HB
195

STEVE COWPER
GOVERNOR

PHONE
(907) 561-4227

STATE OF ALASKA
OFFICE OF THE GOVERNOR

ALASKA WOMEN'S COMMISSION
3601 C STREET - SUITE 742
ANCHORAGE, ALASKA 99503

RECEIVED
MAR 12 1990
JAN FAIKS
SENATE OFFICE

March 7, 1990

Senator Jan Faiks
Alaska State Legislature
P.O. Box V (MS3100)
Juneau, Alaska 99811

Dear Senator Faiks;

I met with the attorneys that I am working with on HB195 and have discussed with your aide Mr. Christiensen the newly added intent language. We like the first section, page 1, lines 10-14, ending at "dissolution". We are concerned that the second part of this intent language is unnecessary and possibly damaging to the bill. Also, it is unusual to have intent language which tells the Supreme Court that this bill does not do anything. It appears to limit the intent of the legislature.

The purpose of this bill was to simplify for lawyers and persons representing themselves what their rights are. The intent language here tells people to go back to case law, which will be confusing, rather than directly referring them to the language of the statute.

Our intent is to codify the factors to be weighed by the court. The language in the bill does not verbatim track Merrill v Merrill and other cases but incorporates also the trend in our courts and in other states to more fairly allocate the economic impact of divorce. In part this is because Merrill is a 1962 case. The language used in the statute embodies modern terminology, e.g. retirement benefits, health insurance. The legislative intent is to equalize the economic effect of divorce, which is not addressed in case law, and to embrace this as a fair standard for its citizens. It is our impression that this new intent language significantly weakens the statute.

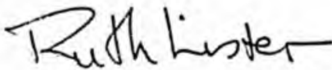
Another issue we raised with Mr Christiensen was that the intent language does not address the other changes in the bill, such as the heightened judicial scrutiny for dissolution. Rather than use intent language to enumerate all the changes in the statute, we feel that this information could more appropriately be addressed in a briefing paper to legislators.

We have two other concerns. First, under the list of factors on pages 4 and 5, factor (E) should be deleted. The Merrill factor here is "conduct of the parties", which is clearly outdated. We suggested "conduct of the parties including the unreasonable depletion of marital assets" because there have been a few cases where this factor was used in this way. These few cases could, however, be addressed under other factors.

Second, we request the deletion of the "," on page 6 line 24 after "persons", so that it is clear that "in the child's best interests" refers to visitation by grandparents and other persons.

Thank you for giving us the opportunity to comment on the proposed CS to HB195.

Sincerely,



Ruth Lister
Executive Director
Alaska Women's Commission

RL/bh

KENNETH C. KIRK
Attorney-at-Law
540 L Street, Suite 206
Anchorage, Alaska 99501
(907) 279-1659

December 27, 1989

State Senator Jan Faiks
P.O. Box V
Juneau, Alaska 99811

Dear Senator Faiks:

I appreciated your interest and courtesy when I recently testified before yourself and Senator Rodey regarding CSHB 195. I wanted to elaborate on an aspect of the bill on which I only touched briefly at the hearing. By now someone will undoubtedly have called your attention to a note in the Alaska Law Review, December 1989, regarding the Nelson v. Nelson case. If you do not have this article yet, please feel free to have your Aide call my secretary, and we will copy it and send it to you immediately. That article has some logical flaws, and I wanted to make sure you are aware of them.

In my testimony, I pointed out that there were three different ways for the court to consider career assets. First, they could simply treat the asset as marital property, and order the professional spouse to pay money or property to the non-professional spouse to balance the ledger. This would partially be prevented by Richmond. Second, they could award some form of alimony to the non-professional spouse based on the professional spouse's increased earnings. Statutorily, such an award would have to be "just and necessary". By "necessary" it is meant that the non-professional spouse does not have sufficient assets or income to meet her reasonable needs. Third, the court can give the non-professional spouse a greater share of the other marital assets on the basis that the professional spouse is better situated financially. This is presently being done under the Merrill factors.

The concern I expressed at the hearing was that the bill in question suggested that the career assets should be taken into account in all three ways; in other words, it should not only be taken into consideration when determining whether alimony should be awarded, but also when determining whether one spouse should receive more than 50% of the marital property, and it should also be valued and distributed as a marital asset. Aside from the possibility of triple-dipping, which I think the Judges here would be able to avoid, I was concerned that the Bill missed the opportunity to give some kind of clear direction to the courts as to which avenue would be preferred.

The Law Review note I mentioned points out correctly that the danger in leaving career assets as only a Merrill factor is that there might not be enough other marital assets to divide. In other words, if the professional degree is not considered marital property, but the non-professional spouse gets a larger percentage of the other marital assets, the court may not be able to do justice unless there are sufficient other marital assets to divide. This would be especially true if the marriage dissolved soon after the professional degree was earned. To this extent, I agree with the article.

Where I disagree with the Law Review note is that it goes on to find property distribution to be preferable as between the other two alternatives. It also says that the property distribution should be in a lump sum, although this makes no sense if the parties do not have the additional assets to make that possible. Assuming, then, that we are talking about payments over a long period of time, classifying those payments as alimony would be fairer to both sides than classifying them as property. For one thing, the IRS has to be taken into account. If the professional spouse is making payments over a long period of time based on the "asset" of the professional degree, he is going to be paying taxes on the full amount of the income he receives, although he does not get to keep it; in the meantime, the non-professional spouse is in effect receiving income with the taxes already paid. Classifying the distribution as alimony means that the professional spouse will pay the taxes on the income he gets to keep, and the non-professional spouse will pay taxes on the income she receives. Another problem is the bankruptcy system. A property settlement based on long-term payments from a professional degree would be a hollow victory if the professional spouse then declared Chapter 7, and was freed from the future obligation. Alimony payments, on the other hand, survive bankruptcy.

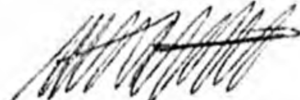
The difficulty, under the current Alaska Statutes, with awarding alimony based on career assets is that the statute says that the alimony must be necessary, so if the non-professional spouse also has a decent income, she is not entitled to alimony. This is, however, a statutory point and can be changed by the legislature.

In conclusion, it seems to me that the best and fairest way to handle the question is to continue the use of career assets as a Merrill factor if there are sufficient marital assets to adequately compensate the non-professional spouse; and if there are not, to allow alimony to be instituted when it is not absolutely necessary, provided that it is justified by career assets. In such a case, you might also want to clarify in the

Statute that alimony based on career assets need not necessarily terminate upon remarriage of the payee spouse.

Thank you for taking the time to consider my opinion. If there is anything I can do to assist you in making these difficult decisions, please let me know.

Sincerely yours,



KENNETH C. KIRK

KCK/bj

AAUW AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

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American Association of University Women
Alaska Division

DIVORCE AND DISSOLUTION REFORM

AAUW SUPPORTS LEGISLATION TO CORRECT THE ECONOMIC INEQUITIES THAT OCCUR UNDER CURRENT DIVORCE AND DISSOLUTION LAWS, TO CLARIFY THE RIGHTS OF SPOUSES DURING DIVORCE ACTION, AND TO PREVENT THE IMPROVERISHMENT OF WOMEN AND CHILDREN AS A RESULT OF DIVORCE.

No-fault divorce was hailed as a progressive social reform to lessen the emotional trauma of divorce of all family members. Alaska, one of eight states to adopt such law (enacted in 1976), allows people to fashion their own divorces without legal assistance. Currently about two-thirds of all Alaskan divorces are terminated through dissolution procedures as opposed to the more traditional and structured divorce proceedings. Recent research, however, suggests that many women and children suffer severe "downward mobility" as the unintended result of these reforms. Economic settlements are often unfair, and women and children appear to be losing ground financially because of them.

Current Alaska law does not authorize spousal support while a divorce is pending. In addition, the court often awards insufficient attorney's fees to a spouse already in financial need. Proposed Divorce and Dissolution Reform bills address these problems; furthermore, proposed legislation would clarify that "career assets" are part of marital property under dissolution law.

In addition, reform would require greater judicial scrutiny to ensure that economic settlements would be fair and equitable. This would serve to protect the best interests of children involved and help prevent unfair bargaining power from being exercised by either of the parties.

In the face of a growing body of research which suggests that the current legal system of divorce creates economic hardships for women and children instead of providing greater family equity, AAUW advocates reform in the Divorce and Dissolution laws. Inadequate and poorly enforced child support awards, the near absence of spousal support, and unequal division of marital property are creating a new class of poor. Legislative reform, such as HB 195 introduced by the Governor February 24, 1989, is necessary to correct these inequities.

DIVORCE AND DISSOLUTION REFORM

Testimony before Senate Judicial Committee on HB195 - 11/28/89

AAUW SUPPORTS HB 195 WHICH STRIVES TO CORRECT THE ECONOMIC INEQUITIES THAT OCCUR UNDER CURRENT DIVORCE AND DISSOLUTION LAWS, TO CLARIFY THE RIGHTS OF SPOUSES DURING DIVORCE ACTION, AND TO PREVENT THE IMPROVERISHMENT OF WOMEN AND CHILDREN AS A RESULT OF DIVORCE.

No-fault divorce was hailed as a progressive social reform to lessen the emotional trauma of divorce of all family members. Alaska, one of eight states to adopt such law, allows people to fashion their own divorces without legal assistance. Currently about two-thirds of all Alaskan divorces are terminated through dissolution procedures as opposed to the more traditional and structured divorce proceedings. Recent research, however, suggests that many women and children suffer severe "downward mobility" as the unintended result of these reforms. Economic settlements are often unfair, and women and children appear to be losing ground financially because of them.

Current Alaska law does not authorize spousal support while a divorce is pending. In addition, the court often awards insufficient attorney's fees to a spouse already in financial need. HB 195 addresses these problems. Furthermore, this legislation would clarify that "career assets" are part of marital property under dissolution law. This is especially important as career assets become a larger part of the average couple's "investment portfolio". As home ownership becomes less possible for young people, career assets increasingly may become the only assets acquired during marriage. In addition, reform would require greater judicial scrutiny to ensure that economic settlements would be fair and equitable. This would serve to protect the best interests of children involved and help prevent unfair bargaining power from being exercised by either of the parties.

In the face of a growing body of research which suggests that the current legal system of divorce creates economic hardships for women and children instead of providing greater family equity, AAUW strongly advocates reform in the Divorce and Dissolution laws. Inadequate and poorly enforced child support awards, the near absence of spousal support, and unequal division of marital property are creating a new class of poor. Legislative reform such as HB 195 is necessary to correct these inequities.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M   February 28, 1990

SUBJECT: Purpose Statement for SCS CSHB 195(Jud)

TO: Senator Jan Faiks
Chair, Judiciary Committee

FROM: Terri Lauterbach
Legislative Counsel

As approved by Chris Christensen of your office, this memo proposes a rewrite of the purpose statement requested for SCS CSHB 195(Jud). While I continue incorporating other changes in the SCS, you will have time to review this language and approve it for insertion in the SCS later today.

The proposed language is as follows:

> * Section 1. INTENT. By amending AS 25.24.160(a)(2) and (4) in this Act and by referring to those paragraphs in other sections of AS 25.24 in this Act, it is the legislature's intent to codify the principal factors to be weighed by a court in making an equitable division of property or an award of maintenance in a divorce or dissolution proceeding, as enunciated by the Alaska Supreme Court in the case of Merrill v. Merrill, 368 P.2d 546 (Alaska 1962), and subsequent opinions. Except for AS 25.24.160(a)(4)(F), the factors codified are intended to restate the principal factors found in case law, not to change them, affect the interpretation given to them, or preclude changes or additions to them by future court rulings.

Please let me know if you would like changes in this language. As soon as I get your approval, we will insert the section into the latest draft of the SCS and get a full copy of the draft to you.

TL:pl
WKP2/104

STEVE COWPER
GOVERNOR

PHONE:
(907) 561-4227

STATE OF ALASKA

OFFICE OF THE GOVERNOR

ALASKA WOMEN'S COMMISSION
3601 C STREET • SUITE 742
ANCHORAGE, ALASKA 99503

May 1, 1989

Senator Jan Faiks
P.O. Box V
Juneau, AK 99811

Dear Senator Faiks:

HB 195, an act relating to divorce and dissolution, passed the House on April 29. Anticipating that Senate Judiciary will be its first committee of referral in the Senate, I am sending you information on the bill. House Finance has zeroed the $66,500 fiscal note from the court system and so the bill could pass the Senate this year if Senate Finance waives it and if the timelines are expedited.

The bill is similar to HB 189, which went as far as Senate Rules three years ago when time ran out. I have asked John Reese, the attorney who worked on the wording changes from the previous bill, to call you regarding HB 195. I believe that there is good support for this bill in the Senate.

I appreciate your understanding and support of the issues addressed in HB 195 and hope that we can work together to secure its passage.

Sincerely,

Ruth Lister

Ruth Lister
Executive Director

RL/mm

Enclosure

STEVE COWPER
GOVERNOR

PHONE
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STATE OF ALASKA

OFFICE OF THE GOVERNOR

ALASKA WOMEN'S COMMISSION
3601 C STREET • SUITE 742
ANCHORAGE, ALASKA 99503

March 17, 1989

POSITION PAPER ON HB 195

In the last two decades, the divorce process has undergone major reform. The introduction of no-fault divorce and the procedure of dissolution for terminating marriages have had a major impact on divorce and its consequences in Alaska. The impetus behind this legislation was to remove the bitter court battles that had traditionally accompanied divorce and to lessen the financial burden of divorce. While emotionally less traumatic and, in the case of dissolutions, much cheaper, we are seeing a serious negative economic impact of divorce on women and children. A recent study by the Alaska Women's Commission showed that women's per capita income declines 33% after divorce and men's increases 17%.

Dissolution is used by 2/3 of Alaskan couples who end their marriages. Alaska is one of only 8 states that permit dissolution. It is also one of the most liberal in its provisions. Most other states do not permit dissolutions if there are minor children, if the marriage is one of long duration, or if the couple has property. Alaska law places no limitations on the use of dissolutions.

What we have found is that women who choose dissolution suffer even more financial hardship than women who go through divorce. Our study indicated that women using dissolutions received only 29% of the marital property. Physical custody of the children was awarded to the mother in 70% of cases using divorce compared with 52% of cases using dissolution. Women are not faring so well with dissolutions because there is often an imbalance of power in marital relationships and women are pressured or threatened to agree to settlements which are not in their or their children's best interests. In Alaska 26% of women report having been in a violent relationship. Domestic violence is a factor in a significantly high number of divorces.

For all of the above reasons, the Alaska Women's Commission believes that there should be heightened judicial scrutiny of dissolutions under certain circumstances. HB 195 would require increased judicial scrutiny for dissolutions where there are minor children, there is evidence of domestic violence, one party has an attorney, or there is a patently inequitable division of property. In addition to statements currently required in a dissolution of marriage petition, parties must state whether either spouse needs medical care, whether a domestic violence complaint has been filed, whether either party has received legal counsel and whether the petition constitutes the entire agreement between the parties. Both parties are required to be present at the hearing except upon a finding that there are compelling circumstances warranting absence.

HB 195, "Divorce/Dissolution Bill"

HB 195 is aimed at correcting some of the deficiencies of Alaska's divorce and dissolution statutes. Divorce and dissolution are two different processes used to achieve the same result: a decree of divorce. Dissolutions allow people to become divorced without retaining attorneys, provided that both parties agree on all issues. Recent research by the Women's Commission (Family Equity at Issue, 1987) indicates that women are agreeing to inequitable divorce settlements for a number of reasons. One reason is that they do not have the financial resources to contest the settlement, and therefore have no alternative but to agree to inequitable terms of a dissolution.

HB 195 clarifies and strengthens the courts prerogative of requiring one spouse to provide reasonable spousal support including attorney's fees while the divorce is pending. This would assist women in contesting inequitable settlements.

Another reason women may be agreeing to unreasonable settlements is that there is a history of violence or an otherwise unequal distribution of power in the relationship. HB 195 would require parties in a dissolution to disclose the following:

- the existence of any domestic violence complaints,
- either party having received legal counsel,
- either party needing medical care,
- that the agreement constitutes the entire agreement between the parties.

In the event that any of the following conditions exist:

- there are minor children,
- there is evidence of domestic violence,
- one party has an attorney,
- there is a patently inequitable division of property.

HB 195 would require heightened judicial scrutiny of the dissolution. This bill would also require that both parties be present at the hearing unless there are compelling circumstances warranting absence.

HB 195 would also give either party the option of changing his or her name as part of the divorce process in addition to the option under current law of keeping the married name or restoring the prior name.

Finally, HB 195 would add language to include career assets to the statutes regarding the division of property and award of spousal maintenance. Career assets are defined as the ability of a spouse to earn money as a result of education, profession, or employment acquired in part through the contributions, including homemaking and child care, provided by the other spouse.

ALASKA WOMEN'S COMMISSION

A second area addressed by HB 195 is the division of property and spousal maintenance. In many marriages the couple's major investments are in the education and career of the primary wage earner, usually the husband. Homemaking and child raising, which are usually done by women, enable the primary wage earner to make career advancements. The value of homemaking and child raising, which are essential to the marriage partnership and thus to the building of career assets, are presently virtually ignored. The division of marital property usually excludes career assets, thus allowing the major wage earner to keep what are often the most valuable assets of the marriage. For example, not only do almost twice as many men as women have retirement benefits, but the median value of the husband's benefits is three times that of the wife's. Retirement benefits were divided by only 20% of couples in our study. Other types of career assets were rarely included in the division of property. By not including career assets we are contributing to the rising number of women and children in poverty.

Alimony or spousal maintenance was awarded in only 10 percent of divorces surveyed. Awards lasted usually for one year, at most two, and averaged $500 month. Yet most who received it had no job, no other income and were of an age which made it difficult to find paid work

In HB 195 career assets are defined as the ability of a spouse to earn money resulting from education, profession or employment acquired in part as a result of the contributions, including homemaking and child rearing, provided by the other spouse. This legislation would require that career assets be considered in the division of property and award of spousal maintenance. Retirement benefits are also specified.

A third area addressed by HB 195 is the ability of the parties involved to obtain legal representation, support and protection prior to a settlement. Half of the women we surveyed felt pressured to reach a divorce settlement by economic factors such as non-support of the children until settlement of the divorce. Only 15% indicated that the other spouse paid any portion of the respondent's attorney fees. HB 195 clarifies and strengthens orders during the pendency of the action providing for spousal maintenance, attorney's fees, child support and protective restraining orders.

Finally, the bill provides for name changes in divorce and dissolution proceedings, which will have the effect of amending Rule 84(a), Alaska Rules of Civil Procedure.

In Alaska, with a divorce rate of 63% compared with 47% nationally, it is imperative that the economic hardships for women and children created by divorce be addressed and increased judicial scrutiny of dissolutions be incorporated into the statute. Divorce laws are based upon the notion that women have achieved equality of opportunity in the job market. Married women earn on average half of what their spouse's earn. Many have put their own careers or education on hold and thus not attained an earning power adequate to support themselves and their children, even with child support. Hardest hit are older homemakers. HB 195 is a critical piece of legislation. The Alaska Women's Commission strongly urges your support.

complete

MEMORANDUM

State of Alaska
Department of Law

TO: Shari Kochman
Legislative Staff Assistant
Office of the Governor

DATE: March 2, 1989

FILE NO.: 773-89-0094

TEL. NO.: 465-3603

SUBJECT: Sectional analysis of HB 195

FROM: Elizabeth L. Shaw
Assistant Attorney General

Attached is a sectional analysis of HB 195. Please let me know if there is anything further needed.

ELS:bap

Attachment

cc: Art Peterson w/copy of analysis
Ruth Lister w/copy of analysis

SECTIONAL ANALYSIS OF HB 195

HB 195 provides expressly for spousal support and attorney fees to be awarded during the pendency of divorce proceedings. It also requires a greater judicial scrutiny of marriage dissolution agreements in specific situations. With some of its clean-up and technical amendments, the bill seeks to simplify the dissolution statutes by removing the present inconsistency in references to the dissolution petition being "filed" or being "brought." (Normally "actions" are "brought," and "petitions" are "filed.") A section-by-section description follows.

Section 1

In sec. 1, the bill amends AS 25.24.100 to eliminate a one year durational residency requirement for divorce proceedings for military personnel stationed in Alaska.

Section 2

In sec. 2, the bill repeals and reenacts AS 25.24.140(a) to deal more specifically with attorney fees and costs, and to state that the court may require one spouse to provide reasonable spousal support, including medical expenses, as well as child support, during the pendency of the divorce proceedings. Existing AS 25.24.140(b) allows the court to restrain either spouse from disposing of property of either party during the pendency of the

action. The bill repeals and reenacts AS 25.24.140(b) to provide that during the pendency of the proceeding, the court may issue an order restraining a spouse from disposing of the property of either spouse, or marital property, without the permission of the other spouse unless there is a court order. The court may also order that each spouse be restrained from subjecting the other spouse or another person living in the household to domestic violence, that one spouse vacate the marital residence, or that one spouse be restrained from communicating directly or indirectly with the other spouse or from entering a vehicle in the possession of or occupied by the other spouse.

Section 3

In sec. 3, the bill amends AS 25.24.160(a)(4) to include retirement benefits in the property that may be divided at the time of the divorce. The amendment also provides that in the property division decisions the court must consider the contribution of each spouse in the acquisition of career assets. Career assets, defined in sec. 17 of the bill, means the ability of a spouse to earn money resulting from the education, profession or employment acquired in part as a result of the contributions, including homemaking and child rearing, provided by the other spouse.

Section 4

In sec. 4, the bill adds a new section which provides that in the divorce or annulment action a court has jurisdiction to change the name of either party. The new section provides a notice and hearing procedure for the change of name to other than a prior name.

Section 5

AS 25.24.200 (a), (b) and (c) are amended in sec. 5 to reflect that property to be distributed in a property settlement in a dissolution proceeding includes retirement benefits and consideration of career assets. AS 25.24.200(c) is also amended to require, through reference to AS 25.24.220(i), that if only one party is represented by an attorney, if a family member has filed a domestic violence complaint, if there are minor children of the marriage, or if there is a patently inequitable division of the marital estate, a spouse may not waive his or her right to answer the petition, or to receive notice of the hearing. A third amendment to AS 25.24.200(c) requires that when a party does execute a waiver he or she must acknowledge under oath that the dissolution petition constitutes the entire agreement between the parties.

Section 6

Section 6 of the bill adds a new subsection to AS 24.25.-200 which specifically states that property division and spousal maintenance must take into consideration career assets.

Section 7

Section 7 makes an amendment in the provision regarding a spouse changing his or her name as part of the dissolution process. A spouse may change his or her name as part of the dissolution action, not merely restore his or her prior name.

Section 8

Section 8 of the bill repeals and reenacts AS 25.24.-210(e) to provide that, in addition to the statements currently required in a dissolution of marriage petition, the parties must also state whether either spouse requires medical care or treatment, whether a domestic violence complaint has been filed during the marriage, whether either party has received the advice of legal counsel, and whether the petition constitutes the entire agreement between the parties. A reference to retirement benefits and career assets has also been added, to correspond to other amendments made by the bill.

Section 9

Section 9 of the bill repeals and reenacts AS 25.24.-220(b) to require that both parties must attend the dissolution hearing personally, and not through counsel if one party is represented by counsel and the other is not, if a domestic violence complaint has been filed during the marriage, or if there are children of the marriage. One of the spouses to be absent from the hearing if the court finds it would be an undue hardship for him or her to attend.

Sections 10 and 12

Section 10 and sec. 12 of the bill make conforming amendments to AS 25.24.220 (c) and AS 25.24.220 (e) to provide consistency in references.

Section 11

Section 11 of the bill amends AS 25.24.220(d) to require that the written agreements of spouses who have filed for dissolu-tion of their marriage under AS 25.24.220(a) constitute the en e agreement between the parties. Other conforming amendments are also made in AS 25.24.220(d). This statute currently using the legalese triplet "fair, just, and equitable" as the standard for acceptable agreements between the spouses. The bill removes the redundancy and relies simply on the word "just."

Section 13

AS 25.24.220(g) is amended in sec. 13 of the bill to require that the court's amendments to written agreements must be agreed to by both petitioners in writing or on the record. Other conforming amendments regarding retirement benefits and career assets are also made in this subsection.

Section 14

AS 25.24.220 is further amended in sec. 14 by adding two new subsections that require that, for a dissolution petition filed under AS 25.24.200(a), the court will use a heightened level of scrutiny if one party is represented by counsel and the other is not, if a domestic violence complaint has been filed during the marriage by a member of the family, or if there are any minor children of the marriage.

Section 15

Section 15 of the bill repeals and reenacts AS 25.24.-230(a) to require that if the dissolution petition is not subject to AS 25.24.220(h), the court, in granting the dissolution, must find that the written agreements regarding spousal support and tax consequences, division of property including retirement benefits and consideration of career assets, and allocation of obligations,

are fair and just. In this case there would be no children of the marriage to consider.

Section 15 also repeals and reenacts AS 25.24.230(b) to require that, if there are children of the marriage, if only one party is represented by counsel, if a complaint for domestic violence has been filed during the marriage, or if the division of the marital estate is patently inequitable (i.e., if the dissolution petition is subject to AS 25.24.220(h)), the standard to be used by the court in review of the written agreements is that the agreements are just.

Under both AS 25.24.230(a) and (b), the court must find that the parties understand the nature and consequence of their action and that they entered into the agreements voluntarily and free from coercion.

The language of existing AS 25.24.230(b) -- (g) appears as AS 25.24.230(c) -- (h) in the bill, with some minor corrections and conforming language changes including a hearing and notice requirement if a spouse seeks a change of a name other than a prior name.

Section 16

AS 25.24.250 is amended in sec. 16 by adding a new subsection that requires that the forms or instructions prepared

by the Department of Law and the Alaska Court System for use by the public must specify that the dissolution petition constitutes the entire agreement between the parties, and the forms or instructions must provide examples of the kinds of property and obligations that are subject to distribution.

Section 17

Section 17 of the bill adds a new section to AS 25.24 to define "career assets." That term relates to the petitioners property, and is added to AS 25.24 in several places by the bill.

Section 18

Section 18 of the bill notes that the effect providing for hearing and notice procedures for name changes in divorce and dissolution proceedings will have the effect of amending Rule 84(a), Alaska Rules of Civil Procedure.

THE SUPREME COURT OF THE STATE OF ALASKA

DAVID H. NELSON,	)	
	)	
Appellant,	)	File No. S-2311
	)	
v.	)	3AN 86 16230 Civil
	)	
DEBBIE L. NELSON,	)	MEMORANDUM OPINION
	)	AND JUDGMENT*
Appellee.	)	
	)	[No. 463 - July 26, 1989]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Victor D. Carlson, Judge.

Appearances: David H. Nelson, Pro Se, Anchorage, for Appellant. Julie A. Clark, Anchorage, for Appellee.

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton, and Moore, Justices.

David Nelson appeals from a divorce decree which awarded custody of the parties' three children to Debbie Nelson and ordered him to pay $300 per month per child for their support. We affirm the custody award, and remand for a redetermination of the appropriate amount of child support.

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*Entered pursuant to Appellate Rule 214.

The Nelsons were married in 1980. Mrs. Nelson filed for divorce in December 1986; she sought custody of the children and requested $200 per month per child for their support. In Mr. Nelson's answer, he also sought custody and a like amount for child support. The parties had already divided their marital property. After a one-day bench trial, Judge Victor Carlson awarded sole custody of the children to Mrs. Nelson, as the child custody investigator had recommended. He also ordered Mr. Nelson to pay $300 per month per child for their support.

A review of the record reveals no evidence that plain error[1] was committed in awarding custody of the three children to Mrs. Nelson. The custody investigator reported that both parents "have genuine love and concern for their children," and that, although neither parent's care of the children had been perfect, "Mrs. Nelson would be the best able to make decisions and provide care for the children." In awarding Mrs. Nelson sole custody, the trial court

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1. Mr. Nelson's brief failed to comply with the requirements of Appellate Rule 212. Although we accepted his brief in the form submitted, his noncompliance is substantial and pervasive. We have no clear indication of what he claims as error or the grounds thereof. Since his brief is conclusory and his arguments are sometimes undecipherable, our review is limited to a search of the record for plain error. See Martin v. English, 492 P.2d 105, 106 (Alaska 1971).

followed the recommendation contained in the investigator's detailed report. Mr. Nelson has not shown that the court's custody determination was plain error. We, therefore, affirm on this issue.

Mr. Nelson also argues that the trial court erred in ordering him to pay $300 per month per child for the support of his children. He claims not to have the ability to pay such an amount. Mrs. Nelson contends that the award was proper because the court could infer that Nelson was able to work, but willfully chose not to do so. Thus, she argues, the court did not err in its order.

It is undisputed that Mr. Nelson was unemployed and without assets at the time of trial. He had a shoulder condition which had required surgery, and considered himself permanently disabled. His only income, at that time, was a monthly payment of $280 from the State, Division of Public Assistance, pending a decision on his application for social security insurance benefits based on his disability.

The trial court, nevertheless, ordered Mr. Nelson to pay a total of $900 per month in child support. When Mrs. Nelson's counsel asked whether the court really meant to order $900 in support, Judge Carlson said "[t]hat's right . . . that's what it takes to support youngsters in our community. . . . Now I don't expect that he's going to pay near that much, but . . . there will be a jury trial later

on his failure to make support payments." Earlier, the judge had told Mr. Nelson that he was "facing a jury trial for non-support one of these days," and mentioned that he may need to spend time in "one of the local institutions."

