

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

March 18, 2011

1:33 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Bill Wielechowski, Vice Chair
Senator Joe Paskvan
Senator Lesil McGuire
Senator John Coghill

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 86

"An Act relating to the protection of property of persons under disability and minors; relating to the crime of violating a protective order concerning certain vulnerable persons; relating to aggravating factors at sentencing for offenses concerning a victim 65 years or older; relating to the protection of vulnerable adults; amending Rule 12(h), Alaska Rules of Criminal Procedure; amending Rule 45(a), Alaska Rules of Criminal Procedure; amending Rule 65, Alaska Rules of Civil Procedure; amending Rule 17, Alaska Rules of Probate Procedure; amending Rule 9, Alaska Rules of Administration; and providing for an effective date."

- HEARD & HELD

SENATE CONCURRENT RESOLUTION NO. 2

Proposing amendments to the Uniform Rules of the Alaska State Legislature relating to the presiding officer pro tempore.

- MOVED CSSCR 2(STA) OUT OF COMMITTEE

SENATE BILL NO. 30

"An Act providing for the release of certain property in the custody of a law enforcement agency to the owner under certain conditions."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 86

SHORT TITLE: PROTECTION OF VULNERABLE ADULTS/MINORS

SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

02/09/11 (S) READ THE FIRST TIME - REFERRALS
02/09/11 (S) JUD, FIN
02/21/11 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/21/11 (S) Heard & Held
02/21/11 (S) MINUTE(JUD)
03/18/11 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: SB 30

SHORT TITLE: RETURN OF SEIZED PROPERTY

SPONSOR(s): DYSON

01/19/11 (S) PREFILE RELEASED 1/7/11
01/19/11 (S) READ THE FIRST TIME - REFERRALS
01/19/11 (S) STA, JUD
02/03/11 (S) STA AT 9:00 AM BUTROVICH 205
02/03/11 (S) Heard & Held
02/03/11 (S) MINUTE(STA)
02/17/11 (S) STA AT 9:00 AM BUTROVICH 205
02/17/11 (S) Moved CSSB 30(STA) Out of Committee
02/17/11 (S) MINUTE(STA)
02/21/11 (S) STA RPT CS 4DP 1NR NEW TITLE
02/21/11 (S) DP: KOOKESH, PASKVAN, MEYER, GIESSEL
02/21/11 (S) NR: WIELECHOWSKI
02/28/11 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/28/11 (S) Heard & Held
02/28/11 (S) MINUTE(JUD)
03/18/11 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: SCR 2

SHORT TITLE: UNIFORM RULES: PRESIDING OFFICER PRO TEM

SPONSOR(s): DAVIS

01/19/11 (S) READ THE FIRST TIME - REFERRALS
01/19/11 (S) STA, JUD, FIN
02/10/11 (S) STA AT 9:00 AM BUTROVICH 205
02/10/11 (S) Heard & Held
02/10/11 (S) MINUTE(STA)
02/15/11 (S) STA AT 9:00 AM BUTROVICH 205
02/15/11 (S) Moved CSSCR 2(STA) Out of Committee
02/15/11 (S) MINUTE(STA)
02/16/11 (S) STA RPT CS 1DP 1DNP 3NR SAME TITLE

02/16/11 (S) DP: PASKVAN
02/16/11 (S) DNP: GIESSEL
02/16/11 (S) NR: WIELECHOWSKI, MEYER, KOOKESH
03/11/11 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
03/11/11 (S) Heard & Held
03/11/11 (S) MINUTE(JUD)

WITNESS REGISTER

SCOTT STERLING, Supervising Attorney
Elder Fraud and Assistance
Office of Public Advocacy (OPA)
Department of Administration
Juneau, AK

POSITION STATEMENT: Answered questions regarding SB 86

JOANNE GIBBENS, Deputy Director
Division of Senior and Disabilities Services (DSDS)
Department of Health and Social Services (DHSS)
Juneau, AK

POSITION STATEMENT: Answered questions regarding SB 86.

