	(S)	JUD RPT 2DP 2NR
03/17/04	(S)	DP: SEEKINS, THERRIAULT; NR: FRENCH,
03/17/04	(S)	OGAN
03/26/04	(S)	TRANSMITTED TO (H)
03/26/04	(S)	VERSION: SB 344
03/26/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/26/04	(H)	<Bill Hearing Postponed>
03/29/04	(H)	READ THE FIRST TIME - REFERRALS
03/29/04	(H)	JUD
03/29/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/29/04	(H)	Bill Postponed To 3/30/04
03/30/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/30/04	(H)	Scheduled But Not Heard
04/14/04	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 427
SHORT TITLE: PROTECTION OF PERSONS AND PROPERTY
SPONSOR(S): REPRESENTATIVE(S) ANDERSON

02/04/04	(H)	READ THE FIRST TIME - REFERRALS
02/04/04	(H)	HES, JUD
04/01/04	(H)	HES AT 3:00 PM CAPITOL 106
04/01/04	(H)	Heard & Held
04/01/04	(H)	MINUTE(HES)
04/06/04	(H)	HES AT 3:00 PM CAPITOL 106
04/06/04	(H)	Moved CSHB 427(HES) Out of Committee
04/06/04	(H)	MINUTE(HES)
04/08/04	(H)	HES RPT CS(HES) 1DP 5AM
04/08/04	(H)	DP: CISSNA; AM: SEATON, COGHILL, WOLF,
04/08/04	(H)	GATTO, WILSON
04/13/04	(H)	FIN REFERRAL ADDED AFTER JUD
04/14/04	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 381
SHORT TITLE: CHILD ENDANGERMENT DRIVING OFFENSES
SPONSOR(S): REPRESENTATIVE(S) MCGUIRE

01/20/04	(H)	READ THE FIRST TIME - REFERRALS
01/20/04	(H)	HES, JUD
04/06/04	(H)	HES AT 3:00 PM CAPITOL 106

04/06/04	(H)	Moved CSHB 381(HES) Out of Committee
04/06/04	(H)	MINUTE(HES)
04/08/04	(H)	HES RPT CS(HES) 1DP 1NR 3AM
04/08/04	(H)	DP: WILSON; NR: COGHILL; AM: SEATON,
04/08/04	(H)	WOLF, GATTO
04/13/04	(H)	FIN REFERRAL ADDED AFTER JUD
04/14/04	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 275
SHORT TITLE: VETERINARIANS AND ANIMALS
SPONSOR(S): REPRESENTATIVE(S) CHENAULT

04/17/03	(H)	READ THE FIRST TIME - REFERRALS
04/17/03	(H)	L&C, RES
02/20/04	(H)	L&C AT 3:15 PM CAPITOL 17
02/20/04	(H)	<Bill Hearing Postponed>
03/29/04	(H)	L&C AT 3:15 PM CAPITOL 17
03/29/04	(H)	Moved CSHB 275(L&C) Out of Committee
03/29/04	(H)	MINUTE(L&C)
03/31/04	(H)	RES REFERRAL WAIVED
04/01/04	(H)	L&C RPT CS(L&C) NT 3DP 2NR 1AM
04/01/04	(H)	DP: CRAWFORD, LYNN, ANDERSON;
04/01/04	(H)	NR: ROKEBERG, DAHLSTROM; AM: GUTTENBERG
04/01/04	(H)	JUD REFERRAL ADDED AFTER L&C
04/01/04	(H)	FIN REFERRAL ADDED AFTER JUD
04/05/04	(H)	JUD AT 1:00 PM CAPITOL 120
04/05/04	(H)	-- Meeting Postponed to Tues. 4/6/04 --
04/06/04	(H)	JUD AT 1:00 PM CAPITOL 120
04/06/04	(H)	Heard & Held
04/06/04	(H)	MINUTE(JUD)
04/07/04	(H)	JUD AT 1:00 PM CAPITOL 120
04/07/04	(H)	Heard & Held
04/07/04	(H)	MINUTE(JUD)
04/14/04	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

SENATOR RALPH SEEKINS
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of SB 344.

BETHANN B. CHAPMAN, Attorney at Law
Faulkner Banfield, PC
Juneau, Alaska
POSITION STATEMENT: Testified in support of SB 344 and responded to questions.

STEPHEN E. GREER, Attorney at Law
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of SB 344.

DAVID G. SHAFTEL, Attorney at Law
Law Offices of David G. Shaftel, PC
Anchorage, Alaska
POSITION STATEMENT: Assisted with the presentation of SB 344.

DOUGLAS J. BLATTMACHR, President
Chief Executive Officer (CEO)
Alaska Trust Company
Anchorage, Alaska
POSITION STATEMENT: Testified in support of SB 344 and responded to questions.

PETER B. BRAUTIGAM, Attorney at Law
Hartig Rhodes Hoge & Lekisch, PC
Anchorage, Alaska
POSITION STATEMENT: Responded to questions during discussion of SB 344.

JOSHUA FINK, Public Advocate
Anchorage Office
Office of Public Advocacy (OPA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: Provided comments and responded to questions during discussion of HB 427.

JAMES H. PARKER, Assistant Public Advocate
Anchorage Office
Office of Public Advocacy (OPA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: Responded to questions during discussion of HB 427.

BETTY WELLS, Member
Alaska State Association for Guardianship and Advocacy, Inc. (ASAGA)
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 427.

KENNETH C. KIRK, Attorney at Law
Kenneth Kirk & Associates
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 427, provided comments in response to questions and suggested deleting Sections 1-4 of the proposed committee substitute (CS), Version I.

HEATH HILYARD, Staff
to Representative Lesil McGuire
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Assisted with the presentation of HB 381 on behalf of the sponsor, Representative McGuire.

ALLEN STOREY, Lieutenant
Central Office
Division of Alaska State Troopers
Department of Public Safety (DPS)
Anchorage, Alaska
POSITION STATEMENT: Testified in support of the provisions being discussed during the hearing on HB 381, and responded to questions.

LINDA WILSON, Deputy Director
Central Office
Public Defender Agency (PDA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 381.

DEAN J. GUANELI, Chief Assistant Attorney General
Legal Services Section-Juneau
Criminal Division
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: Provided comments during discussion of proposed Amendment 2 to HB 381; provided comments during discussion of proposed Amendment 13 to HB 275.

SHARALYN WRIGHT, Staff
to Representative Mike Chenault
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: During discussion of HB 275 and proposed amendments, provided comments on behalf of the sponsor, Representative Chenault.

REPRESENTATIVE MIKE CHENAULT
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of HB 275.

JOE McKINNON, Staff
to Representative Max Gruenberg
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 275, explained proposed Amendments 14 and 15.

ACTION NARRATIVE

TAPE 04-64, SIDE A
Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 1:45 p.m. Representatives McGuire, Anderson, Holm, Ogg, Samuels, and Gara were present at the call to order. Representative Gruenberg arrived as the meeting was in progress.

HB 336 - CIVIL DAMAGES FOR UNINSURED DRIVERS

Number 0096

CHAIR McGUIRE announced that the first order of business would be HOUSE BILL NO. 336, "An Act limiting recovery of civil damages by an uninsured driver; and providing for an effective date."

Number 0139

REPRESENTATIVE HOLM moved that the committee rescind its action, on 4/7/04, in failing to report from committee the proposed committee substitute (CS) for HB 336, Version 23-LS1254\D, Bullock, 2/23/04.

Number 0142

REPRESENTATIVE GARA objected, and asked to know the reason for the motion.

REPRESENTATIVE HOLM declined to give a reason.

A roll call vote was taken. Representatives Ogg, Samuels, Holm, Anderson, and McGuire voted in favor of the motion to rescind the committee's action in failing to report from committee the proposed CS for HB 336, Version 23-LS1254\D, Bullock, 2/23/04. Representative Gara voted against it. Therefore, the motion to rescind the committee's action passed by a vote of 5-1.

Number 0248

REPRESENTATIVE SAMUELS moved to report the proposed CS for HB 336, Version 23-LS1245\D, Bullock, 2/23/04, out of committee with individual recommendations and the accompanying fiscal notes.

REPRESENTATIVE GARA objected.

Number 0297

A roll call vote was taken. Representatives Ogg, Samuels, Holm, Anderson, and McGuire voted in favor of reporting the proposed CS for HB 336, Version 23-LS1245\D, Bullock, 2/23/04, out of committee. Representative Gara voted against it. Therefore, CSHB 336(JUD) was reported from the House Judiciary Standing Committee by a vote of 5-1.

SB 344 - TRUSTS/ESTATES/PROPERTY TRANSFERS

Number 0319

CHAIR McGUIRE announced that the next order of business would be SENATE BILL NO. 344, "An Act relating to the Uniform Probate Code and trusts, including pleadings, orders, nonprobate assets, estates of decedents, minors, protected persons, incapacitated persons, guardians, conservators, trustees, foreign trusts, principal and income, and transfer restrictions; relating to corporate voting trusts; and providing for an effective date."

Number 0340

SENATOR RALPH SEEKINS, Alaska State Legislature, sponsor, relayed that SB 344 deals with the Uniform Probate Code and trusts. He went on to say:

A real vital characteristic of [a] highly developed economy is the ease with which the financial resources flow from one market to another. In fact, the magnet-like attraction between money and the market that offers the most advantageous terms is perhaps best demonstrated within the financial services industry itself. Over the years, the Alaska banking industry has attracted funds to our state as a result of a particular niche that we have successfully developed in an obscure corner of the industry known as trust and estate services. Much of this success can be attributed to the foresight demonstrated by [the] Alaska State Legislature. Since 1997, the legislature has passed numerous bills effectively making Alaska a premier jurisdiction for this financial specialty. Just last year, in [SB 87], [we] adopted a more recent version of the Uniform Principal and Income Act, and [HB 212] updated other portions of Alaska's trust laws last year. And both were signed into law last summer.

And while [SB] 344 may not be as far-reaching as the other two bills, it accomplishes much the same purpose. It does this by making a host of small, technical revisions to current statute. It updates provisions relating to "virtual representation," it clarifies when a trustee can be relieved of liability, and it adds provisions which other jurisdictions have already adopted. Keeping our trust statutes current has a had a direct, positive impact on our state's economy, and, over the years, these periodic revisions have helped bring hundreds of millions of dollars of trust assets into the state and added tens of millions of dollars to local bank deposits. Furthermore, it has increased business activity for attorneys, accountants, life insurance agents, and brokerage firms in the state of Alaska.

