

**ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE**

May 4, 2004
8:28 a.m.

TAPE(S) 04-61,62

MEMBERS PRESENT

Senator Ralph Seekins, Chair
Senator Scott Ogan, Vice Chair
Senator Gene Therriault
Senator Hollis French

MEMBERS ABSENT

Senator Johnny Ellis

COMMITTEE CALENDAR

CS FOR HOUSE BILL NO. 275(FIN)

"An Act relating to animals, and to the care of and to cruelty to animals."

SCHEDULED BUT NOT HEARD

CS FOR HOUSE BILL NO. 427(JUD)

"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 Rule 17(c), Alaska Rules of Civil Procedure, and Rules 16(f) and 17(e), Alaska Rules of Probate Procedure; and providing for an effective date."

MOVED CSHB 427(JUD) OUT OF COMMITTEE

SENATE BILL NO. 97

"An Act relating to public interest litigants and to attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure."

HEARD AND HELD

SENATE BILL NO. 246

"An Act relating to the commission of an offense or a juvenile delinquency act involving the victim's race, sex, color, creed, physical or mental disability, sexual orientation, ancestry, or national origin; relating to sentencing, informal adjustment,

and adjudication for those offenses and acts; relating to a diversity tolerance program for certain juvenile delinquency acts; relating to a civil cause of action for certain acts involving discriminatory harassment; and providing for an effective date."

SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: HB 275

SHORT TITLE: ANIMALS AND CRUELTY TO 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
04/14/04	(H)	Moved CSHB 275(JUD) Out of Committee
04/14/04	(H)	MINUTE(JUD)
04/19/04	(H)	JUD RPT CS(JUD) NT 2DP 2NR
04/19/04	(H)	DP: GRUENBERG, MCGUIRE; NR: SAMUELS,
04/19/04	(H)	HOLM
04/26/04	(H)	FIN AT 8:30 AM HOUSE FINANCE 519
04/26/04	(H)	Heard & Held
04/26/04	(H)	MINUTE(FIN)
04/27/04	(H)	FIN AT 1:30 PM HOUSE FINANCE 519
04/27/04	(H)	Moved CSHB 275(FIN) Out of Committee
04/27/04	(H)	MINUTE(FIN)
04/28/04	(H)	FIN RPT CS(FIN) NT 5DP 6NR

04/28/04 (H) DP: CROFT, MEYER, CHENAULT, FOSTER,
 04/28/04 (H) WILLIAMS; NR: HAWKER, STOLTZE, JOULE,
 04/28/04 (H) MOSES, FATE, HARRIS
 04/30/04 (H) TRANSMITTED TO (S)
 04/30/04 (H) VERSION: CSHB 275(FIN)
 05/01/04 (S) READ THE FIRST TIME - REFERRALS
 05/01/04 (S) JUD, FIN
 05/03/04 (S) JUD AT 8:00 AM BUTROVICH 205
 05/03/04 (S) Heard & Held
 05/03/04 (S) MINUTE(JUD)
 05/04/04 (S) JUD AT 8:00 AM BUTROVICH 205

BILL: HB 427

SHORT TITLE: GUARDIANS, CONSERVATORS,OPA, ETC
 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
 04/14/04 (H) Moved CSHB 427(JUD) Out of Committee
 04/14/04 (H) MINUTE(JUD)
 04/21/04 (H) JUD AT 1:00 PM CAPITOL 120
 04/21/04 (H) Moved New CSHB 427(JUD) Out of
 Committee
 04/21/04 (H) MINUTE(JUD)
 04/22/04 (H) JUD RPT CS(JUD) NT 7DP
 04/22/04 (H) DP: GARA, SAMUELS, GRUENBERG, OGG,
 04/22/04 (H) HOLM, ANDERSON, MCGUIRE
 04/23/04 (H) FIN REFERRAL WAIVED
 04/30/04 (H) TRANSMITTED TO (S)
 04/30/04 (H) VERSION: CSHB 427(JUD)
 05/01/04 (S) READ THE FIRST TIME - REFERRALS
 05/01/04 (S) JUD, FIN
 05/03/04 (S) JUD AT 8:00 AM BUTROVICH 205
 05/03/04 (S) Heard & Held
 05/03/04 (S) MINUTE(JUD)
 05/04/04 (S) JUD AT 8:00 AM BUTROVICH 205