In past cases we have noted that the trial court, in determining child support awards, must "examine the relative financial situations of the parties and the total cost of supporting the children." Lone Wolf v. Lone Wolf, 741 P.2d 1187, 1191 (Alaska 1987); Hunt v. Hunt, 698 P.2d 1168, 1172 (Alaska 1985).

> In general, if a parent has the ability to earn income greater than that actually being earned at the time the support needs are being evaluated, the court can make a finding as to what the actual income would be if the parent were making up to capacity and may enter a child support order accordingly.

1 Lindley on Separation Agreements and Antenuptial Contracts ¶ 15.02 at 15-52 to -53 (1988). See King v. King, 235 S.E.2d 502, 503 (Ga. 1977) ("The ability to earn an income is one factor . . ., and [the] jury may award alimony on this basis although the husband may be temporarily impoverished."); Ellis v. Ellis, 262 N.W.2d 265, 267-68 (Iowa 1978) ("his ability to pay alimony is to be determined on the basis of his earning capacity rather than by the amount of his voluntarily reduced income"); Schuler v. Schuler, 416 N.E.2d 197, 203 (Mass. 1981) (judge "may also consider earning power"); Finn v. Finn, 517 A.2d 317, 318

(Me. 1986) ("The court properly considered the defendant's earning capacity, future prospects and ability to pay."); Dunn v. Dunn, 307 N.W.2d 424, 426 (Mich. App. 1981) (court not "limited to consideration of the parent's actual income and may also look to the parent's unexercised ability to earn") (emphasis in original); Quick v. Quick, 290 S.E.2d 653, 658 (N.C. 1982) ("If the supporting spouse is deliberately depressing income or engaged in excessive spending, then capacity to earn, instead of actual income may be the basis of the award.").

Judge Carlson had sufficient evidence to infer that Mr. Nelson's income at the time of trial was not an accurate measure of his overall earning capacity. The record shows, however, that Judge Carlson based his award, instead, upon his own view of the amount needed to support the children without making a reasoned assessment of Mr. Nelson's future prospects and his true earning capacity. Indeed, Judge Carlson's comments regarding the potential for a non-support trial underscore the fact that he purposefully entered an order with which he knew Mr. Nelson could not comply. Thus, we conclude that the court committed plain

error in setting the amount of the support award. Accordingly, a remand is necessary on this issue.[2]

AFFIRMED in part, REVERSED in part and REMANDED.

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1889
274-9492

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2. We note that on remand, the trial court will be governed by the provisions of Civil Rule 90.3, which became effective subsequent to the date of the original decree.

Christine FLORES, Petitioner,

v.

David FLORES, Respondent.

No. 3832

Supreme Court of Alaska.

July 13, 1979.

In divorce proceeding, the Superior Court, Third Judicial District, S. J. Buckalew, J., ruled that permanent counsel would not be appointed for wife due to lack of funds and that case should proceed with wife unrepresented, and wife filed petition for review. The Supreme Court, Matthews, J., held that due process clause of State Constitution guaranteed wife, an indigent party, the right to court-appointed counsel in a private child custody proceeding in which her spouse was represented by Alaska legal services corporation.

Ordered accordingly.

Connor, J., dissented in part and concurred in part and filed opinion.

1. Constitutional Law ⇐314

Due process clause of State Constitution guaranteed wife, an indigent party, the right to court-appointed counsel in private child custody proceeding in which her spouse was represented by Alaska legal services corporation, where interest at stake was wife's right to direct upbringing of her child, where legal issues were much more complex than usual because of jurisdictional problems and because divorce proceedings were taking place in two states, and where wife lacked funds to come to Alaska and would otherwise have lost custody proceeding by default. Const. art. 1, § 7.

2. Divorce ⇐301

There is a strong state interest in divorce-child custody proceedings, for, unlike commercial contracts, legally binding marriages and divorces are wholly creations of the state and any provision for child custody in a divorce order is fully enforceable by the state.

3. Attorney and Client ⇐23

Where due process clause of State Constitution gave wife, an indigent party who resided in California, the right to court-appointed counsel in a divorce-child custody proceeding in which husband was represented by Alaska legal services corporation, where Alaska legal services corporation did not have regulations relating to such matters as record keeping, access to files, supervision, and physical separation of offices which would have been sufficient to insure that two attorneys employed by corporation could represent conflicting positions in litigation, where children's rules of procedure did not furnish basis for imposing duty of representation on public defender agency, counsel had to be appointed from the private bar, with compensation permitted under administrative rule. Const. art. 1, § 7; Rules of Children's Procedure, rule 12; Rules Governing the Administration of all Courts, rule 15.1.

4. Divorce ⇐301

Children's rule requiring appointment of counsel to represent parents who are financially unable to employ counsel to represent themselves, where issues are complex or have serious consequences was not intended to apply to divorce proceedings. Rules of Children's Procedure, rule 12; Rules Governing the Administration of all Courts, rule 15.1.

Max F. Gruenberg, Jr., and G. R. Eschbacher, Anchorage, for petitioner.

Donald E. Clocksin and Lucinda McBurney, Alaska Legal Services, Anchorage, for respondent.

Dana Fabe, Asst. Public Defender and Brian Shortell, Public Defender, Anchorage, amicus curiae.

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR and MATTHEWS, JJ.

OPINION

MATTHEWS, Justice.

This petition for review presents a single issue: whether an indigent party has the

right to court-appointed counsel in a private child custody proceeding in which her spouse is represented by Alaska Legal Services Corporation (ALSC). We hold that the due process clause of the Alaska Constitution [1] guarantees such a right.

The petition for review stems from a divorce proceeding in which custody of the couple's child is the only contested issue. The petitioner, Christine Flores, and the respondent, David Flores, are both indigent. Christine is a California resident and has evidently remained in that state throughout the time period relevant here. On or about November 18, 1976, David removed the couple's child from California to Alaska without Christine's consent. He subsequently obtained the services of ALSC and filed for divorce in Anchorage on December 20, 1976, but service was not made on Christine until April of 1977. In the interim, she obtained the services of the Legal Aid Society of Sacramento and filed for dissolution of the marriage in the Sacramento court on January 21, 1977. Service was made on David, and on March 18 the California court found that it had jurisdiction and granted interim custody to Christine. David subsequently obtained service on Christine and was awarded interim custody by an Anchorage court.

At that point, Christine's California counsel contacted a private Anchorage attorney who agreed to make a limited appearance for the sole purpose of requesting appointment of permanent counsel for Christine. An initial hearing was held on August 31, 1977, on a motion to join the Public Defender Agency as the real party in interest since Christine was attempting to require that agency to represent her in the divorce proceeding. It was stipulated that ALSC was unable to take conflicting sides of a divorce and that ALSC was without funds to hire a private attorney. The trial judge subsequently signed an order permitting service on the Public Defender.

A second hearing was held on November 14, 1977, at which an attorney from the Public Defender Agency was present as well as an ALSC attorney representing David Flores and the private attorney representing Christine Flores. The trial judge ruled that permanent counsel would not be appointed due to lack of funds and that the case should proceed with Christine unrepresented.

Petition for review of this ruling was made pursuant to Alaska Appellate Rules 23 [2] and 24,[3] and an entry of default in the divorce-child custody proceeding was stayed pending the outcome of the petition.[4]

We exercised our discretion by granting immediate review because of a substantial likelihood that injustice would result if normal appellate procedure were allowed to

1. Alaska Const. art. 1, § 7.

2. Alaska R.App. P. 23(e) provides:

An aggrieved party, including the State of Alaska, may petition this court as set forth in Rule 24 to be permitted to review any order or decision of the superior court, not otherwise appealable under Rule 5, in any action or proceeding, civil or criminal, as follows:

. . . . .

(e) Where postponement of review until normal appeal may be taken from a final judgment will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship, or other related factors.

3. Alaska R.App. P. 24(a) specifies:

A review is not a matter of right, but will be granted only: (1) where the order or decision sought to be reviewed is of such substance and importance as to justify deviation from the normal appellate procedure by way of appeal and to require the immediate attention of this court; or (2) where the sound policy behind the general rule of requiring appeals to be taken only from final judgments is outweighed by the claim of the individual case that justice demands a present and immediate review of a particular non-appealable order or decision; or (3) where the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative tribunal, as to call for this court's power of supervision and review.

4. Christine Flores is prevented by her indigency from travelling to Alaska to make a court appearance.

take its course.[5] Because of the petitioner's need for immediate representation, we entered an order requiring the superior court to appoint private counsel for her, indicating that an opinion would follow and that the order "is not intended to intimate the view of the court on the ultimate issues."

[1] In holding that the due process clause of the Alaska Constitution [6] guarantees the right to counsel in this case, we recognize that the right is one usually associated with criminal proceedings. We also note, however, that this court has consistently avoided any formalistic categorization of proceedings as "criminal" and "civil" when determining if strict due process safeguards are required. "Due process is flexible, and the concept should be applied in a manner which is appropriate in the terms of the nature of the proceeding." [7] Thus we have previously held that the due process clause of the Alaska Constitution requires that counsel be provided for defendants in civil contempt proceedings, *Otton v. Zaborac*, 525 P.2d 537 (Alaska 1974), and in paternity suits, *Reynolds v. Kimmons*, 569 P.2d 799 (Alaska 1977), where the state supplies counsel to the mother.

The interest at stake in this case is one of the most basic of all civil liberties, the right to direct the upbringing of one's child.[8] This right has consistently been recognized by the United States Supreme Court as being among the "liberties" protected by the due process clause of the Federal Constitution. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *May v. Anderson*, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953); *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Pierce v. Society of the Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

In *Reynolds*, we recognized the importance of the parent-child relationship. Although *Reynolds* was a paternity proceeding, we quoted with approval the decision of the Ninth Circuit in *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974), which was a class action brought by indigent parents seeking injunctive relief and a declaratory judgment to the effect that whenever indigent parents become involved in child dependency proceedings, they are entitled to appointment of counsel. The court refused to adopt an inflexible rule that counsel was required in all child dependency proceedings, but it did hold the following:

> Parents are entitled to a judicial decision on the right to counsel in each case. The determination should be made with the understanding that *due process requires the state to appoint counsel whenever an indigent parent, unable to present his or her case properly, faces a substantial possibility of the loss of custody or of prolonged separation from a child.*

Id. at 945 (footnote omitted) (emphasis added).

[2] It is true that both *Reynolds* and *Cleaver* involved proceedings that were prosecuted by the state, but that does not remove the present case from the scope of their rationale. Although a private individual initiated the proceeding below, he was represented by counsel provided by a public agency. Fairness alone dictates that the petitioner should be entitled to a similar advantage. Furthermore, there is a strong state interest in divorce-child custody proceedings. Unlike commercial contracts, legally binding marriages and divorces are wholly creations of the state.[9] Any provi-

5. *See* note 2, *supra*.

6. "No person shall be deprived of life, liberty, or property, without due process of law." Alaska Const. art. I, § 7.

7. *Otton v. Zaborac*, 525 P.2d 537, 539 (Alaska 1974).

8. Although the divorce proceeding will not sever all parental rights of the petitioner, an award of custody to the respondent will have the same consequences, due to the distance between California and Alaska and the petitioner's indigency.

9. For this reason, the United States Supreme Court in *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), held that divorce proceedings must meet due process requirements. In striking down state procedures

sion for child custody in a divorce order is fully enforceable by the state.[10] In this case, Christine Flores stands to lose a basic "liberty" just as surely as if she were being prosecuted for a criminal offense.

We have noted on previous occasions that "[c]hild custody determinations are among the most difficult in the law." [11] Although the legal issues in a given case may not be complex, the crucial determination of what will be best for the child can be an exceedingly difficult one as it requires a delicate process of balancing many complex and competing considerations that are unique to every case. A parent who is without the aid of counsel in marshalling and presenting the arguments in his favor will be at a decided and frequently decisive disadvantage which becomes even more apparent when one considers the emotional nature of child custody disputes, and the fact that all of the principals are likely to be distraught. This disadvantage is constitutionally impermissible where the other parent has an attorney supplied by a public agency.

In this case, the legal issues are much more complex than usual because of jurisdictional problems and because divorce proceedings are taking place in two states. Regardless of the complexity of the case, however, a denial of the right to counsel will necessarily be fatal to the petitioner's cause, because she lacks the funds to come to Alaska and will therefore lose the custody proceeding by default. Her right to be heard will truly be meaningless unless she is afforded the right to counsel.[12]

[3] Having determined that there is a constitutional right to counsel in proceedings of this nature, it is necessary to further consider who will act as such and who will pay. Three sources from which counsel may be furnished have been suggested. They are ALSC, the Public Defender Agency, and the private bar.

ALSC contends that it cannot furnish attorneys to represent opposing sides in litigation. That conclusion follows if ALSC is viewed as an ordinary law firm to which the rule applies which bars all members of a firm from representing a client when one member of a firm has a conflict of interest.[13]

It is not, however, an inevitable conclusion that ALSC could not under any circumstances furnish counsel to take both sides of a case. Regulations might be developed relating to such matters as record keeping,

that required indigents seeking divorce to pay court fees and service-of-process costs, the Court reasoned:

> [W]e are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery.
>
> . . . Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one. In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum.

401 U.S. at 376–77, 91 S.Ct. at 785, 28 L.Ed.2d at 118.

10. *See Public Defender Agency v. Superior Court*, 534 P.2d 947 (Alaska 1975), where we held that the Attorney General may enforce support orders.

If a parent takes a child under age 12 from the person having lawful custody of the child, without that person's consent, he has committed the criminal offense of child stealing. AS 11.15.290.

11. *Horton v. Horton*, 519 P.2d 1131, 1132 (Alaska 1974); reiterated in *Horutz v. Horutz*, 560 P.2d 397, 399 (Alaska 1977); *Lacy v. Lacy*, 553 P.2d 928, 929 (Alaska 1976).

12. We emphasize that our holding in this opinion is limited to cases involving child custody where an indigent party's opponent is represented by counsel provided by a public agency.

13. *Aleut Corporation v. McGarvey*, 573 P.2d 473 (Alaska 1978); *Borden v. Borden*, 277 A.2d 89 (D.C.1971); *see Estep v. Johnson*, 383 F.Supp. 1323 (D.Conn.1974).

access to files, supervision, and physical separation of offices which would be sufficient to ensure that two attorneys employed by ALSC could represent conflicting positions in litigation, each having undivided loyalty to his client and fully able to exercise that independent professional judgment which is required by the Code of Professional Responsibility.[14] However, there now exist no such regulations and without them ALSC cannot realistically be considered as a source of legal representation.

Both parties contend that the Public Defender Agency has the statutory obligation to furnish counsel in this case. Their argument is that AS 18.85.100(a) requires the public defender to represent "[a]n indigent person who . . . is entitled to representation under the Supreme Court Rules of Children's Procedure . . . ." and that Children's Rule 15(a)(3) requires the appointment of counsel in the present circumstances. It provides:

> The court shall appoint counsel to represent the child, his parents, guardian, or custodian, when the assistance of counsel is desired, as follows:
>
> (3) For his parents . . . when they are financially unable to employ counsel to represent themselves and the issues are complex or have serious consequences.

[4] We do not believe that Children's Rule 15(a) was intended to apply to divorce proceedings. The scope of the Children's Rules is defined in Rule 1(b) which provides: "The procedure in children's matters shall be governed by these rules." The term "children's matters" is not further defined. However, reference is made throughout the rules to ch. 10, Title 47 of the Alaska Statutes, which deals exclusively with cases where the state as a party has chosen to interfere with a parent's right of custody, either in a delinquency proceeding, or where a violation of law by the child is alleged, or in a dependency proceeding where a child may need protection. None of the rules is cross-referenced to Title 9 of the Alaska Statutes which governs child custody proceedings in divorce cases, and none of the rules refer to child custody proceedings in divorce cases. Light is cast upon the intended coverage of the Children's Rules by Rule 12 which defines the appropriate subjects of inquiry involved at "the child hearing." Those subjects are, "whether the child is delinquent, dependent, delinquent and dependent, or in need of supervision." For these reasons we conclude that the Children's Rules of Procedure are inapplicable to this case and cannot furnish a basis for imposing a duty of representation on the Public Defender Agency. In reaching this conclusion, we recognize that in several of our cases involving private parties we have referred to various provisions in the Children's Rules.[15] However, in each of those cases, the citation was given to support an analogous procedure adopted in the case in question; we did not hold that the Children's Rules were directly applicable.

Having eliminated ALSC and the Public Defender Agency as present sources of representation, only the private bar remains.[16] Counsel should be appointed from the private bar.

BURKE, J., not participating.

CONNOR, Justice, dissenting in part, concurring in part.

The majority holds today that our due process clause guarantees indigent civil litigants the right to counsel at public expense

14. We encourage such an effort.

15. The decisions are *Reynolds v. Kimmons*, 569 P.2d 799, 802 n. 10 (Alaska 1977); *Veazey v. Veazey*, 560 P.2d 382, 385 (Alaska 1977); *Johnson v. Johnson*, 544 P.2d 65, 72 n. 16 (Alaska 1975); *Carle v. Carle*, 503 P.2d 1050, 1053 n. 5 (Alaska 1972); *Sheridan v. Sheridan*, 466 P.2d 821, 825 n. 16 (Alaska 1970).

16. Administrative Rule 15.1 provides for compensation of attorneys appointed by the court to represent persons "under the Rules of Children's Procedure or pursuant to statute . . ." at the rate of forty dollars per hour. That rule is broad enough to permit compensation in cases such as the present one where the appointment of counsel is constitutionally required.

whenever "[t]he interest at stake . . . is one of the most fundamental of all civil liberties, the right to direct the upbringing of one's child." While I agree that in this case the petitioner, because of the extreme disadvantage to which she is put, should have counsel appointed for her from some source, there are a number of reasons why I am unable to join my colleagues in holding that all indigent child custody litigants are constitutionally entitled to counsel at public expense.

I can find no authoritative precedent, state or federal, to firmly support such an extension of due process rights. In *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), the court merely struck down court fees and service of process fees that effectively denied access to the state courts to indigents seeking divorce. While the court did note the importance of the "basic position of the marriage relationship in this society's hierarchy of values," [1] the key factor in the decision appears to have been the state monopolization of the means for legally dissolving the marriage relationship.[2] Since a legal divorce in Connecticut could *only* be obtained through the courts, filing fees which significantly impeded indigents' access to those courts and which did not serve a "countervailing state interest of overriding significance" [3] were held to violate due process. In reaching this decision, the majority in *Boddie* carefully avoided any suggestion that the right to counsel was mandated in such cases. Here it is worth noting that, unlike the circumstances presented in *Boddie*, child custody litigants are not compelled to go to court to settle their claims.

Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974), which the majority relies upon in the case at bar, was concerned with child dependency proceedings in which the state of California was a party. The excerpted language from that case which appears in the majority opinion here was uttered only in regard to such dependency proceedings. Moreover, the court in *Cleaver* did not establish a firm constitutional rule requiring court-appointed counsel in every dependency proceeding; rather, it established general guidelines to be applied on a case by case basis.[4]

Similarly, our previous decisions in this area do not require that counsel be provided to indigent civil litigants in private child custody proceedings. In *Otton v. Zaborac*, 525 P.2d 537 (Alaska 1974), we held that an indigent in a contempt proceeding, for non-support of his child, had a constitutional right to a court-appointed attorney, stating:

> We base this decision on the right to jury trial in a contempt proceeding for non-payment of child support recognized in *Johansen v. State*, 491 P.2d 759 (Alaska 1971), and on the underlying rationale of that decision which focuses on the very real threat of incarceration. [footnote omitted].

Otton, supra at 538.

In explaining why the need for assistance of counsel was deemed greater when a jury trial was involved, we quoted the concurring opinion of Mr. Justice Powell in *Argersinger v. Hamlin*, 407 U.S. 25, 45–46, 92 S.Ct. 2006, 2016–17, 32 L.Ed.2d 530, 543 (1972):

> An unskilled layman may be able to [represent] himself in a nonjury trial before a judge experienced in piecing together unassembled facts, but before a jury the guiding hand of counsel is needed to marshal the evidence into a coherent whole consistent with the best case on behalf of the [litigant].

Otton, supra at 540.

In a later case, *Reynolds v. Kimmons*, 569 P.2d 799 (Alaska 1977), we extended the right to counsel to an indigent defendant in a paternity suit brought by the state on behalf of the mother. In reaching that result, we relied heavily on the fact that in

1. *Boddie v. Connecticut, supra*, 401 U.S. at 374, 91 S.Ct. at 784, 28 L.Ed.2d at 116.

2. *Id.*

3. *Id.* 401 U.S. at 377, 91 S.Ct. at 785, 28 L.Ed.2d at 118.

4. *Cleaver v. Wilcox, supra*, at 945.

such proceedings defendants suffer serious exposure to criminal liability.[5] We also noted that any resultant paternity and support decree would be likely to have a major impact on the defendant's life and would be *res judicata* in later contempt proceedings that could result in incarceration.[6] Furthermore, we reasoned that the need for counsel was heightened because the defendant was being prosecuted by the state with all of its resources and power.[7] The *Reynolds* decision, therefore, was not simply based on the significance of the parent-child relationship, but was founded on other important factors as well.

Notwithstanding this absence of authoritative precedent, I am particularly troubled by the failure of the majority to give full consideration to those procedural aspects of private child custody proceedings which help to insure that even unrepresented litigants will have a full, fair opportunity to be heard.

First, as in any case, the court itself may call, question, and cross-examine witnesses in an effort to determine the best interests of the child. In this regard it is noteworthy that a Divorce Reform Task Force report of the National Council on Family Relations has recommended that child custody determinations should no longer be a product of adversarial proceedings. See, 1 Family Law Reporter 2026 (1974). Although the report does not specify any alternative procedures, its conclusion suggests that it may be preferable to leave the examination of witnesses in such proceedings solely to the province of the judge, thereby diminishing some of the adversarial aspects of these hearings.

Second, the Alaska legislature has, by statute, provided for the appointment of counsel to represent children who are the subject of private custody proceedings. AS 09.65.130. These attorneys, in fulfilling their obligations to their clients, must call, examine, and cross-examine witnesses for both sides and make appropriate evidentiary objections. This, too, helps to insure that the strength and weaknesses of each opposing side will be fully and properly aired even without the assistance of counsel.

Finally, unlike other types of civil litigation, there is no right to a jury trial in private child custody proceedings. The determination of the best interest of the child is made solely by the court. AS 25.20.060. Thus, as implied in *Otton, supra*, there is no special need for "the guiding hand of counsel . . . to marshal the evidence into a coherent whole" for a jury; rather, the judge, experienced in piecing together unassembled facts, is capable of fully evaluating the evidence in favor of, and against, both sides.

In light of these considerations, I believe there is no sound basis for concluding that a private child custody litigant cannot be provided with a meaningful opportunity to be heard without the assistance of counsel. On the contrary, certain procedural aspects of child custody proceedings—the exclusive fact-finding role of the judge and independent counsel for the children—support the view that unrepresented child custody litigants may actually be afforded more due process "protection" than other private civil litigants, threatened with deprivation of other important rights, who do not have an attorney.

This brings me to a third troubling aspect of today's holding, namely, the extent to which the majority's reasoning, applied with basic notions of equal protection, logically requires counsel for other indigents in private litigation involving other rights. There, too, complex and emotional issues may be involved, along with important state interests in the outcome. These factors, the majority opinion suggests, enhance the need for assistance of counsel, and this would be especially true where the fact-finding role is delegated to a jury, as it often would be in other cases. *See, Otton, supra* at 540. Thus, I am unable to see

5. *Reynolds v. Kimmons, supra*, at 802.

6. *Id.*

7. *Id.* at 803.

how, logically, this court will be able to limit its holding today, consonant with equal protection, to deny appointed counsel to other indigent persons involved in such private civil litigation.[8] This point was made by Chief Judge Breitel in a related case, *In the Matter of Smiley*, 36 N.Y.2d 433, 369 N.Y.S.2d 87, 330 N.E.2d 53, 57 (1975), where the New York Court held that there was no constitutional right to counsel in divorce cases:

> It merits added comment that among the many kinds of private litigation which may drastically affect indigent litigants, matrimonial litigation is but one. Eviction from homes, revocation of licenses affecting one's livelihood, mortgage foreclosures, repossession of important assets purchased on credit, and any litigation which may result in the garnishment of income may be significant and ruinous for an otherwise indigent litigant. In short, the problem is not peculiar to matrimonial litigation. The horizon does not stop at matrimonial or any other species of private litigation.[9] [footnote added]

Finally, there is another aspect of the court's decision which requires comment, and that is the cost to the public. Whether we place responsibility on the private bar or the state treasury, the cost ultimately will be borne by the public. Even if the initial burden were cast upon the private bar, the expense of providing counsel for indigent civil litigants eventually would be paid for from some other source. So far as I know, we lack reliable data on the legal needs of the poor in civil cases in Alaska and the expense of meeting those needs. Without such information, it seems to me hazardous to create an inflexible constitutional right, the impact of which we can only vaguely discern. In this regard, I think it unfortunate that the state has not been heard before the court takes this major constitutional step, as the state has an obvious interest in the ramifications of this decision.

For these reasons, I would hold that the petitioner is not entitled to counsel as a matter of constitutional right, but rather is entitled to appointed counsel in the discretion of the court.[10]

PURITAN LIFE INSURANCE COMPANY, Appellant,

v.

Carolyn S. GUESS, Appellee.

No. 3807.

Supreme Court of Alaska.

July 20, 1979.

Beneficiary under life policy brought action against insurer. The Superior Court, Third Judicial District, J. Justin Ripley, J., entered judgment in favor of beneficiary, and insurer appealed. The Supreme Court,

8. The majority opinion expresses the belief that a "public agency" supplied Mr. Flores with counsel in this case. I disagree. The Alaska Legal Services Corporation is a non-profit enterprise organized pursuant to 42 U.S.C. § 2996b, which established the national Legal Services Corporation. It is clear that the national Legal Services Corporation is not an agency of the federal government, nor are its staff members federal employees. 42 U.S.C. § 2996c(c); 42 U.S.C. § 2996d(e)(1). *Spokane County Legal Services, Inc. v. Legal Services Corporation*, 433 F.Supp. 278, 280 (E.D.Wash. 1977). In my view, the Alaska Legal Services Corporation is a private corporation and not an agency of the state or federal government. Therefore, I conclude that a "public agency," in the sense of being an agency of the government, did not provide Mr. Flores with counsel in this case.

9. *See also* the opinion of Mr. Justice Black, dissenting from a denial of a petition for certiorari in *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 954, 91 S.Ct. 1624, 29 L.Ed.2d 124 (1971).

10. It should be noted that AS 25.30.100(c) grants the superior court authority to order "another party" to pay "travel and other necessary expenses" of an out-of-state party if this would be "just and proper under the circumstances."

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501 in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

ROBERT L. RICHMOND, Appellant,	)	File No. S-2209
v.	)	3AN-84-9889 CI
MARGARET T. RICHMOND, Appellee.	)	O P I N I O N
	)	[No. 3500 - September 15, 1989]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Victor D. Carlson, Judge.

Appearances: James D. Gilmore and Jeffrey M. Feldman, Gilmore & Feldman, Anchorage, for Appellant. Robert H. Wagstaff, Wagstaff, Pope & Clocksin, Anchorage, for Appellee.

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton and Moore, Justices.

COMPTON, Justice.
RABINOWITZ, Justice, dissenting.

This appeal is from the property division, alimony, child support, and attorney fees and costs judgment in a domestic proceeding between Robert and Margaret. Robert asserts that the professional goodwill of an attorney is unmarketable and hence the trial court erred by including

his professional goodwill in the marital estate. He also contends that the trial court erred by accepting an improper value for his law firm's tangible assets, awarding Margaret $3,000 per month alimony for six years, $1,000 per month per child for child support, and approximately $80,000 in attorney fees and costs.

I. FACTUAL AND PROCEDURAL BACKGROUND

At the time Margaret and Robert were married in 1967, Robert was attending law school on the "G.I. Bill." Both Robert and Margaret worked while Robert was in law school. After Robert graduated, they came to Alaska, and Robert began practicing law. At the time this proceeding was filed, Robert was the sole shareholder of his professional corporation.

Although Margaret did some work at the law firm for Robert and managed the couple's condominiums and personal finances, she was primarily a homemaker, raising the couple's three children.[1]

Robert and Margaret separated on October 24, 1984. The division of property, alimony, child support and attorney fees and costs were determined at trial in 1986. Child custody was settled by stipulation. The trial court

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1. At the time of trial in this case, the three children were 14, 13 and 9 years of age.

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awarded Margaret approximately $1.2 million in marital assets. This was essentially all the marital estate except Robert's law practice, which was awarded to him. The law practice was valued by Margaret's expert at $1.125 million; her expert valued the tangible assets of the law practice at $457,000 and Robert's goodwill at $550,000. These values were accepted by the trial court. Robert's expert valued Robert's law practice at $189,500. His expert valued Robert's goodwill at between $5,000 and $15,000.

The trial court also awarded Margaret $3,000 per month alimony for six years, $3,000 per month child support ($1,000 per month per child), and approximately $80,000 for attorney fees and costs. Judgment was entered April 30, 1987. Facts pertinent to each issue are addressed in the discussion.