Number 0532

SENATOR SEEKINS concluded:

Well, necessity, ingenuity, and routine advances in technology collaborate on a daily basis to reinvent the world of financial products and services. (Indisc. - room noise) have successfully staked out a place in this world through our contemporary set of trust and estate laws, and [SB 344] now seeks to

> preserve our position in what amounts to a highly fluid marketplace unrestricted by geographic boundaries. It seems reasonable to us, and this bill helps us, to keep that money flowing in this direction.

REPRESENTATIVE HOLM, referring to Senator Seekins's comments that hundreds of millions of dollars of trust assets are brought into the state and that tens of millions of dollars have been deposited in local banks, asked where the difference between those two amounts has gone.

SENATOR SEEKINS suggested that the difference between those two amounts has been deposited into trust companies and trust funds. In response to a comment, he indicated that the changes to Alaska laws regarding trusts and estates are an attempt at staying ahead of other states' laws pertaining to this industry. He mentioned that a small group of lawyers, accountants, and trust officers has been investigating how to stay on the cutting edge regarding this issue, and that it is this small group that has brought forth the concept of SB 344.

Number 0658

REPRESENTATIVE GARA mentioned that he is "sold" on what he referred to as the economic part of the bill, that which promotes the industry in the state. He noted, however, that it seems odd to him that there have been three bills on this subject in such a short span of time.

SENATOR SEEKINS offered that the aforementioned group brought forth the concepts of those three bills and relayed to him that they were the refinements that Alaska law needed in order to keep up with what other states are doing regarding the trust industry. He offered his belief that these changes clarify trust law and will aid in developing the industry.

CHAIR McGUIRE recalled other, past legislation on this issue, and characterized it as a very complex, ever-changing area of law. She offered her belief that the Delaware legislature has been known to convene a session for the purpose of updating the laws pertaining to this industry.

Number 0952

BETHANN B. CHAPMAN, Attorney at Law, Faulkner Banfield, PC, said she wants to testify in support of SB 344, and would focus her

comments on two of its provisions. Referring to Sections 2 and 4, she said:

> The current law that we have for notice provisions in probate and trust proceedings is out of date and is not consistent with our new, complex [trusts] and, particularly, dynasty trusts that can last, now, in perpetuity. Section 2 expands the doctrine of what's known as virtual representation - but really it's called substitute notice - and this doctrine will allow notice to be served on one or more persons who have (indisc.) interest with respect to [a] particular issue in a trust or estate matter so long as there is no conflict of interest. And the modifications that are contained in Section 2 really just expand and explicitly include specific types of gifts that are commonly found in trusts. I believe that this change will insure that parties have access to the courts in a very efficient manner, and is more consistent with the types of trusts we are now seeing in Alaska and in ... all other states as well.
>
> The other provision I wanted to focus on is Section 4, and that [pertains to] limitations on proceedings against trustees. Currently, we do not have a statute of limitations ... for proceedings against trustees for breach of trust unless there's been a final account, and many times [there] ... can be a very long period of time before any claims can be brought against a trustee. A final account is only rendered when the trust relationship is terminated. In light of the fact that we now have trusts that can last in perpetuity, and if there's been no termination of the trust relationship or trustee relationship, we may find ourselves in a situation where we have costly and extremely complex litigation arising out of a claim of a breach of trust that may have happened many, many, many years prior to the time the claim was brought to the courts.
>
> Under current law, there is a six-month statute of limitations for any claim by a beneficiary against a trustee once a final accounting has been rendered. This proposal expands the statute of limitations to cover claims that could be brought on any interim accounting that may be rendered, so long as the beneficiary is provided notice of the limitation

period. Under the current law there is no requirement that the beneficiary be notified of the time limitations to bring a breach of trust claim; now, this provision would expand the six-month limitation period to cover interim accounting, but also require the trustee to provide the beneficiary notice of the time limit. That notice provision is consistent with what we have in the probate code when we're dealing with an estate that is going through probate rather than a trust.

Number 1152

MS. CHAPMAN concluded:

I testify in support of SB 344, and point out that yes it is the third bill, recently, that we've seen, but in the last few years there have been major changes in trust laws, which ... hadn't changed for decades. As those laws change, I believe Alaska needs to continue to be in the forefront of having trust laws that are modern, provide opportunities to both Alaskans and nonresidents to bring their money to Alaska, and help the industry. I'll be happy to answer any questions that anybody may have. Thank you.

MS. CHAPMAN, in response to questions, said:

I don't think people are going to read their interim accountings any less than they're going to read a final account. And I believe the six months is consistent with the approach that it's used in all probate proceedings and trust proceedings, and that is that when you're dealing with this type of a relationship, which is ... a fiduciary relationship, [then] ... those accountings are very detailed and are designed to provide information to a beneficiary so that they know what has happened in an interim period.

And I don't believe that they're putting us at risk, and [I believe] that the six-month statute of limitations is consistent with how we approach all trust proceedings, which is: you don't want these to sit around and continue to potentially be brought many years later, because you put the trust at risk - not just the trustee - [since] ... many times you have a beneficiary who may become disgruntled down the line,

> and if they can go back that many years, you're putting all the other beneficiaries at risk as well.
>
> I believe the six-month statute of limitations is protective of all the beneficiaries of a trust, and more so than I think it's protective of a trustee, because it ensures that you cannot allow a disgruntled beneficiary, many years later, to bring a claim - whether it's valid or brought in bad faith - and tie up trust assets, [and] cause a trustee to defend a claim, which, if the trustee has not breached their fiduciary duty, ... [is] paid from the trust assets. And I believe this will ensure that those claims are brought in a timely manner.

MS. CHAPMAN, in response to further questions, indicated that all breach of trust claims, including those arising from fraud, would be covered under the legislation, and that if an attorney is serving as a trustee, the bill would "reduce the tail," but noted that her firm's policy precludes attorneys serving as trustees and so she isn't sure that many attorneys do that.

Number 1473

STEPHEN E. GREER, Attorney at Law, relayed that "this has been a coordinated effort by a group of attorneys." He offered his belief that SB 344 is a very good bill, and noted that one of the reasons "we come forward every year with a new bill is that it takes an incredible amount of time to research ... the bill, to research the law, and pass it around to other members." Alaska is very fortunate to have a group of attorneys that are so interested in the area of law in which they practice that they are willing to put forth this effort, he opined, adding, "we can't do it all at once and [so] we've taken it piece by piece."

Number 1540

DAVID G. SHAFTEL, Attorney at Law, Law Offices of David G. Shaftel, PC, noted that five states - Alaska, Delaware, Nevada, Rhode Island, and Utah - have enacted laws dealing with spendthrift trusts, abolishing the rule against perpetuities, and providing tax- and asset-protection approaches for estate planners and their clients. He, too, noted that both Alaskans and nonresidents are able to take advantage of Alaska's laws pertaining to trusts and estates, but cautioned that nonresidents can also chose to take advantage of similar laws in

other states. He spoke of a national conference attended by active estate planning attorneys and estate planning accountants, and relayed that a number of provisions in SB 344 were either already enacted by other states or were discussed at the last conference.

MR. SHAFTEL referred to Sections 3 and 8-11, and said that these provisions deal with subjects such as moving trusts to Alaska; clarifying that spendthrift trust limitations are intended to come within the bankruptcy code's spendthrift trust restriction; providing for a qualified personal residence trust (QPRT) and a grantor retained annuity trust (GRAT); providing, with regard to spendthrift trusts, that fraudulent transfer liability goes against the settlor that commits the fraudulent transfer; providing protection for the trustee and other persons who form limited partnerships or limited liability partnership for the purpose of minimizing federal estate tax; and providing that any action brought to challenge a transfer to a trust be brought in Alaska.

MR. SHAFTEL mentioned that SB 344 also contains: a couple of technical corrections to [Alaska's version of] the Uniform Principal and Income Act; a savings-clause provision - in Section 7 - pertaining to marital trusts; and an elimination - in Section 1 - of the 10-year limitation on voting trusts. In conclusion, he said he thinks SB 344 is an excellent bill, and he urged members to support it.

REPRESENTATIVE GRUENBERG remarked that Section 7, which pertains to marital trusts, appears to "keep the tax status even if somebody leaves the magic language out of the trust."

MR. SHAFTEL concurred.

Number 2021

REPRESENTATIVE GRUENBERG asked whether additional language to that effect ought to be inserted in the bill.

MR. SHAFTEL replied:

> It's an interesting idea. We do put such language in our trusts. ... In other words, we have general savings clauses that are similar to what you're talking about, where we indicate that [there's] the intent, for example, if we're dealing with a marital deduction trust, ... to qualify for a marital

> deduction and that all of the language and provisions of this trust instrument will be so construed ... in order to qualify under Internal Revenue Code "2056." ...
>
> So you're right on; I mean, your suggestion is a good one. Now, in state law, generally what you see are these more specific types of savings provisions ..., and there're two of them that your looking at in Section 7, one of which is already our law, and that last sentence, which we're adding. Let our group give some thought to your suggestion, and perhaps ... this [issue] will come back to you again and maybe we can improve on this.

REPRESENTATIVE GRUENBERG remarked that if such language were prepared within the next few days, perhaps it could be added to the bill via a floor amendment.

Number 2133

REPRESENTATIVE GARA turned attention to Section 11, said it appears to preclude creditors from going after a trust even if the owner of the trust is guilty of wrongdoing.

MR. SHAFTEL replied:

> If the evildoer in your scenario had transferred assets to a spendthrift trust well before the actions and fraud or other conduct ... was involved here, and that trust had been set up correctly and was implemented correctly and there was an independent trustee who had absolute discretion to make distributions to that particular person or another member of his family, then the harmed party could not get at the assets in that trust. And that's true ... whether we're talking about a self-settled trust or a third-party trust.
>
> If that person's parents had created a spendthrift trust - and keep in mind, we're talking about [an] irrevocable trust that that person has no control, himself, over anymore ... - and then at a later time in his life he went out and committed a fraud or a theft or something worse, you couldn't get at those assets in that trust. That's just the law, that's the law in every state in dealing with spendthrift trusts,

and it's the law in five states dealing with self-settled spendthrift trusts if they were created, funded, and are truly independent and implemented correctly.

Number 2270

REPRESENTATIVE GARA asked how current law will be changed by [Section 11].

MR. SHAFTEL replied:

[Proposed] subsection (l) in Section 11 is a provision that we are taking almost verbatim from Delaware and Rhode Island. ... The purpose of this section is to require that if someone is challenging a transfer to a trust -- let's take your scenario, and in you're scenario ... - and we're primarily dealing ... with nonresidents - a nonresident in New York argues that the person who set up this Alaska trust committed a fraudulent transfer. And to give you an example of a fraudulent transfer: let's take your scenario but put it in New York state, and say that this person, after or ... while he was in the process of defrauding the victim, also transferred assets to a trust in Alaska.