BILL: SB 97

SHORT TITLE: ATTY FEES: PUBLIC INTEREST LITIGANTS

SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

03/03/03 (S) READ THE FIRST TIME - REFERRALS
03/03/03 (S) RES, JUD
03/28/03 (S) RES AT 3:30 PM BUTROVICH 205
03/28/03 (S) Heard & Held
03/28/03 (S) MINUTE(RES)
04/03/03 (S) RES AT 8:00 AM BELTZ 211
04/04/03 (S) JUD AT 1:30 PM BELTZ 211
04/04/03 (S) <Pending Referral>
04/07/03 (S) RES AT 3:30 PM BUTROVICH 205
04/07/03 (S) Moved Out of Committee
04/07/03 (S) MINUTE(RES)
04/08/03 (S) RES RPT 2DP 2DNP 1NR 1AM
04/08/03 (S) DP: WAGONER, SEEKINS;
04/08/03 (S) DNP: ELTON, LINCOLN;
04/08/03 (S) NR: DYSON; AM: STEVENS B
04/09/03 (S) JUD AT 1:30 PM BELTZ 211
04/09/03 (S) Scheduled But Not Heard
04/23/03 (H) JUD AT 1:00 PM CAPITOL 120
04/23/03 (S) Heard & Held
04/23/03 (S) MINUTE(JUD)
04/28/03 (H) JUD AT 1:00 PM CAPITOL 120
04/28/03 (S) Moved SB 97 Out of Committee
04/28/03 (S) MINUTE(JUD)
04/29/03 (S) JUD RPT 3DP 2DNP
04/29/03 (S) DP: SEEKINS, OGAN, THERRIAULT;
04/29/03 (S) DNP: ELLIS, FRENCH
05/01/04 (S) RETURNED TO JUD COMMITTEE
05/04/04 (S) JUD AT 8:00 AM BUTROVICH 205

BILL: SB 246

SHORT TITLE: HATE CRIMES/DISCRIMINATION/TOLERANCE PROG

SPONSOR(s): SENATOR(s) LINCOLN

01/12/04 (S) PREFILE RELEASED 1/2/04
01/12/04 (S) READ THE FIRST TIME - REFERRALS
01/12/04 (S) STA, JUD
03/23/04 (S) STA AT 3:30 PM BELTZ 211
03/23/04 (S) Moved SB 246 Out of Committee
03/23/04 (S) MINUTE(STA)
03/24/04 (S) STA RPT 4DP
03/24/04 (S) DP: STEVENS G, HOFFMAN, STEDMAN, GUESS
03/24/04 (S) FIN REFERRAL ADDED AFTER JUD

04/07/04 (S) JUD AT 8:00 AM BUTROVICH 205
04/07/04 (S) Heard & Held
04/07/04 (S) MINUTE(JUD)
04/23/04 (S) JUD AT 8:00 AM BUTROVICH 205
04/23/04 (S) Scheduled But Not Heard
05/04/04 (S) JUD AT 8:00 AM BUTROVICH 205

WITNESS REGISTER

Mr. Jim Shine
Staff to Representative Anderson
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Answered questions about CSHB 427(JUD)

Mr. Jim Parker
Assistant Public Advocate
Office of Public Advocacy
Department of Administration
900 W 5th Ave.
Anchorage, AK 99501-2090
POSITION STATEMENT: Answered questions about CSHB 427(JUD)

Mr. Craig Tillery
Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Described changes made in Version V of SB 97

Mr. Joe Balash
Chief of Staff to Senator Therriault
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Answered questions about SB 97

ACTION NARRATIVE

TAPE 04-61, SIDE A

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at 8:28 a.m. Senators Ogan, French, Therriault and Chair Seekins were present. The first order of business to come before the committee was HB 275. CHAIR SEEKINS turned the gavel over to Vice-Chair Ogan.

CSHB 427(JUD)-GUARDIANS, CONSERVATORS, OPA, ETC.

MR. JIM SHINE, staff to Representative Anderson, sponsor of HB 427, reminded members that Senator Therriault asked at a previous hearing whether two provisions in the bill would have a fiscal impact on the Alaska Court System (ACS). After speaking with Mr. Wooliver of the ACS and members of the Office of Public Advocacy (OPA), all determined that the statutory changes are consistent with existing court rule so would have no fiscal impact. He directed attention to a letter, copied to committee members, saying as much.