II. DISCUSSION

A. PROPERTY DIVISION

Robert appeals the property division. He argues that his professional goodwill is unmarketable and therefore not part of the marital estate. He also objects to the valuation of his law practice's tangible assets.

Property divisions are reviewed to determine "whether the trial court abused the broad discretion given it under AS 25.24.160(a)(4)." Moffitt v. Moffitt, 749 P.2d 343, 346 (Alaska 1988). The trial court must use a

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three-step process in dividing property: First, the trial court is to determine what property is available for division; this determination is reviewed under an abuse of discretion standard "although it may involve legal determinations, which this court reviews independently." Id. Second, the trial court is to value the property; this is a factual inquiry to be reversed only if clearly erroneous. Id. Third, the trial court is to equitably allocate the property; this determination is reviewed applying an abuse of discretion standard and set aside only if clearly unjust. Id. Because Robert raises the legal question whether goodwill is available for distribution, this court will independently review the trial court's decision to include goodwill in the marital estate.

1. Marketability of Robert's Professional Goodwill.

The goodwill of a professional corporation is property which may be includable in the marital estate in a divorce proceeding. See Rostel v. Rostel, 622 P.2d 429, 430-31 (Alaska 1981). In Rostel we held that income earning capacity attributable solely to the expertise, talents and personality of one spouse is property subject to division by the court. Id. No distinction was made between marketable and unmarketable goodwill. Id. We narrowed our position on professional goodwill in Moffitt, 749 P.2d at 347. There we held that only marketable goodwill was to be included in the marital estate. Id. The court chose this approach "because

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to award the value of an unmarketable asset to an ex-spouse might restrict the liberty of the spouse who possesses that asset." Id. at n.3. In order that an ex-spouse's liberty not be restricted, this court will not divide goodwill that cannot be sold. Id.

Robert contends that his law practice has no marketable professional goodwill, and that the trial court erred by including his professional goodwill in the marital estate. We continue to adhere to the view we expressed in Moffitt and conclude that Robert is correct.

In Moffitt, we articulated a two-part test for assessing the divisibility of professional goodwill. Moffitt, 749 P.2d at 347 The trial court must first determine if goodwill exists. Id. If the trial court determines that goodwill exists, "it then must determine whether the good will could actually be sold to a prospective buyer." Id. "If the trial court determines either that no good will exists or that the goo. will is unmarketable, then no value for good will should be considered in dividing marital assets."[2] Id.

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2. Our dissenting colleague disagrees with our view that it is unfair to include unmarketable goodwill in the marital estate. [Dissent at 4-5] The dissent finds the criticism of Moffitt by L. Golden, Equitable Distribution of Property § 6.21, Supp. at 107 (1983 & Supp. 1988), persuasive. [Dissent at 4-5] We do not.

(Footnote Continued)

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We express no opinion regarding the marketability of a multi-lawyer law firm's professional goodwill.[3] It may be that marketable professional goodwill exists in a multi-lawyer firm, for example, upon evidence of sales or purchases of partnership interests.

In this case it is clear that Robert's goodwill is unmarketable. The uncontroverted evidence established that his law practice's goodwill could not be sold.[4]

(Footnote Continued)

As noted by Golden, unmarketable goodwill represents the reputation and future earning capacity of the professional spouse. The portion of unmarketable goodwill that reflects increased earning capacity is accounted for in the property division. Merrill v. Merrill, 368 P.2d 546, 547 n.4 (Alaska 1962). As to the professional spouse's personal reputation in Nelson v. Nelson, 736 P.2d 1145 (Alaska 1987), we held that because a professional degree was personal to the holder, it was not subject to division. Id. at 1146. In the context of this case, Robert's professional goodwill is personal to him and stands on the same footing as a professional degree.

3. Contrary to the dissent's assertion, the central question here is not whether a multi-lawyer firm has divisible goodwill. Robert was the sole shareholder of his firm. The firm employed associates and is a multi-lawyer firm in that sense. However, it is not a multi-lawyer firm in the sense of having multiple-shareholders or partners.

4. At trial Margaret's expert testified that a law practice, including its goodwill, could not be sold. Robert's expert stated that in his opinion Robert's law firm does not have marketable professional goodwill.

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We conclude that Robert has no marketable professional goodwill in his law practice, and that the trial court erred by including his professional goodwill in the marital estate.

2. Valuation of the Law Firm's Tangible Assets.

Robert contends that three errors were made in valuing the tangible assets of the law firm. He asserts errors in valuing the accounts receivable, equipment, and work in progress.

Margaret's expert valued Robert's law firm's accounts receivable at their book value of $202,454. He made no provision for bad debts. He reasoned that no bad debt reserve was warranted because Robert's practice was primarily insurance company defense. Thus, he felt 100% of the accounts were collectible.

Robert's expert valued Robert's law firm's accounts receivable at $180,018. He arrived at his figure by using the actual amount collected out of the $202,454 receivable as of October 24, 1984. He determined that $22,436 of the accounts receivable on October 24, 1984, had been written off.

It was clearly erroneous for the trial court to rely on Margaret's figures. The trial court had the actual figures before it and did not have to rely on Margaret's expert's incorrect assumption.

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The valuation of the firm's office equipment, accepted by the court, was based on replacement cost, arrived at by reference to Robert's corporate insurance policy. Robert relied on a valuation by William Borchardt, manager of Arctic Office Products, for the equipment's fair market value. Upon questioning from the bench, Mr. Borchardt indicated that his valuation was based on the fair market value at the time of trial in 1986, not the value as of October 24, 1984, the date agreed on for valuation.

Again, it was clear error to accept Margaret's valuation of the equipment. Reliance on the replacement cost of the equipment was not in accordance with acceptable valuation methods. The trial court should have looked to the fair market value of the equipment. Cf. Hayes v. Hayes, 756 P.2d 298, 299 (Alaska 1988) (rejecting valuation of business based on insurance funded buy out agreement). However, Mr. Borchardt's valuation was of no evidentiary value. On remand the trial court should ascertain or estimate the fair market value of the equipment as of October 24, 1984.

Robert also objected to Margaret's valuation of his firm's work in progress. It was valued at $155,584, based on data from the Altman-Weil survey for year ending

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1984.[5] Robert used records of his law firm to value work in progress at $60,935. This figure was based on records the firm began keeping in May 1985 and calculations based on work in progress as of February 28, 1985. Robert's expert worked backwards from these figures to determine work in progress on October 24, 1984.

Relying on a national survey when actual figures are available is an abuse of discretion. If the trial court found Robert's figures unreliable, it could have obtained reliable figures to value the work in progress. Based on the foregoing, we have a definite and firm conviction that a mistake was made in valuing Robert's law firm's tangible assets. Therefore, we remand the valuation for redetermination.

B. TRIAL COURT'S AWARD OF ALIMONY.

Margaret was awarded $3,000 per month alimony. The "rehabilitative alimony" was to be paid for six years "to assist her in the transition from being a participant in an economic partnership to supporting herself." Margaret contends that the court's award of alimony in this amount

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5. The Altman-Weil survey estimates work in progress as of the end of the fiscal year. The trial court's acceptance of this figure is puzzling. The trial court did not rely on Altman-Weil's valuation for accounts receivable. This selective use of data resulted in Robert's practice being overvalued.

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was justified by the need to equalize her earnings with Robert's. Robert challenges this award. He argues that it is unjust, unnecessary and contrary to decisions of this court.

An award of alimony is within the trial court's discretion and will be set aside only if it is unjust or unnecessary. Messina v. Messina, 583 P.2d 804 (Alaska 1978). Recently, we reiterated our position that alimony is not "just and necessary" when the property division can adequately provide for the "reasonable needs of the spouse seeking alimony." Hilliker v. Hilliker, 755 P.2d 1111, 1112 (Alaska 1988) (and cases cited therein). Rehabilitative alimony may be awarded for a specific purpose and a short duration even with an adequate property division, Bussell v. Bussell, 623 P.2d 1221, 1224 (Alaska 1981), but is limited to job training or other means directly related to entry or advancement within the work force. Schanck v. Schanck, 717 P.2d 1, 5 (Alaska 1986). The party seeking rehabilitative alimony must intend to use it for such purposes. Miller v. Miller, 739 P.2d 163, 165 (Alaska 1987). Absent such an intent, rehabilitative alimony should not be awarded. Id.[6]

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6. In addition to rehabilitative alimony, this court has recognized reorientation alimony. Dixon v. Dixon, 747 P.2d 1169 (Alaska 1987). The purpose of reorientation alimony is to allow the requesting spouse an opportunity to adjust to the changed financial circumstances accompanying a

(Footnote Continued)

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Applying the foregoing analysis to this case, we conclude that the trial court's award of rehabilitative alimony was an abuse of discretion. Margaret has a college degree and was employed at the time of the trial. She disclaimed any need for or intent to seek retraining. Absent any intention to pursue training, Margaret was not entitled to rehabilitative alimony. See Miller, 739 P.2d at 165.

Margaret argues that the award is not unjust and unnecessary because it equalizes her income with Robert's. She reasons that it is fair to award alimony in this case because of the difference between her earning capacity and Robert's. However, differences in earning capacity should be taken into account in the property division. Merrill v. Merrill, 368 P.2d 546, 547-48 n.4 (Alaska 1962). As observed in Dixon v. Dixon, 747 P.2d 1169, 1173 (Alaska 1987), in some cases it may be appropriate to give a larger

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(Footnote Continued)

divorce. Dixon, 747 P.2d at 1173. However, reorientation alimony is only appropriate when the property settlement will not adequately meet the parties' reasonable needs. Dixon, 747 P.2d at 1172-1174.

The trial court could have meant to award reorientation alimony in this case. However, the award of alimony here cannot stand as reorientation alimony. There is sufficient property available to meet her reasonable needs. Hilliker v. Hilliker, 755 P.2d 1111, 1112 (Alaska 1988). Therefore, an award of reorientation alimony would be an abuse of discretion.

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share of the marital estate to the spouse with the smaller earning capacity.[7] 747 P.2d at 1173.

C. TRIAL COURT'S AWARD OF CHILD SUPPORT.

Robert objects to the trial court's award to Margaret of $1,000 per child per month for child support. Additionally, Robert was ordered to pay 100% of the children's medical and dental expenses.[8] In awarding child support, the trial court stated in its Findings of Fact and Conclusions of Law:

> 7. The children have enjoyed a standard of living commensurate with their father's earnings. Defendant is financially able to pay and should pay the amount of $1,000 per month per child for a total of $3,000 per month as child support for the support and maintenance of the three minor children of the parties. These child support payments should be paid through the Child Support Enforcement Agency in Anchorage, Alaska on the first day of each month beginning May 1, 1987.
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> 8. Defendant is financially able to pay and should pay all medical, surgical, hospital, dental and

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7. This is not to say that Margaret must be provided with property which will produce an amount of income sufficient to support a standard of living comparable to that which was enjoyed during the marriage. Both parties to a divorce must reorganize financially. Hilliker v. Hilliker, 755 P.2d 1111, 1113 n.2 (Alaska 1988) (citing Monsma v. Monsma, 618 P.2d 559, 560 (Alaska 1980); Allen v. Allen, 554 P.2d 393, 395-96 (Alaska 1976)).

8. Robert does not object to paying the full medical and dental expenses of the children.

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orthodontic expenses of the minor children.

Margaret testified that without any "fluff" each child's expenses were $833 per month. This figure only covered expenses; it did not allow for trips or vacations. Margaret arrived at this figure by taking monthly expenses for herself and the three children and dividing by four and multiplying by three. Margaret asked that child support be set at $1,000 per child per month to allow her to provide the children with "extracurricular enjoyment." She presented no evidence to support an amount above $833 per child per month.

Robert testified that the expenses were $515 per child. His figures were arrived at by examining the monthly expenditures and attempting to filter out what were actually Margaret's expenses. He argues that he is shouldering the total out-of-pocket expenses of the children, and thus the award is contrary to the decisions of this court.

Child support awards are within the broad discretion of the trial court. Pattee v. Pattee, 744 P.2d 658, 662 (Alaska 1987). They are not to be set aside unless the trial court has abused its discretion, i.e., unless based on the record as a whole this court is left with a "definite and firm conviction that a mistake has been made." Hunt v. Hunt, 698 P.2d 1168, 1172 (Alaska 1985).

Awards of child support are to be based on the total cost of supporting the children and the relative

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financial abilities of both parents. Pattee, 744 P.2d at 662; Hunt, 698 P.2d at 1172. The first step is to assess the reasonable needs of the children, including their station in life. Cf. Hunt, 698 P.2d at 1173. Second, the trial court is to assess the relative financial ability of the parents to meet the children's needs. Id. Third, the court determines whether the relative financial abilities justify placing a greater burden on one parent and a lesser burden on the other. Id. at 1172.

Applying the foregoing analysis to this case, a review of the record as a whole leads us to a definite and firm conviction that a mistake has been made. Robert was ordered to pay 100% of the child's out-of-pocket expenses based solely on his financial ability to pay. No mention was made of Margaret's ability to share in meeting the children's needs.[9] Child support is to be equitably assessed based on both parents' ability to meet the reasonable needs of the children. See Hunt, 698 P.2d at 1172-73. Margaret concedes that she can expect substantial

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9. Robert's income before taxes was accepted by the court to be $197,000 per year. Robert claimed his income was approximately $180,000. Margaret earned $22,000 per year working for the Anchorage Olympic Organizing Committee. Margaret can expect substantial pre-tax income from investing property awarded her in this case. There was no discussion in the Findings of Fact and Conclusions of Law regarding the assessment of Margaret's ability to meet a share of the children's expenses.

investment income from the property. Although this is not as great as Robert's income, it does not justify placing the entire burden for out-of-pocket expenses on him. He may have to carry a greater burden, but not the total burden.[10] Hunt, 698 P.2d at 1172. Additionally, Robert was ordered to pay the full medical and dental expenses of the children.

The trial court failed to properly determine the ability of both parents to provide for the reasonable needs of the children. Thus, the award of child support must be remanded for redetermination.

The trial court also failed to properly assess the children's reasonable needs. Instead, it fixed the level of support at $1,000 per child per month without evidence to support a figure greater than $833 per child per month.[11]

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10. As Hunt indicates, the relative financial ability of the parties may justify placing a greater burden on one parent and a lesser burden on the other. 698 P.2d at 1172. This suggests that when feasible some burden should be placed on the parent who is disadvantaged financially.

11. The trial court's award would have required Robert to pay $36,000 per year in child support. Had this case been decided under Alaska R. Civ. P. 90.3 (effective August 1, 1987), Robert's total child support would have been $19,800 per year. This figure is arrived at by multiplying $60,000 (the rule's presumed upper limit) by .33 (the factor used for three children). Alaska R. Civ. P. 90.3(a)(2)(c), (c)(2). Any additional amount of support would require justification. Alaska R. Civ. P. 90.3(c)(2). Robert would also be entitled to a credit for medical and dental expenses he paid. Alaska R. Civ. P. 90.3(d).

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On remand we direct the trial court to determine the proper child support level under the guidelines established in Civil Rule 90.3. Although this case arose before the effective date of Civil Rule 90.3, the legislature has made it clear that pre-Civil Rule 90.3 child support awards are subject to redetermination under Civil Rule 90.3. See AS 25.24.170(b). By applying the Civil Rule 90.3 guidelines on remand, the trial court will avoid an almost certain motion to modify any award made under pre-Civil Rule 90.3 guidelines.

D. ATTORNEY FEES.

Robert was ordered to pay two-thirds of Margaret's actual attorney fees and costs, approximately $80,000.

Margaret contends that Robert waived review of this issue by failing to argue it properly in his brief. We need not address this contention, since "[b]ecause this case must be remanded, the trial court's attorney[] fees determination must be vacated. . . ." Brooks v. Brooks, 733 P.2d 1044, 1058 (Alaska 1987). However, Margaret is entitled to receive presently the amount included in the trial court's award to compensate her for increased litigation costs attributable to Robert's conduct.[12] On

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12. The trial court noted in its findings that (Footnote Continued)

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remand, the trial court shall segregate its award, identifying separately the amount it included to so compensate Margaret. Judgment for that amount may be entered.

III. CONCLUSION

Because Robert's professional goodwill is not marketable, the trial court's inclusion of his professional goodwill in the marital estate is REVERSED. The trial court's valuation of the tangible assets of Robert's law firm is REVERSED and REMANDED for redetermination.

The trial court abused its discretion in awarding Margaret alimony. There is adequate property to meet her needs. Therefore, the alimony award must be REVERSED.

The trial court abused its discretion by not assessing the ability of both parents to provide for the children's reasonable needs. Additionally, the trial court awarded an amount of child support not substantiated by the evidence. Therefore, the child support award must be REVERSED and REMANDED for redetermination of a proper amount, in accordance with Civil Rule 90.3.

(Footnote Continued)

Robert's "conduct during the course of this case and immediately preceding it has unnecessarily increased these costs." However, the trial court did not identify the amount of or place a value on the costs unnecessarily increased.

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The award of attorney fees and costs must be VACATED.

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RABINOWITZ, Justice, dissenting.

I dissent from the majority's determination of the goodwill issue. In my opinion, the superior court properly determined that Robert's professional corporation may have goodwill and that it should be included in the marital estate.

As the majority points out,[1] this court held in Rostel v. Rostel[2] that a professional practice's goodwill is a divisible marital asset.[3] Although some courts have held to the contrary,[4] this view remains the majority view[5] and, in my opinion and that of several commentators,[6] the better view:

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1. Maj. op. at 4.

2. 622 P.2d 429 (Alaska 1981).

3. Id. at 430-31.

4. See, e.g., Powell v. Powell, 648 P.2d 218, 222-24 (Kan. 1982); Nail v. Nail, 486 S.W.2d 761, 763-64 (Tex. 1972); Holbrook v. Holbrook, 309 N.W.2d 343, 354-55 (Wis. App. 1981).

5. In re Marriage of Kapusta, 491 N.E.2d 48, 51 (Ill. App. 1986) (citing Annotation, Accountability for Good Will of Professional Practice in Actions Arising from Divorce or Separation, 52 A.L.R.3d 1344 (1973)); Prahinski v. Prahinski, 540 A.2d 833, 842 (Md. App.) (citing authorities), cert. granted, 546 A.2d 490 (Md. 1988).

6. See, e.g., 2 H. Clark, The Law of Domestic Relations in the United States § 16.5, at 199 (2d ed. 1987); L. Golden, Equitable Distribution of Property § 6.21, at 188 (1983 & Supp. 1988) (hereinafter "L. Golden"); Note, Treating Professional Goodwill as Marital Property in Equitable Distribution States, 58 N.Y.U. L. Rev. 554, 555 (1983) (authored by Carmen Valle Patel); Comment, Identifying, Valuing, and Dividing Professional Goodwill as Community Property at Dissolution of the Marital

(footnote continued)

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Including goodwill within the marital estate is consonant with the policies of equitable distribution. Goodwill represents the probability of future earnings based on circumstances created during the marriage. It reflects the value of a demonstrated capacity to draw business, i.e., the individual has already built up a following. After divorce the professional practice will continue to benefit from the goodwill generated while the parties were married. Much of the economic value of the practice produced during the marriage may be reflected in its goodwill. It would be inequitable to ignore the contribution of the other spouse to the development of that economic resource.

There is one crucial distinction between a professional practice, on the one hand, and the education, degree, and license which are its necessary predicates. The latter are intellectual accomplishments, personal achievements of the holder. The practice is a commercial enterprise, a business. It provides income upon which the family depends. Equitable distribution assumes marriage is a partnership, with both parties contributing to its economic well-being. If the financial foundation of that partnership, the source of income, is placed beyond the reach of one of the spouses, the theory loses its meaning.

If equitable distribution does not apply to a professional business, is there any reason to apply it to any business? Valuation problems are not confined to the professions (even assuming that professions can be defined with precision). If something is property it comes within the statute, whether it is difficult to value or not. It is contrary to the spirit and policy of the statute to say that because the value of the practice, possibly the most substantial asset

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(footnote continued)

Community, 56 Tul. L. Rev. 313, 313 (1981) (authored by Bryan Mauldin) (hereinafter "Mauldin Comment").

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> of the marriage, cannot be measured with certainty it will be given no value at all. If equitable distribution is to have vitality then such items must be included within its scope.7/

To the extent that Moffitt v. Moffitt[8] did implicitly alter our position on professional goodwill as expressed in Rostel, I think that any alteration was a mistake, and that the better view is that professional goodwill need not be marketable to be considered in dividing the marital assets.

In this regard, I find persuasive the criticisms leveled by commentators against Moffitt and other similar cases:

> Several recent cases have adopted a limited form of divisibility, holding that goodwill is divisible only if it exists apart from the owner's individual reputation and future earning capacity. Moffitt v. Moffitt, 749 P.2d 343 (Alaska 1988); Wilson v. Wilson, 741 S.W.2d 640 (Ark. 1987); [Prahinski v. Prahinski, 540 A.2d 833, 843 (Md. App.), cert. granted, 546 A.2d 490 (Md. 1988)]; Taylor v. Taylor, 386 N.W.2d 851 (Neb. 1986); see Buckl v. Buckl, 542 A.2d 65 (Pa. Super. 1988). These cases display a curious inconsistency. Assume that an educated wife uses her own time and effort doing free public relations work for the husband's business, causing its reputation to increase significantly. If the business is a close corporation practicing under a trade name, then the wife's efforts have increased the corporation's goodwill, and she will be compensated for her efforts. See, e.g., In re Brooks, 742 S.W.2d 585 (Mo. App. 1987); Buckl. But if the wife makes exactly the

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7. L. Golden § 6.21, at 189.

8. Moffitt v. Moffitt, 749 P.2d 343 (Alaska 1988).

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same contributions to the husband's solo professional practice, the goodwill will not be property and the wife will not be compensated. The court will solemnly assure her that unlike the wife in the first situation, her efforts went only to increase her husband's personal reputation and future earning capacity, neither of which constitutes marital property. Thus, whether or not the wife receives compensation for her valuable efforts depends upon the type of business the husband conducts and the form in which he conducts it.

It is difficult to explain this difference of result on any defensible grounds. Some courts have noted that business goodwill is immediately realizable, while professional goodwill is not, see Buckl, but even these courts have generally held in other contexts that an asset need not be immediately realizable in order to constitute marital property. For instance, retirement benefits generally cannot be transferred before maturity, but courts in most states have nevertheless found them to be marital property.9/

Other courts have noted that an award of unrealizable goodwill can be unfair to the owning spouse, because it may force him to pay the nonowning spouse her share by means of a promissory note, thus forcing him to remain employed in order to make the payments. E.g., Moffitt. The alternative, however, is to deny the nonowning spouse any rights in an asset of great economic worth which as a matter of economic fact will substantially benefit the owning spouse in the future. Possible difficulties in arranging means of payment should not justify

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9. Alaska is among these states. See Laing v. Laing, 741 P.2d 649, 655-56 (Alaska 1987) (nonvested pensions are marital assets subject to division by divorce court); Monsma v. Monsma, 618 P.2d 559, 560-61 (Alaska 1980) (vested federal civil service retirement benefits are a divisible marital asset).

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depriving either spouse of their legitimate marital property rights.10/

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10. L. Golden § 6.21, supp. at 107 (citation forms altered; Prahinski citation inserted). See also Comment, Hanson v. Hanson, Mitchell v. Mitchell: The Division of Professional Goodwill upon Marital Dissolution, 11 Harv. Women's L.J. 147 (1988) (authored by Jane A. Materazzo).

The problem perceived because of the intangible and potentially nonliquid character of professional goodwill is magnified as courts are faced with astonishingly high valuations. Where the value of the non-professional spouse's interest in the professional goodwill exceeds the combined value of the professional spouse's share of all tangible community assets, the courts are faced with an additional problem: How is the professional spouse going to obtain the cash necessary to make the ordered compensatory payment? It has been noted that "[i]n very few cases will the goodwill be a liquid asset similar to the items used to offset its value in a division of community property such as stock, real property or bank accounts." At dissolution, all the assets of the practice, including the goodwill, must necessarily be awarded to the licensed professional spouse. The non-professional spouse's interest in the goodwill must be compensated with other property. Not only is the professional spouse faced with the forced liquidation of tangibles in order to pay the necessary compensation, but there may not be enough tangibles to liquidate.

However, this is also the precise situation in which the non-professional spouse needs the greatest protection. If his share in the professional goodwill is left uncompensated and there is also little tangible property to be awarded, the non-professional spouse will be left with few assets while the professional spouse enjoys continued possession of a very valuable asset. This would amount to a perpetuation of the economic superiority of the professional or working spouse over the non-professional or non-working spouse which community property is intended to remedy. Clearly the role of the court is not to

(footnote continued)

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In the instant case, there was extensive evidence presented as to Margaret's direct and indirect contributions to the success of Robert's law practice. Margaret's brief presents an accurate characterization of these efforts:

> When Robert Richmond opened his own law practice, Margaret Richmond was there to assist him. She worked as a secretary in the law office. When law clerks and associates were hired, she housed and fed them, and washed their clothes. She frequently entertained employees and clients of the law firm, giving annual New Year's Eve parties and "surprise" birthday parties for Robert

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(footnote continued)

> force the professional spouse into bankruptcy or forced sale of his practice, nor is this a necessary result. It is equally unnecessary for the court to deny the non-professional spouse a fair division of property by intentionally undervaluing the professional goodwill.
>
> . . . .
>
> The solution is not bankruptcy, forced sale of the practice, undervaluation of professional goodwill, or unequal division of the community. The financial interests of both spouses require a far less onerous remedy which is readily available since it frequently is used and is certainly within the courts' discretionary powers. A court, upon assigning a fair value to the professional goodwill and making an appropriate division of tangibles, need only, where necessary to avoid hardship, order periodic payments or the execution of a promissory note payable in installments over a term sufficient to meet the balance due plus interest accrued on the compensation for the non-professional spouse's interest in the good-will. Such a method meets the financial needs of both spouses.

Mauldin Comment, 56 Tul. L. Rev. at 328-30 (footnotes omitted; emphasis added).

> Richmond. She handled the remodeling of the law office building. She volunteered for community service activities [in part as an effort] to promote the public image of the law firm. . . .
>
> In addition to her efforts on behalf of the law firm, Margaret Richmond managed the family home and the family finances. She agreed to stay at home and care for their three children so that Robert Richmond could continue with developing the law practice and legal career. The specific agreement between the parties was that Robert Richmond's only responsibility was to bring home money from the law practice and that Margaret Richmond would "do everything else." Accordingly, Margaret Richmond acquired money from her parents to [assist in the purchase of the family home]. She acted as business manager for the Richmonds' real estate, managing an apartment building, purchasing [and setting up for rental] a condominium in Hawaii, and remodeling the family home. Margaret Richmond's job was full time as an equal participant in the Margaret and Robert Richmond partnership.

(Citations to trial transcript omitted.)

I agree with Margaret that her contribution to the goodwill of Robert's law practice should be recognized in the marital property division:

> After divorce, the law practice will continue to benefit from that goodwill as it had during the marriage. Much of the economic value produced during an attorney's marriage will inhere in the goodwill of the law practice. It would be inequitable to ignore the contribution of the non-attorney spouse to the development of that economic resource. An individual practitioner's inability to sell a law practice does not eliminate existence of goodwill and its value as an asset to be considered in equitable distribution. Obviously, equitable distribution does not require conveyance or transfer

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> of any particular asset. The other spouse, in this case the wife, is entitled to have that asset considered as any other property acquired during the marriage partnership.11/

The majority opinion states that "it is clear that Robert's goodwill[12] is unmarketable. . . . [and that] uncontroverted evidence established that his law practice's goodwill could not be sold."[13] If Robert were dissolving or withdrawing from a solo law practice, I could agree that any goodwill in Robert's practice could not be sold.[14] However, this would not

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11. Dugan v. Dugan, 457 A.2d 1, 6 (N.J. 1983). Accord In re Marriage of Fenton, 184 Cal. Rptr. 597, 600-02 (Cal. App. 1982).

12. I cannot agree with the majority's use of the words "Robert's goodwill." The issue here is not the goodwill possessed by Robert, but rather the goodwill (if any) possessed by Robert's law practice.

13. Maj. op. at 6.

14. See Geffen v. Moss, 125 Cal. Rptr. 687 (Cal. App. 1975) (sale of goodwill of sole legal practitioner's practice unenforceable as against public policy).

In Litman v. Litman, 463 N.Y.S.2d 24 (N.Y. App. Div. 1983), aff'g 453 N.Y.S.2d 1003 (N.Y. Sup. Ct. 1982), aff'd, 463 N.E.2d 34 (N.Y. 1984), the appellate court reversed the trial court's decision that "since a lawyer is enjoined by the Code of Professional Responsibility . . . from selling his or her practice, it is unfair to subject the practice to equitable distribution upon dissolution of the lawyer's marriage." 463 N.Y.S.2d at 25 (citation omitted). The court held that, though the firm need not be sold, the husband would have to compensate the wife for her share of the equity in the firm. Id.