That's a fraudulent transfer and it should be set aside. And what this provision says here, though, is that the action to set aside has to occur in Alaska and not in New York. And what's important about that is, it has Alaska's procedural law apply then, Alaska statute of limitations applies to it, and [an] Alaska court gets to judge the validity of this Alaska trust, which is set up under Alaska law. This is, as I say, ... a provision that's been enacted in both Delaware and in Rhode Island ... for exactly the purpose that I've described.

REPRESENTATIVE GARA said he just wanted to make sure that this provision is not giving people the ability to avoid paying for their misconduct by putting money in a trust.

MR. SHAFTEL opined that this provision neither allows such nor is intended to allow such.

REPRESENTATIVE GARA remarked that if that is the case and fraudulent transfers are already precluded by law, why add new

language that includes this rule that says one can't recover from the person's trust.

TAPE 04-64, SIDE B
Number 2390

MR. SHAFTEL replied:

> When you get into the area of conflict of laws dealing with trusts and dealing with fraudulent transfers and dealing with which state's statute of limitations - not substantive law - ... applies, if ... the ... forum state, which is Alaska, ... has a provision in its law that says that its law and its courts are going to have jurisdiction, then that procedural statute of limitations provision will be applied, even if they were to apply the substantive law of New York in our example. So ... our Alaska court could decide to apply New York's substantive fraudulent transfer law, under the basic rules ... in the area of conflict of law, but they would apply Alaska's statute of limitations law because we have this choice of law provision in our statute.

REPRESENTATIVE GARA asked where in existing law it says that a person cannot go after the trust assets of someone who victimized him/her.

MR. SHAFTEL said it is located in AS 34.40.110.

CHAIR McGUIRE concurred.

REPRESENTATIVE GRUENBERG turned attention to page 10, line 4, which specifically states that it's the superior court that has jurisdiction, and asked whether there is any reason why the language couldn't just say "courts of this state."

MR. SHAFTEL said there is no reason why it couldn't.

REPRESENTATIVE GRUENBERG turned attention to page 9, lines 13-14, which says: "(4) at the time of the transfer, the settlor is in default by 30 or more days of making a payment due under a child support judgment or order.". He noted that this language appears to focus on the time of the transfer, and that if one were simply up to date on child support payments, the assets of the trust could not be accessed. He asked Mr. Shaftel to comment.

Number 2186

MR. SHAFTEL remarked:

> This provision has been discussed at length with regard to prior bills, and actually it goes back to the original bill in 1997. ... The problem with changing this provision and broadening it to cure what you're concerned with is that ... basically what happens is, you destroy the transfer tax minimization benefit of these trusts, and ... all gifts to these trusts would be incomplete gifts and all of the trust assets would be included in the settlor's gross estate at death, and we would deprive Alaskans of the ability to save transfer taxes by using these trusts. ... It would be a shame to do that.
>
> Now, the discussions in the past have pointed out ... [that] there's no experience ... with these trusts being used by "deadbeat dads or deadbeat moms" ... to defeat child support, and that the tax benefit that I just referred to greatly outweighs the hypothetical. And from a theoretical standpoint ... you're absolutely correct, but it greatly outweighs our experience. And if we ever do have an experience where this becomes a major problem or a significant problem, then it should be addressed, but right now the price is way too great.

CHAIR McGUIRE concurred that this issue has been addressed during hearings on prior legislation, adding that the Child Support Enforcement Division was consulted on this issue with the result being that the 30-day timeframe was picked as a compromise. She offered her belief that it would create uncertainty to change the current language to address the remote possibility that someone would get current on his/her child support payments in order to default at a later date.

REPRESENTATIVE GRUENBERG asked whether there might be language they could add such that if someone later defaults on child support, he/she runs the risk of "the whole thing falling."

MR. SHAFTEL relayed that he would give that concept some thought during the interim.

Number 2013

DOUGLAS J. BLATTMACHR, President, Chief Executive Officer (CEO), Alaska Trust Company, said that he supports SB 344, and thinks it enhances what's been done since 1997, has created a number of jobs in Alaska, and has brought a lot of deposits to Alaska and a lot of money directly to [the estates] of Alaskans.

REPRESENTATIVE GARA turned attention to Section 4, and said it appears to protect members of the industry from consumers and, thus, troubles him because he doesn't feel that consumers will look at an interim accounting as closely as they will a final accounting. He asked Mr. Blattmachr how he would feel about the bill if it passed out of committee without Section 4.

MR. BLATTMACHR replied:

> We think this is an important provision, and it was recommended to us at the national conference that [Mr. Shaftel] mentioned. I think one of the differences is that ... we have, now, perpetual trusts, that almost every one we have is a perpetual trust that in theory can last hundreds if not a thousand years. [So] ... if you have a trust that was started 100 years ago, all of a sudden, without this provision, a beneficiary could say, "Gee, I didn't like your action that you took 100 years ago; looking in hindsight now, you should have invested in some other type of investment." And ... there's ... no time limitation, and there won't be any. And I think the fact that ... now, when you get a final accounting, you are not notified that you have any time restriction; you're just given a final accounting.
>
> You may look at it, you may not, but you have a six-month ... window to look at it. [Under this provision], you have to be told that you have a six-month window, and the statements that you receive have to be sufficient enough to have let you know that there was a problem. So it can't be that ... a statement is sent and doesn't disclose this information and then you're off the hook; it has to have the information so a reasonable person could see what you did. So we think it's a very important provision, and we think it will attract a lot of ... additional business to Alaska and we think a lot of trusts will be sent to Alaska.

Number 1874

REPRESENTATIVE GARA asked how a shorter statute of limitations will attract more trust business to Alaska.

MR. BLATTMACHR said a shorter statute of limitations will eliminate unnecessary trust litigation. What happens now, if a beneficiary of a trust that was started 200 or 100 years ago decides to take an action against a trustee, the trustee has the ability to use the trust assets to protect itself, and if, after costly and lengthy litigation, the trustee is found to not have done anything wrong, the trust would have spent a significant sum of money on something that happened 100 or 200 years ago. A lot of people like the fact that there is a statute of limitations, he opined, and that beneficiaries of trusts are a little more involved in their trusts than they might be in their brokerage accounts.

REPRESENTATIVE GRUENBERG asked who would receive the notification in instances where the beneficiary is mentally disabled, for example, and is therefore represented by another person, and whether "adequate disclosure" would mean adequate from the point of view of the beneficiary, of the representative, of a trust officer, or of "a reasonable person." He opined that it should mean adequate from the point of view of the recipient of the information, and remarked that this provision does not seem to be drafted from the consumer's point of view and, thus, concerns him.

MR. SHAFTEL replied:

> We've used interim accountings without this statute because we feel it's to the beneficiary's advantage, as well as ... for the trustee's protection, to at least annually give an accounting and set up a procedure. And [we've] done this just through the court system, where we'll ask for a hearing, and we will ask that if a beneficiary has any objection, that they come in within a period of time and make their objection [known] at that hearing. ...

Number 1723

MR. SHAFTEL added:

> And we're doing this with the hope that that will ... draw their attention to what's been done over the past

year. ... It seems to me it's much to the beneficiary's advantage to be focusing on [his/her] trust every year than to have a long period of time. Now, some trusts that we're talking about that would be covered by this statute, the one I was just referring to, went on for about 10 years and then it was wrapped up. It was, in effect, trust administration after the surviving spouse died. The trusts that [Mr. Blattmachr is] referring to are trusts that don't have final accountings - they just continue on and on and on.

And it does make a lot of sense for both the trustee but also equally for the beneficiary to focus on these trusts every year and have an interim accounting, which is what we're talking about here, that they have to focus on. But if something's wrong, it will have occurred in the last year and they'll have the evidence and the people around who can verify that something went wrong. It seems to me it's to the beneficiary's disadvantage to be lulled into letting that trust just sit there and at some point perhaps they'll look at it, have years go by - where there's been [a] breach of trust or something else ... where they were harmed - and then have to go back and try [to] figure out what happened and try [to] find the people and gather the evidence.

So there's some real advantage in interim accountings and having a procedure that focuses both the beneficiary, for the beneficiary's protection, and the trustee, for the trustee's protection, and gets that segment of time resolved one way or another.

REPRESENTATIVE GRUENBERG opined, though, that under the language in Section 4, a plaintiff's lawyer could simply make the claim that the report did not adequately disclose information pertaining to a potential breach of trust.

MR. SHAFTEL remarked:

Adequate disclosure is a concept that we're very familiar with in the trust and estate area. It's in the Internal Revenue Code. And ... that language that was dropped - ... "full discloser" - ... was felt to be ambiguous and require some type of perfection that couldn't be reached. So it's not a standard that

we're unfamiliar with. ... Clever attorneys in both sides can always make arguments, and ultimately those will have to be resolved by the court system if they get that far. But again, what this provision, as I understand it, is designed to do, is to provide statutory support for interim accountings.

Number 1491

MR. SHAFTEL asked Representative Gara to comment on the consumer protection aspect of this provision.

REPRESENTATIVE GARA remarked:

I just think you're going to get a mixed bag of clients: those who pay really close attention to their interim statements, and those who don't. ... I'm thinking of a compromise that seems to meet the concerns that you mentioned ... [and] meets my concerns too. The compelling argument that you make is, you don't want somebody, 100 years later, to file a negligence claim against you. That makes sense. On the other hand, I'm not so comfortable giving them only six months. That's one thing. The other thing is, again, I understand [that] you don't want somebody to file a ... claim against you a long, long, long time later, but if it's fraud or theft of deceit - and there are commonly exceptions for that kind of conduct in the law - I guess I'm not so thrilled about shortening the statute of limitations for those things.

So I what I'm thinking of is changing the six-month period, [for] the interim accounting, to three years; you don't have to wait your whole life to hear about a claim in that circumstance, just three years, [and] we've historically had statute of limitations up to six years and ten years for property claims and things like that. That would be one thing. And the other would be to say that the new amendment that you propose, that applies to a date from the interim accounting, applies for breach of trust except for when that breach is fraud, theft, or deceit.

REPRESENTATIVE GARA continued:

> And I can imagine cases of fraud, theft, or deceit. ... In a down stock market you expect that you're portfolio is going to shrink and you don't notice that [it] shrunk by an extra $100,000 and [that] it shrunk by the extra $100,000 because somebody took your money, and, as somebody who expected to lose money during that down market, you just didn't go and question whether or not somebody ... stole money from you, but I suppose somebody could come back and say, later on, you should have noticed, you should have been more mistrustful. And so what I'm thinking of is just that, to give you what you're asking for except for in the those cases of egregious conduct, and to do it for three years rather than six months. How would that sit with you?