SENATOR THERRIAULT said he has a better understanding of the situation at the ACS and his concern was addressed. In past years, certain jurisdictions of the court were lax in making sure the annual reports were done. The ACS has taken steps to correct that over the past year. Therefore, he does not believe the ACS will need additional money to complete the report.

SENATOR FRENCH said he received an e-mail from a constituent who said Section 19 seems to give the same powers and duties of a conservator to anyone appointed as a guardian. Her point was that the standards for appointing the two differ. She believes it is inappropriate to give a person the powers of a conservator without requiring that person to meet the qualifications necessary to be appointed a conservator. She questioned if Section 19 becomes law and a person is appointed a full guardian with the powers of a conservator and a second person is appointed the conservator, which one will control the protected person's estate and to which the bank should give control of the accounts.

MR. JIM PARKER, Assistant Public Advocate, Office of Public Advocacy, responded:

The purpose here has been an assumption that full guardianship - full powers to include financial decision making and the ability to apply for benefits, the ability to receive funds, the findings that need to be made, it's true, for a conservatorship are different. I've actually been attending meetings of the court system's [indisc.] committee recently and there's a proposed guardianship order and they're holding off to see what happens with this legislation. It would be necessary for the court to make the findings for conservatorship if the person appointed

as guardian was made a full guardian and the definition of full guardian would necessarily include guardianship - or financial powers. If there's a separate person acting as the conservator this does happen unless a family member wants to retain the ability to act as a conservator or is uncomfortable. I think the court would have to make the conservatorship findings.

[Because of poor transmission, Mr. Parker's testimony was difficult to hear so Senator French asked him to condense his answer.]

MR. PARKER said he thought the court would have to make the findings required in the statute for conservatorship if it is making a person a full guardian. He stated, "Senator French, it's sort of like a lesser included."

SENATOR FRENCH asked Mr. Parker if he questions the premise of the constituent's question because a person would have the same powers if appointed a full guardian.

MR. PARKER said yes, this statutory change would clarify that a person who is appointed as a full guardian would become a conservator.

SENATOR FRENCH asked what would happen if a conservator already existed.

MR. PARKER said that conservator would be a partial guardian. He said the courts should look at every area that is requested and make the necessary findings. The court should not be giving more powers than justified in a particular case, as that would be taking away a person's rights. The court should make sure it's appropriate for the guardian to have decision-making authority in terms of placement, medical decisions, or whatever is requested but the court should not grant powers that are unnecessary.

SENATOR FRENCH asked if any full guardian who is given conservator's powers will have to meet the requirements of a conservator.

MR. PARKER said a person cannot have a conservator just because someone else is making bad decisions regarding, for example, money management.

SENATOR THERRIAULT said about four years ago a piece of legislation was worked on that he believes was the genesis of this bill. Since that time, it is his understanding that a group has "worked this." He asked if Mr. Parker was part of a group that collaborated on this legislation.

MR. PARKER said he was.

VICE-CHAIR OGAN announced an at-ease.

When the meeting reconvened, SENATOR THERRIAULT moved CSHB 427(JUD) with individual recommendations and attached fiscal notes.

VICE-CHAIR OGAN announced that without objection, the motion carried and that the committee would recess to the call of the chair.

TAPE 04-62, SIDE A

SB 97-ATTY FEES: PUBLIC INTEREST LITIGANTS

CHAIR SEEKINS called the meeting back to order at 5:38 p.m. Present were Senators Ogan, Therriault and Chair Seekins. The committee took up SB 97. He asked a representative from the administration to address the committee.

MR. CRAIG TILLERY, Assistant Attorney General, Department of Law, offered the following explanation of the proposed committee substitute, labeled 23G-2.

The proposed CS is similar to HB 145, which was passed by the legislature last year. HB 145 provided that the criteria that forms the basis of the public interest litigant policy may not be used to discriminate in the award of fees to or against a party. That bill was challenged in Superior Court and found to be unconstitutional on the following basis. First, it would require a rule change, which requires a two-thirds vote of the legislature. Second, the enhanced fees against the public interest litigant would violate equal protection. The limits on the awarded enhanced fees to the public interest litigant were not challenged, according to the court. The most critical issue was the two-thirds vote. The due process and equal protection decisions were grounded on what the court saw as a disconnect between the purpose of the statute, which is characterized as intended to deal with natural resource cases due to the fact that the bill was aimed at natural resource cases when

originally introduced. The disconnect was between that purpose and the effect of that statute, which was to affect all cases with very specific exceptions related to constitutional rights. For those reasons, the court found HB 145 to be overly broad.