DOUG WOOLIVER
Administrative Attorney
Alaska Court System
Juneau, AK

POSITION STATEMENT: Answered questions regarding SB 86.

KELLY HENRIKSEN, Assistant Attorney General
Civil Division
Human Services Section
Department of Law (DOL)
Juneau, AK

POSITION STATEMENT: Answered questions regarding SB 86.

MARIE DARLIN
American Association of Retired Persons (AARP)
Juneau, AK

POSITION STATEMENT: Testified in support of SB 86.

SENATOR BETTYE DAVIS
Alaska State Legislature
Juneau, AK

POSITION STATEMENT: Sponsor of SCR 2.

CHUCK KOPP, Staff to Senator Dyson
Alaska State Legislature

Juneau, AK

POSITION STATEMENT: Presented SB 30 for Senator Fred Dyson, the Sponsor.

ACTION NARRATIVE

[1:33:56 PM](#)

CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at 1:33 p.m. Senators Coghill, Paskvan, McGuire, and French were present at the call to order.

SB 86-PROTECTION OF VULNERABLE ADULTS/MINORS

[1:34:36 PM](#)

CHAIR FRENCH announced the consideration of SB 86 and stated that this bill hearing would be a work session to reach a compromise in order to prepare a committee substitute (CS).

[1:35:08 PM](#)

SENATOR WIELECHOWSKI joined the committee.

[1:36:53 PM](#)

CHAIR FRENCH said he'd like to start with the notice provisions. In the underlying statute, Title 13, dealing with ex parte orders, there are notice provisions that are in conflict with the proposed bill. Ex parte orders normally occur without giving notice to the other side. This is unusual because only one person is in the court room. As it stands now it says, "On a petition for appointment of a conservator or other protective order, the person to be protected ..." must be served personally by certified mail or by any other method of notice of hearing. That is in AS 13.26.185. The bill needs to clarify that there aren't two sets of notice requirements.

The other concern is on page 4, line 22. Scott Sterling had the same concern. Because it's a vulnerable adult, that person probably wouldn't be the only other person in the court. The bill requires notice to the respondent, and there should also be some notice to the vulnerable adult as well, because you don't know the level of vulnerability.

[1:40:51 PM](#)

SCOTT STERLING, Supervising Attorney, Elder Fraud and Assistance, Office of Public Advocacy (OPA), Department of Administration (DOA), said he agrees there should be consistency between new language and the existing statute. He said we can carve out an exception for the protective orders that are

authorized by the new section and he would be happy to work on language to address that issue.

MR. STERLING added that on page 4, line 22, the concern is ensuring that the vulnerable adult will receive notice, unless it's certified to the court that it would increase the harm to the vulnerable adult. This is to prevent an unscrupulous third party from using this remedy, and also to ensure that the vulnerable adult knows that relief is being sought on their behalf. In most cases, the vulnerable adult probably will be the petitioner, and that issue need not be addressed. This is for the case when an incapacitated person is being victimized and a third party tries to halt the harm; they can come in and say they are speaking on the victim's behalf but the victim would still receive notice.

CHAIR FRENCH said that makes sense. He posed a hypothetical with a vulnerable parent, an evil brother, and a good-hearted sister.

MR. STERLING said the first question is if the vulnerable adult has capacity. If they do, they could ask for relief. If the vulnerable adult lacks capacity and is being victimized the good hearted sister could go to court and speak on the person's behalf for relief, and exempt notice to the vulnerable adult because the perpetrator could intercept it. Unless there is a specific reason, the vulnerable adult would receive notice. It is better to freeze the situation so appropriate agencies can make inquiries without further dissipation of assets.

[1:46:12 PM](#)

CHAIR FRENCH asked if the House had developed specific language.

MR. STERLING answered yes; it is now in the form of a CS in the other body.

CHAIR FRENCH asked if he'd seen the letter from Mark Regan of the Disability Law Center. He summarized it as follows: Mr. Regan recommends an opportunity for the person and respondent to be protected on three days' notice and adds a provision for immediate reappointment of counsel.