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lead me to conclude that an ongoing solo law practice lacks goodwill for marital division purposes.[15]

The fact is, however, that Robert is not a sole practitioner, but rather the sole shareholder of an ongoing multi-lawyer professional corporation, Richmond and Associates.[16] Thus, by expressing no opinion as to whether a multi-lawyer law firm has professional goodwill, the majority opinion fails to decide the central issue presented to this court on the issue of goodwill.[17]

In my opinion, both a solo practitioner (operating either as a sole proprietorship or as a professional corporation) and a multi-lawyer law firm (operating either as a partnership or

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15. The courts are divided on the question of whether a law practice operated as a sole proprietorship may have goodwill divisible for marital estate purposes. Compare Dugan v. Dugan, 457 A.2d 1, 6 (N.J. 1983); In re Marriage of Freedman, 665 P.2d 902, 904-05 (Wash. App. 1983) (both holding that goodwill may exist and be divided upon divorce) with Prahinski v. Prahinski, 540 A.2d 833, 843-44 (Md. App.), cert. granted, 546 A.2d 490 (Md. 1988); Beasley v. Beasley, 518 A.2d 545, 552 (Pa. Super. 1986) (both holding that there is no divisible goodwill).

16. See also In re Marriage of Lopez, 113 Cal. Rptr. 58, 63 (Cal. App. 1974) (solo attorney formed partnership with two associates by selling interests in firm which included goodwill), disapproved on other grounds, In re Marriage of Morrison, 573 P.2d 41 (Cal. 1978). In the instant case one of the associates in Robert's firm became a partner, and the firm is now Richmond & Quinn.

17. Thus, I cannot agree with the majority that "[t]he uncontroverted evidence established that his law practice's goodwill could not be sold." Maj. op. at 6.

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as a professional corporation) may have goodwill.[18] If it does, it should be considered in valuing the marital estate for the reasons that I have expressed above. Although the courts are deeply divided on the question of whether the goodwill of a sole legal practitioner's practice is a divisible marital asset,[19] the majority of courts that have considered the question of whether the goodwill of a multi-lawyer law firm is a divisible asset have answered that question in the affirmative.[20]

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18. The existence and value of goodwill must be determined regardless of whether it is "that of a sole practitioner, a professional partnership or a professional corporation." In re Marriage of Lopez, 113 Cal. Rptr. at 68.

19. See supra note 15.

20. See Molloy v. Molloy, 761 P.2d 138, 139-41 (Ariz. App. 1988) (goodwill of incorporated law firm is a marital asset subject to distribution); Todd v. Todd, 78 Cal. Rptr. 131, 135-36 (Cal. App. 1969)(goodwill of partnership divisible); In re Marriage of Brooks, 756 P.2d 161, 162-63 (Wash. App. 1988)(goodwill of incorporated law firm may be valued even though assigned no value in the corporate bylaws). But see Holbrook v. Holbrook, 309 N.W.2d 343, 354-55 (Wis. App. 1981)(goodwill or intangible value of partnership interest in law firm not an asset subject to division).

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regarding the trading of the stocks, the record clearly shows that Erick took no *active* interest in the maintenance, management or control of the stocks. Erick admitted at trial that he did not give the stock broker any instructions concerning the account, nor could he identify a single transaction in which he had been involved.

There is also no real indication that Erick's contributions to the marital community allowed Debra to preserve her inheritance. In fact, the opposite appears to be true. The record indicates that Debra's inheritance allowed the parties to acquire substantial marital assets. Debra contributed over $78,000 of her inheritance directly into the marital estate. Moreover, it was the availability of Debra's inheritance that allowed the parties to acquire the mortgage on the Eagle River house, an asset that was awarded to Erick. Debra also worked throughout the course of the Julsen's thirteen year marriage, earning $20,000 to $30,000 annually.

[9] Even assuming, *arguendo*, that Erick's contributions did benefit Debra's inheritance, it does not necessarily follow that invasion is required. Our prior cases do not hold, as Erick apparently assumes, that "benefit to separate property" mandates invasion. Rather, *Vanover* and its progeny merely indicate that where such circumstances exist, the trial court *may* in its discretion, determine that the equities require that all or part of the separate property be subject to distribution. *See Brooks*, 733 P.2d at 1053–54; *Burrell v. Burrell*, 537 P.2d 1, 3, 6 (Alaska 1975); *Vanover*, 496 P.2d at 648.

In the case at bar, the trial court specifically found that "no reason exists to justify invasion of [Debra's inheritance]." In light of the fact that Erick received over $225,000 in marital assets, is only 40 years old and earns over $50,000 a year, we perceive no abuse of discretion in the trial court's refusal to invade Debra's inheritance. Such a determination is not clearly unjust.

Erick's third argument is that an inheritance received during marriage constitutes, as a matter of law, a marital asset. Erick's argument essentially is that under the plain meaning of AS 25.24.160(a)(4) [5], any asset acquired during marriage by either spouse is a marital asset subject to distribution. Consequently, since Debra acquired her inheritance during the marriage, it must be deemed a marital asset.

Although we have had the issue of whether an inheritance received during marriage constitutes property acquired during marriage before us on several prior occasions, we have never actually decided the matter.[6]

Looking to other jurisdictions for guidance shows that a substantial majority of states deem inherited property to be the separate non-marital property of the inheriting spouse. *Hussey v. Hussey*, 280 S.C. 418, 312 S.E.2d 267, 270 (1984). By statute, twenty-one states and the District of Columbia either define inherited property as separate property or exclude it from the definition of marital property. *See* L. Golden, *Equitable Distribution of Property* § 5.20, at 113–14 (1983). *Accord*, Uniform Marital Property Act § 4, *reprinted in* 9A U.L.A. 29 (Supp.1986).[7] Other jurisdictions

5. *See supra* note 4.

6. In *Burrell*, 537 P.2d at 2–3, Homer had inherited a 1/4 interest in a trust estate worth $1,167,000. The trial court held that the inheritance constituted a non-marital asset and declined to invade it in making the property division. *Id.* at 3. On review, we did not question the trial court's theory that the inheritance was to be classified as a non-marital asset, but held, on the assumption that the inheritance should be deemed property acquired before coverture, that "a just division of the property ... required invasion of [Homer] separate property, ... and the award of some portion of ... [it] to [Teresa]." *Id.* at 6 & n. 15 (footnotes omitted).

More recently in *Gabaig*, we intimated that property inherited during marriage should be treated as a non-marital asset, but since the point was not argued we had no occasion to rule on the matter. 717 P.2d at 842 & n. 17. In that case, we upheld the trial court's property division awarding Dorothy only one-third of the marital assets even though all the other factors indicated that a more equal division would be equitable. *Id.* Our rationale in *Gabaig* for upholding the husband's greater share was that "he inherited it." *Id.* at 843.

7. UMPA § 4(g)(1) provides in part:

Property acquired by a spouse during marriage ... is individual property if acquired:

Sec. 25.24.120. Defenses to adultery. In a divorce action for adultery, the following defenses may be made:

(1) procurement;

(2) connivance;

(3) the act has been expressly forgiven or impliedly forgiven by the voluntary cohabitation of the parties after knowledge of the act;

(4) the plaintiff is also guilty of adultery and without procurement or connivance of the defendant and not forgiven as provided in the defenses to adultery; or

(5) the action has not been commenced within two years after the discovery of the act by the plaintiff. (§ 12.11 ch 101 SLA 1962)

Revisor's notes. — Formerly AS 09.55.180. Renumbered in 1983.

Collateral references. — Connivance, 3 Am. Jur. POF, pp. 371-378.

Sec. 25.24.130. Defenses to other divorce grounds. When the divorce action is for any of the grounds provided in AS 25.24.050(4)-(6), the defense of procurement or that the defendant has been expressly forgiven may be made. When the divorce action is for the ground provided in AS 25.24.050(3), the defense of procurement or that the defendant has been expressly forgiven or that the action was not brought within two years after conviction may be made. (§ 12.12 ch 101 SLA 1962)

Revisor's notes. — Formerly AS 09.55.190. Renumbered in 1983.

Collateral references. — What constitutes reconciliation of separated spouses, 35 ALR2d 746.

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Sec. 25.24.140. Orders during action. (a) During the pendency of the action, the court may provide by order

(1) that one spouse pay an amount of money as may be necessary to enable the other spouse to prosecute or defend the action;

(2) for the care, custody, and maintenance of the minor children of the marriage during the pendency of the action;

(3) for the freedom of one spouse from the control of the other spouse during the pendency of the action;

(b) The court may restrain either or both parties from disposing of the property of either party during the pendency of the action. (§ 12.13 ch 101 SLA 1962; am § 71 ch 127 SLA 1974)

Revisor's notes. — Formerly AS 09.55.200. Renumbered in 1983.

Cross references. — For duty of parent and child to maintain each other, see AS 25.20.030.

REPEALED ? REENACTED SECTIONS

Revisor's notes. — Formerly AS 09.55.231. Renumbered in 1983.

Cross references. — For jurisdiction of court to consider child custody, see As 25.30.020.

Effect of amendments. — The 1982 amendment, in subsection (a), inserted "including visitation by grandparents and other persons" in the middle of paragraph (2).

NOTES TO DECISIONS

Jurisdiction. — The superior court has no jurisdiction to make the "child custody determination" that is a prerequisite to the entry of a decree of dissolution under AS 25.24.230(a) unless one of the conditions listed in AS 25.30.020(a) exists. Layne v. Niles, Sup. Ct. Op. No. 2396 (File No. 5887), 632 P.2d 234 (1981).

Cited in Szmyd v. Szmyd, Sup. Ct. Op. No. 2472 (File No. 5854) 641 P.2d 14 (1982).

Sec. 25.24.210. Petition for dissolution. (a) The caption in a petition for dissolution of marriage under AS 25.24.200 — 25.24.260 shall be styled substantially "In the Matter of the Dissolution of the Marriage of . . . . and . . . ."

(b) The petition shall be filed with the superior court and shall either

(1) recite that the conditions enumerated under AS 25.24.200(a) exist and shall be signed and verified by both of the petitioners or by one petitioner, if that petitioner personally serves the petition on the other spouse in accordance with the Alaska Rules of Civil Procedure in anticipation that the spouse will comply with AS 25.24.200(c); or

(2) recite that the conditions enumerated under AS 25.24.200(b) exist and be signed and verified by one of the petitioners.

(c) The petition shall state that the spouse or spouses executing the petition consent to the jurisdiction of the court.

(d) The petition shall request that the marriage be dissolved and that the prior name of a spouse be restored, if desired by that spouse.

(e) If the petition is brought by both spouses under AS 25.24.200(a), the petition shall state in detail the terms of agreement as between the spouses with regard to the custody of children, child support, visitation, spousal support and tax consequences, if any, division of property, and allocation of debts, and, in addition, shall state

(1) the respective occupations of the spouses;

(2) the income, assets, and liabilities of the respective spouses at the time of filing the petition;

(3) the date and place of the marriage;

(4) the name, date of birth, and current custodial status of each minor child born of the marriage or adopted by the petitioners;

(5) whether the wife is pregnant;

(6) other facts and circumstances which the petitioners believe should be considered; and

(7) any other relief sought by the spouses. (§ 1 ch 260 SLA 1976)

Revisor's notes. — Formerly AS 09.55.232. Renumbered in 1983.

Sec. 25.24.220. Hearing. (a) After a petition for dissolution is filed under the provisions of AS 25.24.210, a hearing shall be scheduled in accordance with the Alaska Rules of Civil Procedure.

(b) If the petition is brought by both spouses under AS 25.24.200(a), both the husband and wife are required to attend the hearing personally and not through counsel unless the court, for good cause, provides otherwise, or unless a spouse has complied with AS 25.24.200(c), in which case only the spouse filing the petition is required to attend. Either spouse may have counsel at the hearing.

(c) If the petition is brought by one spouse under AS 25.24.200(b), that spouse shall submit proof of diligent inquiry as to the whereabouts of the absent spouse and provide notice by publication, posting, or other means as ordered by the court in accordance with the Alaska Rules of Civil Procedure.

(d) If the petition is brought by both spouses under AS 25.24.200(a), the court shall examine the petitioners or petitioner present and consider whether

(1) the spouses fully understand the nature and consequences of their action;

(2) the agreements between the spouses concerning child custody, child support, and visitation are fair, just, and equitable as between the spouses and in th[illegible] interests of the children of the marriage;

(3) the ag[illegible]etween the spouses relating to the division of property, [illegible]upport, and the allocation of obligations are fair, just, an[illegible]le; and

(4) [illegible]tions in AS 25.24.200(a) have been met.

(e) [illegible]etition is brought by one spouse under AS 25.24.200(b), the c[illegible]all examine the petitioner and consider whether the petitione[illegible] understands the nature and consequences of the action and wheth[illegible]e conditions in AS 25.24.200(b) have been met.

(f) [illegible]ourt may appoint a guardian ad litem to represent the best interes[illegible]f the child. Appointment of a guardian ad litem or attorney for the [illegible]ild shall be made under the terms of AS 25.24.310.

(g) The court may amend the agreements between the spouses relating to child custody, child support, visitation, spousal support, division of the property, and allocation of obligations, but only if both petitioners concur in the amendment. (§ 1 ch 260 SLA 1976)

Revisor's notes. — Formerly AS 09.55.233. Renumbered in 1983.

Sec. 25.24.230. Judgment. (a) If the petition is brought by one or both spouses under AS 25.24.200(a), the court may grant the spouses a final decree of dissolution and shall provide the other relief as pro-

vided in this section if the court, upon consideration of the information contained in the petition and the testimony of the spouse or spouses at the hearing, finds that

(1) the spouses understand fully the nature and consequences of their action;

(2) the agreements between the spouses concerning child custody, child support, visitation, spousal support and tax consequences, if any, division of property, and allocation of obligations are not grossly unfair, unjust, or inequitable and are in the best interests of the children of the marriage, if any; and

(3) the conditions in AS 25.24.200(a) have been met.

(b) If the petition is brought by one spouse under AS 25.24.200(b), the court may grant the spouses a final decree of dissolution and restore the petitioner's prior name, when so requested, if the court, upon consideration of affidavits supplied by the spouse and the testimony of the spouse at the hearing, finds that

(1) the spouse present at the hearing understands fully the nature and consequences of the action; and

(2) the conditions in AS 25.24.200(b) have been met.

(c) The court shall dismiss or continue an action brought under AS 25.24.200 — 25.24.260 before findings are made if

(1) a representative of the minor children objects to a term of any of the agreements between the spouses;

(2) either of the spouses withdraws from any of the agreements required under AS 25.24.200(a); or

(3) the petition alleges that the conditions in AS 25.24.200(b) exist, but the whereabouts of the absent spouse becomes known to the other spouse or the court before findings are made.

(d) The court shall deny the relief sought in an action brought under AS 25.24.200 — 25.24.260 if the court does not make the findings requisite under (a) and (b) of this section.

(e) If the petition is brought by both spouses under AS 25.24.200(a), the court shall restore either spouse's prior name, if so requested, and shall fully and specifically set out in the decree the agreements of the spouses relating to child custody, child support, visitation, spousal support, division of property, and the allocation of the obligations of the spouses; and the court shall order the performance of those agreements. The court shall also state, in the decree, whether child support payments are to be made through the child support enforcement agency. If the petition is brought by one spouse under AS 25.24.200(b), the decree shall state that it does not bar future action on the issues not resolved in the decree.

(f) Notwithstanding any other provisions of AS 25.24.200 — 25.24.260, the court may not award as between the spouses any real or personal property acquired by the spouses before the date of the marriage, unless the spouses expressly agree otherwise or the court deter-

mines that such property should be made available, by sale or other conveyance, to ensure that the children's best interests are provided for. If the court determines that the children's best interests require an award of premarital property but the spouses do not agree, the action shall be dismissed or continued. (§ 1 ch 260 SLA 1976)

Revisor's notes. — Formerly AS 09.55.234. Renumbered in 1983.

Cross references. — For jurisdiction of court to make child custody determination, see AS 25.30.020(a).

NOTES TO DECISIONS

Jurisdiction to make child custody determination. — The superior court has no jurisdiction to make the "child custody determination" that is a prerequisite to the entry of a decree of dissolution under subsection (a) unless one of the conditions listed in AS 25.30.020(a) exists. Layne v. Niles, Sup. Ct. Op. No. 2396 (File No. 5887), 632 P.2d 234 (1981).

Sec. 25.24.240. Effect and modification of decree. (a) A decree of dissolution issued under AS 25.24.200 — 25.24.260 shall have the same force and effect as a decree granted under AS 25.24.010 — 25.24.180.

(b) A decree of dissolution granted under AS 25.24.200 — 25.24.260 may be modified or enlarged as prescribed by AS 25.24.150 — 25.24.170. (§ 1 ch 260 SLA 1976)

Revisor's notes. — Formerly AS 09.55.235. Renumbered in 1983.

Sec. 25.24.250. Forms. (a) The Department of Law, in cooperation with the administrator of the Alaska Court System, shall prepare forms and instructions for use by persons wishing to obtain a dissolution of their marriage under AS 25.24.200 — 25.24.260 and wishing to utilize the services of the child support enforcement agency. These forms shall conform to the requirements of the Alaska Rules of Civil Procedure, except that information appearing on the forms in legible handwriting shall be acceptable.

(b) Forms prepared under (a) of this section shall be made available to the public at each office of the division of social services of the Department of Health and Social Services, and every superior court, and wherever else considered necessary by the Department of Law. (§ 1 ch 260 SLA 1976)

Revisor's notes. — Formerly AS 09.55.236. Renumbered in 1983.

Sec. 25.24.260. Miscellaneous. No spouse may be precluded from filing an action for divorce under AS 25.24.010 — 25.24.180 upon dismissal or denial of a petition filed under AS 25.24.200 — 25.24.260. (§ 1 ch 260 SLA 1976)

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comprised of three stages: (1) determining what property is eligible for distribution, (2) determining the value of that property, and (3) making an equitable division. Our analysis in this case has been concerned with part (1) of the above process. With respect to the five-plex, the Arizona townhouse, and the airplane, stage (2) has already been carried out. No valuation has yet been made of the Gambell 1 property, however, and that must be accomplished on remand. Following that, the superior court is directed to make an equitable division based upon the full equity value of each item of property.[20]

[6] The "principal factors" to be weighed by the superior court in reaching a division of property are:

(a) the ages of the parties;

(b) their earning capacity;

(c) the duration of the marriage;

(d) the conduct of the parties during marriage;

(e) their "station in life";

(f) the circumstances and necessities of each;

(g) their health;

(h) their financial condition;

(i) the time and manner of acquisition of the property in question;

(j) the value of the property at the time of division;

(k) the income-producing capacity of the property.

Merrill v. Merrill, 368 P.2d 546, 647–48 n. 4 (Alaska 1962). These *Merrill* factors have been consistently reiterated by this court in subsequent opinions.[21] The *Merrill* criteria will be of increased usefulness to a trial court in its determination of an equitable division of property, if the court begins its consideration of the *Merrill* factors with the presumption that the most equitable divi-

21. *Hinchey v. Hinchey*, 625 P.2d 297, 304–05 (Alaska 1981); *Burrell v. Burrell*, 537 P.2d 1, 4 (Alaska 1975); *Vanover v. Vanover*, 496 P.2d 644, 645 (Alaska 1972); *Stroecker v. Stroecker*, 428 P.2d 384, 386 (Alaska 1967); *Groff v. Groff*, 408 P.2d 998, 1001 (Alaska 1965).

sion of the property is an equal division. This starting point is intended to provide a grounding point by which the relevance of the *Merrill* factors may be determined.

In the past we have held that there is no requirement that the ultimate division made by the trial court must be an equal one. *Rostel v. Rostel*, 622 P.2d 429, 432 (Alaska 1981); *Hurn v. Hurn*, 541 P.2d 360 (Alaska 1975). In no sense do we intend to modify these decisions. The trial courts will still retain broad discretion in assigning weight to the various factual elements highlighted in *Merrill*.[22]

D. *Conclusion*

With respect to the four items of property discussed in Part B of this opinion, we reverse and remand this case to the superior court for a redetermination of the division of property in conformity with this opinion.[23]

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings not inconsistent with this opinion.

STATE of Alaska, DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, Appellant,

v.

UNIVERSITY OF ALASKA, Appellee.

No. 5942.

Supreme Court of Alaska.

May 20, 1983.

Wage claim was filed with the Department of Labor by university counsel, pro-

22. The criteria in *Merrill* are not exhaustive, and thus the trial court is free to consider additional factors which may be relevant in a particular case.

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NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPR . COURT OF THE STATE OF ALASKA

CYRIL R. WANAMAKER, Appellant,	Supreme Court No. S-2841
v.	1JU-82-1372 CIVIL
JUDITH LEE SCOTT (WANAMAKER), Appellee.	OPINION
	[No. 3566 - March 2, 1990]

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau
Rodger W. Pegues, Judge.

Appearances: David C. Crosby, Council & Crosby, Juneau, for Appellant. Anthony M. Sholty, Faulkner, Banfield, Doogan & Holmes, Juneau, for Appellee.

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton, and Moore, Justices.

RABINOWITZ, Justice.

INTRODUCTION.

Randy Wanamaker appeals from the attorney's fees portion of the superior court's modification order which granted his former wife, Judith Scott, custody of their minor child. He does not contest the change of custody.

Randy argues that the superior court lacked subject matter jurisdiction as to the modification motion under the Uniform Child Custody Jurisdiction Act, AS 25.30.010-.910 (UCCJA), and the federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (PKPA). It is Randy's position that Washington, the state in which the original custody decree was issued, has "continuing jurisdiction" to the exclusion of the courts of Alaska. In regard to the award of attorney's fees, Randy contends that the court abused its discretion in holding he exhibited "bad faith and vexatious conduct" in opposing Judith's motion to change custody.

FACTS.

In 1976 the parties obtained a divorce in the state of Washington. Custody of their 2½ year old child, Jennifer, was awarded to Judith. Randy subsequently moved from Washington to Juneau. In 1981 Randy obtained a custody modification order from

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the Washington Superior Court which awarded him custody of Jennifer.[1]

Between 1981 and 1987 Jennifer lived with Randy in Juneau. Throughout this 1981-1987 period Jennifer visited with her mother for about three to four weeks per year in Washington, with about two to three weeks of this being summer visitation. Judith resided in the Seattle area from 1981 at least through May of 1987.

In December of 1986 Randy filed a motion in the superior court of Alaska to modify Judith's visitation so that it would not take place in the presence of Carlos Rojas, who had since been divorced from Judith. The parties stipulated in May of 1987 that visitation would be conducted out of Rojas' presence. Then on May 18, 1987, Judith filed motions in the superior court of Alaska for modification of the 1981 Washington custody order and for temporary custody. Randy opposed these motions on substantive, not jurisdictional grounds.

The superior court denied Judith's motion for temporary custody, but subsequently granted Judith's motion to modify custody. The court awarded Judith custody of Jennifer because of

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1. The basis for the modification award was: 1) domestic violence between Judith and her husband, Carlos Rojas; 2) an unstable childhood environment which was evidenced both by numerous residence changes, and the delegation by Judith of child-care responsibilities to other persons for extended periods of time; and 3) financial problems on the part of Judith.

its conclusion that Judith would better foster an open and loving parent-child relationship with the non-custodial parent, and that Jennifer had a strong preference to live with her mother. The court also found that the reasons which caused the Washington court to remove Jennifer from Judith's custody in 1981 no longer existed. Judith was also awarded $17,126.50 in full attorney's fees on the basis of Randy's "bad faith and vexatious conduct" in opposing the motion for change of custody.

Randy appeals on three grounds. First, he argues that under the Uniform Child Custody Jurisdiction Act the superior court improperly exercised subject matter jurisdiction. He argues that the UCCJA, which in relevant part has been enacted in Alaska and Washington, required the superior court to defer to Washington's "continuing" modification jurisdiction. Second, Randy contends that the federal Parental Kidnapping Prevention Act mandates the same conclusion. Finally, Randy takes the position that the superior court committed reversible error in finding that he exhibited "bad faith and vexatious conduct" in his opposition to Judith's motion to modify custody.

II. DID THE SUPERIOR COURT HAVE JURISDICTION TO MODIFY THE CUSTODY PROVISIONS OF THE WASHINGTON DECREE?

The provisions of UCCJA, as adopted in Alaska and Washington, determine which court has subject matter jurisdiction over custody matters.[2] Briefly stated, the superior court lacked jurisdiction to modify the subject custody decree if, as of the date Alaska jurisdiction was invoked,[3] the Washington court retained jurisdiction to modify its original 1976 custody decree. AS 25.30.130(a);[4] Szmyd v. Szmyd, 641 P.2d 14, 16, 17 (Alaska

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2. See Nicholaus v. Nicholaus, 756 P.2d 1338, 1342 (Wyo. 1988); Gomez v. Gomez, 446 N.Y.S.2d 127, 129 (N.Y. App. 1982), aff'd, 452 N.Y.S.2d (N.Y. 1982). As a court which does not have subject matter jurisdiction is without power to decide a case, this issue cannot be waived, and can be raised at any point during the litigation. Mundy & Mundy, Inc. v. Adams, 602 P.2d 1021, 1024 (N.M. 1979); see also Nicholaus, 756 P.2d at 1342; State v. Buckley, 734 P.2d 1047, 1049 (Ariz. App. 1987); Gomez, 446 N.Y.S.2d at 129. Thus, no matter how disingenuous it may be for a party which has previously invoked a state's jurisdiction later to challenge it in a related case, this court must ensure that the superior court's order is not "void." See Nicholaus, 756 P.2d at 1340, 1342. Neither the fact that Randy has previously attempted to invoke the superior court's jurisdiction to modify Judith's visitation privileges, nor the fact that Randy raises these jurisdictional issues for the first time on appeal obviates this court's responsibility to determine whether the superior court had subject matter jurisdiction.

3. Jurisdiction is evaluated as of the date invoked - May 18, 1987 in the case at bar. See State ex rel. Laws v. Higgins, 734 S.W.2d 274, 278 (Mo. App. 1987).

4. Alaska Statute 25.30.130(a) provides:

> (a) If a court of another state has made a custody decree, a superior court of this state may not modify that decree unless (1) it appears to

(footnote continued)

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1982) (jurisdictional prerequisites of the UCCJA apply to motions before a superior court to modify custody decrees). As Washington is no longer Jennifer's home state, the essential inquiry is whether a Washington court would assume jurisdiction over the modification request pursuant to RCW 26.27.030(1)(b):

(footnote continued)

> the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this chapter or has declined to assume jurisdiction to modify the decree, and (2) the court of this state has jurisdiction.

Section 14 of the UCCJA is substantively identical. The official commentary to section 14 reads in part as follows:

> Courts which render a custody decree normally retain continuing jurisdiction to modify the decree under local law. Courts in other states have in the past often assumed jurisdiction to modify the out-of-state decree themselves without regard to the preexisting jurisdiction of the other state. In order to achieve greater stability of custody arrangements and avoid forum shopping, subsection (a) declares that other states will defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of this Act. In other words, all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case to satisfy section 3. The fact that the court had previously considered the case may be one factor favoring its continued jurisdiction. If, however, all the persons involved have moved away or the contact with the state has otherwise become slight, modification jurisdiction would shift elsewhere.

9 U.L.A. Child Custody Jurisdiction Act, § 14, at 292 (1988) (citations omitted).

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> RCW 26.27.030. Jurisdiction. (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if the conditions as set forth in any of the following paragraphs are met:
>
> (a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; or
>
> (b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships;
>
> . . . .
>
> (3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

We conclude that on the facts before us the courts of Washington would have held that they lacked jurisdiction at the time Judith made her 1987 custody motion. Alaska, not Washington, then had the most significant connection to Jennifer. In re Custody of Thorensen, 730 P.2d 1380, 1388 (Wash. App. 1986).

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In Thorensen a child and two parents lived in Florida at least between 1976 (when the child was born) and 1980. Id. at 1382. A custody order was issued by a Florida court in favor of the mother in 1979. Id. The father then moved for modification in 1980, again in Florida. Id. The Florida court issued an order granting custody to the state. This order was never enforced, as the mother had earlier fled the state with the child. Id. In 1986 the mother petitioned a Washington superior court to modify the 1980 order, and preclude enforcement of a related 1986 Florida order. Id. The Washington court asserted jurisdiction over the mother's motion to modify on grounds that the state of Washington had developed the most significant connections with the child. Id. at 1386, 1388. At the time of the modification motion the child had resided in Washington for the previous two years, and had not lived in Florida for five years. The Thorensen court noted that jurisdiction would vest in the court with the "maximum" contacts to the child, and concluded, "Florida court records from 5 years ago, when [the child] was only 4 years old, have little bearing on the present and future of the 10-year-old child with education records, medical records, and living arrangements in the state of Washington for the last 2 years." Id. at 1388. The Thorensen court concluded

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that Washington, the "home state," was the most appropriate forum.[5]

III. WAS THE SUPERIOR COURT PRECLUDED FROM HEARING JUDITH'S MODIFICATION MOTION BY THE PROVISIONS OF THE FEDERAL PARENTAL KIDNAPPING PREVENTION ACT?

Under the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, a non-decree state court may not modify a custody order as long as the decree state has jurisdiction.[6] Since we have

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5. See also 9 U.L.A. Child Custody Jurisdiction Act, § 3, 144-45 (1988); Trask v. Trask, 727 P.2d 88, 91 (N.M. App. 1986); Olson v. Olson, 494 A.2d 737, 744 (1985); Swire v. Swire, 494 A.2d 1035, 1039 (N.J. Super. 1985); Hudson v. Hudson, 670 P.2d 287, 292 (Wash. App. 1983); L.F. v. G.W.F., 443 A.2d 751, 753-56 (N.J. Super. 1982); In re Reynolds, 441 N.E.2d 1141, 1144-45 (Ohio App. 1982); Siegel v. Siegel, 417 N.E.2d 1312, 1313, 1317-19 (Ill. 1981); Hegler v. Hegler, 383 So.2d 1134, 1135-37 (Fla. App. 1980); Pierce v. Pierce, 287 N.W.2d 879, 883 (Iowa 1980); Honigsberg v. Goad, 550 S.W.2d 471, 472 (Ky. 1976). But see, e.g., Kendall v. Whalen, 526 A.2d 588, 590 (Me. 1987); Kumar v. Superior Court, 652 P.2d 1003, 1009 (Cal. 1982); Jefferson v. Downs, 436 N.Y.S.2d 169, 171 (N.Y. Sup. 1981). See generally Bodenheimer, Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the Uniform Child Custody Jurisdiction Act, 14 Fam. L.Q. 203 (1981); Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications, 65 Cal. L. Rev. 978 (1977).