MR. SHAFTEL replied: "Personally, I don't have a problem with either of those changes, but I would like to defer to [Mr. Blattmachr] and Peter Brautigam who are involved in this provision."

Number 1363

PETER B. BRAUTIGAM, Attorney at Law, Hartig Rhodes Hoge & Lekisch, PC, offered:

> My only thought is ... that three years seems very long, especially for an interim accounting issue, because that can affect future accountings and the way ... the trustees are going to be investing the money. I'll defer to [Mr. Blattmachr] on that issue. But the other point is, the current statute provides for a six-months [period] after the final accounting. Is the proposal that that would also be changed to three years and, if so, I would encourage the group not to go for a three-year [period] on the final accounting.

REPRESENTATIVE GARA responded: "My understanding is that you have changed the date from the final accounting to from the interim accounting. Right?"

REPRESENTATIVE GRUENBERG offered his belief that Representative Gara is suggesting that they change the "six months" on line 6 of page 5, and leave the "three years" on line 12 of page 5. He opined that it might be best to have a three-year statute of limitations on the final accounting and a shorter statute of

limitations on the interim accounting. He suggested making it a two-year statute of limitations for the interim accounting.

MR. BRAUTIGAM said that if "a client of mine would go to court and get a final accounting approved by the court, what we would advise our trustees [to do] is to hold onto the money for another three years, which would require tax returns and things of that nature." He added that he would prefer a six-month statute of limitations on the final accounting.

REPRESENTATIVE GRUENBERG pointed out, however, that current language in the bill specifies a three-year statute of limitations on final accountings. Thus, wouldn't Mr. Brautigam give that advice anyway? he asked.

MR. BRAUTIGAM replied that it would depend on who the trustee is and what the issues are.

MR. BLATTMACHR concurred that it would depend in the facts and circumstances.

REPRESENTATIVE GRUENBERG suggested that this issue be looked at more thoroughly before [moving the bill from committee].

Number 1188

CHAIR McGUIRE relayed that SB 344 would be held over for the purpose of considering this issue further.

HB 427 - PROTECTION OF PERSONS AND PROPERTY

Number 1160

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 427, "An Act relating to guardianships and conservatorships, to the public guardian and the office of public advocacy, to private professional guardians and private professional conservators, to court visitors, court-appointed attorneys, guardians ad litem, and fiduciaries, and to the protection of the person or property of certain individuals, including minors; amending Rules 16(f) and 17(e), Alaska Rules of Probate Procedure; and providing for an effective date." [Before the committee was CSHB 427(HES).]

Number 1129

REPRESENTATIVE ANDERSON, sponsor, made a motion to adopt the proposed committee substitute (CS) for HB 427, Version 23-LS1627\I, Bannister, 4/14/04, as the work draft. There being no objection, Version I was before the committee.

REPRESENTATIVE ANDERSON explained that Version I encompasses changes and recommendations made in the House Health, Education and Social Services Standing Committee. He offered his belief that HB 427 will go a long way towards preventing exploitation and mistreatment of vulnerable and incapacitated adults receiving the services of a private guardian or conservator, and relayed that it was drafted with input from the Alaska State Association for Guardianship and Advocacy (ASAGA) Inc., Office of Public Advocacy (OPA), Adult Protective Services, Office of the Long Term Care Ombudsman, Disability Law Center [of Alaska], Senior Advocacy Coalition, and [judicial branch of government].

REPRESENTATIVE ANDERSON mentioned that professional guardians - both private and public - and family guardians provide services to approximately 2,500 disabled, vulnerable, Alaskan adults. He noted that under current law, private guardians and conservators - individuals with the responsibility to make housing, legal, and medical decisions for the disabled, infirm mentally ill, and seniors - are completely unregulated by the state. Many other states regulate private guardians, he remarked, because vulnerable and incapacitated adults are easy prey for those wishing to exploit them.

REPRESENTATIVE ANDERSON said that HB 427 grants the state regulatory authority over private guardians and conservators, and establishes minimum qualification standards. State oversight, he opined, will ensure that vulnerable and incapacitated adults receive the care that they deserve. Under the bill, the Division of Occupational Licensing would have the authority to revoke a private guardian's license if he/she is found to have abandoned, exploited, abused, or neglected someone in his/her care, or [is shown to be] unfit due to professional incompetence. In conclusion, he said he supports the bill.

REPRESENTATIVE GRUENBERG asked whether HB 427 was modeled after legislation in other states.

REPRESENTATIVE ANDERSON said he believed so.

Number 0928

JOSHUA FINK, Public Advocate, Anchorage Office, Office of Public Advocacy (OPA), Department of Administration (DOA), thanked Representative Anderson for introducing HB 427, calling it important legislation. He went on to say:

> In this state we regulate barbers, hairdressers, acupuncturists, [and] ... concert promoters, but we don't regulate guardians and conservators who ... take care of incapacitated and vulnerable adults, who are in positions where they very easily could be exploited. And we've had some situations of concern over the past couple of years. This legislation, which was modeled off of pieces of Arizona's law [and] Washington [state's law] was put together with a number of groups .... I do want to say, I'm indebted to those people I worked with - I [only] ... took their product and brought it to Representative Anderson ..., [and] I am grateful that he introduced that.

MR. FINK, in response to a question, explained that Arizona, Washington, California, and Texas have laws that require registration; those laws were looked at during the development of HB 427.

REPRESENTATIVE GRUENBERG directed attention to Section 6, regarding the appointment of a guardian ad litem, and asked whether it modifies Rule 17(c) of the Alaska Rules of Civil Procedure. He opined that if it does, then there should be an amendment to the title reflecting that.

MR. FINK offered his belief that the bill does not amend Rule 17(c) of the Alaska Rules of Civil Procedure, but offered to research that issue.

REPRESENTATIVE GRUENBERG opined that the language on page 11, line 21, takes away the courts discretion regarding the appointment of a guardian ad litem.

Number 0661

JAMES H. PARKER, Assistant Public Advocate, Anchorage Office, Office of Public Advocacy (OPA), Department of Administration (DOA), offered his belief that although Rule 17(c) allows the court to appoint a guardian ad litem to sue or defend on behalf of a infant or incompetent person, Section 6 is not creating a right for a guardian ad litem; instead, Section 6 modifies

existing statute - Title 13 - regarding the process of appointing a guardian ad litem and his/her primary function. Additionally, Rule 17(c) says in part, "The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action". He offered his belief that the bill doesn't modify Rule 17(c).

REPRESENTATIVE GRUENBERG pointed out, however, that Rule 17(c) also says in part "or shall make such other order as it deems proper", and opined that this language gives the court discretion.

CHAIR McGUIRE and REPRESENTATIVE GRUENBERG mentioned that the committee would be requesting an opinion on this issue from Legislative Legal and Research Services.

Number 0556

BETTY WELLS, Member, Alaska State Association for Guardianship and Advocacy, Inc. (ASAGA), relayed that she is chair of the task force that sought assistance from the various groups that developed HB 427, that she is affiliated with the National Guardianship Association, Inc., that she works as a "court visitor" in Anchorage and its surrounding area, and that she has been involved with the issue of adult guardianship for the last 15 years. She went on to say:

> I'm aware that Alaska is not alone in reviewing and changing the statutes to protect vulnerable adults. Although most of the changes proposed in this bill clarify current statutory language and practice, there is now legislation proposed to regulate private agencies, and I believe that to be a vital part of the bill. With some abuse that we uncovered in a court trial on the viability of a private agency in 2001 and in 2002, we discovered that we really couldn't continue to operate without some form of registration or licensure of private professional guardians.
>
> Our current statute leaves us vulnerable to a system where there is opportunity for corruption, as discovered in our own court case. And, as stated before, there are no regulations providing any oversight to private guardianship agencies. The court monitors individual guardianships, and our statutes have provisions for mandatory reporting; unfortunately, it's not adequate for the oversight

that we need. Passing this legislation will assist the courts by licensing professional guardians. It will take the question of an agency's qualifications or viability out of [the] court system and allow them to concentrate on the merits of each case.

I've learned that Alaska is a leader with respect to respondent's rights in adult guardianship cases: they have the right to an attorney, to a hearing, to a jury trial on the issue of incapacity; [and] we have a great public guardianship program for those indigent adults who qualify. There is room, however, for private agencies in Alaska, and [the] ASAGA supports the appointment of private agencies when appropriate. By mandating regulations and the establishment of professional standards, Alaska will continue to be a leader with respect to these issues. Passing this bill will go a long way in putting the trust back into the system.

MS. WELLS concluded:

[The] ASAGA anticipates only a small number of licenses will be issued, and anticipates no fiscal note, as the fees generated for obtaining the license will cover the costs. Licensure will ensure continuing education in the areas of guardianship, and [the] ASAGA already sponsors at least one conference each year, where people can get their continuing [education]. The bill also outlines minimum educational requirements for families and friends that wish to become appointed. I'd like to thank representative Anderson for sponsoring HB 427, and the [House Judiciary Standing Committee] for hearing this bill and [providing me with] the opportunity to voice my support.

Number 0335

REPRESENTATIVE GRUENBERG gave an example of a case in which a woman's former attorney had been appointed as her guardian ad litem even though he had access to confidential information about her and ultimately used that information against her, and suggested that Section 6 might need to be altered to ensure that such a person would be removed as a guardian ad litem because of a conflict of interest.

MR. PARKER offered:

> I can tell you what the thinking was behind [this proposed] amendment [to current statute]. The statute currently provides for the appointment of a guardian ad litem, but that is the first thing that occurs with the appointment of an attorney to represent the respondent, and the attorney is to act under the traditional attorney-client model, where the attorney advocates for the express wishes of [his/her] client. There has been, nationally, criticism of the effectiveness of representation of respondents in guardianship cases. I don't think we have a tremendous problem here, but ... it [has] been noted that at times there's been a tendency for attorneys, when they are representing incapacitated persons, to advocate, not for what the client says, but for what they believe is in the client's best interest.
>
> The feeling was that this statute, as it currently is written, is not clear enough that the attorney should act as an attorney unless it is impossible for the attorney to ascertain, or for the client to communicate, what their wishes or preferences or desires are concerning the issues at stake in the guardianship case. So the way we would hope this would work is that a person enter an appearance as an attorney or, more frequently, they would be appointed, because most attorneys for respondents in guardianship cases are appointed. When they visited with their client, they would certainly attempt to have a conversation about the issues at hand and what the client's position would be. But ... I can tell you, there are a certain number of cases where a person ... [is] going to be nonverbal or perhaps they're in a coma, and at that point, you simply cannot act as an attorney in the traditional sense, where you're advocating for your client's wishes. ...