MR. STERLING said he'd like to look at that letter but he sees no reason why a person couldn't say they need modification. The vulnerable adult is entitled to counsel and this ex parte provision would fit better with the situation where counsel is appointed. It would be different from the domestic violence arena.

[1:49:17 PM](#)

CHAIR FRENCH said you could see where the situation could devolve quickly, and there could be substantial assets at risk.

MR. STERLING answered we're often trying to give legal protections long after the assets are gone.

CHAIR FRENCH pointed out the definitions for undue influence from other states. He said it's in the packet with the memo from Mr. Sterling.

[1:51:21 PM](#)

SENATOR PASKVAN asked how many people would take advantage of this ex parte process.

MR. STERLING replied they don't have immediate relief mechanisms in the law. The best they can do is file for an emergency conservatorship. Probably half of the cases that come to his office have entirely dissipated assets or largely so.

SENATOR PASKVAN said he's wondering if this will result in so many cases statewide that it will unduly impact the court system.

MR. STERLING answered it may rise to that level over time.

CHAIR FRENCH noted that Ms. Gibbens was on line.

[1:54:29 PM](#)

JOANNE GIBBENS, Deputy Director, Division of Senior and Disabilities Services (DSDS), Department of Health and Social Services (DHSS) stated that for FY10 DSDS received 541 calls regarding financial exploitation. She added that she didn't have data about how many of those calls resulted in verified cases.

SENATOR PASKVAN asked if that phone number was accessible statewide.

MS. GIBBONS answered yes.

[1:55:59 PM](#)

DOUG WOOLIVER, Administrative Attorney, Alaska Court System, stated that last year the court record shows there were 281 combined conservatorships and guardianships filed, and 61 conservatorships of an adult were filed. He added that they would expect to see an increase in those over time both because

of the aging population and because this bill creates an opportunity that doesn't currently exist.

CHAIR FRENCH noted that Alaska has the fastest growing senior population in the nation.

[1:57:18 PM](#)

CHAIR FRENCH said point 2 of Mr. Sterling's memo suggests replacing the current subsection (f) with other language. He asked if he meant to delete the contents of lines 17-22.

MR. STERLING said yes. He added that this was corrected in the CS before the House committee.

[1:58:33 PM](#)

SENATOR MCGUIRE reminded the committee that this isn't just about seniors. Her brother for example, has traumatic brain injury and issues of individual liberty come into play once the adult reaches the age of majority. This is an important provision when you consider seniors and the number of victims of traumatic brain injury coming out of Iraq. Alaska is good about recognizing individual liberties, she said.

[2:00:18 PM](#)

SENATOR PASKVAN referenced point 2 of Mr. Sterling's memo and asked what it intends to speak to.

MR. STERLING said the discussion on the companion bill articulated the same concern of ensuring that due process notice accompanies the ex parte order process. The remedy was to mail, fax, or deliver a copy of the order to the third party's bank, for example. The idea of recording with the state recorder wasn't viable because of existing provisions in Title 40. The drafters suggested saying the order would be effective upon registering with the Department of Public Safety (DPS). That ties in with the similar registry provision for domestic violence and stalking orders. This address the fact that most financial institutions are national companies and they have the ability to research the registry that's contemplated. On the family abuse level, the idea is that if the protective order is served on the alleged perpetrator at their residence or work that would satisfy due process for receiving notice.

[2:04:12 PM](#)

SENATOR PASKVAN said you're referencing the perpetrator, not the financial institution.

MR. STERLING said it's the third party provision but the order would need to be served on that branch and the perpetrator so they are held liable for obeying the order.

CHAIR FRENCH said you'll need to enlist the aid of third parties from time to time in order to be effective.

MR. STERLING agreed: for example, a family member holds a nominally valid power of attorney and a third party, such as a bank, is obliged to honor that. We don't want to put that third party in a position of dishonoring it without this notice. They would then be on the alert that someone is abusing the power of attorney. Do not honor that, under the protection of this order, until the situation can be clarified.