MR. TILLERY said the proposed committee substitute responds to the court decision in several ways. First, it enacts the same rule changes with a two-thirds vote of the legislature. Second, it makes clear that the legislature recognizes the broader application of change made by the bill and intended to do so to carry out the fundamental purpose of providing fair and consistent treatment using objective criteria. The proposed committee substitute still contains provisions for special treatment of cases based on certain constitutional rights. It still allows special treatment in other instances where the legislature has specified, namely consumer protection cases. This bill differs from HB 145 by adding a new special situation for award of attorneys' fees for actions that challenge decisions by the Board of Fisheries and the Board of Game. In this bill, the provision that deals with fees to and against a party are split into two separate provisions and a severability clause has been added, to clarify that these two conducts have separate importance and can be severed if one is found to be unconstitutional. The proposed committee substitute repeals HB 145 retroactively to its effective date, which will moot the current litigation.

MR. TILLERY said a new provision in the CS addresses a separate but related issue. Enhanced fee awards against the state - the amount over the normal compensation awarded by the court, will represent a serious impact on the state treasury. Over the last 10 years, that impact has averaged \$600,000 per year above normal compensation. Section 4 of the CS creates a new provision in Title 9 devoted to immunity. It provides that, as a matter, under the government's sovereign immunity for civil actions or appeals in which money judgments are recovered, state and municipalities are not liable to pay more than 20 percent of the money judgment recovered for attorneys' fees. In a civil action in which no money is recovered, the liability is capped at 30 percent for cases that go to trial and 20 percent for cases resolved without trial. For appeals in which the prevailing party recovers no money judgment, the liability is capped at 20 percent. These limits on liability are very similar to the limits the courts have found to represent fair compensation to prevailing parties. These limitations do not apply where statutes differ, where the court finds awarding attorneys' fees appropriate as a sanction to misconduct, or in cases involving

the condemnation of property under the power of eminent domain. Immunity can be waived by specific statute; one such waiver would be the constitutional rights provision; another would be the new provision that relates to challenges to actions by the Boards of Fish and Game. Immunity asserts legislative control over state expenditures and provides protection of the state.

SENATOR THERRIAULT asked if, by repealing HB 145, any possibility of appealing Judge Collins' decision will be extinguished.

MR. TILLERY said that is correct.

SENATOR THERRIAULT asked why it is a foregone conclusion that the legislature would want to forego that possibility.

MR. TILLERY explained if this bill passes by a two-thirds vote, the only reason to go to the expense and trouble of litigating HB 145 would be for public interest litigant cases that have arisen in the meantime. He is only aware of one that has come up; that case is very small and DOL does not believe the party asserting it will prevail. Therefore, there is no reason to continue the HB 145 litigation unless someone simply wants an answer to the question of whether a two-thirds vote was necessary.

SENATOR THERRIAULT said the legislature has to be guarded about the erosion of its power and its assertion last year when passing HB 145 was that it was a doctrine, not necessarily a court rule, so it did not require a two-thirds vote. He noted that Mr. Tillery is asking, with the language in SB 97, that the legislature forego a decision on that matter by a higher court and to leave the lower court ruling to stand.

MR. TILLERY agreed but said that is DOL's practical position. He noted that although the legislature may have a different position, the preamble of the bill says that the legislature does not endorse that court decision. If the legislature deleted the repeal provision, HB 145 would be left intact and the appeal could continue.

SENATOR THERRIAULT said Legislative Legal and Research Services raised the issue of the sovereign immunity clause and the concern that approach will backfire because it is unsure that the Supreme Court will look kindly at the threat of a constitutional crisis or consider it to be abrasive. He asked if there is an alternate route that the legislature can use.

MR. TILLERY said he is not aware of an alternate route that would address this issue. He doesn't believe the court would find this to be abrasive any more than the legislature finds the court's creation of a policy that reaches into the state's treasury to be abrasive. This is an area between the two branches of government that needs to be explored and the court would have the chance to review and resolve it. He said that DOL does not believe it in anyway impedes the legislature's policy; DOL believes it helps the legislature's position.