TAPE 04-65, SIDE A
Number 0001

MR. PARKER continued:

> At that point, it would be appropriate for the attorney to request that they be treated as a guardian ad litem, and then the statute provides guidance as to

how the analysis should take place [regarding] what the attorney, who's acting as guardian ad litem, is going to advocate for, and to make sure that it's not just a matter of saying, "Well, we agree with the visitor's report," that there is an inquiry. But the purpose of this legislation ... is to clarify that ... consistent with your ethical duties, you act as an attorney representing your client's wishes despite their incapacity. And as you know, the code of professional responsibility mandates that ... attorneys treat their clients, and act as attorneys to the greatest extent possible, in the ordinary way when they have clients with incapacities.

It should be noted that in the sanity context, when [an] attorney is appointed to represent somebody who's the subject of an involuntary commitment petition, the attorney acts as an attorney and ... I've never heard of (indisc.) to guardian ad litem. I think this recognizes there are situations where there needs to be a guardian ad litem appointed, but also acknowledges that it's a slippery slope, and that there should be more objective standards about when you do that and it should be only when you cannot ascertain your client's position or your client [is], at that time, incapable of communicating [his/her] wishes. ...

Number 0152

KENNETH C. KIRK, Attorney at Law, Kenneth Kirk & Associates, offered to address this issue as well.

REPRESENTATIVE GRUENBERG suggested instead that the interested parties simply consider the issue, adding that he just wants to ensure that the court would not be able to appoint someone as a guardian ad litem if he/she intended to use confidential information against his/her client.

MR. KIRK offered his belief that the Alaska Rules of Evidence would be the appropriate place to include language to that effect. After noting that he has been involved in a lot of conservatorship and guardianship appointments, he relayed that he has never used guardian ad litem powers except in situations where the client was really not able to express a preference, for example, the client was comatose or catatonic. Short of such an inability, he opined, a client has a constitutional

right to be represented by an attorney that will act as the client wishes.

MR. KIRK also pointed out that Rule 1.14 of the Alaska Rules of Professional Conduct speaks to "the decisions the attorney has to go through, ethically, when deciding whether to ask for a representative for the client ... in a guardianship or conservatorship context, where perhaps the main issue of the litigation is whether the person is competent." It would be problematical under Rule 1.14, he opined, to turn on one's client as portrayed in the example given earlier by Representative Gruenberg.

Number 0362

MR. KIRK, speaking to the bill, said:

> I like this bill except for one aspect and that's ... Sections 1-4, which basically create a new regulatory regime for guardians and conservators. It's not a bad bill in isolation, and if we had a lot of people clamoring for this kind of work, I think it'd be an excellent idea. The problem is, we don't; we are very shorthanded. ... Basically we have two people who do private guardianship work in the greater Anchorage area and I think one other that does conservatorship work. ... To put up additional barriers to entry into that field is a real problem.
>
> These provisions are not only going to make it more difficult for people to get into ... this thing, ... [but] basically you have to come up with some money and jump into it whole hog; you wouldn't be able to go into it sort of bit by bit maybe while working at some other job and taking a few of these cases and eventually building up a clientele. And it applies even if there's only one client. For example, if [you] have somebody who needs a lot of guardianship assistance and has a friend who's willing to do that but the friend wants to be paid for the substantial commitment of time, as I read the bill, that person would have to go through and qualify as a private guardian if he's going to [get] paid for it.
>
> But even aside from that, I'm just really concerned about [the fact that] we have enough trouble getting people to do this kind of work; we already have a way

- basically [via] the probate court - to make sure that people who are incompetent or unqualified or who (indisc.) need other necessities - such as posting a bond if necessary - are kept out. And so I'd really encourage taking out Sections 1-4 and the various other references in the other sections that are dependent on that. Thank you.

CHAIR McGUIRE suggested that Sections 1-4 are "the crux of the bill."

MR. FINK agreed, and said he opposes deleting Sections 1-4.

Number 0500

MR. PARKER said he disagrees with the suggestion to delete Sections 1-4, but acknowledged that Mr. Kirk has a valid point regarding the need for more private guardians and conservators. He opined that Sections 1-4 are the crux of the bill and won't place onerous burdens on private professional guardians and conservators. He noted that proposed AS 08.26.010 says that a person may not engage in the business of providing services as a guardian or conservator unless the person has a license to do so, and said he did not think that receiving free room and board for taking care of a family member, for example, qualifies as a business, though if more specificity is needed regarding what constitutes a business, then that could be addressed.

REPRESENTATIVE GRUENBERG turned attention to Section 6, subsection (c), and indicated that he still has concerns about a person's former attorney being appointed as his/her guardian ad litem, opining that such would be a direct conflict of interest if the person is still able to make his/her wishes known but the attorney didn't wish to follow those wishes as an attorney and so sought appointment as the person's guardian ad litem. He asked whether language precluding such ought to be added to that provision.

MR. PARKER offered his belief that changing the standard of appointment from "when the ward or respondent cannot determine the ward or respondent's own interests without assistance", to "when the [ward, protected person, or] respondent is incapable of determining the ward's, protected person's, or respondent's position regarding the issues involved in the pending proceedings", will eliminate the possibility of a conflict of interest.

MR. FINK said that if the respondent can, in any way, communicate with his/her attorney, then the appointment of a guardian ad litem is not appropriate, and such is the intent of the bill.

REPRESENTATIVE GRUENBERG indicated that his concern has been satisfied by the remarks of Mr. Fink and Mr. Parker.

Number 0845

REPRESENTATIVE SAMUELS moved to report the proposed CS for HB 427, Version 23-LS1627\I, Bannister, 4/14/04, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 427(JUD) was reported from the House Judiciary Standing Committee.

The committee took an at-ease from 3:35 p.m. to 3:50 p.m.

HB 381 - CHILD ENDANGERMENT DRIVING OFFENSES

Number 0887

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 381, "An Act relating to child endangerment." [Before the committee was CSHB 381(HES).]

CHAIR McGUIRE, sponsor, relayed that she developed HB 381 at the request of one of her constituents, that many states already address this issue, and that members' packets include information put together by the National Conference of State Legislatures outlining what the laws regarding this issue are in other states. Currently under Alaska law, a person has to wear a seatbelt and failure to do so results in a "secondary offense." House Bill 381 addresses the issue of vehicular-related child endangerment and, under current law, it is a violation to either fail to restrain a child or improperly restrain a child, and such a violation could result in a fine of up to $50, she added..

Number 0993

HEATH HILYARD, Staff to Representative Lesil McGuire, Alaska State Legislature, sponsor, noted that current law can be found in AS 28.05.095.

CHAIR McGUIRE said that HB 381 creates a new crime for transporting a child while being under the influence of an intoxicant.

MR. HILYARD added that according to information he's received, 71 percent of the children who died while riding in a vehicle driven by an intoxicated driver were not restrained, and 82 percent of children being driven by an intoxicated person are unrestrained. He surmised that these statistics indicate that there is "a great deal of crossover between people who commit both of these two acts - those who drive intoxicated with a child in the vehicle, and those who fail to properly restrain."

CHAIR McGUIRE noted that children, in most cases, don't have the ability to make those types of choices for themselves, and offered that HB 381 will provide penalties for driving with an child in the vehicle while under the influence of an intoxicant.

CHAIR McGUIRE relayed that she would like to add back into HB 381 a provision that would increase the current penalties for transporting a child that is not properly restrained when such leads to physical injury or death of the child - this provision had been removed in the House Health, Education and Social Services Standing Committee.

Number 1172

CHAIR McGUIRE referred to a one-page document that contained proposed Amendments 1-4, which read [original punctuation provided]:

AMENDMENT 1
Page 2, Lines 8-10

After "watercraft"
DELETE "under the influence of an intoxicant."
REPLACE WITH "in violation of AS 28.35.030."

AMENDMENT 2
Page 2, after subsection [sic] (4)

INSERT "(5) transports a child in a motor vehicle in violation of AS 25.05.095(b), and the child suffers physical injury or dies."

AMENDMENT 3
Page 2, Lines 11-13

"**Sec. 2.** AS 11.51.100 is amended by adding a new subsection:

(e) Endangering the welfare of a child in the first degree under (a)(4) of this section is a class A misdemeanor."

AMENDMENT 4
Page 2, Lines 14-15
Current Sec. 3 is replaced with:

"**Sec. 3**. AS 11.51.100 is amended by adding a new subsection:

(f) Endangering the welfare of a child in the first degree under (a)(5) of this section is a

(1) class C felony if the child dies;

(2) class A misdemeanor if the child suffers serious physical injury; or

(3) class B misdemeanor if the child suffers physical injury.

DELETE language found in current Sec. 3

Number 1203

CHAIR McGUIRE noted that Amendment 2 contains a typo and thus the statute that should be referenced is AS 28.05.095(b), which currently reads:

(b) Except as provided in (c) of this section, a driver may not transport a child under the age of 16 in a motor vehicle unless the driver has provided the required safety device and properly secured each child as described in this subsection. If the child is less than four years of age, the child shall be properly secured in a child safety device meeting the standards of the United States Department of Transportation for a child safety device for infants. If the child is four but not yet 16 years of age, the child shall be properly secured in a child safety device approved for a child of that age and size by the United States Department of Transportation or in a safety belt, whichever is appropriate for the particular child.

CHAIR McGUIRE explained that Amendment 2 would reinsert the language removed by the House Health, Education and Social Services Standing Committee creating a new crime of endangering

the welfare of a child in the first degree, and that Amendment 4 would make the crime a class C felony if the child dies, a class A misdemeanor if the child suffers serious physical injury, and a class B misdemeanor if the child suffers physical injury. She noted that members' are being given a handout outlining the current penalties and fines for the aforementioned felony and misdemeanor convictions.

Number 1370

ALLEN STOREY, Lieutenant, Central Office, Division of Alaska State Troopers, Department of Public Safety (DPS), said that the DPS is in support of the provisions being discussed. He said it is common to come upon situations involving vehicles and alcohol wherein a child hasn't been restrained; in three such cases that he is familiar with, the child was ejected from the car and went sliding down the road.

