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COMMITTEE REPORT

HOUSE

Judiciary

(7)

FURTHER: Finance

1/18/85

Date: 14 Feb, 1985

The Committee on Health, Education and Social Services has had HB 92

"An Act relating to child and spousal support; and providing for an effective date."

under consideration and recommends:

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for HB 97 same title
- do pass new title
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation Zero Fiscal Note Attached
- referred to the _____ Committee:

MEMBERS SIGNING
DO PASS

W. K. ...

...

Katie ...

...

...

...

...

...

MEMBERS HAVING
OTHER RECOMMENDATIONS:

Adrian L. Taylor (Don't know)

W. K. ... co-chair

CHAIRMAN

...

C. ...

MEMORANDUM

TO: HOUSE HESS COMMITTEE MEMBERS

FROM: NANCY BENNETT, COMMITTEE STAFF

RE: CS FOR HB 92 (HESS) - CHANGES IN THE BILL

DATE: FEBRUARY 13, 1985

SECTION 1 and 3 were deleted from the original bill because the committee determined that existing state law already provides remedies for paternity determination better than what was proposed in HB 92.

SECTION 4 was deleted because the subcommittee decided to pursue a different route in providing for interstate income withholding of support payments (see section 4) rather than adoption of a Model Law.

Page 1, lines 25-29 and page 2 lines 1-3: The language was rewritten to be more concise and readable. "May" on page 1, line 28 was changed to "shall" to comply with PL 98-378 which requires income withholding orders.

Page 2, line 22: The language "or if there are any other legal defenses" was added to the sentence as a finding of the court hearing.

Page 2, lines 22-25: This amendment was suggested by Judge Carlson, to make the law comply with the reality of court operations.

Page 3, lines 14-16: Removed language which provided for a misdemeanor for an employer who violates the section.

Page 3, line 29: Added "and reasonable attorney fees" to what the court may order in addition to court costs.

Page 4, line 20: Added "reduce" to grant more discretion to the court in adjusting orders.

Page 4, lines 21-23: Language re-written to comply with federal law. It provides that payments can be terminated or reduced if all arrears are paid but language allowing termination upon a good payment history was deleted since it was determined out of compliance with federal regulations.

Page 4, lines 26-29: Language was added to allow the agency to proceed with interstate support obligations.

Page 5, line 10: Deleted language relating to penalties since the committee determined, upon testimony by the agency director, that penalties are administratively difficult to determine and rarely collected.

Page 5, lines 23-25: Deleted previous language concerning penalties and added language allowing the agency to work interstate support obligations through the courts of the state.

Page 6, line 3: Added "spousal" to the provision for medical support order since many orders are combined for child and spousal support.

Page 6, line 5-17: Added a new section to the bill to apply all state laws relating to support enforcement to interstate obligations the agency may receive.

Page 6, lines 19-21: Deleted all language related to penalties.

Page 7, line 12: Added "or spousal".

Page 7, line 18-23: Added language to this section to guarantee non-discrimination on the basis of receipt of public assistance.

Page 8, lines 5-8: Judge Carlson suggested language to make clear the intent of the section. Also changed "petition" (line 8) to "motion"

Page 9, line 7: Added "attorney fees" to be consistent with language in other sections of the bill.

Page 10, line 5: Added language concerning notice to make the section consistent with other parts of the bill amending notice provisions.

Page 10, lines 11-13: Added a new section to the bill providing that undistributed payments may be returned to the obligor after seven years.

assistance.

- Sec 9 Language corrects oversight in Ch. 144, SLA 84 when AS 47.23.265 was enacted, which sets out general notice provisions in all of AS 47.23.
- Sec 10 Clean up language suggested by Judge Carlson (lines 5-8). Other provisions change general notice requirements in compliance with section 9.
- Sec 11 PL 98-378 requires that withholding orders are subject to 15 USC 1673 (b), Consumer Credit Reporting Act.
- Sec 12 Language changes consistent with other sections, and allows the agency to retain costs of attorney fees.
- Sec 13 Language changes consistent with other sections.
- Sec 14 Notice changes consistent with section 9.
- Sec 15 New section which allows undistributed support payments to be returned to obligor.
- Sec 16 Immediate effective date.

Original sponsor: Rules/Governor

1 IN THE HOUSE

BY THE HEALTH, EDUCATION AND
SOCIAL SERVICES COMMITTEE

2 CS FOR HOUSE BILL NO. 92 (HESS)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to child and spousal support; and
7 providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 09.65.132 is amended to read:

10 Sec. 09.65.132. INCOME WITHHOLDING [ASSIGNMENT] ORDER FOR CHILD
11 SUPPORT. (a) A judgment, court order, or order of the child support
12 enforcement agency under AS 47.23 [(AS 47.23)] providing for the
13 support of a minor child must [SHALL] contain an income withholding
14 [ASSIGNMENT] order.

15 (b) An income withholding [ASSIGNMENT] order must [SHALL] direct
16 the obligor, the obligor's employer, future employer, and any person,
17 political subdivision, or department of the state to withhold [ASSIGN]
18 money due or to be due the obligor and pay the money to the [OBLIGEE
19 OR, WHERE THE ORDER IS ISSUED TO THE CHILD SUPPORT ENFORCEMENT AGENCY
20 (AS 47.23) OR COLLECTIONS ARE BEING MADE THROUGH THE CHILD SUPPORT EN-
21 FORCEMENT AGENCY, TO THAT] agency, in an amount determined under (h)
22 of this section [SUFFICIENT TO MEET THE SUPPORT PAYMENTS IMPOSED BY
23 THE COURT OR BY THE CHILD SUPPORT ENFORCEMENT AGENCY UNDER AS 47.23.-
24 140].

25 (c) If support payments are in arrears in an amount at least
26 equal to support payable for one month, the agency, on behalf of an
27 [AN] obligee or person or public agency designated to receive support
28 payments, shall [MAY] request an income withholding [ASSIGNMENT] order
29 against the obligor [TO TAKE EFFECT] by filing a sworn statement with

1 the court that alleges [ALLEGING IN A SWORN STATEMENT] that the
2 obligor is in arrears in an amount at least equal to the support
3 payable for one month [HAS FAILED TO MAKE A SUPPORT PAYMENT IN FULL
4 WITHIN 45 DAYS OF THE DATE THE PAYMENT WAS DUE AND BY FILING THAT
5 STATEMENT WITH THE COURT].

6 (d) If an application is [HAS BEEN] filed with the clerk of
7 court, notice shall be served upon the obligor in the manner provided
8 by Rule 5, Alaska Rules of Civil Procedure or any other method permit-
9 ted by law. The notice shall [BE SENT BY CERTIFIED MAIL, RETURN
10 RECEIPT REQUESTED, TO THE LAST KNOWN ADDRESS OF THE OBLIGOR. THE
11 NOTICE SHALL BE POSTMARKED NO LATER THAN 10 DAYS AFTER THE DATE ON
12 WHICH THE APPLICATION WAS FILED AND SHALL] inform the obligor that the
13 income withholding order [ASSIGNMENT] will take effect 15 days after
14 the date on which the notice is served [WAS RECEIVED] unless the
15 obligor requests a hearing within the 15 days after the notice is
16 served [WAS SENT]. If the obligor requests a hearing, an income
17 withholding order [ASSIGNMENT] may not take effect until the conclu-
18 sion of the hearing. The court shall hold a hearing requested under
19 this section within 15 days after the date the obligor requests the
20 hearing, to determine if there are any mistakes of fact that make the
21 withholding order improper, if the amount to be withheld is incorrect,
22 or if there are any other legal defenses. The court shall inform the
23 obligor, either at the hearing or within 15 days after the hearing,
24 whether or not the withholding will occur and of the date on which it
25 is to commence. [IF THE OBLIGOR PAYS ALL SUPPORT PAYMENTS DUE BEFORE
26 THE HEARING, AN INCOME ASSIGNMENT ORDER MAY NOT TAKE EFFECT.]

27 (e) The obligee or person or public agency that requested the
28 income withholding [ASSIGNMENT] order shall immediately send a copy of
29 the income withholding [ASSIGNMENT] order and a copy of AS 47.23.260

1 and 47.23.270 by certified mail to persons who may owe money to an
2 obligor. An income withholding [ASSIGNMENT] order made under this
3 section is binding upon a person, employer, political subdivision, or
4 department of the state immediately upon receipt of a copy of the
5 income withholding [ASSIGNMENT] order. An employer shall begin with-
6 holding the specified amount from the employee's wages 14 days after
7 the mailing date on the notice or on the first day of the next pay
8 period, if earlier. The amount withheld shall be sent to the agency.

9 (f) An employer may not discharge, discipline, or refuse to em-
10 ploy an obligor on the basis of an income withholding order issued
11 [ASSIGNMENT] under this section. If an employer discharges, disci-
12 plines, or refuses to employ an obligor because of an income withhold-
13 ing obligation, the court, after notice and hearing, may order rein-
14 statement or restitution to the obligor, or both. A person who vio-
15 lates this subsection or a regulation adopted to implement it, is
16 liable for a fine of not more than \$1,000.

17 (g) An income withholding order [ASSIGNMENT] under this section
18 has priority over all other attachments, executions, garnishments, or
19 other legal process brought under state law against the same wages
20 [ASSIGNMENTS] unless otherwise ordered by the court. An income with-
21 holding order [ASSIGNMENT] is not limited to the wages of an obligor
22 but may include all money owed to the obligor not otherwise exempt by
23 law. Exemptions under AS 09.38 do not apply to income assignments
24 under this section[; HOWEVER, 50 PERCENT OF THE OBLIGOR'S NET DISPOS-
25 ABLE EARNINGS IS EXEMPT FROM EXECUTION UNDER THIS SECTION. IN THIS
26 SUBSECTION, "NET DISPOSABLE EARNINGS" HAS THE MEANING GIVEN IN 15
27 U.S.C. 1672].

28 (h) The court may order an obligor to pay the plaintiff's court
29 [ALL COURTS] costs and reasonable attorney fees which resulted from

1 [INVOLVED IN] an income withholding [ASSIGNMENT] proceeding under this
2 section.

3 * Sec. 2. AS 09.65.132 is amended by adding new subsections to read:

4 (i) An employer shall, to the extent permitted under 15 U.S.C.
5 1673(b), withhold the current support obligation from an obligor's
6 wages. An employer shall withhold additional income, to the extent
7 permitted under 15 U.S.C. 1673(b), from an obligor's wages for any
8 support arrearage.

9 (j) An employer may combine into a single payment amounts with-
10 held from more than one obligor if the employer specifies the portion
11 of the payment attributable to each obligor. If in receipt of more
12 than one income withholding order regarding one obligor, the employer
13 shall honor the orders by paying each in full in the sequence of its
14 receipt to the extent permitted under 15 U.S.C. 1673(b).

15 (k) At the time an obligor terminates employment with an em-
16 ployer then in receipt of an unsatisfied income withholding order
17 regarding the obligor, the employer shall immediately inform the
18 agency of the obligor's name and last known address and the name and
19 address of all other known employers of the obligor.

20 (l) An obligor may petition the court to terminate or reduce the
21 withholding of income, if all support payments are current, upon good
22 cause shown, such as the emancipation of a child for whom support is
23 paid, or the lack of contact by the agency with the obligee.

24 * Sec. 3. AS 47.23.020(a) is amended to read:

25 (a) The agency shall

26 (1) seek enforcement of [OBTAIN, ENFORCE, AND ADMINISTER]
27 child support orders of the superior courts of the state in other
28 jurisdictions and shall obtain, enforce, and administer the orders in
29 this state;

1 (2) adopt regulations to carry out the purposes of this
2 chapter, including regulations that [WHICH] establish

3 (A) schedules for determining the amount an obligor is
4 liable to contribute toward the support of an obligee under this
5 chapter and under 42 U.S.C. 651 - 665 (Title IV-D, Social Secur-
6 ity Act);

7 (B) procedures for hearings conducted under AS 47.23.-
8 170; and

9 (C) subject to AS 47.23.025 and to federal law, a
10 uniform [SCHEDULE OF PENALTIES AND A] rate of interest on arrear-
11 ages of support that shall be charged the obligor upon notice if
12 child support payments are 10 or more days overdue or if payment
13 is made by a check backed by insufficient funds;

14 (3) administer and enforce the Uniform Reciprocal Enforce-
15 ment of Support Act (AS 25.25);

16 (4) establish, enforce, and administer child support obli-
17 gations administratively in accordance with this chapter;

18 (5) administer the state plan required under 42 U.S.C.
19 651 - 665 (Title IV-D, Social Security Act) as amended;

20 (6) disburse child support payments collected by the agency
21 to the obligee together with interest charged under (2)(C) of this
22 subsection; [AND]

23 (7) establish and enforce through the superior courts of
24 the state child support orders from other jurisdictions pertaining to
25 obligors within the state: [DEPOSIT PENALTIES CHARGED UNDER (2)(C) OF
26 THIS SUBSECTION IN THE GENERAL FUND]

27 (8) enforce and administer spousal support orders if a
28 spousal support obligation has been established with respect to the
29 spouse and if the support obligation established with respect to the

1 child of that spouse is also being administered; and

2 (9) obtain a medical support order as part of a child or
3 spousal support order if health care coverage is available to the
4 obligor at a reasonable cost.

5 * Sec. 4. AS 47.23 is amended by adding a new section to read:

6 Sec. 47.23.022. ENFORCEMENT REQUESTS FROM OTHER STATES. (a)

7 The agency may act, under the laws of this state, upon requests from
8 similar state agencies in other states that operate child support
9 enforcement programs under 42 U.S.C. 651 - 665 (Title IV-D Social
10 Security Act) to establish and enforce against obligors within this
11 state support obligations determined in other states.

12 (b) Requests from child support enforcement agencies in other
13 states shall be made by application containing the information that
14 this state's agency requires and including written authorization from
15 the requesting state agency and the obligee for this state's agency to
16 initiate action necessary to establish, enforce, and collect the
17 support obligation on their behalf.

18 * Sec. 5. AS 47.23.025 is amended to read:

19 Sec. 47.23.025. RATES OF [PENALTY AND] INTEREST. [A PENALTY
20 IMPOSED UNDER AS 47.23.020(a)(2)(C) MAY NOT BE AT A RATE THAT EXCEEDS
21 THE RATE OF INTEREST IMPOSED ON DELINQUENT TAXES UNDER AS 43.05.225.]
22 The rate of interest imposed under AS 47.23.020(a)(2)(C) shall equal
23 the rate imposed under AS 43.05.225 or a lesser rate that is the
24 maximum rate of interest permitted to be imposed under federal law.

25 * Sec. 6. AS 47.23.045 is amended to read:

26 Sec. 47.23.045. DETERMINATION OF SUPPORT OBLIGATION. The agency
27 may appear in an action seeking an award of support on [IN] behalf of
28 a child owed a duty of support, or to enforce a spousal support order
29 if a spousal support obligation has been established and if a support

1 obligation, established with respect to a child of that spouse, is
2 also being administered. and may also appear in an action seeking
3 modification of a support order, decree or judgment already entered.
4 Action under this section may be undertaken upon application of an
5 obligee, or at the agency's own discretion if the obligor is liable to
6 the state under AS 47.23.120(a) or (b).

7 * Sec. 7. AS 47.23.050(c) is amended to read:

8 (c) In a court proceeding where the support of a minor child is
9 at issue, the court may order either or both parents to pay the amount
10 necessary for support, maintenance, nurture, and education of the
11 child. The court shall issue a medical support order as part of a
12 child or spousal support order if health care coverage is available to
13 the obligor at a reasonable cost. Upon a showing of good cause the
14 court may order the parents required to pay support to give reasonable
15 security for payments. An order for prospective child support may be
16 modified or revoked as the court considers necessary.

17 * Sec. 8. AS 47.23.100 is amended to read:

18 Sec. 47.23.100. ALL PERSONS MAY USE AGENCY. The agency shall
19 provide aid upon application to any person due child support under the
20 laws of this state regardless of whether assistance is received under
21 AS 47.25.310 - 47.25.410 [UPCN APPLICATION]. The agency may not
22 impose a fee for services provided under AS 47.23.010 - 47.23.280
23 unless required by federal law.

24 * Sec. 9. AS 47.23.150(a) is amended to read:

25 (a) Action to enforce a support order administratively under
26 AS 47.23.230 - 47.23.270 is initiated by the agency serving a notice
27 on the obligor of the obligor's liability under the support order.
28 [NOTICE UNDER THIS SUBSECTION SHALL BE SERVED PERSONALLY OR BY REGIS-
29 TERED, CERTIFIED, OR INSURED MAIL, RETURN RECEIPT REQUESTED, FOR

1 RESTRICTED DELIVERY ONLY TO THE PERSON TO WHOM THE NOTICE IS DIRECTED
2 OR TO THE PERSON AUTHORIZED UNDER FEDERAL REGULATION TO RECEIVE THAT
3 PERSON'S RESTRICTED DELIVERY MAIL.]

4 * Sec. 10. AS 47.23.226 is amended to read:

5 Sec. 47.23.226. COLLECTION OF [ACTION TO COLLECT] CHILD SUPPORT.
6 To [COMMENCE AN ACTION TO] collect the payment due, the custodian of a
7 child, or the agency on behalf of that person, shall file with the
8 court (1) a motion [PETITION] requesting establishment of a judgment;
9 (2) an affidavit that states that one or more payments of child sup-
10 port are 30 or more days past due and that specifies the amounts past
11 due and the dates they became past due; and (3) notice of the ob-
12 ligor's right to respond. Service on the obligor shall be in the
13 manner provided in AS 47.23.265 [BY THE RULE OF CIVIL PROCEDURE FOR
14 SERVICE OF SUMMONS IN A CIVIL ACTION]. The child's custodian, or the
15 agency on behalf of the custodian, shall file with the court proof of
16 service of the petition, affidavit, and notice. The obligor shall
17 respond no later than 15 days after service by filing an affidavit
18 with the court. If the obligor's affidavit states that the obligor
19 has paid any of the amounts claimed to be delinquent, describes in
20 detail the method of payment or offers any other defense to the peti-
21 tion, then the obligor is entitled to a hearing. After the hearing,
22 if any, the court shall enter a judgment for the amount of money owed.
23 If the obligor does not file an affidavit under this section, the
24 court shall enter a default judgment against the obligor.

25 * Sec. 11. AS 47.23.250(i) is amended to read:

26 (i) Exemptions under AS 09.38 do not apply to proceedings to
27 enforce the payment of child support under AS 47.23.230 - 47.23.270;
28 however, 50 percent of the obligor's net disposable earnings is exempt
29 from execution under AS 47.23.230 - 47.23.253 [47.23.270]. In this

1 subsection, "net disposable earnings" has the meaning given in 15
2 U.S.C. 1672.

3 * Sec. 12. AS 47.23.255 is amended to read:

4 Sec. 47.23.255. INCOME WITHHOLDING [ASSIGNMENT] ORDERS. (a)
5 The agency shall pay the obligee all money recovered by the agency
6 under an income withholding [ASSIGNMENT] order except for costs and
7 attorney fees that are recovered from the obligor.

8 (b) Notwithstanding AS 47.23.250, an income withholding [ASSIGN-
9 MENT] order contained in a decision of the agency that has not been
10 set aside by the superior court under AS 47.23.220 shall be enforced
11 under the procedure established in AS 09.65.132.

12 * Sec. 13. AS 47.23.260 is amended to read:

13 Sec. 47.23.260. CIVIL LIABILITY UPON FAILURE TO COMPLY WITH AN
14 ORDER OR LIEN. If any person, political subdivision, or department of
15 the state (1) fails to make an answer to an order to withhold and
16 deliver within the time prescribed in AS 47.23.250; (2) fails or
17 refuses to deliver property in accordance with an order issued under
18 AS 47.23.250; (3) pays over, releases, sells, transfers, or conveys
19 real property subject to a lien filed under AS 47.23.230 to or for the
20 benefit of the obligor or any other person; (4) fails or refuses to
21 surrender upon demand property attached; (5) fails or refuses to honor
22 an assignment of wages or an income withholding [ASSIGNMENT] order
23 under AS 09.65.132 presented by the agency, the person, political
24 subdivision, or department of the state is liable to the agency in an
25 amount equal to 100 percent of the amount constituting the basis of
26 the lien, order to withhold and deliver, attachment, or withholding
27 [ASSIGNMENT] of wages or income, together with costs, interest, and
28 reasonable attorney fees.

29 * Sec. 14. AS 47.23.265(a) is amended to read:

1 (a) Except as otherwise provided under this chapter, when a
2 notice, paper, or other document is required by this chapter to be
3 given or served upon a person by the agency, the notice, paper, or
4 other document may be served as required by Rule 5, Alaska Rules of
5 Civil Procedure or any other method permitted by law [SENT BY REGIS-
6 TERED OR CERTIFIED MAIL TO THE LAST KNOWN ADDRESS OF THAT PERSON.
7 SERVICE BY MAIL UNDER THIS CHAPTER IS EFFECTED WHEN THE NOTICE, PAPER,
8 OR OTHER DOCUMENT IS PROPERLY ADDRESSED REGISTERED OR CERTIFIED, AND
9 MAILED].

10 * Sec. 15. AS 47.23 is amended by adding a new section to read:

11 Sec. 47.23.278. PAYMENTS NOT DISBURSED. Support payments col-
12 lected and held by the agency for seven years without disbursement shall
13 be returned to the obligor.

14 * Sec. 16. This Act takes effect immediately in accordance with AS 01.-
15 10.070(c).



OFFICIAL BUSINESS

Alaska State Legislature

House of Representatives

COMMITTEE ON HEALTH, EDUCATION
AND SOCIAL SERVICES

POUCHV
JUNEAU, AK 99811
465-3759

Proposed amendment

Sec. 25.24.160 Judgment.

change as follows:

(2) for the payment by either or both parties of an amount of money or goods, in gross or installments, as may be just and proper for the parties to contribute toward the nurture and education of their children, such an order may include an automatic cost-of-living increase, and the court may order the parties to arrange with their employers for an automatic payroll deduction each month or each pay period, if the period is other than monthly, of the amount of the installment; if the employer agrees, the installment shall be forwarded by the employer to the clerk of the superior court which entered the judgment or to the court trustee, and the amount of the installment is exempt from execution.

King v. King, Sup. Ct. Op. No. 650 (File No. 1235), 477 P.2d 356 (1970).

The "clean hands" doctrine serves no purpose in a setting where the court is asked to modify its own custody award as specifically allowed by the statute. King v. King, Sup. Ct. Op. No. 650 (File No. 1235), 477 P.2d 356 (1970).

Courts will recognize and enforce custody decrees of a sister state without reexamination of their merits, regardless of change of conditions, when there is mis-

conduct or malfeasance on the part of the parent seeking such reexamination, by invoking the doctrine of "clean hands." This misconduct generally consists of defiantly leaving a sister state, usually the marital domicile, with the minor to avoid its jurisdiction and for the purpose of seeking redetermination of the issue in a more favorable forum. King v. King, Sup. Ct. Op. No. 650 (File No. 1235), 477 P.2d 356 (1970).

Collateral references. — Consent of natural parents as essential to adoption where parents are divorced, 47 ALR2d 824.

Court's power as to custody and visitation of children in marriage annulment proceedings, 63 ALR2d 1008.

Mental health of contesting parent as factor in award of child custody, 74 ALR2d 1073.

Power of court which denied divorce, legal separation or annulment, to award custody or make provisions for support of child, 7 ALR3d 1096.

Withholding or denying visitation rights for failure to make alimony or support payments, 51 ALR3d 520.

Right, in child custody proceedings, to cross-examine investigating officer whose report is used by court in its decision, 59 ALR3d 1337.

Effect in subsequent proceedings, of paternity findings or implications in divorce or annulment decree or in support or custody made incident thereto, 78 ALR3d 846.

Grandparents' visitation rights, 90 ALR3d 222.

Rights and remedies of parents inter se with respect to the names of their children, 92 ALR3d 1091.

Admissibility of social worker's expert testimony on custody issue, 1 ALR4th 837.

Visitation rights of persons other than natural parents or grandparents, 1 ALR4th 1270.

Parent's physical disability or handicap as factor in custody award or proceedings, 3 ALR4th 1044.

Initial award or denial of child custody to homosexual or lesbian parent, 6 ALR4th 1297.

Race as factor in custody award or proceedings, 10 ALR4th 796.

Desire of child as to geographical location of residence or domicile as factor in awarding custody or terminating parental rights, 10 ALR4th 827.

Right of incarcerated mother to retain custody of infant in penal institution, 14 ALR4th 748.

Propriety of awarding joint custody of children, 17 ALR4th 1013.

Propriety of awarding custody of child to parent residing or intending to reside in foreign country, 20 ALR4th 677.

Sec. 25.24.160. Judgment. In a judgment in an action for divorce or action declaring a marriage void or at any time after judgment, the court may provide

(1) *[Repealed, § 2 ch 160 SLA 1968.]*

(2) for the payment by either or both parties of an amount of money or goods, in gross or installments, as may be just and proper for the parties to contribute toward the nurture and education of their children, and the court may order the parties to arrange with their employers for an automatic payroll deduction each month or each pay period, if the period is other than monthly, of the amount of the installment; if the employer agrees, the installment shall be forwarded by the employer to the clerk of the superior court which entered the judgment

such an order may include an automatic cost of living increase,

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or to the court trustee, and the amount of the installment is exempt from execution;

(3) for the recovery by one party from the other of an amount of money for maintenance, in gross or in installments, as may be just and necessary without regard to which of the parties is in fault;

(4) for the delivery to either party of that party's personal property in the possession or control of the other party at the time of giving the judgment;

(5) [Repealed, § 5 ch 251 SLA 1976.]

(6) for the division between the parties of their property, whether joint or separate, acquired only during coverture, in the manner as may be just, and without regard to which of the parties is in fault; however, the court, in making the division, may invade the property of either spouse acquired before marriage when the balancing of the equities between the parties requires it; and to accomplish this end the judgment may require that one or both of the parties assign, deliver, or convey any of their real or personal property to the other party;

(7) to change the name of one of the parties. (§ 12.14 ch 101 SLA 1962; am § 1 ch 84 SLA 1966; am §§ 2 — 6 ch 160 SLA 1968; am §§ 72, 73 ch 127 SLA 1974; am § 5 ch 251 SLA 1976)

Revisor's notes. — Formerly AS 09.55.210. Renumbered in 1983.

NOTES TO DECISIONS

- I. General Consideration.
- II. Child Support.
- III. Alimony.
- IV. Division of Property.
 - A. In General.
 - B. What Constitutes Property.

I. GENERAL CONSIDERATION.

This section and AS 09.55.220 (now AS 25.24.170) are predicated upon the court's jurisdiction of the parties and the subject matter. *Weber v. Weber*, 10 Alaska 214 (1942).

And jurisdiction of defendant's person is necessary for money judgment for alimony. — Where the plaintiff was a resident of Connecticut and the defendant a resident of Alaska, constructive service of summons being made on the defendant in Alaska, the court of the forum had jurisdiction of the marital status but did not have jurisdiction of the person of the defendant which is essential for the entry of a money judgment for alimony. *Thornhill v. Huston*, 13 Alaska 150 (1951).

Quoted in *Balchen v. Balchen*, Sup. Ct. Op. No. 1469 (File No. 3178), 566 P.2d 1324 (1977); *Allen v. Allen*, Sup. Ct. Op.

No. 2514 (File No. 6006), 645 P.2d 774 (1982).

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II. CHILD SUPPORT.

The trial court is given broad discretion in fashioning suitable visitation rights and support obligations. *Curgus v. Curgus*, Sup. Ct. Op. No. 943 (File No. 1837), 514 P.2d 647 (1973).

Continuation of educational support beyond age of majority. — A reasonable construction of this section allows for the continuation of educational support of children beyond the age of majority. *Hinchey v. Hinchey*, Sup. Ct. Op. No. 2312 (File No. 3528), 625 P.2d 297 (1981).



Alaska State Legislature
House of Representatives
COMMITTEE ON HEALTH, EDUCATION
AND SOCIAL SERVICES

OFFICIAL BUSINESS

POUCHY
JUNEAU, AK 99811
465-3759

MEMORANDUM

TO: HOUSE HESS COMMITTEE MEMBERS

FROM: NANCY BENNETT, COMMITTEE STAFF

RE: HB 92 - CHILD AND SPOUSAL SUPPORT

DATE: FEBRUARY 13, 1985

THE SUBCOMMITTEE ASSIGNED TO HB 92 HAD QUESTIONS CONCERNING TWO SECTIONS OF THE BILL:

1. Page 3, lines 14 to 16 provides that an employer who discharges, disciplines or refuses to employ an obligor because of an income withholding order is liable for a fine of not more than \$1,000. PL 98-378 requires that such a fine be imposed (see attached language from the law). The question raised by the subcommittee was if the fine could be held in trust by the agency against future non payment of child support. Drafting attorney, George Edwards, says that any money designated as a fine imposed through the courts must be paid into the General Fund according to AS 22.15.250 (also attached). Since the federal law specifically demands a fine, it would appear that the funds collected would be required to be placed into the General Fund.

2. Page 4, lines 20-24 provides that an obligor may petition the court to reduce or terminate the withholding of income. The original bill had provided that an obligor could petition for termination or reduction on the basis of a flawless three year payment record, but the people from Region X (who checked with Washington D.C.) said this will not be allowed in the final regulations (relevant draft regulation attached, which are not as clear as the final draft will apparently become).

subsection, as is necessary to comply with the order and provide for the payment of any fee to the employer which may be required under paragraph (6)(A), up to the maximum amount permitted under section 303(b) of the Consumer Credit Protection Act (15 U.S.C. 1613(b)). If there are arrearages to be collected, amounts withheld to satisfy such arrearages, when added to the amounts withheld to pay current support and provide for the fee, may not exceed the limit permitted under such section 303(b), but the State need not withhold up to the maximum amount permitted under such section in order to satisfy arrearages.

"(2) Such withholding must be provided without the necessity of any application therefor in the case of a child (whether or not eligible for aid under part A) with respect to whom services are already being provided under the State plan under this part, and must be provided in accordance with this subsection on the basis of an application for services under the State plan in the case of any other child in whose behalf a support order has been issued or modified in the State. In either case such withholding must occur without the need for any amendment to the support order involved or for any further action (other than those actions required under this part) by the court or other entity which issued such order.

"(3) An absent parent shall become subject to such withholding, and the advance notice required under paragraph (4) shall be given, on the earliest of—

"(A) the date on which the payments which the absent parent has failed to make under such order are at least equal to the support payable for one month,

"(B) the date as of which the absent parent requests that such withholding begin, or

"(C) such earlier date as the State may select.

"(4)(A) Such withholding must be carried out in full compliance with all procedural due process requirements of the State, and (subject to subparagraph (B)) the State must send advance notice to each absent parent to whom paragraph (1) applies regarding the proposed withholding and the procedures such absent parent should follow if he or she desires to contest such withholding on the grounds that withholding (including the amount to be withheld) is not proper in the case involved because of mistakes of fact. If the absent parent contests such withholding on those grounds, the State shall determine whether such withholding will actually occur, shall (within no more than 45 days after the provision of such advance notice) inform such parent of whether or not withholding will occur and (if so) of the date on which it is to begin, and shall furnish such parent with the information contained in any notice given to the employer under paragraph (6)(A) with respect to such withholding.

"(B) The requirement of advance notice set forth in the first sentence of subparagraph (A) shall not apply in the case of any State which has a system of income withholding for child support purposes in effect on the date of the enactment of this section if such system provides on that date, and continues to provide, such procedures as may be necessary and continues to provide, such procedures as may be necessary to meet the procedural due process requirements of State law.

"(5) Such withholding must be administered by a public agency designated by the State, and the amounts withheld must be expeditiously distributed by the State or such agency in accordance with section 457 under procedures (specified by the State) adequate to document payments of support and to track and monitor such payments, except that the State may establish or permit the establishment of alternative procedures for the collection and distribution of such amounts (under the supervision of such public agency) otherwise than through such public agency so long as the entity making such collection and distribution is publicly accountable for its actions taken in carrying out such procedures, and so long as such procedures will assure prompt distribution, provide for the keeping of adequate records to document payments of support, and permit the tracking and monitoring of such payments.

"(6)(A)(i) The employer of any absent parent to whom paragraph (1) applies, upon being given notice as described in clause (ii), must be required to withhold from such absent parent's wages the amount specified by such notice (which may include a fee, established by the State, to be paid to the employer unless waived by such employer) and pay such amount (after deducting and retaining any portion thereof which represents the fee so established) to the appropriate agency (or other entity authorized to collect the amounts withheld under the alternative procedures described in paragraph (5)) for distribution in accordance with section 457.

"(ii) The notice given to the employer shall contain only such information as may be necessary for the employer to comply with the withholding order.

"(B) Methods must be established by the State to simplify the withholding process for employers to the greatest extent possible, including permitting any employer to combine all withheld amounts into a single payment to each appropriate agency or entity (with the portion thereof which is attributable to each individual employee being separately designated).

"(C) The employer must be held liable to the State for any amount which such employer fails to withhold from wages due an employee following receipt by such employer of proper notice under subparagraph (A), but such employer shall not be required to vary the normal pay and disbursement cycles in order to comply with this paragraph.

"(D) Provision must be made for the imposition of a fine against any employer who discharges from employment, refuses to employ, or takes disciplinary action against any absent parent subject to wage withholding required by this subsection because of the existence of such withholding and the obligations or additional obligations which it imposes upon the employer.

"(7) Support collection under this subsection must be given priority over any other legal process under State law against the same wages.

"(8) The State may take such actions as may be necessary to extend its system of withholding under this subsection so that such system will include withholding from forms of income other than wages, in order to assure that child support owed by absent parents in the State will be collected without regard to the types of such absent parents' income or the nature of their income-producing activities.

ISIONS

I must modify the sentence... be is... convinced that the district court was... Galaktionoff v. State, Sup. Ct. Op. No. 700 (File No. 1291), 486 P.2d 919 (1971).

trial de novo on appeal prior to 1980 amendment. — For cases discussing... Galaktionoff v. State, Sup. Ct. Op. No. 700 (File No. 1291), 486 P.2d 919 (1971).

court can hear argument of counsel... Lee v. State, Sup. Ct. Op. No. 107 (File No. 193), 374 P.2d 962 (1962).

superior court has the power to... Kinsman v. State, Sup. Ct. Op. No. 786 (File No. 1523), 496 P.2d 63 (1972).

may not be applied to work an... Kinsman v. State, Sup. Ct. Op. No. 786 (File No. 1523), 496 P.2d 63 (1972).

dismissal without warning. — The... Kinsman v. State, Sup. Ct. Op. No. 786 (File No. 1523), 496 P.2d 63 (1972).

crime of conviction considered... — The fair approach in

sentences is to treat the case as... Galaktionoff v. State, Sup. Ct. Op. No. 700 (File No. 1291), 486 P.2d 919 (1971).

The superior court judge's estimation of... Galaktionoff v. State, Sup. Ct. Op. No. 700 (File No. 1291), 486 P.2d 919 (1971).

Indue consideration given district... Galaktionoff v. State, Sup. Ct. Op. No. 700 (File No. 1291), 486 P.2d 919 (1971).

Sec. 22.15.250. Disposition of fines. When by law any fees, fines, forfeitures, or penalties are levied and collected by the district judge or magistrate, the proceeds and all other money collected shall be accounted for and transmitted to the administrative director of the judicial system for transfer to the general fund of the state except as provided in AS 22.15.270. (§ 21 ch 184 SLA 1959; am § 3 ch 24 SLA 1966)

Sec. 22.15.260. Bond. Before entering upon his duties each district judge and magistrate shall execute and file with the administrative director a surety bond in form and amount to be determined by rule of the supreme court. The state shall pay for the bond. (§ 22 ch 184 SLA 1959; am § 3 ch 24 SLA 1966)

Sec. 22.15.270. Retention of fines, etc., by political subdivisions. All fines, penalties and forfeitures resulting from violations of ordinances of political subdivisions shall be returned to the political subdivision whose ordinance is involved in the manner provided by rule of the supreme court. Fines, penalties and forfeitures imposed after appeals accrue to the state, unless the appeal is prosecuted by the political subdivision. (§ 23 ch 184 SLA 1959; am § 3 ch 24 SLA 1966; am § 1 ch 219 SLA 1976)

Revisor's notes. — In implementing... ch. 24, SLA 1966, in AS 22.15.270 "district judge" was added to rather than substituted for "magistrate" because it is clear that, as used in the old version, the word "magistrate" included both the dis-

P.2d 919 (1971).

Prosecution of appeal does not change offense from petty to serious. — Where a defendant had no constitutional or statutory right to trial by jury when he originally appeared before a magistrate on a charge of violating a municipal ordinance, the fact that he chose to prosecute an appeal does not change the nature of the offense from petty to serious; the possible penalty is not increased; no additional constitutional or statutory right sprang into existence on his appeal to give him a right to trial by jury. Knudsen v. City of Anchorage, Sup. Ct. Op. No. 21 (File No. 58), 358 P.2d 375 (1960).

Appeal from joint judgment. — See Stanley v. Greenberg, 5 Alaska 178 (1914). Applied in Hanrahan v. City of Anchorage, Sup. Ct. Op. No. 121 (File No. 247), 377 P.2d 361 (1962); State v. Marathon Oil Co., Sup. Ct. Op. No. 1098 (File No. 2199), 528 P.2d 293 (1974); Halligan v. State, Sup. Ct. Op. No. 2299 (File No. 5035), 624 P.2d 281 (1981).

district magistrate and the deputy magistrate. Therefore both the district judge and the magistrate are now included. For cases construing this section prior to the 1976 amendment, see Alexander v. City of Anchorage, Sup. Ct.

In accordance with section 466(b)(2) of the Act, proposed § 303.100(a)(4) requires that the State law be designed so that, in the case of a support order being enforced under the State plan, withholding occurs without the need for any amendment to the support order involved or any further action by the court or entity that issued it. This blanket provision of State law must apply to both existing and new support orders.

Section 466(a)(8) of the Act and § 303.100(h), which implements the second required State procedure discussed above, provide that new or modified support orders established after the effective date of the new law must have a specific provision for withholding. As stated earlier, this is to ensure that withholding as a means of collecting support is available if arrearages occur without the necessity of applying for IV-D services. Notwithstanding, if a new or modified support order does not include a provision for withholding and the order is being enforced by the IV-D agency, withholding must occur as required in § 303.100 (a) through (g).

To implement the requirements under section 466(b)(3) of the Act for triggering withholding, proposed § 303.100(a)(4) requires that the State take steps to begin withholding on the date on which the parent fails to make payments in an amount equal to one month's support obligation. This does not mean that the individual must miss paying the support obligation for one month. Any combination of unpaid support totalling one month's accrued arrearages would trigger a withholding. Paragraph (a)(4) would also permit the State to take steps to implement the withholding at any earlier time that is in accordance with State law or that the absent parent may request. This means that a State could use withholding to collect support in all cases if it chose to do so.

Section 466(b)(4) of the Act and proposed § 303.100(a)(5) require that withholding be carried out in full compliance with all procedural due process requirements under the State's laws. Section 303.100(a)(6) requires States to have procedures for terminating the withholding promptly, in accordance with section 466(b)(10) of the Act. For instance, a State would terminate a withholding when there is no further support obligation or when the whereabouts of the child and custodial parent are unknown preventing the forwarding of payments. In paragraph (a)(7), we propose to require States to have procedures for promptly refunding to individuals

monies that have been improperly withheld.

Under section 466(b)(4), States must provide notice to an individual before notifying the individual's employer concerning a withholding. The notice must inform the individual of the intent to withhold and of the procedures to follow to contest the withholding. An individual may contest the withholding only on the basis of a mistake of fact. If the individual contests the proposed withholding, the State must determine whether or not the withholding will occur and, if so, notify the individual, within no more than 45 days after the provision of the advance notice, of the timeframe within which the withholding is to begin. To implement these requirements, § 303.100 (b) and (c) set forth the criteria that States must meet in giving advance notice and providing an opportunity to contest the withholding. In proposed paragraph (b)(1), States must provide advance notice to the absent parent of the delinquency of support payments and the potential withholding. The notice must inform individuals: (1) of the amount to be withheld; (2) that the withholding applies to current and subsequent periods of employment; (3) of the methods available for contesting the withholding on the grounds that the withholding is not proper because of mistakes of fact; (4) of the period within which the State must be contacted in order to contest the withholding and that failure to contact the State within the specified time limit will result in the State notifying the employer to begin the withholding; and (5) of the actions the State will take if the individual contests the withholding. Although we are not specifying a period of time within which an individual must notify the State to contest the withholding, States should establish a standard time period (for example, 10 days) that would allow them to complete all required action within the statutory 45-day limit contained in paragraph (c).

As specified in section 466(b)(4) of the Act, proposed paragraph (b)(2) exempts any State which has a withholding system in effect as of August 16, 1984, if the system provides, on that date and afterwards, any other procedures necessary to meet the State's procedural due process requirements.

Paragraph (c) would require that States establish procedures for use when an absent parent contests a withholding. At a minimum, the procedures must provide that the State, within 45 days of giving advance notice to the individual, will: (1) Give the

individual an opportunity to present his or her case; (2) decide if the withholding will occur based on an evaluation of the facts; and (3) notify the individual whether or not the withholding is to occur and if so, include in the notice the timeframe within which withholding will begin and the information provided to the employer in the notice required in paragraph (d).

When the absent parent does not contest the withholding or has exhausted all procedures established by the State in accordance with paragraph (c), the State must give notice of the withholding to the employer, in accordance with section 466(b)(6)(A) of the Act and § 303.100(d). Clear Congressional intent in the Conference report indicates that Federal employees are subject to the withholding provisions of the new statute. Therefore, in cases involving Federal employees and members of the uniformed services, the notice to the employer must be directed to the appropriate designated official identified in: Appendix A of 5 CFR Part 581 for Federal employees; 32 CFR 54.6(g) of proposed regulations issued October 18, 1982 (47 FR 46297) for members of the military; 42 CFR 21.74 for members of the Public Health Service; and 33 CFR 54.07 for members of the Coast Guard. In cases involving members of the uniformed services, requests for withholding must meet the requirements in the above regulations.

Section 466(b)(6) of the Act sets forth specific requirements with respect to notice to the employer as well as responsibilities of the employer and the State in withholding wages. To meet these requirements, the notice to the employer must contain the elements listed in the proposed § 303.100(d)(1). Under paragraph (d)(1)(i) the notice would require the employer to withhold the amount specified in the notice (and include a statement that the amount actually withheld for support and for other purposes may not be in excess of the amount allowed under section 303(b) of the Consumer Credit Protection Act.) Under paragraph (d)(1)(ii), the notice would instruct the employer to pay the amount to the State (or other individual or entity that the State designates) at the same time the employee is paid. Under paragraph (d)(1)(iii), the State may allow the employer to deduct a fee established by the State and specified in the notice for the administrative costs of each withholding. Under this provision, the State must specify that the fee be withheld from the absent parent's wages in addition to the amount to be withheld to satisfy support.



Alaska State Legislature
House of Representatives
COMMITTEE ON HEALTH, EDUCATION
AND SOCIAL SERVICES

OFFICIAL BUSINESS

POUCHY
JUNEAU, AK 9981
465-3759

Proposed amendment

Sec. 25.24.160 Judgment.

change as follows:

(2) for the payment by either or both parties of an amount of money or goods, in gross or installments, as may be just and proper for the parties to contribute toward the nurture and education of their children, such an order may include an automatic cost-of-living increase, and the court may order the parties to arrange with their employers for an automatic payroll deduction each month or each pay period, if the period is other than monthly, of the amount of the installment; if the employer agrees, the installment shall be forwarded by the employer to the clerk of the superior court which entered the judgment or to the court trustee, and the amount of the installment is exempt from execution.

King v. King, Sup. Ct. Op. No. 650 (File No. 1235), 477 P.2d 356 (1970).

The "clean hands" doctrine serves no purpose in a setting where the court is asked to modify its own custody award as specifically allowed by the statute. King v. King, Sup. Ct. Op. No. 650 (File No. 1235), 477 P.2d 356 (1970).

Courts will recognize and enforce custody decrees of a sister state without reexamination of their merits, regardless of change of conditions, when there is mis-

conduct or malfeasance on the part of the parent seeking such reexamination, by invoking the doctrine of "clean hands." This misconduct generally consists of defiantly leaving a sister state, usually the marital domicile, with the minor to avoid its jurisdiction and for the purpose of seeking redetermination of the issue in a more favorable forum. King v. King, Sup. Ct. Op. No. 650 (File No. 1235), 477 P.2d 356 (1970).

Collateral references. — Consent of natural parents as essential to adoption where parents are divorced, 47 ALR2d 824.

Court's power as to custody, visitation of children in marriage, annulment proceedings, 63 ALR2d 1008.

Mental health of contesting parent as factor in award of child custody, 74 ALR2d 1073.

Power of court which denied divorce, legal separation or annulment, to award custody or make provisions for support of child, 7 ALR3d 1096.

Withholding or denying visitation rights for failure to make alimony or support payments, 51 ALR3d 520.

Right, in child custody proceedings, to cross-examine investigating officer whose report is used by court in its decision, 59 ALR3d 1337.

Effect in subsequent proceedings, of paternity findings or implications in divorce or annulment decree or in support or custody made incident thereto, 78 ALR3d 846.

Grandparents' visitation rights, 90 ALR3d 222.

Rights and remedies of parents inter se with respect to the names of their children, 92 ALR3d 1091.

Admissibility of social worker's expert testimony on custody issue, 1 ALR4th 837.

Visitation rights of persons other than natural parents or grandparents, 1 ALR4th 1270.

Parent's physical disability or handicap as factor in custody award or proceedings, 3 ALR4th 1044.

Initial award or denial of child custody to homosexual or lesbian parent, 6 ALR4th 1297.

Race as factor in custody award or proceedings, 10 ALR4th 796.

Desire of child as to geographical location of residence or domicile as factor in awarding custody or terminating parental rights, 10 ALR4th 827.

Right of incarcerated mother to retain custody of infant in penal institution, 14 ALR4th 748.

Propriety of awarding joint custody of children, 17 ALR4th 1013.

Propriety of awarding custody of child to parent residing or intending to reside in foreign country, 20 ALR4th 677.

Sec. 25.24.160. Judgment. In a judgment in an action for divorce or action declaring a marriage void or at any time after judgment, the court may provide

(1) *[Repealed, § 2 ch 160 SLA 1968.]*

(2) for the payment by either or both parties of an amount of money or goods, in gross or installments, as may be just and proper for the parties to contribute toward the nurture and education of their children, and the court may order the parties to arrange with their employers for an automatic payroll deduction each month or each pay period, if the period is other than monthly, of the amount of the installment; if the employer agrees, the installment shall be forwarded by the employer to the clerk of the superior court which entered the judgment

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or to the court trustee, and the amount of the installment is exempt from execution;

(3) for the recovery by one party from the other of an amount of money for maintenance, in gross or in installments, as may be just and necessary without regard to which of the parties is in fault;

(4) for the delivery to either party of that party's personal property in the possession or control of the other party at the time of giving the judgment;

(5) [Repealed, § 5 ch 251 SLA 1976.]

(6) for the division between the parties of their property, whether joint or separate, acquired only during coverture, in the manner as may be just, and without regard to which of the parties is in fault; however, the court, in making the division, may invade the property of either spouse acquired before marriage when the balancing of the equities between the parties requires it; and to accomplish this end the judgment may require that one or both of the parties assign, deliver, or convey any of their real or personal property to the other party;

(7) to change the name of one of the parties. (§ 12.14 ch 101 SLA 1962; am § 1 ch 84 SLA 1966; am §§ 2—6 ch 160 SLA 1968; am §§ 72, 73 ch 127 SLA 1974; am § 5 ch 251 SLA 1976)

Revisor's notes. — Formerly AS 09.55.210. Renumbered in 1983.

NOTES TO DECISIONS

- I. General Consideration.
- II. Child Support.
- III. Alimony.
- IV. Division of Property.
 - A. In General.
 - B. What Constitutes Property.

I. GENERAL CONSIDERATION.

This section and AS 09.55.220 (now AS 25.24.170) are predicated upon the court's jurisdiction of the parties and the subject matter. Weber v. Weber, 10 Alaska 214 (1942).

And jurisdiction of defendant's person is necessary for money judgment for alimony. — Where the plaintiff was a resident of Connecticut and the defendant a resident of Alaska, constructive service of summons being made on the defendant in Alaska, the court of the forum had jurisdiction of the marital status but did not have jurisdiction of the person of the defendant which is essential for the entry of a money judgment for alimony. Tnornhill v. Huston, 13 Alaska 150 (1951).

Quoted in Balchen v. Balchen, Sup. Ct. Op. No. 1469 (File No. 3178), 566 P.2d 1324 (1977); Allen v. Allen, Sup. Ct. Op.

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POSITION PAPER

HOUSE BILL No. 92

JAN 30 '85

For "An act relating to child and spousal support; and providing for an effective date."

House Bill No. 92 provides for a series of changes in the statutes governing the operations of the Child Support Enforcement Division (CSED) of the Department of Revenue. Most of these changes are required by the federal Child Support Enforcement Amendments of 1984.

The Department of Health and Social Services supports any reasonable, cost-effective measures which would improve the ability of CSED to establish and collect child support obligations. The funds it collects, on behalf of children receiving assistance under our Aid to Families with Dependent Children Program (AFDC), are partially retained by the state as an offset to AFDC expenditures. Successful collections on behalf of AFDC recipients do result in families leaving the AFDC rolls. Just as importantly, we believe prompt and successful collection efforts on behalf of children who are not receiving AFDC is often instrumental in keeping the family from needing to apply for assistance. We view CSED's success as an essential element in restraining the rapid growth in AFDC expenditures.

An amendment in federal law included in the Child Support Enforcement Amendments of 1984 makes the passage of HB No. 92 of vital interest to our Department. This amendment provides that, should a state's child support enforcement activities be found to be substantially out of compliance with federal requirements and performance standards, the fiscal penalty to the state will be taken as a percentage decrease in the state's AFDC 50 percent federal matching funds. With this amendment comes a clearly-stated congressional intent not merely to threaten such penalties, but to actually enforce them.

RECOMMENDATION

Since passage of HB No. 92 is necessary to ensure CSED's compliance and failure to pass this legislation may pose an actual threat to AFDC federal funding of a magnitude that may even require supplemental state funding, we urge you to enact this bill substantially as written.

Recommended by:

John R. Taber
John R. Taber, Director
Division of Public Assistance

Date:

1/28/85

Approved by:

John R. Pugh
John R. Pugh, Commissioner
Department of Health & Social
Services

Date:

1/30/85

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: HB 92
 Title: An Act relating to child and spousal support
 Sponsor: Rules, by request
 Requestor: Revenue
 Date of Request: 1/18/85

FISCAL DETAIL

Agency Affected: Health & Social Services
 Program Category Affected: _____
 BRU, Program or Subprogram(s) Affected: Assistance Payments, AFDC Component

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

HB 92 has a potential cost-avoidance impact upon Aid to Families with Dependent Children (AFDC) utilization and expenditures. If enacted, it should result in some single parent families being supported sufficiently to eliminate their need to apply for AFDC. It should also slightly increase the numbers of current AFDC recipient families leaving the AFDC rolls. Finally, enactment helps to ensure compliance with federal program requirements, thereby avoiding federal

Prepared By: John R. Taber, Director
 Division: Public Assistance

Phone: 465-3347
 Date: _____

Approved by Commissioner: John R. Py
 Agency: _____

Date: 1/30/85 JCC

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

7/1/84

ANALYSIS CONT.

fiscal penalties, which would be taken against the 50% federal AFDC funding. However, no data exists by which the total potential amount of cost-avoidance might be estimated.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

BILL SHEFFIELD, GOVERNOR

REPLY TO:

1031 W 4th AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701
PHONE: (907) 452-1568

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600
465-3603

February 5, 1985

The Honorable Max Gruenberg
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: HB 92 Child and Spousal
Support

Dear Representative Gruenberg:

During the House HESS committee meeting on January 30, 1985, you asked me to look into the constitutional issue of due process in relation to the use of regular mail as a means of affording notice to obligors in child support enforcement actions. 1/ Your question was predicated on the Child Support Enforcement Division's proposal that the agency be allowed to use regular mail to notify an obligor of enforcement actions.

The seminal United States Supreme Court case concerning notice continues to be Mullane v. Central Hanover Bank and Trust Co., 399 U.S. 306, 314, 315 (1950) which provides that:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. ... The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, ... or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

1/ My focus is limited to the case where a child support amount has been established and the obligor had notice and an opportunity to be heard in the establishment proceeding.

HR 92

Section 9 of the bill corrects an oversight. Section 11, ch. 144, SFA 1984, enacted AS 47.23.265, which currently sets out specific service provisions for all of AS 47.23. Service provisions contained in AS 47.23.150 should have been deleted at the same time, but were not. The amendments to AS 47.23.150 in sec. 9 of the bill accomplish the deletion.

Section 10 of the bill amends AS 47.23.226 to refer to the general service provision in AS 47.23.265. Section 14 of the bill then modifies that general service provision so that no more restrictive service requirements are necessary than are appropriate under Rule 5 of the Alaska Rules of Civil Procedure. Civil Rule 5 allows service either upon a party or his attorney by first class mail. It has been perceived as a problem to some of the individual's handling child support cases on behalf of the agency that the previous requirement of service by registered or certified mail often set up a barrier to the receipt of the notice. Since the affected sections only relate to the enforcement of previously established support orders, the court has continuing jurisdiction to enforce those orders. *Palchen v. Balchen*, 566 P.2d 324 (Alaska 1977). In that case, the Alaska Supreme Court acknowledged that the proper service provision in enforcement actions is Civil Rule 5(b), and not Civil Rule 4 which requires personal or restricted delivery service. The court even commented that there would be merit to providing, in matters of support enforcement, that service could be made directly to the party rather than upon the attorney for the party carrier divorce proceeding.

Sections 12 and 13 of the bill simply change language in statutes pertaining to income assignment orders to reflect the new term, "income withholding" orders.

Sincerely,

/s/

Bill Sheffield
Governor"

HR 93

HOUSE BILL NO. 93 by the Rules Committee by request of the Governor, entitled:

"An Act establishing a system of recreation rivers; and providing for an effective date."

was read the first time and referred to the Resources and Finance Committees.

A fiscal note was attached and appears in House Journal Supplement No. 5. The Governor's transmittal letter, dated January 18, 1985, appears below:

HR 93

"Dear Representative Grussenford:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the creation of a system of recreation rivers.

The bill is based in part on legislation enacted last session creating the Kenai River Special Management Area. The establishment of the Kenai River Special Management Area was a significant beginning in our program to improve the quality of recreation for Alaskans and to reduce the resource damage that results from overuse.

This year I will be introducing several pieces of legislation directed at expanding and diversifying recreational opportunities in southcentral Alaska. To provide for the growing recreation demands of Alaskans, who are among the most active anglers, hikers, boaters, hunters and campers in the United States, we must take action now to designate appropriate state lands and waters for special use.

Today I am introducing two recreation bills: to establish a state recreation rivers system, including the Little Susitna River, and to designate the Willow Creek State Recreation Area. Both of these areas were recommended for special designation on the Willow Subbasin Plan adopted two years ago. On March 1, after the Susitna Area Plan is adopted, I will introduce legislation to create several more special areas as recommended in the final plan.

Section 1 of this bill amends AS 41.21.022 to allow the discharge of firearms for lawful hunting in recreation river corridors except when public safety requires otherwise.

Section 2 contains the body of the bill. New AS 41.21.308 states the purposes of the new sections in AS 41.21, which include dedication of a recreation river and adjacent state land as a unit of the state park system. New AS 41.21.310 designates the Little Susitna River corridor and adjacent state lands as a recreation river. New AS 41.21.312 delegates to the Department of Natural Resources the regulatory responsibilities for the river corridor subject to the existing powers of the Department of Fish and Game, Board of Fisheries, Board of Game, Guide Licensing and Control Board, and Department of Environmental Conservation.

Under new AS 41.21.314, the commissioner of natural resources is directed to develop and adopt a comprehensive management plan for the river corridor through a public hearing process and consultation with affected local municipalities and other interested state and local agencies. Once the plan is adopted, the commissioner is directed to adopt regulations under the Administrative Procedure Act (AS 44.62) to implement the plan. These regulations, as a minimum, must designate appropriate transportation and utility corridors for the area in cooperation with the Department of Transportation and Public Facilities; establish guidelines for the extraction of sand and gravel for public purposes and the harvest of forest

HB 92

HOUSE BILL NO. 92 by the Rules Committee by request of the Governor, entitled:

"An Act relating to child and spousal support; and providing for an effective date."

was read the first time and referred to the Health, Education & Social Services, Judiciary and Finance Committees.

A fiscal note was attached and appears in House Journal Supplement No. 5. The Governor's transmittal letter, dated January 18, 1985, appears below:

"Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to child support enforcement. This bill is intended to ensure that Alaska Statutes are in compliance with the federal Child Support Enforcement Amendments of 1984, PL 98-378, which strengthens enforcement techniques of state agencies. It is essential that these provisions be in effect by October 1, 1985, in order for the state to continue to obtain federal funding of 70 percent for support enforcement. Other provisions of the bill strengthen the remedies presently available by amending AS 47.23 and AS 09.65.132.

Sections 1 and 3 of the bill are necessitated by Sec. 466 of PL 98-378, which mandates that each state must have in effect a law that will permit the establishment of the percentage of a child at any time before the child's 18th birthday. Section 1 adds new AS 09.10.095, which acts as a statute of limitation. Section 3 amends AS 25.20.050, relating to establishment of paternity, to specify that such an action must be permitted until the child is 13. As a statute of limitation, a child's right to bring such an action would toll during his minority, so an action could still be maintained until age 20. AS 25.20.070 would not prohibit an action at that time, but simply reflects the federal mandate that parentage actions be permitted at least until the child reaches age 18.

Section 2 amends AS 09.65.132 to conform to federal requirements relating to income withholding orders. The use of the term "income withholding order" in substitution for "income assignment order" will provide for consistency in state and federal statutes. PL 98-378 requires that collections be deposited and distributed by a public agency designated by the state. In this case, the agency is the child support enforcement division of the Department of Revenue (referred to as the "agency"). Since the agency will be required to administer any income withheld, and will be accountable for collection and distribution, the bill also requires that all applications for income withholding orders be filed through the agency. The effectiveness of AS 09.65.132 as an enforcement tool is strengthened by requiring an automatic procedure to trigger withholding without court intervention if an obligor does

HB 92

not request a hearing, and an expedited decision if a hearing is requested. The service requirement is also amended so that no more restrictive service provision is necessary than would be required under normal motion practice in a typical lawsuit. PL 98-378 also requires that employers who discharge an employee, discipline an employee, or refuse to hire a person, because of an income withholding order, be fined; therefore the bill adds a provision making commission of any of those acts a misdemeanor punishable by a fine of not more than \$1,000. This misdemeanor is not classified; thus the imprisonment provisions of AS 12.55.135 do not apply.

Section 2 of the bill also amends AS 09.65.132(g) to remove the income exemption for collections from income under an income withholding order, because new subsection (h) requires that at least the amount of the support obligation be withheld, subject to the limits of 15 U.S.C. sec. 1673(b). 15 U.S.C. sec. 1673(b) allows withholding of 50 percent of an individual's disposable earnings, or 60 percent if the individual does not support a spouse or dependent child. The maximum amount allowed to be withheld is raised to 55 and 65 percent, respectively, if collection is for arrearages over 12 weeks old. Section 11 of the bill modifies AS 47.23.250(l) to also remove the income exemptions set out in that subsection.

Section 4 of the bill contains a new chapter, AS 25.26, the Interstate Income Withholding Act, which is also required by PL 98-378. This chapter draws heavily upon a Model Interstate Income Withholding Act, drafted by the Child Support Projects section of the American Bar Association and the National Conference of State Legislatures. The Model Act was prepared to assist states to meet the deadline of October 1, 1985 for implementation of the interstate withholding requirements. The Model Act enables states that enact similar provisions to order income withholding in another state in the same manner as they would impose intrastate withholding, without the necessity of filing a new action in the other state, as is necessary under the existing Uniform Reciprocal Enforcement of Support Act (AS 25.25) or other enforcement statutes.

Sections 5, 7, and 8 of the bill amend several sections of AS 47.23 to reflect other requirements of PL 98-378. The child support enforcement agency will be responsible for enforcing existing spousal support orders where it is also enforcing a child support order. It must also attempt to obtain medical support orders as a part of a child support order if health care coverage is available to the obligor at a reasonable cost.