6. 28 U.S.C. § 1738A(f) reads:

> A court of a state may modify a [custody order of another state], if
>
> . . . .
>
> (2) the court of the other state no longer has jurisdiction . . . .

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concluded that the Washington courts would not have jurisdiction, the federal bar does not apply.

IV. DID THE SUPERIOR COURT ERR IN AWARDING JUDITH FULL ATTORNEY'S FEES IN CONNECTION WITH THE MOTION TO MODIFY CUSTODY?

The superior court awarded Judith her full attorney's fees incurred in connection with the custody modification motion. The superior court's award was based on its finding that Randy had "engaged in bad faith and vexatious conduct in his attempts to retain custody" of his daughter.[7]

In motions to amend or enforce a visitation or custody order, attorney's fees will be assessed only against litigants who have acted willfully and without just excuse. See L.L.M. v. P.M., 754 P.2d 262, 265 (Alaska 1988). Our review of the record in this case leads us to the conclusion that the superior court erred in its overall conclusion that an award of attorney's fees

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7. The superior court found that Randy had attempted to mislead the court in regard to Jennifer's custodial preference, and his reasons for limiting Judith's visitations with Jennifer. Additionally, the superior court found that Randy had pressured Jennifer to change her custodial preference, and that Randy had mischaracterized a counselor's analysis of Jennifer's relationship with her mother. The court also found that Randy had been unreasonable in failing to transfer to Judith certain of Jennifer's bank records and personal belongings following entry of the custody modification order. The superior court further found that Randy's "obduracy" made court intervention on this issue necessary.

against Randy was appropriate.[8] Such a holding on these facts would run counter to the rationale we adopted in L.L.M., that a party who reasonably and in good faith[9] believes his or her actions are justified by the best interests of the child[10] should

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8. At the hearing on modification of custody, Randy testified that Jennifer "told me that she wanted to live with her mother as long as she could." However, Randy apparently felt Jennifer had been pressured and was confused. Against this background, his putting Jennifer's preference in issue was not vexatious or in bad faith. Neither did Randy's efforts to persuade Jennifer to consider options of shared custody amount, in this context, to undue pressure. Finally, we conclude that Randy's characterization of Jennifer's and Judith's "peer" relationship does find support in counselor Nancy Karcarand's affidavit. Our review of the record thus does not reveal support for the superior court's holding of bad faith and vexatious conduct by Randy in connection with the motion for modification. We note that Judith has recovered full attorney's fees on her motion to order transfer of Jennifer's property and records, which recovery is not at issue in this appeal.

9. At the close of the custody modification hearing the superior court announced its ruling, stating in part:

> I think part of the reason for the disputes is simply a different appreciation by the listener of what is being said, what is being intended. That happens all the time, and there isn't any attempt to mislead or deceive or to lie.

Concerning Randy's motives, the superior court stated: "I don't consider him to be ill-motivated. I don't think that at all. I think he's always been well-motivated."

10. In its modification decision the superior court found in part, that:

> Some six years ago, Randy and his present wife (Karen) took Jennifer as a then distraught child into their home, provided her with nurture and support, helped her to progress from failing

(footnote continued)

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not be deterred from taking appropriate action by the possibility of an award of attorney's fees and costs. 754 P.2d at 265.

AFFIRMED in part, REVERSED in part.

(footnote continued)

> grades to solid B's and A's, and with the assistance of counseling, helped her grow from a problem-bent child to an outgoing perky, self-confident teenager of advanced maturity. There is, therefore, no question that they are, in Ms. Karacand's phrase, functionally competent parents. . . .

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tion, decide that it is in the public interest to establish another election procedure, there is no constitutional obstacle to that course of action. Those who reside or own property in the area to be annexed have no vested right to insist that annexation take place only with their consent. The subject of expansion of municipal boundaries is legitimately the concern of the state as a whole, and not just that of the local community.[34] There has been no infringement or deprivation of rights protected by the Fourteenth Amendment.

The Fifteenth Amendment and the Supreme Court's decision in the Gomillion[35] case are not pertinent. They are concerned with the denial of a citizen's right to vote because of his race or color. That factor is not involved in this case.

[8] In a companion case (No. 71) a number of residents of the District commenced an action against the District and its board of directors to compel the latter, by mandatory injunction, to hold an election in order that new directors could be elected—the terms of the others having expired. The City of Anchorage moved to intervene, claiming that because the District had been annexed to the city and thus dissolved by operation of law, no purpose could be served by the election of new directors who would have no functions to perform. The court dismissed the action, holding that its decision in the prior action brought by the City for a declaratory judgment was controlling.

What we have said above as to the validity and effect of the annexation of the Fairview District to the City of Anchorage disposes of this second appeal. There would be no sense in requiring the election of a board of directors for a public utility district which no longer was in existence.

The judgments are affirmed.

34. Cf. Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907); Mount Pleasant v. Beckwith, 100 U.S. 514, 524–525, 25 L.Ed. 699, 701 (1880).

35. Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

Charles C. MERRILL, Appellant,

v.

Margaret F. MERRILL, Appellee.

No. 77.

Supreme Court of Alaska.

Feb. 6, 1962.

Wife's action for divorce in which the Superior Court of the Third Judicial District, J. Earl Cooper, J., granted the wife a divorce and awarded her $35,000 and the husband appealed. The Supreme Court, Arend, J., held that the findings were insufficient to show the basis on which $35,000 award was made and the cause would be remanded for making appropriate findings and if this could not be done, the trial court should grant a new trial.

Judgment vacated and cause remanded with directions.

1. Divorce ⟹252, 286

Division of property between parties in divorce action rests in discretion of trial judge and Supreme Court will not disturb division unless clearly unjust. A.C.L.A. 1949, § 56–5–13.

2. Divorce ⟹285

Supreme Court when called upon to review division of property in divorce action needs to know the ultimate facts found. A.C.L.A.1949, § 56–5–13.

3. Trial ⟹394(1)

Requirement that in all cases tried on facts without jury court shall find facts specially and state separately its conclusions of law is mandatory, and must be reasonably complied with. Alaska Rules of Civil Procedure, rule 52(a).

4. Trial ⟹395(2)

Trial court, when case is heard without jury, has duty to show by sufficiently de-

tailed and explicit findings, basis of its decision to enable reviewing court to determine grounds upon which it reached its decision. Alaska Rules of Civil Procedure, rule 52(a); Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.

5. Appeal and Error ⟹989, 996, 1122(1)

Supreme Court's function is not to weigh evidence, draw reasonable inferences, make findings and determine result.

6. Divorce ⟹253, 287

Findings of trial court in divorce action were insufficient to show basis of $35,000 award to wife in lieu of any other right or interest in property of parties and case would be remanded for purpose of making appropriate findings or for new trial if additional findings were not possible.

Arthur D. Talbot, Anchorage, for appellant.

Neil S. Mackay, Anchorage, for appellee.

Before NESBETT, C. J., and DIMOND and AREND, JJ.

AREND, Justice.

This is a divorce action in which the trial court granted the plaintiff wife a divorce from the defendant, Charles C. Merrill, and awarded her the sum of $35,000, apparently in lieu of any right or interest in certain property of the parties. The defendant, as the appellant here, contends that the award was excessive and unjust and states that this presents the only issue on which he seeks review.

About two months after it tried the case, the court made and filed its findings of fact. These were to the effect that the parties married in 1952; that no issue had been born of the marriage; that certain property rights of the parties needed to be adjudicated; and that it became impossible for the parties to continue to live together as husband and wife because of an incompatibility of temperament between them.[1] On the basis of those findings, the court then made its conclusions of law that the plaintiff should "execute a quitclaim deed to the property owned by the parties"; and that the defendant husband should execute a deed of trust to the property of the parties, in the amount of $35,000, to a designated trustee, with the husband as trustor and the wife as beneficiary. The husband was also required to execute a promissory note for $35,000, along with the deed of trust, the note to be repaid at the monthly rate of $175, without interest.[2] A decree was entered accordingly and this appeal followed.

In his brief on appeal the defendant states that he is unable to say precisely upon what basis the court arrived at the $35,000 figure, as the findings of fact are silent on the subject. We have the same complaint to make.

[1, 2] Section 56-5-13 A.C.L.A.1949 empowers the trial court to provide, *inter alia*, in the divorce decree

> "For the division between the parties of their joint property, or the separate property of each, *in such manner as may be just*, and without regard as to which of the parties is the owner of such property * * *." (Emphasis supplied.)

Under the wording of this statute, the division of property between the parties in a divorce action rests in the discretion of the trial judge, and we should not disturb such division unless clearly unjust.[3] When called upon, as here, to review the justness of the division of property in a divorce action, we need to be informed by the trial court what it found to be the ultimate facts[4] upon which it based its conclusion

1. There is nothing in the findings to indicate that either party was to blame for the incompatibiity of temperament.

2. The conclusions of law do not indicate whether the deed of trust was to serve as security for the note, nor do they designate the payee of the note.

3. See Crouch v. Crouch, 63 Cal.App.2d 747, 147 P.2d 678, 682 (1944); Harris v. Harris, 169 Kan. 339, 219 P.2d 454 (1950); Kirsch v. Kirsch, 192 Wash. 156, 73 P.2d 356 (1937).

4. It has been held that the principal factors to be considered by the trial court

that the property should be divided as it has decreed.

[3] To take care of just such a situation as we have before us here, Rule 52(a) of the Rules of Civil Procedure was promulgated to provide that "in all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon."[5] The rule is mandatory and must be reasonably complied with.[6]

[4] As one well recognized authority points out, findings of fact under Rule 52(a) have a threefold purpose: "as an aid in the trial judge's process of adjudication; for the purposes of res judicata and estoppel by judgment; and as an aid to the appellate court on review."[7] To particularize, the requirement that the trial judge file findings of fact gives assurance that he has exercised care in ascertaining the facts, and has employed both skill and judgment in reducing his thoughts on contested matters to precise and pertinent findings while the evidence is still fresh in his mind.[8] Further, under Rule 52(a), it is the duty of the trial court by sufficiently detailed and explicit findings "to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision."[9]

[5, 6] From our study of the briefs and record we do not reach the ready conclusion of the trial court that the $35,000 award to the appellee was justified under the facts. It is quite possible that adequate findings would remove our doubts in this respect. As the case stands now we would have to assume the role of the trial court, weigh the evidence, draw reasonable inferences, make findings and determine the result. That is not our function or obligation. Therefore, the judgment in favor of the plaintiff with respect to the $35,000 awarded to her is vacated and the cause remanded to the superior court for the purpose of making appropriate findings of fact in the light of this opinion.[10] If this cannot be done, then the superior court shall, in lieu of making further findings of fact, grant a new trial.

So ordered.

in determining the question of alimony or division of property as between the parties are the respective ages of the parties; their earning ability; the duration and conduct of each during the marriage; their station in life; the circumstances and necessities of each; their health and physical condition; their financial circumstances, including the time and manner of acquisition of the property in question, its value at the time and its income producing capacity if any. Ruff v. Ruff, 78 N.D. 775, 52 N.W.2d 107, 111 (1952); Kressly v. Kressly, 77 S.D. 143, 87 N.W.2d 601, 603–604 (1958); 2 Nelson, Divorce and Annulment, § 14.135 (2d ed. 1945).

5. An identical provision in Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. has been operative in the federal district courts since 1938. The federal rules were extended to the Territory of Alaska in 1946 and remained with us until they were superseded by our own Rules of Civil Procedure in 1959 under statehood.

6. Maher v. Hendrickson, 188 F.2d 700 (7th Cir. 1951).

7. 5 Moore, Federal Practice para. 52.06 [1], at 2653 (2d ed. 1951).

8. United States v. Forness, 125 F.2d 928, 942–943 (2d Cir. 1942), cert. denied, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942).

9. Irish v. United States, 225 F.2d 3, 8 (9th Cir. 1955); United States v. Horsfall, 270 F.2d 107 (10th Cir. 1959).

10. We do not mean to intimate that findings must be made on all of the matters enumerated in the fourth note to this opinion or that no others need be made. We hold only that the findings should be sufficient to indicate the factual basis for the ultimate conclusion. See Kelley v. Everglades Drainage Dist., 319 U.S. 415, 422, 63 S.Ct. 1141, 87 L.Ed. 1485, 1489 (1943).

John PASLEY, d/b/a Pa
Appellant
v.
Phyllis E. BARBER
No. 128.
Supreme Court of
Feb. 6, 196

Action by broker to
sions. From an adverse
Superior Court for the
Fourth Judicial District C
Hepp, J., the broker ap
preme Court, Nesbett, C
that broker was not entit
where sale fell through l
was unable to convey go

Remanded with dire
ment for the defendant;

Arend, J., dissented i

1. Brokers ⚿61(1, 4)

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terms specified, broker is
mission even though sale
cause the seller or perso
ker is unable to convey
where broker knew or sh
of defects in the title.

2. Brokers ⚿61(4)
Principal and Agent ⚿

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unable to convey clear
erty listed for sale becau
in divorce litigation.

3. Brokers ⚿61(4)
Principal and Agent ⚿

Where broker's age
ployed as bookkeeper for
ness, broker was properl
sions where the agent w

have reached the same result by judicial decision. *See Bailey v. Bailey*, 250 Ga. 15, 295 S.E.2d 304, 305 (1982); *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832, 834 (1982); *Anderson v. Anderson*, 282 S.C. 162, 318 S.E.2d 566, 567 (1984); *Hussey*, 312 S.E.2d at 270. *See generally*, Golden, *supra* § 5.20, at 113–14; 1 J. McCahey, *Valuation and Distribution of Marital Property* § 18.05[4], at 18–72 to 18–75 (1986).

The policy considerations underlying this view have been stated as follows:

> The philosophy underlying equitable distribution is that marriage is a partnership and both spouses contribute, either directly or indirectly to the acquisition of property obtained during the marriage. If property is acquired without the joint efforts of the parties such property arguably should not be subject to division. For this reason, and because most inheritances are from family members and may have strong sentimental value, many states ... categorize inherited property as separate property.

Golden, *supra*, § 5.19, at 113 (footnote omitted). Other rationales variously identified include (a) tradition; (b) a belief that property which does not come into the marriage through the spouses' mutual efforts owes nothing to the marriage and is not intended to be shared; (c) the recognition that marital property is or should be only that property which arises from or to some extent is augmented by the efforts of the marital parties; and (d) the fact that inclusion of inherited property in the marital estate removes it from the natural line of succession, thus thwarting the intent of the person who acquired the property and passed it on to the inheriting spouse. *See Bailey*, 295 S.E.2d at 305; *Hussey*, 312 S.E.2d at 270.

[10] We find the majority rule and the policy considerations underlying it persuasive for several reasons. First, it is in line with our view of equitable distribution in general, which recognizes the partnership theory of marriage and considers the mutual effort and tangible contributions of the parties rather than the mere existence of the marital relationship. *See, e.g., Brooks*, 733 P.2d at 1053–54. Second, it accords the term acquired its ordinary and common meaning.[8] Therefore, we hold that for the purposes of equitable division, an inheritance received by one spouse[9] during marriage is not property acquired during coverture within the meaning of AS 25.24.160(a)(4), but constitutes a non-marital asset of the inheriting spouse. As such, an inheritance will not be subject to distribution unless a balancing of the equities requires it. Because the equities require no invasion here, the trial court's decision on this issue is affirmed.

2. *Child Custody*

Erick's second assertion of error is that the trial court based its decision to deny joint custody on inadequate findings.

[11] Child custody disputes are among the most difficult a trial court faces. *McDanold v. McDanold*, 718 P.2d 467, 468 (Alaska 1986). Trial courts are, therefore, vested with broad discre[...] where custody should b[...] also, *Craig v. McBride*, [...] (Alaska 1982); *Horutz v* [...] 397, 399 (Alaska 1977). [...] will reverse a trial cour[...] custody issue only if we [...] the record shows an abu[...] if controlling factual fi[...] erroneous. *E.g. McClai*[...] P.2d 381, 384 (Alaska 19[...] discretion may be foun[...] court considered imprope[...] consider statutorily-man[...] improperly weighed cert[...] ing its determination. [...]

[12] We find none of [...] stances present here. [...] grounded its decision pri[...] ing that the Julsens coul[...] the extent necessary to [...] of joint custody." This [...] supported by the record[...]

In *McClain*, we stated [...] apparent, ... that coo[...] parents is essential if [jo[...] be in the best interests [...] P.2d at 386. In *Smith v* [...] 282, 283 (Alaska 1983), w[...] court's rejection of joint [...] its finding that the part[...] able to cooperate. In ligh[...] *Smith*, we conclude that [...] not abuse its discretion in[...] custody was not in the [...] best interests.[10] The tri[...] determination is affirme[...]

III. CONCLUSION

For the reasons discuss[...] court's valuation of the r[...] est in the Minnesota [...] VERSED and REMAN[...] trial court may elicit ev[...] property's value. In all c[...] trial court's judgment is [...]

(1) by gift or a disposition at death made by a third person to the spouse and not to both spouses.

9A U.L.A. at 29.

8. We have repeatedly stated that unless words have been given a peculiar meaning, by virtue of statutory definition or judicial construction, they are to be construed in accordance with their common usage. *E.g., Division of Elections v. Johnstone*, 669 P.2d 537, 539 (Alaska 1985); *Lynch v. McCann*, 478 P.2d 835, 837 (Alaska 1970). *See also* AS 01.10.040 ("words and phrases shall be construed according to ... their common and approved usage").

In this regard, *Black's Law Dictionary* 23 (5th ed. 1979) defines acquired as follows:

> To gain ... usually by one's own exertions; ... to obtain by search, endeavor, investment, practice or purchase, ...

Likewise, the *Random House College Dictionary* 13 (Rev. ed. 1984) defines acquired as "to gain oneself through one's actions or efforts." As commonly used, then, the word acquired presupposes some effort, endeavor or action in the acquisition of the property, and thus, does not include property, like inheritances, which are received gratuitously from a third party.

9. Property inherited by both spouses jointly, of course, constitutes marital property subject to division.

10. Although Judge Carlson [...] express findings on all the [...] record reflects that he gav[...] the issue and considered th[...] to the case. Indeed, we do[...]

NOTES

NELSON V. NELSON: A PROPOSAL FOR EQUITABLE DISTRIBUTION OF THE PROFESSIONAL DEGREE

I. Introduction: The Status of the Professional Degree in Marital Dissolution in Alaska

Is a professional degree or license, earned by one party during a marriage, to be considered marital property subject to division upon marital dissolution? The Supreme Court of Alaska has joined the growing number of jurisdictions that have addressed this question, holding in *Nelson v. Nelson*[1] that a professional degree or license is *not* marital property. Under this holding, the spouse in Alaska who contributes to her[2] husband's professional education, and thus his earning potential, cannot be directly compensated for her investment. The contributing spouse must rely on the court's discretion in granting alimony,[3] if the court finds such an award both "just and necessary,"[4] or in considering her contributions when distributing the general marital property.[5]

On *Nelson*'s facts, the court's refusal to recognize the professional degree as property did not prevent an equitable result, but in other factual situations the holding threatens to have that effect unless it is modified. The court compensated the wife in *Nelson* by awarding her

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1. 736 P.2d 1145 (Alaska 1987).

2. The contributing spouse is assumed to be the wife, because in the vast majority of cases on record this is the situation. Exceptions include Lyons v. Lyons, 403 Mass. 1003, 526 N.E.2d 1063 (1988); McGowan v. McGowan, 142 A.D.2d 355, 535 N.Y.S.2d 990 (1988); Freyer v. Freyer, 138 Misc. 2d 158, 524 N.Y.S.2d 147 (1987); Cronin v. Cronin, 131 Misc. 2d 879, 502 N.Y.S.2d 368 (1986).

3. The terms "alimony" and "maintenance" are used interchangeably in this article.

4. Alaska Stat. § 25.24.160(a) (Supp. 1988). The statute provides in pertinent part:

> In a judgment in an action for divorce . . . the court may provide . . . (2) 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. . . .

5. *Nelson*, 736 P.2d at 1147.

half of the substantial assets the couple had accumulated during their seventeen-year marriage, pointing out that in the case of a long marriage the wife "receives a return which may exceed the amount of her contributions to [her husband's] education," and that the wife can receive a "return of her investment" by sharing in the accumulated marital property.[6] The *Nelson* court was thus able to compensate the wife without dealing with the ramifications of the professional-degree-as-property issue.[7]

The court, however, expressly reserved the question of whether a remedy exists to compensate the contributing spouse in the more common situation of a brief marriage during which one spouse has worked to enable the other to study full-time, with the result that the couple has not acquired any substantial assets that can be divided upon divorce.[8] In such a case, the wife's situation upon dissolution is made more inequitable by the possibility that, because she is obviously self-supporting, the court will not find an award of maintenance "necessary." Moreover, since in Alaska marital dissolutions are accomplished without regard to fault,[9] the contributing spouse who may be the more innocent of the parties can no longer make financial claims on the basis of fault.[10] Thus, the contributing spouse may leave the marriage with nothing, while her husband takes with him the valuable asset of future earning potential as a professional.

Alaska's courts will eventually be called upon to address the manifest inequity in such a situation. The policy behind Alaska's statute is clear: the court is to make every effort to balance the equities between the parties.[11] To broadly assert, as the court did in *Nelson*, that a

6. *Id.* at 1146 (quoting Lesman v. Lesman, 88 A.D.2d 153, 158, 452 N.Y.S.2d 935, 939 (1982)).

7. In cases of long-term marriages, courts in other jurisdictions have taken a facts-first approach similar to the approach used in *Nelson*, avoiding meaningful confrontation with the issue of how a remedy would be found in a different factual situation. *See* Wisner v. Wisner, 129 Ariz. 333, 631 P.2d 115 (Ct. App. 1981); *In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (Ct. App. 1979), *overruled on other grounds*, *In re* Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1979); Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (Ct. App. 1969); Vaclav v. Vaclav, 96 Mich. App. 584, 293 N.W.2d 613 (1980); Diment v. Diment, 531 P.2d 1071 (Okla. Ct. App. 1974).

8. *Nelson*, 736 P.2d at 1147. In Rhodes v. Rhodes, 754 P.2d 1333 (Alaska 1988), the supreme court held that the fact that the work of one spouse has contributed to the earning potential of the other must be considered as a "relevant factor" in making an equitable division of property. 754 P.2d at 1335. In *Rhodes*, as in *Nelson*, there were marital assets that could be divided. The court still has made no provision for compensating the contributing spouse in an assetless marriage where the contributing spouse can be considered as self-supporting.

9. *See* ALASKA STAT. § 25.24.160(a) (Supp. 1988).

10. ALASKA STAT. § 25.24.160(2), (4) (Supp. 1988).

11. ALASKA STAT. § 25.24.160(a) (Supp. 1988). The statute provides:

professional degree is not property subject to equitable distribution, without making other provision for the contributing spouse where the degree is the family's only asset, is to permit one party to leave the marriage enriched at the expense of the other — a signal that further balancing needs to be done.

Ideally, the Alaska Supreme Court should effect this balancing by recognizing the professional degree as marital property and by valuing it according to a labor theory of value.[12] Alternative workable remedies exist, however, that do not necessitate designating the degree as property, and which are possible under Alaska law. These remedies include equitable relief by means of quasi-contract and in gross restitutionary maintenance awards. As long as *Nelson* controls, the courts should consider applying these remedies when the situation envisioned in, but not addressed by, *Nelson* arises.

II. *Nelson v. Nelson*

June and Clairborne Nelson were married for seventeen years prior to their divorce in 1985. June had worked full-time to enable Clairborne to finish the last two years of his bachelor's degree in business accounting. While he was in school, Clairborne also worked part-time and received tuition aid because of his earlier military service. After graduation, Clairborne went to work for ARCO and June cared for their three children. She worked outside the home from time to time as well, most recently as a part-time pilot for a local airline.[13] The couple had accumulated assets valued by the trial court at $196,343. June petitioned the court to declare her husband's degree a "human capital asset" and thus part of the marital property, and to compensate her contribution to that degree by adding a portion of its value to her half of the property division.[14] The Alaska Supreme Court held that the lower court had not erred in dividing the marital assets equally,[15] or in failing to consider the degree as a marital asset.[16]

> In a judgment in an action for divorce . . . the court may provide (4) 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 . . . .

Id. (emphasis added).

12. *See infra* note 58 and accompanying text.

13. *Nelson*, 736 P.2d at 1146.

14. *Id.* at 1145-46.

15. *Id.* at 1147.

16. *Id.* at 1146.

The court acknowledged that other jurisdictions have recognized that one spouse has "a compensable property interest in the enhanced earning potential arising out of the other spouse's degree."[17] The court, however, distinguished *Nelson* on the basis of the facts typically present in such cases and absent in *Nelson*: the relatively brief marriage during which no immediately available assets exist because one spouse has worked to enable the other to obtain a professional education. The court pointed out that Clairborne's degree was not a specialized postgraduate degree, that he had contributed as well by working and receiving tuition aid, and that the length of the Nelsons' marriage had allowed June to realize her expectations by participating in the fruits of her husband's enhanced earning potential.[18] On these facts, the court found that an equal division of the general marital assets by the trial court was not inequitable.[19] Moreover, the court declared that a professional degree is not marital property subject to division under any circumstances.[20]

III. The Concept of the Degree as Property

A. *In re Marriage of Graham:* The Property Anomaly

By holding that a professional degree is not marital property subject to division, the *Nelson* court espoused the view expressed by a majority of jurisdictions,[21] most of which follow the reasoning of the

17. *Id.* at 1146 (citing *In re* Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978); Woodworth v. Woodworth, 126 Mich. App. 258, 259, 337 N.W.2d 332, 334 (1983)). Other cases which recognize a property interest in the professional degree, the minority position at the present time, include Reen v. Reen, 8 Fam. L. Rptr. 2193 (Mass. Probate & Fam. Ct. Hampden Div. Dec. 23, 1981); Daniels v. Daniels, 165 Mich. App. 726, 731, 418 N.W.2d 924, 927 (1988); Wilkins v. Wilkins, 149 Mich. App. 779, 791, 386 N.W.2d 677, 682 (1986); Thomas v. Thomas, 131 Mich. App. 830, 831, 346 N.W.2d 595, 596, *overruled on other grounds*, 419 Mich. 942, 355 N.W.2d 617 (1984); Vaclav v. Vaclav, 96 Mich. App. 584, 592, 293 N.W.2d 613, 617 (1980); McGowan v. McGowan, 142 A.D.2d 355, 357, 535 N.Y.S.2d 990, 991 (1988); O'Brien v. O'Brien, 66 N.Y.2d 576, 580-81, 498 N.Y.S.2d 743, 746, 489 N.E.2d 712, 715 (1985) (medical license is marital property); Daniels v. Daniels, 20 Ohio Op. 458, 459, 185 N.E.2d 773, 775 (1961) (medical license found analogous to a franchise and constitutes property that court may consider in determining alimony award).

18. *Nelson*, 736 P.2d at 1147.

19. *Id.*

20. *Id.* at 1146.