Number 1416

LINDA WILSON, Deputy Director, Central Office, Public Defender Agency (PDA), Department of Administration (DOA), indicated that Amendments 1 and 3 would take care of the concerns she has with proposed [paragraph] (4) of Section 1. With regard to Amendments 2 and 4, she noted that concerns were raised in the House Health, Education and Social Services Standing Committee that there could be difficulty tracking the provisions encompassed in Amendment 4 with the [federal] regulations that would be referenced via Amendment 2. For example, it can be difficult to know what the appropriate car seat is for a particular child depending on his/her weight, height, and other factors, particularly given that a child can grow out of one weight/height class into another in a very short period of time and, thus, a person could unknowingly be exposed to a criminal penalty.

MS. WILSON opined that the proposed amendments are a real plus to the bill, and thanked Chair McGuire for proposing those changes. "We certainly all agree that there should be proper support and protection for children," she added. In response to a question, she remarked that when a mental state is not specifically mentioned in a statute, the courts generally construe the mens rea to be knowingly.

CHAIR McGUIRE indicated that the goal is to have this provision apply to those who knowingly don't restrain their children

properly, and relayed that she would be willing to specify that mental state in the bill.

LIEUTENANT STOREY relayed that earlier in the year he'd drafted language regarding the "child restraint issue," and indicated that he would send that language to [the committee].

CHAIR McGUIRE, after ascertaining that no one else wished to testify, closed public testimony on HB 381.

Number 1680

REPRESENTATIVE SAMUELS moved to adopt CSHB 381(HES) as the work draft. There being no objection, CSHB 381(HES) was before the committee.

Number 1689

CHAIR McGUIRE made a motion to adopt Amendment 1 [text provided previously]. There being no objection, Amendment 1 was adopted.

Number 1722

CHAIR McGUIRE stated that she would like to amend Amendment 2 [text provided previously] so that it references AS 28.05.095(b). [No objection was heard and so Amendment 2 was treated as amended.]

CHAIR McGUIRE mentioned that she would also be amenable to changing Amendment 2 [as amended] such that it would say in part "serious physical injury" rather than just "physical injury".

Number 1729

CHAIR McGUIRE made a motion to adopt Amendment 2 [as amended].

REPRESENTATIVE HOLM objected for the purpose of discussion. He remarked that Ms. Wilson has a good point regarding the difficulty of knowing what kind of restraining device one's child should be in, because a mistake in this regard could make someone a felon.

CHAIR McGUIRE asked Ms. Wilson whether she could suggest language to clarify that the bill should apply to those who make no effort at all to restrain a child, and not to those that make a good faith effort to restrain a child.

MS. WILSON noted that AS 28.05 does reference the [U.S.] Department of Transportation's standards for safety devices that are required, and said that perhaps the language could be narrowed such that it simply references safety devices. This might avoid the debate about which safety device should have been used, and the bill would then apply to those that use no device whatsoever.

MR. HILYARD said that according to his understanding, in six out of ten instances of child fatality in traffic accidents, the children were not restrained at all. Thus, he surmised, even restraining a child improperly will decrease the likelihood, statistically, that he/she will die. He noted that the National Transportation Safety Board (NTSB) recommends that states strengthen their child restraint laws in the following ways: require all children under the age of 4 years old to be in child safety seats; require that 4- to 8-year-old children use auto safety booster seats; eliminate provisions that permit children under 8 years old to be buckled up in a seat belt; and require all children under age 13 to ride in the back seat, if a seat is available.

REPRESENTATIVE HOLM suggested that if Amendment 2 [as amended] is altered such that the text being inserted reads in part, "transports a child in a motor vehicle without restraint", it would eliminate the issue of whether the restraint is the appropriate one.

CHAIR McGUIRE indicated that she would be amenable to changing the text of Amendment 2 [as amended] to read, " (5) transports a child in a motor vehicle with no restraining device, and the child suffers physical injury or dies."

REPRESENTATIVE HOLM mentioned that such language would be agreeable to him.

Number 1987

REPRESENTATIVE GRUENBERG indicated that he is opposed to that suggestion. Instead, he relayed, he would be amenable to updating AS 28.05.095(b) such that it includes the NTSB's recommendations. Also, he remarked, he'd like Amendment 2 [as amended] to refer to "serious physical injury", adding that perhaps it should also be amended to reflect that the person "knowingly transports ...".

CHAIR McGUIRE asked Lieutenant Storey whether his aforementioned suggested language would provide a compromise between having it be for not restraining a child at all and having it be linked with the federal standards currently referenced in AS 28.05.095(b).

LIEUTENANT STOREY said it seems like the sticking point on this issue is the vagueness of AS 28.05.095(b), and posited that perhaps his suggested language, which would update AS 28.05.095(b), might provide a solution. He again relayed that he would provide that language to the committee. On a different point, he said:

> One of the things that occurred to me while the discussion was going on is that we're holding the driver responsible for it, [but] ... maybe we should hold any ... responsible adult who's in the vehicle responsible for ensuring that the child is restrained, not [just] necessarily the driver.

Number 2150

REPRESENTATIVE GRUENBERG, on that point, opined that the language is proper as is, adding:

> Like the captain of a ship, the driver is responsible for the car and the operation of the car. If somebody else is responsible for strapping the infant in and something happens, then technically that person would be aiding and abetting ... - if they did it knowingly - and ... since it's an accomplice before the fact would be punishable as the principle. ... We should just leave the statute alone in that area.

LIEUTENANT STOREY, in response to a question, relayed that language he would be providing the committee references the age and size of a child. For example: if the child is less than one year of age and weighs less than 20 pounds, the child shall be properly restrained in a rear-facing infant seat; if the child is more than one year but less than four and weighs less than 40 pounds but at least 20 pounds, the child shall be properly restrained in a forward-facing child seat.

CHAIR McGUIRE remarked that including such criteria in HB 381 might prove controversial and asked Lieutenant Storey whether he'd been considering adding such language to "the primary offense seatbelt law."

LIEUTENANT STOREY said yes, adding: "We've been asked by several organizations, police officers, and a couple of legislators ... to look at that because it is vague and they're having some concerns about being able to enforce that provision because of the vagueness of it."

CHAIR McGUIRE remarked that because she is proposing to raise the offense to a felony, she wants to be careful with how the language is worded.

Number 2260

CHAIR McGUIRE made a motion to adopt a second amendment to Amendment 2, as amended, to add "knowingly" before "transports".

Number 2275

DEAN J. GUANELI, Chief Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), suggested instead saying, "unless restrained by a safety belt or another restraining device approved or adopted by the U.S. [Department of Transportation] or the State of Alaska." Such language would provide latitude but not allow the restraint to be some sort of "jury-rigged thing." He opined that there are aspects of AS 20.05.095 that are important and should thus be referenced as well, for example, the exemption for passengers in a school bus and the prohibition against removing the safety belts from a vehicle.

CHAIR McGUIRE remarked that although the U.S. Department of Transportation has developed standards, it is unclear "who gets them" or where the general public can go to find out what they are.

TAPE 04-65, SIDE B
Number 2374

CHAIR McGUIRE mentioned that she likes Mr. Guaneli's suggested language and the idea of specifying "knowingly". On that point, she mentioned that the language she is considering would be something along the lines of: "transports a child in a motor vehicle unless restrained by a safety belt or other child safety device approved by the U.S. [Department of Transportation]".

REPRESENTATIVE GRUENBERG opined that "the child seatbelt law should be in one place" and that the amendment's current

reference to AS 28.05.095(b) is fine because it could apply even if that statute or its referenced federal standards change. He suggested that the committee adopt the second amendment to Amendment 2, as amended, and then adopt Amendment 2, as amended. He also suggested, however, that AS 28.05.095(b) ought to be updated as well.

CHAIR McGUIRE voiced her concern that attempting to change AS 28.05.095(b) [via HB 381] could bog down the bill, and suggested that an alternative would be to forgo adopting Amendment 2, as amended.

REPRESENTATIVE GRUENBERG suggested as another alternative that they adopt Amendment 2 [as amended and with the second proposed amendment to it adopted], and then alter Amendment 4 [text provided previously] so that a violation of the language in Amendment 2 would only result in a misdemeanor. He remarked, however, that he likes the current concept in Amendment 4 of making it a class C felony if a child dies because of the violation.

MR. GUANELI suggested: "If it were made, 'unless restrained by a safety belt or another device as required by [AS 28.05.095(b)]', that may do it, and ... I think that has the added advantage because ..., internally, ... that references subsection (c) of that statute, ... so you may get the benefit of both."

REPRESENTATIVE GRUENBERG opined that such language could be read as lowering the standard because, for example, a person could use a regular seatbelt on a toddler. He said he'd prefer to leave Amendment 2 [as amended and with the second proposed amendment to it adopted] as is.

Number 2226

MS. WILSON remarked:

> You also need to remember, when considering this, ... that the person who's being charged in this particular statute is somebody who's responsible for the child. So it's a parent or guardian or somebody charged with the care of the child. And so if you've got somebody in that situation who, because they didn't put the right seatbelt on their child, and, without any fault of their own other than not putting them in the right seatbelt, was hit by another car and ... and the child

> dies, can you think of anything worse that would happen? ... You had a part to play in the death of your child - that is such a penalty in and of itself - ... and then now let's charge them with a felony. ...

REPRESENTATIVE GRUENBERG, in response to questions, offered his belief that law enforcement can stop a person for a violation of AS 28.05.095(b).

MS. WILSON concurred.

REPRESENTATIVE HOLM asked whether use of seatbelts would be required in motor homes or on farm vehicles.

CHAIR McGUIRE noted that AS 28.05.095(c)(4) currently provides an exemption for vehicles that are not equipped with seatbelts.

REPRESENTATIVE GARA added his understanding that seatbelts are only required on public roadways.

CHAIR McGUIRE surmised that the question before the committee is whether having a child die because he/she was transported in a vehicle without being properly restrained should engender more than a $50 fine.

REPRESENTATIVE GRUENBERG offered his belief that such should result in more than a $50 fine.

CHAIR McGUIRE concurred and said she is open to suggestions regarding what that penalty should be.

Number 2077

REPRESENTATIVE GARA said he is leaning toward the concept that if one causes terrible injury to one's child, that is penalty enough, but added that [he] also wants to send the message that people need to restrain their children.

CHAIR McGUIRE pointed out that the one responsible for not restraining a child could wind up being the babysitter, the drunken boyfriend or girlfriend, or the neighbor.

REPRESENTATIVE GRUENBERG asked about probation.

MR. GUANELI said that generally, the Department of Corrections (DOC) does not actively supervise anyone on misdemeanor probation.

REPRESENTATIVE GRUENBERG said he wants to be sure that probation becomes a part of the [sentencing] equation such that a requirement of that probation would be that for a period of several years, all children under the defendant's care must be properly restrained.