Section 6 of the bill reflects a change in the percentage of penalty that must be assessed, if any is imposed, to comport with PL 98-378. Under the federal law, the penalty rate must be between three and six percent; the bill imposes the highest penalty possible. Even at the six percent penalty rate, the present penalty is reduced by one-half from the 12 percent penalty now assessed.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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465-3603

February 5, 1985

The Honorable Max Gruenberg
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: HB 92 Child and Spousal
Support

Dear Representative Gruenberg:

During the House HESS committee meeting on January 30, 1985, you asked me to look into the constitutional issue of due process in relation to the use of regular mail as a means of affording notice to obligors in child support enforcement actions. 1/ Your question was predicated on the Child Support Enforcement Division's proposal that the agency be allowed to use regular mail to notify an obligor of enforcement actions.

The seminal United States Supreme Court case concerning notice continues to be Mullane v. Central Hanover Bank and Trust Co., 399 U.S. 306, 314, 315 (1950) which provides that:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. ... The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, ... or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

1/ My focus is limited to the case where a child support amount has been established and the obligor had notice and an opportunity to be heard in the establishment proceeding.

The Alaska Supreme Court has relied upon this standard in its own decisions regarding procedural due process requirements. 2/ In Balchen v. Balchen 566 P.2d 1324, 1327 (Alaska 1977) the Alaska Supreme Court found that the formal complaint-summons service requirements of Civil Rule 4 are inappropriate in proceedings which seek to enforce terms of a prior divorce decree relating to child support payments, for, unlike most judgments, divorce decrees can be modified at anytime. The appropriate procedure to be followed in such cases is set forth in the Civil Rule 5. 3/

Civil Rule 5 provides in part:

(b) Service -- How Made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing....

2/ In State v. Bowers Office Products, Inc. 621 P.2d 11, 13 (Alaska 1980) the court found that the use of regular mail was adequate service to notify potential bidders of a bid amendment.

In Wickersham v. State Commercial Fisheries Entry Commission, 680 P.2d 1135, 1145, 1147 (Alaska 1984) the Alaska Supreme Court found that the Commission's efforts to notify potential applicants for limited entry permits through bulk mailing and media advertisements were constitutionally adequate, even if the materials sent by the Commission never actually reached the potential applicants.

3/ In Balchen three years had elapsed between the divorce decree and the modification hearing.

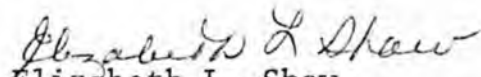
The Honorable Max Gruenberg
Alaska State Legislature
Re: HB 92 Child and Spousal Support

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Page 3

It is the contention of the Child Support Enforcement Division that as in other continuing civil litigation the obligor bears responsibility for keeping the agency or the court informed of his or her current address. ^{4/} In the child support cases in question an obligor has participated, or had the opportunity to participate, in a prior judicial proceeding regarding his or her child support obligation. The court has continuing jurisdiction of the child support matter. To require the agency to meet the requirements of Civil Rule 4, as if each enforcement proceeding were a new action appears unduly onerous and would interfere unnecessarily with the enforcement process.

Sincerely yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: 
Elizabeth L. Shaw
Assistant Attorney General

ELS:bap

4/ AS 47.23.265(b) provides:

SERVICE; NOTIFICATION OF CHANGE OF ADDRESS. (a) Except as otherwise provided under this chapter, when a notice, paper, or other document is required by this chapter to be given or served upon a person by the agency, the notice, paper, or other document may be sent by registered or certified mail to the last known address of that person. Service by mail under this chapter is effected when the notice, paper, or other document is properly addressed, registered or certified, and mailed.

(b) A person required by court order to make child support payments through the agency shall keep the agency informed of the person's current address.

Incest as included within charge of rape, 76 ALR2d 181.
 Criminal responsibility of husband for rape or assault to commit rape on wife, 81 ALR2d 1017.
 Fraud or impersonation, rape by, 91 ALR2d 691.
 Incompetency as defense to charge of rape, attempt to rape, or assault with intent to commit rape, 21 ALR3d 1351.
 Rape or similar offense based on interference with woman who is allegedly mentally deficient, 31 ALR3d 1227.
 Liability of parent for injury to unemancipated child caused by parent's negligence, 41 ALR3d 901.
 Seizure or detention for purpose of com-

mitting rape, robbery, or similar offense as constituting separate crime of kidnapping, 43 ALR3d 689.
 Consent as defense in prosecution for sodomy, 58 ALR3d 636.
 Multiple instances of forcible intercourse involving same defendant and same victim as constituting multiple crimes of rape, 81 ALR3d 1228.
 What constitutes offense of "sexual battery," 87 ALR3d 1250.
 Constitutionality of rape laws limited to production of females only, 49 ALR3d 129.
 Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like, 3 ALR3d 1009.

Sec. 11-1110. Sexual assault in the first degree. (a) A person commits the crime of sexual assault in the first degree if,

- (1) being any age, the defendant engages in sexual penetration with another person without consent of that person;
- (2) being any age, the defendant attempts to engage in sexual penetration with another person without consent of that person and causes serious physical injury to that person;

- (3) *Repealed*, § 10 ch 78 S.L.A. 1983, /
- (4) *Repealed*, § 10 ch 78 S.L.A. 1983, /
- (b) Sexual assault in the first degree is an unclassified felony and is punishable as provided in AS 12-55. (§ 3 ch 165 S.L.A. 1978; am § 8 ch 107, S.L.A. 1980; am § 6 ch 143 S.L.A. 1982; am § 10 ch 78 S.L.A. 1983)

Cross references. — For evidence of past sexual conduct in trials of sexual assault in any degree or attempt to commit sexual assault in any degree, see AS 12-55(b).
Effect of amendments. — The 1980 amendment inserted "or aids, induces or encourages a person under 13 years of age to engage in sexual penetration with another person" near the end of paragraph (3) in subsection (a).
 The 1982 amendment substituted "a

unclassified felony and is punishable as provided in AS 12-55" for "a class A felony" at the end of subsection (b).
 The 1983 amendment repealed paragraphs (3) and (4) of subsection (a).
Legislative history reports. — For a report on Chapter 102, S.L.A. 1980 (HCS CSSB 5114, *see* 1980 Senate Journal Supplement, No. 41, May 29, 1980) or 1980 House Journal Supplement, No. 79, May 28, 1980.

NOTES TO DECISIONS

- I General Commentation
- II Commentaries
- A General
- B Annotations
- C Decisions

LEGISLATIVE CONSIDERATION. — Op. No. 262 (46 No. 6890), 661 P.2d 621 (1983).
History of first degree sexual assault. — *See* AS 11-1110 and the 1980

must prove that the defendant knowingly engaged in sexual intercourse and recklessly disregarded his victim's lack of consent. Construed in this way, the statute does not punish harmless conduct and is neither vague nor overbroad. Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 661 P.2d 621 (1983).

Construing the Revised Code and the concurrent amendments governing sentences together indicates that the legislature has not irrationally failed to distinguish between degrees of culpability, and the penalty provisions of the sexual offenses provisions of the Revised Code did not subject defendant to cruel and unusual punishment or deny him substantive due process or the equal protection of the laws. Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 661 P.2d 621 (1983).

Categories constitute same offense. — All of the categories contained within the definition of sexual assault in the first degree under subsection (a)(1) through (a)(4) of this section, constitute the same offense for legal purposes. Juney v. State, Ct. App. Op. No. 72 (File No. 5606), 641 P.2d 823 (1982), modified on other grounds and aff'd on rehearing, Ct. App. Op. No. 259 (File No. 5606), 655 P.2d 30 (1983).

And none is more serious than others. — Nothing contained in the statutory language of this section or the legislative history of the provision suggests that the type of conduct listed in any one of subsection (a)'s four paragraphs was meant to be inherently more serious than any of the others. To the contrary, the grouping of these four separate sets of conduct together under the same criminal heading, with identical classifications as class A felonies, is a forcible indication of the legislature's conclusion that all four paragraphs were meant to be viewed as involving equally serious conduct. Juney v. State, Ct. App. Op. No. 72 (File No. 5606), 641 P.2d 823 (1982), modified on other grounds and aff'd on rehearing, Ct. App. Op. No. 259 (File No. 5606), 655 P.2d 30 (1983).

Subsection (a)(1) is akin to the common law definition of rape. Juney v. State, Ct. App. Op. No. 72 (File No. 5606), 641 P.2d 823 (1982), modified on other grounds and aff'd on rehearing, Ct. App. Op. No. 259 (File No. 5606), 655 P.2d 30 (1983).

Mental state required under (a)(1). — Lack of consent is a "surrounding circum-

stance" which requires a complementary mental state as well as conduct to constitute a crime. Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 661 P.2d 621 (1983).

No specific mental state is mentioned in subsection (a)(1) of this section governing the surrounding circumstance of "consent"; therefore, the state must prove that the defendant acted "recklessly" regarding his putative victim's lack of consent. Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 661 P.2d 621 (1983).

Attempted sexual assault in the first degree and sexual assault in the second degree are closely related, since sexual penetration involves sexual contact and both offenses proceed on a theory of coerced assent. Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Constitutionality of conviction for similar offense. — Where defendant was charged with attempted sexual assault in the first degree, he was thereby assumed to have notice that he might be convicted of second-degree sexual assault because of the similarities in the elements of the two offenses, and his conviction for the latter offense did not violate due process. Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Sufficient evidence of attempted assault. — A jury could reasonably infer that defendant's entering of victim's bed naked and uninvited and fondling her breasts were "substantial steps" toward the commission of sexual assault in the first degree so as to provide sufficient evidence of attempted assault. Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Instructions. — The trial court did not commit plain error in failing to specifically instruct the jury that defendant had to recklessly disregard a substantial risk that the victim did not consent to intercourse before he could be convicted of first-degree sexual assault. Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 661 P.2d 621 (1983).

Instructions on lesser included offense. — In a prosecution of first-degree sexual assault, where the undisputed evidence including defendant's testimony establish sexual penetration, there was no duty to instruct on attempted sexual penetration or forcible sexual contact

Hartley v. State, Ct. App. Op. No. 153 (File No. 5737), 653 P.2d 1052 (1982).

The 10-year presumptive term for first-degree sexual assault under the provisions of AS 12.55.125(c) was meant by the legislature to be appropriate in the majority of cases, which are those cases involving conduct that is characteristic of the offense of rape and that fall into the middle-ground between the most serious and least serious extremes for the offense, and it must be recognized that this presumptive term takes into account the high potential for the use of violence and the likelihood of some physical injury in the first-degree sexual assaults falling within the definition of subsection (a)(1) of this section. Juneby v. State, Ct. App. Op. No. 72 (File No. 5606), 641 P.2d 823 (1982), modified on other grounds and affirmed on rehearing, Ct. App. Op. No. 259 (File No. 5606), 665 P.2d 30 (1983).

Sentence upheld. — See Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

Where record supported finding that defendant was the leader of a group of three or more persons who participated in offense of sexual assault in the first degree, such evidence, combined with consideration of prior, similar actions and of defendant's apparent lack of remorse, warranted imposition of eight-year sentence. Willard v. State, Ct. App. Op. No. 240 (File No. 6285), 662 P.2d 971 (1983).

Sentence of 10 years imprisonment, with eight suspended, was not excessive for conviction of attempted sexual assault in first degree. Van Hatten v. State, Ct. App. Op. No. 269 (File No. 5877), P.2d (1983).

Sentence for attempted sexual assault and burglary held excessive. — See Hansen v. State, Ct. App. Op. No. 218 (File No. 6965), 657 P.2d 862 (1983).

Applied in Nukapirak v. State. Ct. App. Op. No. 80 (File No. 5820), 645 P.2d 215 (1982); Seymour v. State, Ct. App. Op. No. 196 (File No. 6,951), 655 P.2d 786 (1982); Howard v. State, Ct. App. Op. No. 260 (File Nos. 6027, 6123), 661 P.2d 603 (1983).

Stated in Hunt v. State. Ct. App. Op. No. 41 (File No. 5995), 633 P.2d 1021 (1981); Feehook v. State, Ct. App. Op. No. 178 (File No. 6630), 655 P.2d 1308 (1982); Tazuki v. State, Ct. App. Op. No. 195 (File No. 6951), 655 P.2d 788 (1982).

Cited in Stores v. State. Sup. Ct. Op. No. 2252 (File No. 3355), 625 P.2d 820 (1980); State v. June Dec. Ct. App. Op. No. 104

Pogamaluk v. State, Ct. App. Op. No. 176 (File No. 6531), 655 P.2d 339 (1982); Erhart v. State, Ct. App. Op. No. 185 (File No. 6244), 636 P.2d 1199 (1982); Ekker v. State, Ct. App. Op. No. 190 (File No. 6726), 656 P.2d 577 (1982); Nukapirak v. State, Sup. Ct. Op. No. 2667 (File No. 5820), P.2d (1983).

II. FORMER LAW.

A. Generally.

Editor's notes. — The cases cited in the note below were decided under former AS 11.15.120 and 11.15.130.

Forcible rape ranks among the most serious crimes. Newson v. State, Sup. Ct. Op. No. 1136 (File No. 2169), 533 P.2d 904 (1975); State v. Lancaster, Sup. Ct. Op. No. 1247 (File No. 2571), 550 P.2d 1257 (1976); State v. Wassilie, Sup. Ct. Op. No. 1630 (File No. 3691), 578 P.2d 971 (1978); Ahvik v. State, Sup. Ct. Op. No. 2123 (File No. 4556), 613 P.2d 1252 (1980).

The reason such a crime as forcible rape is most serious is because it amounts to a desecration of the victim's person which is a vital part of her sanctity and dignity as a human being. Gordon v. State, Sup. Ct. Op. No. 831 (File No. 1535), 501 P.2d 772 (1972); Torres v. State, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974); Ames v. State, Sup. Ct. Op. No. 1137 (File No. 2145), 533 P.2d 246, modified on rehearing on other grounds, 537 P.2d 1116 (1975); Newson v. State, Sup. Ct. Op. No. 1136 (File No. 2189), 533 P.2d 904 (1975); State v. Lancaster, Sup. Ct. Op. No. 1247 (File No. 2571), 550 P.2d 1257 (1976); Berdewick v. State, Sup. Ct. Op. No. 1500 (File No. 3341), 569 P.2d 184 (1977); State v. Wassilie, Sup. Ct. Op. No. 1630 (File No. 3691), 578 P.2d 971 (1978).

Definition of rape under former law. — Sekinoff v. United States, 283 F.38 (9th Cir. 1922).

Criminal intent was required for conviction of statutory rape. — See State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

Although former AS 11.15.120 was silent as to any requirement of intent, the requirement of criminal intent was inferred. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978). Rape is a general intent crime, and all that is required for a conviction is proof of the voluntary commission of the prohibited act. Walker v. State, Sup. Ct. Op. No. 2570 (File No. 4971), 657 P.2d 88

Lesser included offense. — The Alaska statutes do not proscribe fornication, and therefore, it could not be considered an offense of a lesser degree to statutory rape. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978); Tuokak v. State, Ct. App. Op. No. 108 (File No. 4656), 648 P.2d 1018 (1982). The offense of assault with intent to commit rape is a lesser included offense to rape. Tuokak v. State, Sup. Ct. Op. No. 2266 (File No. 4669), 621 P.2d 1350 (1981).

Attempt. — Every element of an attempt is comprised in an assault with intent to commit the offense of rape. Sekinoff v. United States, 283 F.38 (9th Cir. 1922).

Separate crimes. — Rape, assault with a dangerous weapon, and kidnapping with separate crimes with separate elements. Lacy v. State, sup. Ct. Op. No. 2039 (File No. 3741), 608 P.2d 19 (1980).

Separate sentences were called for where defendant's conduct in kidnapping her and raping his victim and assaulting her with a deadly weapon constituted the commission of three distinct offenses, each of which violated a different societal interest. State v. Ochippinti, Sup. Ct. Op. No. 1405 (File No. 3084), 562 P.2d 348 (1977).

Female under age of consent is in law incapable of consent. — The crime of rape is committed upon a female under the age of consent with or without her consent since she is in law incapable of consent. Torres v. State, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974).

Thus, it is not necessary to establish her consent as an essential element of the crime. Torres v. State, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974). **Indictment need not allege consent of female under age of consent.** — An indictment for rape of a girl under the age of consent is not insufficient because it fails to allege that the act was done with her consent. Callahan v. United States, 240 F.683 (9th Cir. 1917); Rose v. United States, 240 F.685 (9th Cir. 1917).

Defense of reasonable mistake of age. — A charge of statutory rape was defensible where an honest and reasonable mistake of fact as to the victim's age was shown. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978). The charge of statutory rape was legally unsupported unless a defense of reasonable mistake of age was allowed. To refuse

criminal liability without any criminal mental element. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

While, where an offender was aware he was committing an act of fornication, a mistake of fact did not serve as a complete defense, it should have served to reduce the offense to that which the offender would have been guilty of had he not been mistaken. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

Under former AS 11.15.120, if an accused had a reasonable belief that the person with whom he had sexual intercourse was 16 years of age or older, he could not have been convicted of statutory rape. If, however, he did not have a reasonable belief that the victim was 18 years of age or older, he could still have been criminally liable for contribution to the delinquency of a minor. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

For approved instruction on consent of female under age of consent, see case v. United States, 240 F.685 (9th Cir. 1917).

C. Procedure.

Indictment charging attempted rape and citing only the rape statute held sufficient. — See State v. Thomas, Sup. Ct. Op. No. 1077 (File No. 2234), 525 P.2d 1092 (1974).

Charging defendant with the crime of murder committed "in the attempt to perpetrate a rape" fails to allege the separate crime of rape with sufficient clarity to support a conviction. Alto v. State, Sup. Ct. Op. No. 1443 (File No. 2339), 565 P.2d 492 (1977).

Severance of counts involving various victims. — Where defendant was prosecuted on multiple counts of unlawful entry with intent to rape, assault, and burglary, involving various victims, the trial court did not err in denying severance of the counts since evidence regarding the attack on each of the alleged victims would have been admissible in the trial of each of the other charges if the charges had been separately tried. Nix v. State, Ct. App. Op. No. 157 (File No. 5841), 653 P.2d 1093 (1982).

Character evidence. — See Freeman v. State, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Questioning victim's credibility. — While a defendant could properly seek to question the victim's credibility, the estab-

extrinsic evidence on a collateral matter. *Moss v. State*, Sup. Ct. Op. No. 2239 (File No. 4369), 620 P.2d 674 (1980).

Corroboration of prosecutrix's testimony. — No corroboration of prosecutrix's testimony is necessary in statutory rape cases. *Burke v. State*, Sup. Ct. Op. No. 2194 (File No. 39659), 624 P.2d 1240 (1980).

Evidence of prior history of sexual activity with victim. — Whether evidence in a statutory rape prosecution of prior history of sexual activity with the prosecutrix is justified as background or the ongoing nature of the relationship is probative, the nexus of these reasons justifies an exception to the general rule against admissibility of prior bad acts. *Burke v. State*, Sup. Ct. Op. No. 2194 (File No. 39659), 624 P.2d 1240 (1980).

Evidence of prior misconduct. — See *Freeman v. State*, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Evidence of prior sexual offenses. — See *Freeman v. State*, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Determining age from appearances. — See *Toures v. State*, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974).

Admission of defendant's driver's license into evidence to establish his age was harmless beyond a reasonable doubt. *Toures v. State*, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974).

Psychiatric testimony. — See *Freeman v. State*, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Psychiatric evidence showing that an individual accused of sexually deviant misconduct is not a sexual psychopath should properly be regarded to be character evidence. *Freeman v. State*, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Hearsay testimony. — It was not error to admit hearsay testimony concerning complaints made by a rape victim to her mother and a school counselor. *Greenway v. State*, Sup. Ct. Op. No. 2206 (File No. 4754), 626 P.2d 1060 (1980).

Failure at preliminary hearing to state all the facts attending a charged rape in response to an instruction to proceed and tell what happened is not a ground of impeachment. *Tankley v. United States*, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

Error to admit recording of sodomitous interview. — In a prosecution for statutory rape and sodomy, it was error to admit the recording of a

prior consistent statement for the limited purpose of rehabilitating an impeached witness. *Lindsey v. United States*, 16 Alaska 268, 237 F.2d 893 (9th Cir. 1956).

Or to exclude public from trial. — The trial court erred in assuming the power of excluding the public from a trial on the charge of rape of an adult woman. *Tankley v. United States*, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

It would be denying the defendant his presumption of innocence and a protection by the court of his guilt to hold that a married woman must be relieved of the embarrassment of a public trial because she is called upon to testify to the story of the defendant's crime and her shame. *Tankley v. United States*, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

Verdict supported by evidence. — Testimony of complaining witness of her conduct before and after the alleged rape, corroborated and contradicted, and her sole evidence of the rape itself, supports the verdict on the inference that the defendant's defense was untrue, and that she was the unfortunate victim of a brutal outrage. *Tankley v. United States*, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

Instructions. — The use of the following instruction in a statutory rape case is prohibited: "A charge such as that made against the defendant in this case is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent. Therefore, the law requires that you examine the testimony of the female person named in the indictment with caution." *Burke v. State*, Sup. Ct. Op. No. 2194 (File No. 39659), 624 P.2d 1240 (1980).

Since specific intent is not an element of the offense of rape, giving an instruction that the law assumes that every person intends the natural consequences of his voluntary acts was not error. *Walker v. State*, Sup. Ct. Op. No. 2570 (File No. 4921), 652 P.2d 88 (1982).

Instruction sufficiently covering question of impeachment. — See *Tankley v. United States*, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

For approved instruction on consent of female under age of consent, see *Rose v. United States*, 240 F. 685 (9th Cir. 1917).

Sentencing. — The recommended five year maximum, except for cases involving particularly serious offenses, dangerous offenders and professional criminals, of *Dolan v. State*, Sup. Ct. Op. No. 1022

not applicable to the crime of rape of a person under 16 years by a person 19 years or older, made punishable by former AS 11.15.130(a) by "any term of years." *Edenshaw v. State*, Ct. App. Op. No. 005 (File No. 5239), 631 P.2d 506 (1981).

What must be reflected in sentence for forcible rape. — Although the perpetrator of such a crime as forcible rape may not be beyond rehabilitation, the crime itself deserves community condemnation; in addition to serving rehabilitative purposes the sentence must reflect such condemnation as well as act as a deterrent to the offender and to others. *Newsom v. State*, Sup. Ct. Op. No. 1136 (File No. 2189), 633 P.2d 904 (1975).

Sentence for rape upheld. — See *Gordon v. State*, Sup. Ct. Op. No. 431 (File No. 1535), 601 P.2d 772 (1972); *Torres v. State*, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974); *Newsom v. State*, Sup. Ct. Op. No. 1136 (File No. 2189), 633 P.2d 904 (1975); *Ames v. State*, Sup. Ct. Op. No. 1137 (File No. 2145), 533 P.2d 246, modified on rehearing, 537 P.2d 1116 (1975); *Coleman v. State*, Sup. Ct. Op. No. 1410 (File No. 2915), 562 P.2d 697 (1976); *Nukapigak v. State*, Sup. Ct. Op. No. 1288 (File No. 2331), 553 P.2d 40 (1977); *aff'd on rehearing*, 576 P.2d 982 (1978); *Bordewick v. State*, Sup. Ct. Op. No. 1500 (File No. 3341), 569 P.2d 184 (1977); *Morrill v. State*, Sup. Ct. Op. No. 1677 (File No. 3900), 575 P.2d 1200 (1978); *Alexander v. State*, Sup. Ct. Op. No. 1622 (File No. 3505), 579 P.2d 591 (1978); *State v. Wassilie*, Sup. Ct. Op. No. 1630 (File No. 3691), 578 P.2d 971 (1978); *State v. Jensen*, Ct. App. Op. No. 126 (File No. 5879), 650 P.2d 422 (1982).

Sentence for attempted rape upheld. — See *Shelton v. State*, Sup. Ct. Op. No. 2074 (File No. 3908), 611 P.2d 24 (1980) (decided under former AS 11.15.130).
Sentence for assault with intent to rape upheld. — See *Fomin v. State*, Sup. Ct. Op. No. 2233 (File No. 5013), 619 P.2d 718 (1980).

State, Sup. Ct. Op. No. 2077 (File No. 3522), 611 P.2d 469 (1980); *Cochrane v. State*, Sup. Ct. Op. No. 2086 (File No. 4531), 611 P.2d 61 (1980); *Heltmer v. State*, Sup. Ct. Op. No. 2181 (File No. 4383), 616 P.2d 884 (1980); *Tuckfield v. State*, Sup. Ct. Op. No. 2266 (File No. 4569), 621 P.2d 1350 (1981); *Edenshaw v. State*, Ct. App. Op. No. 005 (File No. 5239), 631 P.2d 506 (1981); *Kompkoff v. State*, Ct. App. Op. No. 015 (File No. 5324), 626 P.2d 1091 (1981); *Williams v. State*, Ct. App. Op. No. 139 (File No. 5676), 652 P.2d 478 (1982).

Sentence for rape held excessive. — See *Ahvik v. State*, Sup. Ct. Op. No. 2123 (File No. 4556), 613 P.2d 1252 (1980); *Hintz v. State*, Sup. Ct. Op. No. 2334 (File No. 3541), 627 P.2d 207 (1981); *Qualle v. State*, Ct. App. Op. No. 138 (File No. 5666), 652 P.2d 481 (1982).

Sentences of 15 years for rape of one victim; 10 years concurrent with the 15-year term for burglarizing her residence; 10 years for burglarizing another victim's residence; six months concurrent with the 10-year burglary term for assault on the second victim; 15 years for rape of a third victim; and 10 years concurrent with the 15-year sentence for burglarizing the third victim's residence, for a total of 40 years incarceration, was error. *Nix v. State*, Ct. App. Op. No. 157 (File No. 5481), 653 P.2d 1093 (1982).

Sentence for rape too lenient. — See *State v. Lancaster*, Sup. Ct. Op. No. 1247 (File No. 2571), 550 P.2d 1257 (1976); *State v. Wassilie*, Sup. Ct. Op. No. 1630 (File No. 3691), 578 P.2d 971 (1978); *State v. Jensen*, Ct. App. Op. No. 126 (File No. 5879), 650 P.2d 422 (1982).

Sentence for attempted rape upheld. — See *Shelton v. State*, Sup. Ct. Op. No. 2074 (File No. 3908), 611 P.2d 24 (1980) (decided under former AS 11.15.130).
Sentence for assault with intent to rape upheld. — See *Fomin v. State*, Sup. Ct. Op. No. 2233 (File No. 5013), 619 P.2d 718 (1980).

Sec. 11.41.420. Sexual assault in the second degree. (a) An offender commits the crime of sexual assault in the second degree if the offender engages in

(1) sexual contact with another person without consent of that person; or

(2) sexual penetration with a person who the offender knows

(A) is suffering from a mental disorder or defect which renders the person incapable of appraising the nature of the conduct under circumstances in which a person who is capable of appraising the nature of the

(B) is incapacitated.

(b) Sexual assault in the second degree is a class B felony. (§ 3 ch 166 SLA 1978, am § 1 ch 78 SLA 1983)

Effect of amendments. — The 1983 amendment rewrote subsection (a).

NOTES TO DECISIONS

For cases construing former crime of rape, see notes to AS 11.41.410.
Attempted sexual assault in the first degree and sexual assault in the second degree are closely related, since sexual penetration involves sexual contact and both offenses proceed on a theory of coerced assent. *Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).*

Constitutionality of conviction where original charge was under AS 11.41.410. — Where defendant was charged with attempted sexual assault in the first degree, he was thereby assumed to have notice that he might be convicted of second-degree sexual assault because of the similarities in the elements of the two offenses, and his conviction for the latter offense did not violate due process. *Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).*
Evidence. — Where victim woke up in the early morning hours to find defendant

in her bed and fondling her breast, and where she testified that she was temporarily in shock and afraid he would hurt her, a jur. could find that victim's momentary acquiescence in defendant's fondling her breast constituted second-degree sexual assault. *Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).*

Instructions. — The trial judge directed in refusing to instruct on the lesser included offense of attempted sexual contact in the second degree. *Johnson v. State, Ct. App. Op. No. 267 (File No. 6662), 665 P.2d 566 (1983).*
Sentence upheld. — Sentence of eight years with three years suspended for sexual assault in the second degree was not clearly mistaken. *Howard v. State, Ct. App. Op. No. 260 (File Nos. 6027, 6123), 664 P.2d 603 (1983).*

Child in Stores v. State, Sup. Ct. Op. No. 2252 (File No. 3595), 625 P.2d 820 (1980).

Sec. 11.41.430. [Repealed, § 10 ch 78 SLA 1983. For current law, see AS 11.41.420(a)(2).]

Sec. 11.41.434. Sexual abuse of a minor in the first degree. (a) An offender commits the crime of sexual abuse of a minor in the first degree if

- (1) being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person; or
- (2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age and who (A) is entrusted to the offender's care by authority of law; or (B) is the offender's son or daughter, including an illegitimate or adopted child, or a stepchild.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 2 ch 78 SLA 1983)

NOTES TO DECISIONS

Editor's notes. — The cases cited in the note below were decided under former AS 11.15.134 and former AS 11.41.410(a)(4).
For cases construing former rape statute, see AS 11.41.410, Notes to Decisions, analysis line II.

State's authority to control sexual conduct of children. — Although juveniles may have certain rights to sexual privacy, the state may nevertheless exercise control over the sexual conduct of children beyond the scope of its authority to control adults. *Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).*

Where juveniles have certain rights to privacy and to express their own autonomy, the state's interest in the well-being of its children may justify legislation that could not properly be applied to adults. *Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).*

As to constitutionality of former statute making lewd and lascivious acts toward children a crime, see *Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).*

Physical conduct punished under former statute. — See *Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977); Smiloff v. State, Sup. Ct. Op. No. 1637 (File No. 3006), 579 P.2d 28 (1978).*

Former section prohibited fellatio. — See *Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).*

Consent is not at issue. — The state may forbid an adult to have fellatio with a child under the statutory prescribed age regardless of whether the child consents to the act. *Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).*

Mitigating Factors. — In prosecution for first-degree sexual assault, defendant's familiarity with his victim (his 12-year-old daughter) was not a mitigating factor. *Hodges v. State, Ct. App. No. 233 (File No. 7330), 660 P.2d 1203 (1983).*

Sentence under former AS 11.15.134 upheld. — See *Noble v. State, Sup. Ct. Op. No. 1286 (File No. 2468), 552 P.2d 142 (1978); Buchanan v. State, Sup. Ct. Op.*

No. 1316 (File No. 2553), 554 P.2d 1163 (1976); *Morgan v. State, Sup. Ct. Op. No. 1908 (File No. 4187), 598 P.2d 957 (1979); Baker v. State, Sup. Ct. Op. No. 1968 (File No. 4631), 602 P.2d 797 (1979); Alvarado v. State, Sup. Ct. Op. No. 2323 (File No. 5133), 626 P.2d 582 (1981).*

Sentence for assault upheld. — In prosecution of defendant with no prior criminal record on two counts of first-degree sexual assault of his 12-year-old daughter, sentence of two consecutive eight-year terms with five years suspended was not excessive. *Hodges v. State, Ct. App. Op. No. 233 (File No. 7330), 660 P.2d 1203 (1983).*

In light of the substantial duration of defendant's sexual abuse of his stepdaughter (three years), his failure to learn from the earlier discovery of his prior offenses, his disregard of a court order that he avoid contact with the victim, and his total failure to take any meaningful step toward rehabilitation, 10-year sentence with four years suspended was not excessive for conviction of first-degree sexual assault. *Langton v. State, Ct. App. Op. No. 236 (File No. 7188, 6247, 7114), 662 P.2d 954 (1983).*

Sentence under AS 11.15.134 held excessive. — See *Qualle v. State, Ct. App. Op. No. 138 (File No. 5666), 652 P.2d 481 (1982).*

Sentence for assault held too lenient. — Sentence of 20 years imprisonment for first-degree sexual assault of two-year old child was excessive and case was remanded for resentencing not to exceed 120 years. *Langton v. State, Ct. App. Op. No. 236 (File Nos. 7188, 6247, 7114), 662 P.2d 954 (1983).*

Sentence for assault held too lenient. — Suspended five-year sentence for first-degree sexual assault of defendant's four-year old son was disproportionate to too lenient, with a 90-day to three-year sentence suggested. *Langton v. State, Ct. App. Op. No. 236 (File Nos. 7188, 6247, 7114), 662 P.2d 954 (1983).*

Applied in *Seymore v. State, Ct. App. Op. No. 196 (File No. 6995), 655 P.2d 786 (1982).*

Sec. 11.41.436. Sexual abuse of a minor in the second degree. (a) An offender commits the crime of sexual abuse of a minor in the second degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least three years younger than the offender, or aids, induces, causes or encourages a person who is 13, 14, or 15 years of age and at least three years younger than the offender to engage in sexual penetration with another person;

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age or aids, induces, causes, or encourages a person under 13 years of age to engage in sexual contact with another person;

(3) being 18 years of age or older, the offender engages in sexual contact with a person who is under 18 years of age and who

(A) is entrusted to the offender's care by authority of law; or

(B) is the offender's son or daughter, including an illegitimate or adopted child, or a stepchild; or

(4) being 16 years of age or older, the offender aids, induces, causes, or encourages a person who is under 16 years of age to engage in conduct described in AS 11.41.455(a)(2) — (6).

(b) Sexual abuse of a minor in the second degree is a class B felony. (§ 2 ch 78 SLA 1983)

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Sec. 11.41.438. Sexual abuse of a minor in the third degree. (a) An offender commits the crime of sexual abuse of a minor in the third degree if, being 16 years of age or older, the offender engages in sexual contact with a person who is 13, 14, or 15 years of age and at least three years younger than the offender.

(b) Sexual abuse of a minor in the third degree is a class C felony. (§ 2 ch 78 SLA 1983)

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Sec. 11.41.440. Sexual abuse of a minor in the fourth degree. (a) A person commits the crime of sexual abuse of a minor in the fourth degree if, being under 16 years of age, the offender engages in sexual penetration or sexual contact with a person who is under 13 years of age and at least three years younger than the offender.

(b) Sexual abuse of a minor in the fourth degree is a class A misdemeanor. (§ 3 ch 166 SLA 1978; am § 9 ch 102 SLA 1980; am § 3 ch 78 SLA 1983)

Effect of amendments. — The 1980 amendment rewrote subsection (a). The 1983 amendment rewrote this section.

Legislative history reports. — For a

report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, May 28, 1980.

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Applied in *Goulden v. State*, Ct. App. Op. No. 201 (File No. 6465), 656 P.2d 1218 (1983).

Cited in *Stores v. State*, Sup. Ct. Op. No. 2252 (File No. 3595), 625 P.2d 820 (1980); *Hodges v. State*, Ct. App. Op. No. 233 (File No. 7330), 660 P.2d 1203 (1983).

Collateral reference. — Civil liability for criminal knowledge with actual consent of girl under age of consent, 45 ALR 780; 79 ALR 1229.

Assault with intent to ravish or rape consenting female under age of consent, 81 ALR 599.
Parent or person in loco parentis, liability for rape of minor child, 19 ALR2d 460.
Assault with intent to commit unnatural sex act upon minor as affected by latter's consent, 65 ALR2d 748.
Applicability of rape statute covering children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 ALR2d 874.

Sec. 11.41.445. General provisions. (a) In a prosecution under AS 11.41.410 — 11.41.440 it is an affirmative defense that, at the time of the alleged offense, the victim was the legal spouse of the defendant unless

(1) the spouses were living apart; or

(2) the defendant caused physical injury to the victim.

(b) In a prosecution under AS 11.41.410 — 11.41.440, whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant reasonably believed the victim to be that age or older, unless the victim was under 13 years of age at the time of the alleged offense. (§ 3 ch 166 SLA 1978)

Sec. 11.41.450. Incest. (a) A person commits the crime of incest if, being 18 years of age or older, that person engages in sexual penetration with another who is related, either legitimately or illegitimately, as

(1) an ancestor or descendant of the whole or half blood;

(2) a brother or sister of the whole or half blood; or

(3) an uncle, aunt, nephew, or niece by blood.

(b) Incest is a class C felony. (§ 3 ch 166 SLA 1978)

NOTES TO DECISIONS

Death of defendant abated prosecution under former section. *Hartwell v. State*, Sup. Ct. Op. No. 391 (File No. 704), 423 P.2d 282 (1967), decided under former AS 11.40.110.

Collateral references. — Aiding and abetting offense of incest by one not related to party. 5 ALR 784; 74 ALR 1110; 131 ALR 1322.
Relationship created by adoption as within statute regarding incest. 151 ALR 1146.
Consent as element of incest. 36 ALR2d 1299.

Sexual intercourse between persons related by half blood. 72 ALR2d 706.
Prosecutrix as accomplice or victim. 74 ALR2d 705.
Rape, incest as included within chapter of. 76 ALR2d 484.

Sec. 11.41.455. Unlawful exploitation of a minor. (a) A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct listed in (1) — (6) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:

- (1) sexual penetration;
 - (2) the lewd touching of another person's genitals, anus, or breast;
 - (3) the lewd touching by another person of the child's genitals, anus, or breast;
 - (4) masturbation;
 - (5) bestiality; or
 - (6) the lewd exhibition of the child's genitals.
- (b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is intended to be used in producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct.
- (c) Unlawful exploitation of a minor is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 57 SLA 1983)

Cross references. — For crime of distribution of child pornography, see AS 11.61.125.
Effect of amendments. — The 1983 amendment, in subsection (a), substituted "magazine, or other printed material that visually depicts the conduct listed in (1) — (6) of this subsection, the person" for "or

magazine that depicts such conduct, the person," substituted "18 years" for "16 years" in two places, and added "the following actual or simulated conduct" to the end, all in the introductory paragraph; substituted "lewd" for "obscene" in paragraphs (2), (3) and (6); and deleted "female" preceding "breast" in paragraph

(3) The amendment also redesignated former subsection (b) as subsection (c) and added present subsection (b).

NOTES TO DECISIONS

Applied in *Qualle v. State*, Ct. App. Op. No. 138 (File No. 5666), 652 P.2d 481 (1982).

Sec. 11.41.460. Indecent exposure. (a) An offender commits the crime of indecent exposure if the offender intentionally exposes the offender's genitals to another person with reckless disregard for the offensive, insulting, or frightening effect the act may have on that person.

(b) Indecent exposure before a person under 16 years of age is a class A misdemeanor. Indecent exposure before a person 16 years of age or older is a class B misdemeanor. (§ 4 ch 78 SLA 1983)

Sec. 11.41.470. Definitions. For purposes of AS 11.41.410 — 11.41.470, unless the context requires otherwise,

- (1) "incapacitated" means temporarily incapable of appraising the nature of one's own conduct and physically unable to express unwillingness to act;
- (2) "victim" means the person alleged to have been subjected to sexual assault in any degree or sexual abuse of a minor in any degree;
- (3) "without consent" means that a person (A) with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone; or (B) is incapacitated as a result of an act of the defendant. (§ 3 ch 166 SLA 1978; am § 5 ch 78 SLA 1983)

Cross references. — For definition of terms used in this title, see AS 11.81.900.
Effect of amendments. — The 1983 amendment deleted "imminent" preceding "death" and substituted "one's own conduct and" for "his conduct and is" in paragraph (1) and deleted "imminent" preceding "death" and substituted "kidnapping" in paragraph preceding "temporarily incapable" and (3)(A).

NOTES TO DECISIONS

Applied in *Nicholson v. State*, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982); *Juneby v. State*, Ct. App. Op. No. 259 (File No. 5606), 665 P.2d 30 (1983); *Reynolds v. State*, Ct. App. Op. No. 262 (File No. 6890), P.2d (1983).
Quoted in *Woods v. State*, Sup. Ct. Op. No. 2698 (File No. 6180), P.2d (1983).
Cited in *Hartley v. State*, Ct. App. Op. No. 157 (File No. 5737), 653 P.2d 1052 (1982).

Chapter 50. Syndicalism.

(Repealed, § 21, ch. 166, SLA 1978. For Law on terrorististic threatening, see AS 11.56.810.)

Chapter 51. Offenses Against the Family.

Section	Section
100. Endangering the welfare of a minor	130. Contributing to the delinquency of a minor
120. Criminal nonsupport	140. Unlawful marrying
125. Failure to permit visitation with a minor	

Collateral references. — 10 Am. Jur. 2d, Bigamy, § 1 et seq.; 42 Am. Jur. 2d, Infants, §§ 16, 17, 55, 65-74; 37 Am. Jur. 2d, Juvenile Courts, Etc., §§ 63-70; 59 Am. Jur. 2d, Parent and Child, §§ 45, 50-67.

10 C.J.S., Bigamy, § 1 et seq.; 43 C.J.S., Infants, §§ 10, 24, 98; 67 C.J.S., Parent and Child, §§ 41, 165-178.

Sec. 11.51.100. Endangering the welfare of a minor. (a) A person commits the crime of endangering the welfare of a minor if, being a parent, guardian, or other person legally charged with the care of a child under 10 years of age, the person intentionally deserts the child in any place under circumstances creating a substantial risk of physical injury to the child.

(b) Endangering the welfare of a minor is a class C felony. (§ 5 ch 166 SLA 1978)

Collateral references. — Liability of parent for injury to unemancipated child caused by parent's negligence — in which cases, 6 ALR4th 1066.

Sec. 11.51.120. Criminal nonsupport. (a) A person commits the crime of criminal nonsupport if, being a person legally charged with the support of a child under 18 years of age, the person fails without lawful excuse to provide support for the child.

(b) As used in this section "support" includes necessary food, care, clothing, shelter, medical attention, and education. There is no failure to provide medical attention to a child if the child is provided treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination.

(c) Criminal nonsupport is a class A misdemeanor. (§ 5 ch 166 SLA 1978)

NOTES TO DECISIONS

Editor's notes. — The cases cited in the notes below were decided under former AS 11.35.010, 11.35.030 and 11.35.100.

A father has a primary and continuing obligation to support his children. *Johansen v. State, Sup. Ct. Op. No. 746* (File No. 1309), 491 P.2d 759 (1971).

And the inability of a father to engage in his chosen trade may not excuse him from that obligation. *Johansen v. State, Sup. Ct. Op. No. 746* (File No. 1309), 491 P.2d 759 (1971).

There is no room for professional or occupational pride where the duty of child support is involved. *Johansen v. State, Sup. Ct. Op. No. 746* (File No. 1309), 491 P.2d 759 (1971).

Former section included person's postdivorce obligation to support. — See *Johansen v. State, Sup. Ct. Op. No. 746* (File No. 1309), 491 P.2d 759 (1971).

Applicability of former statute to putative fathers of illegitimate children. — See *S.L.W. v. Alaska Work. Comp. Bd., Sup. Ct. Op. No. 736* (File No. 1333), 490 P.2d 42 (1971).

The purpose of contempt proceedings for nonpayment of child support decrees is to coerce the defendant to pay money. It is not to punish him for his past failure to pay. *Johansen v. State, Sup. Ct. Op. No. 746* (File No. 1309), 491 P.2d 759 (1971).

Alaska statutes classify indirect contempt for nonsupport as a crime. *Johansen v. State, Sup. Ct. Op. No. 746* (File No. 1309), 491 P.2d 759 (1971).

And a jury trial is available. *Johansen v. State, Sup. Ct. Op. No. 746* (File No. 1309), 491 P.2d 759 (1971).

If the defendant asserts that he lacks the ability to comply with the court's order of child support, then he is entitled to a jury trial on this issue. *Johansen v. State, Sup. Ct. Op. No. 746* (File No. 1309), 491 P.2d 759 (1971).

Procedural aspects of contempt proceedings in nonsupport cases. — For delineation of the procedural aspects of contempt proceedings in nonsupport cases where the purpose is to coerce the defendant's performance of his obligation, see *Johansen v. State, Sup. Ct. Op. No. 746* (File No. 1309), 491 P.2d 759 (1971).

Changes of venue in nonsupport contempt cases. — It can be expected that courts hearing nonsupport contempt cases in the future may choose in some

cases to make use of the discretionary authority vested in them by AS 22.10.030 and will grant changes of venue. *Johansen v. State, Sup. Ct. Op. No. 746* (File No. 1309), 491 P.2d 759 (1971).

Inability to comply with a child support order is an affirmative defense. *Johansen v. State, Sup. Ct. Op. No. 746* (File No. 1309), 491 P.2d 759 (1971).

In a contempt action the father will not be permitted to succeed on the defense of having a legitimate reason or excuse for not complying with an order of child support where he has not made a reasonable effort to employ his earning capacity in directions other than the one he has chosen as his chief means of livelihood. *Johansen v. State, Sup. Ct. Op. No. 746* (File No. 1309), 491 P.2d 759 (1971).

Burden of proving noncompliance with court order of child support. — At a contempt trial, the burden of proving noncompliance, by a preponderance of the evidence, with the court's order of child support should be on the plaintiff, who initiates the action. *Johansen v. State, Sup. Ct. Op. No. 746* (File No. 1309), 491 P.2d 759 (1971).

Defendant must prove his inability to comply with a court order of child support. *Johansen v. State, Sup. Ct. Op. No. 746* (File No. 1309), 491 P.2d 759 (1971).

In almost all child support contempt cases, the crucial issue will concern the defendant's ability to comply. The burden of proof in this respect should remain with the defendant. This is where it presently rests, in this state and in other jurisdictions; such allocation of the burden of proof is appropriate. *Johansen v. State, Sup. Ct. Op. No. 746* (File No. 1309), 491 P.2d 759 (1971).

The shifting of the burden of proof entails a partial change of the ordinary standard employed in criminal cases. But this is still advantageous to both parties. The defendant's protection increases as the burden of proof is shifted. He needs only to show by a preponderance of the evidence that he is unable to pay. Once he has met this burden, incarceration, as a coercive method, serves no useful purpose. At the same time the interest of the complainants, in receiving money which defendant is able to pay, is protected under this approach. *Johansen v. State, Sup. Ct. Op. No. 746* (File No. 1309), 491 P.2d 759 (1971).

(6) the person recklessly creates a hazardous condition for others by an act which has no legal justification or excuse; or
 (7) the offender intentionally exposes the offender's buttock or anus to another with reckless disregard for the offensive or insulting effect the act may have on that person.

(b) As used in this section, "noise" is "unreasonably loud" if, considering the nature and purpose of the defendant's conduct and the circumstances known to the defendant, including the nature of the location and the time of day or night, the conduct involves a gross deviation from the standard of conduct that a reasonable person would follow in the same situation. "Noise" does not include speech that is constitutionally protected.

(c) Disorderly conduct is a class B misdemeanor and is punishable as authorized in AS 12.55 except that a sentence of imprisonment, if imposed, shall be for a definite term of not more than 10 days. (§ 7 ch 166 SLA 1978; am § 6 ch 78 SLA 1983)

Effect of amendments. — The 1983 amendment, in paragraph (a)(7), removed personal pronouns and substituted

"buttock or anus" for "genitals, butt, anus, or female breast."

NOTES TO DECISIONS

Editor's notes. — The cases cited in the notes below were decided under former AS 11.40.080 and 11.45.030.
Constitutionality of former disorderly conduct statute. — See *Poole v. State*, Sup. Ct. Op. No. 1060 (File No. 2104), 524 P.2d 286 (1974); *State v. Martin*, Sup. Ct. Op. No. 1122 (File No. 2143), 532 P.2d 316 (1975).
Disorderly conduct statute cannot be applied to behavior which is constitutionally exempt from criminal prohibition. *Anniskette v. State*, Sup. Ct. Op. No. 732 (File No. 1231), 489 P.2d 1012 (1971).

Policemen presumed least likely to be provoked. — Insofar as the theory of disorderly conduct rests on the tendency of the actor's behavior to provoke violence in others, one must suppose that policemen, employed and trained to maintain order, would be least likely to be provoked to disorderly responses. *Anniskette v. State*, Sup. Ct. Op. No. 732 (File No. 1231), 489 P.2d 1012 (1971).

It is only in the most limited circumstances that speech may be punished. *Anniskette v. State*, Sup. Ct. Op. No. 732

Collateral references. — 112 Am. Jur. 2d, *Breach of Peace*, Etc., §§ 18-40.
 11 C.J.S., *Breach of the Peace*, §§ 1-16.
Failure or refusal to obey police officer's order to move on, on street, as disorderly conduct. 65 ALR2d 1152.
Misuse of telephones as disorderly conduct. 97 ALR2d 504.

Vagueness as invalidating statutes or ordinances dealing with disorderly persons or conduct. 12 ALR3d 1448.
Larceny as within disorderly conduct statute or ordinance. 71 ALR3d 1156.

Sec. 11.61.120. Harassment. (a) A person commits the crime of harassment if, with intent to harass or annoy another person, that person

- (1) insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response;
- (2) telephones another and fails to terminate the connection with intent to impair the ability of that person to place or receive telephone calls;
- (3) makes repeated telephone calls at extremely inconvenient hours;
- (4) makes an anonymous or obscene telephone call or a telephone call that threatens physical injury;
- (5) subjects another person to offensive physical contact; or
- (6) violates a provision of an order issued under AS 25.35.010(b) or 25.35.020 restraining the respondent from communicating directly or indirectly with the petitioner.

(b) Harassment is a class B misdemeanor. (§ 7 ch 166 SLA 1978; am § 10 ch 61 SLA 1982)

Cross references. — For provisions authorizing arrest without warrant in certain cases where the police officer has reasonable cause to believe that the person has committed a crime under this section, see AS 12.25.030(b).
Effect of amendments. — The 1982 amendment added paragraph (6) to subsection (a).

NOTES TO DECISIONS

For case construing former AS 11.45.035 relating to illegal use of telephones. see *Anniskette v. State*, Sup. Ct. Op. No. 732 (File No. 1231), 489 P.2d 1012 (1971).

Collateral references. — Misuse of telephones as disorderly conduct, 97 ALR2d 504.
Validity, construction, and application

of state criminal statute forbidding use of telephone to annoy or harass, 95 ALR3d 411.

(Sec. 11.61.125, Distribution of child pornography.) A person commits the crime of distribution of child pornography if the person brings or causes to be brought into the state for sale or distribution, or

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in the state possesses, prepares, publishes, or prints with intent to distribute, sell, or exhibit to others for commercial consideration, any material that visually depicts conduct described under AS 11.41.455(a), knowing that the production of the material involved the use of a child under 18 years of age who engaged in the conduct.

(b) This section does not apply to acts that are an integral part of the exhibition or performance of a motion picture if the acts are performed within the scope of employment by a motion picture operator or projectionist employed by the owner or manager of a theater or other place for the showing of motion pictures, unless the motion picture operator or projectionist

- (1) has a financial interest in the theater or place in which employed; or
- (2) causes the performance or motion picture to be performed or exhibited without the consent of the manager or owner of the theater or other place of showing;
- (c) Distribution of child pornography is a class C felony. (§ 2 ch 57 SLA 1983)

Cross references. — For crime of unlawful exploitation of a minor, see AS 11.41.455.

Sec. 11.61.130. Misconduct involving a corpse. (a) A person commits the crime of misconduct involving a corpse if

- (1) except as authorized by law or in an emergency, the person intentionally disinters, removes, conceals, or mutilates a corpse;
 - (2) the person engages in sexual penetration of a corpse; or
 - (3) the person detains a corpse for a debt or demand or upon a lien or charge.
- (b) Misconduct involving a corpse is a class A misdemeanor. (§ 7 ch 166 SLA 1978)

Cross references. — 22 Am. Jur. 2d, Dead Bodies, §§ 47-50.

25A C.J.S., Dead Bodies, §§ 8(2)-8(4).

Action at law for desecration of grave, 172 ALR 554.

Immunity from liability for unlawful treatment of dead body in operation of hospital by state or governmental unit or agency, 25 ALR2d 244.

Liability in damages for withholding corpse from relatives, 48 ALR3d 240.

Validity, construction, and application of statutes making it a criminal offense to mistreat or wrongfully dispose of dead body, 81 ALR3d 1071.

Sec. 11.61.140. Cruelty to animals. (a) A person commits the crime of cruelty to animals if the person

- (1) intentionally inflicts severe and prolonged physical pain or suffering on an animal;
- (2) recklessly neglects an animal and, as a result of that neglect, causes the death of the animal or causes severe pain or suffering to the animal; or

(3) kills an animal by the use of a decompression chamber.

(b) It is a defense to a prosecution under (a)(1) or (2) of this section that the conduct of the defendant

- (1) conformed to accepted veterinary practice;
 - (2) was part of scientific research governed by accepted standards; or
 - (3) was necessarily incident to lawful hunting or trapping activities.
- (c) In this section, "animal" means a vertebrate living creature not a human being, but does not include fish.

(d) Cruelty to animals is a class A misdemeanor. (§ 7 ch 166 SLA 1978; am § 1 ch 78 SLA 1980; am § 20 ch 59 SLA 1982)

Effect of amendments. — The 1980 amendment rewrote the section. — The 1980 Collateral references. — 4 Am. Jur.

The 1982 amendment inserted "(a)(1) or (a)(2) of" in the introductory language of subsection (b).

3A C.J.S., Animals, §§ 99-112.

Cruelty in trapping animals, 79 ALR

Editor's notes. — The provisions of 1308.

paragraphs (1) and (3) of subsection (a) as it existed prior to the 1980 amendment

cruelty, 82 ALR2d 794.

Sec. 11.61.145. Promoting an exhibition of fighting animals. (a) A person commits the crime of promoting an exhibition of fighting animals if the person

- (1) owns, possesses, keeps, or trains an animal with intent that it be engaged in an exhibition of fighting animals;
- (2) instigates, promotes, or has a pecuniary interest in an exhibition of fighting animals; or
- (3) attends an exhibition of fighting animals.

(b) The animals, equipment, vehicles, money, and other personal property used by a person in a violation of (a)(1) or (2) of this section shall be forfeited to the state if the person is convicted of an offense under this section.

(c) In this section, "animal" means a vertebrate living creature not a human being, but does not include fish.

(d) Promoting an exhibition of fighting animals

- (1) under (a)(1) or (2) of this section is a class C felony;
- (2) under (a)(3) of this section is a violation for the first offense and a class B misdemeanor for the second and each subsequent offense. (§ 2 ch 78 SLA 1980)

Sec. 11.61.150. Obstruction of highways. (a) A person commits the crime of obstruction of highways if the person knowingly

- (1) places, drops, or permits to drop on a highway any substance that creates a substantial risk of physical injury to others using the highway; or
- (2) renders a highway impassable or passable only with unreasonable inconvenience or hazard.

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§ 11.65.030

- (b) Criminal possession of explosives is a
- (1) class A felony if the crime intended is murder in any degree or kidnapping;
- (2) class B felony if the crime intended is a class A felony;
- (3) class C felony if the crime intended is a class B felony;
- (4) class A misdemeanor if the crime intended is a class C felony;
- (5) class B misdemeanor if the crime intended is a class A or class B misdemeanor. (§ 7 ch 166 SLA 1978)

Collateral references. — 31 Am. Jur. Possession of bomb, molotov cocktail, or
 2d, Explosions and Explosives, similar device as criminal offense, 42
 §§ 121-130. ALR3d 1230.
 35 C.J.S., Explosives, § 12.

Sec. 11.61.250. Unlawful furnishing of explosives. (a) A person commits the crime of unlawful furnishing of explosives if the person furnishes an explosive substance or device to another knowing that the other intends to use the substance or device to commit a crime.
 (b) Unlawful furnishing of explosives is a class C felony. (§ 7 ch 166 SLA 1978)

Chapter 65. Offenses Against Public Convenience.

Secs. 11.65.010 — 11.65.020. [Renumbered as AS 30.50.020 and 30.50.010.]

Sec. 11.65.030. Tampering with posted notices. [Repealed, § 21, ch. 166, SLA 1978.]

Chapter 66. Offenses Against Public Health and Decency.

- Article
- 1. Prostitution and Related Offenses (§§ 11.66.100 — 11.66.150)
- 2. Gambling Offenses (§§ 11.66.200 — 11.66.280)

Article 1. Prostitution and Related Offenses.

Section	Section
100. Prostitution	130. Promoting prostitution in the third degree
110. Promoting prostitution in the first degree	140. Corroboration of certain testimony not required
120. Promoting prostitution in the second degree	150. Definitions

§ 11.66.100

CRIMINAL LAW

§ 11.66.110

NOTES TO DECISIONS

Municipal ordinances not prohibited. — The enactment of this article does not prohibit municipal ordinances penalizing the solicitation of prostitutes by putative customers. Municipality of Anchorage v. Afualo, Ct. App. Op. No. 213 (File Nos. 7094, 7095), 657 P.2d 407 (1983).

There is nothing in this article which

would support an inference that the legislature sought to encourage men to patronize prostitutes nor is there any indication in this article that the legislature sought statewide uniformity in regulating commercial sexual relations. Municipality of Anchorage v. Afualo, Ct. App. Op. No. 213 (File Nos. 7094, 7095), 657 P.2d 407 (1983).

Collateral references. — 63 Am. Jur. 2d, Prostitution, § 1 et seq.
 27 C.J.S., Disorderly Houses, § 1 et seq.;
 73 C.J.S., Prostitution, § 1 et seq.
 Constitutionality and construction of pandering acts, 74 ALR 311.

Validity and construction of statute or ordinance proscribing solicitation for purposes of prostitution, lewdness, or assignment — modern cases, 77 ALR3d 519.

Sec. 11.66.100. Prostitution. (a) A person commits the crime of prostitution if the person engages in or agrees or offers to engage in sexual conduct in return for a fee.
 (b) Prostitution is a class B misdemeanor. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

Common law. — The keeping of a bordello was a misdemeanor at common law, whereas fornication and prostitution were not. Eleazar v. United States, 16 Alaska 561, 241 P.2d 385 (9th Cir. 1956), decided under former AS 11.40.220.

This section is not irreconcilable with a municipal ordinance prohibiting the solicitation of prostitutes by putative customers. Municipality of Anchorage v. Afualo, Ct. App. Op. No. 213 (File Nos. 7094, 7095), 657 P.2d 407 (1983).
 Actual payment of a fee is not required; an act of prostitution is com-

plete when an offer is extended or an agreement made to engage in sexual conduct in return for a fee. Garibay v. State, Ct. App. Op. No. 221 (File No. 6246), 658 P.2d 1350 (1983).

Proof. — Customer's testimony that he agreed to purchase sexual favors for sum of \$200, his testimony that he charged the purchase price using his VISA card, and the VISA charge slip itself, were all highly probative of whether an agreement or offer to engage in sexual conduct in return for a fee was in fact made. Garibay v. State, Ct. App. Op. No. 221 (File No. 6246), 658 P.2d 1350 (1983).

Collateral references. — Prostitution as vagrancy, 14 ALR 1591.
 Entrapment to procure women for immoral purposes, 18 ALR 186; 66 ALR 478; 86 ALR 263.

Sec. 11.66.110. Promoting prostitution in the first degree. (a) A person commits the crime of promoting prostitution in the first degree if the person

- (1) induces or causes a person to engage in prostitution through the use of force;
- (2) as other than a patron of a prostitute, induces or causes a person under 16 years of age to engage in prostitution; or
- (3) induces or causes a person in that person's legal custody to engage in prostitution.
- (b) In a prosecution under (a)(2) of this section, it is not a defense that the defendant reasonably believed that the person induced or caused to engage in prostitution was 16 years of age or older.
- (c) Except as provided in (d) of this section, promoting prostitution in the first degree is a class B felony.
- (d) A person convicted under (a)(2) of this section is guilty of a class A felony. (§ 8 ch 166 SLA 1978; am §§ 1, 2 ch 50 SLA 1983)

Effect of amendments. — The 1983 (d) of this section to the beginning of subsection (c) and added subsection (d).

NOTES TO DECISIONS

For case construing former statute prohibiting importing or exporting females for immoral purposes, see State v. Adkerson, Sup. Ct. Op. No. 294 (File No. 520), 403 P.2d 673 (1965).

For case construing former procurement statute, see Johnson v. State, Sup. Ct. Op. No. 832 (File No. 1338), 501 P.2d 762 (1972).

Sentence for procurement upheld. — See Price v. State, Sup. Ct. Op. No. 1450 (File No. 2794), 565 P.2d 868 (1977).

For case construing former statute concerning necessary evidence for prostitution or seduction, see Johnson v. State, Sup. Ct. Op. No. 832 (File No. 1338), 501 P.2d 762 (1972).