21. Jones v. Jones, 454 So. 2d 1006, 1009 (Ala. Ct. Civ. App. 1984); Pyeatte v. Pyeatte, 135 Ariz. 346, 351, 661 P.2d 196, 201 (Ct. App. 1982); Meinholz v. Meinholz, 283 Ark. 509, 512, 678 S.W.2d 348, 349 (1984); *In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 461, 152 Cal. Rptr. 668, 677 (Ct. App.), *overruled on other grounds*, *In re* Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1979); *In re* Marriage of Graham, 194 Colo. 429, 432, 574 P.2d 75, 77 (1978); Wright v. Wright, 469 A.2d 803, 806 (Del. Fam. Ct. 1983); Hughes v. Hughes, 438 So. 2d 146, 150 (Fla. Dist. Ct. App. 1983); *In re* Marriage of Weinstein, 128 Ill. App.

leading case, *In re Marriage of Graham*.[22] *Nelson* cited with approval the *Graham* court's rationale for refusing to classify a professional degree as marital property:

> An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of "property." It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere

3d 234, 244, 470 N.E.2d 551, 559 (1984); *In re* Marriage of McManama, 386 N.E.2d 953, 955 (Ind. Ct. App. 1979), *vacated on other grounds*, 399 N.E.2d 371 (1980); *In re* Marriage of Francis, 442 N.W.2d 59, 62 (Iowa 1989); *In re* Marriage of Wagner, 435 N.W.2d 372, 375 (Iowa 1988); McGowan v. McGowan, 663 S.W.2d 219, 223 (Ky. Ct. App. 1983); Archer v. Archer, 303 Md. 347, 358, 493 A.2d 1074, 1080 (1985); Drapek v. Drapek, 399 Mass. 240, 244, 503 N.E.2d 946, 949 (1987); Moss v. Moss, 80 Mich. App. 693, 695, 264 N.W.2d 97, 98 (1978); DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 758 (Minn. 1981); Lowrey v. Lowrey, 633 S.W.2d 157, 160 (Mo. Ct. App. 1982); Ruben v. Ruben, 123 N.H. 358, 361, 461 A.2d 733, 735 (1983); Lynn v. Lynn, 91 N.J. 510, 517, 453 A.2d 539, 542 (1982); Muckelroy v. Muckelroy, 84 N.M. 14, 15, 498 P.2d 1357, 1358 (1972); Lesman v. Lesman, 88 A.D.2d 153, 158, 452 N.Y.S.2d 935, 939 (1982); Geer v. Geer, 84 N.C. App. 471, 478, 353 S.E.2d 427, 431 (1987); Nastrom v. Nastrom, 262 N.W.2d 487, 493 (N.D. 1978); Stevens v. Stevens, 23 Ohio St. 3d 115, 117, 492 N.E.2d 131, 135 (1986); Adair v. Adair, 670 P.2d 1002, 1003 (Okla. Ct. App. 1983); Lehmicke v. Lehmicke, 339 Pa. Super. 559, 566, 489 A.2d 782, 786 (1985); Heath v. Heath, 295 S.C. 312, 314, 368 S.E.2d 222, 223 (Ct. App. 1988); Wehrkamp v. Wehrkamp, 357 N.W.2d 264, 266 (S.D. 1984); Frausto v. Frausto, 611 S.W.2d 656, 659 (Tex. Ct. Civ. App. 1980); Johnson v. Johnson, 771 P.2d 696, 697 (Utah 1989); Sorensen v. Sorensen, 769 P.2d 820, 826 (Utah 1989); Hoak v. Hoak, 370 S.E.2d 473, 477 (W.Va. 1988); *In re* Marriage of Lundberg, 107 Wis. 2d 1, 10, 318 N.W.2d 918, 922 (1982); Grosskopf v. Grosskopf, 677 P.2d 814, 822 (Wyo. 1984).

22. 194 Colo. 429, 574 P.2d 75 (1978). The following states have specifically adopted the *Graham* language: Alaska, Arizona, California, Florida, Illinois, Iowa, Kentucky, Maryland, New Jersey, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, Wisconsin. *See* Nelson v. Nelson, 736 P.2d 1145, 1146-47 (Alaska 1987); Wisner v. Wisner, 129 Ariz. 333, 339-40, 631 P.2d 115, 121-22 (Ct. App. 1981); *In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 461 n.5, 152 Cal. Rptr. 668, 678 n.5 (Ct. App.), *overruled on other grounds*, *In re* Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1979); Hughes v. Hughes, 438 So. 2d 146, 147 (Fla. Dist. Ct. App. 1983); *In re* Marriage of Goldstein, 97 Ill. App. 3d 1023, 1027, 423 N.E.2d 1201, 1203 (1981); *In re* Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978); Inman v. Inman, 578 S.W.2d 266, 268 (Ky. Ct. App. 1979), *rev'd*, 648 S.W.2d 847 (1982) (The Kentucky Supreme Court adopted the *Graham* language which had been rejected by the lower court.); Archer v. Archer, 303 Md. 347, 351, 493 A.2d 1074, 1076 (1985); Mahoney v. Mahoney, 91 N.J. 488, 496, 453 A.2d 527, 531 (1982); Stevens v. Stevens, 23 Ohio St. 3d 115, 117-18, 492 N.E.2d 131, 133 (1986); Hubbard v. Hubbard, 603 P.2d 747, 750 (Okla. 1979); Hodge v. Hodge, 513 Pa. 264, 268, 520 A.2d 15, 17 (1986); Saint-Pierre v. Saint-Pierre, 357 N.W.2d 250, 259 (S.D. 1984); Gardner v. Gardner, 748 P.2d 1076, 1080 (Utah 1988); *In re* Marriage of Lundberg, 107 Wis. 2d 1, 8, 318 N.W.2d 918, 921 (1982).

> expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.[23]

Graham involved a six-year marriage during which the wife supported her husband in his pursuit of a master's degree in business administration. As is common in such situations, the couple had accumulated no marital assets,[24] so Anne Graham could not be compensated by a property division as June Nelson was. The Colorado court, noting that Anne Graham had not sought maintenance, said that a trial court could consider one spouse's contribution to the education of the other in awarding maintenance.[25] As the dissent pointed out, however, Colorado's statute restricted the court's power to award maintenance in cases where the spouse seeking it is incapable of self-support.[26] The *Graham* court's refusal to recognize the professional degree as property, combined with statutory inflexibility as to the awarding of alimony, deprives the self-supporting contributing spouse of any compensation — a clearly inequitable resolution in such a situation.[27]

B. Historical Perspective on the Law of Property

The view of property espoused by the *Graham* court represents the once-dominant physicalist conception of property as articulated by William Blackstone in the eighteenth century.[28] Blackstone based his law of property on a taxonomy of things — things which could be perceived by the senses, and rights issuing out of those things.[29] Blackstone's concept recognized as property only things over which absolute dominion and control could be exercised.[30] A central aspect of this control was the alienability of property.

23. *Graham*, 194 Colo. at 432, 574 P.2d at 77, *cited in Nelson*, 736 P.2d at 1146-47.

24. *Id.* at 431, 574 P.2d at 76.

25. *Id.* at 433, 574 P.2d at 78.

26. *Id.* at 435, 574 P.2d at 78-79 (Carrigan, J., dissenting).

27. Recognizing the harshness of this potential result, the Colorado Supreme Court subsequently ruled that, in cases where there is insufficient marital property to divide, the maintenance statute's requirement of "reasonable need" must be interpreted broadly enough to encompass the working spouse's reasonable expectations after years of deferring the acquisition of marital property and postponing her own career goals in order to assist the other spouse through career training. *In re* Marriage of Olar, 747 P.2d 676, 681-82 (Colo. 1987).

28. 2 W. BLACKSTONE, COMMENTARIES (1765).

29. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325, 331 (1980). This article offers an excellent summary of the development of new property concepts.

30. *Id.* at 331.

During the nineteenth century, as protection of intangible forms of wealth became increasingly important to litigants, courts began to define property in terms of the right to value, rather than the absolute right to a given thing. Various forms of nonphysical property were thus created, especially in equity jurisprudence, under which valuable interests had to be designated as property in order to qualify for equitable protection.[31] Among the personal rights recognized as property during this time was the goodwill of a business, which formerly had been recognized only as an incident of real property.[32] By the end of the century, property no longer denoted exclusively rights over things, but rights to any valuable interest as well.[33]

Accordingly, a modern concept of property developed which defines property as a set of legal relations between people with respect to valuable interests.[34] This view was adopted by the Restatement of Property in 1936. The Restatement definition begins: "The word 'property' is used in this Restatement to denote legal relations between persons with respect to a thing. The thing may be an object having physical existence or it may be ***any kind of an intangible*** such as a patent right or a chose in action."[35] The Restatement then describes the legal relations which constitute property in terms of four elements (rights, privileges, powers and immunities), with their correlatives (absence of rights, duties, liabilities and disabilities).[36] The property owner possesses a "bundle of rights,"[37] and ownership does not depend on having all of the available rights in the bundle, one of which is alienability. The property is no less valuable if it happens to be inalienable.[38]

This modern definition, which unlike Blackstone's is not self-limiting, could theoretically embrace all valuable interests. In practice, however, judicial selection of the interests which are to receive the

31. *Id.* at 334 (citing the rule in equity first stated in Gee v. Pritchard, 2 Swanst. 402, 36 Eng. Rep. 670 (1818)).

32. *See id.* at 335-36.

33. Among the other interests held to be property by courts during the late nineteenth and early twentieth centuries were the right to use news one has gathered, International News Serv. v. Associated Press, 248 U.S. 215, 237-38 (1918), and the right to a tax exemption on tribal land, Choate v. Trapp, 224 U.S. 665, 673 (1912).

34. See Reich, *The New Property*, 73 YALE L.J. 733 (1964), for a perceptive and thorough analysis of rights and status as the modern individual's wealth, or property.

35. RESTATEMENT OF PROPERTY ch. 1 introductory note (1936) (emphasis added).

36. *Id.* §§ 1-4.

37. J. DUKEMINIER & J. KRIER, PROPERTY 158 (2d ed. 1988).

38. An example of property that cannot be transferred by the owner is an inalienable life estate of which the owner is life tenant. *See* 3 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1157 (2d ed. 1956).

protection of the property laws is based on public policy considerations. Public policy thus serves as the limiting principle that determines what valuable interests are denominated as property. Community property and equitable distribution statutes reflect public policy favoring recognition and protection of all valuable interests acquired by spouses during marriage. The modern definition of property permits recognition that, in many young families, a professional degree or license, with its enhanced earning potential, is the major marital asset.[39] A narrow view of marital property ignores the public policy expressed by the social and legislative history of the equitable dissolution statutes.[40] Ideally, the implications of the legislated policy of equitable distribution should be as important to courts as precedent in designating what is to constitute marital property.[41]

C. Alimony versus Property Award

Why have courts such as the Colorado Supreme Court in *Graham* avoided the accepted concept of property, reverting instead to a narrow, anachronistic definition that ill accords with equitable distribution policy, in order to support their conclusion that the professional degree is not marital property? The answer may lie partly in the conservative nature of the judiciary in general; claims that a professional degree should be considered as marital property are relatively new,[42] and, except for New York's Equitable Marriage Distribution Law,[43] no state statutes specify that professional degrees must be considered

39. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379, 411 (1980).

40. *See generally* I. ELLMAN, P. KURTZ & A. STANTON, FAMILY LAW, 291-300 (1986). *See also* Gailor & McGill, *The Equitable Distribution of Professional Degrees upon Divorce in North Carolina*, 10 CAMPBELL L. REV. 69, 80 (1987).

41. The public policy that both parties to a marital dissolution are to receive an equitable share of the assets accumulated during marriage underlies the property division statutes of the 42 equitable distribution jurisdictions (including the District of Columbia) and the nine community property states, which are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin.

42. The earliest claim found is Colvert v. Colvert, 568 P.2d 623 (Okla.), *overruled*, Hubbard v. Hubbard, 603 P.2d 747, 752 (Okla. 1977).

43. N.Y. DOM. REL. LAW § 236 (McKinney 1980-81). Under this statute, New York courts have found that marital property encompasses not only professional degrees and licenses, but also the skills of an artisan, actor, professional athlete or any person whose expertise has enabled him to become an exceptional wage earner. *See* Golub v. Golub, 139 Misc. 2d 440, 444, 527 N.Y.S.2d 946, 949 (Sup. Ct. 1988) (increase during marriage in value of wife's career as model and actress was marital property, in view of husband's contributions to increase). *See also* McAlpine v. McAlpine, 143 Misc. 2d 30, 31-33, 539 N.Y.S.2d 680, 681-82 (Sup. Ct. 1989) (husband's award of fellowship in Society of Actuaries was marital asset, but since wife had not contributed to its attainment she could not share in any enhanced earning capacity).

as marital property.[44] Thus, courts can choose to interpret such statutes narrowly to find that the legislature did not intend professional degrees to be included as marital property subject to equitable division.[45]

The primary reason for these courts' conservatism, however, appears to be their unwillingness to undertake the valuation problems a professional degree represents, especially to grapple with the issue of future earning potential.[46] Yet, recognizing the inequities in allowing a contributing spouse who is capable of self-support to go totally without compensation, courts in the *Graham* line have allowed the husband's future earning potential to be considered in awarding alimony, while still denying that the degree itself is a divisible marital asset.[47] One appellate court has even held that the lower court's erroneous award of a property settlement representing a valuation of the husband's degree could be sustained if it were recharacterized as a provision for additional alimony.[48] In these jurisdictions, alimony becomes the back door by which the contributing spouse can be compensated with some future earnings, without designating the degree or earning potential as property.

44. Some statutes do require the courts to consider, in awarding maintenance or property, "the contribution by one party to the education, training, or increased earning power of the other." WIS. STAT. ANN. §§ 767.26(9), 767.255(5) (West 1981). Statutes with similar provisions include CAL. CIV. CODE § 4801(a)(1)(B)(2) (West Supp. 1989); DEL. CODE ANN. tit. 13, § 1512(c)(6) (Supp. 1988); FLA. STAT. ANN. § 61.075 (1)(d), (e) (West Supp. 1989); GA. CODE ANN. § 19-6-5(a)(6) (1982); IND. CODE ANN. § 31-1-11.5-11(d) (Burns 1987 & Supp. 1989); IOWA CODE ANN. § 598.21(1)(e) (West 1989); N.J. STAT. ANN. § 2A:34-23.1(h) (West Supp. 1989) (award of alimony); N.C. GEN. STAT. § 50-20(c)(7) (1987); OR. REV. STAT. ANN. § 107.105(1)(d) (1983); 23 PA. CONS. STAT. ANN. § 501(b)(6) (Purdon Supp. 1989); TENN. CODE ANN. § 36-5-101(d)(9) (1984 & Supp. 1988). *See* Haugan v. Haugan, 117 Wis. 2d 200, 207-12, 343 N.W.2d 796, 804 (1984) (even though wife was not in need, she could be awarded maintenance to compensate her for contribution to husband's education). A few statutes do not mention the contribution of one spouse to the education of the other, but do require consideration of a spouse's "interruption of [a] personal career or educational opportunities." *See, e.g.*, NEB. REV. STAT. § 42-365 (1988); N.J. STAT. ANN. § 2A:34-23(b)(8) (West Supp. 1989) (equitable distribution of property).

45. *See* Hodge v. Hodge, 337 Pa. Super. 151, 155-57, 486 A.2d 951, 952-54 (Super. Ct. 1984), *aff'd*, 513 Pa. 264, 520 A.2d 15 (1986).

46. *See infra* Section IV.A.

47. *See* Archer v. Archer, 303 Md. 347, 493 A.2d 1074 (1985); Drapek v. Drapek, 399 Mass. 240, 244-47, 503 N.E.2d 946, 949-50 (1987); Rayburn v. Rayburn, 738 P.2d 238, 240 (Utah Ct. App. 1987).

48. Petersen v. Petersen, 737 P.2d 237, 242 (Utah Ct. App. 1987).

While this solution may appear on its face to be equitable, the use of alimony rather than a property settlement has important disadvantages for the contributing spouse.[49] Alimony is taxable income which is terminable upon the remarriage of the recipient or the death of either party. Alimony is conventionally not paid in a lump sum but over a period of years, posing the risks to the recipient of collection problems and possible modification or termination by the court.[50] Alimony awards interfere with the important goal of finality of litigation, causing unnecessary expenditure of judicial resources. The protracted nature of alimony payments also means that the recipient cannot use the money as flexibly as she could a lump sum property award, toward financing her own education or starting a business, for example. Most importantly, alimony is not a matter of right; its propriety and amount are discretionary with the court in all jurisdictions, based by statutory mandate on the court's concept of need or necessity in the particular case.[51] The contributing spouse is thus completely at the mercy of the court and her ex-spouse over a period of years.[52]

In contrast, a fair division of property is generally seen by courts as equitably necessary, not discretionary.[53] A property award is final and not terminable on the recipient's death or remarriage.[54] Such an award does not constitute taxable income. Moreover, the award is generally nonmodifiable, so that once the property settlement agreement is reached the parties need not return to court.[55]

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49. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 650 (2d ed. 1988).

50. *Id.* at 653.

51. *Id.* at 644. *See, e.g.*, ALASKA STAT. § 25.24.160 (Supp. 1988), and text *supra* at note 4. Given these disadvantages, the fact that alimony is not dischargeable if the payor goes bankrupt seems small consolation to the contributing spouse.

52. Even though fault has largely been eliminated as a ground for divorce, some courts still consider it a relevant factor in the alimony decision. *See, e.g.*, Chapman v. Chapman, 498 S.W.2d 134, 138 (Ky. 1973) (fault is not to be considered in determining whether a spouse is entitled to maintenance, but it may be considered in determining the amount to be awarded); Mahne v. Mahne, 147 N.J. Super. 326, 329, 371 A.2d 314, 315, *cert. denied*, 75 N.J. 22, 379 A.2d 253 (1977); Hegge v. Hegge, 236 N.W.2d 910, 916 (N.D. 1975). Some statutes also explicitly state that the court is to consider fault (often expressed as "the conduct of the parties") in awarding alimony. *See* FLA. STAT. ANN. § 61.08(1) (West Supp. 1980); GA. CODE ANN. § 19-6-1(b) (1982); MASS. ANN. LAWS ch. 208, § 34 (Law. Co-op. 1989); MO. REV. STAT. § 452.335(2)(9) (West Supp. 1989); N.C. GEN. STAT. § 50-16.2 (1988); 23 PA. CONS. STAT. ANN. § 501(b)(14) (Purdon Supp. 1989); W. VA. CODE § 48-2-15(i) (1986).

53. Moore, *Should a Professional Degree be Considered a Marital Asset Upon Divorce?*, 15 AKRON L. REV. 543, 551-52 (1982).

54. *Id.*

55. *See, e.g.*, Gailor & McGill, *supra* note 40, at 82-86; Note, Horstmann v. Horstmann: *Present Right to Practice a Profession as Marital Property*, 56 DENVER L.J. 677, 681-84 (1979).

The policy behind equitable distribution of marital assets is that marriage is an economic partnership, and that the couple's investments in the marital property should be divided as fairly as possible. Valuing the professional degree indirectly by means of an alimony award may seem to achieve an equitable resolution for the contributing spouse in some situations, but it poses unacceptable risks and disadvantages for the recipient, unless certain of the traditional attributes of alimony are altered. Both common judicial solutions to the problem — indirectly valuing the degree through alimony, or refusing to value the degree at all — can severely disadvantage the contributing spouse and thus frustrate the policy on which equitable distribution is founded.

IV. POSSIBLE SOLUTIONS FOR BALANCING THE EQUITIES

A. Valuing the Degree Using a Labor Theory

The problem of how to assign a value to the professional degree or license appears to be the primary concern of courts which, like the Alaska Supreme Court, have denied the degree or license status as marital property. At the root of this concern lies the perceived necessity of finding a way to value the degree-holding spouse's future earning capacity in order to arrive at a full economic valuation of the degree. It is a well-settled principle of economics that the present value of an income-producing entity consists of its future earning capacity.[56] Valuing a future earning stream, however, while economically desirable, presents two serious problems in the marital dissolution context.

The first problem is that prospective valuation is necessarily speculative. Although abundant statistics exist to provide data for the formulas used to calculate future earning potential attributable to a professional degree,[57] not all degree holders can earn the average statistical value; and it is not possible to consider fully all the variables that can affect actual future value. Such variables include not only

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56. Garfield, *Wrongful Death: Principles Governing Valuation of Economic Law*, 1967 INS. L.J. 654, 655.

57. A typical calculation is described in Fitzpatrick & Doucette, *Can the Economic Value of an Education Really Be Measured? A Guide for Marital Property Dissolution*, 21 J. FAM. L. 511, 516-20 (1982). More generally, to determine future earning potential, one must:

> 1. determine earning capacity after the education has been acquired, to be compared with the earning capacity if the education has not been obtained;
> 2. subtract out-of-pocket costs and opportunity costs — lost earnings — of the added education, costs which would be incurred anyway;
> 3. discount future income to present value, selecting a discount rate which factors in elements of risk such as premature death or disability.

Krauskopf, *supra* note 39, at 382-84.

premature death or disability, but unforeseeable changes in market opportunities, or changes of career or profession.[58] It is true that courts have long engaged in just such speculation in allowing calculations of future earning potential as damages in wrongful death and personal injury actions, and several commentators cite this precedent as justification for valuing the professional degree's future earning potential.[59] These advocates overlook the fact that in tort, it is the finding of fault that justifies the imposition of damages. With the growing trend toward no-fault divorce, this important policy justification is increasingly inapplicable in marital dissolution law.

The second difficulty is that valuing of the degree in terms of statistically average future earnings could seriously infringe on the student spouse's personal freedom to pursue his career as he wishes, or even to change careers entirely. A graduate of a nationally ranked law school has the option to work in a large law firm in a major city at a high entering salary, yet he may wish to practice public interest law or work for a government agency, or he may have captured a prestigious, but low-paying judicial clerkship. If he chooses any of the less remunerative positions, his earnings will be below the statistical average for his profession. Must he be required to live in a different city, give up a clerkship, or stay in a profession for which he may soon discover he is unsuited, in order to realize the income level projected at the time of the marital dissolution?

Any of these alternatives would represent an unsupportable encroachment on the personal freedom of a spouse who, at least in the eyes of the law, if not in fact, has committed no fault. Placing such a lien on the student spouse's future cannot be justified, even on the grounds that only by so doing can the contributing spouse be fully compensated. Some means of valuation must be employed that establishes a more just balance between these competing interests.

The valuation method that comes the closest to achieving this balance is the labor theory of value, as proposed by Professor Linda

58. Mullenix, *The Valuation of an Educational Degree at Divorce*, 16 LOY. L.A. L. REV. 227, 268 (1983).

59. *See* Gailor & McGill, *supra* note 40, at 97; Moore, *supra* note 53, at 547; Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1219 (1981); Krauskopf, *supra* note 39, at 388-89; Case Comment, *Divorce After Professional School: Education and Future Earning Potential May Be Marital Property: In re* Marriage of Horstmann, 44 MO. L. REV. 329, 333-36 (1979); Comment, *Professional Education as a Divisible Asset in Marriage Dissolutions*, 64 IOWA L. REV. 705 (1979); Case Comment, *Graduate Degree Rejected as Marital Property Subject to Division upon Divorce: In re* Marriage of Graham, 11 CONN. L. REV. 62, 71 (1978); Comment, *The Interest of the Community in a Professional Education*, 10 CAL. W. L. REV. 590, 605-06 (1974).

Mullenix.[60] This method is founded on the classic economic theory that the value of any commodity can be expressed in terms of the labor input required to produce it. The labor theory of value was dominant before the advent of modern industrialized society brought to the fore market-oriented theories of value, and it is still a valid means of assessing the value of a nonmarketable asset that has been produced by the application of a single factor of production.[61]

According to the labor theory, the measure of the value of the degree as a marital asset is the amount of labor time it took the student spouse to acquire it. Upon divorce, the student spouse owes the marriage the value of this asset, or the time which was spent on its acquisition, rather than on contributions to the family that the student spouse could have otherwise made. This value is determined by awarding the contributing spouse fifty percent of the student spouse's actual post-degree income for the same period of time it took him to acquire the degree. Thus, the contributing spouse who supported the student spouse during a three-year law degree is entitled to fifty percent of the student spouse's income for the three years following the divorce. A court employing this method never has to set an actual monetary value on the degree, so that the need for often conflicting expert valuations is avoided.[62]

The labor theory of value allows the contributing spouse to be compensated with an amount that exceeds mere restitution, because it is the cost of the degree to the student spouse, and not the wife's contributions, that is being valued. The contributing spouse is fully compensated for her investment in labor expended, even if she does not receive as much money as she would have if the degree were valued in terms of future earnings. The period of payment is confined to the first few years of the student spouse's professional career, when his earning power reflects primarily the degree's value rather than the value of experience and skill acquired over time. Moreover, limitation of the period of payment to a few years minimizes the restrictions on the student spouse's pursuit of his career that would be imposed by an award of a portion of the student spouse's future earnings spanning most if not all of his productive lifetime.

Valuing the degree in terms of labor also provides a means of reimbursing the contributing spouse's opportunity costs without engaging in speculation as to the monetary value of opportunities foregone. The primary opportunity costs incurred by the contributing

60. Mullenix, *supra* note 58, at 274-83. *See also* Haugan v. Haugan, 117 Wis. 2d 200, 214-15, 343 N.W.2d 796, 803 (1984).

61. Mullenix, *supra* note 58, at 274-77.

62. *Id.* at 278-79.

spouse are time spent and salary and educational opportunities sacrificed. Receiving fifty percent of the degree-holding spouse's income for the same period of time foregone by the contributing spouse allows her the same kind of benefit she had provided — a sum of money large enough to enable the pursuit of a full-time educational program, or to fund other opportunities of her choice.

Upon declaring that a professional degree or license is marital property subject to equitable distribution, the Alaska Supreme Court should adopt the labor theory of valuation as the preferred method for trial courts to use in valuing the degree or license. This method provides a fair return on the contributing spouse's monetary and opportunity cost investment without placing untenable restrictions on the student spouse's future, and, in addition, it is simple to calculate and to implement. Trial courts should, however, maintain the discretion to adjust the percent of the labor award downward from fifty percent if the equities of the individual case, supported by adequate evidence, require. An example of such a case would be one in which the student spouse was declared ineligible for a scholarship, or was required to borrow money from an outside source at a higher interest rate, because his wife was contributing to the family income.

B. Restitution in Quasi-Contract

If the Alaska Supreme Court chooses to remain among the majority of jurisdictions that do not recognize the professional degree as marital property, alternative means remain for balancing the equities between the contributing spouse and student spouse. A court is not restricted by the terms of the equitable distribution and maintenance statutes, but may resort to its inherent power to grant equitable relief by finding that a quasi-contract, or contract implied in law, existed between the husband and wife.[63] The court can thus apply principles of restitution to prevent the unjust enrichment of the student spouse independently of maintenance determinations and without having to designate the degree as marital property.

To grant this remedy, the court must find that one party has received a benefit at the expense of the other, and that it would be unjust for the recipient to retain the benefit without compensating the other party. As long as the conferring of the benefit was neither officious nor gratuitous, its retention is considered unjust.[64] The Restatement

63. *See, e.g.*, Krauskopf, *supra* note 39, at 389-91.

64. *See* Mahoney v. Mahoney, 91 N.J. 488, 500, 453 A.2d 527, 533 (1982) ("Where a partner to marriage takes the benefits of his spouse's support in obtaining a professional degree or license with the understanding that future benefits will accrue and inure to both of them, and the marriage is then terminated without the supported

of Restitution recognizes that a benefit is unjustly retained when services are performed with the recipient's knowledge because the performer reasonably believes that he will also benefit from the services.[65]

A number of courts have applied the principle of unjust enrichment in the context of marital investment in the education of a spouse,[66] but a few courts have refused to do so, acting on the presumption that services performed within the marital relationship are gratuitous.[67] This presumption derives from the traditional common law marital contract, whereby certain mutually beneficial services were to be performed gratuitously by the husband and wife. The common law contract, however, never imposed on either spouse, especially the wife,[68] the duty of supporting the other during the acquisition of an education. Since by so doing the contributing spouse has performed a service and rendered a benefit not encompassed by the traditional contract, and for which the contract provides no offsetting benefit, she should not be presumed to have provided this service gratuitously.[69] Instead, the court should look to the contributing spouse's reasonable expectations of the benefit she would in turn receive for performing the service.[70] Although the contributing spouse cannot share in the eventual earnings realized from the degree, as she had

spouse giving anything in return, an unfairness has occurred that calls for a remedy.").

65. RESTATEMENT OF RESTITUTION § 40(b) (1937).

66. *See* Pyeatte v. Pyeatte, 135 Ariz. 346, 661 P.2d 196 (Ct. App. 1982); Woodworth v. Woodworth, 126 Mich. App. 258, 337 N.W.2d 332 (1983); DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. 1981); *In re* Marriage of Cropp, 5 Fam. L. Rptr. (BNA) 2957 (D. Minn. 1979); Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982); Adair v. Adair, 670 P.2d 1002 (Okla. Ct. App. 1983). *See also* Hubbard v. Hubbard, 603 P.2d 747, 749-52 (Okla. 1979) (Oklahoma Supreme Court creates hybrid form of alimony called "cash award in lieu of property settlement," limited to cases where only major marital asset is educational degree).

67. Wisner v. Wisner, 129 Ariz. 333, 341, 631 P.2d 115, 123 (Ct. App. 1981), *limited to facts of case*, Pyeatte v. Pyeatte, 135 Ariz. 346, 354, 661 P.2d 196, 202 (Ct. App. 1982); Lesman v. Lesman, 88 A.D.2d 153, 158-59, 452 N.Y.S.2d 935, 939 (1982).

68. *See* Church v. Church, 96 N.M. 388, 395-96, 630 P.2d 1243, 1250-57 (Ct. App. 1981) (wife's claims of providing financial support and educational funds for husband's medical education state a basis for relief because wife had no duty to support (applying Virginia law)).

69. *See* Krauskopf, *supra* note 39, at 394. *See also* Woodworth v. Woodworth, 126 Mich. App. 258, 268, 337 N.W.2d 332, 337 (1983) ("Clearly . . . the degree was a family investment, rather than a gift or benefit to the degree holder alone. Treating the degree as such a gift would unjustly enrich the degree holder to the extent that the degree's value exceeds its cost.").

70. DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 758 (Minn. 1981) (court awarded extra-statutory equitable remedy on basis that wife had a "reasonable expectation" that she would be rewarded for her efforts in putting husband through medical school by a higher standard of living when he began practicing medicine).

however, conventional alimony is an unsatisfactory means of compensating the contributing spouse.[78] If the Alaska courts wish to employ this remedy, several characteristics of conventional alimony must be altered to provide the contributing spouse the benefits she would have if there were property to divide.

Any maintenance award which functions as restitution to a contributing spouse should be a lump sum, or in gross, award. This award may be made payable in installments, but should be made nonterminable upon remarriage.[79] By holding that contributions to the welfare of a spouse may be considered in determining maintenance, courts have recognized that the obligation to make the contributing spouse whole is a function of alimony as valid as the more traditional function of providing support.[80] Once this compensatory function is acknowledged, the necessity of making the alimony award nonterminable is apparent.[81] Making the award in gross allows the kind of finality present in a property settlement; although the award is of necessity usually made payable in installments, it is not open-ended like conventional alimony and the payments generally terminate within a shorter period of time.