[2:08:00 PM](#)

SENATOR PASKVAN said the banks would need to check the registry.

MR. STERLING replied they would if they didn't receive the notice by fax or mail. With the property conveying statutes, financial institutions do this checking regularly for UCC filings.

[2:09:28 PM](#)

CHAIR FRENCH asked why he suggested a change in the definition of "fiduciary duty."

MR. STERLING said this was addressed in the House bill. He cited Paskvan v. Messich; it would be most consistent with existing law.

CHAIR FRENCH asked if "third party" could be changed to "a person."

MR. STERLING said would be fine.

[2:12:02 PM](#)

CHAIR FRENCH asked about the mandatory reporting on page 9, Sec. 16.47.24.010. There's a "shall" and the issue is if there's a penalty for not making a report.

[2:13:19 PM](#)

KELLY HENRIKSEN, Assistant Attorney General, Civil Division, Human Services Section, Department of Law (DOL), said they didn't contemplate a penalty. It was intended to be an incentive.

CHAIR FRENCH noted there is already a penalty in subsection (c).

MS. HENRIKSON said she found similar language in the OCS mandatory reporting language, in AS 47.17.020. It says the peace officer "shall immediately take action to protect the child and shall at the earliest opportunity notify the nearest office of the Department."

CHAIR FRENCH said the peace officer falls under subsection (a). The issue is there's a "shall" and if you don't report a serious crime resulting in injury, you are criminally liable.

MS. HENRIKSON said we wouldn't treat a police officer any differently.

CHAIR FRENCH said it's not the police officer; it's the reporting person on line 4 who might be at risk. Those are the same mandatory reports.

[2:16:31 PM](#)

SENATOR PASKVAN said page 9, line 11-16, says "if the decision under this subsection is to take immediate action it may not bring an action unless there is gross negligence or intentional misconduct." He asked if there is a reason for saying immediate action and why wouldn't it include the decision not to take immediate action.

MS. HENRIKSON said she reads it the same way. It applies to both the VPSO and police officer.

SENATOR PASKVAN cited the sentence above and said it's odd.

MS. HENRIKSON agreed it should be made consistent.

[2:19:07 PM](#)

CHAIR FRENCH said his list of concerns had been addressed and noted that DOL had no further questions.

[2:19:49 PM](#)

MARIE DARLIN, American Association of Retired Persons (AARP), stated support for SB 86. She said as the population ages more of these problems will come to the fore. She agreed with Senator McGuire that this would apply to more than just seniors.

CHAIR FRENCH closed public testimony and held SB 86 in committee awaiting a CS.

SCR 2-UNIFORM RULES: PRESIDING OFFICER PRO TEM

[2:21:47 PM](#)

CHAIR FRENCH announced the consideration of SCR 2. Finding no one who wanted to testify, he closed public testimony and asked the sponsor if she had anything to add.

SENATOR BETTYE DAVIS, sponsor of SCR 2, opined that there wasn't any interest in giving testimony because this is an internal matter. This officer has a temporary function but nationwide there are 34 Pro Tems in the House and 42 in the Senate. Most are men. This allows the speaker or president to use the position in any way he or she wants. This would be beneficial.

CHAIR FRENCH solicited a motion.

[2:24:51 PM](#)

SENATOR WIELECHOWSKI moved to report SCR 2 from committee with individual recommendations and attached fiscal note(s). Responding to the chair, he confirmed that the motion was to move the state affairs committee substitute.

[2:25:08 PM](#)

SENATOR COGHILL objected to comment that he personally doesn't see a need at this point. He removed his objection.

CHAIR FRENCH announced that without further objection, CSSCR 2(STA) moved from the Senate Judiciary Standing Committee.

[2:26:05 PM](#)

At ease from 2:26 p.m. to 2:28 p.m.