Collateral references. — Transporting female for purpose of prostitution, 74 ALR 330. Woman conniving or consenting to own transportation, 84 ALR 376.

Sec. 11.66.120. Promoting prostitution in the second degree. (a) A person commits the crime of promoting prostitution in the second degree if the person

- (1) manages, supervises, controls, or owns, either alone or in association with others, a prostitution enterprise other than a place of prostitution; or
- (2) procures or solicits a patron for a prostitute.
- (b) Promoting prostitution in the second degree is a class C felony. (§ 8 ch. 166 SLA 1978)

NOTES TO DECISIONS

For case construing former statute prohibiting soliciting or procuring for purpose of prostitution, see Plas v. State, Sup. Ct. Op. No. 1904 (File Nos. 3529, 3530), 598 P.2d 966 (1979).

Instruction. — Trial court did not err in

refusing to give instruction requiring state to prove that prostitution enterprise involved in case was of an ongoing nature. Garibay v. State, Ct. App. Op. No. 221 (File No. 6246), 658 P.2d 1350 (1983).

Collateral references. — Separate acts of taking earnings of or support from prostitution, 3 ALR 1195.

Sec. 11.66.130. Promoting prostitution in the third degree. (a) A person commits the crime of promoting prostitution in the third degree if, with intent to promote prostitution, the person

- (1) manages, supervises, controls, or owns, either alone or in association with others, a place of prostitution;
- (2) as other than a patron of a prostitute, induces or causes a person 16 years of age or older to engage in prostitution;
- (3) as other than a prostitute receiving compensation for personally rendered prostitution services, receives or agrees to receive money or other property pursuant to an agreement or understanding that the money or other property is derived from prostitution; or
- (4) engages in conduct that institutes, aids, or facilitates a prostitution enterprise.
- (b) Promoting prostitution in the third degree is a class A misdemeanor. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

Editor's notes. — The cases cited in the notes below were decided under former AS 11.40.260, 11.40.300, 11.40.330, 11.40.410, and 11.40.420.

Common law. — The keeping of a bawdyhouse was a misdemeanor at common law. Eleazar v. United States, 16 Alaska 661, 241 F.2d 385 (9th Cir. 1956).

Lessor may be guilty as keeper. — If a man leases his house to a woman to be kept as a bawdyhouse for purposes of prostitution, and it is kept for such purposes, with his knowledge, he is guilty as keeper. Rosencranz v. United States, 155 F. 38 (9th Cir. 1907).

As well as agent of lessor. — The agent of an owner who rents a house knowing that it is to be used as a house of prostitution, and that it is so used, may be found guilty as a keeper. Rosencranz v.

United States, 155 F. 38 (9th Cir. 1907).
For case construing former statute prohibiting employment in a house of prostitution or living on the earnings of a prostitute, see Johnson v. State, Sup. Ct. Op. No. 832 (File No. 1338), 501 P.2d 762 (1972).

For case construing former statute prohibiting importing or exporting females for immoral purposes, see State v. Adkerson, Sup. Ct. Op. No. 294 (File No. 520), 403 P.2d 673 (1965).

For case construing former statute prohibiting pimping, see Johnson v. United States, 260 F. 783 (9th Cir. 1919).

For case construing former statute prohibiting a male's living with or on the earnings of a prostitute, see Dunn v. State, Sup. Ct. Op. No. 409 (File No. 735), 426 P.2d 993 (1967).

Sec. 12.05.010. Crime commenced outside state but consummated inside. When the commission of a crime commenced outside the state is consummated inside the state, the defendant is liable to punishment in this state even though out of the state at the time of the commission of the crime charged, if the defendant consummated the crime through the intervention of an innocent or guilty agent, or by other means proceeding directly from the defendant. (§ 1.06 ch 34 SLA 1962)

Legislative history reports. — For report on original bill, see 1962 House Journal, pp. 224-231.

Collateral references. — 21 Am. Jur. 2d, Criminal Law, § 386.

Chapter 10. Limitations of Actions.

Section

- 10. General time limitations
- 20. Specific time limitation
- 30. When period of limitation runs
- 40. When period of limitation does not run

Sec. 12.10.010. General time limitations. A prosecution for murder may be commenced at any time. Except as otherwise provided by law, no person shall be prosecuted, tried, or punished for any offense, not murder, unless the indictment is found or the information or complaint is instituted within five years next after such offense shall have been committed. (§ 1.02 ch 34 SLA 1962; am § 1 ch 99 SLA 1962)

Cross references. — For limitations on prosecutions under the election laws, see AS 15.13.120(e) and AS 15.56.130.

NOTES TO DECISIONS

The statute of limitations is jurisdictional. *Padie v. State*, Sup. Ct. Op. No. 1359 (File No. 3113), 557 P.2d 1138 (1976), aff'd on other grounds, Sup. Ct. Op. No. 1465, 566 P.2d 1024 (1977).

It is to be construed in favor of the defendant. *Padie v. State*, Sup. Ct. Op. No. 1359 (File No. 3113), 557 P.2d 1138 (1976), aff'd on other grounds, Sup. Ct. Op. No. 1465, 566 P.2d 1024 (1977).

Statute of limitations for manslaughter. — While there is no statute of limitations in Alaska for the offense of murder, the crime of manslaughter is subject to a five-year statute of limitations. *Padie v. State*, Sup. Ct. Op. No. 1843 (File No. 3564), 594 P.2d 50 (1979).

Defendant may not be convicted of time-barred lesser included offense. — Just as a defendant may not be charged with a time-barred offense, he may not be convicted of it, even as a lesser offense

mitigating effects of passion and provocation, requiring the jury to acquit him if he presented such evidence in mitigation and the state did not negate it. *Padie v. State*, Sup. Ct. Op. No. 1359 (File No. 3113), 557 P.2d 1138 (1976), aff'd on other grounds, Sup. Ct. Op. No. 1465, 566 P.2d 1024 (1977).

A statute of limitations can be waived if the trial court determines that the following prerequisites have been met: (1) The waiver is knowing, intelligent, and voluntary; (2) it is made for the defendant's benefit and after consultation with counsel; and (3) the defendant's waiver does not handicap his defense or contravene any other public policy reasons motivating the enactment of the statute. *Padie v. State*, Sup. Ct. Op. No. 1843 (File No. 3564), 594 P.2d 50 (1979).

Since defendant's waiver of the relevant statute of limitations was knowingly, intelligently, and voluntarily entered; it was made for defendant's benefit and after consultation with counsel; and defendant's waiver did not contravene any of the policy reasons underlying criminal statutes of limitations, the superior court possessed jurisdiction to accept defendant's plea of nolo contendere to the charge of manslaughter after the statute of limitations had run. *Padie v. State*, Sup. Ct. Op. No. 1843 (File No. 3564), 594 P.2d 50 (1979).

Collateral references. — 21 Am. Jur. 2d, Criminal Law, § 223 et seq.
22 C.J.S., Criminal Law, § 223 et seq.

Sec. 12.10.020. Specific time limitation. (a) Even if the general time limitation has expired, a prosecution for any offense which includes a material element of fraud or breach of fiduciary obligation may be commenced within one year after the discovery of the offense by an aggrieved party or by a person who has legal capacity to represent an aggrieved party or a legal duty to report the offense and who is not a party to the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years.

(1) Even if the general time limitation has expired, a prosecution for any offense based upon misconduct in office by a public officer or employee may be commenced within one year after discovery of the offense by a person having a duty to report such offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years.

Case-by-case analysis as to waivability issue. — Although most courts have treated the waivability issue as dependent on whether a statute is treated as jurisdictional or as an affirmative defense, this arbitrary distinction should be abandoned in favor of a case-by-case analysis focusing on the language of the applicable statute of limitations and the public policies behind its enactment. *Padie v. State*, Sup. Ct. Op. No. 1843 (File No. 3564), 594 P.2d 50 (1979).

By seeking an instruction on an offense which is time-barred, defendant does not waive the defense of this section. *Padie v. State*, Sup. Ct. Op. No. 1359 (File No. 3113), 557 P.2d 1138 (1976), aff'd on other grounds, Sup. Ct. Op. No. 1465, 566 P.2d 1024 (1977).

Applied in *Coffey v. State*, Sup. Ct. Op. No. 1732 (File No. 3002), 685 P.2d 514 (1978).

Stated in *Yarbor v. State*, Sup. Ct. Op. No. 1240 (File No. 2397), 546 P.2d 564 (1976); *State v. Brinkley*, Ct. App. Op. No. 361 (File No. A-164), P.2d (1984).

Cited in *Marks v. State*, Sup. Ct. Op. No. 787 (File No. 1414), 496 P.2d 66 (1972); *In re P.H.*, Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

(c) Even if the general time limitation has expired, a prosecution under AS 11.41.410 — 11.41.460 for an offense committed against a person under the age of 16 may be commenced within one year after the crime is reported to a peace officer or the person reaches the age of 16, whichever occurs first. This subsection does not extend the period of limitation by more than five years. (§ 1.03 ch 34 SLA 1962; am § 7.7h 78 SLA 1983)

Cross references. — For applicability of (c) of this section, see § 11, ch. 78, SLA 1983, in the Temporary and Special Acts. Effect of amendments. — The 1983 amendment added subsection (c).

Stated in State v. Brinkley, Ct. App. Op. No. 361 (File No. A-164), P.2d (1984).

Sec. 12.10.030. When period of limitation runs. (a) An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed.

(b) A prosecution is commenced either when an indictment is found or when a warrant is issued, provided that such warrant is executed without unreasonable delay. (§ 1.04 ch 34 SLA 1962)

NOTES TO DECISIONS

Warrant requirements. — Subsection (b) and AS 12.10.040(b) do not require that a warrant be based on an indictment, information, or other charging document before the statute of limitations is tolled by its issuance. *Shaw v. State, Ct. App. Op. No. 50 (File No. 5311), 634 P.2d 381 (1981).*

Reasonable delay found. — Where defendant did not appear for sentencing on felony convictions and the trial court issued a bench warrant for his failure to appear, yet not until six years, 10 months, and four days later was defendant indicted for his failure to appear, the issuance of the warrant constituted a pending prosecution under AS 12.10.040(b) which, when combined with the finding of the trial court that under subsection (b) there was a reasonable basis for delay in executing the warrant to toll the statute of limitations, was sufficient to bring prosecution of the offense within the five-year period allowed by the statute of limitations. *Shaw v. State, Ct. App. Op. No. 50 (File No. 5311), 634 P.2d 381 (1981).*

Collateral references. — 21 Am. Jur. 2d, Criminal Law, § 157.

Sec. 12.10.040. When period of limitation does not run. (a) The period of limitation does not run during any time when the accused, with a purpose to avoid detection, apprehension, or prosecution, is outside the state or is absent from the accused's usual place of abode within the state, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years.

(b) The period of limitation does not run during any time when a prosecution against the accused for the same conduct is pending in this state. (§ 1.05 ch 34 SLA 1962)

NOTES TO DECISIONS

Warrant requirements. — AS 12.10.030(b) and subsection (b) do not require that a warrant be based on an indictment, information, or other charging document before the statute of limitations is tolled by its issuance. *Shaw v. State, Ct. App. Op. No. 50 (File No. 5311), 634 P.2d 381 (1981).*

Pending prosecution found. — Where defendant did not appear for sentencing on felony convictions and the trial court issued a bench warrant for his failure to appear, yet not until six years, 10 months, and four days later was defendant indicted for his failure to appear, the issuance of the warrant constituted a pending prosecution under subsection (b) which, when combined with the finding of the trial court that under AS 12.10.030(b) there was a reasonable basis for delay in executing the warrant to toll the statute of limitations, was sufficient to bring prosecution of the offense within the five-year period allowed by the statute of limitations. *Shaw v. State, Ct. App. Op. No. 50 (File No. 5311), 634 P.2d 381 (1981).*

Collateral references. — Necessity of alleging in indictment or information limitation-tolling facts, 52 ALR3d 922.

Chapter 15. Parties.

[Repealed, § 21 ch 166 SLA 1978. For present provisions, see AS 11.16.]

Chapter 20. Bars to Actions.

Section	Section
40. Conviction or acquittal elsewhere as bar	40. When conviction or acquittal is a bar to other offenses
20. When acquittal or dismissal is a bar	50. Dismissal as bar
30. When acquittal is a bar	60. Discharges of codefendant as bar

Sec. 12.20.010. Conviction or acquittal elsewhere as bar. When an act charged as a crime is within the jurisdiction of the United States, another state, or a territory, as well as of this state, a conviction or acquittal in the former is a bar to the prosecution for it in this state. (§ 1.11 ch 34 SLA 1962)

and amounts on the checks, including those to be uttered, and assisted in running the checks through the check processor, could have been initiated and punished for the offenses of which the defendants were convicted and was an accomplice. *Ing v. United States*, 278 F.2d 362 (9th Cir. 1960).

Facts showing witness was not accomplice. — General statement by witness that he and defendant, "had talked over the fact of burglarizing King Builders" was not enough to show that he conspired in a prearranged plan to commit the particular crimes with which defendant was charged, or that he in any manner aided, abetted, assisted or participated in the criminal acts. *Taylor v. State*, Sup. Ct. Op. No. 216 (File No. 407), 391 P.2d 950 (1964).

That witness later disposed of the stolen goods, knowing they were stolen, did not make him an accomplice. *Taylor v. State*, Sup. Ct. Op. No. 216 (File No. 407), 391 P.2d 950 (1964).

Evidence not connecting defendants with crime. — Where the facts and circumstances relied upon for corroboration did no more than show an opportunity for the defendants to have committed the crimes or connect them with the perpetrators, such evidence did not tend to connect the defendants with the commission of the crimes of which they were convicted. *Ing v. United States*, 278 F.2d 362 (9th Cir. 1960).

Sufficiency of corroborating testimony. — Corroborating testimony is not sufficient if it requires the interpretation and direction of the testimony to be corroborated. *Ing v. United States*, 278 F.2d 362 (9th Cir. 1960).

The statutory requirement of corroboration is satisfied when the corroborating evidence tends to induce in the minds of the jurors a rational belief that the accomplice was speaking the truth when he implicated the defendant in the criminal event. *Dimmick v. State*, Sup. Ct. Op. No. 632 (File No. 1098), 473 P.2d 616 (1970).

The corroborative evidence fulfills the requirement that it tend to connect the defendant with the commission of the crime where it serves as a means of inducing in the minds of the jurors a rational belief that the accomplice was speaking the truth when he implicated the defendant in the criminal event. *Pulankis v. State*, Sup. Ct. Op. No. 649 (File No. 1108), 476 P.2d 474 (1970).

Corroborating evidence need only be sufficient to induce in the minds of the jurors a rational belief that the accomplice was speaking the truth when he implicated the defendant in the criminal event. *Anthony v. State*, Sup. Ct. Op. No. 1025 (File No. 1774), 521 P.2d 486 (1974).

Evidence was sufficient to satisfy the statutory requirement of corroboration. *Thomas v. State*, Sup. Ct. Op. No. 200 (File No. 384), 391 P.2d 18 (1964).

In a prosecution for unnatural carnal copulation, there was ample corroboration of alleged accomplice's testimony. *Christy v. United States*, 17 Alaska 107, 261 P.2d 357, 9th Cir. 1958, cert. denied, 360 U.S. 919, 79 S. Ct. 1438, 3 L. Ed. 2d 1535, rehearing denied, 361 U.S. 857, 80 S. Ct. 47, 41 L. Ed. 2d 96 (1959).

Raising issue of erroneously allowing uncorroborated testimony to go to jury. — That it was error for the court to allow uncorroborated testimony to go to the jury is an issue properly raised by a motion for judgment of acquittal. *Beavers v. State*, Sup. Ct. Op. No. 765 (File No. 1387), 492 P.2d 88 (1971).

Section inapplicable to grand jury proceedings. — This section's evidentiary requirement of corroboration is inapplicable to grand jury proceedings. *Merrill v. State*, Sup. Ct. Op. No. 392 (File No. 688), 423 P.2d 686, cert. denied, 386 U.S. 1040, 87 S. Ct. 1497, 18 L. Ed. 2d 607 (1967).

Hence, indictment may be returned without corroboration of accomplice's testimony. — There is no requirement in either Alaska's Code of Criminal Procedure, or in its Rules of Criminal Procedure, that an accomplice's testimony be corroborated before an indictment can be properly returned. *Merrill v. State*, Sup. Ct. Op. No. 392 (File No. 688), 423 P.2d 686, cert. denied, 386 U.S. 1040, 87 S. Ct. 1497, 18 L. Ed. 2d 607 (1967).

Applied in *Carman v. State*, Sup. Ct. Op. No. 1979 (File No. 3555), 602 P.2d 1255 (1979); *Miller v. State*, Ct. App. Op. No. 24 (File No. 4572), 629 P.2d 546 (1981).

Quoted in *Oksoktaruk v. State*, Sup. Ct. Op. No. 2089 (File No. 3986), 611 P.2d 521 (1980); *Price v. State*, Ct. App. Op. No. 100 (File No. 5083), 617 P.2d 611 (1982).

Stated in *Dunichs v. State*, Sup. Ct. Op. No. 185 (File No. 295), 388 P.2d 813 (1964).

Secs. 12.45.030 — 12.45.040. Evidence required in certain cases. (Repealed, § 21 ch 166 SLA 1978.)

Sec. 12.45.030. Evidence of past sexual conduct inadmissible in rape and assault with intent to commit rape. (a) In prosecutions for the crime of sexual assault in any degree or an attempt to commit sexual assault in any degree, evidence of the complaining witness' previous sexual conduct shall not be admitted nor reference made to it 'the presence of the jury except as provided in this section. When the defendant seeks to admit the evidence for any purpose, the defendant may apply for an order of the court at any time before or during the trial or preliminary hearing. After the application is made, the court shall conduct a hearing in camera to determine the admissibility of the evidence. If the court finds that evidence offered by the defendant regarding the sexual conduct of the complaining witness is relevant, and that the probative value of the evidence offered is not outweighed by the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the complaining witness, the court shall make an order stating what evidence may be introduced and the nature of the questions which shall be permitted. The defendant may then offer evidence under the order of the court.

(b) In the absence of a persuasive showing to the contrary, evidence of the complaining witness' sexual conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible under this section.

(c) In this section "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject to this section. (§ 1 ch. 165 SLA 1977; am. § 15, ch 166 SLA 1978)

Cross references. — For similar court rule, see Evid. R. 404(a)(2).

NOTES TO DECISIONS

In camera hearing before presenting evidence. — In prosecution for attempted sexual assault in the first degree, defendant's counsel should have moved for an in camera hearing before presenting any evidence relating to the victim's prior sexual conduct. *Baden v. State*, Ct. App. Op. No. 285 (File No. 6832), 667 P.2d 1275 (1983).
Applied in *Padgett v. State*, Sup. Ct. Op. No. 1801 (File No. 3317), 590 P.2d 432 (1979); *Moss v. State*, Sup. Ct. Op. No. 2239 (File No. 4389), 620 P.2d 674 (1980); *Kvasnikoff v. State*, Ct. App. Op. No. 314 (File No. 5586), 674 P.2d 302 (1983).

Collateral references. — Modern status of admissibility, in statutory rape prosecution, of complainant's prior sexual acts or general reputation for unchastity, 90 ALR3d 257.

Modern status of admissibility, in statutory rape prosecution, of complainant's prior sexual acts or general reputation for unchastity, 90 ALR3d 1300.

Effect of amendments. — The 1983 amendment inserted "and in AS 12.62.035" near the beginning of subsection (a).

Sec. 12.62.035. Access to certain crime information. (a) Notwithstanding any other provision of law, an interested person as defined in (e) of this section may request from the commission records of all convictions involving contributing to the delinquency of a minor and any sex crimes of a person who holds or applies for a position in which the person has or would have supervisory or disciplinary power over a minor. The commission shall authorize the disclosure of the information to the requesting interested person and shall provide a copy of the information to the person who is the subject of the request.

(b) A request for records under (a) of this section shall include within it the fingerprints of the person who is the subject of the request and any other data specified in regulations adopted by the commission. The request shall be on a form approved by the commission, and the commission may charge a fee to be paid by the requesting interested person for the actual cost of processing the request. The commission shall destroy an application within six months after the requested information is sent to the requesting interested person and the person who is the subject of the request.

(c) The commission shall adopt regulations to implement the provisions of this section.

(d) If an individual is denied employment as a result of the disclosure of inaccurate or incomplete records under this section, an action may be brought against the state. No other action may be brought against the state, or an agency or employee of the state, as a result of disclosing or failing to disclose criminal justice information.

(e) As used in this section:

(1) "contributing to the delinquency of a minor" means a conviction for a violation or attempted violations of AS 11.51.130(a)(1), (3), or (5); former AS 11.40.130; or the laws of another jurisdiction if the offense would have been a crime in this state under AS 11.51.130(a)(1), (3), or (5) or former AS 11.40.130 if committed in the state;

(2) "interested person" means a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person, that employs or solicits the employment of a person to serve with or without compensation in a position in which the person has or would have supervisory or disciplinary power over a minor;

(3) "sex crime" means a conviction for a violation or attempted violation of AS 11.41.410 — 11.41.420, AS 11.61.110(a)(7), or AS 11.66.100 — 11.66.130; former AS 11.15.120, 11.15.134, or 11.15.160; former AS 11.40.080, 11.40.110, 11.40.130, or 11.40.200 — 11.40.420; or the laws of another jurisdiction if the offense would have been a crime in this state under one of the sections listed in this paragraph if committed in the state. (§ 2 ch 66 SLA 1983; am § 44 ch 6 SLA 1984)

Effect of amendments. — The 1984 amendment, in subsection (e), in paragraph (1), substituted "former AS 11.40.130; or the laws of another jurisdiction" for "or for a violation or attempted violation of an offense committed outside the state" and inserted "or former AS 11.40.130," and in paragraph (3) substituted "above sections."

Sec. 12.62.040. Security, updating, and purging. (a) Criminal justice information systems shall

(1) be dedicated to law enforcement purposes and be under the management and control of law enforcement agencies unless exempted under regulations adopted under AS 12.62.010;

(2) include operating procedures approved by the commission which are reasonably designed to assure the security of the information contained in the system from unauthorized disclosure, and reasonably designed to assure that criminal offender record information in the system is regularly and accurately revised to include subsequently furnished information;

(3) include operating procedures approved by the commission which are designed to assure that information concerning an individual shall be removed from the records, based on considerations of age, nature of record, and reasonable interval following the last entry of information indicating that the individual is still under the jurisdiction of a law enforcement agency.

(b) Notwithstanding any provision of this section, any criminal justice information relating to minors which is maintained as part of a criminal justice information system must be afforded at least the same protection and is subject to the same procedural safeguards for the benefit of the individual with respect to whom the information is maintained, in matters relating to access, use and security as it would be under AS 47.10.090. (§ 1 ch 161 SLA 1972)

Sec. 12.62.050. Interstate systems for the exchange of criminal justice information. (a) The commission shall regulate the participation by all state and local criminal justice agencies in an interstate system for the exchange of criminal justice information, and shall be responsible to assure the consistency of the participation with the provisions and purposes of this chapter. The commission may not compel any criminal justice agency to participate in an interstate system.

(b) Direct access to an interstate system for the exchange of criminal justice information shall be limited to those criminal justice agencies that are expressly designated for that purpose by the commission. When the system employs telecommunications access terminals, the commission shall limit the number and placement of the terminals to those for which adequate security measures may be taken and as to which the commission may impose appropriate supervisory regulations. (§ 1 ch 161 SLA 1972)

(b) If more than one power is proposed, each appears separately on the ballot.

(c) The borough mayor shall certify the election results to the Department of Community and Regional Affairs. If the majority of the votes cast on the question is favorable, the borough shall assume the added power within 30 days of certification of election results. (§ 2 ch 118 SLA 1972; am § 9 ch 200 SLA 1972)

Chapter 41. Powers of Third Class Boroughs.

Section

10. Powers of third class boroughs
20. Assembly to serve as school board

Sec. 29.41.010. Powers of third class boroughs. (a) A third class borough shall exercise the areawide powers of education and tax assessment and collection in the manner provided for second class boroughs. Areawide exercise of powers other than education and tax assessment and collection is not authorized.

(b) A third class borough may by a majority vote of the voters in a general or special election provide for planning, platting and zoning in accordance with AS 29.33.070 — 29.33.245 for boroughs and may exercise any general law municipal power which a second class borough is authorized to assume by this title. Powers assumed by a third class borough under this section may be exercised only within service areas. A third class borough may establish, operate, alter or abolish service areas in the manner provided by AS 29.63.090 for second class boroughs. The acquisition of additional powers on a service area basis may be initiated in either of two ways:

- (1) A number of signatures equal to 15 per cent of the number of votes cast in the proposed service area at the preceding regular election may file a petition with the assembly; or
 - (2) the assembly may place the question on the ballot.
- (c) A third class borough may borrow money and issue negotiable general obligation, revenue or refunding bonds and other evidences of indebtedness as provided for first and second class boroughs in AS 29.58.150 — 29.58.340.

(d) A military reservation within a third class borough is not part of the borough school district until the military mission is terminated or until inclusion in the borough school district is approved by the Department of Education. However, operation of the military reservation schools by the borough school district may be required by the Department of Education under AS 14.14.110. If the military mission of a military reservation terminates or continued management and control by a regional educational attendance area is disapproved by the Department of Education, operation, management and control of

district in which the military reservation is located. (§ 2 ch 118 SLA 1972; am § 4 ch 32 SLA 1973; am § 7 ch 72 SLA 1974; am § 7 ch 13 SLA 1975; am § 35 ch 124 SLA 1975; am §§ 1, 2 ch 93 SLA 1977)

Legislative history reports. — For [Finance] am H, see: 1974 House Journal, report on ch. 72, SLA 1974 (HCS CSSB 122 p. 519).

NOTES TO DECISIONS

Operation of military reservation schools. — Nothing in the 1975 amendments requires local school districts that take over operation of military reservation schools to assume any risk of loss or duty to insure school buildings. *State v. Fairbanks N. Star School Dist.*, Sup. Ct. Op. No. 4477, 621 P.2d 1329 (1981).

The state must bear the loss resulting from the fire destruction of a military reservation school operated by a local school district in the absence of provisions to the contrary. *State v. Fairbanks N. Star Borough School Dist.*, Sup. Ct. Op. No. 2257 (File No. 4477), 621 P.2d 1329 (1981).

Sec. 29.41.020. Assembly to serve as school board. The borough assembly is the borough school board for third class boroughs. The borough executive is the presiding officer of the borough assembly and president of the school board. The borough executive has all powers of a borough executive except for the veto power. (§ 2 ch 118 SLA 1972; am § 30 ch 94 SLA 1980)

Effect of amendments. — The 1980 amendment deleted the former second sentence, which read: "Where applicable,

Chapter 43. Powers of Cities Outside Boroughs.

Section

10. Additional powers
20. Assessment and tax collection
30. Education
40. Planning and zoning

Section

100. Extension of curfews outside cities
105. Enforcement of curfews
110. Penalty for violation of curfews

Sec. 29.43.010. Additional powers. In addition to the powers granted by AS 29.48, cities outside boroughs are granted the powers specified in this chapter. Powers of this chapter which are incorporated by reference to laws governing boroughs apply to home rule cities outside boroughs only in those cases in which they are made applicable to home rule boroughs in the provisions incorporated. (§ 2 ch 118 SLA 1972)

Sec. 29.43.020. Assessment and tax collection. Home rule and first class cities outside boroughs may assess, levy and collect a general property tax. A property tax if levied must be assessed, levied and collected as provided by AS 29.53 for boroughs. Cities outside boroughs

NOTES TO DECISIONS

Applied in *City of Yakutat v. Rymann*,
Sup. Ct. Op. No. 2581 (File Nos. 6033,
6099), 654 P.2d 785 (1982).

Sec. 29.43.030. Education. Home rule and first class cities outside boroughs constitute city school districts and establish, maintain, and operate a system of public schools as provided by AS 29.33.050 for boroughs. (§ 2 ch 118 SLA 1972)

Sec. 29.43.040. Planning and zoning. (a) Home rule and first class cities outside first and second class boroughs shall, and second class cities outside first and second class boroughs may, provide for planning, platting and zoning, as provided by AS 29.33.070 — 29.33.245 for boroughs.

(b) Home rule and first class cities within third class boroughs shall, and second class cities within third class boroughs may, provide for planning, platting and zoning, as provided by AS 29.33.070 — 29.33.245 for boroughs. (§ 2 ch 118 SLA 1972; am §§ 8, 9 ch 93 SLA 1977)

Effect of amendment. — The 1977 class" preceding "boroughs" in two places amendment inserted "first and second" in subsection (a) and added subsection (b).

Sec. 29.43.100. Extension of curfews outside cities. The provisions of a curfew ordinance enacted by a city of any class concerning minors shall be imposed in the total area within 20 miles of the limits of that city. If a given area lies within 20 miles of two or more cities with conflicting curfew ordinances, the provisions of the curfew ordinance of the city having the largest population prevails as to the overlapping area. (§ 1 ch 86 SLA 1962)

Revisor's notes. — Formerly AS 11.60.250. Renumbered in 1976 under municipalities in this title no longer § 2, ch. 166, SLA 1978. Also in 1978, the words "or village" following the word

Sec. 29.43.105. Enforcement of curfews. (a) The municipal peace officers shall enforce the provisions of the ordinance inside the city limits. Under AS 29.43.100 — 29.43.110 the state peace officers shall enforce the provisions of the ordinance in the area outside the city limits.

(b) In an area where state peace officers are not available, the municipal peace officer may enforce the provisions of the ordinance in the area outside the city limits if the enforcement responsibilities are delegated by contract between the state and the municipality. § 3 ch

Revisor's notes. — Formerly AS 11.60.250. Renumbered in 1978 under § 22, ch. 166, SLA 1978.

Sec. 29.43.110. Penalty for violation of curfew. The penalty for ordinance of AS 29.43.100 — 29.43.110 is as prescribed by the curfew ordinance of the city, and a fine so paid shall be paid to the city when the violation takes place in the city. Otherwise the fine shall be paid to the state. However, the penalty shall not exceed a fine of \$300, or imprisonment for 30 days, or both. (§ 2 ch 86 SLA 1962)

Revisor's notes. — Formerly AS 11.60.250. Renumbered in 1978 under § 22, ch. 166, SLA 1978.

Chapter 48. Powers Applicable to All Municipalities.

Article

1. General Powers (§§ 29.48.010 — 29.48.020)
2. Facilities, Services and Regulation (§§ 29.48.030 — 29.48.110)
3. Municipal Enactments (§§ 29.48.130 — 29.48.220)
4. Miscellaneous Provisions (§§ 29.48.250 — 29.48.270)
5. Construction of Powers (§§ 29.48.310 — 29.48.330)

Article 1. General Powers.

Section

10. General powers
20. Second class borough powers outside cities

Sec. 29.48.010. General powers. Municipalities have the following general powers, subject to other provisions of law:

- (1) to establish and prescribe the functions of municipal departments, offices or agencies;
- (2) to establish and prescribe salaries for the elected and appointed municipal officers and employees;
- (3) to make investigations of the affairs of the municipality and make inquiries into the conduct of a municipal department;
- (4) to enter into agreements, including those for cooperative or joint administration of any functions or powers with a local government, with the state, or with the United States;
- (5) to require periodic and special reports from a municipal department to be submitted through the municipal executive;
- (6) to sue and be sued;
- (7) to levy taxes and special assessments;
- (8) to enforce ordinances and to prescribe penalties for violations;
- (9) to acquire, manage, control, use and dispose of real and personal

Sec. 47.08.140. Definitions. In AS 47.08.010 — 47.08.140

(1) "applicant" means a person who has suffered a catastrophic illness and is applying for assistance under AS 47.08.010 — 47.08.140 or is the subject of an application for assistance under AS 47.08.010 — 47.08.140;

(2) "applicant's share" means the amount of the total medical expense related to the catastrophic illness which the committee determines the applicant can reasonably be expected to pay based on income, assets, and number of dependents under AS 47.08.060;

(3) "catastrophic illness" means illness or injury which results in medical expenses of over \$1,000 during a period not to exceed 12 months, after all other sources of third-party payment have been exhausted;

(4) "committee" means the Catastrophic Illness Committee, created under AS 47.08.020;

(5) "elective medical or surgical procedures" means treatment which is not essential to the life or health of a person;

(6) "family" means two or more persons related by blood or marriage or adoption living as one economic unit;

(7) "liquid assets" means assets which can be readily converted to cash;

(8) "medical expense" means any financial obligation incurred in the course of treatment of illness as prescribed by a physician, including bills for ancillary services, patient transportation, transport, or a medical or family escort when reasonably necessary, or living expenses while receiving outpatient treatment in a community to which the applicant is not reasonably able to commute from the applicant's permanent place of abode;

(9) "nonliquid assets" means all assets which are not liquid assets; (10) "permanent place of abode" means a dwelling, or a dwelling unit in a multiple dwelling, including lots and outbuildings or an appropriate portion of these, which are necessary to convenient use of the dwelling unit;

(11) "provider" means a licensed physician, pharmacist, dentist, or other health service worker or a licensed hospital, clinic, skilled nursing home, intermediate care facility or health maintenance organization which has provided services not excluded by AS 47.08.050 to an applicant as a result of a catastrophic illness;

(12) "third-party payments" means payments of medical expenses related to a catastrophic illness by sources other than the applicant or the committee, including but not limited to state and federal medical assistance programs, private health insurance, employment-related health insurance, military health insurance, workers' compensation, violent crimes compensation, Indian Health Service of the United States Department of Health and Human Services, and awards in legal actions. (§ 1 ch 107 SLA 1978)

Chapter 10. Delinquent Minors and Children in Need of Aid.**Article**

1. Children's Proceedings (§§ 47.10.010 — 47.10.142)
2. Juvenile Institutions (§§ 47.10.150 — 47.10.220)
3. Care of Children (§§ 47.10.230 — 47.10.260)
4. General Provisions (§§ 47.10.270 — 47.10.290)

NOTES TO DECISIONS

Cited in Flores v. Flores, Sup. Ct. Op. No. 1875 (File No. 3832), 598 P.2d 893 (1979).

Article 1. Children's Proceedings.

Section	Section
10. Jurisdiction	85. Child in need of aid; religious treatment
20. Investigation and petition	90. Records
30. Summons and custody of minor	96. Arrest of a minor
40. Release of minor	100. Retention of jurisdiction over minor
50. Appointment of guardian ad litem or attorney	110. Appointment of guardian or custodian
60. Waiver of jurisdiction	120. Support of minor
70. Hearings	130. Detention
76. Young adult advisory panels	140. Temporary detention and detention hearing
80. Judgments and orders	142. Emergency custody and temporary placement hearing
81. Disposition hearing reports	
82. Best interests of the child	
83. Review hearing information	
84. Legal custody, guardianship, and residual parental rights and responsibilities	

Sec. 47.10.010. Jurisdiction. (a) Proceedings relating to a minor under 18 years of age residing or found in the state are governed by this chapter, except as otherwise provided in this chapter, when the court finds the minor

(1) to be a delinquent minor as a result of violating a criminal law of the state or of a municipality of the state; or

(2) to be a child in need of aid as a result of

(A) the child being habitually absent from home or refusing to accept available care, or having no parent, guardian, custodian or relative caring or willing to provide care, including physical abandonment by

(i) both parents,

(ii) the surviving parent, or

(iii) one parent if the other parent's rights and responsibilities have been terminated under AS 47.10.080 or voluntarily relinquished;

(b) the child being in need of medical treatment to cure, alleviate, or prevent substantial physical harm, or mental harm as evidenced by failure to thrive, severe anxiety, depression, withdrawal, or untoward aggressive behavior or hostility toward others, and the child's parents are unwilling to provide the medical treatment;

(c) the child having suffered substantial physical harm or if there is an imminent and substantial risk that the child will suffer such harm as a result of the actions done by or conditions created by the child's parent, guardian or custodian or the failure of the parent, guardian or custodian adequately to supervise the child;

(d) the child having been sexually abused either by the child's parent, guardian or custodian, or as a result of conditions created by the child's parent, guardian or custodian, or by the failure of the parent, guardian or custodian adequately to supervise the child;

(e) the child committing delinquent acts as a result of pressure, guidance, or approval from the child's parents, guardian or custodian;

(f) the child having suffered substantial physical abuse or neglect as a result of conditions created by the child's parent, guardian or custodian.

When a minor is accused of violating a traffic statute or regulation, a traffic ordinance or regulation of an incorporated municipality, a fish and game statute or regulation under AS 16 or a parks and recreational facilities statute or regulation under AS 41.21, excepting a statute the violation of which is a felony, the procedure prescribed in AS 47.10.020 — 47.10.790 may not be followed, except that a parent, guardian or legal custodian shall be present at all proceedings. The minor accused of a traffic offense, a fish and game statute or regulation violation under AS 16 or parks and recreational facilities violation under AS 41.21 shall be charged, prosecuted, and sentenced in the district court in the same manner as an adult.

(c) In a controversy concerning custody of a minor, the court may appoint a guardian of the person and property of a minor and may order support to either or both parents. Custody of a minor may be given to the Department of Health and Social Services, and payment of support money to the department may be ordered. (§ 4 art I ch 145 SLA 1957; am § 1 ch 76 SLA 1961; am §§ 1, 2 ch 110 SLA 1967; am § 1 ch 61 SLA 1969; am § 6 ch 104 SLA 1971; am §§ 7, 8 ch 63 SLA 1977; am § 1 ch 104 SLA 1982)

Cross references. — See Rules of Children's Procedure, Alaska Rules of Court (amendment added subparagraph (2)(f) to subsection (a)).
 Procedure and Administration. For waiver of jurisdiction, see AS 47.10.060. For provisions relating to child protection, see AS 47.17. For provisions establishing office of child advocacy, see AS 47.50.

Effect of amendments. — The 1982 rates as masters under Civil Rule 53."

§ 47.10.010 WELFARE, SOCIAL SERVICES AND INSTITUTIONS § 47.10.010

Section 32, ch. 63, S.L.A. 1977, provides: "Section 7 of this Act has the effect of changing Children's Rule 12 by deleting any references to 'Truant from school,' 'endangering' the morals or health, 'being wayward or habitually disobedient,'

or 'uncontrolled,' and has the effect of substituting the words 'child in need of aid' for the terms 'child in need of supervision' and 'dependent' where those two terms appear in Rules of Children's Procedure."

NOTES TO DECISIONS

Applicability of 1977 amendment. — All cases pending at the time of the enactment of the new children's statute by the 1977 acts are entitled to hearing under the new, rather than the old, standards. In re J.M., Sup. Ct. Op. No. 1548 (File No. 3219, 3229), 573 P.2d 1376 (1978).

In order to provide guidance to the superior court for the administration of juvenile justice, children adjudged dependent under the standards of former subsection (a)(5) of this section prior to its repeal in 1977 are entitled, on request, to a dispositional hearing under the standards of this newly-enacted subsection (a)(2)(C) of this section. In re J.M., Sup. Ct. Op. No. 1548 (File No. 3219, 3229), 573 P.2d 1376 (1978).

Children adjudged dependent under former (a)(5) of this section are entitled on request to an adjudicative hearing under the standards of subsection (a)(2)(C). In re C.L.T., Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 581 (1979).

Rehabilitation, rather than punishment, is the express purpose of juvenile jurisdiction. Mere confinement without treatment does not contribute to the goal of rehabilitation; such confinement constitutes cruel and unusual punishment. *Rust v. State*, Sup. Ct. Op. No. 1668 (File No. 3172), 582 P.2d 134 (1978).

Principal precept behind children's court concept is that a person under 18 years of age does not have mature judgment and may not fully realize the consequences of his acts, and that therefore he should not generally have to bear the stigma of a criminal conviction for the rest of his life. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

A child "in need of aid" appears to be the functional equivalent of a "dependent" child under this section as it existed prior to its 1977 amendment. In re C.L.T., Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

The phrase "under 18 years of age" refers to the age of the accused person at the time of the alleged offense. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Jurisdiction dependent upon age of offender at time of act. — Juvenile jurisdiction of the superior court in delinquency proceedings is dependent upon the age of the offender at the time of the delinquent acts. *Henson v. State*, Sup. Ct. Op. No. 1590 (File No. 3021), 576 P.2d 1352 (1978).

Child is exempt from criminal prosecution until children's court waives jurisdiction. — From the moment a child commits an offense he is exempt from criminal prosecution until the children's court properly waives its jurisdiction. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Deferring action against child until 18th birthday would frustrate purpose of juvenile courts. — To allow officials charged with the execution of the law to prosecute a child offender as a criminal merely by deferring action until the child's 18th birthday would frustrate the purpose of juvenile courts. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Serious constitutional issues would arise if the nature of the proceedings against a child offender were to depend on the arbitrary decision of law-enforcement officials. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

When person over or under certain age. — With respect to penal statutes, whether a person is over or under a certain age depends upon whether he has reached that particular anniversary of his birthday or not. *State v. Linn*, Sup. Ct. Op. No. 47 (File No. 122), 363 P.2d 361 (1961).

"Delinquent" status depends not upon a criminal conviction but upon proof that the juvenile committed acts which would have been criminal if committed by an adult. *Rust v. State*, Sup. Ct. Op. No. 1658 (File No. 3172), 582 P.2d 134 (1978).

One who committed a crime when 18 years of age could be criminally prosecuted, as an adult, when he had been previously adjudged a delinquent minor and the court had retained supervisory jurisdiction over him until age 19. *Henson v. State*, Sup. Ct. Op. No. 1590 (File No. 3021), 576 P.2d 1352 (1978).

Former AS 17.12.110(d)(4) not in conflict. — Former AS 17.12.110(d)(4), which provided that a person who, while under the age of 18, possesses, controls or uses any amount of marijuana was, upon conviction, guilty of a misdemeanor punishable by a fine of not more than \$1000, was not in conflict with paragraph (a)(1) of this section and AS 47.10.080(b)(1). M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

State may interfere with certain conduct of children in need of aid. — Conduct of children alleged to be in need of supervision (see now children alleged to be in need of aid), such as running away from home and foster home placement, may constitutionally be interfered with by the state. L.A.M. v. State, Sup. Ct. Op. No. 1249 (File No. 2221), 547 P.2d 827 (1976).

Interests to be protected by legislation regarding children in need of aid. — See L.A.M. v. State, Sup. Ct. Op. No. 1249 (File No. 2221), 547 P.2d 827 (1976). Means chosen by the state to protect children are closely and substantially related to an appropriate government interest. L.A.M. v. State, Sup. Ct. Op. No. 1249 (File No. 2221), 547 P.2d 827 (1976).

The purpose of the supervision or treatment contemplated by the creation of the child in need of supervision (see now child in need of aid), and its predecessor noncriminal delinquency was reintegration of the child into her family and resumption of parental custody including parental control. L.A.M. v. State, Sup. Ct. Op. No. 1249 (File No. 2221), 547 P.2d 827 (1976).

The discretion allotted a parent in the administration of punishment is not unlimited. Clearly it does not extend to punishment regularly causing the "substantial physical harm" which under subsection (a)(2)(C) determines that a child is in need of aid. In re D.C., Sup. Ct. Op. No. 1862 (File No. 3840), 596 P.2d 22 (1979).

A minor who has been adjudged a child in need of supervision (now child in need of aid) cannot be institutionalized under the Children's Code. In re A. Minor Child, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

The Department of Health and Social Services does not possess the authority to institutionalize any minor, including one who has been declared a child in need of supervision (see now child in need of aid) who has been committed to its custody. It is unreasonable to construe Alaska children's statutes in a manner which would

result in the grant to the Department of Health and Social Services of broader powers of commitment than possessed by the trial court. In re A. Minor Child, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

Requisites to determination of delinquency. — Before a juvenile can be determined delinquent in a proceeding which could result in commitment to an institution, thus curtailing his freedom, certain requisites must be met. First, written notice of the charges must be given to the juvenile and his parents sufficiently in advance of the proceedings to allow preparation to meet the charges. Second, the child and his parents must be apprised of the right to counsel, including appointed counsel in case of indigency. Third, the child may exercise his privilege against self-incrimination. Lastly, absent a valid confession, the determination of delinquency cannot be sustained in the absence of sworn testimony, which is subject to cross-examination. E.J. v. State, Sup. Ct. Op. No. 628 (File No. 1144), 471 P.2d 367 (1970).

Minor properly declared delinquent. — Where the lower court determined that a minor would not abide by any orders it entered regarding her supervision under former subsection (j) of AS 47.10.080, this behavior constituted willful criminal contempt of the court's authority; were she an adult, her actions would be characterized as a "crime" under Alaska statutes. She was, therefore, properly declared a delinquent and subject to those sanctions available for the correction of a delinquent minor's behavior. L.A.M. v. State, Sup. Ct. Op. No. 1249 (File No. 2221), 547 P.2d 827 (1976).

Where the parents' interests are hostile to the child's, the parents may not select the child's attorney. Wagstaff v. Superior Court, Family Court Div., Sup. Ct. Op. No. 1144 (File No. 2208), 535 P.2d 1220 (1975).

Then the child may retain the attorney of his choice or, in the alternative, ask the court to appoint an attorney for him. Wagstaff v. Superior Court, Family Court Div., Sup. Ct. Op. No. 1144 (File No. 2208), 535 P.2d 1220 (1975).

And court must respect choice. — If the child has retained counsel, the court must respect the child's choice. Wagstaff v. Superior Court, Family Court Div., Sup. Ct. Op. No. 1144 (File No. 2208), 535 P.2d 1220 (1975).

The required standard of proof has been increased from "a preponderance of

the evidence" to "beyond a reasonable doubt" in the adjudicatory stages of at least those delinquency proceedings in which a child is charged with an act that would be a crime if committed by an adult. E.J. v. State, Sup. Ct. Op. No. 628 (File No. 1144), 471 P.2d 367 (1970).

Privilege against self-incrimination. — See E.L.L. v. State, Sup. Ct. Op. No. 1540 (File No. 3374), 572 P.2d 786 (1977) (decided prior to the 1977 amendment to this section).

Violation of former law relating to purchase of intoxicating liquors by minors. — See Purdy v. United States, 16 Alaska 173, 146 F. Supp. 762 (D. Alaska 1956).

Prosecution for joyriding. — Subsection (b) of this section and former AS 28.35.010(d) demonstrated a clear legislative intent to exclude from the coverage and requirements of the juvenile code those cases involving alleged misdemeanor violations of Alaska's "joyriding" statute by persons under 18 years of age. State v. G.L.P., Sup. Ct. Op. No. 1786 (File No. 2978), 590 P.2d 65 (1979).

One under 18 years of age could be charged, prosecuted and sentenced in the district court, as an adult, for a misdemeanor violation of Alaska's "joyriding" statute, former AS 28.35.010(a), before there had been an order by the superior court waiving the latter court's juvenile jurisdiction. State v. G.L.P., Sup. Ct. Op. No. 1786 (File No. 2978), 590 P.2d 65 (1979).

Termination of parental rights due to abandonment. — In proceeding to terminate parental rights, although trial judge orally stated that he considered involuntary incarceration to constitute abandonment, where written findings of

fact, submitted by state and signed by court, referred to parent's voluntary absence from October of 1980 to June of 1981 as the relevant conscious disregard of parental obligations, there was no reversible error. Nada A. v. State, Sup. Ct. Op. No. 2632 (File Nos. 6546, 6693), 660 P.2d 436 (1983).

There is no statute authorizing awards of attorney's fees in child in need of aid proceedings, nor has any rule or order authorizing such an award been promulgated. Cooper v. State, Sup. Ct. Op. No. 2453 (File Nos. 4906, 4970), 638 P.2d 174 (1981).

Appeal after serving sentence. — If there remain collateral legal disabilities apart from the sentence, an appeal is not mooted even though the sentence has been served. E.J. v. State, Sup. Ct. Op. No. 628 (File No. 1144), 471 P.2d 367 (1970).

Applied in In re S.D., Sup. Ct. Op. No. 1255 (File No. 2530), 549 P.2d 1190 (1976). Quoted in In re P.N., Sup. Ct. Op. No. 1127 (File No. 2191), 533 P.2d 13 (1975); R.D.S.M. v. Inlake Officer, Sup. Ct. Op. No. 1449 (File No. 2821), 565 P.2d 855 (1977); N.P.A. v. State, Sup. Ct. Op. No. 2005 (File No. 4618), 604 P.2d 699 (1979); E.A. v. State, Sup. Ct. Op. No. 2289 (File No. 4687), 4870, 623 P.2d 1210 (1981).

Stated in D.R.C. v. State, Ct. App. Op. No. 94 (File No. 4905), 646 P.2d 252 (1982). Cited in Grannau v. Occhipinti, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979); P.S. v. State, Ct. App. Op. No. 194 (File No. 6870), 665 P.2d 1319 (1982); State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984); Brower v. State, Ct. App. Op. No. 381 (File No. 7916), P.2d (1984).

Power of juvenile court to exercise continuing jurisdiction over infant delinquent or offender, 76 ALR 657.

Marriage as affecting jurisdiction of juvenile court over delinquents or dependents, 14 ALR2d 336.

Homicide by juvenile as within jurisdiction of juvenile court, 48 ALR2d 662.

Age of child at time of alleged offense or delinquency, or at time legal proceedings are commenced, as criterion of jurisdiction of juvenile court, 89 ALR2d 506.

Collateral references. — 27 Am. Jur., Infants, §§ 101 to 112; 31 Am. Jur., Juvenile Courts and Delinquents, Dependent and Neglected Children, §§ 13 to 50.

43 C.J.S., Infants, §§ 6, 93 et seq. Another court's jurisdiction over a child as affected by assumption of jurisdiction by juvenile court, 11 ALR 147; 78 ALR 317; 146 ALR 1153.

Vagrancy of minors, 14 ALR 1507. Constitutionality of statute which, for reformatory purposes, deprives parent of custody or control of child, 60 ALR 1342.

Sec. 47.10.020. Investigation and petition. (a) Whenever a person informs the court of the facts which bring a minor within this chapter, the court shall appoint a competent person or agency to make a preliminary inquiry and report for the information of the court to determine whether the interests of the public or of the minor require that further action be taken. Upon the receipt of the report, the court may informally adjust or dispose of the matter without a hearing, or it may authorize the person having knowledge of the facts of the case to file with the court a petition setting out the facts. Where the court informally adjusts or disposes of the matter, the minor may not be detained or taken into the custody of the court, and the matter shall be closed by the court upon adjustment or disposition.

(b) The petition and all subsequent pleadings shall be styled as follows: "In the matter of, a minor under 18 years of age." The petition may be executed upon the petitioner's information and belief, and shall be verified. It shall include the following information:

- (1) the name, address and occupation of the petitioner, together with the petitioner's relationship to the minor, and the petitioner's interest in the matter;
 - (2) the name, age and address of the minor;
 - (3) a brief statement of the facts which bring the minor within this chapter;
 - (4) the names and addresses of the minor's parents;
 - (5) the name and address of the minor's guardian, or of the person having control or custody of the minor.
- (c) If the petitioner does not know a fact required in this section, the petitioner shall so state in the petition. (§ 5 art I ch 145 SLA 1957)

Cross references. — For the preliminary inquiry referred to in (a) of this section, see Children's Rule 4, Alaska Rules of Court. As to the petition, see Children's Rule 8.

NOTES TO DECISIONS

Distinctions between this section and AS 25.24.310. — See *Granato v. Ouchipinti*, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979). Cited in *M.O.W. v. State*, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Collateral references. — 42 Am. Jur. 2d, Infants, §§ 14 to 17, 20, 22 et seq.; 47 Am. Jur. 2d, Juvenile Courts and Delin- 43 C.J.S., Infants, §§ 6, 93 et seq.

Sec. 47.10.030. Summons and custody of minor. (a) After a petition is filed and after further investigation which the court directs, if

the person having custody or control of the minor has not appeared voluntarily, the court shall issue a summons which (1) recites briefly the substance of the petition; (2) clearly states that at the hearing it is possible that parental rights and responsibilities may be terminated forever and that the minor may at the hearing be committed to the Department of Health and Social Services for possible adoption; and (3) directs the person having custody or control of the minor to appear personally in court with the minor at the place and at the time set forth in the summons.

(b) In all cases under this chapter the minor, each parent of the minor and the guardian of the minor shall be given notice adequate to give actual notice of the proceedings and the possibility of termination of parental rights and responsibilities, taking into account education and language differences which are known or reasonably ascertainable by the petitioner or the department. The notice of the hearing shall contain all names by which the minor has been identified. Notice shall be given in the manner appropriate under rules of civil procedure for the service of process in a civil action under Alaska law or in any manner the court by order directs. Proof of the giving of the notice shall be filed with the court before the petition is heard. The court may also subpoena the parent of the minor, or any other person whose testimony may be necessary at the hearing. A subpoena or other process may be served by a person authorized by law to make the service, and where personal service cannot be made, the court may direct that service of process be in a manner appropriate under rules of civil procedure for the service of process in a civil action under Alaska law or in any manner the court directs.

(c) If the minor is in such condition or surroundings that the minor's welfare requires the immediate assumption of custody by the court, the court may order, by endorsement upon the summons, that the officer serving the summons shall at once take the minor into custody and make the temporary placement of the minor which the court directs. (§ 6 art I ch 145 SLA 1957; am § 1 ch 110 SLA 1960; am § 6 ch 104 SLA 1971; am § 9 ch 63 SLA 1977)

NOTES TO DECISIONS

Editor's notes. — *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971) and *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971), cited below, were decided prior to the 1977 amendment to this section, which rewrote subsection (b).

The child and his parents must receive notice which would be deemed adequate in a civil or criminal proceeding. These requirements suggest that Alaska civil and criminal rules should be looked to for techniques of service on children. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971). Personal service upon the child is required. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Sec. 47.10.060. Waiver of jurisdiction. (a) If the court finds at a hearing on a petition that there is probable cause for believing that a minor is delinquent and finds that the minor is not amenable to treatment under this chapter, it shall order the case closed. After a case is closed under this subsection, the minor may be prosecuted as an adult.

(b) *[Repealed, § 8 ch 110 SLA 1967.]*

(c) *[Repealed, § 8 ch 110 SLA 1967.]*

(d) A minor is unamenable to treatment under this chapter if the minor probably cannot be rehabilitated by treatment under this chapter before reaching 20 years of age. In determining whether a minor is unamenable to treatment, the court may consider the seriousness of the offense the minor is alleged to have committed, the minor's history of delinquency, the probable cause of the minor's delinquent behavior, and the facilities available to the division of youth and adult authority for treating the minor.

(e) A person who has been tried as an adult under this section, or the Department of Health and Social Services on the person's behalf, may petition the superior court to seal the records of all criminal proceedings, except traffic offenses, initiated against the person, and all punishments assessed against the person, while the person was a minor. A petition under this subsection may not be filed until five years after the completion of the sentence imposed for the offense for which the person was tried as an adult. If the superior court finds that the punishment assessed against the person has had its intended rehabilitative effect, the superior court shall order the record of proceedings and the record of punishments sealed. Sealing the records restores civil rights removed because of a conviction. A person may not use these sealed records for any purpose except that the court may order their use for good cause shown or may order their use by an officer of the court in making a presentencing report for the court. (§ 9 art I ch 145 SLA 1957; am § 1 ch 118 SLA 1962; am §§ 3, 8 ch 110 SLA 1967; am § 6 ch 104 SLA 1971; am § 13 ch 63 SLA 1971)

Cross references. — For hearings See also, Children's Rule 3, Alaska Rules before the juvenile court, see AS 47.10.070. of Court.

NOTES TO DECISIONS

Non-criminal treatment of child offenders is to be rule. — The statutory framework for dealing with child offenders contemplates that non-criminal treatment is to be the rule and adult criminal disposition the exception. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Section provides means to determine unavailability to treatment available for

child offenders. — The waiver procedure set out in this section and in Rule of Children's Procedure 3 provides the means by which the children's court judge determines, prior to adjudicating the delinquency petition, that an accused child is not a suitable subject for the treatment available for child offenders. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The court's authority to impose a penal sentence on a juvenile is limited under the strict procedures of subsections (a) and (d) and Children's Rule 3. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

A minor may move to waive children's court jurisdiction pursuant to subsection (a). M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

A minor under the age of 18 cannot "elect" to be tried as an adult. M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Where no waiver hearing has been conducted, the court has no authority to sentence a delinquent child as an adult. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Before treating a juvenile as an adult, the court must first conduct a waiver hearing. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Option available to prosecution absent waiver. — A proceeding in children's court, which is limited to the dispositions set forth in AS 47.10.080(b), is the only option available to the prosecution absent waiver under subsection (a) of this section, and the standards established in subsection (a) are sufficiently clear to prevent arbitrary enforcement. M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

But hearing is not criminal in nature. — A waiver hearing is not criminal in nature and is dispositional, rather than adjudicatory. N.P.A. v. State, Sup. Ct. Op. No. 2005 (File No. 4618), 604 P.2d 599 (1979).

And right to attend may be waived. — Although a minor had a constitutional right to attend her waiver hearing, she waived that right when she voluntarily failed to appear at the hearing by refusing to waive extradition from another state. N.P.A. v. State, Sup. Ct. Op. No. 2005 (File No. 4618), 604 P.2d 599 (1979).

Findings necessary to justify waiver. — To justify waiver, the children's court judge must find, on sufficient evidence, that probable cause is established at the hearing for believing that the child committed the act with which he was charged in the petition and which if committed by an adult would constitute a crime and the child is not amenable to the treatment provided under this article. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

As a prerequisite to criminal prosecution, the children's court must find not only that the child is properly accused but also that he would not be receptive to the rehabilitative programs available to the court. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The inability to predicate a plan for a defendant during the short time remaining before his 19th birthday coupled with the obvious need of treatment as disclosed by the record may be sufficient to justify a waiver to adult jurisdiction. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The court may close out the case as a juvenile matter only upon finding cause to believe that the minor is delinquent and that the minor is not amenable to treatment. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

A court must find that there is probable cause to believe that the minor is delinquent and that the minor is not amenable to treatment before jurisdiction may be waived. In re J.H.B., Sup. Ct. Op. No. 1626 (File No. 2947), 578 P.2d 146 (1978).

Subsection (d) is clear on its face that age 20 is the proper age for determining whether a minor is amenable to treatment. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

The 1977 amendments of this section and 47.10.080 show that it is the legislature's intent that age 20 is the age to be used in determining the amenability issue. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Binding advance consent to treatment. — In order to give effect of the legislature's intent that a court may consider treatment until age 20 in determining waiver of juvenile jurisdiction, it is necessary that the judge be able to evaluate at the time of the waiver hearing whether the juvenile will in fact be available for treatment. It is not possible for the judge to know this unless the child can give binding consent at the time of the hearing. State v. F.A., Sup. Ct. Op. No. 4041 (File No. 4333), 608 P.2d 12 (1980).

The portion of the opinion in In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978) that held that a minor in a waiver hearing could not give a binding advance consent to treatment beyond age 19 was mistaken. State v. F.L.A., Sup. Ct. Op. No. 2041 (File No. 4333), 608 P.2d 12 (1980).

Waiver decision without testimony of psychologist or psychiatrist. — A waiver of juvenile jurisdiction decision can be made without the testimony of a psychologist or psychiatrist, since such testimony is germane to at most two of the four factors set out in subsection (d) of this section, and not all four of those facts need be determined adversely to the youth to warrant waiver of juvenile jurisdiction. In re J.R., Sup. Ct. Op. No. 2165 (File No. 5194), 616 P.2d 865 (1980).

There is no conflict between subsection (d) and AS 47.10.080(b)(1). In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

The inconsistency between subsection (d) of this section and 47.10.080(b)(1) that existed prior to the 1977 amendments to these sections has been eliminated in that subsection (d) now provides that the determinative age is 20 and AS 47.10.080(b)(1) provides that the maximum limitation of confinement of minors is to the age of 20. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Factors to be considered in judging seriousness of alleged offense. — In judging the seriousness of the alleged offense, the children's court judge may consider not only the type of crime charged but also the circumstances surrounding its commission, the factors leading to delinquency, history of delinquency, and facilities available for rehabilitation. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The amenability decision rests in the sound discretion of the children's court judge. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972); In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

But the latitude afforded him is not unbounded. The proper exercise of that discretion must be predicated not only upon procedural regularity sufficient to satisfy the basic requirements of due process but also on a full inquiry into the amenability issue. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The trial court must make an evidentiary record and make written findings of fact, as required by Children's Rule 3(b), as to each of these four factors enunciated in subsection (d). In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

These findings must be supported by substantial evidence. In re F.S., Sup. Ct.

Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Substantial evidence must be presented before jurisdiction may be waived. D.H. v. State, Sup. Ct. Op. No. 1396 (File No. 2837), 561 P.2d 294 (1977).

Based on these findings, the trial court, within its sound discretion, must make a decision as to the minor's amenability to treatment. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Factors to be considered in determining amenability. — Subsection (d) of this section suggests four factors which may be considered by the court when inquiring into the amenability issue: (1) the seriousness of the offense; (2) the delinquency of the minor; (3) the probable cause of the delinquent behavior; and (4) the facilities available for the treatment of the minor. J.W.H. v. State, Sup. Ct. Op. No. 1708 (File No. 3812), 581 P.2d 227 (1978).

All four factors listed in subsection (d) need not be resolved against the child to justify waiver. For is there value in requiring the children's court to make an arithmetic calculation as to the weight to be given each factor. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

But there must be a thorough examination of the child, his background and alternative strategies of rehabilitation short of adult criminal treatment. Lacking such an examination, the children's court has no evidentiary basis for the decision. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972); D.H. v. State, Sup. Ct. Op. No. 1396 (File No. 2837), 561 P.2d 294 (1977).

Though the standards for determining amenability to treatment through the children's court lack explicit definition, it is clear from the statute that the court in most cases must go beyond the circumstances surrounding the alleged delinquent acts and the age of the child. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Even though the children's court may have independent knowledge concerning children's treatment programs and facilities, it is necessary to make the existence and evaluation of such programs a part of the waiver proceedings to enable proper review by the supreme court. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

At a waiver hearing there must be a thorough examination of (1) the probable

cause for believing that the child committed the act with which he was charged and (2) the amenability of the child to juvenile treatment. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974).

In the absence of such an examination there is no evidentiary basis for a waiver decision. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974); J.W.H. v. State, Sup. Ct. Op. No. 1708 (File No. 3812), 583 P.2d 227 (1978).

The record must disclose the existence and evaluation of the available children's treatment programs in all future cases in order to establish the validity of the hearing. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974).

The constitutional prerequisites for a valid waiver of juvenile court treatment are reflected in Rule of Children's Procedure 3 which guarantees the child a hearing before the children's court judge after adequate notice thereof, counsel at the hearing who has had access to records and reports relevant to issues before the court, and a statement of reasons accompanying the waiver order. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Compliance with Rule of Children's Procedure 3(h) is essential to insure that the waiver hearing is not a "mere ritual" and to avoid a meaningful basis for review. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974).

The waiver hearing is a critically important stage in criminal proceedings against a child. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

At stake at a child's waiver hearing is the statutory promise of special rehabilitative treatment in lieu of the harsher sanction of criminal conviction. Because the consequences of waiver are great, the hearing must measure up to the essentials of due process and fair treatment. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The investigation at a waiver hearing cannot be a mere ritual. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

There must be a hearing which measures up to the essential of due process and fair treatment. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974); J.W.H. v. State, Sup. Ct. Op. No. 1708 (File No. 3812), 583 P.2d 227 (1978).

The right of confrontation applies to children's proceedings in which the child is charged with misconduct for which he may be incarcerated. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 503 P.2d 837 (1972).

Waiver without hearing is denial of due process. — To waive children's court jurisdiction without a hearing or opportunity for adversary presentation is a denial of fair process. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972). **As is waiver without substantial evidence of unamenability to treatment.** — To waive children's court jurisdiction without substantial evidence having been presented that the child is unamenable to juvenile rehabilitation programs is denial of fair process. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The proper standard of proof as to the amenability of a minor to treatment is the "preponderance of the evidence." Standard. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Probable cause determination cannot be based on hearsay testimony. — The probable cause determination of a court at a waiver hearing concerning juveniles cannot be based upon hearsay testimony. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Exclusion of testimony held proper. — Although proffered testimony was relevant to the amenability issue, the superior court did not abuse its discretion in excluding it because its prejudicial impact outweighed its probative value. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Insufficient evidence. — Where the court had little information concerning the probable cause of the minor's delinquent behavior, it was aware only of the nature of the offenses, of the fact that the minor was apparently not in need of funds, and of his statement that he regarded the commission of the crimes as a game, this information was insufficient to satisfy the requirements of this subsection. D.H. v. State, Sup. Ct. Op. No. 1399 (File No. 2837), 561 P.2d 294 (1977).

Waiver hearing did not comply with the standards set forth in this section and Rule of Children's Procedure 3. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974).

Trial court's conclusion that minor was amenable to treatment was abuse of discretion. — See in re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Prosecution for joyriding. — One under 18 years of age could be charged, prosecuted and sentenced in the district court, as an adult, for a misdemeanor violation of Alaska's "joyriding" statute, former AS 28.35.010(a), before there had been an order by the superior court waiving the latter court's juvenile jurisdiction. *State v. G.L.R.*, Sup. Ct. Op. No. 1786 (File No. 2978), 590 P.2d 65 (1979).
Applied in *State v. Jensen*, Ct. App. Op. P.2d (1984).

Sec. 47.10.070. Hearings. The court may conduct the hearing in an informal manner in the courtroom or in chambers. A hearing may be held before a young adult advisory panel in accordance with AS 47.10.075. The court shall give notice of the hearing to the department and it may send a representative to the hearing. The court shall also transmit a copy of the petition to the department. The representative of the department may also be heard at the hearing. The public shall be excluded from the hearing, but the court, in its discretion, may permit individuals to attend a hearing, if their attendance is compatible with the best interests of the minor. Nothing in this section may be applied in such a way as to deny a child's rights to a public trial and to a trial by jury. (§ 1.1.1) art I ch 145 SLA 1957; am § 1 ch 49 SLA 1966; am § 53 ch 71 SLA 1972)

Cross references. — For waiver hearings, see AS 47.10.060.
Editor's notes. — *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

NOTES TO DECISIONS

Constitutionality. — See *In re Gault*, 387 U.S. 1, 87 Sup. Ct. 1128, 18 L. Ed. 2d 527 (1967), discussing due process requirements in juvenile delinquency proceedings.

Constitutional requirements apply to children. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Hence, states must afford juveniles due process of law in delinquency proceedings that might result in the child's incarceration, and accordingly juveniles must be afforded the right to be represented by counsel must be given proper and timely notice, must be given the right of confrontation and cross-examination of witnesses, and afforded the privilege against self-incrimination. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

While the U.S. Supreme Court has not

the adjudicatory stage has no necessary applicability to other steps of the juvenile process. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Due process standards must be observed at a detention inquiry since it may result in the deprivation of the child's liberty. Due process requires at the very least that detention orders be based on competent, sworn testimony, that the child have the right to be represented by counsel at the detention inquiry, and that the detention order state with particularity the facts supporting it. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Incarceration, when applied to children, is a taking of liberty under the 14th amendment, regardless of benevolent-sounding labels. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The due process clause of the 14th amendment applies when a child is charged with misconduct for which he may be incarcerated in an institution, regardless of the labels of the adjudication and institution, so the child is entitled to notice of charges, counsel, confrontation and cross-examination, and the privilege against self-incrimination. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The right to grand jury indictment is not so fundamental that due process is offended by alternate methods for instituting children's proceedings where the child is charged with having violated a criminal statute. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Children who are charged with acts which would be chargeable only by grand jury indictment, if committed by an adult, need not be indicted by a grand jury. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Children are constitutionally entitled to jury trial in the adjudicatory stage of a delinquency proceeding. However, due to the uniqueness of some facets of the proceedings governing children's court proceedings and the potential damage which may accrue to the child by a public trial, the child should first consult with his counsel and his parents or guardian when appropriate, and then affirmatively assert the right to a trial by jury before it is finally granted. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971). But see *McKiever v.*

Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 637 (1971), in which it was held that trial by jury in the juvenile court's adjudicatory stage is not a constitutional requirement.

Whenever a child in a delinquency proceeding is charged with acts which would be a crime, subject to incarceration if committed by an adult, Alaska Const., art. I, § 11, guarantees him the right to jury trial. To the extent in *re White*, Sup. Ct. Op. No. 507 (File No. 1013), 445 P.2d 813 (1968) [subsequently overruled, in *re G.K.*, Sup. Ct. Op. No. 796 (File Nos. 1627, 1654, 1674), 487 P.2d 914 (1972)] is inconsistent with this opinion, it is overruled. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The purposes of the right to jury trial, such as protection against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge, apply as much in children's cases as in adult cases. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

If the child waives jury trial, the state may not require it, but jury trial shall be provided only on demand. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The Hammonds test of waiver (*Hammonds v. State*, Sup. Ct. Op. No. 483 (File No. 828), 442 P.2d 39 (1968)), applies to infants as well as adults. The consequences of application will differ for infants, because some decisions can be "knowingly and intelligently" made only by persons of fuller knowledge and maturity. An infant not advised by an attorney could make few knowledgeable and intelligent decisions about whether to waive rights in judicial proceedings. On the other hand, in areas where an adult ordinarily delegates to his attorney decision-making authority, as in deciding whether to object to introduction of evidence, the competence of the attorney rather than of the client generally determines whether waivers satisfy the Hammonds criteria. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The right to counsel extends to children charged with delinquency. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

A juvenile must be afforded the right to be represented by counsel at the delinquency proceeding, and a denial of that right violates due process. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Right to reasonable time to prepare for trial. — It is unquestionable that the right to the assistance of counsel of necessity includes the concomitant right to have a reasonable time in which to prepare for trial. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

While an adult defendant in a criminal case must be brought to trial within a reasonable time, due process requires that he may not be brought to trial too soon. He must be given a reasonable time to consult with his counsel and to prepare his defense. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

This section provides for the exclusion of the public from children's hearings. *RLR v. State*, Sup. Ct. Op. No. 705 (File No. 1156), 487 P.2d 27 (1971).

But such provision involves only persons whose presence is not desired by child. — The area of discretion in the rule, where the court may refuse to open the hearing, involves persons whose presence is not desired by the child. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

It is an abuse of discretion for the court to refuse admittance to individuals whose presence is favored by the child, except in special circumstances such as the unavailability of a courtroom sufficiently large to hold all the individuals whose presence is sought. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

If the child or his guardian ad litem

wants the press, friends, or others to be free to attend, then the hearing must be open to them. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

As children are guaranteed the right to a public trial by the Alaska Constitution. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Due process requires that children have the right to a public trial by jury where they are charged with acts which would be a crime if committed by an adult. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

The fundamental constitutional right of public trial by jury must be afforded children in delinquency adjudication proceedings, in spite of the possible interference with the benevolent motive of the children's court system which have, in the past, justified denial of those rights. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

The reasons for the constitutional guarantees of public trial apply as much to juvenile delinquency proceedings as to adult criminal proceedings. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Delinquency must be proved beyond a reasonable doubt under the due process clause of the 14th amendment. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Cited in *In re P.N.*, Sup. Ct. Op. No. 1127 (File No. 2191), 533 P.2d 13 (1975); *M.O.W. v. State*, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Collateral references. — Power of juvenile delinquency proceedings, 43 ALR2d 1128.
Degree of proof in juvenile delinquency proceedings, 43 ALR2d 1138.

Sec. 47.10.075. Young adult advisory panels. (a) Unless the minor objects, the court may select a young adult advisory panel to hear the case and advise the court of a recommended judgment and order. The court may consider any of the panel recommendations in making its judgment and order in the case.

(b) The principal of each high school shall submit annually to the court a list of the students enrolled in grades 10, 11 and 12. The court shall determine the method of selecting the members of each panel.

(c) A student shall be excused from attending school while serving as a panel member. A student may not serve more than once each year as a panel member.

(d) A student shall be excused from service as a panel member if the student submits a written request to the court indicating the reason for not wishing to serve. (§ 2 ch 49 SLA 1966)

Legislative history reports. — For report on ch. 49, SLA 1966, see 1966 House Journal, p. 52.

Sec. 47.10.080. Judgments and orders. (a) The court, at the conclusion of the hearing, or thereafter as the circumstances of the case may require, shall find and enter a judgment that the minor is or is not delinquent or a child in need of aid.

(b) If the court finds that the minor is delinquent, it shall

(1) order the minor committed to the Department of Health and Social Services for a period of time not to exceed two years or in any event extend past the day the minor becomes 19, except that the department may petition for and the court may grant in a hearing (A) two-year extensions of commitment which do not extend beyond the child's 19th birthday if the extension is in the best interests of the minor and the public; and (B) an additional one-year period of supervision past age 19 if continued supervision is in the best interests of the person and the person consents to it; the department shall place the minor in the juvenile facility which the department considers appropriate and which may include a juvenile correctional school, detention home, or detention facility; the minor may be released from placement or detention and placed on probation on order of the court and may also be released by the department, in its discretion, under AS 47.10.200;

(2) order the minor placed on probation, to be supervised by the department, and released to the minor's parents, guardian, or a suitable person; if the court orders the minor placed on probation, it may specify the terms and conditions of probation; the probation may be for a period of time, not to exceed two years and in no event extend past the day the minor becomes 19, except that the department may petition for and the court may grant in a hearing

(A) two-year extensions of supervision which do not extend beyond the child's 19th birthday if the extension is in the best interests of the minor and the public; and

(B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it;

(3) order the minor committed to the department and placed on probation, to be supervised by the department, and released to the minor's parents, guardian, other suitable person, or suitable nondetention setting such as a family home, group care facility, or child care facility, whichever the department considers appropriate to implement the treatment plan of the predisposition report; if the court orders the minor placed on probation, it may specify the terms and conditions

of probation; the department may transfer the minor, in the minor's best interests, from one of the probationary placement settings listed in this paragraph to another, and the minor, the minor's parents or guardian, and the minor's attorney are entitled to reasonable notice of the transfer; the probation may be for a period of time, not to exceed two years and in no event extend past the day the minor becomes 19, except that the department may petition for and the court may grant in a hearing

(A) two-year extensions of commitment which do not extend beyond the child's 19th birthday if the extension is in the best interests of the minor and the public; and

(B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it; or

(4) order the minor to make suitable restitution in lieu of or in addition to the court's order under (1), (2) or (3) of this subsection.

(5) order the minor committed to the Department of Health and Social Services for placement in an adventure-based education program established under AS 47.21.020 with conditions the court considers appropriate concerning release upon satisfactory completion of the program or commitment under (1) of this subsection if the program is not satisfactorily completed.

(c) If the court finds that the minor is a child in need of aid, it shall

(1) order the minor committed to the department for placement in an appropriate setting for a period of time not to exceed two years or in any event past the date the minor becomes 19 years of age, except that the department may petition for and the court may grant in a hearing (A) two-year extensions of commitment which do not extend beyond the minor's 19th birthday if the extension is in the best interests of the minor and the public; and (B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it; the department may transfer the minor, in the minor's best interests, from one placement setting to another, and the minor, the minor's parents or guardian, and the minor's attorney are entitled to reasonable notice of the transfer;

(2) order the minor released to the minor's parents, guardian, or some other suitable person, and, in appropriate cases, order the parents, guardian, or other person to provide medical or other care and treatment; if the court releases the minor, it shall direct the department to supervise the care and treatment given to the minor, but the court may dispense with the department's supervision if the court finds that the adult to whom the minor is released will adequately care for the minor without supervision; the department's supervision may not exceed two years or in any event extend past the date the minor reaches age 19, except that the department may petition for and the court may grant in a hearing

(A) two-year extensions of supervision which do not extend beyond the minor's 19th birthday if the extension is in the best interests of the minor and the public; and

(B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it; or

(3) by order, upon a showing in the adjudication by clear and convincing evidence that there is a child in need of aid under AS 47.10.010(a)(2) as a result of parental conduct and upon a showing in the disposition by clear and convincing evidence that the parental conduct is likely to continue to exist if there is no termination of parental rights, terminate parental rights and responsibilities of one or both parents and commit the child to the department or to a legally appointed guardian of the person of the child, and the department or guardian shall report annually to the court on efforts being made to find a permanent placement for the child.

(d) An order issued under (c) (3) of this section authorizes the commissioner of health and social services or a designee or the guardian of the person of the child to consent to the adoption of the child.

(e) If the court finds that the minor is not delinquent or a child in need of aid, it shall immediately order the minor released from the department's custody and returned to the minor's parents, guardian, or custodian, and dismiss the case.

(f) A minor found to be delinquent or a child in need of aid is a ward of the state while committed to the department or the department has the power to supervise the minor's actions. The court shall review an order made under (b) or (c)(1) or (2) of this section annually, and may review the order more frequently to determine if continued placement, probation, or supervision, as it is being provided, is in the best interest of the minor and the public. The department, the minor, the minor's parents, guardian, or custodian are entitled, when good cause is shown, to a review on application. If the application is granted, the court shall afford these parties and their counsel reasonable notice in advance of the review and hold a hearing where these parties and their counsel shall be afforded the opportunity to be heard. The minor shall be afforded the opportunity to be present at the review.

(g) No adjudication under this chapter upon the status of a child may operate to impose any of the civil disabilities ordinarily imposed by conviction upon a criminal charge, nor may a minor afterward be considered a criminal by the adjudication, nor may the adjudication be afterward deemed a conviction, nor may a minor be charged with or convicted of a crime in a court, except as provided in this chapter. The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court, nor does the commitment and placement or evidence operate to disqualify a minor in a future civil service examination or appointment in the state.

(h) The department shall pay all court costs incurred in all proceedings in connection with the adjudication of delinquency under this chapter, including hearings which result in the release of the minor.

(i) A minor, the minor's parents or guardian acting on the minor's behalf, or the department may appeal a judgment or order, or the stay, modification, setting aside, revocation, or enlargement of a judgment or order issued by the court under this chapter.

(j) *Repealed, § 29 ch 63 SLA 1977.*

(k) In making its order under (c) of this section, the court shall consider the fact, if it is a fact, that the minor was being provided treatment by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination. (§ 10(i) art 1 ch 1 SLA 1957; am § 2 ch 110 SLA 1960; am § 2 ch 118 SLA 1962; am § 1 ch 40 SLA 1967; am §§ 1-4 ch 27 SLA 1970; am §§ 12-15 ch 245 SLA 1970; am § 6 ch 104 SLA 1971; am §§ 6, 7 ch 1 SLA 1972; am §§ 1, 2 ch 125 SLA 1973; am §§ 14-18, 29 ch 63 SLA 1977; am § 6 ch 86 SLA 1979)

Cross references. — For the standard of proof for findings under this section, see Children's Rule 21, Alaska Rules of Court. See also, Children's Rules 22 and 23.

Editor's notes. — Section 31, ch. 63, SLA 1977, provides: "Section 18 of this Act has the effect of adding to the court's responsibilities when holding a review under Rule 28, Alaska Rules of Children's Procedure, by requiring the court to hold a hearing upon a showing of good cause, give notice, and afford an opportunity to be heard."

Section 34, ch. 63, SLA 1977, in the first sentence provides: "The portions of AS 47.10.080(b) and (c) in secs. 15 and 16 of

this Act which specify the length of commitment to the department or probation or supervision by the department are applicable to these minors affected under former AS 47.10.080(b), (c) and (j) before the effective date of this Act (August 26, 1977) so that the commitment, probation or supervision of minors by the department before the effective date of this Act (August 26, 1977) shall continue, but may not exceed two years from the effective date of this Act (August 26, 1977) unless two-year extensions have been granted by the court under this Act." Subsection (j) of AS 47.10.080 was repealed by § 29, ch. 63, SLA 1977.

NOTES TO DECISIONS

Each category of children mandates differences regarding content of dispositional orders. — Alaska's pertinent statutory provisions and procedural rules distinguish between categories of children for purposes of administering Alaska children's laws. Of controlling significance is that each class or category mandates distinct differences regarding the permissible content of any dispositional order the trial court can enter. In re A Minor Child, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 638 (1971).

Where a delinquent child was sentenced to a fixed time period and ordered to an adult institution, this

Authority to order placement of delinquent child. — In enacting paragraph (b)(3), the legislature intended for the department, not the court, to make the decisions concerning placement of the minor. State, Dept of Health & Social Servs. v. A.C., Ct. App. Op. No. 384 (File No. 7643), P.2d (1984).

Paragraph (b)(3) of this section provides the court authority to order the delinquent minor placed on probation to the Department of Health and Social Services; it is then up to the department to determine whether the minor should be placed with his parents or in another setting. State, Dept of Health & Social Servs. v. A.C., Ct. App. Op. No. 384 (File No. 7643), P.2d (1984).

Review of placement decision. — The superior court has the authority to review the decision of the department to determine if the placement is in the best interest of the minor, but in reviewing a decision of the department, the superior court may not substitute its judgment for the judgment of the department; since the legislature has committed the decision of placement to the department's discretion, the question for the court is whether the agency abused its discretion. State, Dept of Health & Social Servs. v. A.C., Ct. App. Op. No. 384 (File No. 7643), P.2d (1984).

Jurisdiction dependent upon age of offender at time of act. — Juvenile jurisdiction of the superior court in delinquency proceedings is dependent upon the age of the offender at the time of the delinquent act. Henson v. State, Sup. Ct. Op. No. 1590 (File No. 3024), 576 P.2d 1352 (1978).

Where a delinquent child was under the age of 18 at the time the acts of delinquency were committed, he is considered a minor for the purposes of adjudication and disposition. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Option available to prosecution absent waiver under AS 47.10.080(a). — A proceeding in children's court, which is limited to the dispositions set forth in AS 47.10.080(b), is the only option available to the prosecution absent waiver under AS 47.10.080(a), and the standards established in that section are sufficiently clear to prevent arbitrary enforcement. M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4816), 615 P.2d 1223 (1982).

One who committed a crime when 18 years of age could be criminally prosecuted, as an adult, when he had been

previously adjudged a delinquent minor and the court had retained supervisory jurisdiction over him until age 19. Henson v. State, Sup. Ct. Op. No. 1590 (File No. 3024), 576 P.2d 1352 (1978).

Section is maximum sentencing statute. — Statutes requiring release upon a specified birthday are, in effect, maximum sentencing statutes. Davenport v. McGinnis, Sup. Ct. Op. No. 1049 (File No. 1942), 522 P.2d 1140 (1974).

Sentence reduction to 19 years of age not retroactive. — There was nothing in the amendatory legislation to this section that indicated an intention that the sentence reduction should operate retroactively. Davenport v. McGinnis, Sup. Ct. Op. No. 1049 (File No. 1942), 522 P.2d 1140 (1974).

There is no conflict between subsection (b)(1) and AS 47.10.060(d). In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Age 20 is the proper age for determining whether a minor is amenable to treatment. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

The inconsistency between AS 47.10.060(d) and subsection (b)(1) of this section that existed prior to the 1977 amendments to these sections has been eliminated in that AS 47.10.060 (d) now provides that the determinative age is 20 and subsection (b)(1) provides that the maximum limitation of confinement of minors is 20. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Binding advance consent to treatment. — In order to give effect to the legislature's intent that a court may consider treatment until age 20 in determining waiver of juvenile jurisdiction, it is necessary that the judge be able to evaluate at the time of the waiver hearing whether the juvenile will in fact be available for treatment. It is not possible for the judge to know this unless the child can give binding consent at the time of the hearing. State v. F.L.A., Sup. Ct. Op. No. 2041 (File No. 4333), 608 P.2d 12 (1980).

A minor may bindingly consent to an additional period of supervision as provided by subsection (b)(1) of this section. In determining the effect to be given to such consent, the court should consider the age and maturity of the juvenile and whether he has the advice of counsel. To protect a minor from making a decision adverse to his own interests, a guardian ad litem may be appointed. State v. F.L.A., Sup. Ct. Op.

No. 2041 (File No. 4333), 608 P.2d 12 (1980).

The portion of the opinion in *In re F.S.*, 586 P.2d 607 (1978) that held that a minor in a waiver hearing could not give a binding advance consent to treatment beyond age 19 was mistaken. *State v. F.L.A.*, Sup. Ct. Op. No. 2041 (File No. 4333), 608 P.2d 12 (1980).

While it is true, as indicated in *In re F.S.*, Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978), that the statute contemplates that the determination of the additional period of treatment be made after the initial hearing, such an intent does not mandate that an advance consent to treatment given by the minor may not be regarded as binding. *State v. F.L.A.*, Sup. Ct. Op. No. 2041 (File No. 4333), 608 P.2d 12 (1980).

The lower court erred in considering the purported consent of a minor to an additional year of supervision because: (1) the minor could withdraw his consent upon reaching majority and (2) even assuming the minor's consent could not be withdrawn, subsection (b)(1) requires that the department petition the court and that additional commitment be in the minor's best interests before the court has jurisdiction to order the additional one-year period. *In re F.S.*, Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Subsection (b)(1) requires that the department petition for an additional one-year period of supervision and that continued supervision be in the best interests of the minor before the court may order an additional year. Thus, a minor's prospective consent to additional supervision is not a material factor unless the other two conditions of the statute are fulfilled. *In re F.S.*, Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

This statute contemplates that the decision to extend the period of supervision be made after the initial dispositional hearing. To give effect to the minor's advance consent would thus be contrary to the apparent intent of the legislature. *In re F.S.*, Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

The court must choose between commitment to the Department of Health and Social Services and probation, and may not delegate the choice to the Department of Health and Social Services. This is a correct textual analysis, especially in light of the provision in subsection (b)(1) for subsequent court order for probation following placement or

detention. The legislature has clearly indicated its intent to place this choice in the hands of the court. *R.I.R. v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Court-ordered probation. — Probation cannot be deemed court-ordered under subsection (b) of this section unless it is directly ordered. It cannot be "triggered" by a decision of the department that the juvenile has successfully completed a rehabilitation program, even if the court judgment states that institutionalization will end upon such successful completion. *In re L.C. v. State*, Sup. Ct. Op. No. 2277 (File Nos. 4401, 4411), 625 P.2d 839 (1981).

The hearing judge erred by placing a delinquent child on probation until his 20th birthday. *B.A.M. v. State*, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Petition necessary to extend probation beyond 18th birthday. — The superior court was without authority to extend probation beyond the delinquent child's 19th birthday without a petition from the department to extend the probationary period for an additional year. *B.A.M. v. State*, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

A minor who has been adjudged a child in need of supervision is now a child in need of aid; cannot be institutionalized under the Children's Code. *In re A. Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

Where a runaway child is found to be a child in need of supervision is now child in need of aid, not a delinquent minor, no legal basis exists for his incarceration. *In re A. Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

The only instance under Alaska children's laws authorizing institutionalization or incarceration is when the child has violated the laws of the state, or any of its political subdivisions, and in turn has been adjudged a delinquent minor. *In re A. Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

The legislature has authorized institutionalization only where the child is found to be a delinquent minor. *In re A. Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

Power of court under subsection (c). — Under subsection (c) of this section, the court is empowered to order the minor committed to the Department of Health and Social Services or order the minor released to his parents, guardian, or some

other suitable person. *In re A. Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

The Department of Health and Social Services does not possess the authority to institutionalize any minor, including one who has been declared a child in need of supervision [see now child in need of aid], who has been committed to its custody. It is unreasonable to construe Alaska children's statutes in a manner which would result in the grant to the Department of Health and Social Services of broader powers of commitment than possessed by the trial court. *In re A. Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

A child "in need of aid" appears to be the functional equivalent of a "dependent" child under AS 47.10.010 as it existed prior to its 1977 amendment. *In re C.L.T.*, Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

Parental right to custody and control is not absolute. — While a parent has a right to the care, custody and control of his or her children, this right is not absolute, and "courts have become increasingly aware of the rights of children." The Alaska legislature has struck a balance between these potentially competing rights by requiring the state to prove its allegations by clear and convincing evidence in parental rights termination cases. Once this burden of proof has been met, however, the statute mandates a termination. *In re D.C.*, Sup. Ct. Op. No. 1862 (File No. 3840), 592 P.2d 22 (1979).

The discretion allotted a parent in the administration of punishment is not unlimited. Clearly it does not extend to punishment regularly causing the "substantial physical harm" which under AS 47.10.010(a)(2)(C) determines that a child is in need of aid. *In re D.C.*, Sup. Ct. Op. No. 1862 (File No. 3840), 592 P.2d 22 (1979).

Statutory provisions governing judgments and orders terminating parental rights have been changed. In order to terminate parental rights, the court must now find that the child is in need of aid under AS 47.10.010(a)(2) as the result of parental conduct proved by clear and convincing evidence and that the parental conduct is likely to continue to exist if there is no termination of parental rights, proved again by clear and convincing evidence. AS 47.10.080(c)(3). *In re C.L.T.*, Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

In order to terminate parental rights under this section, the court must find by clear and convincing evidence (1) that there is a child in need of aid under AS 47.10.010(a)(2) as a result of parental conduct, and (2) that the parental conduct is likely to continue. *E.A. v. State*, Sup. Ct. Op. No. 2289 (File Nos. 4687, 4870), 623 P.2d 1210 (1981).

Under former AS 47.10.010(a)(5) and subsection (a) and former subsection (c)(3)(D) of this section, in order to terminate parental rights, the superior court was required to find (1) that the child was a "dependent minor" and (2) that the parent had demonstrated by her conduct, proved by clear and convincing proof, that she was unfit to continue to exercise her parental rights and responsibilities. *In re C.L.T.*, Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

Parent's impulsive personality disorder not ground for termination of rights. — Where after finding that child was in need of aid, trial judge found that the parent "is likely to continue to demonstrate a conscious disregard of the obligation owed by a parent to a child even after her release from incarceration because she suffers from an impulsive personality disorder," such finding was insufficient to satisfy requirement of clear and convincing evidence that conduct leading to determination that child is in need of aid is likely since an impulsive personality disorder itself is not conduct and thus, not a ground for termination. *Nada A. v. State*, Sup. Ct. Op. No. 2632 (File Nos. 6546, 6593), 680 P.2d 436 (1983).

Findings. — A finding that the parental conduct is likely to continue must be made expressly on the record prior to ordering the termination of parental rights. *E.A. v. State*, Sup. Ct. Op. No. 2289 (File Nos. 4687, 4870), 623 P.2d 1210 (1981).

Abandonment. — For cases construing former language in subsection (c) providing for termination of parental rights and responsibilities when the child had been abandoned, see *D.M. v. State*, Sup. Ct. Op. No. 962 (File No. 1843), 515 P.2d 1254 (1973); *In re B.J.*, Sup. Ct. Op. No. 1110 (File No. 2161), 530 P.2d 747 (1975); *In re E.J. (T.)*, Sup. Ct. Op. No. 1348 (File No. 2775), 557 P.2d 1128 (1976).

A rehabilitation program is not a common practice in the trial courts absent approval by a representative of the state. *In re E.J. (T.)*, Sup. Ct. Op. No. 1348 (File No. 2775), 557 P.2d 1128 (1976).

Trial court did not abuse discretion in failing to consider possibility of setting up plan for reestablishing family relationship between father and son. — See *In re E.J. (T.)*, Sup. Ct. Op. No. 1348 (File No. 2775), 557 P.2d 1128 (1976).

Role of trial court in proceeding involving termination of parental rights. — See *In re E.J. (T.)*, Sup. Ct. Op. No. 1348 (File No. 2775), 557 P.2d 1128 (1976).

Applicability of burden of proof. — A burden of proof is not applicable to a dispositive hearing other than when termination of parental rights is involved. *In re S.D.*, Sup. Ct. Op. No. 1255 (File No. 2530), 549 P.2d 1190 (1976). See also *In re C.L.T.*, Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

Determination of the standard to be applied by the court at the dispositive phase of a child hearing was not tantamount to establishing a burden of proof requirement. Such a requirement had been set forth in former subsection (c)(3)(D) [see now subsection (f)(3)]. No such requirement had been set forth in situations such as where termination of parental rights was not involved. *In re S.D.*, Sup. Ct. Op. No. 1255 (File No. 2530), 549 P.2d 1190 (1976).

Standard of proof held constitutional. — Allowing parental rights to be terminated based on a standard of proof less stringent than "beyond a reasonable doubt" does not violate the due process clause of the United States Constitution or the Alaska Constitution. *In re C.L.T.*, Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

Since in proceedings brought to terminate parental rights, the parent is neither charged with criminal behavior nor subject to incarceration as a direct consequence of the proceeding, there is nothing in the federal constitution that compels adoption of the proof beyond a reasonable doubt standard in termination proceedings. *In re C.L.T.*, Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

Clear and convincing proof is a more demanding standard than a mere preponderance of the evidence and is adequate to protect the parent's substantial interest in his or her child custody rights. This evidentiary standard balances the competing interests involved in a proceeding brought to terminate parental rights, one of which is the right of a child to an adequate home. *In re C.L.T.*, Sup. Ct.

Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

The due process clause did not require a standard of proof greater than clear and convincing evidence when the state sought to terminate parental rights because of unfitness under former subsection (c)(3)(D). *In re C.L.T.*, Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979). Standard of proof under former subsection (c)(3)(D) calling for "clear and convincing" evidence of the natural mother's unfitness for the care and custody of the child was held proper. *In re K.S.*, Sup. Ct. Op. No. 1219 (File No. 2359), 543 P.2d 1191 (1975).

Protection provided by Indian Child Welfare Act. — The Indian Child Welfare Act, 25 U.S.C. §§ 1901 — 1963, enacted in 1978, provides a higher standard of protection to the rights of parents in termination proceedings involving Indians and Native Alaskans than that provided in this section. *E.A. v. State*, Sup. Ct. Op. No. 2289 (File Nos. 4687, 4870), 623 P.2d 1210 (1981).

Orders terminating parental rights met statutory and rule of court requirements regarding findings of fact. — See *In re C.L.T.*, Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

Review of orders terminating parental rights. — Orders made under subsection (c)(3) of this section are not entitled to automatic review, inasmuch as subsection (f) of this section specifies which orders are entitled to this review and orders under subsection (c)(3) of this section are not included within the list. *Rita T. v. State*, Sup. Ct. Op. No. 2294 (File No. 5036), 623 P.2d 344 (1981).

All orders made pursuant to this section, including orders under subsection (c)(3) of this section, are to be reviewed upon application of an interested party if the party establishes good cause for the review, and if the child is still a ward of the court. *Rita T. v. State*, Sup. Ct. Op. No. 2294 (File No. 5036), 623 P.2d 344 (1981).

As long as a child remains the ward of the court, under subsection (f) of this section his or her natural parents are entitled to a review of the order terminating their parental rights upon a showing of good cause for the hearing. *Rita T. v. State*, Sup. Ct. Op. No. 2294 (File No. 5036), 623 P.2d 344 (1981).

Good cause could be established if the parents showed that it would be in the best interests of the child to resume living with them because they have sufficiently rela-

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furnish justification for dispensing with constitutional safeguards. *In re A Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

The right of confrontation is paramount to the state's policy of protecting a juvenile offender. *Davis v. State*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

But state's interest in secrecy of juvenile adjudications need not always fall before confrontation right. — See *Gonzales v. State*, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

Prosecution witnesses impeachable by cross-examination for bias from probationary status as juvenile delinquent. — The confrontation clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness's probationary status as juvenile delinquent although such an impeachment would conflict with a state's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency. *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

Whatever temporary embarrassment might result to a prosecution witness or his family by disclosure of his juvenile record — if the prosecution insisted on using him to make its case — is outweighed by petitioner's right to probe into the infirmity of possible bias on the testimony of a crucial identification witness. *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

The state cannot, consistent with right of confrontation, require the defendant to bear the full burden of vindicating the state's interest in the secrecy of juvenile criminal records. *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

The United States supreme court has held that the constitutional right of confrontation required that defense counsel be allowed to investigate the potential bias of a crucial prosecution witness, even where that potential bias arose out of a juvenile adjudication and its resultant probationary status. *Gonzales v. State*, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

The United States supreme court concluded that Alaska's interest in protecting the anonymity of the juvenile offender was outweighed by the more

bilitated themselves so that they can provide proper guidance and care for the child. *Rita T. v. State*, Sup. Ct. Op. No. 2294 (File No. 5036), 623 P.2d 344 (1981).

Where, when a mother applied for a hearing before the superior court, she indicated that as a result of a 14-month rehabilitation program she had overcome the problems that had led to the termination of her parental rights and also indicated that professional counselors, social workers and others would be able to establish that she was now capable of providing a warm and loving home for the child, this was a sufficient showing of good cause to entitle her to a review of the order terminating her parental rights if the child had not yet been adopted. *Rita T. v. State*, Sup. Ct. Op. No. 2294 (File No. 5036), 623 P.2d 344 (1981).

Former AS 17.12.110(d)(4) not in conflict. — Former AS 17.12.110(d)(4), which provided that a person who, while under the age of 18, possesses, controls or uses any amount of marijuana: was, upon conviction, guilty of a misdemeanor punishable by a fine of not more than \$1000, was not in conflict with AS 47.10.010(a)(1) and paragraph (b)(1) of this section. *M.O.W. v. State*, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

For reference to apparent conflict between subsection (c)(1) as it read prior to 1977 amendment and Child's Rule 22(f), see footnote 30 in *re S.D.*, Sup. Ct. Op. No. 1255 (File No. 2530), 549 P.2d 1190 (1976).

Peremptory challenge procedure inapplicable to juvenile proceedings.

— While juvenile proceedings have some of the characteristics of both civil and criminal actions, they are basically different from both, and the words "civil or criminal" as used in AS 22.20.022 must be strictly construed. The trial judge was correct in holding that peremptory challenge procedure applied only to civil and criminal actions and not to juvenile proceedings. *In re A Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

Notions of benevolent protective policies cannot be used to validate departures from positive law relating to the adjudicative and dispositive phases of children's proceedings. *In re A Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

Nor to justify dispensing with constitutional safeguards. — The benevolent social theory supposedly underlying children's court acts does not

critical need to afford a criminal defendant reasonable inquiry into the motives of prosecution witnesses. *Gonzales v. State*, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

Conflict between section and decision in *Davis v. Alaska* is superficial. — The conflict between this section and the supreme court's decision in *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), is only superficial. *Gonzales v. State*, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

Since disclosure requires, because of probationary status, not juvenile adjudication. — The constitutional requirement of disclosure in the facts in *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), is created not by the juvenile adjudication itself but by the probationary status of the juvenile at the time of *Davis*' trial, with its potential for motivating false testimony. *Gonzales v. State*, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

Where the witness was not on juvenile probation, it cannot be seriously argued that the fact of previous juvenile convictions, standing alone, provided any inference of potential bias. *Gonzales v. State*, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

State adjudications directed solely at credibility do not conflict with confrontation right. — Juvenile adjudications which are state by Alaska's standards and directed solely at general credibility rather than bias are generally not sufficiently probative to create a genuine conflict with the defendant's right of confrontation. *Gonzales v. State*, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

Where the attempted impeachment was of general credibility by proof of prior "victims," the probative value of this type of evidence is considerably less than that which suggests false or distorted testimony because of bias, and the need to confront a witness with such evidence is correspondingly less. *Gonzales v. State*, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

As a general rule, the trial courts could properly refuse evidence of state con-

victions or juvenile adjudications where these were offered for the purpose of discrediting the witness generally rather than to show some specific pertinent bias or prejudice toward the defendant. *Thomas v. State*, Sup. Ct. Op. No. 1040 (File No. 1888, 1854) 522 P.2d 528 (1974).

Privilege against self-incrimination. — When a person under the age of 18 years violated former AS 47.10.010(a)(1), he could be adjudged a "delinquent minor," one possible consequence of which adjudication was commitment to a juvenile facility until the age of 19 (now 20). Moreover, if there was probable cause to believe the minor was delinquent and the court found that he was not amenable to treatment as a juvenile, he could be prosecuted as if he were an adult. Thus, there was always some danger of incarceration, or other criminal sanctions, when a child committed an act which would have been a crime if committed by an adult. Under such circumstances a child had a privilege against self-incrimination. *E.L.L. v. State*, Sup. Ct. Op. No. 1540 (File No. 3374), 572 P.2d 786 (1977).

A child adjudicated delinquent for selling LSD may be incarcerated, possibly even in a city jail, until age 19, which may be many years. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1150), 487 P.2d 27 (1971).

Subsection (g) provides in part that a juvenile offender may not be considered a criminal by reason of the adjudication, nor may the adjudication be afterward deemed a conviction. *Gonzales v. State*, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

A judge cannot consider a juvenile offense as a criminal conviction for the purpose of prescribing a mandatory sentence. *Berfield v. State*, Sup. Ct. Op. No. 581 (File No. 960), 458 P.2d 1008 (1969).

The judge's consideration of factors relating to accused's life, characteristics, background and behavior prior to reaching the age of 18 years did not mean that he considered accused a criminal or that he was using the juvenile offenses as criminal convictions in determining the sentence to impose. *Berfield v. State*, Sup. Ct. Op. No. 581 (File No. 960), 458 P.2d 1008 (1969).

Consideration of the juvenile record is proper by the court imposing a sentence upon an adult offender. *Penn v. State*, Sup. Ct. Op. No. 1773 (File No. 3873), 588 P.2d 288 (1978).

Use of the juvenile history of the offender in sentencing proceedings does not amount to the use of those proceedings as evidence against the offender within the proscription of such a statute as this section. *Penn v. State*, Sup. Ct. Op. No. 1773 (File No. 3873), 588 P.2d 288 (1978).

When sentence determined. — The sentence which may be imposed upon a convicted adult is determined as of the time of the final judgment of conviction, or as of the time of commission of the offense. These rules have been applied to juvenile sentencing. *Davenport v. McGinnis*, Sup. Ct. Op. No. 1049 (File No. 1942), 522 P.2d 1140 (1974).

Review of custody orders. — The new children's law, as a result of the 1977 acts, provides for review of custody orders annually more often if good cause is shown. *In re A.M.*, Sup. Ct. Op. No. 1548 (File No. 3219, 3229), 573 P.2d 1376 (1978).

Appeal of detention order. — Under this section and Children's Rule 29(a), a minor who is detained may appeal his detention order. *A.M. v. State*, Ct. App. Op. No. 150 (File No. 6105), 663 P.2d 346 (1982).

Appellants are authorized to bring juvenile bail appeals under App. R. 207 to ensure that juvenile detention hearings

are not insulated from review. *A.M. v. State*, Ct. App. Op. No. 150 (File No. 6105), 663 P.2d 346 (1982).

Appeal from detention order dismissed as untimely. — See A.M. v. State, Ct. App. Op. No. 150 (File No. 6105), 663 P.2d 346 (1982).

Appellate jurisdiction. — AS 22.05.010 places final appellate jurisdiction in all cases in the supreme court. In re A Minor Child, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

Applied in L.A.M. v. State, Sup. Ct. Op. No. 1249 (File No. 2221), 547 P.2d 827 (1976); *Adams v. Ross*, Sup. Ct. Op. No. 1281 (File No. 2458), 551 P.2d 948 (1976); *D.H. v. State*, Sup. Ct. Op. No. 1396 (File No. 2837), 561 P.2d 291 (1977).

Quoted in *Davis v. State*, Sup. Ct. Op. No. 816 (File Nos. 1428, 1436), 499 P.2d 1025 (1972).

Stated in *In re G.K.*, Sup. Ct. Op. No. 795 (File Nos. 1627, 1654, 1674), 497 P.2d 914 (1972).

Cited in *Ellison v. State*, Sup. Ct. Op. No. 898 (File No. 1750), 511 P.2d 1066 (1973); *D.L.J. v. W.D.R.*, Sup. Ct. Op. No. 2433 (File No. 5411), 635 P.2d 834 (1981); *S.O. v. W.S.*, Sup. Ct. Op. No. 2491 (File No. 5656), 643 P.2d 997 (1982).

Collateral references. — Right of indigent parent to appointed counsel in proceeding for involuntary termination of parental rights, 80 ALR3d 1141.

Sec. 47.10.081, Pre-disposition hearing reports. (a) Before the disposition hearing of a delinquent minor the department shall submit a pre-disposition report with a recommended plan of treatment to aid the court in its selection of a disposition, and any further information which the court may request.

(b) Before the disposition hearing of a child in need of aid the department shall submit a pre-disposition report to aid the court in its selection of a disposition. This report shall include, but is not limited to, the following:

(1) a statement of changes in the child's or parent's behavior, which will aid the court in determining that supervision of the family or placement is no longer necessary;

(2) if removal from the home is recommended, a description of the reasons the child cannot be protected or rehabilitated adequately in the home, including a description of any previous efforts to work with the parents and the child in the home and the parents' attitude toward placement of the child;

(3) a description of the potential harm to the child which may result from removal from the home and any efforts which can be made to minimize such harm; and

(4) any further information which the court may request.

When the court shall inform the child, the child's parents and the attorneys representing the parties and the guardian ad litem that the predisposition report will be available to them not less than 10 days before the disposition hearing.

(d) For purposes of this section "parents" means the natural or adoptive parents, and any legal guardian, relative, or other adult person with whom the child has resided and who has acted as a parent in providing for the child for a continuous period of time before this action. (§ 26 ch 63 SLA 1977)

NOTES TO DECISIONS

Applied in *Granato v. Occhipinti*, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979). Cited in *M.O.W. v. State*, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Sec. 47.10.082. Best interests of the child. In making its dispositional order under AS 47.10.080(b) the court shall consider the best interests of the child and the public, and in making its dispositional order under AS 47.10.080(c) the court shall consider the best interests of the child; in either case the court shall consider also the ability of the state to take custody and to care for the child to protect the child's best interests under AS 47.10.010 — 47.10.142. (§ 26 ch 63 SLA 1977)

NOTES TO DECISIONS

Showing required to justify termination of parental rights. — While best interests of the child become relevant at some point, they first must be a showing of parental conduct sufficient to justify termination. *Nada A. v. State*, Sup. Ct. Op. No. 2632 (File Nos. 6546, 6693), 660 P.2d 436 (1983). Cited in *Granato v. Occhipinti*, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979); *M.O.W. v. State*, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Sec. 47.10.083. Review hearing information. In the case of a child in need of aid, the child shall be returned home at the review hearing under AS 47.10.080(f) unless the court finds by a preponderance of the evidence that the basis upon which the child was adjudicated under AS 47.0010(a)(2) continues to exist. If the child is not returned home, the court shall establish on the record

- (1) why the child was removed from the home;
- (2) what services have been provided to or offered to the parents to facilitate reunion;

(3) what services were utilized by the parents to facilitate reunion;

(4) the visitation history between the parents and the child;

(5) whether additional services are needed to facilitate the return of the child to the child's parents;

(6) when return of the child can be expected. (§ 26 ch 63 SLA 1977)

NOTES TO DECISIONS

Cited in *M.O.W. v. State*, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Sec. 47.10.084. Legal custody, guardianship, and residual parental rights and responsibilities. (a) When a child is committed under AS 47.10.080(b)(1) or (c)(1) to the department or released under AS 47.10.080(b)(2) or (3) or (c)(2) to the child's parents, guardian, or other suitable person, a relationship of legal custody exists. This relationship imposes on the department and its authorized agents or the parents, guardian, or other suitable person the responsibility of physical care and control of the child, the determination of where and with whom the child shall live, the right and duty to protect, train and discipline the child, and the duty of providing the child with food, shelter, education, and medical care. These obligations are subject to any residual parental rights and responsibilities and rights and responsibilities of a guardian if one has been appointed. When parental rights have been terminated, or there are no living parents and no guardian has been appointed, the responsibilities of legal custody include those in (b) and (c) of this section. The department or person having legal custody of the child may delegate any of the responsibilities under this section, except authority to consent to marriage, adoption, and military enlistment may not be delegated. For purposes of this chapter a person in charge of a placement setting is an agent of the department.

(b) When a guardian is appointed for the child, the court shall specify in its order the rights and responsibilities of the guardian. The guardian may be removed only by court order. The rights and responsibilities may include, but are not limited to, having the right and responsibility of reasonable visitation, consenting to marriage, consenting to military enlistment, consenting to major medical treatment, obtaining representation for the child in legal actions, and making decisions of legal or financial significance concerning the child.

(c) When there has been transfer of legal custody or appointment of a guardian and parental rights have not been terminated by court decree, the parents shall have residual rights and responsibilities. These residual rights and responsibilities of the parent include, but are not limited to, the right and responsibility of reasonable visitation,

consent to adoption, consent to marriage, consent to military enlistment, consent to major medical treatment except in cases of emergency or cases falling under AS 09.65.100, and the responsibility for support, except if by court order any residual right and responsibility has been delegated to a guardian under (b) of this section. (§ 26 ch 63 SLA 1977)

NOTES TO DECISIONS

Effect of being foster parents on husband-wife evidentiary privilege. — A foster child is a child of the foster parents for purposes of applying the exception to the husband-wife privilege set forth in Alaska Evidence Rule 505(a)(2)(D)(i); one foster parent cannot rely on the husband-wife privilege, refuse to testify

against the other concerning evidence relating to an assault on the foster child. Daniels v. State, Ct. App. Op. No. 357 (File No. A-366), P.2d (1984). Cited in M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Sec. 47.10.085. Child in need of aid; religious treatment. In a case in which the minor's status as a child in need of aid is sought to be based on the need for medical care, the court may, upon consideration of the health of the minor and the fact, if it is a fact, that the minor is being provided treatment by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination, dismiss the proceedings and thereby close the matter. This may be done, in the interests of justice and religious freedom, on the court's own motion or upon the application of a party to the proceedings, at any stage of the proceedings after information is given to the court under AS 47.10.020(a). (§ 8 ch 1 SLA 1972; am § 19 ch 63 SLA 1977)

NOTES TO DECISIONS

Cited in M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1984).

Sec. 47.10.090. Records. (a) The court will make and keep records of all cases brought before it. The court's official records may be inspected only with the court's permission and only by persons having a legitimate interest in them. All information and social records pertaining to a minor and prepared by an employee of the court or by a federal, state or city agency in the discharge of the employee's or agency's official duty, are privileged and may not be disclosed directly or indirectly to anyone without the court's permission. However, a state or city law-enforcement agency shall disclose information regarding a case which is needed by the person or agency charged with

making a preliminary investigation for the information of the court. Within 30 days of the date of a minor's 18th birthday or, if the court retains jurisdiction of a minor past the minor's 18th birthday, within 30 days of the date on which the court relinquishes jurisdiction over the minor, the court shall order sealed all the court's official records, information and social records pertaining to that minor, as well as records of all criminal proceedings against the minor and punishments assessed against the minor except for traffic offenses. A person may not use these sealed records for any purpose except that the court may order their use for good cause shown or may order their use by an officer of the court in making a presentencing report for the court.

(b) The name or picture of a minor under the jurisdiction of the court may not be made public in connection with the minor's status as a delinquent child or a child in need of aid unless authorized by order of the court, except that the name of a minor who is found for the second time to have violated a law, which if committed by an adult would be a felony, shall be made public unless the court, for good cause, in certain individual cases, enters an order prohibiting the disclosure.

(c) A person who violates a provision of this section is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than \$500 or by imprisonment for not more than one year, or by both. (§ 10(3)(4) art 1 ch 145 SLA 1957; am § 1 ch 124 SLA 1972; am § 1 ch 90 SLA 1975; am § 20 ch 63 SLA 1977)

Cross references. — For explanation of Children's Procedure, see § 2, ch. 90, how amendments in 1975 changed Rules SLA 1975).

NOTES TO DECISIONS

Purpose for enacting subsection (a). — Reading this section together with other sections of the laws relating to children's proceedings leads one to believe that subsection (a) was enacted principally for the purpose of protecting the child against the possible adverse effects an unauthorized revelation of his social record would have. In re P.N., Sup. Ct. Op. No. 1127 (File No. 2191), 533 P.2d 13 (1975).

Children's proceeding. In re P.N., Sup. Ct. Op. No. 1127 (File No. 2191), 533 P.2d 13 (1975).

Waiver of provisions of section. — In the case of use of restraints more severe than placement in adjustment rooms (solitary confinement), the approval of the director of McLaughlin Youth Center must be obtained and a report made to the child's attorney and the family court. The provisions of this section are waived for this purpose. T.M. v. Director of McLaughlin Youth Center, Superior Court, No. 72-449 (1973). Stated in R.L.R. v. State, Sup. Ct. (Op. No. 706 (File No. 1156), 487 P.2d 27 (1971)). Cited in M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982); State v. R.H. Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

There is no indication that subsection (a) was intended to authorize the granting of testimonial use immunity to parents. In re P.N., Sup. Ct. Op. No. 1127 (File No. 2191), 533 P.2d 13 (1975). The supreme court could not say with certainty that this section would be construed to forbid the use, in a subsequent criminal action against a parent, of testimony that the parent gave at a child-

Sec. 47.10.095. Arrest of a minor. The arrest of a minor other than for a traffic offense is not considered an arrest for any purpose except for the purpose of the disposition of a proceeding arising out of that arrest. (§ 2 ch 124 SLA 1972)

Sec. 47.10.100. Retention of jurisdiction over minor. (a) The court retains jurisdiction over the case and may at any time stay execution, modify, set aside, revoke, or enlarge a judgment or order, or grant a new hearing, in the exercise of its power of protection over the minor and for the minor's best interest, for a period of time not to exceed two years or in any event extend past the day the minor becomes 19, unless soon discharged by the court, except that the department may apply for and the court may grant an additional one-year period of supervision past age 19 if continued supervision is in the best interests of the person and the person consents to it. An application for any of these purposes may be made by the parent, guardian, or custodian acting in behalf of the minor, or the court may, on its own motion, and after reasonable notice to interested parties and the appropriate department, take action which it considers appropriate.

(b) If the court determines at a rehearing that it is for the best interests of the minor to be released to the care or custody of the minor's parent, guardian, or custodian, it may enter an order to that effect and the minor is discharged from the control of the department.

(c) If a minor is adjudicated a delinquent or a child in need of aid before the minor's 18th birthday, the court may retain jurisdiction over the minor after the minor's 18th birthday for the purpose of supervising the minor's rehabilitation, but the court's jurisdiction over the minor under this chapter never extends beyond the minor's 19th birthday, except that the department may apply for and the court may grant an additional one-year period of supervision past age 19 if continued supervision is in the best interests of the person and the person consents to it. The department may retain jurisdiction over a child between the child's 18th and 19th birthdays for the purpose of supervising the child's rehabilitation, if the child has been placed under the supervision of the department before the child's 18th birthday, except that the department may apply for and the court may grant an additional one-year period of supervision past age 19 if continued supervision is in the best interests of the person and the person consents to it. (§ 11 art I ch 145 SLA 1957; am §§ 16, 17 ch 5 SLA 1970; am § 21 ch 63 SLA 1977,

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When one commits a criminal offense after reaching the age of 18 years, he is no longer entitled to claim the benefits of the Children's Code. *Henson v.* State, Sup. Ct. Op. No. 1590 (File No. 3024), 576 P.2d 1352 (1978). Offenses to which court's jurisdiction not extended. — Neither subsection

(a) nor subsection (c) purports to extend the court's juvenile jurisdiction to newly committed offenses occurring between the offender's 18th and 19th birthdays. *Henson v. State*, Sup. Ct. Op. No. 1590 (File No. 3024), 576 P.2d 1352 (1978). Jurisdiction defeated only by expressly retroactive statute. — Once

the sentencing court acquires jurisdiction over the individual, only an expressly retroactive statute could defeat its continuing jurisdiction for the duration of the sentence originally imposed. *Davenport v. McCormis*, Sup. Ct. Op. No. 1049 (File No. 1942), 522 P.2d 1140 (1974).

Sec. 47.10.110. Appointment of guardian or custodian. When, in the course of a proceeding under this chapter, it appears to the court that the welfare of a minor will be promoted by the appointment of a guardian or custodian of the minor's person, the court may make the appointment. The court shall have a summons issued and served upon the parents of the minor, if they can be found, in a manner and within a time before the hearing which the court considers reasonable. The court may determine whether the father, mother, or the Department of Health and Social Services shall have the custody and control of the minor. If the minor is of sufficient age and intelligence to state desires, the court shall consider them. (§ 12 art I ch 145 SLA 1957; am § 6 ch 104 SLA 1971; am § 22 ch 63 SLA 1977)

Collateral references. — 19 Am. Jur. 2d, Guardian and Ward, § 17. 39 C.J.S., Guardian and Ward, §§ 20 to 29.

Right of infant to select his own guardian, 85 ALR2d 921.

Sec. 47.10.120. Support of minor. (a) When a child in need of aid is committed under this chapter, the court may, after giving the parent a reasonable opportunity to be heard, adjudge that the parent shall pay in a manner which the court directs a sum which will cover in full or in part the support of the child in need of aid. When a delinquent minor is committed under this chapter, the court shall order that the parent of the minor pay in a manner which the court directs a sum which will cover in full or in part the support of the delinquent minor.

(b) If a parent wilfully fails or refuses to pay the sum fixed, the parent may be proceeded against as provided by law in cases of family desertion and nonsupport.

(c) The sum collected from a parent under this section shall be directly credited to the general fund of the state. (§ 13 art I ch 145 SLA 1957; am § 1 ch 31 SLA 1959; am § 1 ch 141 SLA 1959; am § 23 ch 63 SLA 1977)

Sec. 47.10.130. Detention. No minor under 18 years of age who is detained pending hearing may be incarcerated in a jail unless assigned to separate quarters so that the minor cannot communicate with or view adult prisoners convicted of, under arrest for, or charged with a crime. When a minor is detained pending hearing, the minor's parent, guardian, or custodian shall be notified immediately. (§ 14 art I ch 145 SLA 1957)

Cross references. — For conditions of detention, see Children's Rule 27, Alaska Rules of Court.

A detention which was twice continued by the master of the children's court for a total period of six days. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

NOTES TO DECISIONS

Sec. 47.10.140. Temporary detention and detention hearing. (a) A peace officer may arrest a minor who violates a law or ordinance in the officer's presence, or whom the officer reasonably believes is a fugitive from justice. A peace officer may continue a lawful arrest made by a citizen. The officer may have the minor detained in a juvenile detention facility if in the officer's opinion it is necessary to do so to protect the minor or the community.

(b) A peace officer who has a minor detained under (a) of this section shall immediately, and in no event more than 12 hours later, notify the court, the minor's parents or guardian, and the Department of Health and Social Services of the officer's action. The department may file with the court a petition alleging delinquency before the detention hearing.

(c) The court shall immediately, and in no event more than 48 hours later, hold a hearing at which the minor and the minor's parents or guardian if they can be found shall be present. The court shall determine whether probable cause exists for believing the minor to be delinquent. The court shall inform the minor of the reasons alleged to constitute probable cause and the reasons alleged to authorize the minor's detention. The minor is entitled to counsel and to confrontation of adverse witnesses.

(d) If the court finds that probable cause exists, it shall determine whether the minor should be detained pending the hearing on the petition or released. It may either order the minor held in detention or released to the custody of a suitable person pending the hearing on the petition. If the court finds no probable cause, it shall order the minor released and close the case.

(e) Except for temporary detention pending a detention hearing or temporary detention under (f) of this section, a minor may not be detained except by court order.

(f) A peace officer may detain a minor who is evading the person having the minor's legal custody if the minor is not otherwise subject to arrest or detention under (a) of this section, for the sole purpose of either (1) returning the minor to the person having legal custody or (2) if the minor prefers, taking the minor to an office specified by the Department of Health and Social Services, facility or contract agency of the Department of Health and Social Services where such exists in the community. Immediately upon detaining a minor under this provi-

§ 47.10.142 WELFARE, SOCIAL SERVICES AND INSTITUTIONS § 47.10.142 sion, the peace officer shall advise the minor of the right to social services under AS 47.10.142(b), and, if known, the peace officer shall advise the person having the legal custody of the minor of the detention.

(g) A minor who is detained under (f) of this section may not be detained in a jail or other facility unless kept out of contact with adult persons convicted or accused of a crime. A minor may not be detained in a jail or other detention facility which has not been approved by the Department of Health and Social Services before detention of the minor. (§ 15 art I ch 145 SLA 1957; am § 3 ch 118 SLA 1962; am § 2 ch 100 SLA 1971; am § 6 ch 104 SLA 1971; am §§ 1, 2 ch 128 SLA 1972)

Cross references. — For custody without a court order, see Children's Rules 6 and 7, Alaska Rules of Court.

NOTES TO DECISIONS

Detention orders neither based on competent testimony nor accompanied by the required statement of facts are invalid. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972). See notes under this catchline, AS 47.10.090, A.M. v. State, Ct. App. Op. No. 150 (File No. 6105), 653 P.2d 316 (1982). Cited in State v. K., P.2d (1984), 375 (File No. 7768), P.2d (1984).