CHAIR McGUIRE, noting that she is looking for broader support down the road, suggested altering Amendment 4 such that if the child dies, it would be a class A misdemeanor; if the child suffers serious physical injury, it would be a class B misdemeanor; and if the child suffers a physical injury, it would be a class C misdemeanor.

REPRESENTATIVE SAMUELS suggested instead that Amendment 4 be altered such that if the child dies or suffers serious physical injury, it would be a class A misdemeanor; and if the child suffers physical injury, it would be a class B misdemeanor.

CHAIR McGUIRE said, "Okay," adding that that would raise the penalties while still preserving the statute that references the federal standards.

REPRESENTATIVE GRUENBERG reiterated his preference for making it a class C felony if the child dies.

CHAIR McGUIRE pointed out, however that if such a provision is kept in, it would apply even in cases where the person transporting the child got in an accident that was the fault of the other driver.

Number 1849

REPRESENTATIVE GARA offered that sometimes there are problems which have no legal solution, and not everything that's wrong in society can be criminalized, and so even though he'd love to find a way to force people to follow the seatbelt law, it may not be possible via criminal statutes.

CHAIR McGUIRE remarked that children must rely on adults to keep them alive and safe, and that the current $50 fine does not seem to be a sufficient deterrent.

REPRESENTATIVE SAMUELS directed attention to page 1, line 5, and asked who would be included under the language "or other person legally charged with the care of a child". For example, if he

were to take a friend's child skiing, would he be considered "legally charged with the care of a child".

CHAIR McGUIRE and REPRESENTATIVE GRUENBERG offered their belief that that would be the case in such a situation because he was entrusted with the care of the child by the child's parent or guardian.

REPRESENTATIVE GRUENBERG again reiterated his preference for making it a class C felony if the child dies, noting that currently, if a person is guilty of negligent homicide in the death of a child or a child dies under circumstances described under AS 11.51.100(a)(2)(A) - wherein the parent or guardian knowingly leaves a child with a registered sex offender - it's a class C felony.

CHAIR McGUIRE indicated that she is hoping to achieve consensus on this issue.

REPRESENTATIVE GRUENBERG relayed that he is satisfied with Amendment 4 as it is currently written, and would feel bad if the death of a child did not warrant a class C felony.

Number 1621

REPRESENTATIVE GARA said:

> A fair amount of this conduct I think is covered already, because if you ... get into a car accident and you injure a child and the child wasn't wearing a seatbelt, if the prosecution wants to, they can pursue a recklessness claim. You've endangered that child: you put a child in your car, without a seatbelt, knowing that the reason for the seatbelt is [that] if you get into a car accident the kid's going to get hurt, and you got into a car accident and the kid got hurt, lo and behold. [It's] not rocket science. It's probably already prosecutable.
>
> And so then the question is, why wouldn't the [district attorney] prosecute something like that, and I think for the same reason whether they do or they don't is probably the same reason we're sitting here having a hard time deciding whether or not it's a crime. And maybe they would prosecute it in a case where, factually, it makes sense to prosecute it, not in the case of the grieving parent, but in the case of

> the irresponsible babysitter. And so maybe the current law gives the [district attorney] the discretion that we want to leave. ...

MR. GUANELI relayed that the two mental states that might possibly be applicable would be criminal negligence or recklessness. Recklessness involves conscious awareness of a risk and disregarding it, and criminal negligence involves failure to perceive the risk. Both, however, have a similar element in that they constitute a gross and unjustifiable deviation from the standard of care that a reasonable person would exercise. The difficulty for prosecutors, he remarked, lies in applying that particular standard to a seatbelt violation. Unfortunately, it's just too common a violation, he remarked, adding his belief that most juries are not going to find either recklessness or criminal negligence in such cases. Therefore, in order to prosecute such cases, there must be a specific statute that deals with the specific conduct of a seatbelt violation and resulting injury, because, without such, a successful conviction is unlikely.

Number 1489

MR. GUANELI, turning to the issue raised by Representative Samuels regarding the phrase, "other person legally charged with the care of the a child", said he is not convinced that that language would apply to the babysitter or neighbor. Instead, he offered, that phrase probably means a foster parent or someone who has temporary custody short of guardianship. Therefore, there is a potential disparity between the standard being applied to parents, guardians, and other persons legally charged with the care of a child, and the standard being applied to babysitters, neighbors, and friends.

REPRESENTATIVE SAMUELS indicated a preference for having a higher standard apply to babysitters , neighbors, and friends, because there is nothing worse to a parent than to lose a child and so such would be punishment enough.

REPRESENTATIVE GRUENBERG argued that because he believes probationary restrictions should apply for several years in cases where a child dies, the legislature should make such instances a class C felony because felons are subject to supervised probation.

CHAIR McGUIRE, referring to Representative Samuels point, said she would be amenable to removing the language, ", under 16 years of age," from AS 11.51.100(a).

REPRESENTATIVE GRUENBERG cautioned against doing such, since AS 11.51.100(a) applies to circumstances other than those involving seatbelts. He suggested instead that they consider making a separate statute pertaining to seatbelts that would apply to all persons, not just parents, guardians, or other persons legally charged with the care of a child.

Number 1240

MR. GUANELI suggested that perhaps AS 11.51.100(a) could be altered such that paragraphs (1)-(3) would apply to parents, guardians, or other persons legally charged with the care of a child, and proposed paragraphs (4) and (5) would apply to all persons - all drivers. He predicted that such language could be drafted fairly easily. On the issue of probation, he pointed out that if the legislature says that supervised probation shall apply in certain misdemeanor situations, the courts and the Department of Corrections (DOC) will comply, adding that sometimes this occurs now on a case-by-case basis in certain misdemeanor situations when the DOC is asked by the courts to provide supervised probation. He relayed, however, that he is hesitant to suggest that the legislature put such a stipulation in this statute, because it could easily become the practice to put it in a lot of other statutes and, thus, create a burden for the DOC.

The committee took an at-ease from 5:10 p.m. to 5:11 p.m.

CHAIR McGUIRE proposed that they adopt the second amendment - regarding "knowingly" - to Amendment 2, as amended, [no objection was heard and so Amendment 2, as amended, was treated as amended in this fashion]; that they adopt Amendment 2, as amended; that they adopt Amendments 3 [text provided previously] and 4; and that they stipulate, as suggested by Mr. Guaneli, that proposed paragraphs (4) and (5) apply to all persons.

CHAIR announced that the question before the committee was whether to adopt Amendment 2, as amended.

REPRESENTATIVE HOLM removed his objection.

Number 1119

CHAIR McGUIRE asked whether there were any further [objections] to Amendment 2, as amended. There being none, Amendment 2, as amended, was adopted.

Number 1111

CHAIR McGUIRE made a motion to adopt Amendment 3. There being no objection, Amendment 3 was adopted.

REPRESENTATIVE GRUENBERG, in response to a question regarding the penalty proposed via Amendments 3 and 4, clarified that proposed paragraph (4) pertains to transporting a child while under the influence of an intoxicant, and proposed paragraph (5) pertains to knowingly transporting a child without a proper restraining device.

Number 0997

CHAIR McGUIRE made a motion to adopt Amendment 4.

Number 0970

REPRESENTATIVE GRUENBERG objected for the purpose of discussion. He opined that it would be a good policy to stipulate supervised probation for a violation of proposed subsection (f)(2), which provides for a class A misdemeanor in cases where the child is seriously physically injured. He asked whether the committee would be amenable to that.

REPRESENTATIVE SAMUELS made mention of the fiscal notes.

MS. WILSON pointed out that if a person violates a condition of probation for a misdemeanor crime, it would have the same effect as violating supervised probation.

REPRESENTATIVE GRUENBERG asked whether the committee would be amenable to passing a letter of intent encouraging probation for violation of proposed subsection (f)(2).

REPRESENTATIVE HOLM suggested that the committee discussion regarding the intent of HB 381 should be sufficient.

MR. GUANELI offered his belief that given the DOC's budget situation, unless the DOC is directed to actively supervise someone on misdemeanor probation, it won't happen.

REPRESENTATIVE GRUENBERG clarified that he is referring to encouraging misdemeanor probation.

REPRESENTATIVE SAMUELS sought clarification from Ms. Wilson that misdemeanor probation would have the effect that Representative Gruenberg is seeking.

MS. WILSON said it would.

REPRESENTATIVE GRUENBERG removed his objection.

Number 0747

CHAIR McGUIRE asked whether there were any further objections to Amendment 4. There being none, Amendment 4 was adopted.

Number 0735

CHAIR McGUIRE made a motion to adopt Conceptual Amendment 5, to have paragraphs (1)-(3) apply to parents, guardians, or other persons legally charged with the care of a child, and to have proposed paragraphs (4) and (5) apply to all drivers. There being no objection, Conceptual Amendment 5 was adopted.

Number 0680

REPRESENTATIVE HOLM moved to report CSHB 381(HES), as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 381(JUD) was reported from the House Judiciary Standing Committee.

HB 275 - VETERINARIANS AND ANIMALS

Number 0652

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 275, "An Act relating to veterinarians and animals." [Before the committee was CSHB 275(L&C), which had been amended on 4/7/04.]

Number 0581

SHARALYN WRIGHT, Staff to Representative Mike Chenault, Alaska State Legislature, sponsor, indicated that she'd like the bill to move out as is and let the House Finance Committee deal with any further amendments.

REPRESENTATIVE GRUENBERG noted, however, that he'd been working with Representative Crawford's office on some further proposed amendments, and offered his belief that those proposed amendments wouldn't be controversial.

CHAIR McGUIRE directed attention to the remainder of the changes suggested by the Department of Law (DOL), some of which had been adopted during the bill's hearing on 4/7/04. [These suggested changes were presented and explained by Elise Hsieh from the DOL during the bill's hearing on 4/6/04].

CHAIR McGUIRE - referring to the DOL's suggestion that proposed AS 11.61.138(a)(7) be rewritten to clarify what is meant by the phrase, "with elements similar to a crime under this section" - indicated a preference for letting the House Finance Committee address this suggestion.

CHAIR McGUIRE referred to the DOL's suggestion that proposed AS 11.61.138(b) is awkward and should be rewritten to say, "Each animal that is subject to cruelty to animals under (a)(1)-(5) and (7) of this section shall constitute a separate offense".

Number 0390

REPRESENTATIVE GRUENBERG made a motion to adopt the foregoing suggested language as Amendment 11. There being no objection, Amendment 11 was adopted.