Nothing in Alaska's statute appears to prevent the adoption of in gross maintenance in Alaska.[82] The Alaska Supreme Court's interpretation of the statute also indicates a flexible approach toward the

Wis. 2d 200, 207-21, 343 N.W.2d 796, 800-06 (1984); *In re* Marriage of Lundberg, 107 Wis. 2d 1, 10-12, 318 N.W.2d 918, 922-23 (1932).

78. *See supra* Section III.C.

79. *See In re* Marriage of Francis, 442 N.W.2d 59, 64 (Iowa 1989). Courts which have employed such a remedy include Greer v. Greer, 32 Colo. App. 196, 198-99, 510 P.2d 905, 906-07 (1973), Moss v. Moss, 80 Mich. App. 693, 694-95, 264 N.W.2d 97, 98-99 (1978); Hubbard v. Hubbard, 603 P.2d 747, 751-52 (Okla. 1979), Diment v. Diment, 531 P.2d 1071, 1074 (Okla. Ct. App. 1974); Washburn v. Washburn, 101 Wash. 2d 168, 183, 677 P.2d 152, 160 (1984); *In re* Marriage of Lundberg, 107 Wis. 2d 1, 14-15, 318 N.W.2d 918, 924 (1982).

80. *See In re* Marriage of Lundberg, 107 Wis. 2d 1, 12, 318 N.W.2d 918, 923 (1982) ("[M]aintenance payments are no longer limited to situations where the spouse is incapable of self-support. Instead, we view maintenance as a flexible tool . . . to ensure a fair and equitable determination in each individual case."). *See also* Greer v. Greer, 32 Colo. App. 196, 199, 510 P.2d 905, 907 (1973) ("Although referred to as 'alimony,' the lump sum awarded in the present case . . . must be considered as a substitute for, or in lieu of, the wife's rights in the husband's property as distinguished from her rights of future support envisioned by the ordinary award of alimony.").

81. Krauskopf, *supra* note 39, at 406.

82. ALASKA STAT. § 25.24.160 (Supp. 1988). "In a judgment in an action for divorce . . . the court may provide . . . (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 . . . " (emphasis added). *See also* Faro v. Faro, 579 P.2d 1377, 1380 (Alaska 1978) (trial court is vested with broad discretion in making alimony determination).

granting of maintenance that would support such an award. In *Nelson,* the supreme court restated its longstanding preference for securing the financial needs of divorcing spouses by means of property division rather than alimony.[83] The court stated, however, that where there is no substantial property to divide, alimony may be awarded if it is found "just and necessary."[84] The supreme court has supported a broad reading of the statute, stating that the spouse seeking maintenance is not necessarily ineligible for maintenance because she can support herself; she may be eligible if she is "unable to secure employment appropriate to her skills and interests."[85] The concept of "appropriate employment," rather than any kind of employment for the contributing spouse, reflects an interpretation of the statutory requirement of necessity that is broad enough to permit rehabilitative alimony for the education of a supporting spouse,[86] and to allow a contributing spouse to receive alimony even if she is self-supporting.[87]

The court thus appears to regard the requirement of necessity as one of reasonable necessity in the light of the applicant's situation and reasonable expectations. Given its progressive concept of the function of alimony, it seems likely that the supreme court would uphold an award of in gross nonterminable maintenance in a situation of the type reserved in *Nelson.*

V. CONCLUSION

The time will come when an Alaska court will be confronted with a marital dissolution in which one spouse, during a short-term marriage with no significant assets, made possible the acquisition of a professional degree by the other spouse. The Alaska Supreme Court, which in *Nelson v. Nelson* refused to recognize a professional degree as marital property, has not provided the lower courts with guidance as to how to carry out the policy behind Alaska's equitable distribution statute in such a situation.

Without acknowledging that the degree is property and, thus, without disturbing *Nelson,* a trial court can provide restitutionary

83. *Nelson,* 736 P.2d 1145, 1147 (Alaska 1987). *See also* Bussell v. Bussell, 623 P.2d 1221, 1224 (Alaska 1981); Malone v. Malone, 587 P.2d 1167, 1168 (Alaska 1978); Messina v. Messina, 583 P.2d 804, 805 (Alaska 1978).

84. *Nelson,* 736 P.2d at 1147 (quoting ALASKA STAT. § 25.24.160 (3)).

85. Messina v. Messina, 583 P.2d 804, 805 (Alaska 1978) (citing UNIF. MARRIAGE & DIVORCE ACT § 308, 9A U.L.A. 347 (1973)).

86. Bussell v. Bussell, 623 P.2d 1221, 1224 (Alaska 1981) (award of rehabilitative alimony upheld as not clearly unjust when of limited duration and for a specified purpose).

87. Colorado, since *Graham,* has joined Alaska in holding that the contributing spouse's "appropriate employment" is one of the factors to be considered in determining maintenance. *In re* Marriage of Olar, 747 P.2d 676, 681 (Colo. 1987).

compensation for the contributing spouse by either of two means: employing a theory of unjust enrichment in quasi-contract, or granting a lump-sum maintenance award that is nonterminable and nonmodifiable. Ultimately, however, the supreme court should acknowledge that a professional degree is the kind of valuable interest encompassed by the modern concept of property. Such recognition need not lead inevitably to a speculative valuation based on the degree-holding spouse's future earning potential, nor should it be prevented by the fact that the degree itself is not alienable. By adopting the nonspeculative labor theory of value, the court can avoid valuing the degree in monetary terms entirely. The labor theory, which values the degree according to the time invested by the contributing spouse toward its achievement by the student spouse, compensates the contributing spouse in the fairest manner possible without unduly restricting the future freedom of the student spouse.

Celia Grasty Jones

LATEST

KARLA HUNTINGTON

Insert

Sec. 17. AS25.24 is amended by adding a new section to read:

Article 4. General Provisions

Sec. 25.24.400 Definition. In this chapter, "career assets" means the ability of a spouse to earn money, including marketable and unmarketable good will, resulting from that spouse's education, profession, or employment, that was acquired during marriage.

AS 25.24.150 is amended by adding a new subsection to read:

(f) In an action to modify, vacate, or enforce a custody or visitation decree. the court may, upon application by either party, award attorney fees and costs. In determining the award of attorney fees and costs, the court shall consider the relative financial resources of the parties, and the absence of good faith.

CS SB 450 (Jud)

PROPOSED AMENDMENTS TO SB 450

Page 1, line 6, following "to":

Insert "the reporting and investigation of"

— additional change to the title

Page 1, line 6, following "neglect":

Insert "and to training persons required to report child abuse or neglect"

Page 3, lines 20 - 29, and page 4, lines 1 - 4:

Delete all material.

Insert

(f) If a law enforcement agency determines that a child has been abused or neglected, and (1) that the harm was caused by a teacher or other person employed by the school in which the child is enrolled as a student, (2) that the harm occurred on the premises of the school in which the child is enrolled as a student, or (3) that the harm occurred during an activity sponsored by the school in which the child is enrolled as a student, the law enforcement agency shall, at the conclusion of the investigation, notify the chief administrative officer of the school or district in which the child is enrolled. The notification must set out the factual basis for the law enforcement agency's determination. Within 10 days of receiving notification from the law enforcement agency under this subsection about a person in the teaching profession, as defined in AS 14.20.370, the chief administrative officer shall file a report with the Professional Teaching Practices Commission that sets out the name of the teacher and the information received from a law enforcement agency under this subsection.

Page 4, line 17, following "department":

Insert "or school district"

Page 4, line 26:

Delete "and"

Page 4, line 28, following "neglect":

Insert

";(5) the role of a person required to report child abuse or neglect, and their employing agency, after the report has been made; and

(6) the manner in which cases of child abuse or neglect are investigated by the department and law enforcement agencies following notification of suspected abuse or neglect"

Page 5, line 17, following "abuse":

Insert "committed"

Page 5, line 19, following "abuse":

Insert "committed"

Page 6, line 4, following "custodian.":

Insert

A school official may be present during the interview unless

(1) the child objects; or

(2) the department or law enforcement agency determines that the presence of the school official will disrupt, or interfere with, the investigation.

Page 6, line 14,

delete "recklessly"

add "with criminal negligence"

Page 8, lines 13 - 16:

Delete all material.

Insert

(12) "maltreatment" means behavior that harms or threatens a child's health or welfare and includes conduct that results in a controlled substance, as defined in AS 11.71.900, being found in a newborn child's blood or urine, unless the administration of the controlled substance to the mother or child was authorized under AS 17.30.

Page 8, line 20:

Delete ", with due regard to the child's culture."

Page 8, line 24

delete definition of "recklessly"
add definition of "criminal negligence"

Page 8, line ~~28~~ 29

~~Delete everything after "AS 11.41.410 - 11.41.455"~~

p 8 line 28 after "observe"
insert "intentionally performed in the presence of a child"

STATE OF ALASKA
1990 LEGISLATIVE SESSION

Bill Version: HB 195
Publish Date: 4/28/89

FISCAL NOTE

REQUEST:

Revision Date 1/31/90
Title: An act related to divorce and dissolution
Sponsor: Rules/Governor
Requestor: Senate Judiciary

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Personal Services		50.4	50.4	50.4	50.4	50.4
Travel		12.9	10.0	10.0	10.0	10.0
Contractual						
Supplies						
Equipment		2.6				
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	65.9	60.4	60.4	60.4	60.4

CAPITAL						

REVENUE						

FUNDING: (Thousands of Dollars)

General Funds	0.0	65.9	60.4	60.4	60.4	60.4
Federal Funds						
Other						
TOTAL	0.0	65.9	60.4	60.4	60.4	60.4

POSITIONS:

Full-time		1.0	1.0	1.0	1.0	1.0
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: Jan Strandberg, General Counsel
Division: Alaska Court System
Phone: 264-8228
Date: 01/31/90

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
Date: 01/31/90

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management & Budget
Impacted Agency(ies)

ALASKA COURT SYSTEM
FISCAL ANALYSIS

Summary of FY 89 Filings - Dissolution of Marriage

Court	Number of Filings	Estimated # of Cases Involving Children (1)	Estimated # of Cases Requiring Custody Investigation (2)
Anchorage	1,445	968	97
Fairbanks	475	318	32
Palmer	187	125	13
Kenai	150	101	10
Kodiak	61	41	4
Juneau	173	116	12
Ketchikan	125	84	8
Sitka	51	34	3
Wrangell/ Petersburg	21	14	1
Others	68	46	5
Total	2,756	1,847	185

(1) Two-thirds of dissolution cases are estimated to involve children.

(2) Ten percent of dissolution cases involving children are estimated to require custody investigations.

Although the estimated increase in dissolutions that will require custody investigations is principally centered in Anchorage and Fairbanks, each of the other superior courts is expected to be impacted as well. To meet these needs on a statewide basis, one new custody investigator will be hired in Anchorage to provide services to Anchorage, Fairbanks and other communities on an as needed basis.

ALASKA COURT SYSTEM
FISCAL ANALYSIS

HB 195 – Divorce and Dissolution

	Salary	Benefits	Total
Personal Services			
Custody Investigator, Range 18A, Anchorage, PFT – 12 months	$37,548	$12,900	$50,448
Travel			
Custody Investigator travel–			
Monthly service to Fairbanks, Kenai and Kodiak. Quarterly service to Ketchikan, Sitka, Wrangell, & Petersburg			10,000
Forms Committee meeting– (one time cost)			
Cost of Dissolution Forms Committee meeting in Anchorage for two days with one and one-half days of in-transit time.			2,900
Total Travel			12,900
Equipment: (one time cost)			
Desk, chair, filing cabinet, and typewriter for new employee			2,574
Total First Year Cost			$65,922

No. 2

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: CSHB 195 (FIN)
PUBLISH DATE: HOUSE 4/25/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: An act related to divorce and dissolution
Sponsor:
Requestor: House Finance

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
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 89	FY 90	FY 91	FY 92	FY 93	FY 94
GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: House Finance Committee — Phone: 465-3727
Division: Co-Chairman Ron Larson — Date: 4/20/89 24
Co-Chairman Lyman Hoffman
Approved by Commissioner: — Date:
Agency:

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

STATE OF ALASKA 1989 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version: HB 195
Publish Date:

Revision Date: 3/10/89
Title: An act related to divorce and dissolution
Sponsor:
Requestor:

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)						
OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Personal Services	....	51.1	51.1	51.1	51.1	51.1
Travel	....	12.9	10.0	10.0	10.0	10.0
Contractual	....	....	....	....	....	....
Supplies	....	....	....	....	....	....
Equipment	....	2.5	....	....	....	....
Land & Structures	....	....	....	....	....	....
Grants & Claims	....	....	....	....	....	....
TOTAL OPERATING	0.0	66.5	61.1	61.1	61.1	61.1
CAPITAL	....	....	....	....	....	....
REVENUE	....	....	....	....	....	....
FUNDING: (Thousands of Dollars)						
General Funds	0.0	66.5	61.1	61.1	61.1	61.1
Federal Funds	....	....	....	....	....	....
Other	....	....	....	....	....	....
TOTAL	0.0	66.5	61.1	61.1	61.1	61.1
POSITIONS:						
Full-time	....	2.0	2.0	2.0	2.0	2.0
Part-time	....	....	....	....	....	....
Temporary	....	....	....	....	....	....

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Jan Strandberg
Prepared by: Jan Strandberg, General Counsel
Division: Alaska Court System

Phone: 264-8228
Date: 03/10/89

Stephanie Cole, for-
Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System

Date: 03/10/89

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management & Budget
- Impacted Agency(ies)
- Senate Secretary

RECEIVED
MAR 15 1989
LEGISLATIVE FINANCE

HB 195

ALASKA COURT SYSTEM

FISCAL ANALYSIS

HB 195 - Divorce and Dissolution

Personal Services:	Salary	Benefits	Total
Custody Investigator, Range 18A, Anchorage, PFT - 12 months	$37,548	$13,526	$51,074

Travel:

Custody investigator travel-

Monthly service to Fairbanks, Kenai and Kodiak. Quarterly service to Ketchikan, Sitka, Wrangell, & Petersburg — 10,000

Forms Committee meeting- (one time cost)

Cost of Dissolution Forms Committee meeting in Anchorage for two days with one and one-half days of in-transit time. — 2,900

Total Travel — 12,900

Equipment: (one time cost)

Desk, chair, filing cabinet, and typewriter for each new employee — 2,574

Total First Year Cost — $66,548

ALASKA COURT SYSTEM

FISCAL ANALYSIS

Summary of FY 88 Filings - Dissolution of Marriage

Court	Number of Filings	Estimated # of Cases Involving Children (1)	Estimated # of Cases Requiring Custody Investigation (2)
Anchorage	1,455	975	98
Fairbanks	500	335	34
Palmer	191	128	13
Kenai	131	88	9
Kodiak	50	34	3
Juneau	139	93	9
Ketchikan	73	49	5
Sitka	39	26	3
Wrangell/ Petersburg	26	17	2
Others	76	51	5

(1) Two-thirds of dissolution cases are estimated to involve children.

(2) Ten percent of dissolution cases involving children are estimated to require custody investigations.

Although the estimated increase in dissolutions that will require custody investigations is principally centered in Anchorage and Fairbanks, each of the other superior courts is expected to be impacted as well. To meet these needs on a statewide basis, one new custody investigator will be hired in Anchorage to provide services to Anchorage, Fairbanks and other communities on an as needed basis.

The proposed standing master position in Fairbanks has been eliminated with the expectation that increased custody investigation support from Anchorage will partially assist the present judicial staff in absorbing the extra work engendered by heightened scrutiny.

go0949hG
Lauterbach
3/26/90

Original sponsor(s): Rules/Governor

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE

2 SENATE CS FOR CS FOR HOUSE BILL NO. 195 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to divorce, dissolution, and annul-
7 ment; and amending Rule 84(a), Alaska Rules of Civil
8 Procedure."

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

10 * Section 1. INTENT. By amending AS 25.24.160(a)(2) and (4) in this
11 Act and by referring to those paragraphs in other sections of AS 25.24 in
12 this Act, it is the legislature's intent to codify the principal factors to
13 be weighed by a court in making an equitable division of property or an
14 award of maintenance in a divorce or dissolution proceeding, as enunciated
15 by the Alaska Supreme Court in the case of Merrill v. Merrill, 368 P.2d 546
16 (Alaska 1962), and subsequent opinions. Except for AS 25.24.160(a)(4)(F),
17 the factors codified are intended to restate the principal factors found in
18 case law, not to change them, affect the interpretation given to them, or
19 preclude changes or additions to them by future court rulings.

20 * Sec. 2. AS 25.20 is amended by adding a new section to read:

21 Sec. 25.20.115. ATTORNEY FEE AWARDS IN CUSTODY AND VISITATION
22 MATTERS. In an action to modify, vacate, or enforce that part of an
23 order providing for custody of a child or visitation with a child, the
24 court may, upon request of a party, award attorney fees and costs of
25 the action. In awarding attorney fees and costs under this section,
26 the court shall consider the relative financial resources of the
27 parties and whether the parties have acted in good faith.

28 * Sec. 3. AS 25.24.100 is amended to read:

29 Sec. 25.24.100. RESIDENCY OF MILITARY PERSONNEL. A person

1 serving in a military branch of the United States government who has
2 been continuously stationed at [IN] a military base or installation in
3 the state for at least 30 days is considered [A PERIOD OF ONE YEAR
4 SHALL BE DEEMED] a resident [IN GOOD FAITH] of the state for the
5 purposes of this chapter [AS 25.24.010 - 25.24.180].
6 * Sec. 4. AS 25.24.140 is repealed and reenacted to read:
7 Sec. 25.24.140. ORDERS DURING ACTION. (a) During the pendency
8 of the action, a spouse may, upon application and in appropriate
9 circumstances, be awarded expenses, including
10 (1) attorney fees and costs that reasonably approximate the
11 actual fees and costs required to prosecute or defend the action; in
12 applying this paragraph, the court shall take appropriate steps to
13 ensure that the award of attorney fees does not contribute to an
14 unnecessary escalation in the litigation;
15 (2) reasonable spousal maintenance, including medical
16 expenses; and
17 (3) reasonable support for minor children in the care of
18 the spouse, if there is a legal obligation of the other spouse to
19 provide support.
20 (b) During the pendency of the action, upon application, a
21 spouse is entitled to necessary protective orders, including orders
22 (1) providing for the freedom of each spouse from the
23 control of the other spouse;
24 (2) restraining each spouse from subjecting the other
25 spouse or another person living in the household to domestic violence,
26 as defined in AS 25.35.060;
27 (3) directing one spouse to vacate the marital residence or
28 the home of the other spouse;
29 (4) restraining a spouse from communicating directly or

1 indirectly with the other spouse;

2 (5) restraining a spouse from entering a propelled vehicle
3 in the possession of or occupied by the other spouse; and

4 (6) prohibiting a spouse from disposing of the property of
5 either spouse or marital property without the permission of the other
6 spouse or a court order.

7 (c) After a hearing, if both parties agree, the court may also
8 order that the parties engage in personal or family counseling or
9 mediation. In the order, the court shall provide for the payment of
10 the costs of the counseling or mediation.

11 * Sec. 5. AS 25.24.160(a) is amended to read:

12 (a) In a judgment in an action for divorce or action declaring a
13 marriage void or at any time after judgment, the court may provide

14 (1) for the payment by either or both parties of an amount
15 of money or goods, in gross or installments that may include cost-
16 of-living adjustments, as may be just and proper for the parties to
17 contribute toward the nurture and education of their children, and the
18 court may order the parties to arrange with their employers for an
19 automatic payroll deduction each month or each pay period, if the
20 period is other than monthly, of the amount of the installment; if the
21 employer agrees, the installment shall be forwarded by the employer to
22 the clerk of the superior court <u>that</u> [WHICH] entered the judgment or
23 to the court trustee, and the amount of the installment is exempt from
24 execution;

25 (2) for the recovery by one party from the other of an
26 amount of money for maintenance, <u>for a limited or indefinite period of</u>
27 <u>time,</u> in gross or in installments, as may be just and necessary with-
28 out regard to which of the parties is in fault; <u>an award of mainte-</u>
29 <u>nance must fairly allocate the economic effect of divorce by being</u>

based on a consideration of the following factors:

(A) the length of the marriage and station in life of the parties during the marriage;

(B) the age and health of the parties;

(C) the earning capacity of the parties, including their educational backgrounds, training, employment skills, work experiences, length of absence from the job market, and custodial responsibilities for children during the marriage;

(D) the financial condition of the parties, including the availability and cost of health insuranc ;

(E) the conduct of the parties, including whether there has been unreasonable depletion of marital assets;

(F) the division of property under (4) of this subsection; and

(G) other factors the court determines to be relevant in each individual case;

(3) 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;

(4) for the division between the parties of their property, including retirement benefits, whether joint or separate, acquired only during marriage [COVERTURE], in a just [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, including retirement benefits, 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, including retirement benefits, to the other party; the

1 division of property must fairly allocate the economic effect of
2 divorce by being based on consideration of the following factors:
3 (A) the length of the marriage and station in life of
4 the parties during the marriage;
5 (B) the age and health of the parties;
6 (C) the earning capacity of the parties, including
7 their educational backgrounds, training, employment skills, work
8 experiences, length of absence from the job market, and custodial
9 responsibilities for children during the marriage;
10 (D) the financial condition of the parties, including
11 the availability and cost of health insurance;
12 (E) the conduct of the parties, including whether
13 there has been unreasonable depletion of marital assets;
14 (F) the desirability of awarding the family home, or
15 the right to live in it for a reasonable period of time, to the
16 party who has primary physical custody of children;
17 (G) the circumstances and necessities of each party;
18 (H) the time and manner of acquisition of the property
19 in question; and
20 (I) the income-producing capacity of the property and
21 the value of the property at the time of division
22 [(5) TO CHANGE THE NAME OF ONE OF THE PARTIES].
23 * Sec. 6. AS 25.24 is amended by adding a new section to read:
24 Sec. 25.24.165. CHANGE OF NAME IN DIVORCE OR ANNULMENT. (a) In
25 a judgment in an action for divorce or action declaring a marriage
26 void, the court may change the name of either of the parties.
27 (b) If a party seeks a change of name to a name other than a
28 prior name, the court shall set a date for hearing not less than 40
29 days after filing of the action. Notice of the application for a

1 change of name to a name other than a prior name and the date of the
2 hearing shall be published once each week for four consecutive calen-
3 dar weeks before the hearing in a newspaper of general circulation in
4 the judicial district. The court may also require posting of the
5 notice at locations it considers appropriate. The court shall by
6 judgment authorize the party to assume the new name not less than 30
7 days after issuance of the judgment, if the court is satisfied that no
8 reasonable objection exists to assumption of the new name. Within 10
9 days after issuance of the judgment the party shall publish notice of
10 the approval of the name change in a newspaper of general circulation
11 in the judicial district. The court may also require the posting of a
12 copy of the judgment.
13 * Sec. 7. AS 25.24.200 is amended to read:
14 Sec. 25.24.200. DISSOLUTION OF MARRIAGE. (a) A husband and
15 wife together may petition the superior court for the dissolution of
16 their marriage under AS 25.24.200 - 25.24.260 if the following con-
17 ditions exist at the time of filing the petition:
18 (1) incompatibility of temperament has caused the irremedi-
19 able breakdown of the marriage;
20 (2) if there are minor children of the marriage or the wife
21 is pregnant, <u>and</u> the spouses have agreed on which spouse or third
22 party <u>is to</u> [SHALL] be awarded custody of each minor child of the
23 marriage and the extent of visitation, including visitation by grand-
24 parents and other persons <u>if in the child's best interests</u>, and
25 support to be provided on the children's behalf, whether the payments
26 are to be made through the child support enforcement agency and the
27 tax consequences of that agreement;
28 (3) the spouses have agreed as to the distribution of all
29 jointly owned real and personal property<u>, including retirement</u>

1 benefits, and the payment of spousal maintenance [SUPPORT], if any,
2 and the tax consequences resulting from these payments; the agreement
3 must be fair and just and take into consideration the factors listed
4 in AS 25.24.160(a)(2) and (4) so that the economic effect of disso-
5 lution is fairly allocated; and
6 (4) the spouses have agreed as to the payment of all unpaid
7 obligations incurred by either or both of them, and as to payment of
8 obligations incurred jointly in the future.
9 (b) A husband or wife may separately petition for dissolution of
10 their marriage under AS 25.24.200 - 25.24.260 if the following con-
11 ditions exist at the time of filing the petition:
12 (1) incompatibility of temperament, as evidenced by extend-
13 ed absence or otherwise, has caused the irremediable breakdown of the
14 marriage;
15 (2) the petitioning spouse has been unable to ascertain the
16 other spouse's position in regard to the dissolution of their marriage
17 and in regard to the fair and just division of property, including
18 retirement benefits, spousal maintenance, payment of debts, and cus-
19 tody, support and visitation because the whereabouts of the other
20 spouse is unknown to the petitioning spouse after reasonable efforts
21 have been made to locate the absent spouse; and
22 (3) the other spouse cannot be personally served with
23 process inside or outside the state.
24 (c) Except as provided in AS 25.24.220(i), [NOTHING IN THIS
25 SECTION PROHIBITS] a spouse who has been personally served with a copy
26 of a petition filed [MADE] under (a) of this section may execute [FROM
27 EXECUTING] an appearance, waiver of time to answer, and waiver of
28 notice of hearing. The appearance and waivers must [SHALL] include an
29 acknowledgment signed before an officer authorized to administer an

oath or affirmation that the spouse being served has read the petition; assents to the terms relating to custody of the children, child support, visitation, spousal maintenance taking into consideration the factors listed in AS 25.24.160(a)(2), [SUPPORT] and [RESULTANT] tax consequences, division of property, including retirement benefits and taking into consideration the factors listed in AS 25.24.160(a)(4), and allocation of debts; agrees that the conditions otherwise required by (a) of this section exist; agrees that the petition constitutes the entire agreement between the parties; understands fully the nature and consequences of the action; and is not signing the appearance and waivers under duress or coercion.

(d) The action created under this section is separate from the action created by AS 25.24.010. The procedures prescribed by AS 25.-24.200 - 25.24.260 do not apply to an action brought under AS 25.24.-010, nor do procedures prescribed under AS 25.24.010 - 25.24.180 apply to an action filed [BROUGHT] under this section, except as specifically provided.

* Sec. 8. AS 25.24.200 is amended by adding a new subsection to read:

(e) Spousal maintenance and a division of property must fairly allocate the economic effect of dissolution and take into consideration the factors listed in AS 25.24.160(a)(2) and (4).

* Sec. 9. AS 25.24.210(d) is amended to read:

(d) The petition shall request that the marriage be dissolved and that the [PRIOR] name of a spouse be changed [RESTORED], if desired by that spouse.

* Sec. 10. AS 25.24.210(e) is repealed and reenacted to read:

(e) If the petition is filed by both spouses under AS 25 24.-200(a), the petition must state in detail the terms of the agreement between the spouses concerning the custody of children, child support,

1 visitation, spousal maintenance and tax consequences, if any, and fair
2 and just division of property, including retirement benefits. Agree-
3 ments on spousal maintenance and property division must fairly allo-
4 cate the economic effect of dissolution and take into consideration
5 the factors listed in AS 25.24.160(a)(2) and (4). In addition, the
6 petition must state
7 (1) the respective occupations of the petitioners;
8 (2) the income, assets, and liabilities of the respective
9 petitioners at the time of filing the petition;
10 (3) the date and place of the marriage;
11 (4) the name, date of birth, and current custodial status
12 of each minor child born of the marriage or adopted by the petition-
13 ers;
14 (5) whether the wife is pregnant;
15 (6) whether either petitioner requires medical care or
16 treatment;
17 (7) whether a domestic violence complaint has been filed
18 during the marriage by a member of the household;
19 (8) whether either petitioner has received the advice of
20 legal counsel regarding a divorce or dissolution;
21 (9) other facts and circumstances that the petitioners
22 believe should be considered;
23 (10) that the petition constitutes the entire agreement
24 between the petitioners; and
25 (11) any other relief sought by the petitioners.
26 * Sec. 11. AS 25.24.220(b) is repealed and reenacted to read:
27 (b) Except as provided in (i) of this section, if the petition
28 is filed by both spouses under AS 25.24.200(a), both spouses shall
29 attend the hearing personally and not through counsel. However, if

1 the petition is not subject to (i) of this section, a spouse who
2 complies with AS 25.24.200(c) is not required to attend the hearing.
3 Either spouse may have counsel at the hearing.
4 * Sec. 12. AS 25.24.220(c) is amended to read:
5 (c) If the petition is filed [BROUGHT] by one spouse under
6 AS 25.24.200(b), that spouse shall submit proof of diligent inquiry as
7 to the whereabouts of the absent spouse and provide notice by publica-
8 tion, posting, or other means as ordered by the court under [IN ACCOR-
9 DANCE WITH] the Alaska Rules of Civil Procedure.
10 * Sec. 13. AS 25.24.220(d) is amended to read:
11 (d) If the petition is filed [BROUGHT] by both spouses under
12 AS 25.24.200(a), the court shall examine the petitioners or petitioner
13 present and consider whether
14 (1) the spouses fully understand the nature and conse-
15 quences of their action;
16 (2) the written agreements between the spouses concerning
17 child custody, child support, and visitation are [FAIR,] just [, AND
18 EQUITABLE] as between the spouses and in the best interests of the
19 children of the marriage;
20 (3) the written agreements between the spouses relating to
21 the division of property, including retirement benefits, spousal
22 maintenance [SPOUSAL SUPPORT], and the allocation of obligations are
23 [FAIR,] just; the spousal maintenance and division of property must
24 fairly allocate the economic effect of dissolution and take into
25 consideration the factors listed in AS 25.24.160(a)(2) and (4); [, AND
26 EQUITABLE; AND]
27 (4) the written agreements constitute the entire agreement
28 between the parties; and
29 (5) the conditions in AS 25.24.200(a) have been met.