Appeal of detention order. — See

SECTION 13

Sec. 47.10.142. Emergency custody and temporary placement hearing. (a) The Department of Health and Social Services may take emergency custody of a minor upon discovering any of the following circumstances:

- (1) the minor has been abandoned;
- (2) the minor has been grossly neglected by the minor's parents or guardian as "neglect" is defined in AS 47.17.070(5), so that immediate removal from the minor's surroundings is, in the determination of the department, necessary to protect the minor's life;
- (3) the minor has been abused, as "abuse" is defined in AS 47.17.070(1), so that immediate medical attention is necessary, in the determination of the department;
- (4) the minor has been sexually abused under circumstances listed in AS 47.10.010(a)(2)(D).

(b) A minor who has left home and is evading the person having legal custody of the minor may obtain the services of the department. The department shall assess the situation and furnish the minor with the social services it considers appropriate to protect the well-being of the minor and to preserve the minor's family life if preserving it is considered desirable under the circumstances. If, after assessing the situation, considering the wishes of the minor, and furnishing appropriate social services, the department considers it necessary, the department may take emergency custody of the minor.

When a child is taken into custody under (a) or (b) of this section, the department shall immediately, and in no event more than 12 hours later unless prevented by lack of communication facilities, notify the parents or the person or persons having custody of the child and the court of the action and file with the court a petition alleging that the child is a child in need of aid.

(d) The court shall immediately, and in no event more than 48 hours after being notified unless prevented by lack of transportation, hold a hearing at which the minor, if the minor's health permits, and the minor's parents or guardian, if they can be found, shall be permitted to be present. The court shall determine whether probable cause exists for believing the minor to be a child in need of aid, as defined in AS 47.10.290. The court shall inform the minor, and the minor's parents or guardian if they can be found, of the reasons given as constituting probable cause and the reasons given as authorizing the minor's temporary placement.

(e) If the court finds that probable cause exists it shall order the minor committed to the department for temporary placement, or order the minor returned to the custody of the minor's parents or guardian subject to the department's supervision of the minor's care and treatment. If the court finds no probable cause it shall order the minor returned to the custody of the minor's parents or guardian. (§ 3 ch 100 SLA 1971; am § 6 ch 104 SLA 1971; am § 24 ch 63 SLA 1977; am § 2 ch 104 SLA 1982)

NOTES TO DECISIONS

Effect of amendments. — The 1981 amendment added paragraph (4) to sub-section (a). Cited in State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Article 2. Juvenile Institutions.

Section	Section
150. General powers of department over juvenile institutions	190. Conditions governing detention
160. Duties of department	200. Releasing juveniles after commitment
170. Power of cities to maintain and operate home or facility	210. Youth counsellors
180. Operation of homes and facilities	220. Grants-in-aid

Sec. 47.10.150. General powers of department over juvenile institutions. The Department of Health and Social Services may

- (1) purchase, lease or construct buildings or other facilities for the care, detention, rehabilitation and education of children in need of aid or delinquent minors;
- (2) adopt plans for construction of juvenile homes, juvenile detention facilities, and other juvenile institutions;

(3) adopt standards and regulations under this chapter for the design, construction, repair, maintenance and operation of all juvenile detention homes, facilities, and institutions;

(4) inspect periodically each juvenile detention home, facility, or other institution to ensure that the standards and regulations adopted are being maintained;

(5) reimburse cities maintaining and operating juvenile detention homes and facilities;

(6) enter into contracts and arrangements with cities and state and federal agencies to carry out the purposes of this chapter;

(7) do all acts necessary to carry out the purposes of this chapter;

(8) adopt the regulations necessary to carry out this chapter;

(9) accept donations, gifts or bequests of money or other property for use in construction of juvenile homes, institutions or detention facilities;

(10) operate juvenile homes when municipalities are unable to do so;

(11) receive, care for, and place in a juvenile detention home, the minor's own home, a foster home, or correctional school or treatment institution all minors committed to its custody under this chapter. (§ 3 art II ch 145 SLA 1957; am § 1 ch 152 SLA 1959; am § 6 ch 104 SLA 1971; am § 25 ch 63 SLA 1977)

Cross references. — For operation of the welfare of children under the care of juvenile detention homes and facilities, the department, see AS 47.10.250. see AS 47.10.180. For standards of care for

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Department ordered to promulgate standards for operation of juvenile detention homes. — See T.M. v. Director of McLaughlin Youth Center, Superior Court, No. 72-449 (1973).

Collateral references. — 60 Am Jur. 2d, Penal and Correctional Institutions, § 1 et seq.

Sec. 47.10.160. Duties of department. The Department of Health and Social Services shall

- (1) accept all minors committed to the custody of the department and all minors who are involved in a written agreement under AS 47.10.230(c), and provide for the welfare, control, care, custody, and placement of these minors in accordance with this chapter;
- (2) require and collect statistics on juvenile offenses and offenders in Alaska;

diction the institution is operated, or whose department or agency is charged with performing the service. (§ 3 ch 88 SLA 1960)

Sec. 47.15.040. Financial arrangements. The compact administrator, subject to the approval of the commissioner of administration, may make or arrange for the payments necessary to discharge the financial obligations imposed upon this state by the compact or by a supplementary agreement made under the compact. (§ 4 ch 88 SLA 1960)

Sec. 47.15.050. Appointment of attorney or guardian. Appointment of an attorney or guardian ad litem under the provisions of this compact shall be made in accordance with AS 25.24.310 or AS 44.21.400 — 44.21.440. (§ 5 ch 88 SLA 1960; am § 55 ch 94 SLA 1980; am § 16 ch 55 SLA 1984)

Cross references. — See Admin. R. 13, item appointed under the provisions of Alaska Rules of Court.
Effect of amendments. — The 1984 amendment rewrote this section, which formerly read "A council or guardian ad

Sec. 47.15.060. Enforcement. The courts, departments, agencies and officers of this state and its subdivisions shall enforce this compact and shall do all things appropriate to the effectuation of its purposes and intent which are within their respective jurisdiction. (§ 6 ch 88 SLA 1960)

Sec. 47.15.070. Additional procedures not precluded. In addition to the procedures provided in articles IV and VI of the compact for the return of a runaway juvenile, the particular states, the juvenile or the juvenile's parents, the courts, or other legal custodian involved may agree upon and adopt any plan or procedure legally authorized under the laws of this state and the other respective party states for the return of the runaway juvenile. (§ 7 ch 88 SLA 1960)

Sec. 47.15.080. Short title. This chapter may be cited as the Uniform Interstate Compact on Juveniles. (§ 8 ch 88 SLA 1960)

Chapt. 17. Child Protection.

Section

- 19. Purpose
- 20. Persons required to report
- 25. Duties of public authorities
- 30. Action on reports; termination of parental rights
- 40. Central registry; confidentiality

Section

- 50. Immunity
- 50. Evidence not privileged
- 4. Photographs and x-rays
- 8. Penalty for failure to report
- 19. Definitions

other than accidental means, of harm through physical abuse or neglect or sexual abuse or sexual exploitation, the legislature requires the reporting of these cases by practitioners of the healing arts and others to the appropriate public authorities. It is the intent of the legislature that, as a result of these reports, protective services will be made available in an effort to prevent further harm to the child, to safeguard and enhance the general well-being of the children in this state, and to preserve family life whenever possible. (§ 1 ch 100 SLA 1971; am § 3 ch 104 SLA 1982)

Effect of amendments. — The 1982 amendment in the first sentence, substituted "neglect or sexual abuse or sexual arts" and inserted "of the healing arts."

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Use of reports. — The reports of child abuse and neglect required by this section are intended for use in child protection proceedings and are not intended for use in

criminal proceedings. *State v. R.H.*, Ct. App. Op. No. 376 (File No. 7768). P.24 (1984). See also notes to AS 47.17.060, under catchline "Judicial proceeding."

Collateral references. — 42 Am. Jur. 2d, Infants, §§ 16, 17.

43 C.J.S., Infants, §§ 36 to 39, 70 to 75, 94.

Medical attention, criminal neglect by failure to provide, 12 ALR2d 1047.

Liability of parent for injury to unemancipated child caused by parent's negligence, 41 ALR3d 904.

Validity and construction of penal statute prohibiting child abuse, 1 ALR4th 38.

Sec. 47.17.020. Persons required to report. (a) The following persons who, in the performance of their professional duties, have cause to believe that a child has suffered harm as a result of abuse or neglect shall immediately report the harm to the nearest office of the department:

- (1) practitioners of the healing arts;
- (2) school teachers and school administrative staff members;
- (3) social workers;
- (4) peace officers, and officers of the Department of Corrections;
- (5) administrative officers of institutions;
- (6) licensed day care providers and paid staff;
- (7) licensed foster care providers.

(b) This section does not prohibit the named persons from reporting cases which have come to their attention in their nonprofessional capacities nor does it prohibit any other person from reporting a child's harm which the person has cause to believe is a result of abuse or neglect. These reports shall be made to the nearest office of the department.

Sec. 47.17.010. Purpose. In order to protect children whose health and well-being may be adversely affected through the infliction, by

SECTION 17

SECTION 16

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Applied in State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

(c) If the person making a report of harm under this section cannot reasonably contact the nearest office of the department and immediate action is necessary for the well-being of the child, the person shall make the report to a peace officer. The peace officer shall take immediate action to protect the child and shall, at the earliest opportunity, notify the nearest office of the department. (§ 1 ch 100 SLA 1971; am §§ 4, 5 ch 104 SLA 1982; am E.O. No. 55, § 42 (1984))

Effect of amendments. — The 1982 amendment, substituted amendment, in subsection (a), added "and school administrative staff members" at the end of paragraph (2) and added paragraphs (6) and (7). The 1984 amendment, substituted "Department of Corrections" for "division of corrections" in paragraph (4) of subsection (a).

NOTES TO DECISIONS

Cited in State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Collateral references. — Civil liability report battered child syndrome, 97 ALR3d of physician for failure to diagnose or 338.

Sec. 47.17.025. Duties of public authorities. (a) A law enforcement agency shall immediately notify the department of the receipt of a report of harm to a child from abuse. Upon receipt from any source of a report of harm to a child from abuse, the department shall notify the Department of Law and investigate the report and, within 72 hours of the receipt of the report, shall provide a written report of its investigation of the harm to a child from abuse to the Department of Law for review.

(b) The report of harm to a child from abuse required from the department by this section shall include:

- (1) the names and addresses of the child and the child's parent or other persons responsible for the child's care, if known;
- (2) the age and sex of the child;
- (3) the nature and extent of the harm to the child from abuse;
- (4) the name and age and address of the person known or believed to be responsible for the harm to the child from abuse, if known;
- (5) information that the department believes may be helpful in establishing the identity of the person believed to have caused the harm to the child from abuse. (§ 6 ch 104 SLA 1982)

Sec. 47.17.030. Action on reports; termination of parental rights. (a) If a child, concerning whom a report of harm is made, is believed to reside within the boundaries of a local government exercising health functions for the area in which the child is believed to reside, the department may, upon receipt of the report, refer the matter to the appropriate health or social services agency of that local government. For cases not referred to an agency of a local government, the department shall, for each report received, investigate and take action, in accordance with law, which may be necessary to prevent further harm to the child or to insure the proper care and protection of the child.

(b) A local government health or social services agency receiving a report of harm shall, for each report received, investigate and take action, in accordance with law, which may be necessary to prevent further harm to the child or to insure the proper care and protection of the child. In addition, the agency receiving a report of harm shall forward a copy of its report of the investigation, including information the department requires by regulation, to the department.

(c) Action shall be taken regardless of whether the identity of the person making the report of harm is known.

(d) Before the department or a local government health or social services agency may seek the termination of parental rights, under AS 47.10.080(c)(3), it shall offer protective social services and pursue all other reasonable means of protecting the child.

(e) In all actions taken by the department or a health and social services agency of a local government under this chapter that result in a judicial proceeding, the child shall be represented by a guardian ad litem in that proceeding. Appointment of a guardian ad litem shall be made in accordance with AS 25.24.310. (§ 1 ch 100 SLA 1971; am § 1 ch 222 SLA 1976; am § 17 ch 55 SLA 1984)

Effect of amendments. — The 1984 amendment added the second sentence in subsection (e).

NOTES TO DECISIONS

Effect of subsection (d). — Subsection (d) of this section is clearly intended to prevent further abuse by providing protective services to the child, and it does not place a mandatory duty on the state to provide counseling and other support services to the family prior to seeking termination of parental rights. E.A. v. State, Sup. Ct. Op. No. 2289 (File Nos. 4687, 4670), 623 P.2d 1210 (1981).

§ 47.17.040

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§ 47.17.060

Applied in State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d 442 (1979).

Quoted in Granato v. Occhipinti, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979).

Collateral references. — 43 C.J.S., Infants, §§ 71, 72.

Physical abuse of child by parent as ground for termination of parent's right to child, 53 ALR3d 605. Sexual abuse of child by parent as ground for termination of parent's right to child, 58 ALR3d 1074. Validity of state statute providing for termination of parent's rights, 22 ALR4th 774.

Sec. 47.17.040. Central registry; confidentiality. (a) The department shall maintain a central registry of all investigation reports but not of the reports of harm.

(b) Investigation reports and reports of harm filed under this chapter are considered confidential and are not subject to public inspection and copying under AS 09.25.110 and 09.25.120. However, in accordance with department regulations, investigation reports may be used by appropriate governmental agencies with child-protection functions, inside and outside Alaska, in connection with investigations or judicial proceedings involving child abuse, neglect, or custody. A person, not acting in accordance with department regulations, who makes public information contained in confidential reports is guilty of a misdemeanor. (§ 1 ch 100 SLA 1971; am § 2 ch 222 SLA 1976)

NOTES TO DECISIONS

Psychotherapist/patient privilege. — Child abuse reports are not open to the public, and are therefore not within A.R.E.R. 504(d)(5), which provides that there is no physician or psychotherapist/patient privilege "as to information that the physician or psychotherapist is required to report to a public employee or as to information required to be recorded in a public office, if such report or record is open to public inspection." State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Sec. 47.17.050. Immunity. A person who, in good faith, makes a report under this chapter, or who participates in judicial proceedings related to the submission of reports under this chapter, is immune from any civil or criminal liability which might otherwise be incurred or imposed. (§ 1 ch 100 SLA 1971)

Sec. 47.17.060. Evidence not privileged. Neither the physician-patient nor the husband-wife privilege is a ground for excluding evidence regarding a child's harm, or its cause, in a judicial proceeding related to a report made under this chapter. (§ 1 ch 100 SLA 1971)

§ 47.17.064 WELFARE, SOCIAL SERVICES AND INSTITUTIONS § 47.17.070

NOTES TO DECISIONS

For discussion of constitutional problems in interpreting this section to abrogate psychotherapist privilege in criminal proceedings, see State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

referred to in this section occur through the department in relation to protective services, and are civil rather than criminal. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Applicability to psychologists. — The court assumed but did not decide that this section applies to psychologists, who are not physicians. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Since AS 47.17.025 refers to the Department of Law, without reference to the criminal division, AS 47.17.025 does not, standing alone, necessarily require the requirement of former AS 11.67.040 that the district attorney receive child abuse reports; nor does it establish an intent that child abuse reports result in criminal prosecutions; and consequently, the Court of Appeals could not find that a criminal prosecution for child sexual abuse is necessarily "a judicial proceeding related to a report made under this chapter" pursuant to this section. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

"Judicial proceeding". — This section only applies to child protective proceedings instituted under AS 47.10 and not to criminal proceeding for sexual abuse. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Giving the Department of Health and Social Services primary control of the abused child again indicates a legislative intent that the "judicial proceedings"

Sec. 47.17.064. Photographs and x-rays. The department or a person required under AS 47.17.020(a)(1) to report that a child suffered substantial harm as a result of physical abuse or neglect may without the permission of the parents

- (1) take or have taken photographs of the areas of trauma visible on the child; and
(2) if medically indicated, have a radiological examination of the child performed. (§ 7 ch 104 SLA 1982)

Sec. 47.17.069. Penalty for failure to report. A person required to file a report of abuse or neglect under AS 47.17.020 who willfully or knowingly fails or refuses to report the harm required under AS 47.17.020 is guilty of a class B misdemeanor. (§ 7 ch 104 SLA 1982)

Cross references. — For penalties for misdemeanors, see AS 12.55.135.

Sec. 47.17.070. Definitions. In AS 47.17.010 — 47.17.070

- (1) "child abuse or neglect" means the physical injury or neglect, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby;
(2) "child" means a person under 18 years of age;
(3) "department" means the Department of Health and Social Services;

SECTION 2

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SECTION 20

(4) "institution" means a private or public hospital or other facility providing medical diagnosis, treatment, or care;

(5) "neglect" means the failure to provide necessary food, care, clothing, shelter, or medical attention for a child;

(6) ~~Professional of the healing arts~~ includes chiropractors, dentists, health aides, nurses, optometrists, osteopaths, physical therapists, physicians, psychiatrists, psychologists, religious healing practitioners, and surgeons;

(7) "sexual exploitation" means

(A) permission or encouragement to a child for prostitution prohibited by AS 11.66.100 — 11.66.150 by a person responsible for the child's welfare;

(B) permission, encouragement, or activity involved in the unlawful exploitation of a minor prohibited by AS 11.41.455 by a person responsible for the minor's welfare. (§ 1 ch 100 SLA 1971; am § 6 ch 104 SLA 1971; am § 3 ch 222 SLA 1976; am §§ 56, 57 ch 94 SLA 1980; am §§ 8, 9 ch 104 SLA 1982)

Effect of amendments. — The 1980 amendment substituted "18" for "eighteen" near the middle of paragraph (1), and substituted "18" for "16" in paragraph (2).

The 1982 amendment inserted "or neglect" and "sexual exploitation" in paragraph (1) and added paragraph (7).

NOTES TO DECISIONS

Where parents refuse permission for blood transfusion because of religious conviction, the state may intercede and make the child a dependent minor by the parents' failure to provide medical attention under paragraph (5) of this section, obtaining custody and thereafter consenting to the operation. In re Lausterer, Superior Court, 3rd Jud. Dist., No. CP2720 (1972).

Chapter 20. Exceptional Children.

Section	Section
05. Purpose	20. Standards for assistance
10. Assistance authorized	50. Definitions

Sec. 47.20.005. Purpose. It is the purpose of AS 47.20.005 — 47.20.050 to provide appropriate public education and training for the exceptional children in this state who have not reached the age of three. To the maximum extent possible, the department shall establish a learning program which emphasizes individual needs, is home based, and involves parents in the education and training of their children. (§ 1 ch 77 SLA 1978)

Sec. 47.20.010. Assistance authorized. (a) The department shall provide professional guidance and financial assistance to organized groups of parents, nonprofit corporations, school districts, and regional educational attendance areas according to regulations adopted by the

§ 47.20.020 Welfare, Social Services and Institutions § 47.20.050 department for providing special services, evaluation, and special training required by exceptional children.

(b) The program established under (a) of this section shall emphasize individual needs and, where possible, be home based and involve parents in the education and training of their children. (§ 2 ch 118 SLA 1961; am § 6 ch 104 SLA 1971; am § 2 ch 77 SLA 1978)

Sec. 47.20.020. Standards for assistance. The department shall assist organized parental groups, school districts, regional educational attendance areas, and nonprofit corporations which have requested assistance and have arranged for the necessary facilities and equipment for training centers for exceptional children. (§ 3 ch 118 SLA 1961; am § 3 ch 77 SLA 1978)

Secs. 47.20.030 — 47.20.040. Appropriations; purpose. (Repealed, § 6 ch 77 SLA 1978.)

Sec. 47.20.050. Definitions. In this chapter

(1) "department" means the Department of Health and Social Services;

(2) "evaluation" means the physical and mental examinations necessary to determine the extent of the handicap;

(3) "exceptional children" includes those children who have not reached age of three and whose development is significantly delayed due to mental retardation, physical, neurological, or emotional handicaps;

(4) "professional guidance" means the consultative services or other medical and educational specialists developed by the department for the education and training of exceptional children;

(5) "special service" means evaluation and special training;

(6) "special training" means (A) nursery or pre-school training to compensate for the special handicaps of exceptional children in order to prepare them, when possible, for admission to special classes in a regular school at the age determined by law, or (B) training in self-help skills, safety, social and simple occupational skills for trainable mentally retarded children of school age who are incapable of academic subjects. (§ 5 ch 118 SLA 1961; am §§ 4—6 ch 77 SLA 1978)

Revisor's notes. — Reorganized in 1984 to alphabetize the terms defined.

Chapter 21. Adventure-Based Education.

Section
10. Establishment
20. Program

(C) manifests a current intent to carry out plans of serious harm to that person's self or another;

(11) "mental health professional" means a psychiatrist or physician who is licensed to practice in this state or employed by the federal government; a clinical psychologist licensed by the state Board of Psychologists and Psychological Associate Examiners; a psychological associate trained in clinical psychology and licensed by the Board of Psychologists and Psychological Associate Examiners; a registered nurse with a master's degree in psychiatric nursing, licensed by the State Board of Nursing; and a social worker with a master's degree in social work and substantial experience in the field of mental illness;

(12) "mental illness" means an organic, mental, or emotional impairment that has substantial adverse effects on an individual's ability to exercise conscious control of the individual's actions or ability to perceive reality or to reason or understand; mental retardation, epilepsy, drug addiction, and alcoholism do not per se constitute mental illness, although persons suffering from these conditions may also be suffering from mental illness;

(13) "peace officer" includes a state police officer, municipal or other local police officer, state, municipal, or other local health officer, public health nurse, United States marshal or deputy United States marshal, or a person authorized by the court;

(14) "professional person in charge" means the senior mental health professional at a facility or that person's designee; in the absence of a mental health professional it means the chief of staff or a physician designated by the chief of staff;

(15) "provider of outpatient care" means a mental health professional or hospital, clinic, institution, center, or other health care facility designated by the department to accept for treatment patients who are ordered to undergo involuntary outpatient treatment by the court or who are released from inpatient treatment by the court and that they undergo outpatient treatment;

(16) "screening investigation" means the investigation and review of facts which have been alleged to warrant emergency examination or treatment, including interviews with the persons making the allegations, any other significant witnesses who can readily be contacted for interviews, and, if possible, the respondent, and an investigation and evaluation of the reliability and credibility of persons providing information or making allegations;

(17) "state" means a state of the United States, the District of Columbia, the territories and possessions of the United States, and the Commonwealth of Puerto Rico, and, with the approval of the United States Congress, Canada. (§ 1 ch 84 SLA 1981; am §§ 26-30 ch 142 SLA 1984)

Effect of amendments. — The 1984 amendment inserted "or operated by the federal government" in paragraph (6); added the subparagraph (A) designation in paragraph (7), added "or" to the end of that subparagraph, and added subparagraph (B); reworded subparagraphs (10)(A) and (C) and paragraph (12) to remove personal pronouns; deleted "imminent and substantial" preceding "bodily harm" and substituted "behavior causing, attempting or threatening that harm" for "attempts at suicide or bodily harm" in paragraph (10)(A); substituted "harm to others" for "imminent and substantial bodily harm to

one or more other persons" and the language beginning "recent behavior causing, attempting" or "behavior causing or attempting harm, including, in regard to evaluations, at least one incident within 30 days before the filing of a petition for emergency hospitalization" in paragraph (10)(B); substituted "manifests" for "demonstrates" in paragraph (10)(C); substituted "trained in clinical psychology and licensed" for "with a clinical psychology or counseling specialty licensed" near the middle of paragraph (11); and inserted "substantial" preceding "experience" near the end of paragraph (11).

Chapter 35. Private Institutions.

Section	Section
10. Powers of department	75. Licensure of providers of care for dependent adults by municipalities
20. License or permit required	90. Licensing and supervision of maternity homes
30. Authority to issue regulations	100. License required
40. Licensing	900. Definitions
55. Provisional license	
60. Records required	
70. Violations	

Sec. 47.35.010. Powers of department. (a) The department may (1) license and supervise boarding homes, foster homes, group homes, nurseries, institutions caring for children and foster homes, group homes and institutions caring for dependent adults;

(2) investigate and supervise licensees;

(3) enforce the standards established by it;

(4) contract with private or municipal agencies to investigate and make recommendations to the department for the licensing and supervision of boarding homes, foster homes, group homes, nurseries, institutions caring for children and foster homes, group homes and institutions caring for dependent adults under procedures and standards of operation established by the department.

(b) The department shall, within 90 days after receiving a written request that it do so, delegate its powers relating to nurseries under this section and under AS 47.35.040 — 47.35.060 to a municipality which has adopted an ordinance providing for day care licensing under home rule powers or as authorized under AS 29.48.035(a)(20). A municipality to which these powers have been delegated may waive or modify any regulation or standard established by the department under the authority of AS 47.35.010 — 47.35.080 as it applies to nurseries or the application of any such regulation or standard as it applies to a particular day care licensee but must notify the department of any waiver. (§ 2 ch 17 SLA 1951; am §§ 1, 2 ch 42 SLA 1973; am §§ 1, 2 ch 253 SLA 1976; am § 1 ch 45 SLA 1977; am § 1 ch 98 SLA 1977; am § 135 ch 6 SLA 1984)

Revisor's notes. -- In 1984 "former" was inserted before the reference to AS 47.35.050. That section was repealed by sec. 5, ch. 97, SLA 1982. Effect of amendments. -- The 1984 amendment changed an internal reference in subsection (b).

NOTES TO DECISIONS

Cited in *J.M.A. v. State*, Sup. Ct. Op. No. 1201 (File No. 2391), 542 P.2d 170 (1975).

Sec. 47.35.020. License or permit required. A person may not, without a license or permit to do so,

(1) maintain or conduct, for more than 90 days, a boarding home, foster home, group home, institution, or other place for the regular reception or care of children under 16 years of age, or a foster home, group home, or institution for the care of dependent adults; or

(2) engage in the business of receiving or caring for children under 14 years of age, with or without compensation, in a nursery in which five or more children not related by blood or marriage, or legal adoption, to the owner, operator or manager of the business are lodged. (§ 3 ch 17 SLA 1951; am § 3 ch 42 SLA 1973; am § 3 ch 253 SLA 1976; am § 2 ch 45 SLA 1977; am § 1 ch 97 SLA 1982)

Effect of amendments. -- The 1982 amendment inserted "for more than 90 days" near the beginning of paragraph (1) and made minor changes in style.

Sec. 47.35.030. Authority to issue regulations. The department may adopt regulations and standards consistent with other requirements of law. This authority does not deny a religious group from establishing and operating an institution solely because of the prior installation or operation of another religious group in the same area. The authority to adopt regulations and standards shall be exercised to insure compliance with the intents and purpose of AS 47.35.010 — 47.35.100. The department may inspect and examine an institution, home or place, or the performance of a service. (§ 4 ch 17 SLA 1951; am § 1 ch 77 SLA 1967)

Sec. 47.35.040. Licensing. (a) The department shall issue a license to a facility if it determines that the facility has met the standards for operation set out in AS 47.35.010 — 47.35.080 and the regulations adopted under AS 47.35.010 — 47.35.080.

(b) A license is valid for two years after the date of issuance unless it is revoked or modified. The department may revoke a license or modify a license to provisional status if it determines that a facility is not in compliance with AS 47.35.010 — 47.35.080 or the regulations adopted under AS 47.35.010 — 47.35.080.

(c) The department may waive compliance with a standard set out in regulations adopted under AS 47.35.010 — 47.35.080 if an accept-

§ 47.35.050 WELFARE, SOCIAL SERVICES AND INSTITUTIONS § 47.35.060
able alternative is established that meets the purpose of the provision and reasonably assures the well-being of persons in care.

(d) A license may not be transferred to a different facility or owner.
(e) The department shall give written notice of revocation or modification under (b) of this section 30 days before the effective date of the action. However, if the health or well-being of children or dependent adults is in jeopardy, the revocation or modification action is effective immediately upon the issuance of written notice by the department. (§§ 5, 8 ch 17 SLA 1951; am § 4 ch 42 SLA 1973; am § 2 ch 97 SLA 1982)

Effect of amendments. -- The 1982 amendment rewrote this section.

Sec. 47.35.050. Duration of license or permit. (Repealed, § 5 ch 97 SLA 1982. For current law see AS 47.35.040(b) and (e).)

Sec. 47.35.055. Provisional license. (a) The department shall issue a provisional license to a new facility if the facility submits to the department an acceptable plan for operation that is in conformity with the provisions of AS 47.35.010 — 47.35.080 and the regulations adopted under AS 47.35.010 — 47.35.080. After the department determines that the new facility is operating in conformity with the provisions of AS 47.35.010 — 47.35.080 and the regulations adopted under AS 47.35.010 — 47.35.080, the department shall issue a license under AS 47.35.040 to the facility.

(b) The department may issue a provisional license to a facility that is licensed under AS 47.35.040 but is temporarily unable to conform to the provisions of AS 47.35.010 — 47.35.080 or the regulations adopted under AS 47.35.010 — 47.35.080.

(c) The department may issue a provisional license under (b) of this section only if the facility submits to the department an acceptable plan to bring the facility into conformity with the provisions of AS 47.35.010 — 47.35.080 and the regulations adopted under AS 47.35.010 — 47.35.080 within the time specified in the provisional license.

(d) A provisional license is valid for a period not exceeding one year from the date of issuance. The department may renew a provisional license for an additional period not to exceed one year. (§ 3 ch 97 SLA 1982)

Sec. 47.35.060. Records required. Each licensee or permit holder shall keep records regarding each child or adult in its control and care, or placed by it, which the department prescribes, and shall report to the department the facts which the department requires with reference to the children or adults. All records regarding individuals placed for care in an institution or home under this chapter are confidential and shall be safeguarded from improper disclosure by the agency or department. (§ 9 ch 17 SLA 1951; am § 4 ch 45 SLA 1977)

~~Sec. 47.35.070. Violation.~~ A person who violates a provision of AS 47.35.010 — 47.35.100 or a regulation adopted under AS 47.35.010 — 47.35.100 is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than \$200. (§ 11 ch 17 SLA 1951; am § 2 ch 77 SLA 1967)

Sec. 47.35.075. Licensure of providers of care for dependent adults by municipalities. A first or second class borough or a first or second class city outside a first or second class borough may license and supervise institutions caring for dependent adults. If a borough or city chooses not to license care providers for dependent adults, the department shall be the licensing authority; if a borough or city chooses to exercise any power or responsibility granted to the department under this chapter and shall enforce regulations adopted by the department under AS 47.35.030. (§ 5 ch 45 SLA 1977)

Sec. 47.35.080. (Renumbered as AS 47.35.900.)

Sec. 47.35.090. Licensing and supervision of maternity homes. Maternity homes shall be licensed and supervised in the same manner as boarding homes or foster homes, nurseries and other institutions caring for children as provided in AS 47.35.010 — 47.35.080. In this section "maternity home" means an institution or place of residence whose primary function is to give care to pregnant girls or women, regardless of age, before or during confinement, or which provides care, as needed, to mothers and their infants after confinement, with or without compensation. (§ 1 ch 108 SLA 1960)

Sec. 47.35.100. License required. (a) Without a license issued by the department in accordance with its regulations a person may not operate an agency providing any of the following services:

- (1) the placement of children for foster home care;
 - (2) the placement of children for adoption; or
 - (3) individual and family counseling.
- (b) The license shall remain in effect until revoked for cause. The department shall give written notice of revocation at least 90 days before the effective date of the revocation.
- (c) In this section "agency" does not include an individual who occasionally provides the services set out in (a) of this section. (§ 4 ch 77 SLA 1967)

Sec. 47.35.900. Definitions. In this chapter

- (1) "boarding home or foster home" means an establishment providing regular care for less than six children not related by blood or marriage to the foster parents;
- (2) "department" means the Department of Health and Social Services;

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(3) "facility" means the administration, program, and physical plant of a nursery caring for children, or a foster home, group home, or institution caring for children or dependent adults;

(4) "group home" means a small establishment providing care and services for 10 or fewer children not related by blood, marriage or legal adoption to the foster parent and which is

(A) noncontiguous to another institution; and

(B) stresses normal family living.

(5) "institution" means an establishment providing regular care and services for 11 or more children not related by blood or marriage to the owner or operator;

(6) "nursery" means an establishment providing care and services for any part of the 24-hour day for a child not related by blood or marriage to the owner or operator, but does not include any establishment whose primary purpose is educational. (§ 1 ch 17 SLA 1951; am § 3 ch 77 SLA 1967; am § 1 ch 69 SLA 1971; am § 6 ch 104 SLA 1971; am §§ 6, 7 ch 42 SLA 1973; am § 4 ch 97 SLA 1982)

Revisor's notes. — Formerly AS 47.35.080. Renumbered in 1984.

Effect of amendments. — The 1982 amendment added paragraph (3).
Reorganized in 1984 to alphabetize the terms defined.

Chapter 37. Uniform Alcoholism and Intoxication Treatment Act.

Section	Section
10. Declaration of policy	180. Emergency commitment
20. Office of alcoholism and drug abuse	190. Involuntary commitment of alcoholics
30. Powers of office	200. Hearing on petition for involuntary commitment of alcoholics
40. Duties of office	210. Records of alcoholics and intoxicated persons
50. Interdepartmental coordinating committee	220. Visitation and communication of patients
60. Review board on alcoholism	230. Establishment of emergency service patrol
70. Composition	240. Payment for treatment
80. Qualifications of board members	245. Wages of patients
90. Term of office and vacancies	250. Nonapplicability
100. Compensation, per diem, or expenses	260. Application of Administrative Procedure Act
110. Duties	270. Definitions
120. Alcoholism program coordinator	
130. Comprehensive program for treatment; regional facilities	
140. Public and private treatment facilities	
150. Acceptance for treatment	
160. Voluntary treatment of alcoholics	
170. Treatment and services for intoxicated persons and persons incapacitated by alcohol	

Revisor's notes. — AS 47.37.070 — 47.37.270 were enacted as AS 47.37.062 — 47.37.210 renumbered in 1972.

Collateral references. — 41 Am. Jur. 2d, Incompetent Persons, § 7.
28 C.F.S., Drunkards, § 1 et seq

Suggested Amendments for HB 92
recommended by NCSL in response
to Federal regulations.

To fit in after (h) - so would change (i) and (j).

AS 09.65.132

(i) An employer may combine withheld amounts from absent parents' wages and send a single payment to the agency if the employer separately identifies the portion of the payment attributable to each absent parent. If there is more than one order for withholding against an absent parent, the employer must comply on a "first-come first-served" basis and honor all withholdings to the extent that the total withheld from the absent parent's wages does not exceed the limits established under 15 USC^{SEC.} 1673(b).

(j) An employer must notify the agency when an absent parent terminates employment and provide the absent parent's last known address and name and address of the absent parent's new employer, if known.

(i) = (k)

(j) = (l)

AMENDMENTS FOR HB 92 "RELATING TO CHILD AND SPOUSAL SUPPORT" SUGGESTED BY JUDGE VICTOR CARLSON:

1. Page 2, lines 22-24:

Delete "Notice...withholding." and insert the following language:

The Court shall inform the obligor, either at the hearing or within no more than 15 days after the hearing, whether or not the withholding will occur and of the date on which it is to commence.

REASON: The Court never sends out notice but rules from the bench on these matters and therefore the law should reflect actual practice.

2. Page 15, line 17

Amend to read as follows:

[ACTION TO COLLECT CHILD SUPPORT] COLLECTION OF CHILD SUPPORT. [To commence an action t] To collect the payment due...

3. Page 15, line 20:

Delete "petition" and insert motion.

MEMORANDUM

TO: HOUSE HESS COMMITTEE MEMBERS

FROM: MAX GRUENBERG, CO-CHAIR

RE: AMENDMENTS FOR HB 92 "RELATING TO CHILD AND SPOUSAL SUPPORT"

DATE: JANUARY 30, 1984

1. Delete Section 1.

EXPLANATION: Section 1 provides that a paternity action must be commenced before the child reaches 18. AS 09.10.140 already provides that a statute of limitations for all actions does not begin to run until after the child reaches the age of majority (18). Under AS 09.10.140 a child has two additional years to bring paternity action. Children are not allowed to file lawsuits themselves until they are 18 (but must do it through an adult). Section 1 would actually reduce a child's ability to establish paternity. It was an attempt to comply with the new federal law, which only says that all children must be allowed to establish paternity at least until they are adults, because AS 09.10.140 complies with the new federal law section 1 is unnecessary.

2. Amend 47.23.100 to read:

Sec. 47.23.100. ALL PERSONS MAY USE AGENCY. The agency shall provide aid upon application to any person due child support under the laws of this state whether or not assistance is received under AS 47.25.310-410 [upon application]. The agency may not impose a fee for services provided under AS 47.23.010 - 47.23.280 unless required by federal law.

EXPLANATION: The new language provides that the agency does not act except upon application. The amendment also provides that the agency must assist in collection, whether or not a custodial parent is receiving Aid For Dependent Children.

3. Move all statutes relating to Child Support Enforcement into one title, Title 25 as follows:

All language in AS 47.23 and AS 09.65.132 will become AS 25.25

All current language in AS 25.25 shall become AS 25.26

The Interstate Income Withholding Act in HB 92 (section 4 beginning on page 4) shall become AS 25.27.

EXPLANATION: For the last several years, the revisor of statutes has attempted to move all family laws into Title 25. Apparently overlooked were AS 09.65.132 and AS 47.23 (concerning the Child Support Enforcement Agency). The amendment moves these provisions into Title 25 and renumbers them and the Uniform Reciprocal Enforcement of Support Act (which is already in Title 25) appropriately.

Sectional Summary Relates to PL 98-378
★ - effective earlier than 10/1/85

Child Support Enforcement Amendments of 1984

Section 1 Bill title.

★ Section 2 Would amend section 451 of the Social Security Act to clarify that assistance in obtaining support must be available to all children for whom such assistance is requested.

Equal Treatment
eff. with
enactment

Section 3 Would amend section 454 of the Social Security Act to require States to have laws in effect October 1, 1985 requiring procedures for:

eff date
applies to all
mandatory
practices

- automatic wage withholding in the case of all IV-D child support payments delinquent in an amount equal to one month's support obligation, or upon request by the absent parent, or any time earlier which the State may choose. Withholding must be paid through public or publicly-accountable entities with accurate recordkeeping and monitoring. Advance notice must be given to the absent parent. If contested, State has 45 days from the advance notice to inform absent parent if withholding will occur and (if so) when. The amount to be withheld could include a fee to cover employer costs, at State option. Employer may waive the fee. Provisions must be made for withholding in interstate cases and terminating withholdings in all cases. At the States' option, income other than wages may be subject to withholding.
- expedited processes, either through the judicial or administrative system for the establishment and enforcement of support obligations. States may include establishment of paternity in these processes.
- offsetting State tax refunds to collect overdue support for AFDC and non-AFDC cases, except in appropriate cases.
- imposing liens against real and personal property for amounts of overdue support, except in appropriate cases.
- authorizing the court to require a security, bond, or other guarantee to secure support obligations from absent parents with a pattern of overdue support, except in appropriate cases.
- permitting the establishment of paternity for both AFDC and non-AFDC children until their 18th birthdays.
- making information available to the consumer credit agencies upon request if amounts of overdue support are in excess of \$1000, except in appropriate cases. States may recover costs of this activity from the credit agencies.
- all support orders issued or modified after October 1, 1985 to include a provision for wage withholding.
- Secretary may grant States exemption from the eight requirements above if such State demonstrates that the use of such procedure(s) would not increase the effectiveness or efficiency of the State child support program.

provisions

Summary by Area of Improvement

CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984

SUMMARY

The legislation's key provisions make critical improvements to State and local programs in four major areas:

- o Child support enforcement services must be available equally to welfare and non-welfare families;
- o State Child Support Enforcement programs must use proven enforcement techniques;
- o Federal financing of State program operations and the focus of Federal auditing are tied more closely to program effectiveness and efficiency; and
- o There is a strengthened and focused effort to improve enforcement where the custodial parent and children live in one State, and the parent obligated for support lives in another.

The many provisions of the Amendments are categorized below into these cross-cutting themes, so that the same provision may be referenced more than once.

I. EQUAL ENFORCEMENT SERVICES FOR WELFARE AND NON-WELFARE FAMILIES

A State's child support enforcement services--establishing paternity, locating absent parents, establishing and enforcing support orders--must be available to all families who apply for them. The new legislation enhances equal treatment through:

Wage Withholding

- o Effective October 1, 1985, States must provide for wage withholding when the amount due is equal to one month's support, less if State law permits or absent parent requests; applies to current support and arrearages;
- o Order is issued automatically upon default, the employer and absent parent must be notified, there is no return to court;
- o After October 1, 1985, all support orders initiated by the State include provision for wage withholding;
- o At it's option, the State may apply withholding from sources of income other than wages.

Offset of State and Federal Income Tax Refunds

- o For both welfare and non-welfare families, the State must offset State income tax refunds for overdue child support, in appropriate cases;

- o The State can request offset of Federal income tax refunds payable in 1986 through 1990 for non-welfare families; due process requirements and joint return protections included.

Program Improvement Incentives

- o Incentive payments are made to States based on cost-effective program operation and collections made on behalf of both welfare and non-welfare families.

Other Enhancements

- o Families who leave the welfare rolls must be transferred automatically to non-welfare status for continuation of support enforcement services, with no application or fee required;
- o State enforcement agencies must collect child support on behalf of children receiving foster care;
- o States must collect spousal support when it is also collecting support for the child with whom the former spouse is living;
- o States can use the Federal Parent Locator Service for non-welfare families before exhausting State and local locate sources;
- o States must regularly publicize the availability of enforcement services;
- o Annual notice of support collected for welfare families.

II. STATE AGENCIES MUST USE PROVEN ENFORCEMENT TECHNIQUES

Wage/Income Withholding

- o Results in regular and full payment of both current and overdue support.

Expedited Legal Processes

- o States must use administrative or expedited judicial process for establishing and enforcing support orders, and can use them for establishing paternity.

State and Federal Income Tax Refund Offsets

- o States must offset State income tax refunds for welfare and non-welfare families. Monies collected on behalf of welfare families go toward reimbursing AFDC payments; non-welfare collections go to family;
- o States can request offset of Federal income tax refunds for both welfare and non-welfare families; monies similarly disbursed as under State tax offset.

Liens

- o States must be able to impose liens against real and personal property, where appropriate.

Security or bonds

- o States must be able to require, where there is a pattern of non-payment, or late payment, bonds or security to be deposited with the court from which support payments can be taken where appropriate.

Reports to Credit Bureaus

- o Upon request from a credit bureau, and after notice to the absent parent, the child support agency must report on overdue support amounts over \$1,000, and can report lesser amounts.

Statute of Limitations

- o States must be able to establish paternity until a child's 18th birthday.

III. IMPROVED PROGRAM PERFORMANCE

Federal Financial Participation (FFP)

- o Encourages greater reliance on performance-based incentives by reducing FFP for State administrative costs by 2% starting in FY 1988 (to 68% of costs) and by another 2% in FY 1990 and after (66%).

Incentive Payment Structure

- o Replaces the old fixed rate of 12% of collections for welfare families, effective FY 1986;
- o Pays a minimum of 6% of collections for both welfare and non-welfare families, with additional payments on a sliding scale up to 10% of collections based on the respective ratios of welfare and non-welfare collections to total administrative costs;
- o States must share incentive payments with local child support enforcement programs, where they have participated in the costs of the program;
- o Each State's incentive payments for non-AFDC collections are limited to 100% of the AFDC collection incentive for FY 1986 and 1987, 105% for FY 1988, 110% for FY 1989, and 115% for FY 1990 and after;
- o In calculating incentive payments for FY 1985, the \$50 disregard of child support income (required by Deficit Reduction Act of 1984) will be included.

Program Audit Requirements

- o Replaces annual audit with requirement for audit at least once every three years; audits are comprehensive and performance-based;

- o Replaces current penalty (5% of Federal AFDC funds) with graduated penalties and provides for suspension of penalties based on corrective action plans.

Other

- o Present 90% Federal matching funds are explicitly made available for the development and installation of automated systems to improve required procedures; 90% matching newly extended to computer hardware purchased;
- o Governors must appoint broad-based Commissions on Child Support, with certain exceptions;
- o States are to formulate guidelines for child support awards for judges and other officials who make support determinations;
- o At their option, States may monitor support payments at the request of either parent;
- o The Federal Parent Locator Service and Internal Revenue Service must, upon request, disclose social security numbers to State enforcement agencies.
- o Revised reporting requirements for annual report to the Congress.

IV. IMPROVED ENFORCEMENT OF INTERSTATE CASES

Proven enforcement techniques

- o State must have procedures for interstate enforcement of wage withholding, regardless of where the custodial parent and child and the absent parent live;
- o Expedited legal processes and other techniques are applicable to interstate as well as intrastate cases.

Incentive Payments

- o Interstate collections will be credited to both the initiating and the responding State for calculating incentives.

Federal Income Tax Refund offset on behalf of non-welfare families

Demonstration Grants

- o Legislation authorizes \$7 million in FY 1985, \$12 million in FY 1986 and \$15 million in FY 1987 for special demonstration projects testing innovative methods of interstate enforcement and collection;
- o Demonstration authority including waivers of program requirements extended to child support program.

Program audit focus on program performance, including interstate cooperation

V. OTHER PROVISIONS OF THE AMENDMENTS

Fees

- o States must charge non-AFDC families an application fee of not more than \$25; fee can be charged to the custodial or absent parent, or be paid by the State based on individual's ability to pay;
- o States may charge, in welfare and non-welfare cases, a late-payment fee to the obligated parent of between 3 and 6 % of the arrearages;

Wisconsin Child Support Initiative

Medicaid Benefits

- o Until FY 1989, families that become ineligible for AFDC due to collection of child support, will retain Medicaid benefits for 4 months.

Medical Support

- o States must include medical support as part of child support orders when private health insurance is available to the non-custodial parent at reasonable cost.

Rule 5. Service and Filing of Pleadings and Other Papers.

(a) **Service—When Required.** Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) **Service—How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing. Service, execution and return based on a copy of any paper transmitted by telegraph or radio may be made by the person to whom directed with the same effect as if such copy were the original. In such case the original shall be filed in the court from which it was issued.

(c) **Service—Numerous Defendants.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) **Filing.**

(1) Except as provided in (2) of this paragraph, all papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

(2) Unless filing is ordered by the court on motion of a party or on its own motion, the following may not be filed unless and until they are used in the proceedings:

- (i) notices of taking depositions;
- (ii) interrogatories and requests for admissions and answers thereto;
- (iii) requests for production and responses thereto;
- (iv) subpoenas, including subpoenas duces tecum;
- (v) offers of judgment;
- (vi) proof of service of any of the above;
- (vii) copies of correspondence between counsel.

(e) **Filing With the Court Defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court at the court location where the case is filed unless otherwise directed by the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(f) **Proof of Service.** Proof of service of all papers required or permitted to be served, other than those for which a particular method of proof is prescribed in these rules, must show

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the day and manner of service and may be by written acknowledgement of service, by certificate of an attorney, by affidavit of the person who served the papers, or by any other proof satisfactory to the court. Proof of service must be made promptly and in any event before action is to be taken on the paper served by the court or the parties. Failure to make the proof of service required by this subdivision does not affect the validity of service; and the court may at any time allow the proof of service to be amended or supplied unless it clearly appears that to do so would result in material prejudice to the substantial rights of any party.

(g) Service After Final Judgment.

(1) Notwithstanding the provisions of paragraph (b) of this rule requiring service upon an attorney, a party who has been represented by an attorney in an action or proceeding shall himself be served in accordance with the provisions of paragraph (b) with a motion or other request for relief filed in the action or proceeding where a period of one year has elapsed since the filing of any paper or the issuance of any process in the action or proceeding, and

(i) The final judgment or decree has been entered and the time for filing an appeal has expired or

(ii) If an appeal has been taken, the final judgment or decree upon remand has been entered or the mandate has been issued affirming the judgment or decree, and

(iii) The party's attorney has not filed a notice of continued representation under Rule 81(d)(2).

(2) If a party is served under circumstances described in Section (1) of this paragraph, or if a party appeared in his or her own behalf in the prior action or proceeding, the paper served shall include notice to the party of his right to file written opposition or response, the time within which such opposition or response must be filed, and the place where it must be filed. (Amended by Supreme Court Order 258 effective November 15, 1976; by Supreme Court Order 354 effective April 1, 1979; by Supreme Court Order 372 effective August 15, 1979; by Supreme Court Order 375 effective August 15, 1979; by Supreme Court Order 410 effective May 15, 1980; by Supreme Court Order 471 effective June 1, 1981; and by Supreme Court Order 522 effective October 1, 1982)

320(b).⁷ Thus, while we recognize that strict or absolute necessity is not required, something more than mere convenience must be shown before an occupant of tidelands is entitled to an easement under the provisions of that statute.

[3] Applying the foregoing rule to the instant case, we hold that the trial judge was clearly mistaken in finding that there was a substantial basis for the City engineer's conclusion that the alleged easement was reasonably necessary for appellees' use and enjoyment of their property. The record was devoid of such evidence. At most, the easement was shown to be a matter of added convenience.

Our search of the record fails to disclose evidence sufficient to support appellees' contention that the access available from Water Street would not provide them with a reasonable mode of ingress and egress sufficient to allow them full use and enjoyment of their property. The fact that such access may be less convenient, or that it is not a method of access commonly used by them or their predecessors in interest, does not mean that it is unavailable or that it is not a reasonable mode of access.

The judgment of the superior court is reversed. This matter is remanded for entry of judgment in favor of appellant, such judgment to include an award for costs and reasonable attorney's fees. Our resolution of this case makes it unnecessary for us to decide the other issues presented by the appeal or by appellees' cross appeal.

REVERSE^d. and REMANDED for entry of judgment in favor of appellant.



7. We do not imply that the term "reasonably necessary" should be defined in this manner for the purpose of determining portions of unoccupied tidelands reasonably necessary to an occupant's use and enjoyment of occupied

Alphonse P. BALCHEN, Appellant,

v.

Majorie A. BALCHEN, Appellee.

No. 3178.

Supreme Court of Alaska.

Aug. 5, 1977.

The Superior Court, Third Judicial District, James K. Singleton, J., denied former husband's motion to set aside 1976 judgment entered in favor of former wife on her motion for judgment on back child support to which she was entitled under 1975 divorce decree, and former husband appealed. The Supreme Court, Rabinowitz, J., held that: (1) facts that former husband, rather than his attorney, was served with copy of motion for judgment on back child support and that court's permission had not been obtained prior to serving former husband did not render judgment void; (2) despite fact that service of motion was procedurally defective in that it contained no notice of hearing date and failed to advise former husband of right to file opposition to motion, procedural defects did not furnish sufficient grounds for vacation of judgment since defects were neither jurisdictional nor did they rise to the level of a due process violation.

Affirmed in part and modified in part.

1. Judgment \Rightarrow 15, 349

A judgment rendered without jurisdiction is void and is thus vulnerable to attack pursuant to rule governing motion to set aside judgment. Rules of Civil Procedure, rule 60(b).

2. Divorce \Rightarrow 311

Formal complaint-summons service requirements of civil rule are inappropriate in proceedings which seek to enforce terms of a prior divorce decree relating to child support payments, for, unlike most judgments, divorce decrees can be modified at anytime, and thus superior court retains jurisdiction of the matter after the "final" judgment

or developed land. The definition which we use here applies to the claim of an easement across the tidelands occupied or developed by another.

that the superior court's judgment should be set aside because rendered through excusable neglect, mistake, or inadvertence.³ This latter basis for appellant's attack on the judgment was founded on his allegations that the judgment included future support for a minor child who had been emancipated. The superior court denied Alphonse's Civil Rule 60(b) motion and this appeal followed.

Appellant's primary contention on appeal is that the superior court lacked jurisdiction to enter the judgment for support arrearages because "service of appellee's motion to reduce alleged arrearages to judgment failed to comply with [the appropriate] Rules of Civil Procedure."

[1] Alaska Civil Rule 5(b) provides that with respect to all pleadings and papers subsequent to the original complaint "the service shall be made upon the attorney unless service upon the party himself is ordered by the court." Alaska Civil Rule 4 sets forth the procedures whereby an original complaint is served, complete with a summons. Alphonse, rather than his attorney, was served with a copy of the motion. Thus the procedure used did not comply with Rule 5(b). Alphonse was not served with a summons. Therefore the procedure used did not comply with Rule 4. Alphonse contends that because there was lack of strict compliance with either Rule 4 or Rule 5(b) the superior court was without jurisdiction. A judgment rendered without jurisdiction is void and is thus vulnerable to attack pursuant to a Rule 60(b)(4) motion.⁴ Since this court has not addressed this precise issue before, we think it appropriate to examine relevant authority from other sources.

representative from a final judgment, order, or proceeding for the following reasons:

(4) the judgment is void.¹

Civil Rule 4(a) provides:

Upon the filing of the complaint the clerk should forthwith issue a summons and deliver it for service to a peace officer or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants. Civil Rule 5(b) reads, in part:

Whenever under these rules service is required or permitted to be made upon a party

Writing on the parallel federal rules, Professors Wright and Miller state:

The requirement of service on the attorney is to be followed literally; service upon a party represented by an attorney does not comply with the rule. The theory underlying Rule 5(b) is that service of papers on the attorney rather than the party will expedite preparation of a case for prompt adjudication on the merits.

There are two basic exceptions to the rule that papers be served on the attorney. Under the first, service on a party is valid—indeed it is obligatory—if a party does not have an attorney or if his attorney has ceased to represent him.

The second exception permits service on the party at the express direction of the court.⁵ (footnotes omitted)

A case similar to the one at bar was presented in *Tilghman v. Tilghman*, 57 F.Supp. 417 (D.D.C.1944). In *Tilghman*, the wife moved to have the husband adjudged in contempt for failure to pay the alimony as awarded in their divorce decree. The husband, who was personally served with a copy of the motion outside the District of Columbia, attempted a special appearance to quash service. The district court first noted that the court had acquired jurisdiction over the person of the husband in the divorce proceeding and thus all motions with respect to that action were governed by Fed.R.Civ.P. 5, rather than Fed.R.Civ.P. 4. The court next addressed the issue of non-compliance with the terms of Rule 5(b), since the husband, rather than the hus-

represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court.

3. Civil Rule 60(b)(1) provides that a party may be relieved from a final judgment in cases of "mistake, inadvertence, surprise or excusable neglect."

4. 11 C. Wright & A. Miller, *Federal Practice and Procedure*: Civil § 2862, at 198-200 (1973).

5. 4 C. Wright & A. Miller, *Federal Practice and Procedure*: Civil § 1145, at 583-84 (1969).

federal rules, Frost v. ...

service on the attorney; service by an attorney rule. The theory is that service of process rather than the presentation of a case on the merits. Exceptions to the rule are based on the attorney's service on a party or attorney—if a partner or if his representative him.

permits service in the absence of direction of the court (omitted)

one at bar was *Tilghman*, 57 Alaska 100, 453 P.2d 100, 101 (1969). In *Tilghman*, the court was divided 4-3 and adjudged in favor of the husband in the alimony case. The husband was served with a writ of habeas corpus in the District of Alaska. The court first required jurisdiction over the husband in the case. All motions were governed by the Federal Rules of Civil Procedure. The issue of service of process under Rule 5(b), rather than the husband's

the service shall be unless service is ordered by the court.

that a party may be excused from service in cases of emergency or excusable neglect.

Federal Practice and Procedure 198-200 (1973).

Federal Practice and Procedure 583-84 (1969).

husband's attorney, had been served with the motion. The court stated.

It is true plaintiff did not obtain, in advance, an order of court for service upon the party instead of the attorney, but I cannot believe the Rules are to be construed so narrowly as to make such failure a ground for invalidating the service herein. Such construction would be contrary to their spirit and purpose which is epitomized in Rule 1 Federal Rules of Civil Procedure, wherein it is stated that they should be construed to secure just, speedy, and inexpensive determination of every action.

Indeed, it would seem to be desirable practice, in motions of this character (and I have heretofore so indicated), to serve defendant personally under order of court, rather than his attorney of record, whenever there is likely to be a showing that, with the passage of years after final judgment, the attorney has lost contact with his client.⁶

[2] We think the *Tilghman* analysis is sound. In our view, the formal complaint-summons service requirements of Civil Rule 4 are inappropriate in proceedings which seek to enforce the terms of a prior divorce decree relating to child support payments. Unlike most judgments, divorce decrees can be modified at anytime; thus, the superior court retains jurisdiction of the matter after the "final" judgment has been entered.⁷ We therefore hold that Civil Rule 5(b) provides the appropriate procedure to be followed in such cases.

6. 57 F.Supp. at 418. See generally Annot., 42 A.L.R.2d 1115 (1955) and Annot., 15 A.L.R. 227 (1921).

7. AS 09.55.210 outlines the powers of the court to rule "in an action for divorce or action declaring a marriage void or at any time after judgment" with respect to property divisions and support orders. AS 09.55.205 provides authority for the court to enter orders concerning custody and visitation "at the final hearing or at any time thereafter during the minority" of the child of the marriage.

8. We are of the view that the general procedural questions raised by this appeal should be

[3] Thus we must determine whether the failure to secure the court's permission prior to serving the appellant personally rendered the judgment void. In this case we are presented with a situation which is not atypical. As we noted previously, the decree of divorce was entered in October 1973, and appellee's motion to reduce support arrearages to judgment was granted in August 1976. The fact that attorneys often do not continue to represent individuals after the entry of a divorce decree implies that in order to ensure notice to the party of the pending motion, it is more appropriate to serve the party personally. This situation is analogous to the first exception to Civil Rule 5(b) discussed by Wright and Miller. That is, service on the party rather than the attorney is required when the attorney has ceased to represent the party or when the party does not have an attorney. Admittedly under Alaska's Rules of Civil Procedure as presently constituted, the preferred procedure is to obtain the superior court's permission prior to making service of a motion on a party personally. Nevertheless, this minor non-compliance with Civil Rule 5(b) does not require vacation of the judgment in question.⁸

[4, 5] At oral argument counsel for appellant advanced an argument which differed from those contained in appellant's brief. Appellant Alphonse now contends that appellee's motion to reduce the arrearage to judgment was defective in that it contained no notice of a hearing date⁹ and additionally failed to advise him of the right to file opposition to the motion. Although we think there is merit in appel-

referred to the Supreme Court's Standing Advisory Committee on Civil Rules. More particularly, we think there is merit in providing, in matters such as enforcement procedures pertaining to child support and custody, explicit rules which would permit service, including appropriate notice, on the party rather than upon the attorney who represented the party at proceedings leading up to the judgment or order which is sought to be enforced.

9. On the basis of the record before us, we conclude that no hearing was held on the motion.

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lant's contentions that service of the motion, without more, was procedurally defective, we have concluded that this procedural defect does not furnish sufficient grounds for vacation of the judgment pursuant to Civil Rule 60(b)(4) since the defect is neither jurisdictional nor does it rise to the level of a due process violation.¹⁰ Furthermore, given the particular setting of the case at bar, the procedural defect does not give rise to any other ground for relief specified in Civil Rule 60(b). We note that Alphonse has not contested the amount of support arrearage which the superior court found to be due. In the absence of any showing of a meritorious defense, we hold that the superior court did not err in denying appellant's Civil Rule 60(b) motion.¹¹

In his second specification of error, appellant asserts that the order for future child

support for both children "comprises a miscarriage of justice" because the facts before the court indicated that one of the children was no longer living with the mother. At oral argument counsel for appellee conceded that the order should be modified to require future support payments for only one minor child of the parties. Thus, on the basis of the concession by counsel for appellee, the superior court's order for future child support is to be modified accordingly.

Affirmed in part and modified in part.



10. This notice aspect of the general question will also be referred to the Standing Advisory Committee on Civil Rules. See note 8, *supra*.

11. In *Markland v. City of Fairbanks*, 513 P.2d 658 (Alaska 1973), we outlined the necessity that the Rule 60(b) movant establish a meritorious defense should the judgment be reopened.

Cf. Aguchak v. Montgomery Ward Co., Inc., 520 P.2d 1352, 1354 (Alaska 1974) (Rule 60(b)(4) motion). Except in very unusual cases, we will not reverse the superior court's denial of a Rule 60(b) motion as an abuse of discretion where the movant has not made a showing of a meritorious defense.

from:

REPORT BY THE U.S.

General Accounting Office

U.S. Child Support: Needed Efforts Underway To Increase Collections From Absent Parents

The Department of Health and Human Services' (HHS') Child Support Enforcement Program was created in 1975 to help collect support from absent parents. The program is overseen by HHS' Office of Child Support Enforcement and operated through state and local agencies.