MR. JOE BALASH, staff to Senator Therriault, explained to members that the sovereign immunity question is something that has been a stumbling block in discussions with Jerry Luckhaupt of Legislative Legal and Research Services. He furthered:

One question is...the question about the potential for a constitutional crisis, if you will, as sort of being an underlying threat to the court that, okay, you may find this particular construction in Title 9 to be infirm for one reason or another so we're just going to go ahead and say that the state and a municipality are not going to be liable in the future for any award in excess of the Rule 82 schedule and there's some question as to whether or not the court is going to take that seriously. Currently the legislature already has the power of appropriation. If the legislature chose not to award or to appropriate the fees awarded to a plaintiff that was successful in suing the state that could be done. In fact, there've been a couple of showdowns in the past, particularly related to former Senator Donley and a particular case that he followed very closely.

Now I haven't had the time to go back and research whether, in fact, those fees were never awarded or there was just a delay in the appropriation, but that's something that folks who've been around here a little while might remember and recall as having been an issue. I wasn't able to determine the final outcome of that.

SENATOR THERRIAULT said the possibility of a constitutional showdown would occur if the court determines that the fees are owed but the legislature refuses to pay them under its sovereign status.

MR. BALASH agreed.

SENATOR THERRIAULT said that rather than force that showdown, an alternative way to get there would be preferable, which is what Mr. Luckhaupt is advising.

MR. BALASH added that the first issue about extinguishing the legislature's ability to appeal Judge Collins' decision is interesting because an argument can be made that the changes made in HB 145 last year were changes to substantive law, which is the legislature's place to decide under the Constitution. The case law in this area is a bit gray so this may be an opportunity to get some clarity from the Supreme Court. He noted that whether to approach this particular Supreme Court would be a policy call for the legislature to make.

SENATOR THERRIAULT reminded members that the legislature could preserve the right to appeal by deleting the retroactive section of the bill.

MR. BALASH noted that Sections 6 and 10 would have to be deleted to do so. He said if that happened and DOL were to appeal the case, Legislative Council may wish to move it to be recognized in the appeal to the Supreme Court.

SENATOR THERRIAULT said since, at the very least, this is an issue of the preservation of legislative power, the legislature could participate in an amicus capacity.

MR. BALASH asked Mr. Tillery if his description was correct.

MR. TILLERY replied:

...we really do not think that there is any constitutional show down that would be brought about by use of sovereign immunity. That is a standard clause in the statutes. The language that's in there was essentially taken from the statute. The way that would work is if this is passed and someone challenged it, by likely doing a declaratory judgment, the courts would either rule that the legislature could do this or could not do this and you would - and then there would be no fees. There is no challenge. The real challenge would actually come - it's one of the alternatives that you've mentioned, which is if there is a court order and the legislature refuses to pay it, then you have two branches of government - one of

[indisc.] legislature or something or the state does nothing and the legislature refused to fund it. That's the confrontation but the immunity provision itself - there really is no confrontation. The confrontation is going to be on the court's terms in the court. It's going to decide whether it's valid or invalid....

CHAIR SEEKINS asked Mr. Balash if he is suggesting eliminating Sections 6 and 10.

MR. BALASH said that is correct if the committee would like to see Judge Collins' decision appealed to the Supreme Court for further clarification on the question of substantive law changes.

CHAIR SEEKINS asked if it basically comes down to two different issues. What this bill attempts to accomplish may be totally separate in some respects from what the legislature would be looking at if appealing that ruling because it would be trying to determine the extent of the authority of the legislature in the appeal.

MR. BALASH said that is correct. He then asked Mr. Tillery to comment on whether the court might view that appeal as being moot if the law has since changed.

MR. TILLERY said it is possible the court could view it as moot. He said he is aware of one case that was since filed by a public interest litigant that is alive under that law so they could plead a constitutional claim. He said he cannot answer as to what the court will decide but there is an argument that it is not moot because an active case exists. He added that particular case was brought before Judge Collins one day before the law became effective so it was filed under the old law.

CHAIR SEEKINS asked if that case in itself would not challenge the law passed last year.

MR. TILLERY said it challenges the law but it was filed the day before that law became effective so it would come under the old policy. Therefore, if attorney fees were sought in that case, they would come under the old law.

CHAIR SEEKINS announced he would hold SB 97 until the next day and adjourned the meeting at 6:05 p.m.