Number 0339

CHAIR McGUIRE made a motion to adopt Amendment 12, which was labeled 23-LS0940\U.1, Luckhaupt, 4/7/04, and read:

Page 6, line 29:
Delete "a new paragraph"
Insert "new paragraphs"

Page 7, line 1, following "AS 11.61.140":
Insert ";
(32) the defendant is convicted of an offense specified in AS 11.46.360 or 11.46.365 and an animal was present in the propelled vehicle at the time of the offense; in this paragraph, "animal" has the meaning given in AS 11.61.140"

CHAIR McGUIRE noted that Amendment 12 would add an additional aggravator to Section 4, which pertains to the statute regarding aggravating and mitigating factors in sentencing. This aggravator would apply for crimes of vehicle theft in the first or second degree. She noted that she and her committee aide, Vanessa Tondini, had their dogs taken when Ms. Tondini and her mother had their car carjacked.

MS. WRIGHT pointed out that if such a situation involved a service dog, it would be an even more serious crime than just having one's pet taken away.

Number 0210

CHAIR McGUIRE asked whether there were any objections to Amendment 12. There being none, Amendment 12 was adopted.

The committee took an at-ease from 5:28 p.m. to 5:29 p.m.

Number 0102

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 13, which, with a handwritten correction, read [original punctuation provided]:

> Page 4, lines 27 - 28:
> Delete all material and insert
> "(5) with criminal negligence fails to care for an animal and, as a result, causes the death of the animal or causes severe physical pain or prolonged suffering to the animal;"
>
> Page 5, after line 12:
> Insert the following:
> "(e) In (a)(5) of this section, failure to provide the minimum standards of care for an animal under AS 03.55.100 is prima facie evidence of failure to care for an animal."
>
> Renumber remaining subsections accordingly.

Number 0089

REPRESENTATIVE HOLM objected

Number 0081

DEAN J. GUANELI, Chief Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), said that whenever there are laws that create civil penalties on the one hand and related criminal penalties on the other hand, there is often a tension between the two; the kinds of standards that could be applied to civil penalties sometimes don't work well in the criminal context because the standards for vagueness and ambiguity are much stricter for the latter.

TAPE 04-66, SIDE A
Number 0001

MR. GUANELI relayed that the first part of Amendment 13, which was created by the DOL, proposes to keep the language that is in current law because it doesn't refer to the civil standards regarding minimum standards of care. With regard to the second part of Amendment 13, he indicated that one of the problems facing prosecutors is, what does "fails to care" mean and how is that to be assessed by a jury, and so the DOL's suggested solution is a provision pertaining to prima facie evidence, that if someone fails to provide the minimum standards of care as set out in the civil statutes, that constitutes prima facie evidence of failure to care for the animal. This will give guidance to the jury without having those standards written into the elements of the criminal offense. He noted that there is a similar provision regarding prima facie evidence on page 6, lines 13-15, and opined that such provisions are more workable from a criminal prosecution standpoint.

MS. WRIGHT expressed concern with the first part of Amendment 13 because it removes reference to minimum standards of care, which, she opined, can only be defined by a veterinarian. She also opined that using the phrase "criminal negligence" removes any standard of care for an animal.

REPRESENTATIVE GRUENBERG mentioned that Amendment 13 looks like a good amendment to him.

CHAIR McGUIRE opined that Mr. Guaneli is correct in that if certain actions are going to made a crime, they need to be careful about what the standards are going to be. She offered her belief that application of a civil standard probably won't be upheld.

REPRESENTATIVE HOLM said he disagrees with this kind of a bill because animal cruelty does not rise to the level of cruelty against humans. He mentioned that what is meant by the phrase

"minimum standard of care" will vary depending on the area of the state and the type of animal. He questioned whether allowing buffalo to roam free in the Fairbanks area, for example, would rise to the level of criminal negligence. He relayed that at one point, animal control personnel rounded up some range-fed horses because they appeared to be too thin; when the veterinarian looked at those horses, he deemed them healthy and appropriately thin given that they were range-fed horses. He said he agrees that it should be the veterinarian who determines what the standards of care should be.

Number 0509

CHAIR McGUIRE offered her belief that Amendment 13 would satisfy Representative Holm's concerns because it ensures that before someone is charged with a crime, the behavior has to rise to a higher level, that of criminal negligence.

REPRESENTATIVE HOLM opined, however, that the phrase "fails to care" is subjective.

REPRESENTATIVE GRUENBERG surmised that that is simply a term of art. He also pointed out that the phrase "fails to care for an animal" in the first part of Amendment 13 is linked with the phrase "failure to provide the minimum standards of care" in the second part, which directly references those standards as they are set out in Section 1 of the bill, under proposed AS 03.55.100. He opined that under Amendment 13, in order to make a criminal case, the prosecution will have to present objective evidence from a veterinarian as stipulated in Section 1, subsection (b).

CHAIR McGUIRE opined that Amendment 13 will make the bill better.

MR. GUANELI, in an effort to alleviate Representative Holm's concern regarding the phrase "fails to care", reiterated that that language is part of existing law, and offered his belief that the second part of Amendment 13 gives guidance regarding the standards of care that are set out in the rest of the bill. He relayed that the current language in the bill would repeal current law and make violation of the minimum standards a crime even if the animal is not in pain, injured, or suffering in any way.

MS. WRIGHT said she is not comfortable with Amendment 13 and would like more time to consider it.

CHAIR McGUIRE said she would feel more comfortable with HB 275 if Amendment 13 is included in it, because she thinks that Mr. Guaneli has made good points.

Number 0917

REPRESENTATIVE MIKE CHENAULT, Alaska State Legislature, sponsor, expressed concern that it might be more difficult to prove that someone actually intended to treat an animal a certain way versus just letting a situation develop.

MR. GUANELI, in response to comments about prima facie evidence, said:

> Prima facie evidence probably means a lot of different things in a lot of contexts, but what it would certainly mean in the first instance for investigators is that if they determine that prima facie exists - in other words, that the minimum standards have been violated - that gives them the authority to take some action based on that. In other words, ... but for other things, they can assume that ... there's been a violation of law because, prima facie, this constitutes evidence of that.
>
> So I think the police could seize the animals or ... do those kinds of things that are necessary to protect the animals. I think that a prosecutor could then ..., in good faith, file charges based on that. When it comes to the jury, though, the jury ... would be instructed by the judge that it may rely on those standards [but] it is not required to; in other words, the jury isn't forced to rely on those standards, but those are things that the jury can take into consideration to determine whether the other elements of the crime have been met. ...

REPRESENTATIVE GRUENBERG offered his belief that adoption of Amendment 13 would enable the prosecution to get a motion to dismiss for failure to make out a case denied.

REPRESENTATIVE HOLM removed his objection.

REPRESENTATIVE CHENAULT said he has no objection to Amendment 13.

Number 1123

CHAIR McGUIRE asked whether there were any further objections to adopting Amendment 13. There being none, Amendment 13 was adopted.

REPRESENTATIVE GRUENBERG relayed that he had two more proposed amendments that he wished to discuss, adding his belief that they went together.

Number 1162

JOE McKINNON, Staff to Representative Max Gruenberg, Alaska State Legislature, referred to Amendment 14, which read [original punctuation provided]:

> Page 3, line 10: Amend subsection (d) as follows:
> (d) The state, a municipality, a person, or another entity that supplies shelter, care, veterinary attention or medical treatment for an animal seized under this section shall [MAKE EVERY REASONABLE EFFORT TO LOCATE THE OWNER] **have a lien on the animal for the cost of shelter, care, veterinary attention, or medical treatment**.

MR. McKINNON explained that Amendment 14 came from Representative Crawford's office, and that in part its intent is to delete the language "make every reasonable effort to locate the owner" because it was felt that that burden should not be on the person or entity that is simply caring for the animal. And presumably, he remarked, law enforcement will already be making an effort to locate the owner. Amendment 14 also adds language regarding having a lien for the costs of providing care for the animal. He noted that there have been instances wherein humane groups have spent a significant amount of money caring for the abused animals placed in their care but not received any compensation from the owner. Currently, there is no clear authority for such an entity to assert a claim for any of the costs of caring for an animal.

Number 1238

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 14.

MR. McKINNON referred to Amendment 15, which read [original punctuation provided]:

Page 5, Line 2: Insert new bill section 5 and renumber bill sections accordingly:

Sec. 5. AS 34.35.220 is amended to read:

Sec. 34.35.220. Persons entitled to carrier, warehouse, [AND] livestock **and animal** liens. The following persons shall have liens upon personal property for their just and reasonable charges for the labor, care, and attention bestowed and the food furnished, and may retain possession of the property until the charges are paid:

(1) a person who is a common carrier, or who, at the request of the owner or lawful possessor of personal property, carries, conveys, or transports the property from one place to another;

(2) a person who safely keeps or stores grain, wares, merchandise, and personal property at the request of the owner or lawful possessor of the property; [AND]

(3) a person who pastures or feeds horses, cattle, hogs, sheep, or other livestock, or bestows labor, care, or attention upon the livestock at the request of the owner or lawful possessor of the livestock**; and**

(4) the state, a municipality or another person who provides feed, shelter, care, veterinary attention or medical treatment to an animal seized pursuant to AS 03.55.120.

MR. McKINNON pointed out that if the committee adopts Amendment 15, then Amendment 14 should be changed such that, "**have a lien on the animal for the cost of shelter, care, veterinary attention, or medical treatment**" should be changed to read, "**have a lien under AS 34.35.220**".

Number 1301

REPRESENTATIVE GRUENBERG made a motion to amend Amendment 14 to that effect.

Number 1328

CHAIR McGUIRE asked whether there were any objections to the amendment to Amendment 14. There being none, Amendment 14 was amended.

Number 1340

CHAIR McGUIRE asked whether there were any objections to Amendment 14, as amended. There being none, Amendment 14, as amended, was adopted.

Number 1345

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 15.

REPRESENTATIVE HOLM objected, and asked what happens if someone were to be accused but ultimately not convicted.

REPRESENTATIVE GRUENBERG said that the lien is for the cost of care regardless of whether the person is convicted.

REPRESENTATIVE HOLM opined, however, that if the owner is not convicted, the animal, in essence, was seized without his/her permission and therefore he/she should not be liable for the cost of that care.

MS. WRIGHT suggested that instead of using a lien system, the person or entity that incurs costs for providing care can still file a suit to recover those costs.

Number 1526

REPRESENTATIVE GRUENBERG withdrew Amendment 15, and made a motion that the committee rescind its action in adopting Amendment 14, as amended. There being no objection, the committee rescinded its action in adopting Amendment 14, as amended.

Number 1553

REPRESENTATIVE GRUENBERG moved to report CSHB 275(L&C), as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 275(JUD) was reported from the House Judiciary Standing Committee.

ADJOURNMENT

Number 1557

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 6:00 p.m.