At the Senate Budget Committee's request, GAO reviewed collection activities at five state child support offices and seven local offices. GAO found that

- absent parents paid about half the support owed, and about two-thirds of these parents' payments were delinquent by more than 30 days at least once during the study year;
- there were few standards governing collection activities, and the agencies were not acting promptly or at all to collect past due amounts; and
- the availability of collection services for families not in the Aid to Families with Dependent Children program varied.

Enacted in August 1984, the 1984 Child Support Enforcement Amendments could significantly enhance collections and correct the deficiencies GAO noted.



GAO/HRD-85-5
OCTOBER 30, 1984

SUMMARY OF CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984Section 1 - Contents

Section 2 - Purpose of the program.--Language is added to the statement of purpose assuring that services will be made available to non-AFDC families.

Section 3 - Improved child support enforcement through required state laws and procedures.--States are required to enact laws establishing the following procedures:

1. Mandatory wage withholding for all families (AFDC and non-AFDC) if support payments are delinquent in an amount equal to 1 month's support. States must also allow absent parents to request withholding at an earlier date.
2. Imposing liens against real and personal property for amounts of overdue support.
3. Withholding of state tax refunds payable to a parent of a child receiving services, if the parent is delinquent in support payments.
4. Making available information regarding the amount of overdue support owed by an absent parent, to any consumer credit bureau, upon request of such organization.
5. Requiring individuals who have demonstrated a pattern of delinquent payments to post a bond, or give some other guarantee to secure payment of overdue support.
6. Establishing expedited processes within the state judicial system or under administrative processes for obtaining and enforcing child support orders and, at the option of the state, for determining paternity.
7. Notifying each AFDC recipient at least once each year of the amount of child support collected on behalf of that recipient.
8. Permitting the establishment of paternity until a child's 18th birthday.
9. At the option of the state, providing that child support payments must be made through the agency that administers the state's income withholding system if either the custodial or noncustodial parent requests that they be made in this manner.

The Secretary of Health and Human Services may grant an exemption to a state from the required procedures, subject to later review, if the state can demonstrate that such procedures will not improve the efficiency and effectiveness of the state Child Support Enforcement program.

Service fees to non-AFDC families.--States will be required to charge an application fee for non-AFDC cases not to exceed \$25. The state may charge the fee against the custodial parent, pay the fee out of state funds, or recover the fee from the non-custodial parent.

In addition, states may charge absent parents a late payment fee equal to between 3 and 6 percent of the amount of overdue support. The state may not take any action which would have the effect of reducing the amount paid to the child and will collect the fee only after the full amount of the support has been paid to the child. The late payment fee provision is effective upon enactment.

The enforcement provisions are generally effective October 1, 1985.

Section 4 - Federal matching of administrative costs.--The federal matching share is gradually reduced from 70 percent to 68 percent in fiscal years 1988 and 1989, and 66 percent beginning in fiscal year 1990.

Section 5 - Federal incentive payments.--The current incentive formula which gives states 12 percent of their AFDC collections (paid for out of the federal share of the collections) is replaced with a new formula that will be equal to 6 percent of the state's AFDC collections and 6 percent of its non-AFDC collections. States may qualify for higher incentive payments, up to a maximum of 10 percent of collections, if their AFDC or non-AFDC collections exceed combined administrative costs for both AFDC and non-AFDC components of the program as shown below.

<u>AFDC incentive payment</u>		<u>Non-AFDC incentive payment</u>	
<u>Ratio of AFDC collections to combined AFDC/non-AFDC administrative costs</u>	<u>Incentive equal to this percent of AFDC collections</u>	<u>Ratio of non-AFDC collections to combined AFDC/non-AFDC administrative costs</u>	<u>Incentive equal to this percent of non-AFDC collections</u>
less than 1.4 : 1	6.0	less than 1.4 : 1	6.0
1.4 : 1	6.5	1.4 : 1	6.5
1.6 : 1	7.0	1.6 : 1	7.0
1.8 : 1	7.5	1.8 : 1	7.5
2.0 : 1	8.0	2.0 : 1	8.0
2.2 : 1	8.5	2.2 : 1	8.5
2.4 : 1	9.0	2.4 : 1	9.0
2.6 : 1	9.5	2.6 : 1	9.5
2.8 : 1	10.0	2.8 : 1	10.0

The total dollar amount of incentives paid for non-AFDC families may not exceed the amount of the state's incentive payment for AFDC collections for fiscal years 1986 and 1987. Thereafter the incentive paid for non-AFDC collections will be capped at an amount equal to 105 percent of the incentive for AFDC collections in fiscal year 1988, 110 percent in fiscal year 1989, and 115 percent beginning in fiscal year 1990. For fiscal year 1985, the amount of the AFDC incentive will be calculated on the basis of AFDC collections without regard to the provision added by the Deficit Reduction Act of 1984 that requires that the first \$50 collected on behalf of an AFDC family in any month must be paid to the family without reducing the amount of the AFDC payment to the family.

States may exclude the laboratory costs of determining paternity from combined administrative costs for purposes of computing incentive payments.

States are required to pass through to local jurisdictions that participate in the cost of the program an appropriate share of the incentive payments, as determined by the state, taking into account program effectiveness and efficiency. Amounts collected in interstate cases will be credited, for purposes of computing the incentive payments, to both the initiating and responding states.

As part of the new funding formula, "hold harmless" protection is provided for fiscal years 1986 and 1987 which assures the states that for those years they will receive the higher of the amounts due them under the new incentive and federal match provisions, or no less than 80 percent of what they would have received in fiscal year 1985 under prior law.

The provision is effective beginning with fiscal year 1986 (Oct. 1, 1985).

Section 6 - Federal matching for automated management systems used in income withholding and other procedures.--The 90-percent federal matching rate currently available to states to establish an automatic data processing and information retrieval system may be used to develop and improve income withholding and other required procedures. The 90-percent matching is also available to pay for the acquisition of computer hardware.

The provision is effective October 1, 1984.

Section 7 - Continuing support enforcement for AFDC recipients whose benefits are terminated.--States must provide that families whose eligibility for AFDC is terminated will be automatically transferred from AFDC to non-AFDC status without requiring application services or payment of a fee.

The provision is effective October 1, 1984.

Section 8 - Special project grants to promote improvement in interstate enforcement.--The Secretary is authorized to make demonstration grants to states which propose to undertake new or innovative methods of support collection in interstate cases.

Section 9 - Periodic review of state programs; modifications of penalty.--The director of the federal Office of Child Support Enforcement is required to conduct audits at least every 3 years to determine whether the standards and requirements prescribed by law and regulations have been met. Under the penalty provisions, a state's AFDC matching funds must be reduced by an amount equal to at least 1 but no more than 2 percent for the first failure to comply substantially with the standards and requirements, at least 2 but no more than 3 percent for the second failure, and at least 3 but no more than 5 percent for the third and any subsequent consecutive failures.

Annual audits are required unless a state is in substantial compliance. If a state is not in substantial compliance, the penalty may be suspended only if the state is actively pursuing a corrective action plan, approved by the Secretary, which can be expected to bring the state into substantial compliance on a specific and reasonable timetable. If at the end of the corrective action period substantial compliance has been achieved, no penalties would be due. If substantial compliance has not been achieved, penalties would begin at the end of the corrective

action period if the state has implemented the corrective action plan. A state which is not in full compliance may be determined to be in substantial compliance only if the Secretary determines that any noncompliance is of a technical nature which does not adversely affect the performance of the Child Support Enforcement program.

The provision is effective beginning in fiscal year 1984.

Section 10 - Extension of sec. 1115 demonstration authority to the child support system.--The sec. 1115 demonstration authority is expanded to include the Child Support Enforcement program under specified conditions.

The provision is effective upon enactment.

Section 11 - Child support enforcement for certain children in foster care.--State child support agencies are required to undertake child support collections on behalf of children receiving foster care maintenance payments under title IV-E of the Social Security Act, if an assignment of rights to support to the state has been secured by the foster care agency. In addition, foster care agencies are required to secure an assignment to the state or any rights to support on behalf of a child receiving foster care maintenance payments under the title IV-E foster care program.

The provision is effective October 1, 1984.

Section 12 - Collecting spousal support.--Child support enforcement services must include the enforcement of spousal support, but only if a support obligation has been established with respect to the spouse, the child and spouse are living in the same household, and child support is being collected along with spousal support.

The provision is effective October 1, 1985.

Section 13 - Modifying annual report content.--The information requirements of the Secretary's annual report on Child Support Enforcement program activities are expanded to include the following data.

1. The total number of cases in which a support obligation has been established in the past year and the total amount of obligations;

2. The total number of cases in which a support obligation has been established and the total amount of obligations;

3. Cases described in (1) in which support was collected during a fiscal year and the total amount; and

4. Cases described in (2) in which support was collected during a fiscal year and the total amount.

Additionally, the annual report must include information on the child support cases filed and the collections made in each state on behalf of children residing in another state or cases against parents residing in another state. The annual report must also detail how much in administrative costs is spent in each functional expenditure category (including paternity). This information is to be separately stated for current and for past AFDC and non-AFDC cases.

The provision is effective beginning for the report issued for fiscal year 1986.

Section 14 - Requirement to publicize the availability of child support services.--States must frequently publicize, through public service announcements, the availability of child support enforcement services, together with information as to the application fee for services and a telephone number or postal address to be used to obtain additional information.

The provision is effective October 1, 1985.

Section 15 - State Commissions on Child Support.--The governor of each state is required to appoint a state Commission on Child Support. The commission must include representation from all aspects of the child support system, including custodial and non-custodial parents, the IV-D agency, the judiciary, the governor, the legislature, child welfare and social services agencies, and others.

Each state commission is to examine the functioning of the state child support system with regard to securing support and parental involvement for both AFDC and non-AFDC children, including but not limited to such specific problems as: (1) visitation, (2) establishment of appropriate objective standards for support, (3) enforcement of interstate obligations, and (4) additional federal and state legislation needed to obtain support for all children.

The commission shall submit to the governor, and make available to the public, reports on their findings and recommendations no later than October 1, 1985. Costs of operating the commissions will not be eligible for federal matching.

The Secretary may waive the requirement for a commission at the request of a state if he determines that the state has had such a commission or council within the last 5 years or is making satisfactory progress toward fully effective child support enforcement.

Section 16 - Requirement to include medical support as part of any child support order.--The Secretary is required to issue regulations to require state agencies to petition to include medical support as part of any child support order whenever health care coverage is available to the absent parent at a reasonable cost. The regulations must also provide for improved information exchange between the state IV-D agencies and the Medicaid agencies with respect to the availability of health insurance coverage.

Section 17 - Availability of federal parent locator services to state agencies.--The present requirement that the states exhaust all state child support locator resources before they request the assistance of the federal Parent Locator Service is repealed.

The provision is effective upon enactment.

Section 18 - Guidelines for determining support obligations.--Each state must develop guidelines to be considered in determining support obligations.

The provision is effective October 1, 1987.

Section 19 - Availability of social security numbers for purposes of child support enforcement.--The absent parent's social security number may be disclosed to child support agencies both through the federal Parent Locator Service and by the Internal Revenue Service.

The provision is effective upon enactment.

Section 20 - Extending Medicaid eligibility when support collection results in termination of AFDC eligibility.--If a family loses AFDC eligibility as the result (wholly or partly) of increased collection of support payments under the IV-D program, the state must continue to provide Medicaid benefits for 4 calendar months beginning with the month of ineligibility. (The family must have received AFDC in at least 3 of the 6 months immediately preceding the month of ineligibility).

The provision is effective upon enactment. It is applicable to families becoming ineligible for AFDC before October 1, 1988.

Section 21 - Collection of overdue support from federal tax refunds.--Current law requires the Secretary of the Treasury, upon receiving notice from a state child support agency that an individual owes past due support which has been assigned to the state as a condition of AFDC eligibility, to withhold from any tax refunds due that individual an amount equal to any past due support. The amendments extend this requirement to provide for withholding of refunds on behalf of non-AFDC families under specified conditions.

The provision is effective for refunds payable after the year ending December 31, 1985, and prior to January 1, 1991.

Section 22 - Wisconsin child support initiative.--The Secretary is required to grant waivers to the state of Wisconsin to allow it to implement its proposed child support initiative in all or parts of the state as a replacement for the AFDC and child support programs. The state must meet specified conditions and give specific guarantees with respect to the financial well-being of the children involved.

The provision is effective for fiscal years 1987-94.

Section 23 - Sense of the Congress that state and local governments should focus on the problems of child custody, child support, and related domestic issues.--State and local governments are urged to focus on the vital issues of child support, child custody, visitation rights, and other related domestic issues that are within the jurisdictions of such governments.

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REMARKS

NESC has finally published their analysis of state laws to the new federal law. Call me if you have any questions

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ALASKA

The federal Child Support Amendments of 1984 mandate certain legislative modifications of the Alaska Child Support program. The following provisions in Alaska law contain many of the features mandated by P.L. 98-378:

- o Sections 47.23.110-47.23.280, which create an administrative process for the enforcement of child support obligations;
- o Section 47.23.230, which provides for the imposition of liens against real and personal property;
- o Section 47.23.253, which provides for the intercept of any refund or disbursement by the Department of Revenue for the satisfaction of child support obligations;
- o Section 47.23.273, which approves the dissemination of information on the obligor's child support debts to any consumer credit bureau;
- o Section 47.23.060, the provision by which a court may require a parent to post a bond or security to insure collection of child support obligations;
- o Section 47.23.100, which provides equal treatment of non-AFDC and AFDC clients;
- o 15 Alaska Administrative Code 147.010(c), which provides guidelines to be used in the setting of support orders.

Modifications of Alaska law to meet the Child Support Enforcement Amendments of 1984 would include:

- o ^{not necessary - see 09.65.132} Altering Sections 47.23.070 and .250 to create a mandatory rather than a discretionary income withholding statute and to include:
 - ✓--recognition of income withholding order as top priority;
 - ✓--provision limiting obligor's defenses to mistakes of fact in contested withholding cases;
 - ✓--designation by state of publicly accountable agency to administer the withholding system;
 - *--simplification of the process by the state, such as allowing employer to send in withheld amounts in one check;
 - ✓--provision for withholding income in interstate cases;
 - ✓--provision to terminate withholding;
 - ✓--provision in contested cases for state to notify obligor within 45 days whether withholding will occur;
- o ✓ Altering Sections 47.23.020 and .025 to reduce the optional late payment fee to meet the federal 3% to 6% standard.

The adoption of new provisions to Alaska law would include:

- ✓o Provision for withholding to be part of all support orders issued or modified after 10-1-85.

The following are areas not currently addressed by state statutes and may be implemented by statutory enactment, administrative plan, judicial procedure, or executive action:

- o The enforcement of spousal support when it is part of the support order;
- o Notification to AFDC recipients of the amount collected on their behalf in the past year;
- o Inclusion of medical insurance in the support order;
- o Continuation of medicaid benefits;
- o Provision to expand services to all children receiving foster care through federal-state assistance programs;
- o Publication of the availability of child support enforcement services through public service announcements;
- o Provision for continuation of child support services when AFDC is terminated;
- o Implementation of a fee for non-AFDC services.

Drafters of state law may wish to be aware of federal regulations affecting their state child support programs. Two pertinent examples are:

- ✕ o Procedure for employer to notify the state or local withholding agency of the termination of the obligor's employment and of the obligor's last known address as well as the name and address of the new employer, if known;
- ✓o Procedure to implement the withholding no later than the first pay period that occurs after 14 days from the mailing date on the notice.

FOR MORE INFORMATION

For more information contact Deborah Dale or Charles Brackney, National Conference of State Legislatures, 1125 17th Street, Suite 1500, Denver, Colorado 80202, 303/292-6600.

Public Law 98-378
98th Congress

An Act

To amend part D of title IV of the Social Security Act to assure, through mandatory income withholding, incentive payments to States, and other improvements in the child support enforcement program, that all children in the United States who are in need of assistance in securing financial support from their parents will receive such assistance regardless of their circumstances, and for other purposes.

Aug. 16, 1984
[H.R. 4325]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE; TABLE OF CONTENTS

SECTION 1. This Act may be cited as the "Child Support Enforcement Amendments of 1984".

Child Support
Enforcement
Amendments of
1984.
42 USC 1305
note.

TABLE OF CONTENTS

- Sec. 1. Short title; table of contents.
- Sec. 2. Purpose of the program.
- Sec. 3. Improved child support enforcement through required State laws and procedures.
- Sec. 4. Federal matching of administrative costs.
- Sec. 5. Federal incentive payments.
- Sec. 6. 90-percent matching for automated management systems used in income withholding and other required procedures.
- Sec. 7. Continuation of support enforcement for AFDC recipients whose benefits are being terminated.
- Sec. 8. Special project grants to promote improvements in interstate enforcement.
- Sec. 9. Periodic review of effectiveness of State programs; modification of penalty.
- Sec. 10. Extension of section 1115 demonstration authority to child support enforcement program.
- Sec. 11. Child support enforcement for certain children in foster care.
- Sec. 12. Enforcement with respect to both child and spousal support.
- Sec. 13. Modifications in content of annual report of the Secretary.
- Sec. 14. Requirement that availability of child support enforcement services be publicized.
- Sec. 15. State Commissions on child support.
- Sec. 16. Inclusion of medical support in child support orders.
- Sec. 17. Increased availability of Federal parent locator service to State agencies.
- Sec. 18. State guidelines for child support awards.
- Sec. 19. Availability of social security numbers for child support enforcement purposes.
- Sec. 20. Extension of eligibility under title XIX when support collection results in termination of AFDC eligibility.
- Sec. 21. Collection of past-due support from Federal tax refunds.
- Sec. 22. Wisconsin child support initiative.
- Sec. 23. Sense of the Congress that State and local governments should focus on the problems of child custody, child support, and related domestic issues.

PURPOSE OF THE PROGRAM

SEC. 2. Section 451 of the Social Security Act is amended by striking out "and obtaining child and spousal support," and inserting in lieu thereof "obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this

42 USC 651.

42 USC 601.

part to all children (whether or not eligible for aid under part A) for whom such assistance is requested."

IMPROVED CHILD SUPPORT ENFORCEMENT THROUGH REQUIRED STATE LAWS AND PROCEDURES

42 USC 654.

SEC. 5. (a) Section 454 of the Social Security Act is amended—
 (1) by striking out "and" at the end of paragraph (18);
 (2) by striking out the period at the end of paragraph (19) and inserting in lieu thereof "and"; and
 (3) by adding after paragraph (19) the following new paragraph:

"(20) provide, to the extent required by section 466, that the State (A) shall have in effect all of the laws to improve child support enforcement effectiveness which are referred to in that section, and (B) shall implement the procedures which are prescribed in or pursuant to such laws."

(b) Part D of title IV of such Act is further amended by adding at the end thereof the following new section:

"REQUIREMENT OF STATUTORILY PRESERVED PROCEDURES TO IMPROVE EFFECTIVENESS OF CHILD SUPPORT ENFORCEMENT

42 USC 566.
Supra

"SEC. 466. (a) In order to satisfy section 454(20)(A), each State must have in effect laws requiring the use of the following procedures, to consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:

"(1) Procedures described in subsection (b) for the withholding from income of amounts payable as support.

"(2) Procedures under which expedited processes (determined in accordance with regulations of the Secretary) are in effect under the State judicial system or under State administrative processes (A) for obtaining and enforcing support orders, and (B) at the option of the State, for establishing, paternity. The Secretary may waive the provisions of this paragraph with respect to one or more political subdivisions within the State on the basis of the effectiveness and timeliness of support order issuance and enforcement within the political subdivision (in accordance with the general rule for exemptions under subsection (d)).

"(3) Procedures under which the State child support enforcement agency shall request, and the State shall provide, that for the purpose of enforcing a support order under any State plan approved under this part—

"(A) any refund of State income tax which would otherwise be payable to an absent parent will be reduced, after notice has been sent to that absent parent of the proposed reduction and the procedures to be followed to contest it (and after full compliance with all procedural due process requirements of the State), by the amount of any overdue support owed by such absent parent;

"(B) the amount by which such refund is reduced shall be distributed in accordance with section 457 (b)(4) or (d)(3) in the case of overdue support assigned to a State pursuant to section 492(a)(26) or 471(a)(17), or, in the case of overdue support which a State has agreed to collect under section 454(6), shall be distributed, after deduction of any fees

42 USC 602.
Post, p. 1317.42 USC 602.
Post, p. 1318.
Post, pp. 1319, 1324.

imposed by the State to cover the costs of collection, to the child or parent to whom such support is owed; and

"(C) notice of the absent parent's social security account number (or numbers, if he has more than one such number) and home address shall be furnished to the State agency requesting the refund offset, and to the State agency enforcing the order.

"(4) Procedures under which liens are imposed against real and personal property for amounts of overdue support owed by an absent parent who resides or owns property in the State.

"(5) Procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday.

"(6) Procedures which require that an absent parent give security, post a bond, or give some other guarantee to secure payment of overdue support, after notice has been sent to such absent parent of the proposed action and of the procedures to be followed to contest it (and after full compliance with all procedural due process requirements of the State).

"(7) Procedures by which information regarding the amount of overdue support owed by an absent parent residing in the State will be made available to any consumer reporting agency (as defined in section 603(D) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f))) upon the request of such agency; except that (A) if the amount of the overdue support involved in any case is less than \$1,000, information regarding such amount shall be made available only at the option of the State, (B) any information with respect to an absent parent shall be made available under such procedures only after notice has been sent to such absent parent of the proposed action, and such absent parent has been given a reasonable opportunity to contest the accuracy of such information (and after full compliance with all procedural due process requirements of the State), and (C) a fee for furnishing such information, in an amount not exceeding the actual cost thereof, may be imposed on the requesting agency by the State.

"(8) Procedures under which all child support orders which are issued or modified in the State will include provision for withholding from wages, in order to assure that withholding as a means of collecting child support is available if arrearages occur without the necessity of filing application for services under this part.

Ante, p. 1306.

Notwithstanding section 454(20)(B), the procedures which are required under paragraphs (3), (4), (6), and (7) need not be used or applied in cases where the State determines (using guidelines which are generally available within the State and which take into account the payment record of the absent parent, the availability of other remedies, and other relevant considerations) that such use or application would not carry out the purposes of this part or would be otherwise inappropriate in the circumstances.

"(b) The procedures referred to in subsection (a)(1) (relating to the withholding from income of amounts payable as support) must provide for the following:

Withholding of income.

"(1) In the case of each absent parent against whom a support order is or has been issued or modified in the State, and is being enforced under the State plan, so much of such parent's wages (as defined by the State for purposes of this section) must be withheld, in accordance with the succeeding provisions of this

subsection, as is necessary to comply with the order and provide for the payment of any fee to the employer which may be required under paragraph (6)(A), up to the maximum amount permitted under section 303(b) of the Consumer Credit Protection Act (15 U.S.C. 1673(b)). If there are arrearages to be collected, amounts withheld to satisfy such arrearages, when added to the amounts withheld to pay current support, and provide for the fee, may not exceed the limit permitted under such section 303(b), but the State need not withhold up to the maximum amount permitted under such section in order to satisfy arrearages.

"(2) Such withholding must be provided without the necessity of any application therefor in the case of a child (whether or not eligible for aid under part A) with respect to whom services are already being provided under the State plan under this part, and must be provided in accordance with this subsection on the basis of an application for services under the State plan in the case of any other child in whose behalf a support order has been issued or modified in the State. In either case such withholding must occur without the need for any amendment to the support order involved or for any further action (other than those actions required under this part) by the court or other entity which issued such order.

"(3) An absent parent shall become subject to such withholding, and the advance notice required under paragraph (4) shall be given, on the earliest of—

"(A) the date on which the payments which the absent parent has failed to make under such order are at least equal to the support payable for one month,

"(B) the date as of which the absent parent requests that such withholding begin, or

"(C) such earlier date as the State may select.

"(4)(A) Such withholding must be carried out in full compliance with all procedural due process requirements of the State, and (subject to subparagraph (B)) the State must send advance notice to each absent parent to whom paragraph (1) applies regarding the proposed withholding and the procedures such absent parent should follow if he or she desires to contest such withholding on the grounds that withholding (including the amount to be withheld) is not proper in the case involved because of mistakes of fact. If the absent parent contests such withholding on those grounds, the State shall determine whether such withholding will actually occur, shall (within no more than 45 days after the provision of such advance notice) inform such parent of whether or not withholding will occur and (if so) of the date on which it is to begin, and shall furnish such parent with the information contained in any notice given to the employer under paragraph (6)(A) with respect to such withholding.

"(B) The requirement of advance notice set forth in the first sentence of subparagraph (A) shall not apply in the case of any State which has a system of income withholding for child support purposes in effect on the date of the enactment of this section if such system provides on that date, and continues to provide, such procedures as may be necessary to meet the procedural due process requirements of State law.

"(5) Such withholding must be administered by a public agency designated by the State, and the amounts withheld must be expeditiously distributed by the State or such agency in accordance with section 457 under procedures (specified by the State) adequate to document payments of support and to track and monitor such payments, except that the State may establish or permit the establishment of alternative procedures for the collection and distribution of such amounts (under the supervision of such public agency) otherwise than through such public agency so long as the entity making such collection and distribution is publicly accountable for its actions taken in carrying out such procedures, and so long as such procedures will assure prompt distribution, provide for the keeping of adequate records to document payments of support, and permit the tracking and monitoring of such payments.

"(6)(A)(i) The employer of any absent parent to whom paragraph (1) applies, upon being given notice as described in clause (ii), must be required to withhold from such absent parent's wages the amount specified by such notice (which may include a fee, established by the State, to be paid to the employer unless waived by such employer) and pay such amount (after deducting and retaining any portion thereof which represents the fee so established) to the appropriate agency (or other entity authorized to collect the amounts withheld under the alternative procedures described in paragraph (5)) for distribution in accordance with section 457.

"(ii) The notice given to the employer shall contain only such information as may be necessary for the employer to comply with the withholding order.

"(B) Methods must be established by the State to simplify the withholding process or employers to the greatest extent possible, including permitting any employer to combine all withheld amounts into a single payment to each appropriate agency or entity (with the portion thereof which is attributable to each individual employee being separately designated).

"(C) The employer must be held liable to the State for any amount which such employer fails to withhold from wages due an employee following receipt by such employer of proper notice under subparagraph (A), but such employer shall not be required to vary the normal pay and disbursement cycles in order to comply with this paragraph.

"(D) Provision must be made for the imposition of a fine against any employer who discharges from employment, refuses to employ, or takes disciplinary action against any absent parent subject to wage withholding required by this subsection because of the existence of such withholding and the obligations or additional obligations which it imposes upon the employer.

"(7) Support collection under this subsection must be given priority over any other legal process under State law against the same wages.

"(8) The State may take such actions as may be necessary to extend its system of withholding under this subsection so that such system will include withholding from forms of income other than wages, in order to assure that child support owed by absent parents in the State will be collected without regard to the types of such absent parents' income or the nature of their income-producing activities.

"(9) The State must extend its withholding system under this subsection so that such system will include withholding from income derived within such State in cases where the applicable support orders were issued in other States, in order to assure that child support owed by absent parents in such State or any other State will be collected without regard to the residence of the child for whom the support is payable or of such child's custodial parent.

"(10) Provision must be made for terminating withholding.

"(c) Any State may at its option, under its plan approved under section 454, establish procedures under which support payments under this part will be made through the State agency or other entity which administers the State's income withholding system in any case where either the absent parent or the custodial parent requests it, even though no arrearages in child support payments are involved and no income withholding procedures have been instituted; but in any such case an annual fee for handling and processing such payments, in an amount not exceeding the actual costs incurred by the State in connection therewith or \$25, whichever is less, shall be imposed on the requesting parent by the State.

"(d) If a State demonstrates to the satisfaction of the Secretary, through the presentation to the Secretary of such data pertaining to caseloads, processing times, administrative costs, and average support collections, and such other data or estimates as the Secretary may specify, that the enactment of any law or the use of any procedure or procedures required by or pursuant to this section will not increase the effectiveness and efficiency of the State child support enforcement program, the Secretary may exempt the State, subject to the Secretary's continuing review and to termination of the exemption should circumstances change, from the requirement to enact the law or use the procedure or procedures involved.

"(e) For purposes of this section, the term 'overdue support' means the amount of a delinquency pursuant to an obligation determined under a court order or an order of an administrative process established under State law, for support and maintenance of a minor child which is owed to or on behalf of such child, or for support and maintenance of the absent parent's spouse (or former spouse) with whom the child is living if and to the extent that spousal support (with respect to such spouse or former spouse) would be included for purposes of paragraph (4) or (6) of section 454. At the option of the State, overdue support may include amounts which otherwise meet the definition in the first sentence of this subsection but which are owed to or on behalf of a child who is not a minor child. The option to include support owed to children who are not minors shall apply independently to each procedure specified under this section."

(c) Section 454(6)(B) of such Act is amended to read as follows: "(B) an application fee for furnishing such services shall be imposed, which shall be paid by the individual applying for such services, or recovered from the absent parent, or paid by the State out of its own funds (the payment of which from State funds shall not be considered as an administrative cost of the State for the operation of the plan, and shall be considered income to the program), the amount of which (i) will not exceed \$25 (or such higher or lower amount (which shall be uniform for all States) as the Secretary may determine to be appropriate for any fiscal year to reflect increases or decreases in

administrative costs), and (ii) may vary among such individuals on the basis of ability to pay (as determined by the State), and".

(d) Section 454 of such Act (as amended by subsection (a) of this section) is further amended—

(1) by striking out "and" at the end of paragraph (19);

(2) by striking out the period at the end of paragraph (20) and inserting in lieu thereof "; and"; and

(3) by adding after paragraph (20) the following new paragraph:

"(21)(A) at the option of the State, impose a late payment fee on all overdue support (as defined in section 466(e)) under any obligation being enforced under this part, in an amount equal to a uniform percentage determined by the State (not less than 3 percent nor more than 6 percent) of the overdue support, which shall be payable by the absent parent owing the overdue support; and

"(B) assure that the fee will be collected in addition to, and only after full payment of, the overdue support, and that the imposition of the late payment fee shall not directly or indirectly result in a decrease in the amount of the support which is paid to the child (or spouse) to whom, or on whose behalf, it is owed."

(e) Section 454(5) of such Act is amended by inserting after "directly to the family" the following: ", and the individual will be notified at least annually of the amount of the support payments collected;".

(f) Section 454 of such Act is further amended by adding at the end thereof (after and below paragraph (21) (as added by subsection (d) of this section)) the following new sentence:

"The State may allow the jurisdiction which makes the collection involved to retain any application fee under paragraph (6)(B) or any late payment fee under paragraph (21)."

(g)(1) Except as provided in paragraphs (2) and (3), the amendments made by this section shall become effective on October 1, 1985.

(2) Section 454(21) of the Social Security Act (as added by subsection (d) of this section), and section 466(e) of such Act (as added by subsection (b) of this section), shall be effective with respect to support owed for any month beginning after the date of the enactment of this Act.

(3) In the case of a State with respect to which the Secretary of Health and Human Services has determined that State legislation is required in order to conform the State plan approved under part D of title IV of the Social Security Act to the requirements imposed by any amendment made by this section, the State plan shall not be regarded as failing to comply with the requirements of such part solely by reason of its failure to meet the requirements imposed by such amendment prior to the beginning of the fourth month beginning after the end of the first session of the State legislature which ends on or after October 1, 1985. For purposes of the preceding sentence, the term "session" means a regular, special, budget, or other session of a State legislature.

FEDERAL MATCHING OF ADMINISTRATIVE COSTS

SEC. 4. (a) Section 455(a) of the Social Security Act is amended—

(1) by inserting "(1)" after "(a)";

Ante, p. 1306.

Ante, p. 1306.

42 USC 654.

Supra.

Ante, p. 1310.

Effective dates.
42 USC 654 note.

Supra.

Ante, p. 1306.

42 USC 651.

42 USC 655.

Optional
payment
procedure.
42 USC 654.

Exemption.

(2) by striking out "beginning with the quarter commencing July 1, 1975,";

(3) by striking out paragraph (2) and redesignating paragraphs (1) and (3) as subparagraphs (A) and (B), respectively; and

(4) by amending paragraph (1)(A) as so redesignated to read as follows:

"(A) equal to the percent specified in paragraph (2) of the total amount expended by such State during such quarter for the operation of the plan approved under section 454, and";

(5) in paragraph (1)(B) as so redesignated, by striking out "specified in clause (1) or (2)" and inserting in lieu thereof "specified in subparagraph (A)"; and

(6) by adding at the end thereof the following new paragraph:

"(2) The percent applicable to quarters in a fiscal year for purposes of paragraph (1)(A) is—

"(A) 70 percent for fiscal years 1984, 1985, 1986, and 1987,

"(B) 68 percent for fiscal years 1988 and 1989, and

"(C) 66 percent for fiscal year 1990 and each fiscal year thereafter."

(b) Subsections (d)(1)(B), (d)(2)(A), (d)(2)(B), and (e) of section 452 of such Act are each amended by striking out "455(a)(3)" and inserting in lieu thereof "455(a)(1)(B)".

(c) The amendments made by this section shall apply to fiscal years after fiscal year 1983.

12 USC 652.

Effective date.
12 USC 652 note.

FEDERAL INCENTIVE PAYMENTS

SEC. 5. (a) Section 458 of the Social Security Act is amended to read as follows:

"INCENTIVE PAYMENTS TO STATES

"SEC. 458. (a) In order to encourage and reward State child support enforcement programs which perform in a cost-effective and efficient manner to secure support for all children who have sought assistance in securing support, whether such children reside within the State or elsewhere and whether or not they are eligible for aid to families with dependent children under a State plan approved under part A of this title, and regardless of the economic circumstances of their parents, the Secretary shall, from support collected which would otherwise represent the Federal share of assistance to families of absent parents, pay to each State for each fiscal year, on a quarterly basis (as described in subsection (e)) beginning with the quarter commencing October 1, 1985, an incentive payment in an amount determined under subsection (b).

"(b)(1) Except as provided in paragraphs (2), (3), and (4), the incentive payment shall be equal to—

"(A) 6 percent of the total amount of support collected under the plan during the fiscal year in cases in which the support obligation involved is assigned to the State pursuant to section 402(a)(26) or section 471(a)(17) (with such total amount for any fiscal year being hereafter referred to in this section as the State's 'AFDC collections' for that year), plus

"(B) 6 percent of the total amount of support collected during the fiscal year in all other cases under this part (with such total amount for any fiscal year being hereafter referred to in this section as the State's 'non-AFDC collections' for that year).

12 USC 602.
Amc. p. 1313.

"(2) If subsection (c) applies with respect to a State's AFDC collections or non-AFDC collections for any fiscal year, the percent specified in paragraph (1) (A) or (B) (with respect to such collections) shall be increased to the higher percent determined under such subsection (with respect to such collections) in determining the State's incentive payment under this subsection for that year.

"(3) The dollar amount of the portion of the State's incentive payment for any fiscal year which is determined on the basis of its non-AFDC collections under paragraph (1)(B) (after adjustment under subsection (c) if applicable) shall in no case exceed—

"(A) the dollar amount of the portion of such payment which is determined on the basis of its AFDC collections under paragraph (1)(A) (after adjustment under subsection (c) if applicable) in the case of fiscal year 1986 or 1987;

"(B) 105 percent of such dollar amount in the case of fiscal year 1988;

"(C) 110 percent of such dollar amount in the case of fiscal year 1989; or

"(D) 115 percent of such dollar amount in the case of fiscal year 1990 or any fiscal year thereafter.

"(4) The Secretary shall make such additional payments to the State under this part, for fiscal year 1986 or 1987, as may be necessary to assure that the total amount of payments under this section and section 455(a)(1)(A) for such fiscal year is no less than 80 percent of the amount that would have been payable to that State and its political subdivisions for such fiscal year under this section and section 455(a)(1)(A) if those sections (including the amendments made by section 5(c)(2)(A) of the Child Support Enforcement Amendments of 1984) had remained in effect as they were in effect for fiscal year 1985.

"(c) If the total amount of a State's AFDC collections or non-AFDC collections for any fiscal year bears a ratio to the total amount expended by the State in that year for the operation of its plan approved under section 454 for which payment may be made under section 455 (with the total amount so expended in any fiscal year being hereafter referred to in this section as the State's 'combined AFDC/non-AFDC administrative costs' for that year) which is equal to or greater than 1.4, the relevant percent specified in subparagraph (A) or (B) of subsection (b)(1) (with respect to such collections) shall be increased to—

"(1) 6.5 percent, plus

"(2) one-half of 1 percent for each full two-tenths by which such ratio exceeds 1.4;

except that the percent so specified shall in no event be increased (for either AFDC collections or non-AFDC collections) to more than 10 percent. For purposes of the preceding sentence, laboratory costs incurred in determining paternity in any fiscal year may at the option of the State be excluded from the State's combined AFDC/non-AFDC administrative costs for that year.

"(d) In computing incentive payments under this section, support which is collected by one State on behalf of individuals residing in another State shall be treated as having been collected in full by each such State.

"(e) The amounts of the incentive payments to be made to the various States under this section for any fiscal year shall be estimated by the Secretary at or before the beginning of such year on the basis of the best information available. The Secretary shall

Amc. p. 1311.

Amc. p. 1312.

42 USC 654.

42 USC 655.

make such payments for such year, or a quarterly basis (with each quarterly payment being made no later than the beginning of the quarter involved), in the amounts so estimated, reduced or increased to the extent of any overpayments or underpayments which the Secretary determines were made under this section to the States involved for prior periods and with respect to which adjustment has not already been made under this subsection. Upon the making of any estimate by the Secretary under the preceding sentence, any appropriations available for payments under this section shall be deemed obligated."

(b) Section 454 of such Act (as amended by subsections (a), (d), and (f) of section 3 of this Act) is amended—

- (1) by striking out "and" at the end of paragraph (20);
- (2) by striking out the period at the end of paragraph (21) and inserting in lieu thereof "; and"; and
- (3) by inserting immediately after paragraph (21) the following new paragraph:

"(22) in order for the State to be eligible to receive any incentive payments under section 458, provide that, if one or more political subdivisions of the State participate in the costs of carrying out activities under the State plan during any period, each such subdivision shall be entitled to receive an appropriate share (as determined by the State) of any such incentive payments made to the State for such period, taking into account the efficiency and effectiveness of the activities carried out under the State plan by such political subdivisions."

(c)(1) The amendments made by the preceding provisions of this section shall become effective on October 1, 1985.

(2)(A) Effective until September 30, 1985, section 458(a) of the Social Security Act is amended by striking out "(distributed as provided in section 457 to reduce or repay assistance payments)" and inserting in lieu thereof "distributed as provided in paragraphs (1), (2), and (4)(A) of section 457(b)".

(B) The reference to provisions of section 457(b) of the Social Security Act in the amendment made by subparagraph (A) of this paragraph is a reference to such provisions as in effect after the effective date of section 2640(b) of the Deficit Reduction Act of 1984.

90-PERCENT MATCHING FOR AUTOMATED MANAGEMENT SYSTEMS USED IN INCOME WITHHOLDING AND OTHER REQUIRED PROCEDURES

SEC. 6. (a) Section 454(16) of the Social Security Act is amended by striking out "and (D)" and inserting in lieu thereof the following: "(D) to facilitate the development and improvement of the income withholding and other procedures required under section 466(a) through the monitoring of support payments, the maintenance of accurate records regarding the payment of support, and the prompt provision of notice to appropriate officials with respect to any arrearages in support payments which may occur, and (E)".

(b) Section 455(a)(1)(B) of such Act (as redesignated by section 4(a) of this Act) is amended—

- (1) by inserting after "automatic data processing and information retrieval system" the following: "(including in such sums the full cost of the hardware components of such system)"; and
- (2) by inserting before the semicolon at the end thereof the following: ", or meets such requirements without regard to clause (f) thereof".

Amc. p 1306

Effective date: 42 USC 658 note

Amc. p 1312

Amc. p 1115
42 USC 658 note

Amc. p 1115

42 USC 651

Amc. p 1311

(c) The amendments made by this section shall apply with respect to quarters beginning on or after October 1, 1984.

CONTINUATION OF SUPPORT ENFORCEMENT FOR AFDC RECIPIENTS WHOSE BENEFITS ARE BEING TERMINATED

SEC. 7. (a) Section 457(c) of the Social Security Act is amended—

- (1) by striking out "may" in the matter preceding paragraph (1) and inserting in lieu thereof "shall"; and
- (2) by striking out "the net amount of" in paragraph (2), and by striking out "to the family" and all that follows in such paragraph and inserting in lieu thereof "to the family (without requiring any formal reapplication and without the imposition of any application fee) on the same basis as in the case of other individuals who are not receiving assistance under part A of this title."

(b) The amendments made by subsection (a) shall become effective October 1, 1984.

SPECIAL PROJECT GRANTS TO PROMOTE IMPROVEMENTS IN INTERSTATE ENFORCEMENT

SEC. 8. Section 455 of the Social Security Act is amended by adding at the end thereof the following new subsection:

"(c)(1) In order to encourage and promote the development and use of more effective methods of enforcing support obligations under this part in cases where either the children on whose behalf the support is sought or their absent parents do not reside in the State where such cases are filed, the Secretary is authorized to make grants, in such amounts and on such terms and conditions as the Secretary determines to be appropriate, to States which propose to undertake new or innovative methods of support collection in such cases and which will use the proceeds of such grants to carry out special projects designed to demonstrate and test such methods.

"(2) A grant under this subsection shall be made only upon a finding by the Secretary that the project involved is likely to be of significant assistance in carrying out the purpose of this subsection; and with respect to such project the Secretary may waive any of the requirements of this part which would otherwise be applicable, to such extent and for such period as the Secretary determines is necessary or desirable in order to enable the State to carry out the project.

"(3) At the time of its application for a grant under this subsection the State shall submit to the Secretary a statement describing in reasonable detail the project for which the proceeds of the grant are to be used, and the State shall from time to time thereafter submit to the Secretary such reports with respect to the project as the Secretary may specify.

"(4) Amounts expended by a State in carrying out a special project assisted under this section shall be considered, for purposes of section 458(b) (as amended by section 5(a) of the Child Support Enforcement Amendments of 1984), to have been expended for the operation of the State's plan approved under section 454.

"(5) There is authorized to be appropriated the sum of \$7,000,000 for fiscal year 1985, \$12,000,000 for fiscal year 1986, and \$15,000,000 for each fiscal year thereafter, to be used by the Secretary in making grants under this subsection."

Effective date: 42 USC 654 note

42 USC 657

Effective date: 42 USC 657 note

42 USC 655

Reports

Amc. p 1312
42 USC 654

Appropriation authorization

PERIODIC REVIEW OF EFFECTIVENESS OF STATE PROGRAMS,
MODIFICATION OF PENALTY

42 USC 652

SEC. 9. (a)(1) Section 452(a)(4) of the Social Security Act is amended by striking out "not less often than annually" and inserting in lieu thereof "not less often than once every three years (or not less often than annually in the case of any State to which a reduction is being applied under section 403(h)(1), or which is operating under a corrective action plan in accordance with section 403(h)(2))."

42 USC 654

42 USC 652

(2) Section 402(a)(27) of such Act is amended by striking out "operate a child support program in conformity with such plan" and inserting in lieu thereof "operates a child support program in substantial compliance with such plan."

42 USC 653

(b) Section 403(h) of such Act is amended to read as follows: "(h)(1) Notwithstanding any other provision of this Act, if a State's program operated under part D is found as a result of a review conducted under section 452(a)(4) not to have complied substantially with the requirements of such part for any quarter beginning after September 30, 1983, and the Secretary determines that the State's program is not complying substantially with such requirements at the time such finding is made, the amounts otherwise payable to the State under this part for such quarter and each subsequent quarter, prior to the first quarter throughout which the State program is found to be in substantial compliance with such requirements, shall be reduced (subject to paragraph (2)) by—

"(A) not less than one nor more than two percent, or

"(B) not less than two nor more than three percent, if the finding is the second consecutive such finding made as a result of such a review, or

"(C) not less than three nor more than five percent, if the finding is the third or a subsequent consecutive such finding made as a result of such a review.

42 USC 654

"(2)(A) The reductions required under paragraph (1) shall be suspended for any quarter if—

"(i) the State submits a corrective action plan, within a period prescribed by the Secretary following notice of the finding under paragraph (1), which contains steps necessary to achieve substantial compliance within a time period which the Secretary finds to be appropriate;

"(ii) the Secretary approves such corrective action plan (and any amendments thereto) as being sufficient to achieve substantial compliance; and

"(iii) the Secretary finds that the corrective action plan (and any amendment thereto approved by the Secretary under clause (ii)), is being fully implemented by the State and that the State is progressing in accordance with the timetable contained in the plan to achieve substantial compliance with such requirements.

"(B) A suspension of the penalty under subparagraph (A) shall continue until such time as the Secretary determines that—

"(i) the State has achieved substantial compliance,

"(ii) the State is no longer implementing its corrective action plan, or

"(iii) the State is implementing or has implemented its corrective action plan but has failed to achieve substantial compliance within the appropriate time period (as specified in subparagraph (A)(i)).

"(4) A suspension of the penalty under subparagraph (A) shall continue until such time as the Secretary determines that—

"(i) the State has achieved substantial compliance,

"(ii) the State is no longer implementing its corrective action plan, or

"(iii) the State is implementing or has implemented its corrective action plan but has failed to achieve substantial compliance within the appropriate time period (as specified in subparagraph (A)(i)).

"(C)(i) In the case of a State whose penalty suspension ends pursuant to subparagraph (B)(i), the penalty shall not be applied.

"(ii) In the case of a State whose penalty suspension ends pursuant to subparagraph (B)(ii), the penalty shall be applied as if the suspension had not occurred.

"(iii) In the case of a State whose penalty suspension ends pursuant to subparagraph (B)(iii), the penalty shall be applied to all quarters ending after the expiration of the time period specified in such subparagraph (and prior to the first quarter throughout which the State program is found to be in substantial compliance).

"(3) For purposes of this subsection, section 402(a)(27), and section 452(a)(4), a State which is not in full compliance with the requirements of this part shall be determined to be in substantial compliance with such requirements only if the Secretary determines that any noncompliance with such requirements is of a technical nature which does not adversely affect the performance of the child support enforcement program."

(c) The amendments made by this section shall be effective on and after October 1, 1983.

Amc. p. 1316.
Amc. p. 1317

Effective date.
42 USC 602 note.

EXTENSION OF SECTION 1115 DEMONSTRATION AUTHORITY TO CHILD
SUPPORT ENFORCEMENT PROGRAM

42 USC 1315

SEC. 10. (a) Section 1115(a) of the Social Security Act is amended—

(1) by striking out "part A" in the matter preceding paragraph (1) and inserting, in lieu thereof "part A or D";

(2) by striking out "402," in paragraph (1) and inserting in lieu thereof "402, 454,"; and

(3) by striking out "403," in paragraph (2) and inserting in lieu thereof "403, 455."

42 USC 1315

(b) Section 1115 of such Act is further amended by adding at the end thereof the following new subsection:

"(c) In the case of any experimental, pilot, or demonstration project undertaken under subsection (a) to assist in promoting the objectives of part D of title IV, the project—

"(1) must be designed to improve the financial well-being of children or otherwise improve the operation of the child support program;

"(2) may not permit modifications in the child support program which would have the effect of disadvantaging children in need of support; and

"(3) must not result in increased cost to the Federal Government under the program of aid to families with dependent children."

42 USC 651

CHILD SUPPORT ENFORCEMENT FOR CERTAIN CHILDREN IN FOSTER CARE

42 USC 657

SEC. 11. (a)(1) Section 457 of the Social Security Act is amended by adding at the end thereof the following new subsection:

"(d) Notwithstanding the preceding provisions of this section, amounts collected by a State as child support for months in any period on behalf of a child for whom a public agency is making foster care maintenance payments under part E—

"(1) shall be retained by the State to the extent necessary to reimburse it for the foster care maintenance payments made with respect to the child during such period (with appropriate

42 USC 670

reimbursement of the Federal Government to the extent of its participation in the financing);

"(2) shall be paid to the public agency responsible for supervising the placement of the child to the extent that the amounts collected exceed the foster care maintenance payments made with respect to the child during such period but not the amounts required by a court or administrative order to be paid as support on behalf of the child during such period; and the responsible agency may use the payments in the manner it determines will serve the best interests of the child, including setting such payments aside for the child's future needs or making all or a part thereof available to the person responsible for meeting the child's day-to-day needs; and

"(3) shall be retained by the State, if any portion of the amounts collected remains after making the payments required under paragraphs (1) and (2), to the extent that such portion is necessary to reimburse the State (with appropriate reimbursement to the Federal Government to the extent of its participation in the financing) for any past foster care maintenance payments (or payments of aid to families with dependent children) which were made with respect to the child (and with respect to which past collections have not previously been retained);

and any balance shall be paid to the State agency responsible for supervising the placement of the child, for use by such agency in accordance with paragraph (2)."

(2) Section 457(b) of such Act is amended by inserting "(subject to subsection (d))" after "shall" in the matter preceding paragraph (1).

(b) Part D of title IV of such Act is further amended—

(1) in section 454(4)(B), by inserting "including an assignment with respect to a child on whose behalf a State agency is making foster care maintenance payments under part E," immediately after "such assignment is effective," and by inserting "or E," immediately after "part A"; and

(2) in section 456(n), by inserting "or secured on behalf of a child receiving foster care maintenance payments" immediately after "section 402(n)(26)".

(c) Section 471(a) of such Act is amended—

(1) by striking out "and" at the end of paragraph (15);

(2) by striking out the period at the end of paragraph (16) and inserting in lieu thereof "; and"; and

(3) by adding at the end thereof the following new paragraph: "(17) provides that, where appropriate, all steps will be taken, including cooperative efforts with the State agencies administering the plans approved under parts A and D, to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments under this part."

(d) Section 464(a) of such Act is amended—

(1) by inserting "or section 471(a)(17)" after "402(n)(26)"; and (2) by striking out "457(b)(3)" and inserting in lieu thereof "457 (b)(4) or (d)(3)".

(e) The amendments made by this section shall become effective October 1, 1984, and shall apply to collections made on or after that date.

Pub. L. 1145.
42 USC 657.

Pub. L. 1319.
42 USC 670.

Pub. L. 1167.
42 USC 656.

42 USC 671.

42 USC 601, 651.

Pub. L. 1322.

Effective date.
42 USC 654 note.

ENFORCEMENT WITH RESPECT TO BOTH CHILD AND SPOUSAL SUPPORT

SEC. 12. (a) Section 454(4)(B) of the Social Security Act is amended—

(1) by striking out "and, at the option of the State," and inserting in lieu thereof ", and"; and

(2) by inserting ", and only if the support obligation established with respect to the child is being enforced under the plan" immediately after "but only if a support obligation has been established with respect to such spouse".

(b) Clause (A) of section 454(6) of such Act is amended—

(1) by striking out ", at the option of the State,"; and

(2) by inserting ", and only if the support obligation established with respect to the child is being enforced under the plan" immediately after "but only if a support obligation has been established with respect to such spouse".

(c) The amendments made by this section shall become effective October 1, 1985.

Effective date.
42 USC 654 note.

MODIFICATIONS IN CONTENT OF ANNUAL REPORT OF THE SECRETARY

SEC. 13. (a) Section 452(a)(10)(C) of the Social Security Act is amended to read as follows:

"(C) the following data, with the data required under each clause being separately stated for cases where the child is receiving aid to families with dependent children (or foster care maintenance payments under part E), cases where the child was formerly receiving such aid or payments and the State is continuing to collect support assigned to it under section 402(n)(26) or 471(a)(17), and all other cases under this part:

"(i) the total number of cases in which a support obligation has been established in the fiscal year for which the report is submitted, and the total amount of such obligations;

"(ii) the total number of cases in which a support obligation has been established, and the total amount of such obligations;

"(iii) the number of cases described in clause (i) in which support was collected during such fiscal year, and the total amount of such collections;

"(iv) the number of cases described in clause (ii) in which support was collected during such fiscal year, and the total amount of such collections; and

"(v) the number of child support cases filed in each State in such fiscal year, and the amount of the collections made in each State in such fiscal year, on behalf of children residing in another State or against parents residing in another State."

(b) Section 452(a)(10) of such Act is further amended—

(1) by striking out "and" at the end of subparagraph (G);

(2) by striking out the period at the end of subparagraph (H) and inserting in lieu thereof "; and"; and

(3) by inserting immediately after subparagraph (H) the following new subparagraph:

42 USC 652.

42 USC 602.
Pub. L. 1318.

"(1) the amount of administrative costs which are expended in each functional category of expenditures, including establishment of paternity."

(c) The amendments made by this section shall be effective for reports for fiscal year 1986 and each fiscal year thereafter.

Effective date—
42 USC 652 note.

REQUIREMENT THAT AVAILABLE OF CHILD SUPPORT ENFORCEMENT SERVICES BE PUBLICIZED

SEC. 14. (a) Section 454 of the Social Security Act (as amended by the preceding provisions of this Act) is further amended—

- (1) by striking out "and" at the end of paragraph (21);
- (2) by striking out the period at the end of paragraph (22) and inserting in lieu thereof "; and"; and
- (3) by inserting immediately after paragraph (22) the following new paragraph:

"(23) provide that the State will regularly and frequently publicize, through public service announcements, the availability of child support enforcement services under the plan and otherwise, including information as to any application fees for such services and a telephone number or postal address at which further information may be obtained."

(b) The amendments made by subsection (a) shall become effective October 1, 1985.

Effective date—
42 USC 654 note.

STATE COMMISSIONS ON CHILD SUPPORT

SEC. 15. (a) As a condition of the State's eligibility for Federal payments under part A or D of title IV of the Social Security Act for quarters beginning more than 30 days after the date of the enactment of this Act and ending prior to October 1, 1985, the Governor of each State, on or before December 1, 1984, shall (subject to subsection (f)) appoint a State Commission on Child Support.

(b) Each State Commission appointed under subsection (a) shall be composed of members appropriately representing all aspects of the child support system, including custodial and non-custodial parents, the agency or organizational unit administering the State's plan under part D of such title IV, the State judiciary, the executive and legislative branches of the State government, child welfare and social services agencies, and others.

(c) It shall be the function of each State Commission to examine, investigate, and study the operation of the State's child support system for the primary purpose of determining the extent to which such system has been successful in securing support and parental involvement both for children who are eligible for aid under a State plan approved under part A of title IV of such Act and for children who are not eligible for such aid, giving particular attention to such specific problems (among others) as visitation, the establishment of appropriate objective standards for support, the enforcement of interstate obligations, the availability, cost, and effectiveness of services both to children who are eligible for such aid and to children who are not, and the need for additional State or Federal legislation to obtain support for all children.

(d) Each State Commission shall submit to the Governor of the State and make available to the public, no later than October 1, 1985, a full and complete report of its findings and recommendations resulting from the examination, investigation, and study under this

Report
Public
availability.

section. The Governor shall transmit such report to the Secretary of Health and Human Services along with the Governor's comments thereon.

(c) None of the costs incurred in the establishment and operation of a State Commission under this section, or incurred by such a Commission in carrying out its functions under subsections (c) and (d), shall be considered as expenditures qualifying for Federal payments under part A or D of title IV of the Social Security Act or be otherwise payable or reimbursable by the United States or any agency thereof.

42 USC 601, 651.

(f) If the Secretary, determines, at the request of any State on the basis of information submitted by the State and such other information as may be available to the Secretary, that such State—

(1) has placed in effect and is implementing objective standards for the determination and enforcement of child support obligations,

(2) has established within the five years prior to the enactment of this Act a commission or council with substantially the same functions as the State Commissions provided for under this section, or

(3) is making satisfactory progress toward fully effective child support enforcement and will continue to do so,

then such State shall not be required to establish a State Commission under this section and the preceding provisions of this section shall not apply.

Note, p. 1305.

INCLUSION OF MEDICAL SUPPORT IN CHILD SUPPORT ORDERS

SEC. 16. Section 452 of the Social Security Act is amended by adding at the end thereof the following new subsection:

42 USC 652.

Regulations.

"(f) The Secretary shall issue regulations to require that State agencies administering the child support enforcement program under this part petition for the inclusion of medical support as part of any child support order whenever health care coverage is available to the absent parent at a reasonable cost. Such regulation shall also provide for improved information exchange between such State agencies and the State agencies administering the State Medicaid programs under title XIX with respect to the availability of health insurance coverage."

42 USC 1306.

INCREASED AVAILABILITY OF FEDERAL PARENT LOCATOR SERVICE TO STATE AGENCIES

SEC. 17. Section 453(f) of the Social Security Act is amended by striking out ", after determining that the absent parent cannot be located through the procedures under the control of such State agencies,"

42 USC 653.

STATE GUIDELINES FOR CHILD SUPPORT AWARDS

SEC. 18. (a) Part D of title IV of the Social Security Act (as amended by section 3(b) of this Act) is further amended by adding at the end thereof the following new section:

"STATE GUIDELINES FOR CHILD SUPPORT AWARDS

42 USC 657.

"Sec. 467. (a) Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support

award amounts within the State. The guidelines may be established by law or by judicial or administrative action.

"(b) The guidelines established pursuant to subsection (a) shall be made available to all judges and other officials who have the power to determine child support awards within such State, but need not be binding upon such judges or other officials.

"(c) The Secretary shall furnish technical assistance to the States for establishing the guidelines, and each State shall furnish the Secretary with copies of its guidelines."

(b) The amendment made by subsection (a) shall become effective on October 1, 1987.

Effective date:
42 USC: 657 note

AVAILABILITY OF SOCIAL SECURITY NUMBERS FOR CHILD SUPPORT ENFORCEMENT PURPOSES

SEC. 19. (a) Section 453(b) of the Social Security Act is amended by inserting "the social security account number (or numbers), if the individual involved has more than one such number" and "before 'the most recent address'".

(b)(1) Section 6103(d)(6)(A)(i) of the Internal Revenue Code of 1954 is amended by inserting "social security account number (or numbers), if the individual involved has more than one such number," before "address".

(2) Section 6103(d)(8)(A) of such Code is amended by inserting "social security account numbers," before "net earnings".

Note, p. 820.

EXTENSION OF ELIGIBILITY UNDER TITLE XIX WHEN SUPPORT COLLECTION RESULTS IN TERMINATION OF AFDC ELIGIBILITY

SEC. 20. (a) Section 406 of the Social Security Act is amended by adding at the end thereof the following new subsection:

"(h) Each dependent child, and each relative with whom such a child is living (including the spouse of such relative as described in subsection (b)), who becomes ineligible for aid to families with dependent children as a result (wholly or partly) of the collection or increased collection of child or spousal support under part D, and who has received such aid in at least three of the six months immediately preceding the month in which such ineligibility begins, shall be deemed to be a recipient of aid to families with dependent children for purposes of title XIX for an additional four calendar months, beginning with the month in which such ineligibility begins."

(b) The amendment made by subsection (a) shall apply only with respect to individuals becoming ineligible for aid to families with dependent children (as described in section 406(h) of the Social Security Act as added by such subsection) on or after the date of the enactment of this Act and before October 1, 1988.

(c) Section 1902(n)(10)(A)(i) of such Act is amended by inserting "or 406(h)" after "402(a)(37)".

Effective date:
42 USC: 606 note.

Supra.

Note, p. 1104.
42 USC: 1396a.

COLLECTION OF PAST-DUE SUPPORT FROM FEDERAL TAX REFUNDS

SEC. 21. (a) Section 464(n) of the Social Security Act (as amended by section 12(d) of this Act) is further amended by inserting "(1)" after "Sec. 464. (n)" and by adding at the end thereof the following new paragraphs:

42 USC: 664.

"(2)(A) Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support (as that term is defined for purposes of this paragraph under subsection (c)) which such State has agreed to collect under section 454(f), and that the State agency has sent notice to such individual in accordance with paragraph (3)(A), the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to such past-due support, and shall concurrently send notice to such individual that the withholding has been made, including information with such notice a notification to any other person who may have filed a joint return with such individual of the steps which such other person may take in order to secure his or her proper share of the refund. The Secretary of the Treasury shall pay the amount withheld to the State agency, and the State shall pay to the Secretary of the Treasury any fee imposed by the Secretary of the Treasury to cover the costs of the withholding and any required notification. The State agency shall, subject to paragraph (3)(B), distribute such amount to or on behalf of the child to whom the support was owed.

"(B) This paragraph shall apply only with respect to refunds payable under section 6402 of the Internal Revenue Code of 1954 after December 31, 1985, and before January 1, 1991.