1 * Sec. 14. AS 25.24.220(e) is amended to read:
2 (e) If the petition is filed [BROUGHT] by one spouse under
3 AS 25.24.200(b), the court shall examine the petitioner and consider
4 whether the petitioner fully understands the nature and consequences
5 of the action and whether the conditions in AS 25.24.200(b) have been
6 met.
7 * Sec. 15. AS 25.24.220(g) is amended to read:
8 (g) The court may amend the written agreements between the
9 spouses relating to child custody, child support, visitation, [SPOUSAL
10 SUPPORT,] division of the property, including retirement benefits,
11 spousal maintenance, and allocation of obligations, but only if both
12 petitioners concur in the amendment in writing or on the record.
13 * Sec. 16. AS 25.24.220 is amended by adding new subsections to read:
14 (h) In its examination of a petitioner under (d) of this sec-
15 tion, the court shall use a heightened level of scrutiny of agreements
16 if
17 (1) one party is represented by counsel and the other is
18 not;
19 (2) a domestic violence complaint has been filed during the
20 marriage by a member of the family or there is evidence of domestic
21 violence during the marriage;
22 (3) there is a minor child of the marriage; or
23 (4) there is a patently inequitable division of the marital
24 estate.
25 (i) If the court finds that a higher level of scrutiny is re-
26 quired by (h) of this section, the court shall examine the written
27 agreements between the spouses to determine that they are just, that
28 they constitute the entire agreement between the parties, and that the
29 agreements concerning child custody, child support, and visitation are

1 in the best interest of the children of the marriage, if any. The
2 court shall require the presence of both spouses at a hearing for this
3 purpose unless the court finds on the record that it would constitute
4 a significant hardship on one of the spouses to appear and that a just
5 agreement has been reached. If one of the spouses cannot attend the
6 hearing because it would constitute a significant hardship, the court
7 may require that spouse to be available by telephone to answer ques-
8 tions, at that spouse's expense.
9 * Sec. 17. AS 25.24.230 is repealed and reenacted to read:
10 Sec. 25.24.230. JUDGMENT. (a) If the petition is filed under
11 AS 25.24.200(a), and is not subject to AS 25.24.220(h), the court may
12 grant the spouses a final decree of dissolution and shall order other
13 relief as provided in this section if the court, upon consideration of
14 the information contained in the petition and the testimony of the
15 spouse or spouses at the hearing, finds that
16 (1) the spouses understand fully the nature and conse-
17 quences of their action;
18 (2) the written agreements between the spouses concerning
19 spousal maintenance and tax consequences, if any, division of proper-
20 ty, including retirement benefits, and allocation of obligations are
21 fair and just and constitute the entire agreement between the parties;
22 (3) the spousal maintenance and division of property fairly
23 allocate the economic effect of dissolution and take into considera-
24 tion the factors listed in AS 25.24.160(a)(2) and (4);
25 (4) each spouse entered into the agreement voluntarily and
26 free from the coercion of another person; and
27 (5) the conditions in AS 25.24.200(a) have been met.
28 (b) If the petition is filed under AS 25.24.200(a) and is sub-
29 ject to AS 25.24.220(h), the court may grant the spouses a final

1 decree of dissolution and shall order other relief as provided in this
2 section if the court, upon consideration of the information contained
3 in the petition and the testimony of the spouse or spouses at the
4 hearing, finds that
5 (1) the spouses understand fully the nature and conse-
6 quences of their action;
7 (2) the written agreements between the spouses concerning
8 child custody, child support, and visitation are in the best interest
9 of the children of the marriage, constitute the entire agreement of
10 the parties on child custody, child support, and visitation, and, as
11 between the spouses, are just;
12 (3) the written agreements between the spouses concerning
13 spousal maintenance and tax consequences, if any, division of proper-
14 ty, including retirement benefits, and allocation of obligations are
15 just and constitute the entire agreement between the parties;
16 (4) the spousal maintenance and division of property fairly
17 allocate the economic effect of dissolution and take into considera-
18 tion the factors listed in AS 25.24.160(a)(2) and (4);
19 (5) each spouse entered the agreement voluntarily and free
20 from the coercion of another person; and
21 (6) the conditions in AS 25.24.200(a) have been met.
22 (c) If the petition is filed by one spouse under AS 25.24.-
23 200(b), the court may grant the spouse a final decree of dissolution
24 and change the petitioner's name, if so requested, if the court, upon
25 consideration of affidavits supplied by the spouse and the testimony
26 of the spouse at the hearing, finds that
27 (1) the spouse present at the hearing understands fully the
28 nature and consequences of the action;
29 (2) the conditions in AS 25.24.200(b) have been met; and

1 (3) the requirements of AS 25.24.165(b) have been sat-
2 isfied, if a change of name is requested.
3 (d) The court shall dismiss a petition or continue action on a
4 petition filed under AS 25.24.200 - 25.24.260 before findings are made
5 if
6 (1) a representative of the minor children objects to a
7 term of an agreement between the spouses;
8 (2) either of the spouses withdraws from an agreement
9 required under AS 25.24.200(a); or
10 (3) the petition alleges that the conditions in AS 25.24.-
11 200(b) exist, but the whereabouts of the absent spouse becomes known
12 to the other spouse or the court before findings are made.
13 (e) The court shall deny the relief sought in a petition filed
14 under AS 25.24.200 - 25.24.260 if the court does not make the findings
15 required under (a) - (c) of this section.
16 (f) If the petition is filed by both spouses under AS 25.24.-
17 200(a), the court shall change either spouse's name, if the spouse
18 seeking a change of name to a name other than a prior name complies
19 with AS 25.24.165(b), and shall fully and specifically set out in the
20 decree the written agreements of the spouses and shall order the
21 performance of those written agreements. The court shall also state,
22 in the decree, whether child support payments are to be made through
23 the child support enforcement agency. If the petition is filed by one
24 spouse under AS 25.24.200(b), the decree must state that it does not
25 bar future action on the issues not resolved in the decree.
26 (g) Notwithstanding other provisions of AS 25.24.200 - 25.24.-
27 260, the court may not award to one spouse real or personal property
28 acquired by the other spouse before the date of the marriage, unless
29 the spouses expressly agree otherwise or the court determines that the

1 property should be made available, by sale or other conveyance, to
2 ensure that the best interests of the children are provided for. If
3 the court determines that the best interests of the children require
4 an award of premarital property, but the spouses do not agree, the
5 court shall dismiss or continue the action.
6 (h) If a judgment under this section distributes benefits to an
7 alternate payee under AS 14.25, AS 22.25, AS 26.05.222 - 26.05.226, or
8 AS 39.35, the judgment must meet the requirements of a qualified
9 domestic relations order under the definition of that phrase that is
10 applicable to those provisions.
11 * Sec. 18. AS 25.24.250 is amended by adding a new subsection to read:
12 (c) Forms or instructions prepared under (a) of this section
13 must specify that the dissolution petition constitutes the entire
14 agreement between the parties and must provide examples of kinds of
15 property and obligations that are subject to distribution.
16 * Sec. 19. AS 25.24.165, as added by sec. 6 of this Act, AS 25.24.-
17 210(d) as amended by sec. 9 of this Act, and AS 25.24.230(c) and 25.24.-
18 230(f) as amended by sec. 17 of this Act, have the effect of amending Rule
19 84(a), Alaska Rules of Civil Procedure, to allow a change of name to a name
20 other than a prior name to be commenced in a complaint for divorce or
21 annulment or a petition for dissolution of marriage.
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go0949hG
Lauterbach
2/28/90

[deleted]

NEW

Original sponsor(s): Rules/Governor

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE

2 SENATE CS FOR CS FOR HOUSE BILL NO. 195 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to divorce, dissolution, and annul-
7 ment; and amending Rule 84(a), Alaska Rules of Civil
8 Procedure."

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

10 * Section 1. INTENT. By amending AS 25.24.160(a)(2) and (4) in this
11 Act and by referring to those paragraphs in other sections of AS 25.24 in
12 this Act, it is the legislature's intent to codify the principal factors to
13 be weighed by a court in making an equitable division of property or an
14 award of maintenance in a divorce or dissolution proceeding, as enunciated
15 by the Alaska Supreme Court in the case of Merrill v. Merrill, 368 P.2d 546
16 (Alaska 1962), and subsequent opinions. Except for AS 25.24.160(a)(4)(F),
17 the factors codified are intended to restate the principal factors found in
18 case law, not to change them, affect the interpretation given to them, or
19 preclude changes or additions to them by future court rulings.

20 * Sec. 2. AS 25.20 is amended by adding a new section to read:

21 Sec. 25.20.115. ATTORNEY FEE AWARDS IN CUSTODY AND VISITATION
22 MATTERS. In an action to modify, vacate, or enforce that part of an
23 order providing for custody of a child or visitation with a child, the
24 court may, upon request of a party, award attorney fees and costs of
25 the action. In awarding attorney fees and costs under this section,
26 the court shall consider the relative financial resources of the
27 parties and whether the parties have acted in good faith.

28 * Sec. 3. AS 25.24.100 is amended to read:

29 Sec. 25.24.100. RESIDENCY OF MILITARY PERSONNEL. A person

1 serving in a military branch of the United States government who has
2 been continuously stationed at [IN] a military base or installation in
3 the state for at least 30 days is considered [A PERIOD OF ONE YEAR
4 SHALL BE DEEMED] a resident [IN GOOD FAITH] of the state for the
5 purposes of this chapter [AS 25.24.010 - 25.24.180].
6 * Sec. 4. AS 25.24.140 is repealed and reenacted to read:
7 Sec. 25.24.140. ORDERS DURING ACTION. (a) During the pendency
8 of the action, a spouse may, upon application and in appropriate
9 circumstances, be awarded expenses, including
10 (1) attorney fees and costs that reasonably approximate the
11 actual fees and costs required to prosecute or defend the action; in
12 applying this paragraph, the court shall take appropriate steps to
13 ensure that the award of attorney fees does not contribute to an
14 unnecessary escalation in the litigation;
15 (2) reasonable spousal maintenance, including medical
16 expenses; and
17 (3) reasonable support for minor children in the care of
18 the spouse, if there is a legal obligation of the other spouse to
19 provide support.
20 (b) During the pendency of the action, upon application, a
21 spouse is entitled to necessary protective orders, including orders
22 (1) providing for the freedom of each spouse from the
23 control of the other spouse;
24 (2) restraining each spouse from subjecting the other
25 spouse or another person living in the household to domestic violence,
26 as defined in AS 25.35.060;
27 (3) directing one spouse to vacate the marital residence or
28 the home of the other spouse;
29 (4) restraining a spouse from communicating directly or

1 indirectly with the other spouse;

2 (5) restraining a spouse from entering a propelled vehicle
3 in the possession of or occupied by the other spouse; and

4 (6) prohibiting a spouse from disposing of the property of
5 either spouse or marital property without the permission of the other
6 spouse or a court order.

7 (c) After a hearing, if both parties agree, the court may also
8 order that the parties engage in personal or family counseling or
9 mediation. In the order, the court shall provide for the payment of
10 the costs of the counseling or mediation.

11 * Sec. 5. AS 25.24.160(a) is amended to read:

12 (a) In a judgment in an action for divorce or action declaring a
13 marriage void or at any time after judgment, the court may provide

14 (1) for the payment by either or both parties of an amount
15 of money or goods, in gross or installments that may include cost-
16 of-living adjustments, as may be just and proper for the parties to
17 contribute toward the nurture and education of their children, and the
18 court may order the parties to arrange with their employers for an
19 automatic payroll deduction each month or each pay period, if the
20 period is other than monthly, of the amount of the installment; if the
21 employer agrees, the installment shall be forwarded by the employer to
22 the clerk of the superior court <u>that</u> [WHICH] entered the judgment or
23 to the court trustee, and the amount of the installment is exempt from
24 execution;

25 (2) for the recovery by one party from the other of an
26 amount of money for maintenance, <u>for a limited or indefinite period of</u>
27 <u>time,</u> in gross or in installments, as may be just and necessary with-
28 out regard to which of the parties is in fault; <u>an award of mainte-</u>
29 [take into consideration career assets.] <u>nance must fairly allocate the economic effect of divorce by being</u>

based on a consideration of the following factors:

(A) the length of the marriage and station in life of the parties during the marriage;

(B) the age and health of the parties;

(C) the earning capacity of the parties, including their educational backgrounds, training, employment skills, work experiences, length of absence from the job market, and custodial responsibilities for children during the marriage;

(D) the financial condition of the parties, including the availability and cost of health insurance;

the conduct of the parties, including the unreasonable

(E) the depletion of marital assets by the parties during the marriage;

(F) the division of property under (4) of this subsection; and

(G) other factors the court determines to be relevant in each individual case;

(3) 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;

(4) for the division between the parties of their property, including retirement benefits, whether joint or separate, acquired only during marriage [COVERTURE], in a just [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, including retirement benefits, 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, including retirement benefits, to the other party; the

[take into consideration career assets.]

division of property must fairly allocate the economic effect of divorce by being based on consideration of the following factors:

(A) the length of the marriage and station in life of the parties during the marriage;

(B) the age and health of the parties;

(C) the earning capacity of the parties, including their educational backgrounds, training, employment skills, work experiences, length of absence from the job market, and custodial responsibilities for children during the marriage;

(D) the financial condition of the parties, including the availability and cost of health insurance;

(E) the depletion of marital assets by the parties during the marriage;

(F) the desirability of awarding the family home, or the right to live in it for a reasonable period of time, to the party who has primary physical custody of children;

(G) the circumstances and necessities of each party;

(H) the time and manner of acquisition of the property in question; and

(I) the income-producing capacity of the property and the value of the property at the time of division

[(5) TO CHANGE THE NAME OF ONE OF THE PARTIES].

* Sec. 6. AS 25.24 is amended by adding a new section to read:

Sec. 25.24.165. CHANGE OF NAME IN DIVORCE OR ANNULMENT. (a) In a judgment in an action for divorce or action declaring a marriage void, the court may change the name of either of the parties.

(b) If a party seeks a change of name to a name other than a prior name, the court shall set a date for hearing not less than 40 days after filing of the action. Notice of the application for a

1 change of name to a name other than a prior name and the date of the
2 hearing shall be published once each week for four consecutive calen-
3 dar weeks before the hearing in a newspaper of general circulation in
4 the judicial district. The court may also require posting of the
5 notice at locations it considers appropriate. The court shall by
6 judgment authorize the party to assume the new name not less than 30
7 days after issuance of the judgment, if the court is satisfied that no
8 reasonable objection exists to assumption of the new name. Within 10
9 days after issuance of the judgment the party shall publish notice of
10 the approval of the name change in a newspaper of general circulation
11 in the judicial district. The court may also require the posting of a
12 copy of the judgment.

13 * Sec. 7. AS 25.24.200 is amended to read:

14 Sec. 25.24.200. DISSOLUTION OF MARRIAGE. (a) A husband and
15 wife together may petition the superior court for the dissolution of
16 their marriage under AS 25.24.200 - 25.24.260 if the following con-
17 ditions exist at the time of filing the petition:

18 (1) incompatibility of temperament has caused the irremedi-
19 able breakdown of the marriage;

20 (2) if there are minor children of the marriage or the wife
21 is pregnant, <u>and</u> the spouses have agreed on which spouse or third
22 party <u>is to</u> [SHALL] be awarded custody of each minor child of the
23 marriage and the extent of visitation, including visitation by grand-
24 parents and other persons, <u>if in the child's best interests,</u> and
25 support to be provided on the children's behalf, whether the payments
26 are to be made through the child support enforcement agency and the
27 tax consequences of that agreement;

28 (3) the spouses have agreed as to the distribution of all
29 jointly owned real and personal property<u>, including retirement</u>

benefits, and the payment of spousal maintenance [SUPPORT], if any, and the tax consequences resulting from these payments; the agreement must be fair and just and take into consideration [career assets] the factors listed in AS 25.24.160(a)(2) and (4) so that the economic effect of dissolution is fairly allocated; and

(4) the spouses have agreed as to the payment of all unpaid obligations incurred by either or both of them, and as to payment of obligations incurred jointly in the future.

(b) A husband or wife may separately petition for dissolution of their marriage under AS 25.24.200 - 25.24.260 if the following conditions exist at the time of filing the petition:

(1) incompatibility of temperament, as evidenced by extended absence or otherwise, has caused the irremediable breakdown of the marriage;

(2) the petitioning spouse has been unable to ascertain the other spouse's position in regard to the dissolution of their marriage and in regard to the fair and just division of property, including retirement benefits, spousal maintenance, payment of debts, and custody, support and visitation because the whereabouts of the other spouse is unknown to the petitioning spouse after reasonable efforts have been made to locate the absent spouse; [the division of property and spousal maintenance must take into consideration career assets] and

(3) the other spouse cannot be personally served with process inside or outside the state.

(c) Except as provided in AS 25.24.220(i), [NOTHING IN THIS SECTION PROHIBITS] a spouse who has been personally served with a copy of a petition filed [MADE] under (a) of this section may execute [FROM EXECUTING] an appearance, waiver of time to answer, and waiver of notice of hearing. The appearance and waivers must [SHALL] include an acknowledgment signed before an officer authorized to administer an

oath or affirmation that the spouse being served has read the petition; assents to the terms relating to custody of the children, child support, visitation, spousal maintenance taking into consideration the [career assets] factors listed in AS 25.24.160(a)(2), [SUPPORT] and [RESULTANT] tax consequences, division of property, including retirement benefits and taking into consideration [career assets] the factors listed in AS 25.24.160(a)(4), and allocation of debts; agrees that the conditions otherwise required by (a) of this section exist; agrees that the petition constitutes the entire agreement between the parties; understands fully the nature and consequences of the action; and is not signing the appearance and waivers under duress or coercion.

(d) The action created under this section is separate from the action created by AS 25.24.010. The procedures prescribed by AS 25.-24.200 - 25.24.260 do not apply to an action brought under AS 25.24.-010, nor do procedures prescribed under AS 25.24.010 - 25.24.180 apply to an action filed [BROUGHT] under this section, except as specifically provided.

* Sec. 8. AS 25.24.200 is amended by adding a new subsection to read:

(e) Spousal maintenance and a division of property must fairly allocate the economic effect of dissolution and take into consideration [career assets] the factors listed in AS 25.24.160(a)(2) and (4).

* Sec. 9. AS 25.24.210(d) is amended to read:

(d) The petition shall request that the marriage be dissolved and that the [PRIOR] name of a spouse be changed [RESTORED], if desired by that spouse.

* Sec. 10. AS 25.24.210(e) is repealed and reenacted to read:

(e) If the petition is filed by both spouses under AS 25.24.-200(a), the petition must state in detail the terms of the agreement between the spouses concerning the custody of children, child support,

1 visitation, spousal maintenance and tax consequences, if any, and fair
2 and just division of property, including retirement benefits. Agree-
3 ments on spousal maintenance and property division must fairly allo-
4 cate the economic effect of dissolution and take into consideration
5 [career assets] the factors listed in AS 25.24.160(a)(2) and (4). In addition, the
6 petition must state
7 (1) the respective occupations of the petitioners;
8 (2) the income, assets, and liabilities of the respective
9 petitioners at the time of filing the petition;
10 (3) the date and place of the marriage;
11 (4) the name, date of birth, and current custodial status
12 of each minor child born of the marriage or adopted by the petition-
13 ers;
14 (5) whether the wife is pregnant;
15 (6) whether either petitioner requires medical care or
16 treatment;
17 (7) whether a domestic violence complaint has been filed
18 during the marriage by a member of the household;
19 (8) whether either petitioner has received the advice of
20 legal counsel regarding a divorce or dissolution;
21 (9) other facts and circumstances that the petitioners
22 believe should be considered;
23 (10) that the petition constitutes the entire agreement
24 between the petitioners; and
25 (11) any other relief sought by the petitioners.
26 * Sec. 11. AS 25.24.220(b) is repealed and reenacted to read:
27 (b) Except as provided in (i) of this section, if the petition
28 is filed by both spouses under AS 25.24.200(a), both spouses shall
29 attend the hearing personally and not through counsel. However, if

1 the petition is not subject to (i) of this section, a spouse who
2 complies with AS 25.24.200(c) is not required to attend the hearing.
3 Either spouse may have counsel at the hearing.
4 * Sec. 12. AS 25.24.220(c) is amended to read:
5 (c) If the petition is filed [BROUGHT] by one spouse under
6 AS 25.24.200(b), that spouse shall submit proof of diligent inquiry as
7 to the whereabouts of the absent spouse and provide notice by publica-
8 tion, posting, or other means as ordered by the court under [IN ACCOR-
9 DANCE WITH] the Alaska Rules of Civil Procedure.
10 * Sec. 13. AS 25.24.220(d) is amended to read:
11 (d) If the petition is filed [BROUGHT] by both spouses under
12 AS 25.24.200(a), the court shall examine the petitioners or petitioner
13 present and consider whether
14 (1) the spouses fully understand the nature and conse-
15 quences of their action;
16 (2) the written agreements between the spouses concerning
17 child custody, child support, and visitation are [FAIR,] just [, AND
18 EQUITABLE] as between the spouses and in the best interests of the
19 children of the marriage;
20 (3) the written agreements between the spouses relating to
21 the division of property, including retirement benefits, spousal
22 maintenance [SPOUSAL SUPPORT], and the allocation of obligations are
23 [FAIR,] just; the spousal maintenance and division of property must
24 fairly allocate the economic effect of dissolution and take into
25 consideration the [career assets] factors listed in AS 25.24.160(a)(2) and (4); [, AND
26 EQUITABLE; AND]
27 (4) the written agreements constitute the entire agreement
28 between the parties; and
29 (5) the conditions in AS 25.24.200(a) have been met.

1 * Sec. 14. AS 25.24.220(e) is amended to read:
2 (e) If the petition is <u>filed</u> [BROUGHT] by one spouse under
3 AS 25.24.200(b), the court shall examine the petitioner and consider
4 whether the petitioner fully understands the nature and consequences
5 of the action and whether the conditions in AS 25.24.200(b) have been
6 met.
7 * Sec. 15. AS 25.24.220(g) is amended to read:
8 (g) The court may amend the <u>written</u> agreements between the
9 spouses relating to child custody, child support, visitation, [SPOUSAL
10 SUPPORT,] division of the property, <u>including retirement benefits,</u>
11 <u>spousal maintenance,</u> and allocation of obligations, but only if both
12 petitioners concur in the amendment <u>in writing or on the record</u>.
13 * Sec. 16. AS 25.24.220 is amended by adding new subsections to read:
14 (h) In its examination of a petitioner under (d) of this sec-
15 tion, the court shall use a heightened level of scrutiny of agreements
16 if
17 (1) one party is represented by counsel and the other is
18 not;
19 (2) a domestic violence complaint has been filed during the
20 marriage by a member of the family or there is evidence of domestic
21 violence during the marriage;
22 (3) there is a minor child of the marriage; or
23 (4) there is a patently inequitable division of the marital
24 estate.
25 (i) If the court finds that a higher level of scrutiny is re-
26 quired by (h) of this section, the court shall examine the written
27 agreements between the spouses to determine that they are just, that
28 they constitute the entire agreement between the parties, and that the
29 agreements concerning child custody, child support, and visitation are

in the best interest of the children of the marriage, if any. The court shall require the presence of both spouses at a hearing for this purpose unless the court finds on the record that it would constitute a significant hardship on one of the spouses to appear and that a just agreement has been reached. If one of the spouses cannot attend the hearing because it would constitute a significant hardship, the court may require that spouse to be available by telephone to answer questions, at that spouse's expense.

[(j)] * Sec. 17. AS 25.24.230 is repealed and reenacted to read:

Sec. 25.24.230. JUDGMENT. (a) If the petition is filed under AS 25.24.200(a), and is not subject to AS 25.24.220(h), the court may grant the spouses a final decree of dissolution and shall order other relief as provided in this section if the court, upon consideration of the information contained in the petition and the testimony of the spouse or spouses at the hearing, finds that

(1) the spouses understand fully the nature and consequences of their action;

(2) the written agreements between the spouses concerning spousal maintenance and tax consequences, if any, division of property, including retirement benefits, and allocation of obligations are fair and just and constitute the entire agreement between the parties;

(3) the spousal maintenance and division of property fairly allocate the economic effect of dissolution and take into consideration [career assets] the factors listed in AS 25.24.160(a)(2) and (4);

(4) each spouse entered into the agreement voluntarily and free from the coercion of another person; and

(5) the conditions in AS 25.24.200(a) have been met.

(b) If the petition is filed under AS 25.24.200(a) and is subject to AS 25.24.220(h), the court may grant the spouses a final

1 decree of dissolution and shall order other relief as provided in this
2 section if the court, upon consideration of the information contained
3 in the petition and the testimony of the spouse or spouses at the
4 hearing, finds that

5 (1) the spouses understand fully the nature and conse-
6 quences of their action;

7 (2) the written agreements between the spouses concerning
8 child custody, child support, and visitation are in the best interest
9 of the children of the marriage, constitute the entire agreement of
10 the parties on child custody, child support, and visitation, and, as
11 between the spouses, are just;

12 (3) the written agreements between the spouses concerning
13 spousal maintenance and tax consequences, if any, division of proper-
14 ty, including retirement benefits, and allocation of obligations are
15 just and constitute the entire agreement between the parties;

16 (4) the spousal maintenance and division of property fairly
17 allocate the economic effect of dissolution and take into considera-
18 tion the [career assets] factors listed in AS 25.24.160(a)(2) and (4);

19 (5) each spouse entered the agreement voluntarily and free
20 from the coercion of another person; and

21 (6) the conditions in AS 25.24.200(a) have been met.

22 (c) If the petition is filed by one spouse under AS 25.24.-
23 200(b), the court may grant the spouse a final decree of dissolution
24 and change the petitioner's name, if so requested, if the court, upon
25 consideration of affidavits supplied by the spouse and the testimony
26 of the spouse at the hearing, finds that

27 (1) the spouse present at the hearing understands fully the
28 nature and consequences of the action;

29 (2) the conditions in AS 25.24.200(b) have been met; and

(3) the requirements of AS 25.24.165(b) have been satisfied, if a change of name is requested.

(d) The court shall dismiss a petition or continue action on a petition filed under AS 25.24.200 - 25.24.260 before findings are made if

(1) a representative of the minor children objects to a term of an agreement between the spouses;

(2) either of the spouses withdraws from an agreement required under AS 25.24.200(a); or

(3) the petition alleges that the conditions in AS 25.24.-200(b) exist, but the whereabouts of the absent spouse becomes known to the other spouse or the court before findings are made.

(e) The court shall deny the relief sought in a petition filed under AS 25.24.200 - 25.24.260 if the court does not make the findings required under (a) - (c) of this section.

(f) If the petition is filed by both spouses under AS 25.24.-200(a), the court shall change either spouse's name, if the spouse seeking a change of name to a name other than a prior name complies with AS 25.24.165(b), and shall fully and specifically set out in the decree the written agreements of the spouses and shall order the performance of those written agreements. The court shall also state, in the decree, whether child support payments are to be made through the child support enforcement agency. If the petition is filed by one spouse under AS 25.24.200(b), the decree must state that it does not bar future action on the issues not resolved in the decree.

(g) Notwithstanding other provisions of AS 25.24.200 - 25.24.-260, the court may not award to one spouse real or personal property acquired by the other spouse before the date of the marriage, unless the spouses expressly agree otherwise or the court determines that the

1 property should be made available, by sale or other conveyance, to
2 ensure that the best interests of the children are provided for. If
3 the court determines that the best interests of the children require
4 an award of premarital property, but the spouses do not agree, the
5 court shall dismiss or continue the action.
6 (h) If a judgment under this section distributes benefits to an
7 alternate payee under AS 14.25, AS 22.25, AS 26.05.222 - 26.05.226, or
8 AS 39.35, the judgment must meet the requirements of a qualified
9 domestic relations order under the definition of that phrase that is
10 applicable to those provisions.
11 * Sec. 18. AS 25.24.250 is amended by adding a new subsection to read:
12 (c) Forms or instructions prepared under (a) of this section
13 must specify that the dissolution petition constitutes the entire
14 agreement between the parties and must provide examples of kinds of
15 property and obligations that are subject to distribution.

[AS 25.24.400 definition of "career asset"]

16 * Sec. 19. AS 25.24.165, as added by sec. 6 of this Act, AS 25.24.-
17 210(d) as amended by sec. 9 of this Act, and AS 25.24.230(c) and 25.24.-
18 230(f) as amended by sec. 17 of this Act, have the effect of amending Rule
19 84(a), Alaska Rules of Civil Procedure, to allow a change of name to a name
20 other than a prior name to be commenced in a complaint for divorce or
21 annulment or a petition for dissolution of marriage.
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