SB 30-RETURN OF SEIZED PROPERTY

[2:28:19 PM](#)

CHAIR FRENCH announced the consideration of SB 30 and asked for a motion to adopt the proposed committee substitute (CS).

SENATOR WIELECHOWSKI moved to adopt CS for SB 30, labeled 27-LS0344\D, as the working document.

CHAIR FRENCH objected for discussion purposes.

[2:28:56 PM](#)

CHUCK KOPP, staff to Senator Dyson, said the CS reflects the suggestions the committee made during the last hearing. First, the phrase "crime victim" is used throughout the bill rather

than "a property owner" or "the owner." There is the possibility that some bill language might provide an opportunity for a defendant to misuse the return of property hearing process and detract from the intention of the bill; this is a victims' rights bill. It would be good to use the definition of "crime victim" in order to stay consistent with the mission of victim advocacy. He noted that Anne Carpeneti, DOL, was supportive of the changes.

[2:32:26 PM](#)

SENATOR WIELECHOWSKI asked about an owner of property who wasn't a crime victim, they were a pawn shop or retailer. He asked if they would no longer be covered under AS 12.55.185.

MR. KOPP said he sees it differently because they are a collateral victim. They may not have been an initial victim, but they are suffering a financial loss and don't have a recourse. He felt that Office of Victims Rights (OVR) would at least be able to make a determination that they are a crime victim.

SENATOR PASKVAN cited the statute and said it's awkward at best.

MR. KOPP said it would require an interpretation to say that an offense has been perpetrated against the owner.

CHAIR FRENCH said the basic definition is easy to understand. The question Senator Wielechowski raised is theft of property and the thief sells it and it's sold to the pawn shop and then the police seize the property.

[2:35:27 PM](#)

SENATOR PASKVAN said now if the stolen property is in a pawn shop, the police take it. What the pawn shop owner called and said it's really his property and the police are holding the property. No charges have ever been brought, but he has no way to get it back.

MR. KOPP said he likes that the language clarifies that this is a victim rights bill and he believes that there are collateral victims. With respect to pawn shops, you need to show that the property was taken recklessly. It isn't seized automatically. He recognizes that the bill won't accommodate every situation.

[2:37:59 PM](#)

SENATOR WIELECHOWSKI suggested it's a policy call.

CHAIR FRENCH said it isn't a concern that's been brought to him. This bill is based on the example the sponsor cited about a boat construction site and loss of electronics.

MR. KOPP agreed in that case the property owner was a direct crime victim.

SENATOR PASKVAN said the CS on page 2, lines 19-20, defines crime victim. He asked if it would work to say it potentially may include others.

[2:40:58 PM](#)

SENATOR WIELECHOWSKI said on page 2, lines 6-9, the bill says "After a hearing a court may order the return of the property in the custody of a law enforcement agency to the crime victim if the crime victim by a preponderance of the evidence provides satisfactory proof of ownership."

MR. KOPP said he didn't follow.

CHAIR FRENCH said in the case of a rental car, if the rental car is stolen, the concern relates to who is the victim.

MR. KOPP said both the renter and the owner, but the financial loss would go back to the owner.

[2:43:19 PM](#)

SENATOR PASKVAN said the definition says "against whom the offense has been perpetrated." The police seized property from the pawn shop owner. The definition of victim requires the identification of an offense.

MR. KOPP said the status of that property is unclear.

CHAIR FRENCH said he'd want to hear from the police before standing up for the jewelry shop owner any more.

[2:46:12 PM](#)

MR. KOPP said they kept the definition that's already in law. Doing it any other way would require recognition of collateral victims of crimes.

CHAIR FRENCH said he had a lingering concern that the previous CS empowered defendants, and this version clears that up.

MR. KOPP said this allows OVR to determine if a person is a victim.

2:47:59 PM

CHAIR FRENCH announced that he would hold SB 30 in committee.

2:48:11 PM

There being no further business to come before the committee, Chair French adjourned the meeting at 2:48 p.m.