"(3)(A) Prior to notifying the Secretary of the Treasury under paragraph (1) or (2) that an individual owes past-due support, the State shall send notice to such individual that a withholding will be made from any refund otherwise payable to such individual. The notice shall also (i) instruct the individual owing the past-due support of the steps which may be taken to contest the State's determination that past-due support is owed or the amount of the past-due support, and (ii) provide information, as may be prescribed by the Secretary of Health and Human Services by regulation in consultation with the Secretary of the Treasury, with respect to procedures to be followed, in the case of a joint return, to protect the share of the refund which may be payable to another person.

"(B) If the Secretary of the Treasury determines that an amount should be withheld under paragraph (1) or (2), and that the refund from which it should be withheld is based upon a joint return, the Secretary of the Treasury shall notify the State that the withholding is being made from a refund based upon a joint return, and shall furnish to the State the names and addresses of each taxpayer filing such joint return. In the case of a withholding under paragraph (2), the State may delay distribution of the amount withheld until the State has been notified by the Secretary of the Treasury that the other person filing the joint return has received his or her proper share of the refund, but such delay may not exceed six months.

"(C) If the other person filing the joint return with the named individual owing the past-due support takes appropriate action to secure his or her proper share of a refund from which a withholding was made under paragraph (1) or (2), the Secretary of the Treasury shall pay such share to such other person. The Secretary of the Treasury shall deduct the amount of such payment from amounts subsequently payable to the State agency to which the amount originally withheld from such refund was paid.

Note, p. 1310.
Pub. L. 100-1324.

Effective date:
Note, p. 1154.

"(1) In any case in which an amount was withheld under paragraph (1) or (2) and paid to a State, and the State subsequently determines that the amount certified as past-due support was in excess of the amount actually owed at the time the amount withheld is to be distributed to or on behalf of the child, the State shall pay the excess amount withheld to the named individual thought to have owed the past-due support (or, in the case of amounts withheld on the basis of a joint return, jointly to the parties filing such return)."

(b)(1) Section 464(a)(1) of such Act (as redesignated by subsection (a) of this section) is amended by striking out "and pay" in the second sentence and inserting in lieu thereof the following: "shall concurrently send notice to such individual that the withholding has been made (including in or with such notice a notification to any other person who may have filed a joint return with such individual of the steps which such other person may take in order to secure his or her proper share of the refund), and shall pay".

(2) Section 464(b) of such Act is amended—

(A) by inserting "(1)" after "(b)";

(B) by striking out "The regulations shall specify" in the second sentence and inserting in lieu thereof "The regulations shall be consistent with the provisions of subsection (a)(3), shall specify";

(C) by striking out "and provide" and inserting in lieu thereof "and shall provide";

(D) by adding at the end of paragraph (1) as so redesignated the following: "Any fee paid to the Secretary of the Treasury pursuant to this subsection may be used to reimburse appropriations which bore all or part of the cost of applying such procedure"; and

(E) by adding at the end thereof the following new paragraph: "(2) In the case of withholdings made under subsection (a)(2), the regulations promulgated pursuant to this subsection shall include the following requirements:

"(A) The withholding shall apply only in the case where the State determines that the amount of the past-due support which will be owed at the time the withholding is to be made, based upon the pattern of payment of support and other enforcement actions being pursued to collect the past-due support, is equal to or greater than \$500. The State may limit the \$500 threshold amount to amounts of past-due support accrued since the time that the State first began to enforce the child support order involved under the State plan, and may limit the application of the withholding to past-due support accrued since such time.

"(B) The fee which the Secretary of the Treasury may impose to cover the costs of the withholding and notification may not exceed \$25 per case submitted."

(c) Section 464(c) of such Act is amended—

(1) by striking out "(c) As used in this part" and inserting in lieu thereof "(c)(1) Except as provided in paragraph (2), as used in this part"; and

(2) by adding at the end thereof the following new paragraph: "(2) For purposes of subsection (a)(2), the term 'past-due support' means only past-due support owed to or on behalf of a minor child."

(d) Section 454(c) of the Social Security Act (as amended by section 3(c) of this Act) is further amended—

(1) by redesignating clause (C) as clause (D);

(2) by striking out "fee so imposed" in clause (D) as so redesignated and inserting in lieu thereof "fee so imposed"; and

(3) by striking out "and" at the end of clause (B) and inserting in lieu thereof "; (C) a fee of not more than \$25 may be imposed in any case where the State requests the Secretary of the Treasury to withhold past-due support owed to or on behalf of such individual from a tax refund pursuant to section 464(a)(2), and".

(e)(1) Section 6402(c) of the Internal Revenue Code of 1954 is amended—

(A) by striking out "to which such support has been assigned" and inserting in lieu thereof "collecting such support"; and

(B) by inserting before the last sentence thereof the following: "A reduction under this subsection shall be applied first to satisfy any past-due support which has been assigned to the State under section 402(a)(26) or 471(a)(17) of the Social Security Act, and shall be applied to satisfy any other past-due support after any other reductions allowed by law (but before a credit against future liability for an internal revenue tax) have been made."

(2) Section 6402 of such Code (as amended by section 2653 of the Deficit Reduction Act of 1984) is further amended by redesignating subsection (g) as subsection (h), and by inserting after subsection (f) the following new subsection:

"(g) TREATMENT OF PAYMENTS TO STATES.—The Secretary may provide that, for purposes of determining interest, the payment of any amount withheld under subsection (c) to a State shall be treated as a payment to the person or persons making the overpayment."

(f)(1) Section 6103(l) of such Code (as so amended) is further amended by adding at the end thereof the following new paragraph:

"(1) DISCLOSURE OF CERTAIN INFORMATION TO AGENCIES REQUESTING A REDUCTION UNDER SECTION 6402(c).—

"(A) RETURN INFORMATION FROM INTERNAL REVENUE SERVICE.—The Secretary shall, upon receiving a written request, disclose to officers and employees of a State agency seeking a reduction under section 6402(c)—

(i) the fact that a reduction has been made or has not been made under such subsection with respect to any taxpayer;

(ii) the amount of such reduction;

(iii) whether such taxpayer filed a joint return; and

(iv) taxpayer identity information with respect to the taxpayer against whom a reduction was made or not made and of any other person filing a joint return with such taxpayer; and

(v) the fact that a payment was made (and the amount of the payment) on the basis of a joint return in accordance with section 464(a)(3) of the Social Security Act.

(B) RESTRICTION ON USE OF DISCLOSED INFORMATION.—Any officers and employees of an agency receiving return information under subparagraph (A) shall use such information only for the purposes of, and to the extent necessary in, establishing appropriate agency records or in the defense of any litigation or administrative procedure ensuing from a reduction made under section 6402(c)."

Ante, p. 1322.
26 USC 6402.

42 USC 602
Ante, p. 1318

Ante, p. 1154

Ante, p. 1155
Supra.

Ante, p. 1322.

Supra.

Ante, p. 1322

42 USC 664

Ante, p. 1322

42 USC 661

Ante, p. 1322

Ante, p. 1307.

Autc., p. 1155. (2) Section 6103(p)(3)(A) of such Code (as so amended) is further amended by striking out "or (10)" and inserting in lieu thereof "(10), or (11)".

Autc., p. 1155. (3) Section 6103(p)(4) of such Code (as so amended) is further amended by striking out "or (10)" and inserting in lieu thereof "(10), or (11)".

Autc., p. 1156. (4) Section 6103(p)(4)(E)(ii) of such Code (as so amended) is further amended by striking out "or (10)" and inserting in lieu thereof "(10), or (11)".

Autc., p. 1156. (5) Section 7213(a)(2) of such Code (as so amended) is further amended by striking out "or (10)" and inserting in lieu thereof "(10), or (11)".

Effective date: 26 USC 6003 note. *Autc.*, p. 1325. (g) The amendments made by this section shall apply with respect to refunds payable under section 6402 of the Internal Revenue Code of 1954 after December 31, 1985.

WISCONSIN CHILD SUPPORT INITIATIVE

Waiver
42 USC 602 note, 651. (2) (a)(1) If the State of Wisconsin requests the Secretary of Health and Human Services to waive the requirements of parts A and D of title IV of the Social Security Act, or to waive the requirements of part D and only those requirements of part A of such Act as relate to the provision of aid to dependent children as defined (without regard to section 407) in section 408(a) of the Social Security Act (hereafter referred to in this section as "dependent children in single-parent families"), in order to permit the State to make an adequate test in any county or counties, or throughout the State, of its Child Support Initiative, the Secretary shall waive such requirements if—

- (A) the State provides a complete description, in accordance with paragraph (2), of the programs known as the Initiative, which it will operate in place of the programs under such parts A and D, and makes the description readily available to the public throughout the State;
- (B) the Governor provides assurances that, under the Initiative, assistance will be provided to all children in need of financial support, and the State will continue to operate an effective child support enforcement program;
- (C) the State agrees that, during the conduct of such test, it will continue to determine eligibility for medical assistance under the State plan approved under title XIX of the Social Security Act, applying the criteria (insofar as may be applicable to members of families with dependent children affected by the Initiative) in effect under its State plan approved under part A of title IV for the month preceding the month in which the Initiative (approved under this section) becomes effective, except that such criteria shall be deemed to have been changed to the extent necessary to comply with generally applicable changes in Federal law or regulations occurring after the date of the enactment of this Act;
- (D) the State specifies measurable performance objectives, submits an evaluation plan (including criteria for evaluating the Initiative), and agrees to submit interim and final evaluations and reports, at such time or times and containing such information, as the Secretary may require; and
- (E) the State agrees to obtain, at least once every two years, a financial and compliance audit of the funds received under this

section and to obtain, after the close of the operation of the Initiative under this section, an audit and make it public within the State on a timely basis and provide a copy to the Secretary within 30 days after its completion.

(2) The program description provided under paragraph (1)(A) shall describe in detail how the proposed Initiative will affect children and families, with specific reference to the principles for calculating benefits and establishing and enforcing child support obligations. The description shall also include estimates of cost and program effects and provide other relevant information necessary for the Secretary to determine whether the financial well-being of children and their families will be adversely affected by the operation of the Initiative.

(b) The Child Support Initiative proposed by the State of Wisconsin as detailed in the program description submitted to the Secretary, and the related requested waivers, shall become effective within 120 days after its submission unless the Secretary determines that the financial well-being of children in the State will be adversely affected by the Initiative. The Secretary shall notify the State in writing that, effective with the beginning of the following quarter (or of such later quarter as the State may select), the State may operate its Child Support Initiative instead of its programs of aid to families with dependent children (or, if the State had so requested, instead of its program of aid to dependent children in single-parent families) and child support enforcement in such county or counties, or on a statewide basis, as the State has indicated in its request. Except as specifically provided in subsection (c), no amount will be payable for any quarter under section 403(a) (or under section 403(a) with respect to single-parent families, if the State had so requested), 455(a), or 458 of the Social Security Act with respect to such county or counties in which the Initiative is in effect. (c)(1) For each quarter during which such program is in effect throughout the State, the Secretary will pay to the State the sum of its proportionate share (as defined in paragraph (4)(A)) of each of the following:

- (A) the amount advanced by the Secretary to all the other States (as defined in section 1101(a) of the Social Security Act) for such quarter with respect to section 403(a) (1) and (2) of such Act;
- (B) the amount so advanced by the Secretary with respect to section 403(a)(3) of such Act;
- (C) the amount so advanced by the Secretary with respect to section 455(a) of such Act; and
- (D) the amount so advanced by the Secretary with respect to section 458(a) of such Act,

reduced by so much of its proportionate share of support collections on behalf of individuals receiving aid to families with dependent children (as defined in paragraph (4)(B)) as would have been credited to the Federal Government under section 457(b) of such Act had such collections been made in the last quarter of fiscal year 1985.

(2) If in any quarter the Initiative approved under this section is in operation in fewer than all the counties in the State, the amount paid to the State with respect to the counties to which the waiver under subsection (a) applies shall equal (in lieu of the amount specified in paragraph (1)) the proportionate share with respect to the counties in which the Initiative is operated (as defined in paragraph (5)(A)) of the amount advanced to the State under the

Effective date

42 USC 603

Autc., pp. 1311, 1312.

42 USC 1301
42 USC 603.

Autc., p. 1311.

Autc., p. 1312.

Autc., p. 1318.

Reports.

Audit
Public availability.

four authorities specified in paragraph (1) with respect to all the other counties for such quarter, reduced by so much of the proportionate share of support collections (as defined in paragraph (5)(B)) with respect to the counties in which the Initiative is operated, as would have been credited to the Federal Government under section 457(b) of such Act had such collections been made in the last quarter of fiscal year 1986.

Article, p. 1318

(3) Payment under this subsection shall be estimated by the Secretary before the beginning of each quarter during which the Initiative is in effect on the basis of the advances made under parts A and D of title IV of the Social Security Act for such quarter, and the Secretary shall make payments for such quarter on a monthly basis (with each payment made no later than the beginning of the month involved), in the amounts so estimated, and adjusted as necessary to reflect the amount of any previously made overpayment or underpayment under this section. Payment of any amount determined with respect to paragraphs (1)(A) and (1)(B) shall be made from amounts appropriated to carry out part A of title IV of the Social Security Act for the appropriate fiscal year; payment of any amount determined with respect to paragraphs (1)(C) and (1)(D) shall be made from amounts appropriated to carry out part D of title IV of the Social Security Act.

(4)(A) The State's proportionate share of such amount enumerated in paragraph (1) shall be the portion of such amount that bears the same ratio to such amount as the corresponding portion advanced to the State for quarters in fiscal years 1984 through 1986 bears to the total corresponding amount advanced to all the other States for such quarters.

(B) The State's proportionate share of support collections means the amount that bears the same ratio to such collections on behalf of individuals receiving aid to families with dependent children by all the other States for the quarter involved as such collections by the State for quarters in fiscal years 1984 through 1986 bear to the total of such collections by all the other States for such quarters.

(5)(A) The proportionate share with respect to the counties in which the Initiative is operated, in the case of—

- (i) the amount advanced to the State with respect to all other counties under section 405(a)(1) of the Social Security Act;
- (ii) the amount so advanced under section 403(a)(3) of such Act;
- (iii) the amount so advanced under section 455(n) of such Act; and
- (iv) the amount so advanced with respect to section 458(n) of such Act,

is the sum of such amounts, each having been multiplied by the ratio of (I) the corresponding amount advanced with respect to such counties for all quarters in fiscal years 1984 through 1986 to (II) the corresponding amount advanced with respect to all the other counties in the State for all such quarters.

(B) The proportionate share of support collections for any quarter, with respect to the counties in which the Initiative is operated, means the amount that bears the same ratio to such collections on behalf of individuals receiving aid to families with dependent children with respect to all the other counties in the State for such quarter as such collections by such counties for quarters in fiscal years 1984 through 1986 bear to the total of such collections by all the other counties in the State for such quarters.

42 USC: 601, 602

(6) If the State requests, under subsection (n), waiver of only those requirements under part A of title IV of the Social Security Act as relate to the provision of aid to dependent children in single-parent families, and continues to operate its program of aid to families with dependent children deprived by reason of the unemployment of a parent—

(A) the State's proportionate share of the amount specified in paragraph (1)(A) (and only that amount) shall be computed under paragraph (4) by application of the ratio of (i) the amount advanced to the State, under section 403(a)(1) of the Social Security Act for quarters in fiscal years 1984 through 1986 with respect to expenditures in the form of aid to dependent children in single-parent families, to (ii) the amount advanced to all the other States, under section 403(n) (1) and (2) of such Act with respect to such expenditures, rather than by application of the ratio specified in paragraph (4); and

(B) part A of title IV of such Act shall continue to apply to the State's program of aid to families with dependent children deprived by reason of the unemployment of a parent, except that section 403(a)(3) shall not apply during the period that, or in the part or parts of the State where, the Initiative is in effect.

(d)(1) The State may cease to conduct the Initiative under this section and (if it so chooses) return to the administration of its plans approved under part D of title IV of the Social Security Act upon the provision of the Secretary of at least 3 months advance notice (or such greater advance notice as may be necessary so that administration of such plans will resume at the beginning of a quarter in the fiscal year).

(2) The Secretary may terminate approval of the Initiative upon the giving of at least 3 months advance notice (or such greater advance notice as may be necessary as specified in paragraph (1)) to the State if it is determined that the financial well-being of children in the State (or county or counties involved) would be better achieved by the operation of programs under part A and part D of title IV of the Social Security Act.

(c) This section shall be in effect for quarters beginning after September 30, 1986, and ending before October 1, 1994.

Effective date.

SENSE OF THE CONGRESS THAT STATE AND LOCAL GOVERNMENTS SHOULD FOCUS ON THE PROBLEMS OF CHILD CUSTODY, CHILD SUPPORT, AND RELATED DOMESTIC ISSUES

SEC. 23. (n) The Congress finds that—

(1) the divorce rate in the United States has reached alarming proportions and the number of children being raised in single parent families has grown accordingly;

(2) there is a critical lack of child support enforcement, which Congress has undertaken to address through the child support enforcement program;

(3) Congress is strengthening that program to recognize the needs of all children;

(4) related domestic issues, such as visitation rights and child custody, are often intricately intertwined with the child support problem and have received inadequate consideration; and

(5) these related issues remain within the jurisdiction of State and local governments, but have a critical impact on the health and welfare of the children of the Nation.

42 USC: 603

Article, p. 1311

Article, p. 1312

(b) It is the sense of Congress that—

(1) State and local governments must focus on the vital issues of child support, child custody, visitation rights, and other related domestic issues that are properly within the jurisdictions of such governments;

(2) all individuals involved in the domestic relations process should recognize the seriousness of these matters to the health and welfare of our Nation's children and assign them the highest priority; and

(3) a mutual recognition of the needs of all parties involved in divorce actions will greatly enhance the health and welfare of America's children and families.

Approved August 16, 1984.

LEGISLATIVE HISTORY—H.R. 4325:

HOUSE REPORTS: No. 98-527 (Comm. on Ways and Means) and No. 98-925 (Comm. of Conference).

SENATE REPORT No. 98-387 (Comm. on Finance)

CONGRESSIONAL RECORD:

Vol. 129 (1983): Nov. 16, considered and passed House.

Vol. 130 (1984): Apr. 25, considered and passed Senate, amended.

Aug. 1, Senate agreed to conference report.

Aug. 8, House agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 20, No. 33 (1984):

Aug. 16, 1984, P. presidential statement.

○

Introduced: 1/18/85
Referred: Health, Education & Social
Services, Judiciary and Finance

BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

1 IN THE HOUSE

HOUSE BILL NO. 92

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

6 For an Act entitled: "An Act relating to child and spousal support; and
7 providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

Sec. 466 of PL 98-578 mandates each state must permit the establishment of parentage at any time before child's 18th birthday

* Section 1. AS 09.10 is amended by adding a new section to read:

Sec. 09.10.095. ACTIONS FOR ESTABLISHMENT OF PARENTAGE. A person may bring an action to adjudicate parentage only if it is commenced before the child whose parentage is at issue reaches the age of 18.

* Sec. 2. AS 09.65.132 is amended to read:

Sec. 09.65.132. INCOME WITHHOLDING [ASSIGNMENT] ORDER FOR CHILD SUPPORT. (a) A judgment, court order, or order of the child support enforcement agency (AS 47.23) providing for the support of a minor child must [SHALL] contain an income withholding [ASSIGNMENT] order.

(b) An income withholding [ASSIGNMENT] order must [SHALL] direct the obligor, the obligor's employer, future employer, and any person, political subdivision, or department of the state to withhold [ASSIGN] money due or to be due the obligor and pay the money to the [OBLIGEE] OR, WHERE THE ORDER IS ISSUED TO THE CHILD SUPPORT ENFORCEMENT AGENCY (AS 47.23) OR COLLECTIONS ARE BEING MADE THROUGH THE CHILD SUPPORT ENFORCEMENT AGENCY, TO THAT] agency, in an amount determined under (h) of this section [SUFFICIENT TO MEET THE SUPPORT PAYMENTS IMPOSED BY THE COURT OR BY THE CHILD SUPPORT ENFORCEMENT AGENCY UNDER AS 47.23.-140].

(c) The agency, on behalf of an [AN] obligee or person or public

PL 98-578 requires income withholding-- collections be deposited & distributed by a public agency designated by state. withholding must occur without amendment of support order, must comply with Consumer Credit Reporting Act. (15 USC 1673b) must occur when support overdue one month, obligation must have priority over other legal necessities amount withheld must be current support and arrears, requires notice and opportunity to contest action for mistakes of fact, must inform 45 days after notice sent whether & when withholding will begin, must give employer notice if amount to be withheld, subject employer to fine for discharging/refusing to hire/disciplining employee, employer liable for amount not withheld, effort for employer minimal

us'd.

req'd.

1 agency designated to receive support payments, may request an income
2 withholding [ASSIGNMENT] order to take effect by alleging in a sworn
3 statement that the obligor is in arrears in an amount at least equal
4 to the support payable for one month [HAS FAILED TO MAKE A SUPPORT
5 PAYMENT IN FULL WITHIN 45 DAYS OF THE DATE THE PAYMENT WAS DUE] and by
6 filing that statement with the court.

7 (d) If an application is [HAS BEEN] filed with the clerk of
8 court, the obligor must be served with notice, in the manner provided
9 by Rule 5 of the Rules of Civil Procedure, on [SHALL BE SENT BY CER-
10 TIFIED MAIL, RETURN RECEIPT REQUESTED, TO THE LAST KNOWN ADDRESS OF
11 THE OBLIGOR. THE NOTICE SHALL BE POSTMARKED NO LATER THAN 10 DAYS
12 AFTER] the date on which the application is [WAS] filed. The notice
13 must [AND SHALL] inform the obligor that the income withholding order
14 [ASSIGNMENT] will take effect 15 days after the date on which the
15 notice was served [RECEIVED] unless the obligor requests a hearing
16 within 15 days after the notice was served [SENT]. If the obligor
17 request: a hearing, an income withholding order [ASSIGNMENT] may not
18 take effect until the conclusion of the hearing. The court shall hold
19 a hearing requested under this section within 15 days after the date
20 the obligor requests the hearing, to determine if there are any mis-
21 takes of fact which would make the withholding order improper or if
22 the amount to be withheld is incorrect. Notice of the withholding
23 decision must be sent to the obligor within 45 days after the notice
24 of proposed withholding. [IF THE OBLIGOR PAYS ALL SUPPORT PAYMENTS DUE
25 BEFORE THE HEARING, AN INCOME ASSIGNMENT ORDER MAY NOT TAKE EFFECT.]

26 (e) The obligee or person or public agency that requested the
27 income withholding [ASSIGNMENT] order shall immediately send a copy of
28 the income withholding [ASSIGNMENT] order by certified mail to persons
29 who may owe money to an obligor. An income withholding [ASSIGNMENT]

1 order made under this section is binding upon a person, employer,
2 political subdivision, or department of the state immediately upon
3 receipt of a copy of the income withholding [ASSIGNMENT] order. The
4 employer must begin withholding the specified amount from the employ-
5 ee's wages no later than the first pay period that occurs 14 days
6 after the mailing date on the notice. The amount withheld must be
7 sent to the agency.

8 (f) An employer may not discharge, discipline, or refuse to
9 employ an obligor on the basis of an income withholding order [ASSIGN-
10 MENT] under this section. If an employer discharges, disciplines, or

11 refuses to employ an obligor because of an income withholding obliga-
12 tion, the court, after notice and hearing, may order reinstatement or
13 restitution to the obligor, or both. A person who violates this
14 subsection or a regulation adopted to implement it, is guilty of a
15 misdemeanor and, upon conviction, is punishable by a fine of not more
16 than \$1,000.

17 (g) An income withholding order [ASSIGNMENT] under this section
18 has priority over all other attachments, executions, garnishments, or
19 other legal process brought under state law against the same wages
20 [ASSIGNMENTS UNLESS OTHERWISE ORDERED BY THE COURT]. An income with-
21 holding order [ASSIGNMENT] is not limited to the wages of an obligor
22 but may include all money owed to the obligor not otherwise exempt by
23 law. Exemptions under AS 09.38 do not apply to income assignments
24 under this section[; HOWEVER, 50 PERCENT OF THE OBLIGOR'S NET DISPOS-
25 ABLE EARNINGS IS EXEMPT FROM EXECUTION UNDER THIS SECTION. IN THIS
26 SUBSECTION, "NET DISPOSABLE EARNINGS" HAS THE MEANING GIVEN IN
27 15 U.S.C. 1672].

28 (h) The amount withheld from the obligor's wages must be equal
29 to the current support obligation, up to the limits of 15 U.S.C. sec.

1 1673(u). If the current support payment does not equal the limits of
2 15 U.S.C. sec. 1673(b), an additional amount may be withheld toward
3 *reg'd.* any arrearages. The combined total amount withheld for current sup-
4 port and arrearages may not exceed the limits of 15 U.S.C. sec.
5 1673(b).

6 (i) An obligor may petition the court to terminate the with-
7 holding of income upon good cause shown, such as the emancipation of a
8 *reg'd.* child for whom support is paid, the lack of contact by the agency with
9 the obligee, or the timely payment history of an obligor for a three-
10 year period.

11 (j) The court may order an obligor to pay all court [COURTS]
12 costs involved in an income withholding [ASSIGNMENT] proceeding under
13 this section.

14 * Sec. 3. AS 25.20.050 is amended by adding a new subsection to read:

See section 1
15 (e) An action to adjudicate parentage must be permitted to be
16 initiated until the child whose parentage is at issue reaches age 18.

17 * Sec. 4. AS 25 is amended by adding a new chapter to read:

must have withholding
18 Chapter 26. INTERSTATE INCOME WITHHOLDING ACT.

for interstate cases -
19 Sec. 25.26.010. PURPOSE. The purpose of this chapter is to
20 enhance the enforcement of support obligations (1) by providing a
this chapter modelled
21 quick and effective procedure for the withholding of income derived in
after ABA legislation
22 this jurisdiction to enforce support orders of other jurisdictions,
23 and (2) by requiring that income withholding, to enforce the support
24 orders of this jurisdiction, be sought in other jurisdictions. This
25 chapter must be construed liberally to effect that purpose.

26 Sec. 25.26.020. INITIATION OF INCOME WITHHOLDING AND COOPERATION
27 WITH OTHER JURISDICTIONS. On behalf of a client, or on application of
28 a resident obligee or obligor of a support order issued by this state,
29 or by an agency to whom the obligee has assigned support rights, the

1 Alaska child support enforcement agency shall request the agency of
2 another jurisdiction in which the obligor derives income to obtain an
3 income withholding order. The Alaska agency shall compile and trans-
4 mit to the agency of the other jurisdiction all documentation required
5 to enter a support order for this purpose. The Alaska agency also
6 shall transmit to the agency of the other jurisdiction a certified
7 copy of any subsequent modifications of the support order. If the
8 Alaska agency receives notice that the obligor is contesting income
9 withholding in another jurisdiction, it shall promptly notify the
10 individual obligee of the date, time, and place of the hearings and of
11 the obligee's right to attend.

12 Sec. 25.26.030. RESPONSIBILITIES FOR ENTERING A SUPPORT ORDER OF
13 ANOTHER JURISDICTION FOR PURPOSES OF INCOME WITHHOLDING. (a) Upon
14 receiving from an agency of another jurisdiction a support order of
15 another jurisdiction, along with the documentation specified in (b) of
16 this section, the Alaska agency shall file the documents with the
17 clerk of the court in which withholding is being sought. The clerk of
18 the court shall accept the documents filed. The acceptance consti-
19 tutes entry of the support order under this chapter.

20 (b) The following documentation is required for the entry of a
21 support order of another jurisdiction:

22 (1) a certified copy of the support order with all modi-
23 fications;

24 (2) a certified copy of an income withholding order, if
25 any, still in effect;

26 (3) a copy of the portion of the income withholding statute
27 of the jurisdiction which issued the support order, which states the
28 requirements for obtaining income withholding under the laws of that
29 jurisdiction;

1 (4) a sworn statement of the obligee or certified statement
2 of the agency of the arrearages and the assignment of support rights,
3 if any;

4 (5) a statement of

5 (A) the name, address, and social security number of
6 the obligor, if known;

7 (B) the name and address of the obligor's employer or
8 of any other source of income of the obligor derived in this
9 state against which income withholding is sought;

10 (C) the name and address of the agency or person to
11 whom support payments collected by income withholding must be
12 transmitted.

13 (c) If the documentation received by the agency under (a) of
14 this section does not conform to the requirements of (b) of this
15 section, the agency shall remedy any defect that it can without the
16 assistance of the requesting agency or person. If the agency is
17 unable to make such corrections, the requesting agency or person must
18 immediately be notified of the necessary additions or corrections. In
19 neither case may the documentation be returned. The agency shall file
20 with the court the documentation required by (a) and (b) of this
21 section even if it is not in the usual form required by the laws or
22 court rules of this state, so long as the substantive requirements of
23 this section are met.

24 (d) A support order entered under (a) of this section is en-
25 forceable by an income withholding order against income derived in
26 this state, in the manner and with the effect set out in AS 25.26.040
27 -- 25.26.100 and AS 09.65.132. Entry of the order does not confer
28 jurisdiction on the courts or agencies of this state for any purpose
29 other than income withholding.

1 Sec. 25.26.040. NOTICE. (a) On the date that a support order
2 is entered under AS 25.26.030, the agency shall serve upon the
3 obligor, in accordance with AS 09.65.132(d), notice of a proposed
4 income withholding. That notice must contain the same information
5 required by AS 09.65.132(d). The notice must also advise the obligor
6 that the income withholding was requested on the basis of a support
7 order of another jurisdiction.

8 (b) If the obligor seeks a hearing to contest the proposed
9 income withholding, the agency shall immediately notify the requesting
10 agency, the obligee, the obligor, or an attorney for either, of
11 the date, time, and place of the hearing, and of the obligee's right
12 to attend the hearing.

13 Sec. 25.26.050. INCOME WITHHOLDING HEARING. (a) At a hearing
14 contesting proposed income withholding based on a support order en-
15 tered under AS 25.26.050, the entered order, accompanying sworn or
16 certified statement, and a certified copy of an income withholding
17 order, if any, still in effect, constitute prima facie proof, without
18 further proof or foundation, that (1) the support order is valid; (2)
19 the amount of current support payments and arrearages is as stated;
20 and (3) the obligee would be entitled to income withholding under the
21 laws of the jurisdiction that issued the support order.

22 (b) Once a prima facie case has been established, the obligor
23 may raise only the following, with the burden on the obligor to estab-
24 lish the defenses:

25 (1) that withholding is not proper because of a mistake of
26 fact that is not res judicata concerning such matters as an error in
27 the amount of current support owed or arrearage that had accrued;
28 mistaken identity of the obligor; or error in the amount of income to
29 be withheld;

1 (2) that the court or agency that issued the support order
2 entered under this chapter lacked personal jurisdiction over the
3 obligor;

4 (3) that the support order entered under this chapter was
5 obtained by fraud; or

6 (4) that the statute of limitations precludes enforcement
7 of all or part of the arrearages.

8 (c) If the obligor presents evidence that constitutes a full or
9 partial defense, the court shall, on the request of the obligee,
10 continue the case to permit further evidence relative to the defense
11 to be adduced by either party. However, if the obligor acknowledges
12 liability sufficient to entitle the obligee to income withholding, the
13 court shall require income withholding for the payment of the current
14 support obligation under the support order and of so much of any
15 arrearages as is not in dispute, while continuing the case with re-
16 spect to those matters still in dispute. The court shall determine
17 those matters still in dispute as soon as possible, and, if appropri-
18 ate, shall modify the withholding order to conform to that resolution.

19 (d) In addition to other procedural devices available to a
20 party, any party to the proceeding, or a guardian ad litem or other
21 representative of the child, may adduce testimony of witnesses in
22 another state, including the parties, and of any of the children, by
23 deposition, written discovery, photographic discovery such as vid-
24 eotaped depositions, or personal appearance before the court by tele-
25 phone or photographic means. The court, on its own motion, may direct
26 that the testimony of a person be taken in another state and may
27 prescribe the manner in which and the terms upon which the testimony
28 is to be taken.

29 (e) A court of this state may request the appropriate court or

1 agency of another state to hold a hearing to adduce evidence, to
2 permit a deposition to be taken to order a party to produce or give
3 evidence under other procedures of that state, and to forward to the
4 court of this state certified copies of the evidence adduced in com-
5 pliance with the request.

6 (f) Upon request of a court or agency of another state the
7 courts of this state, which are competent to hear support matters, may
8 order a person in this state to appear at a hearing or deposition
9 before the court to adduce evidence or to produce or give evidence
10 under other procedures available in this state. A certified copy of
11 the evidence adduced, such as a transcript or videotape, must be
12 forwarded by the clerk of the court to the requesting court or agency.

13 (g) A person within this state may voluntarily testify by state-
14 ment or affidavit in this state for use in a proceeding to obtain
15 income withholding outside this state.

16 Sec. 25.26.060. INCOME WITHHOLDING ORDER. If the obligor does
17 not request a hearing in the time provided, or if a hearing is held
18 and it is determined that the obligee has or is entitled to income
19 withholding under the local law of the jurisdiction that issued the
20 support order, the court shall issue an income withholding order under
21 AS 09.65.132. The agency shall notify the requesting agency or person
22 of the date upon which withholding will begin.

23 Sec. 25.26.070. NOTICE TO EMPLOYER AND OTHER PROVISIONS. The
24 provisions of AS 09.65.132 apply to income withholding based on a
25 support order of another jurisdiction entered under this chapter.

26 Sec. 25.26.080. DISTRIBUTION OF COLLECTED SUPPORT PAYMENTS. (a)
27 The income withholding order must direct payment to be made to the
28 agency. The agency shall transmit to the agency or person designated
29 in AS 25.26.030(b)(5)(C) payments received under an income withholding

1 order that is based on a support order of another jurisdiction entered
2 under this chapter.

3 (b) A support order entered under AS 25.26.030 does not nullify,
4 and is not nullified by, a support order made by a court of this state
5 under any other law, or a support order made by a court of any other
6 state. Amounts collected by withholding of income must be credited
7 against the amounts accruing or accrued for any period under a support
8 order issued by either this state or another state.

9 Sec. 25.26.090. CHANGES IN ORIGINAL ORDER. The agency, upon
10 receiving a certified copy of an amendment or modification to a sup-
11 port order entered under AS 25.26.030, shall initiate, as though the
12 order were a support order of this state, necessary procedures to
13 amend or modify the income withholding order of this state which was
14 based upon the entered support order. The court shall amend or modify
15 the income withholding order to conform to the modified support order.

16 Sec. 25.26.100. CHANGES IN JURISDICTION. If the agency deter-
17 mines that the obligor has obtained employment in another state or has
18 a new or additional source of income in another state, it shall
19 promptly notify the agency that requested the income withholding of
20 the changes, and shall forward to that agency all information it has
21 or can obtain with respect to the obligor's new address and the name
22 and address of the obligor's new employer or other source of income.
23 The agency shall include with the notice a certified copy of the
24 income withholding order in effect in this state.

25 Sec. 25.26.110. VOLUNTARY INCOME WITHHOLDING. A person who is
26 the obligor on a support order of another jurisdiction may obtain
27 voluntary income withholding by filing with the agency a request for
28 the withholding and a certified copy of the support order of the other
29 jurisdiction. The court shall issue an income withholding order under

1 AS 09.65.132. Payment must be made to the agency.

2 Sec. 25.26.120. CHOICE OF LAW. (a) The law of this state
3 applies in all actions and proceedings concerning the issuance, en-
4 forcement, and duration of income withholding orders issued by a court
5 of this state, based upon a support order of another jurisdiction
6 entered under AS 25.26.030, except as provided in (b) of this section.

7 (b) The law of the jurisdiction that issued the support order
8 governs the following:

9 (1) the interpretation of the support order entered under
10 AS 25.26.030, including amount, form of payment, and the duration of
11 support;

12 (2) the amount of support arrearages necessary to require
13 the issuance of an income withholding order.

14 Sec. 25.26.130. ADDITIONAL REMEDIES. The remedy provided in
15 this chapter is in addition to, and not in substitution for, any other
16 remedy otherwise available to enforce a support order of another
17 jurisdiction. Relief under this chapter may not be denied, delayed,
18 or otherwise affected because of the availability of other remedies,
19 nor may relief under any other statute be delayed or denied because of
20 the availability of the remedy in this chapter.

21 Sec. 25.26.200. DEFINITIONS. In this chapter,

22 (1) "agency" means the child support enforcement agency of
23 the Alaska Department of Revenue (AS 47.23) and, when the context
24 requires, means either a court or an administrative unit of another
25 jurisdiction with functions similar to those described in this chap-
26 ter, including the issuance and enforcement of support orders;

27 (2) "child" means a person, whether above or below the age
28 of majority, with respect to whom a support order exists;

29 (3) "court" means the superior court of this state and,

1 when the context requires, means either a court or an agency of another
2 jurisdiction with functions similar to those described in this
3 chapter, including the issuance and enforcement of support orders;

4 (4) "employer" means a payor of income;

5 (5) "income" means all money owed to an obligor, including
6 wages, that is not otherwise exempt by law;

7 (6) "income derived in this jurisdiction" means income, the
8 payor of which is subject to the jurisdiction of this state for the
9 purpose of imposing and enforcing income withholding under AS 09.-
10 65.132;

11 (7) "jurisdiction" means a state or political subdivision,
12 territory, or possession of the United States, the District of
13 Columbia, and the Commonwealth of Puerto Rico;

14 (8) "obligee" means a person or entity entitled to receive
15 support under an order of support; the term includes an agency of
16 another jurisdiction to which a person has assigned his or her right
17 of support;

18 (9) "obligor" means a person required to make payments
19 under the terms of a support order for a child, spouse, or former
20 spouse;

21 (10) "support order" means an order, decree, or judgment
22 for the support, or for the payment of arrearages on the support, of a
23 child, spouse, or former spouse, issued by a court or agency of another
24 jurisdiction, whether interlocutory or final, whether prospectively
25 or retroactively modifiable, and whether incidental to a proceeding
26 for divorce, judicial or legal separation, separate maintenance,
27 paternity, guardianship, civil protection, or other proceeding.

28 PL 98-395* Sec. 5. AS 47.23.020(a) is amended to read:

29 *must enforce*
Personal support (a) The agency shall
when child support administrative,
HB 92 *must obtain medical support order*
where reasonable costs, must enforce
withholding in statute

- 1 (1) obtain, enforce, and administer child support orders of
2 the superior courts of the state;
- 3 (2) adopt regulations to carry out the purpose of this
4 chapter, including regulations that [WHICH] establish
- 5 (A) schedules for determining the amount an obligor is
6 liable to contribute toward the support of an obligee under this
7 chapter and under 42 U.S.C. 651 -- 665 (Title IV-D, Social Secu-
8 rity Act);
- 9 (B) procedures for hearings conducted under AS 47.23.-
10 170; and
- 11 (C) subject to AS 47.23.025 and to federal law, a
12 uniform schedule of penalties and a rate of interest on arrear-
13 ages of support that must [SHALL] be charged the obligor upon
14 notice if child support payments are 10 or more days overdue or
15 if payment is made by a check backed by insufficient funds;
- 16 (3) administer and enforce the Uniform Reciprocal Enforce-
17 ment of Support Act (AS 25.25);
- 18 (4) establish, enforce, and administer child support obli-
19 gations administratively in accordance with this chapter;
- 20 (5) administer the state plan required under 42 U.S.C. 651
21 -- 665 (Title IV-D, Social Security Act) as amended;
- 22 (6) disburse child support payments collected by the agency
23 to the obligee together with interest charged under (2)(C) of this
24 subsection; [AND]
- 25 (7) deposit penalties charged under (2)(C) of this sub-
26 section in the general fund;
- 27 (8) administer and enforce the Interstate Income Withhold-
28 ing Act (AS 25.26);
- 29 (9) enforce and administer spousal support orders only if a

1 spousal support obligation has been established with respect to the
2 spouse and if the support obligation established with respect to the
3 child of that spouse is also being administered; and

4 (10) obtain medical support orders as part of a child sup-
5 port order if health care coverage is available to the obligor at a
6 reasonable cost.

7 * Sec. 6. AS 47.23.025 is amended to read:

8 ^{PL 98-378:} Sec. 47.23.025. RATES OF PENALTY AND INTEREST. A penalty im-
9 ^{may impose} ^{penalty, not to} ^{exceed} posed under AS 47.23.020(a)(2)(C) must be 6 percent [MAY NOT BE AT A
10 ^{6%} RATE THAT EXCEEDS THE RATE OF INTEREST IMPOSED ON DELINQUENT TAXES
11 UNDER AS 43.05.225]. The rate of interest imposed under AS 47.23.-
12 020(a)(2)(C) must [SHALL] equal the rate imposed under AS 43.05.225 or
13 a lesser rate that is the maximum rate of interest permitted to be
14 imposed under federal law.

15 * Sec. 7. AS 47.23.045 is amended to read:

16 ^{Am'd PL 98-378} Sec. 47.23.045. DETERMINATION OF SUPPORT OBLIGATION. The agency
17 may appear in an action seeking an award of support on [IN] behalf of
18 a child owed a duty of support, or to enforce a spousal support order
19 if a spousal support obligation has been established and if the sup-
20 port obligation, established with respect to a child of that spouse,
21 is also being administered, and may also appear in an action seeking
22 modification of a support order, decree or judgment already entered.
23 Action under this section may be undertaken upon application of an
24 obligee, or at the agency's own discretion if the obligor is liable to
25 the state under AS 47.23.120(a) or (b).

26 * Sec. 8. AS 47.23.060(c) is amended to read:

27 ^{Am'd PL 98-378} (c) In a court proceeding where the support of a minor child is
28 at issue, the court may order either or both parents to pay the amount
29 necessary for support, maintenance, nurture, and education of the

1 child. The court shall issue a medical support order as part of a
2 child support order if health care coverage is available to the
3 obligor at a reasonable cost. Upon a showing of good cause the court
4 may order the parents required to pay support to give reasonable
5 security for payments. An order for prospective child support may be
6 modified or revoked as the court considers necessary.

7 * Sec. 9. AS 47.23.150(a) is amended to read:

8 *corrects oversight in* (a) Action to enforce a support order administratively under
9 *Ch. 144 SLA 1984* AS 47.23.230 -- 47.23.270 is initiated by the agency serving a notice
10 *when* on the obligor of the obligor's liability under the support order.
11 *AS 47.23.265 enacted* [NOTICE UNDER THIS SUBSECTION SHALL BE SERVED PERSONALLY OR BY REGIS-
12 *which sets out general notice provisions in all of* TERED, CERTIFIED, OR INSURED MAIL, RETURN RECEIPT REQUESTED, FOR
13 *47.23* RESTRICTED DELIVERY ONLY TO THE PERSON TO WHOM THE NOTICE IS DIRECTED
14 OR TO THE PERSON AUTHORIZED UNDER FEDERAL REGULATION TO RECEIVE THAT
15 PERSON'S RESTRICTED DELIVERY MAIL.]

16 * Section 10. AS 47.23.226 is amended to read:

17 *notice changes not* Sec. 47.23.226. ACTION TO COLLECT CHILD SUPPORT. To commence an
18 *revised by PL 96-378* action to collect the payment due, the custodian of a child, or the
19 agency on behalf of that person, shall file with the court (1) a
20 petition requesting establishment of a judgment; (2) an affidavit that
21 states that one or more payments of child support are 30 or more days
22 past due and that specifies the amounts past due and the dates they
23 became past due; and (3) notice of the obligor's right to respond.
24 Service on the obligor must [SHALL] be in the manner provided in
25 AS 47.23.265 [BY THE RULES OF CIVIL PROCEDURE FOR SERVICE OF SUMMONS
26 IN A CIVIL ACTION]. The child's custodian, or the agency on behalf of
27 the custodian, shall file with the court proof of service of the
28 petition, affidavit, and notice. The obligor shall respond no later
29 than 15 days after service by filing an affidavit with the court. If

1 the obligor's affidavit states that the obligor has paid any of the
2 amounts claimed to be delinquent, describes in detail the method of
3 payment or offers any other defense to the petition, then the obligor
4 is entitled to a hearing. After the hearing, if any, the court shall
5 enter a judgment for the amount of money owed. If the obligor does
6 not file an affidavit under this section, the court shall enter a
7 default judgment against the obligor.

8 * Sec. 11 AS 47.23.250(i) is amended to read:
9 *As added by PL 98-378*
10 *Execution* (i) Exemptions under AS 09.38 do not apply to proceedings to
11 *sections* enforce the payment of child support under AS 47.23.230 -- 47.23.270;
12 *where 50% exempt* however, 50 percent of the obligor's net disposable earnings is exempt
13 *Diminishes* from execution under AS 47.23.230 -- 47.23.253 [47.23.270]. In this
14 *withholding orders which will now be subject to* subsection, "net disposable earnings" has the meaning given in 15
15 *15 USC 1673(b)* U.S.C. 1672.

15 * Sec. 12. AS 47.23.255 is amended to read:
16 *Simply changes language of* Sec. 47.23.255. INCOME WITHHOLDING [ASSIGNMENT] ORDERS. (a) The
17 *assignment* agency shall pay the obligee all money recovered by the agency under
18 *to withholding or other* an income withholding [ASSIGNMENT] order except for costs that are
19 *legally due* recovered from the obligor.
20 *shall format* (b) Notwithstanding AS 47.23.250, an income withholding [ASSIGN-
21 MENT] order contained in a decision of the agency that has not been
22 set aside by the superior court under AS 47.23.220 must [SHALL] be
23 enforced under the procedure established in AS 09.65.132.

24 * Sec. 13. AS 47.23.260 is amended to read:
25 *also simple language change* Sec. 47.23.260. CIVIL LIABILITY UPON FAILURE TO COMPLY WITH AN
26 ORDER OR LIEN. If any person, political subdivision, or department of
27 the state (1) fails to make an answer to an order to withhold and
28 deliver within the time prescribed in AS 47.23.250; (2) fails or
29 refuses to deliver property in accordance with an order issued under

1 AS 47.23.250; (3) pays over, releases, sells, transfers, or conveys
2 real property subject to a lien filed under AS 47.23.230 to or for the
3 benefit of the obligor or any other person; (4) fails or refuses to
4 surrender upon demand property attached; (5) fails or refuses to honor
5 an assignment of wages or an income withholding [ASSIGNMENT] order
6 under AS 09.65.132 presented by the agency, the person, political
7 subdivision, or department of the state is liable to the agency in an
8 amount equal to 100 percent of the amount constituting the basis of
9 the lien, order to withhold and deliver, attachment, or withholding
10 [ASSIGNMENT] of wages or income, together with costs, interest, and
11 reasonable attorney fees.

12 * Sec. 14. AS 47.23.265(a) is amended to read:

13 *notice* (a) Except as otherwise provided under this chapter, when a
changes not
14 *reg'd by* notice, paper, or other document is required by this chapter to be
PL 98-378
15 given or served upon a person by the agency, the notice, paper, or
16 other document may be served as required by Rule 5, Alaska Rules of
17 Civil Procedure [SENT BY REGISTERED OR CERTIFIED MAIL TO THE LAST
18 KNOWN ADDRESS OF THAT PERSON]. [SERVICE BY MAIL UNDER THIS CHAPTER IS
19 EFFECTED WHEN THE NOTICE, PAPER, OR OTHER DOCUMENT IS PROPERLY AD-
20 DRESSED REGISTERED OR CERTIFIED, AND MAILED.]

21 * Sec. 15. This Act takes effect immediately in accordance with AS 01.-
22 10.070(c).

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

BILL SHEFFIELD, GOVERNOR

REPLY TO:

1031 W 4th AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701
PHONE: (907) 452-1568

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600
465-3603

January 31, 1985

The Honorable Max Gruenberg
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: HB 92 Child and Spousal
Support

Dear Representative Gruenberg:

Holli Ploog asked me to send you the material you requested during the public hearing on HB 92. I have enclosed a copy of the Revised Uniform Reciprocal Enforcement of Support Act (1968), */ as well as copies of 15 U.S.C. 1673 and the Model Interstate Income Withholding Act (with commentary).

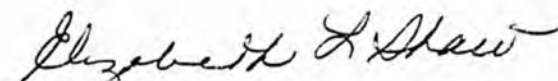
The Department of Law has no proposed amendments to the statutes which control establishment or enforcement of interstate or intrastate child support actions.

By tomorrow I plan to have completed a response to your question regarding due process notice requirement.

Sincerely yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By:


Elizabeth L. Shaw
Assistant Attorney General

ELS:bap
Enclosure
cc: Holli Ploog

*/ In a quick comparison of our statutes and the Revised Uniform Reciprocal Enforcement of Support Act, I highlighted the areas of difference which I spotted.

Appendix A
REVISED UNIFORM RECIPROCAL
ENFORCEMENT
OF SUPPORT ACT (1968)

Drafted by the
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it
APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its
ANNUAL CONFERENCE
MEETING IN ITS SEVENTY-SEVENTH YEAR
AT PHILADELPHIA, PENNSYLVANIA
JULY 22—AUGUST 1, 1968

APPROVED BY THE AMERICAN BAR ASSOCIATION AT ITS
MEETING AT PHILADELPHIA, PENNSYLVANIA
AUGUST 7, 1968

The Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Revised Uniform Reciprocal Enforcement of Support Act was as follows:

W. J. BROCKELBANK, 203 South Polk Street, Moscow, Idaho
83843, *Chairman*
BOYD M. BENSON, 76 Third Street, S.W., The National Bank
of South Dakota Building, Huron, South Dakota 57350
WILLIAM S. BURRAGE, 3 Court Square, Middlebury, Vermont
05753
LOWRY N. COE, 8400 Wisconsin Avenue, Bethesda,
Maryland 20014

FRED T. HANSON, 316 Norris Avenue, McCook, Nebraska
69001

EUGENE A. BURDICK, P.O. Box 757, Williston, North Dakota
58801, *Chairman of Section F*

PART I—General Provisions

SECTION 1. [*Purposes.*] The purposes of this Act are to improve and extend by reciprocal legislation the enforcement of duties of support.

SECTION 2. [*Definitions.*]

(a) "Court" means the [here insert name] court of this State and when the context requires means the court of any other state as defined in a substantially similar reciprocal law.

(b) "Duty of support" means a duty of support whether imposed or imposable by law or by order, decree, or judgment of any court, whether interlocutory or final or whether incidental to an action for divorce, separation, separate maintenance, or otherwise and includes the duty to pay arrearages of support past due and unpaid.

(c) "Governor" includes any person performing the functions of Governor or the executive authority of any state covered by this Act.

(d) "Initiating state" means a state in which a proceeding pursuant to this or a substantially similar reciprocal law is commenced. "Initiating court" means the court in which a proceeding is commenced.

(e) "Law" includes both common and statutory law.

(f) "Obligee" means a person including a state or political subdivision to whom a duty of support is owed or a person including a state or political subdivision that has commenced a proceeding for enforcement of an alleged duty of support or for registration of a support order. It is immaterial if the person to whom a duty of support is owed is a recipient of public assistance.

(g) "Obligor" means any person owing a duty of support or against whom a proceeding for the enforcement of a duty of support or registration of a support order is commenced.

(h) "Prosecuting attorney" means the public official in the appropriate place who has the duty to enforce criminal laws relating to the failure to provide for the support of any person.

(i) "Register" means to [record] [file] in the Registry of Foreign Support Orders.

(j) "Registering court" means any court of this State in which a support order of a rendering state is registered.

(k) "Rendering state" means a state in which the court has issued a support order for which registration is sought or granted in the court of another state.

(l) "Responding state" means a state in which any responsive proceeding pursuant to the proceeding in the initiating state is commenced. "Responding court" means the court in which the responsive proceeding is commenced.

(m) "State" includes a state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any foreign jurisdiction in which this or a substantially similar reciprocal law is in effect.

(n) "Support order" means any judgment, decree, or order of support in favor of an obligee whether temporary or final, or subject to modification, revocation, or remission, regardless of the kind of action or proceeding in which it is entered.

SECTION 3. [*Remedies Additional to Those Now Existing.*] The remedies herein provided are in addition to and not in substitution for any other remedies.

SECTION 4. [*Extent of Duties of Support.*] Duties of support arising under the law of this State, when applicable under section 7, bind the obligor present in this State regardless of the presence or residence of the obligee.

APPENDIX A

PART II—Criminal Enforcement

SECTION 5. [*Interstate Rendition.*] The Governor of this State may

- (1) demand of the Governor of another state the surrender of a person found in that state who is charged criminally in this State with failing to provide for the support of any person; or
- (2) surrender on demand by the Governor of another state a person found in this State who is charged criminally in that state with failing to provide for the support of any person. Provisions for extradition of criminals not inconsistent with this Act apply to the demand even if the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and has not fled therefrom. The demand, the oath, and any proceedings for extradition pursuant to this section need not state or show that the person whose surrender is demanded has fled from justice or at the time of the commission of the crime was in the demanding state.

SECTION 6. [*Conditions of Interstate Rendition.*]

- (a) Before making the demand upon the Governor of another state for the surrender of a person charged criminally in this State with failing to provide for the support of a person, the Governor of this State may require any prosecuting attorney of this State to satisfy him that at least [60] days prior thereto the obligee initiated proceedings for support under this Act or that any proceeding would be of no avail.
- (b) If, under a substantially similar Act, the Governor of another state makes a demand upon the Governor of this State for the surrender of a person charged criminally in that state with failure to provide for the support of a person, the Governor may require any prosecuting attorney to investigate the demand and to report to him whether

proceedings for support have been initiated or would be effective. If it appears to the Governor that a proceeding would be effective but has not been initiated he may delay honoring the demand for a reasonable time to permit the initiation of a proceeding.

(c) If proceedings have been initiated and the person demanded has prevailed therein the Governor may decline to honor the demand. If the obligee prevailed and the person demanded is subject to a support order, the Governor may decline to honor the demand if the person demanded is complying with the support order.

PART III—Civil Enforcement

SECTION 7. [*Choice of Law.*] Duties of support applicable under this Act are those imposed under the laws of any state where the obligor was present for the period during which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown.

SECTION 8. [*Remedies of State or Political Subdivision Furnishing Support.*] If a state or a political subdivision furnishes support to an individual obligee it has the same right to initiate a proceeding under this Act as the individual obligee for the purpose of securing reimbursement for support furnished and of obtaining continuing support.

SECTION 9. [*How Duties of Support Enforced.*] All duties of support, including the duty to pay arrearages, are enforceable by a proceeding under this Act including a proceeding for civil contempt. The defense that the parties are immune to suit because of their relationship as husband and wife or parent and child is not available to the obligor.

prosecuting attorney neglects or refuses to represent the obligee, the [Attorney General] [State Director of Public Welfare] may undertake the representation.]

SECTION 13. [*Petition for a Minor.*] A [petition] on behalf of a minor obligee may be executed and filed by a person having legal custody of the minor without appointment as guardian ad litem.

SECTION 14. [*Duty of Initiating Court.*] If the initiating court finds that the [petition] sets forth facts from which it may be determined that the obligor owes a duty of support and that a court of the responding state may obtain jurisdiction of the obligor or his property it shall so certify and cause 3 copies of the [petition] and its certificate and one copy of this Act to be sent to the responding court. Certification shall be in accordance with the requirements of the initiating state. If the name and address of the responding court is unknown and the responding state has an information agency comparable to that established in the initiating state it shall cause the copies to be sent to the state information agency or other proper official of the responding state, with a request that the agency or official forward them to the proper court and that the court of the responding state acknowledge their receipt to the initiating court.

SECTION 15. [*Costs and Fees.*] An initiating court shall not require payment of either a filing fee or other costs from the obligee but may request the responding court to collect fees and costs from the obligor. A responding court shall not require payment of a filing fee or other costs from the obligee but it may direct that all fees and costs requested by the initiating court and incurred in this State when acting as a responding state, including fees for filing of pleadings, service of process, seizure of property, stereographic or duplication service, or other service supplied to the obligor,

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APPENDIX A

SECTION 10. [*Jurisdiction.*] Jurisdiction of any proceeding under this Act is vested in the [here insert title of court desired].

SECTION 11. [*Contents and Filing of [Petition] for Support; Venue.*]

(a) The [petition] shall be verified and shall state the name and, so far as known to the obligee, the address and circumstances of the obligor and the persons for whom support is sought, and all other pertinent information. The obligee may include in or attach to the [petition] any information which may help in locating or identifying the obligor including a photograph of the obligor, a description of any distinguishing marks on his person, other names and aliases by which he has been or is known, the name of his employer, his fingerprints, and his Social Security number.

(b) The [petition] may be filed in the appropriate court of any state in which the obligee resides. The court shall not decline or refuse to accept and forward the [petition] on the ground that it should be filed with some other court of this or any other state where there is pending another action for divorce, separation, annulment, dissolution, habeas corpus, adoption, or custody between the same parties or where another court has already issued a support order in some other proceeding and has retained jurisdiction for its enforcement.

SECTION 12. [*Officials to Represent Obligees.*] If this State is acting as an initiating state the prosecuting attorney upon the request of the court [a state department of welfare, a county commissioner, an overseer of the poor, or other local welfare officer] shall represent the obligee in any proceeding under this Act. [If the prosecuting attorney neglects or refuses to represent the obligee the [Attorney General] may order him to comply with the request of the court or may undertake the representation.] [If the

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be paid in whole or in part by the obligor or by the [state or political subdivision thereof]. These costs or fees do not have priority over amounts due to the obligee.

SECTION 16. [*Jurisdiction by Arrest.*] If the court of this State believes that the obligor may flee it may

(1) as an initiating court, request in its certificate that the responding court obtain the body of the obligor by appropriate process; or

(2) as a responding court, obtain the body of the obligor by appropriate process. Thereupon it may release him upon his own recognizance or upon his giving a bond in an amount set by the court to assure his appearance at the hearing.

SECTION 17. [*State Information Agency.*]

(a) The [Attorney General's Office, State Attorney's Office, Welfare Department or other Information Agency] is designated as the state information agency under this Act, it shall

(1) compile a list of the courts and their addresses in this State having jurisdiction under this Act and transmit it to the state information agency of every other state which has adopted this or a substantially similar Act. Upon the adjournment of each session of the [legislature] the agency shall distribute copies of any amendments to the Act and a statement of their effective date to all other state information agencies;

(2) maintain a register of lists of courts received from other states and transmit copies thereof promptly to every court in this state having jurisdiction under this Act; and

(3) forward to the court in this State which has jurisdiction over the obligor or his property petitions, certificates and copies of the Act it receives from courts or information agencies of other states.

(b) If the state information agency does not know the location of the obligor or his property in the state and no state location service is available it shall use all means at its disposal to obtain this information, including the examination of official records in the state and other sources such as telephone directories, real property records, vital statistics records, police records, requests for the name and address from employers who are able or willing to cooperate, records of motor vehicle license offices, requests made to the tax offices both state and federal where such offices are able to cooperate, and requests made to the Social Security Administration as permitted by the Social Security Act as amended.

(c) After the deposit of 3 copies of the [petition] and certificate and one copy of the Act of the initiating state with the clerk of the appropriate court, if the state information agency knows or believes that the prosecuting attorney is not prosecuting the case diligently it shall inform the [Attorney General] [State Director of Public Welfare], who may undertake the representation.

SECTION 18. [*Duty of the Court and Officials of This State as Responding State.*]

(a) After the responding court receives copies of the [petition], certificate, and Act from the initiating court the clerk of the court shall docket the case and notify the prosecuting attorney of his action.

(b) The prosecuting attorney shall prosecute the case diligently. He shall take all action necessary in accordance with the laws of this State to enable the court to obtain jurisdiction over the obligor or his property and shall request the court [clerk of the court] to set a time and place for a hearing and give notice thereof to the obligor in accordance with law.

(c) [If the prosecuting attorney neglects or refuses to represent the obligee the [Attorney General] may order him

constituting a defense the court, upon request of either party, shall continue the hearing to permit evidence relative to the duty to be adduced by either party by deposition or by appearing in person before the court. The court may designate the judge of the initiating court as a person before whom a deposition may be taken.

SECTION 21. [*Immunity from Criminal Prosecution.*] If at the hearing the obligor is called for examination as an adverse party and he declines to answer upon the ground that his testimony may tend to incriminate him, the court may require him to answer, in which event he is immune from criminal prosecution with respect to matters revealed by his testimony, except for perjury committed in this testimony.

SECTION 22. [*Evidence of Husband and Wife*] Laws attaching a privilege against the disclosure of communications between husband and wife are inapplicable to proceedings under this Act. Husband and wife are competent witnesses [and may be compelled] to testify to any relevant matter, including marriage and parentage.

SECTION 23. [*Rules of Evidence.*] In any hearing for the civil enforcement of this Act the court is governed by the rules of evidence applicable in a civil court action in the _____ Court. If the action is based on a support order issued by another court a certified copy of the order shall be received as evidence of the duty of support, subject only to any defenses available to an obligor with respect to paternity (Section 27) or to a defendant in an action or a proceeding to enforce a foreign money judgment. The determination or enforcement of a duty of support owed to one obligee is unaffected by any interference by another obligee with rights of custody or visitation granted by a court.

to comply with the request of the court or may undertake the representation.] [If the prosecuting attorney neglects or refuses to represent the obligee, the [Attorney General] [State Director of Public Welfare] may undertake the representation.]

SECTION 19. [*Further Duties of Court and Officials in the Responding State.*]

(a) The prosecuting attorney on his own initiative shall use all means at his disposal to locate the obligor or his property, and if because of inaccuracies in the [petition] or otherwise the court cannot obtain jurisdiction the prosecuting attorney shall inform the court of what he has done and request the court to continue the case pending receipt of more accurate information or an amended [petition] from the initiating court.

(b) If the obligor or his property is not found in the [county], and the prosecuting attorney discovers that the obligor or his property may be found in another [county] of this State or in another state he shall so inform the court. Thereupon the clerk of the court shall forward the documents received from the court in the initiating state to a court in the other [county] or to a court in the other state or to the information agency or other proper official of the other state with a request that the documents be forwarded to the proper court. All powers and duties provided by this Act apply to the recipient of the documents so forwarded. If the clerk of a court of this State forwards documents to another court he shall forthwith notify the initiating court.

(c) If the prosecuting attorney has no information as to the location of the obligor or his property he shall so inform the initiating court.

SECTION 20. [*Hearing and Continuance.*] If the obligee is not present at the hearing and the obligor denies owing the duty of support alleged in the petition or offers evidence

SECTION 24. [*Order of Support.*] If the responding court finds a duty of support it may order the obligor to furnish support or reimbursement therefor and subject the property of the obligor to the order. Support orders made pursuant to this Act shall require that payments be made to the [clerk] [bureau] [probation department] of the court of the responding state. [The court and prosecuting attorney of any [county] in which the obligor is present or has property have the same powers and duties to enforce the order as have those of the [county] in which it was first issued. If enforcement is impossible or cannot be completed in the [county] in which the order was issued, the prosecuting attorney shall send a certified copy of the order to the prosecuting attorney of any [county] in which it appears that proceedings to enforce the order would be effective. The prosecuting attorney to whom the certified copy of the order is forwarded shall proceed with enforcement and report the results of the proceedings to the court first issuing the order.]

SECTION 25. [*Responding Court to Transmit Copies to Initiating Court.*] The responding court shall cause a copy of all support orders to be sent to the initiating court.

SECTION 26. [*Additional Powers of Responding Court.*] In addition to the foregoing powers a responding court may subject the obligor to any terms and conditions proper to assure compliance with its orders and in particular to:

- (1) require the obligor to furnish a cash deposit or a bond of a character and amount to assure payment of any amount due;
- (2) require the obligor to report personally and to make payments at specified intervals to the [clerk] [bureau] [probation department] of the court; and
- (3) punish under the power of contempt the obligor who violates any order of the court.

SECTION 27. [*Paternity.*] If the obligor asserts as a defense that he is not the father of the child for whom support is sought and it appears to the court that the defense is not frivolous, and if both of the parties are present at the hearing or the proof required in the case indicates that the presence of either or both of the parties is not necessary, the court may adjudicate the paternity issue. Otherwise the court may adjourn the hearing until the paternity issue has been adjudicated.

SECTION 28. [*Additional Duties of Responding Court.*] A responding court has the following duties which may be carried out through the [clerk] [bureau] [probation department] of the court:

- (1) to transmit to the initiating court any payment made by the obligor pursuant to any order of the court or otherwise; and
- (2) to furnish to the initiating court upon request a certified statement of all payments made by the obligor.

SECTION 29. [*Additional Duty of Initiating Court.*] An initiating court shall receive and disburse forthwith all payments made by the obligor or sent by the responding court. This duty may be carried out through the [clerk] [bureau] [probation department] of the court.

SECTION 30. [*Proceedings Not to be Stayed.*] A responding court shall not stay the proceeding or refuse a hearing under this Act because of any pending or prior action or proceeding for divorce, separation, annulment, dissolution, habeas corpus, adoption, or custody in this or any other state. The court shall hold a hearing and may issue a support order pendente lite. In aid thereof it may require the obligor to give a bond for the prompt prosecution of the pending proceeding. If the other action or proceeding is concluded before the hearing in the instant proceeding and the judgment therein provides for the support demanded in the [petition] being heard the court must

conform its support order to the amount allowed in the other action or proceeding. Thereafter the court shall not stay enforcement of its support order because of the retention of jurisdiction for enforcement purposes by the court in the other action or proceeding.

SECTION 31. [*Application of Payments.*] A support order made by a court of this State pursuant to this Act does not nullify and is not nullified by a support order made by a court of this State pursuant to any other law or by a support order made by a court of any other state pursuant to a substantially similar act or any other law, regardless of priority of issuance, unless otherwise specifically provided by the court. Amounts paid for a particular period pursuant to any support order made by the court of another state shall be credited against the amounts accruing or accrued for the same period under any support order made by the court of this State.

SECTION 32. [*Effect of Participation in Proceeding.*] Participation in any proceeding under this Act does not confer jurisdiction upon any court over any of the parties thereto in any other proceeding.]

SECTION 33. [*Interstate Application.*] This Act applies if both the obligee and the obligor are in this State but in different [counties]. If the court of the [county] in which the [petition] is filed finds that the [petition] sets forth facts from which it may be determined that the obligor owes a duty of support and finds that a court of another [county] in this State may obtain jurisdiction over the obligor or his property, the clerk of the court shall send the [petition] and a certification of the findings to the court of the [county] in which the obligor or his property is found. The clerk of the court of the [county] receiving these documents shall notify the prosecuting attorney of their receipt. The prosecuting attorney and the court in the [county] to which the copies are forwarded then shall have duties corresponding to those

imposed upon them when acting for this State as a responding state.]

SECTION 34. [*Appeals.*] If the [Attorney General] [State Director of Public Welfare] is of the opinion that a support order is erroneous and presents a question of law warranting an appeal in the public interest, he may

- (a) perfect an appeal to the proper appellate court if the support order was issued by a court of this State, or
- (b) if the support order was issued in another state, cause the appeal to be taken in the other state. In either case expenses of appeal may be paid on his order from funds appropriated for his office.

PART IV—Registration of Foreign Support Orders

SECTION 35. [*Additional Remedies.*] If the duty of support is based on a foreign support order, the obligee has the additional remedies provided in the following sections.

SECTION 36. [*Registration.*] The obligee may register the foreign support order in a court of this State in the manner, with the effect, and for the purposes herein provided.

SECTION 37. [*Registry of Foreign Support Orders.*] The clerk of the court shall maintain a Registry of Foreign Support Orders in which he shall [file] foreign support orders.

SECTION 38. [*Official to Represent Obligee.*] If this State is acting either as a rendering or a registering state the prosecuting attorney upon the request of the court [a state department of welfare, a county commissioner, an overseer of the poor, or other local welfare official] shall represent the obligee in proceedings under this Part.

[If the prosecuting attorney neglects or refuses to represent the obligee, the [Attorney General] may order him to comply with the request of the court or may undertake the representation.] [If the prosecuting attorney

neglects or refuses to represent the obligee, the [Attorney General] [State Director of Public Welfare] may undertake the representation.]

SECTION 39. [Registration Procedure; Notice.]

(a) An obligee seeking to register a foreign support order in a court of this State shall transmit to the clerk of the court (1) three certified copies of the order with all modification thereof, (2) one copy of the reciprocal enforcement of support act of the state in which the order was made, and (3) a statement verified and signed by the obligee, showing the post office address of the obligee, the last known place of residence and post office address of the obligor, the amount of support remaining unpaid, a description and the location of any property of the obligor available upon execution, and a list of the states in which the order is registered. Upon receipt of these documents the clerk of the court, without payment of a filing fee or other cost to the obligee, shall file them in the Registry of Foreign Support Orders. The filing constitutes registration under this Act.

(b) Promptly upon registration the clerk of the court shall send by certified or registered mail to the obligor at the address given a notice of the registration with a copy of the registered support order and the post office address of the obligee. He shall also docket the case and notify the prosecuting attorney of his action. The prosecuting attorney shall proceed diligently to enforce the order.

SECTION 40. [Effect of Registration; Enforcement Procedure.]

(a) Upon registration the registered foreign support order shall be treated in the same manner as a support order issued by a court of this State. It has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a support order of this State and may be enforced and satisfied in like manner.

(b) The obligor has [20] days after the mailing of notice of the registration in which to petition the court to vacate the registration or for other relief. If he does not so petition the registered support order is confirmed.

(c) At the hearing to enforce the registered support order the obligor may present only matters that would be available to him as defenses in an action to enforce a foreign money judgment. If he shows to the court that an appeal from the order is pending or will be taken or that a stay of execution has been granted the court shall stay enforcement of the order until the appeal is concluded, the time for appeal has expired, or the order is vacated, upon satisfactory proof that the obligor has furnished security for payment of the support ordered as required by the rendering state. If he shows to the court any ground upon which enforcement of a support order of this State may be stayed the court shall stay enforcement of the order for an appropriate period if the obligor furnishes the same security for payment of the support ordered that is required for a support order of this State.

SECTION 41. [Uniformity of Interpretation.] This Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

SECTION 42. [Short Title.] This Act may be cited as the Revised Uniform Reciprocal Enforcement of Support Act (1968).

SECTION 43. [Severability.] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

individual are required to be withheld for payment of any debt, the process by which bankruptcy trustee takes title is "a legal or equitable procedure." In re Cedor, D.C. Cal. 1972, 337 F.Supp. 1103, affirmed 470 F.2d 996, certiorari denied 93 S.Ct. 2148, 411 U.S. 973, 36 L.Ed.2d 697.

The term "garnishment" as used in this subchapter setting forth maximum amount which may be garnished from earnings of individual for any work week is not restricted but includes any legal or equitable procedure through which earnings of an individual are required to be withheld for payment of any debt, thus encompassing orders of support as well as ordinary creditor-debtor "garnishment." General Motors Acceptance Corp. v. Metropolitan Opera Ass'n, Inc., 1978, 413 N.Y.S.2d 818, 98 Misc.2d 307.

nishment that portion of worker's checking account funds attributable to her wages and falling within this subchapter's maximum. Edwards v. Henry, 1980, 293 N.W.2d 756, 97 Mich.App. 173.

4. Ripeness

Where Department of Labor had not reached final conclusion regarding its position on coverage of term "garnishment" as used in this subchapter, plaintiffs were not entitled to declaratory relief that term included wage assignments or injunctive relief requiring Secretary of Labor to enforce provisions of this subchapter as so interpreted, and controversy between plaintiffs and Secretary was not ripe for judicial determination. Western v. Hodgson, D.C.W.Va.1973, 359 F.Supp. 194, affirmed 494 F.2d 379.

§ 1673. Restriction on garnishment

Maximum allowable garnishment

(a) Except as provided in subsection (b) of this section and in section 1675 of this title, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed

- (1) 25 per centum of his disposable earnings for that week, or
- (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206(a)(1) of Title 29 in effect at the time the earnings are payable, whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

Exceptions

(b)(1) The restrictions of subsection (a) of this section do not apply in the case of

- (A) any order for the support of any person issued by a court of competent jurisdiction, or in accordance with an administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review.
- (B) any order of any court of the United States having jurisdiction over cases under chapter 13 of Title 11.
- (C) any debt due for any State or Federal tax.

(2) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed—

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(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and

(B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week;

except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if an order is made to enforce that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek.

Execution or enforcement of garnishment order or process prohibited

(c) No court of the United States or any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of this section.

(Pub.L. 90-321, Title III, § 303, May 29, 1968, 82 Stat. 163; Pub.L. 95-30, Title V, § 501(c)(1)-(3), May 23, 1977, 91 Stat. 161, 162; Pub.L. 95-598, Title III, § 312(a), Nov. 6, 1978, 92 Stat. 2676.)

Historical Note

References in Text. Chapter 13 of Title 11, referred to in subsec. (b)(1)(B), is section 1301 et seq. of Title 11, Bankruptcy.

1978 Amendment. Subsec. (b)(1)(B). Pub. L. 95-598 substituted "court of the United States having jurisdiction over cases under Chapter 13 of Title 11" for "court of bankruptcy under chapter XIII of the Bankruptcy Act".

1977 Amendment. Subsec. (b). Pub.L. 95-30, § 501(c)(1), (2), designated existing provisions as par. (1) and existing pars. (1), (2), and (3) as subpars. (A), (B), and (C) thereof, substituted "for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review" for "of any court for the support of any person" in subpar. (A) as so redesignated, and added par. (2).

Subsec. (c). Pub.L. 95-30, § 501(c)(3), inserted ", and no State (or officer or agency thereof)," following "or any State".

Cross References

Enforcement of legal obligations to provide child support and make alimony payments, see section 659 of Title 42, The Public Health and Welfare.

West's Federal Forms

Garnishment, matters pertaining to, see §§ 5196 to 5226.

Code of Federal Regulations

Federal employees, child support and/or alimony, see 5 CFR 581.101 et seq. Policies and procedures applicable, see 29 CFR 870.1 et seq.

Railroad Retirement Board, provisions respecting, see 20 CFR 350.1 et seq.

Remuneration of Board personnel, see 70 CFR 363.1 et seq.

Retirement and unemployment benefits, see 20 CFR 350.1 et seq.

Library References

Consumer Credit § 38.

C.J.S. Interest and Usury; Consumer Credit § 325.

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2. Construction

This section is remedial in general purpose, and the exceptions to its coverage should be strictly construed. In re Cedar, D.C.Cal. 1972, 337 F.Supp. 1103, affirmed 470 F.2d 996, certiorari denied 93 S.Ct. 2148, 411 U.S. 973, 36 L.Ed.2d 697.

Any exception to maximum garnishment restrictions must be narrowly construed. V— v. S—, Mo.App.1979, 579 S.W.2d 149.

3. Construction with bankruptcy provisions

In enacting this subchapter Congress, in an effort to avoid necessity of bankruptcy, sought to regulate garnishment in its usual sense as a levy on periodic payments of compensation needed to support wage earner and his family on a week-to-week, month-to-month basis, and did not intend to drastically alter delicate balance of a debtor's protections and obligations during bankruptcy procedure. Kokoszka v. Belford, Conn.1974, 94 S.Ct. 2431, 417 U.S. 642, 41 L.Ed.2d 374, rehearing denied 95 S.Ct. 160, 419 U.S. 886, 42 L.Ed.2d 131.

This subchapter does not restrict right of trustee in bankruptcy to treat income tax refund as property of bankrupt's estate. Id.

Decisions under former section 35 of Title 11, providing that debts for alimony, maintenance or support are not dischargeable pursuant to existence and preservation of debt; such decisions do not pertain to manner or means of collecting debt, which are governed by state procedures when those procedures do not purport to provide for less limitation on garnishments than this section. Dyche v. Dyche, Mo.1978, 570 S.W.2d 293.

1. Constitutionality

This section does not offend due process by unconstitutionally impairing obligation of contract. Hodgson v. Hamilton Municipal Court, D.C. Ohio 1972, 349 F.Supp. 1125.

Congress had rational basis for determining that this subchapter was needed to carry into execution powers of Congress to regulate commerce and to establish uniform bankruptcy laws, and restriction of this section on garnishment, is constitutional and valid exercise

MODEL INTERSTATE INCOME WITHHOLDING ACT

SECTION 1. GENERAL PROVISIONS

(a) Purpose: The purpose of this Act is to enhance the enforcement of support obligations by providing a quick and effective procedure for the withholding of income derived in this jurisdiction to enforce support orders of other jurisdictions and by requiring that income withholding, to enforce the support orders of this jurisdiction, be sought in other jurisdictions. This Act shall be construed liberally to effect that purpose.

(b) Definitions: As used in this Act:

(1) "Support order" means any order, decree, or judgment for the support, or for the payment of arrearages on such support, of a child, spouse, or former spouse issued by a court or agency of another jurisdiction, whether interlocutory or final, whether or not prospectively or retroactively modifiable, whether incidental to a proceeding for divorce, judicial or legal separation, separate maintenance, paternity, guardianship, civil protection, or otherwise.

(2) "Jurisdiction" means any state or political subdivision, territory or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(3) "Court" means the [insert name] court of this state and, when the context requires, means either the court or agency of any other jurisdiction with functions similar to those defined in this Act, including the issuance and enforcement of support orders.

(4) "Agency" means the [insert name of the income withholding agency] of this state and, when the context requires, means either the court or agency of any other jurisdiction with functions similar to those defined in this Act, including the issuance and enforcement of support orders.

(5) "Child" means any child, whether above or below the age of majority, with respect to whom a support order exists.

(6) "Obligor" means any person required to make payments under the terms of a support order for a child, spouse, or former spouse.

(7) "Obligee" means any person or entity which is entitled to receive support under an order of support and shall include an agency of another jurisdiction to which a person has assigned his or her right to support.

(8) "Income" means [income] as defined in section [cite to definition of income in state withholding law].

(9) "[Employer] [Payor]" means any payor of income.

(10) "Income derived in this jurisdiction" means any income, the payor of which is subject to the jurisdiction of this state for the purpose of imposing and enforcing income withholding under sections _____ through _____ [state's regular intrastate income withholding procedures].

(c) Remedies Additional to Those Now Existing: The remedy herein provided is in addition to, and not in substitution for, any other remedy otherwise available to enforce a support order of another jurisdiction. Relief under this Act shall not be denied, delayed, or otherwise affected because of the availability of other remedies, nor shall relief under any other statute be delayed or denied because of the availability of this remedy.

COMMENT

Subsection (a) states the twofold purpose of the Act: first, to establish a quick and effective procedure for withholding of income in the enacting state in order to enforce a sister state support order, and, second, to require that the appropriate agency in the enacting state seek to have its own support orders enforced in other states by the interstate withholding mechanism. The larger purpose of the Act is intended to enhance interstate support enforcement and the Act should be liberally interpreted and construed toward that end.

As used throughout this commentary, the term "forum state" will refer to the state being asked to utilize its withholding system to enforce a sister state order. The term "requesting state" will refer to the state which seeks this assistance from the forum state.

Most state child support and income withholding laws define frequently used terms. These definitions, for the most part, will also apply to income withholding based on a support order of another jurisdiction. However, for purposes of interstate income withholding, some additional terms and special definitions are needed and these are included in subsection (b).

"Support order," as defined in (b)(1), includes every kind of order for the support of a child, spouse or former spouse, no matter the nature of the legal proceeding in which it was entered. The Act applies to support orders issued by an administrative agency of the requesting state, even if the forum state does not use an administrative process for this purpose. Orders for the support of a spouse or former spouse are included in order to comply with the Child Support Enforcement Amendments of 1984, which requires that income withholding, along with other remedies, be available to enforce support due to a spouse or former spouse with whom the child is living. Social Security Act §466(e), 42 U.S.C. §666(e).

While the full faith and credit clause of the Constitution may not require enforcement of orders that are non-final or modifiable, this subsection includes non-final or temporary support orders, as well as orders which are prospectively or retroactively modifiable. Obligor remain free to seek appropriate modifications in the state which originally issued the support order or any other state which has personal jurisdiction over the parties, and these changes will be reflected in changes in the forum state's withholding order. See Sections 2, 9(a). It should be noted that there is no requirement that a support order include in its terms a conditional order of withholding in order to be entitled to enforcement by this means. Arrearages need not be reduced to judgment before this remedy is used and the remedy is available to enforce the ongoing support obligation.

The definition of "jurisdiction," (b)(2), does not include foreign countries. If foreign nations do not utilize income withholding, this Act could not apply. States wishing to include foreign nations under this Act must define "jurisdiction" accordingly. In so doing, it should be required that foreign support decrees will be recognized under this Act only if withholding or a similar remedy would be required under the facts of the case in that country and "reasonable notice and opportunity to be heard" was given "to all affected persons" at the time of the support decree. Griffin v. Griffin, 327 U.S. 220, 229 (1946).

In subsections (b)(3) and (b)(4) the enacting state should insert the names of the court, if any, and agency respectively, which are responsible for income withholding functions. Typically, these functions might include sending notice to the obligor, conducting income withholding hearings, and sending notice to the payor. Depending on the context in which it is used, "court" may refer either to the specific named court in the enacting state or to the court or agency of another state with similar functions. States may elect to use an administrative agency, rather than a court, to issue withholding orders. "Agency" may also refer to a court or agency of a sister state which performs similar functions.

The definition of "agency" refers to the public agency which, in accordance with the Child Support Enforcement Amendments of 1984, each state must designate to administer its income withholding system. It is assumed that in most states the IV-D agency will be the income withholding agency. Where this is not the case drafters will have to examine the Act carefully and insert the name of the IV-D agency rather than the withholding agency where the context requires.

As a rule, where the terms "court" or "agency" appear in brackets, they refer to the court or agency of the enacting state; where they appear without brackets, they refer to the court or agency of the sister state requesting the interstate income withholding. At times the terms [court] [agency] appear together. Legislative drafters in this case should choose the appropriate one for their state.

"Child," as defined in section (b)(5), includes both minor children and children above the age of majority with respect to whom a support order exists. The latter might include college students or other dependant children above the age of majority such as incompetent young adults. Some states impose liability for support of such "adult children." See, e.g., D.C. Code Ann. §21-586 (1981); Ill. Ann. Stat. ch. 40, §513 (Smith-Hurd 1983). Where another state allows post-minority support, the enacting state should make its income withholding scheme available to enforce sister state support orders pertaining to such children. This also is consistent with the Child Support Enforcement Amendments of 1984, which permits enforcement of support obligations through state IV-D agencies "on behalf of a child who is not a minor child." Social Security Act §466(e), U.S.C. §666(e).

"Obligor," as defined in section (b)(6), is the term used in this Act for the person who is required to make payments under a support order. It corresponds generally to the term "absent parent" which is used in Title IV-D of the Social Security Act.

An "obligee" as defined in section (b)(7) includes not only a person entitled to receive support payments - who might be the custodial parent or another custodian - but also an agency to which a person has assigned his or her right of support.

The term "income," (b)(8), for interstate withholding purposes, should be defined the same as in intrastate withholding cases. The state's usual definition may simply be cross-referenced. Using the forum state's definition of income should simplify administration of the interstate withholding program and ensure that policies of the forum state with respect to what income is reachable are not contravened. See, e.g., Young v. Young, 467 A.2d 33 (Pa. 1983) in which a state

law barring attachment of municipal pension benefits was held to bar equitable distribution of those benefits under a sister state divorce decree.

According to federal law, states must include wages in their income withholding system; however, they may extend withholding to include other types of income. Social Security Act §466(b)(8), 42 U.S.C. §666(b)(8). Most states which, prior to the federal Child Support Enforcement Amendments of 1984, already provided for some form of income withholding have a broad definition of income. For example, Illinois defines income as "any form of periodic payment to an individual, regardless of source, including, but not limited to: wages, salary, commission, compensation as an independent contractor, worker's compensation, disability, annuity and retirement benefits, and any other payments made by any person, private entity, federal or state government, any unit of local government, school district or any other entity created by Public Act." Ill. Rev. Stat. ch. 23 §10-16.2(4) (Smith-Hurd 1983). Many states have adopted broad, catch-all phrases in defining income, such as "earnings or other entitlements to money, without regard to source." Ariz. Rev. Stat. Ann. §§12-2454, 25-323.

The only limit on a state's definition of income are those required by other federal laws. For example, the Louisiana Supreme Court has recently held that maritime worker's benefits are exempt from garnishment for child support due to an anti-attachment provision of the federal Longshoremen's and Harbor Worker's Compensation Act. Thibodeaux v. Thibodeaux, 454 So.2d 813 (1984). Under the Retirement Equity Act of 1984, Pub. L. No. 98-397, Congress has provided that retirement benefits may be withheld to pay for child and spousal support, provided they are based upon a "qualified domestic relations order" as defined in the statute.

The definition of "income derived in this jurisdiction," subsection (b)(10), is essentially a statement of "the jurisdiction of the courts or withholding agency in the forum state. This statute is not based on personal jurisdiction over the obligor. Rather, it is based on the exercise of quasi in rem jurisdiction over the obligor's property, i.e., his income which is derived in the forum state. However, in most cases the forum state will be where the obligor works, and this state will also have personal jurisdiction over the obligor. The use of quasi in rem jurisdiction also distinguishes this procedure from procedures to establish a support obligation initially. There must be personal jurisdiction over an obligor to establish the support obligation in the first instance. The ability to establish personal jurisdiction by long-arm statute for the purpose of establishing the initial support obligation is limited. Kulko v. California Superior Court, 436 U.S. 84 (1978).

The key jurisdictional question for income withholding purposes is whether the forum state has jurisdiction over the payor of income, usually an employer. Only with such jurisdiction can the forum state compel the payor to comply with income withholding. In the majority of cases in which the obligor is employed by the payor, the payor will have its principal place of business in the forum state or will be reachable by the state's long-arm statute because it is doing business in the state. The payor's transaction of business in the forum state, i.e., the obligor works there, should satisfy the "minimum contacts" requirement. International Shoe Co. v. Washington, 360 U.S. 310 (1945). In short, the forum state will usually be where the obligor works.* Preference for the obligor's state of employment will promote fairness by minimizing the obligor's expenses if he wishes to contest withholding. The one exception to this rule might be when the requesting state itself could obtain jurisdiction over the payor. In such instances, use of the state's regular withholding scheme may be preferred, without reverting to this interstate Act. When a state can use its own long-arm statute to reach a payor it may be assumed that it would do so rather than use an interstate income withholding request.

There may be other instances where the forum state is not where the obligor works or resides, such as when income withholding is being sought against pension benefits. The forum state may have little or no direct contacts with the obligor. The Supreme Court, in Shaffer v. Heitner, 433 U.S. 186 (1977), cast doubt on the availability of quasi in rem jurisdiction where the defendant does not have "minimum contacts" with the state where the property is located. However, the Court in Shaffer observed that this holding did not apply to the enforcement of a judgment. In the Court's words:

Once it has been determined by a court of competent jurisdiction that the defendant is a debtor to the plaintiff, there would seem to be no unfairness in allowing an action to realize on the debt in a State where the defendant has property, whether or not that state would have jurisdiction to determine the existence of the debt on an original matter. Id. at 210 n. 36.

Since Shaffer was decided, only two courts have ruled whether or not it applies to enforcement of child support.

*The proposed regulations which implement the 1984 Child Support Enforcement Amendments require that the requesting state agency seek withholding in the state where the obligor is employed. 49 Fed. Reg. 36803 (Sept. 19, 1984) to be codified at 45 C.F.R. 303.100(g)(3). Legislative drafters should consult the final regulations on this point.

Both courts held that, based upon the enforcement of an existing judgment exception, Shaffer did not apply. Huggins v. Diehard, 134 Ariz. 98, 654 P.2d 32 (Ariz. App. 1982); Rich v. Rich, 93 Misc. 2d 409, 402 N.Y.S. 2d 767 (N.Y. Sup. Ct. 1978). Although in many cases a support order is not deemed a judgment, policy considerations of Shaffer suggest that it be treated as one in this context. The Court's purpose in not recognizing quasi in rem jurisdiction without the defendant's minimum contacts to the forum state is that it believed a defendant should not be forced to choose between default and defending an unliquidated claim in a state in which he has no contacts. The Court reasoned that it would be unfair to make a defendant litigate the validity of a claim in an alien forum. Child support orders are liquidated claims; the original order, litigated in a state with personal jurisdiction over both parties, sets the exact amount of support. The defendant had his day in court and now, like any other defendant debtor, has limited defenses to an enforcement actions, such as satisfaction of the judgment.

Subsection (c) provides that income withholding may be used in addition to any other remedies that might be available under state law to enforce a sister state support order. These might include remedies available through URESA or the Uniform Enforcement of Foreign Judgments Act. Monies collected under other procedures will be duly credited in determining the amount to be withheld under the withholding procedures. See Section 8(b). The withholding procedure should not be delayed because other remedies are available or vice versa. Since the Child Support Enforcement Amendments of 1984 mandate the use of withholding, however, this Act must be utilized in IV-D cases upon the accumulation of arrearages sufficient to trigger withholding.

SECTION 2. INITIATION OF INCOME WITHHOLDING AND COOPERATION WITH OTHER JURISDICTIONS

On behalf of any client for whom the [agency] is already providing services, or on application of a resident of this state, an obligee or obligor of a support order issued by this state, or an agency to whom the obligee has assigned support rights, the [agency] shall promptly request the agency of another jurisdiction in which the obligor of a support order derives income to enter the order for the purpose of obtaining income withholding against such income. The [agency] shall compile and transmit promptly to the agency of the other jurisdiction all documentation required to enter a support order for this purpose. The [agency] also shall transmit

immediately to the agency of the other jurisdiction a certified copy of any subsequent modifications of the support order. If the [agency] receives notice that the obligor is contesting income withholding in another jurisdiction, it shall immediately notify the individual obligee of the date, time, and place of the hearings and of the obligee's right to attend.

COMMENT

This section describes the responsibility of the income withholding agency in the enacting state to request income withholding in another state. It is different from the remaining sections which detail the responsibilities of the enacting state upon receiving a request (i.e., acting as the forum state) from another state to obtain and enforce income withholding. Under the Child Support Enforcement Amendments of 1984, both the forum and requesting state may receive incentive payments for child support collected on an interstate basis. Social Security Act §458(d), 42 U.S.C. §658(d).

The income withholding agency is required to request interstate withholding on behalf of its current IV-D clients, as well as for state residents who apply for this service through the IV-D agency. This corresponds to the federal requirement for intrastate cases which requires that income withholding services be made available to IV-D agency clients, both AFDC and non-AFDC. Social Security Act §466(b)(2), 42 U.S.C. §666(b)(2). Non-AFDC families may specifically apply to the IV-D agency to take advantage of the withholding remedy, although many states recognize a private right of action to seek this relief. See, e.g., Cal. Civ. Code. Ann. §4701(b)(1); Tex. Fam. Code Ann. §14.091. In addition, under this section, the agency must also initiate this process for a person who resides out-of-state, when the underlying support order was issued by the agency's state. This will likely occur when the obligee has moved out of state and all the relevant documents, including payment records, are still in possession of the enacting state or when the obligee moved out of state and was receiving payments directly from the obligor, without ever utilizing agency services of a new state. In any event, the obligee could also elect to go to the agency where she or he now resides for purposes of initiating an interstate request for income withholding.

This section also requires the agency to transmit all documentation required by the forum state in order to enter the support order. This means that the agency will have to first determine the forum state's documentation requirements.

This section also requires the requesting state to transmit to the forum state any modifications to the support order, including any termination of the support order. Section 9(a) is the counterpart to this provision, requiring a forum state to amend income withholding in light of any modifications received.

Finally, this section requires the agency to immediately notify the individual obligee when a hearing is scheduled, indicating a challenge to the withholding request. Under Section 4(b), the forum state agency must alert the requesting agency of any pending challenge. Notice to the obligee assures that this individual will be kept aware of case developments and, more importantly, afforded an opportunity to appear at the hearing, either in person, or by telephone (Section 5 (d)) if the individual cares to appear.

SECTION 3. RESPONSIBILITIES FOR ENTERING A SUPPORT ORDER OF ANOTHER JURISDICTION FOR PURPOSES OF INCOME WITHHOLDING

(a) Upon receiving a support order of another jurisdiction with the documentation specified in subsection (b) from an agency of another jurisdiction [an obligee, an obligor, or an attorney for either], the [agency] [shall enter this order]. [shall file these documents with the clerk of the court in which withholding is being sought. [Alternatively, the obligor or obligee may file the documents specified in subsection (b) with the clerk of the court in which income withholding is being sought.] The clerk of the court shall accept the documents filed and such acceptance shall constitute entry of the support order under this Act.]

(b) The following documentation is required for the entry of a support order of another jurisdiction:

- (1) a certified copy of the support order with all modifications;
- (2) a certified copy of an income withholding [order/notice], if any, still in effect;
- (3) a copy of the portion of the income withholding statute of the jurisdiction which issued the support order which states the requirements for obtaining income withholding under the law of that jurisdiction;
- (4) a sworn statement of the obligee or certified statement of the agency of the arrearages and the assignment of support rights, if any;

(5) a statement of:

- (a) the name, address, and social security number of the obligor, if known;
- (b) the name and address of the obligor's employer or of any other source of income of the obligor derived in this state against which income withholding is sought;
- (c) The name and address of the agency or person to whom support payments collected by income withholding shall be transmitted.

(c) If the documentation received by the [agency] under subsection (a) does not conform to the requirements of subsection (b), the [agency] shall remedy any defect which it can without the assistance of the requesting agency [or person]. If the [agency] is unable to make such corrections, the requesting agency [or person] shall immediately be notified of the necessary additions or corrections. In neither case shall the documentation be returned. The [agency and court] shall accept the documentation required by subsections (a) and (b) even if it is not in the usual form required by state or local rules, so long as the substantive requirements of these subsections are met.

(d) A support order entered under subsection (a) shall be enforceable by income withholding against income derived in this state in the manner and with the effect as set forth in sections 4-11 of this Act and [cite to this state's regular income withholding provisions]. Entry of the order shall not confer jurisdiction on the [courts/agencies] of this state for any purpose other than income withholding.

COMMENT

Subsection (a) describes the responsibilities of the forum state's agency. Upon receiving the request for income withholding and accompanying documentation set forth in subsection (b), the agency will enter the support order by the procedure set forth in subsection (a). Entry of a sister state support order under this Act is the cornerstone of this interstate withholding procedure. Once the order is entered, it is enforceable by the forum state's own income withholding law, with some specific minor modifications to accommodate interstate needs. Subsection (b). It is assumed that states will have enacted an income withholding law or modified their existing one to conform to the Child Support Enforcement Amendments of 1984 by October 1, 1985 or shortly thereafter.

See Social Security Act §466(b), 42 U.S.C. §666(b). It should be noted that this Act may be used only for enforcement of support orders by income withholding. To use other remedies which may be available under state law it will be necessary to use URESA, the Uniform Enforcement of Foreign Judgments Act, a suit on the judgment of another state or some other method of enforcement.

As a general rule, full faith and credit is granted to judgments of a sister state by allowing a suit on the judgment in the forum state. This obviously is a cumbersome process. The Uniform Enforcement of Foreign Judgments Act seeks to circumvent this problem by providing a simpler procedure for registration and enforcement of foreign judgments which would otherwise be entitled to full faith and credit.

Under the traditional view, however, child support orders which are non-final and modifiable are not entitled to full faith and credit. Sistare v. Sistare, 218 U.S. 1 (1910); Restatement (Second) Conflict of Laws §109 (1971). A more contemporary view rejects this notion and would entitle support orders to full faith and credit, regardless of their modifiability. See, Barber v. Barber, 323 U.S. 77 (1944) (Jackson, concurring); Light v. Light, 12 Ill. 2d 502, 147 N.E.2d 34 (1958). Even if the traditional view prevails, a state may recognize a sister state support order under the principle of comity even though not constitutionally compelled to do so. This statute is designed to do precisely that for the specific purpose of allowing income withholding to enforce sister state support orders. It should be noted that under the definition of support order in section 1(b)(1) administrative orders for support as well as judicial orders may be entered and enforced under this Act.

Two kinds of optional language are included in subsection (a). The first choice of language depends on whether the state has chosen to operate its intrastate income withholding system through an administrative agency or through the courts. Model language is provided for both options. Both options are consistent with the 1984 Child Support Enforcement Amendments.

In addition, subsection (a) provides optional language to allow for private party access, whether pro se or through private counsel, to the forum state's income withholding system to enforce a sister state support order. This would be especially logical in states which already permit private parties to initiate income withholding on an intrastate basis. See, e.g., Minn. Stat. Ann. §518.611.1. This option is permissible under the 1984 Amendments but is not required.

If a state uses an administrative enforcement mechanism and does not make it available through private counsel, subsection (a) would read:

"Upon receiving a support order ... from an agency of another jurisdiction, the [agency] shall enter this order."

If private parties are to be allowed access to the administrative remedy, this section would read:

"Upon receiving a support order ... from an agency of another jurisdiction, an obligee, an obligor or an attorney for either, the [agency] shall enter this order."

If the withholding system is operated through the courts and the state chooses to allow private party access subsection (a) would read:

"Upon receiving a support order ... from an agency of another jurisdiction, an obligee, an obligor or an attorney for either, the [agency] shall file these documents with the clerk of the court in which withholding is being sought. Alternatively, the obligor or obligee or the attorney for either may file the documents specified in section (b) with the clerk of the court in which income withholding is being sought. The clerk of the court shall accept the documents filed and such acceptance shall constitute entry of the support order under this Act."

If the state does not wish to allow private party access to the court-based interstate withholding procedure, subsection (a) would read:

"Upon receiving a support order ... from an agency of another jurisdiction, the agency shall file these documents with the clerk of the court in which withholding is being sought. The clerk of the court shall accept the documents filed and such acceptance shall constitute entry of the support order under this Act."

The list of documents required is largely self-explanatory. Subsection (b)(2) applies only when payments were already being withheld from the obligor's income under an income withholding order or notice, still in effect, previously issued in another state. As used throughout this Act, the term "order/notice" refers to the document submitted to the payor requiring him to withhold support payments from the obligor's income. States

have different names for this document. It may also be called, for example, "employer's notice" or an "order of wage withholding." The enacting state should, where order/notice appears in brackets throughout this Act, substitute whatever term it uses. Throughout this Act the term "income withholding" is used. It should be noted that some states may use different, interchangeable terms, such as wage withholding, wage assignment, income assignment, or the like. Again, the enacting state may substitute its usual intrastate term.

Subsection (b)(3) is included because the triggering event in the state which originally issued the support order, i.e., amount of arrearages necessary to mandate income withholding, will determine when income withholding should commence.

Subsection (b)(4), which requires a statement of arrearages and assignment of support rights, can be met in one of two ways. Either the obligee can submit a sworn statement or affidavit or the requesting agency may certify the arrearages and any assignment of support rights. Agency certification will probably be used in states where public agencies or clearinghouses collect and disburse support payments. In such instances a certified copy of the payment record as of the date of the first arrearage or a certified statement of the arrearages will suffice.

Subsection (b)(5) places a burden on the requesting state to provide the name, address and social security number of the obligor and the names and addresses of obligor's employers and other sources of income derived in the forum state. Requesting states may use the Federal Parent Locator Service (FPLS) to obtain this information. Under the Child Support Enforcement Amendments of 1984, access to the FPLS has been liberalized. A state no longer need exhaust its own locator resources before requesting assistance from the FPLS. Social Security Act §453(f), 42 U.S.C. §653(f). A state may also request assistance from the forum state through that state's parent locator system. Furthermore, as noted in the comments to section 3(c), the forum state's location services may be used if it turns out that the information sent was incorrect.

Subsection (c) requires the forum state agency to take steps to correct faulty or incomplete documentation, without returning it to the requesting agency, when possible. This should avoid unnecessary delays and advance Congress' intent of expeditious handling of income withholding cases. In addition to providing for correction of errors, this subsection requires the agency and court to accept or process documents which are correct in substance but not form.

Examples of cases in which improper documentation is submitted which the state may correct or accept as provided include the following:

1. The forum state requires information to be submitted on a special form or in a special format; the requesting agency does not use this form but nonetheless provides all the required information. The forum state should accept the documents as provided or fill out the correct forms and attach the sworn originals.
2. Incorrect information on the obligor's address or source of income is sent by the requesting state. The forum state, through its normal locate procedures, should attempt to provide this data. This does not place any additional burdens on the forum state which is already required to help sister states in this regard. 42 U.S.C. §654(9); 45 C.F.R. 303.7.

Subsection (d) is the central section of this Act. Once a support order is "entered" in the agency or court through the procedures described in this section, it essentially becomes an order of the forum state for the sole and limited purpose of obtaining income withholding. This subsection makes it clear that the entered order does not confer jurisdiction on the court or agency for any other purpose such as resolution of disputes over custody or visitation or modification of the original support order, whether prospectively or retroactively. See discussion of modification issues in Section 5.

SECTION 4. NOTICE

(a) On the date a support order is entered pursuant to section 3, the [agency] [court] shall serve upon the obligor, in accordance with section [cite to notice provision for income withholding], notice of a proposed income withholding. That notice shall contain the same information required in section [cite to regular notice section]. The notice shall also advise the obligor that the income withholding was requested on the basis of a support order of another jurisdiction. The date of serving notice on the obligor shall be the equivalent of [the state's own triggering event] for the purpose of measuring time for holding a hearing and rendering a decision.

(b) If the obligor seeks a hearing to contest the proposed income withholding the [agency] shall immediately notify the requesting agency [obligee, obligor or an attorney for either] of the date, time and place of the hearing and of the obligee's right to attend the hearing.

COMMENT

On the day the original support order is entered under this procedure, notice of the proposed withholding must be sent to the obligor. The forum state will use its regular notice procedures to notify the obligor of the intent to withhold income. The significance of specifying when advance notice should be sent to the obligor is that, under the new federal law, within 45 days of such notice the state must determine whether income withholding will take place if the obligor contests it.

Because locating communicating between states takes an indeterminate amount of time, a gap will inevitably occur between the happening of the triggering event in the requesting state and the sending of notice in the forum state. Accordingly, the Act requires the requesting states to "promptly" request (section 2) and the forum state to "promptly" enter (section 3) support orders without specifying an exact time frame for so doing. However, once the order is entered the notice must be sent at once.

The notice should be served according to usual state practice and contain the same information required in an intrastate income withholding notice. According to section 466(b)(4)(B) of the Social Security Act, as amended by the Child Support Enforcement Amendments of 1984, such notice must alert the absent parent to the proposed withholding and to the procedures to follow if he or she wishes to contest such withholding on the grounds that it is not proper due to a mistake of fact.

This notice should state a method and a time period within which the parent must contact the court or agency in order to contest withholding and should state that failure to do so will result in the implementation of withholding. The only added requirement of this Act is that the notice indicate that the proposed withholding is based upon a sister state support order.

The 1984 Amendments generally require that advance notice of the proposed withholding be sent to the obligor, as described in the previous paragraph. However, the law provides an exception for those states which were operating an income withholding system prior to the date of enactment of the 1984 Amendments. They are not required to provide advance notice as described in the Amendments to obligors so long as due process requirements are met. Social Security Act §466(b)(4)(B), 42 U.S.C. §566(b)(4)(B).

States which fall within this exception should modify their withholding systems to provide some form of notice of withholding and an opportunity to contest before money is actually withheld in interstate cases in order to meet equitable and due process concerns. (Often some notice will have been given in intrastate cases when the original support order is made.)

In addition, states which use automatic, immediate withholding as the payment method in every support case, without first requiring any arrearages, will not generally provide for any special notice or contest procedures dealing with withholding. In those cases, the parties are personally before the court at the time a withholding order is imposed and can resolve any disputes regarding withholding at that time. These states will have to enact special notice and hearing procedures as described in the Amendments for interstate withholding cases in order to ensure adequate due process protection for these obligors.

Finally, this section initiates the running of the 45 days a state has to notify the obligor of the proposed withholding, hold a hearing if one is requested, and inform the obligor of whether or not withholding will occur. Section 466(b)(4)(A) Social Security Act, as amended. To further expedite the handling of these cases, this Act places an obligation on the requesting state to promptly take steps to initiate the interstate income withholding process (see Section 2), and upon the forum state to promptly enter sister state orders. See Section 3(a).

SECTION 5. INCOME WITHHOLDING HEARING

(a) At any hearing contesting proposed income withholding based on a support order entered under section 3, the entered order, accompanying sworn or certified statement, and a certified copy of an income withholding [order/notice], if any, still in effect shall constitute prima facie proof, without further proof or foundation, that the support order is valid, that the amount of current support payments and arrearages is as stated, and that the obligee would be entitled to income withholding under the law of the jurisdiction which issued the support order.

(b) Once a prima facie case has been established, the obligor may raise only the following:

- (1) that withholding is not proper because of a mistake of fact that is not res judicata concerning such matters as an error in the amount of current support owed or

arrearage that had accrued, mistaken identity of the obligor; or error in the amount of income to be withheld;

- (2) that the court or agency which issued the support order entered under this Act lacked personal jurisdiction over the obligor;
- (3) that the support order entered under this Act was obtained by fraud; or
- (4) that the statute of limitations under section 11(c) precludes enforcement of all or part of the arrearages.

The burden shall be on the obligor to establish these defenses.

(c) If the obligor presents evidence which constitutes a full or partial defense, the [court] [agency] shall, on the request of the obligee, continue the case to permit further evidence relative to the defense to be adduced by either party, provided, however, that if the obligor acknowledges liability sufficient to entitle the obligee to income withholding, the [agency] [court] shall require income withholding for the payment of current support payments under the support order and of so much of any arrearage as is not in dispute, while continuing the case with respect to those matters still in dispute. The [court] [agency] shall determine those matters still in dispute as soon as possible, and if appropriate shall modify the withholding order to conform to that resolution.

(d) In addition to other procedural devices available to a party, any party to the proceeding or a guardian ad litem or other representative of the child may adduce testimony of witnesses in another state, including the parties and any of the children, by deposition, by written discovery, by photographic discovery such as videotaped depositions or by personal appearance before the [court] [agency] by telephone or photographic means. The [court] [agency] on its own motion may direct that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony shall be taken.

(e) A [court] [agency] of this state may request the appropriate court or agency of another state to hold a hearing to adduce evidence, to permit a deposition to be taken before the court or agency, to order a party to produce or give evidence under other procedures of that state and to forward to

the [court] [agency] of this state certified copies of the evidence adduced in compliance with the request.

(f) Upon request of a court or agency of another state the [courts] [agencies] of this state which are competent to hear support matters may order a person in this state to appear at a hearing or deposition before the [court] [agency] to adduce evidence or to produce or give evidence under other procedures available in this state. A certified copy of the evidence adduced, such as a transcript or videotape, shall be forwarded by [the clerk of the court] [agency] to the requesting court or agency.

(g) A person within this state may voluntarily testify by statement or affidavit in this state for use in a proceeding to obtain income withholding outside this state.

COMMENT

This section addresses the hearing an obligor may request if he wishes to contest the income withholding. Under subsection (a) the entered support order, the existing income withholding order, if any, and the sworn or certified statement of the appropriate arrearage (see section 3(a)(4)) may be admitted into evidence without any further proof or foundation required and constitute prima facie proof that, absent a valid defense under subsection (b), the obligee is entitled to income withholding under the law of the jurisdiction which issued the support order. This means that the amount of current support and arrearage is as stated and that the triggering event, i.e., amount of arrears required to commence withholding, of the jurisdiction which rendered the support order has been met.

Once a prima facie case is established, subsection (b) shifts the burden of proof to the obligor. The obligor's defenses are limited. They include those defenses permitted by the Child Support Enforcement Amendments of 1984. According to the Act's legislative history, these defenses are restricted to "mistakes of fact," see Subsection (b)(4), which include "errors in the amount of current support owed, errors in the amount of arrearage that had accrued, or mistaken identity of the alleged obligor." The obligor cannot "contest the proposed withholding on other grounds, such as the inappropriateness of the amount of support ordered to be paid, changed financial circumstances of the obligor, or lack of visitation." H.R. Rep. No. 98-527, 98th Cong., 1st Sess. 33 (1983). Such claims, though important, must be pursued through a separate legal action in the state which has jurisdiction over the original support order.

Limitation of defenses to mistakes of fact distinguishes this Act from URESA and RURESAs. Courts have interpreted the latter uniform acts to allow them to consider current support needs and to enter orders for higher or lower support amounts. Balestrine v. Jordan, 275 S.C. 442, 272 S.E.2d 438 (1980); Jarmillo v. Jarmillo, 27 Wash. App. 391, 618 P.2d 528 (1980); McKenna v. McKenna, 253 Ga. 6, 315 S.E. 2d 885 (Ga. 1984). Modification of the support order in the forum state is not permitted under this Act.

In drafting this section, the Advisory Group discussed in great detail the issue of modification of the support amount, both retroactively and prospectively. On policy grounds and for practical considerations, it was determined that modification should not be allowed in the forum state. The policy reasons are as follows:

- (1) Experience under URESA has shown that the responding (forum) state frequently has no relationship to the obligee and dependent child, and they usually are not able to appear in person and often are not notified of hearings, resulting in modification orders which are unreasonably low.
- (2) Modification claims needlessly delay enforcement actions on existing arrearages. It was the intent of Congress in the 1984 Amendments to establish an expeditious system for enforcing support orders as written through an automatic wage withholding system, relying on a separate proceeding to consider modification of the order.
- (3) The obligor's right to seek modification remains intact. He or she may obtain modification in the state which has jurisdiction over the support order and have this modification recognized in the forum state, with any financial adjustments necessary made against future withholding. See Sections 2 and 9(a) regarding modification.
- (4) Where support orders are retroactively modifiable in the original state, immediate withholding should be permitted in the forum state. If the obligor has his arrearages reduced in the original state, the forum state will be notified and withholding adjusted accordingly. See Sections 2, 9(a). As the withholding requirement is applied to new support obligations, the accumulation of large arrearages should not occur in most cases. As a practical matter, courts will seldom retroactively reduce small arrearages.

By limiting jurisdiction in the forum state exclusively to enforcement, this Act follows the example of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act of 1980. Under these statutes a state may have authority to enforce a custody decree but none to modify it. UCCJA and comments; 28 U.S.C. §1738A(a). Modification authority, if any, is independent of enforcement authority and must be based upon specified jurisdictional grounds. UCCJA 14; 28 U.S.C. §1738A(f)7-

In addition to mistakes of fact, three other defenses are permitted under this act. Subsections (b)(2)-(4). These include two collateral attacks on the original judgment which could even be raised in the state which issued the original order if it sought to enforce it. These attacks include charges that the court which issued the original support order lacked jurisdiction (if this had not been previously litigated), or that there was fraud in the procurement of the judgment. See, Griffin v. Griffin, 327 U.S. 220 (1945); Scoles and Hay, Conflicts of Law §24.14 (1982); Leflar, American Conflicts of Law 157 (1977); Restatement (Second), Conflicts of Law §105 (1971). Fraud in the procurement of the support order refers to fraud in the actual obtaining of the order, e.g., the defendant was lured into the jurisdiction in order to obtain personal jurisdiction. The third defense concerns the statute of limitation. See Section 12(c) for choice of law provision pertaining to statute of limitations.

If the obligor meets his burden of proof, it may be necessary to obtain additional evidence in order to resolve the dispute. Subsections (c)-(g) offer means of proving a case without requiring the obligee or other witnesses to travel to the forum state. Subsections (c)-(e) apply when income withholding is being sought in the enacting state; sections (f)-(g) apply when the enacting state is seeking withholding elsewhere. The most common method of presenting evidence, without live courtroom testimony, is by deposition or interrogatory. These sections should augment existing state rules of civil procedure which address out-of-state evidence. For example, many states have adopted the Federal Rule of Civil Procedure 32(a)(3), which permits offering a deposition as evidence at a trial if the court finds that "the witness is at a greater distance than 100 miles from the place of trial or hearing." Many of these provisions are similar to those set forth in the Uniform Child Custody Jurisdiction Act, sections 18-20; therefore state experience under this Uniform Act in adducing evidence across state lines should be instructive. For a description of these techniques see Hoff, P., Schulman, J., and Volenik, A., Interstate Child Custody Disputes and Parental Kidnapping: Policy, Practice and Law, ch. 7 (1982).

Under subsection (c), an obligee may request that the case be continued for the purpose of submitting additional evidence should the obligor fully or partially meet his burden of proof. Income withholding must commence, however, where the right to such withholding is not in dispute, but only the extent of arrearages remains in controversy. This will occur when there is proof that an arrearage sufficient to trigger income withholding exists, but the full amount of arrearages is in dispute. In this scenario, withholding to cover current support and uncontested arrearages will commence. A subsequent hearing will be held to settle the dispute and the original withholding notice to the employer will be modified, if necessary. Subsection (d) addresses methods of collecting evidence, such as interrogatories, depositions, and court appearances live or by telephone. While it may be necessary to continue the case while such evidence is being obtained, these devices are also available for use at the initial hearing. Provisions for notifying the obligee of this first hearing (sections 2, 4(b)) should encourage this result.

SECTION 6. INCOME WITHHOLDING [ORDER/NOTICE]

If the obligor does not request a hearing in the time provided, or if a hearing is held and it is determined that the obligee has or is entitled to income withholding under the local law of the jurisdiction which issued the support order, the [agency] [court] shall issue an income withholding [order/notice] under section [cite to state's regular income withholding provision for notice to obligor of withholding decision]. The [agency] shall notify the requesting agency [or person] of the date upon which withholding will begin.

SECTION 7. NOTICE TO [EMPLOYER/PAYOR] AND OTHER PROVISIONS

The provisions of sections [governing this state's income withholding notice to the employer, penalties and sanctions against noncomplying employers, employer fees, protections against employer retaliation, payment directions, ability to issue a single check, etc.] apply to income withholding based on a support order of another jurisdiction entered under this Act.

COMMENT

These sections incorporate the state's own provisions for issuing an income withholding notice or order to the employer and for other employer-related matters. The latter include

requirements of the Child Support Enforcement Amendments of 1984, such as: contents of the notice to the employer, employer fees, payment mechanisms, and liability of employers who fail to withhold wages or who take adverse job action against an employee who is subject to wage withholding. The agency in the forum state must notify the requesting agency or person of the date on which withholding will begin.

Under section 7 the state will use its regular procedures to notify the employer or other payor of income that support payments must be withheld. The employer will treat the order or notice exactly like any other withholding order or notice. In fact, because of statutory limits on the content of the notice to the employer, the employer probably will not even know the withholding is based on a sister state order. See Social Security Act §466(b)(6)(A)(ii), 42 U.S.C. §666(b)(6)(A)(ii). For that reason, states will probably choose to require payment through the state agency in cases initiated by private counsel or pro se as well as in agency cases.

The language in section 6, "entitled to income withholding under the local law of the jurisdiction which issued the support order," refers to the triggering event in the original state, i.e., whether the amount of arrearages satisfies the requirement for income withholding under the law of the state that originally issued the support order. See also section 11 (b)(2).

SECTION 8. DISTRIBUTION OF COLLECTED SUPPORT PAYMENTS

(a) The income withholding [order/notice] shall direct payment to be made to [agency]. The [agency] shall promptly transmit payments received pursuant to an income withholding [order/notice] based on a support order of another jurisdiction entered under this Act to the agency or person designated in section 3(b)(5)(c).

(b) A support order entered pursuant to section 3 does not nullify and is not nullified by a support order made by a court of this state pursuant to any other law or by a support order made by a court of any other state. Amounts collected by any withholding of income shall be credited against the amounts accruing or accrued for any period under any support orders issued either by this state or by a sister state.

COMMENT

Income withheld under this Act is to be paid to the income withholding agency of the forum state, which in turn will

forward it to the requesting agency or person. If the forum state uses a different entity such as a private agency or bank to collect and disburse such funds, as allowed under the Child Support Enforcement Amendments of 1984, Social Security Act §466(b)(5), 42 U.S.C. §666(b)(5), this entity should also collect and disburse funds withheld in interstate cases under this Act.

Entry of a support order for withholding purposes under this Act does not nullify any other support order which may exist - whether issued by the forum state or another state. When two or more orders exist for the support of one child by an absent parent, any amount collected will be credited against both orders. Such a situation may exist, for example, if there is both an original support order and a subsequent URS order. Amounts withheld are to be credited against both orders.

SECTION 9. CHANGES

(a) Changes in original order: The [agency], upon receiving a certified copy of any amendment or modification to a support order entered pursuant to section 3, shall initiate, as though it was a support order of this state, necessary procedures to amend or modify the income withholding [order/notice] of this state which was based upon the entered support order. [The court shall amend or modify the income withholding [order/notice] to conform to the modified support order.]

(b) Changes in jurisdiction: If the [agency] determines that the obligor has obtained employment in another state or has a new or additional source of income in another state, it shall notify the agency which requested the income withholding of the changes within five working days of receiving that information and shall forward to that agency all information it has or can obtain with respect to the obligor's new address and the name and address of the obligor's new employer or other source of income. The [agency] shall include with the notice a certified copy of the income withholding [order/notice] in effect in this state.

COMMENT

Subsection (a) assures that in the event a support order entered in the forum state is modified in another state, the forum state will take the necessary steps to modify the amounts withheld accordingly. The last sentence, in brackets, applies in states which use the judicial system to impose income withholding. The obligation of an agency to notify a sister

state agency of any change to a support order being enforced in the sister state may be found in section 2.

Under subsection (b), an agency in the forum state must notify the requesting agency when the obligor's source of income has shifted to yet another state. This presumes that when there has merely been a shift of a source of income within the state, e.g., if the obligor gets a new job, the state agency will take necessary steps, as it would with any other in state income withholding case, to obtain withholding against the new source of income within the state. Some states have facilitated the task of identifying new income by requiring employers to notify the agency of any change in the obligor/employee's status, including the name and address of a new employer, if known. N.D. Cent. Code §§14-09-09.1(6). The proposed federal regulations implementing the 1984 Amendments require that states impose an obligation on the employer to provide this information to the state. 49 Fed. Reg. 36803 (Sept. 19, 1984) 45 C.F.R. §302.100(d)(2). States should specifically provide that income withholding orders will apply against successor employers.

SECTION 10. VOLUNTARY INCOME WITHHOLDING

Any person who is the obligor on a support order of another jurisdiction may obtain voluntary income withholding by filing with the [agency] [court] a request for such withholding and a certified copy of the support order of a sister state. The [agency] [court] shall issue an income withholding [order/notice] under section [regular voluntary income withholding section]. Payment shall be made to the [agency].

COMMENT

The Child Support Enforcement Amendments of 1984 require states to withhold income upon the absent parent's request. This section allows such voluntary withholding when the underlying support order is from another state.

SECTION 11. CHOICE OF LAW

(a) The local law of this state shall apply in all actions and proceedings concerning the issuance, enforcement and duration of income withholding [orders/notices] issued by a [court] [agency] of this state, which is based upon a support order of another jurisdiction entered pursuant to section 3, except as provided in subsections (b) and (c).

(b) The local law of the jurisdiction which issued the support order shall govern the following:

- (1) the interpretation of the support order entered under section 3, including amount, form of payment, and the duration of support;
- (2) the amount of support arrearages necessary to require the issuance of an income withholding [order/notice].
- (3) the definition of what costs, in addition to the periodic support obligation, are included as arrearages which are enforceable by income withholding, including but not limited to interest, attorney's fees, court costs, and costs of paternity testing.

(c) The [court] [agency] shall apply the statute of limitations for maintaining an action on arrearages of support payments of either the local law of this state or of the state which issued the support order entered under this Act, whichever is longer.

COMMENT

In keeping with a major principle of this Act -- that the forum state's regular income withholding laws and procedures be applied to the greatest extent possible -- most choice of law questions are resolved in favor of the local law of the forum, making it simpler for decision-makers to apply this Act.

Only three issues must be determined by the law of the state which issued the order. First are the questions of the interpretation of the original support order including questions about the amount and form of payments and the duration of the order. For example, the law of the state issuing the order would determine the meaning of the term "minor child" as used in an order, whether support may continue beyond the age of majority for a college student or whether in-kind payments would be credited against the support obligations. The law of the state which issued the original order determines the amount of support arrearages necessary to require the commencement of withholding. This should pose no problem as a request should not be made until this condition is met and a copy of the section of the state's withholding law containing this condition should be included with the request. Third, the law of the state which issued the support order determines what items are included as arrearages which may be

enforced by income withholding. These could include interest on late payments, attorneys' fees or costs of paternity determination, for example.

Under subsection (c), the forum state must use the statute of limitations of whichever state is longer. This allows maximum time for enforcement. This subsection combines two acceptable choice-of-law practices by joining them in the alternative: first, a state may "borrow" a sister state's statute of limitations period and second, a state may apply its own limitations period to enforce sister state judgments. Restatement (Second) Conflicts of Law §118(2)(1971).

This rule should not be difficult for local judges. Under general conflicts of laws principles a judge may assume that the law of the state whose support order is being considered is the same as the law of the forum until one of the parties demonstrates otherwise. Obviously, it would be in the interest of the requesting state to submit an appropriate reference to the case and statutory law of the state which issued the order when a question is raised.

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