

HB

238

Alaska State Legislature

HOUSE OF REPRESENTATIVES



REPRESENTATIVE FRAN ULMER

MEMORANDUM

November 27, 1989

TO: Senator Jan Faiks
Senate Judiciary Committee

FROM: Rep. Fran Ulmer

RE: HB 238, relating to adult victims of childhood sexual assault

During the last teleconferenced hearing on HB 238, relating to the legal rights of adult survivors of childhood sexual abuse, you asked whether the statute of limitations, extended in the bill from 2 years to 3 years, should be lengthened to an even greater extent in order to allow adequate time for a victim to progress in the healing process before initiating legal action. I have discussed this issue with the Network on Domestic Violence as well as a number of professionals in the field and the consensus is that 3 years should prove adequate.

The more important part of the bill, from the victim's perspective, is the application of the discovery rule. There are two possible scenarios which may occur. In the first instance, a victim may have completely repressed all memory of the childhood sexual abuse and entered therapy as a result of other problems such as alcohol or drug abuse, depression, marital problems, suicide attempts, or many other difficulties commonly associated with a history of abuse. During the course of therapy, the victim may recover memories of the childhood sexual abuse. However, it may be many months or even years before the victim understands the connection between the problems he or she experiences as an adult, such as drug abuse, depression, or marital difficulties, and the childhood sexual abuse. HB 238 stipulates that the statute of limitations shall begin to run "after the plaintiff discovered . . . that the act caused the injury or condition." The recollection of memories alone does not constitute "discovery."

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The second scenario concerns an adult who does retain memories of childhood sexual abuse but enters therapy for other adult problems, as enumerated above. Professionals in the field report that, although an adult victim may wonder about or possibly suspect a relationship between his history of sexual abuse and his adult problems, it is only during the course of therapy that the causal relationship between the earlier abuse and the later difficulties becomes apparent to the victim. As in the scenario described above, the statute of limitations begins to run AFTER "the plaintiff discovered . . . that the act caused the injury or condition."

In both of these situations, discovery is likely to be a process of discovery, rather than a single moment, because it requires the victim to perceive and understand the complex relationship between childhood sexual abuse and dysfunctional adult behaviors which may appear to be totally unrelated on the surface. The recollection of childhood sexual abuse, by itself, does not constitute discovery. It will be up to the victim and his or her therapist to establish the point at which "discovery" effectively occurred.

The length of time needed in therapy, after a victim understands the relationship between the childhood sexual abuse and the adult problems, and before he or she is able to face the abuser in a court of law, is entirely an individual matter. Professionals in the field report that it depends upon the severity of the abuse, how long it continued, the extent to which the victim blamed himself or herself, and a host of other factors. There is no information currently available which would indicate an average length of time needed in therapy before a victim would probably be able to take those actions envisioned in this legislation.

Due to that lack of data and to the individual nature of each case, I believe the three year statute of limitations articulated in the bill provides an adequate length of time to bring a civil action against an abuser. If our experience should prove otherwise, after the bill becomes law, then we would have the data necessary to make a more informed decision regarding the length of time appropriate for an adult survivor of childhood sexual abuse to bring an action against his or her abuser. Our best information, at this time, indicates that three years, after the process of discovery, is a reasonable length of time in which to bring an action.

FU/dl

Alaska State Legislature

HOUSE OF REPRESENTATIVES



REPRESENTATIVE FRAN ULMER

MEMORANDUM

October 2, 1989

TO: Senate Judiciary Committee Members
FROM: Rep. Fran Ulmer
RE: CSHB 238 (Jud)

CSHB 238 (Jud) extends the period of time in which a lawsuit may be brought by adult survivors of childhood sexual abuse. The bill does so by extending the period of time that a victim of sexual abuse can maintain an action for recovery of damages for injuries suffered as a result of that abuse from 2 years to 3 years. It also applies the discovery rule to these civil actions by adult survivors of childhood sexual abuse. The discovery rule provides that the statute of limitations does not begin to run until the plaintiff discovers both the injury and the cause.

This legislation is necessary because many victims of childhood sexual abuse repress all memory of their abuse until well into adulthood. Those who do remember tend to minimize or deny its effects to the extent that they do not connect the abuse with the psychological problems which may be experienced decades later. Adult survivors of childhood sexual abuse typically experience depression, anxiety, feelings of isolation and stigma, substance abuse, and self-destructive behaviors (including suicide). The long term effects also include sexual maladjustment and difficulty in trusting others.

Generally, it is only when an adult survivor of childhood sexual abuse enters therapy that he/she may recall abusive events and can develop any meaningful understanding of his or her injuries. It is usually as a result of therapy, and the healing process it initiates, that an adult survivor has the strength to face his or her abuser. No public benefit supports a rule that shields people who sexually abuse children from the consequences of their conduct. This legislation will provide survivors with an opportunity to obtain damages from an abuser and will, hopefully, have a chilling effect on potential abusers.

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In addition, CSHB 238 corrects inequities in the law relating to sexual assault of mentally incapable and incapacitated persons. These inequities were created as an oversight by the passage of CSHB 545 (Jud) in 1988, signed into law as ch. 96, SLA 1988. The main problem lies in the age element added to several provisions of an uncontroversial law which had been in effect since the criminal code revision of 1978.

For example, as a result of the 1988 amendments to the law, if a 19 year old and a 17 year old sexually assault a person they know to be incapacitated, the 19 year old could be prosecuted for a class B felony, and the 17 year old would not have violated the law. Under prior law, both offenders could have been prosecuted.

A similar inequity is present in those portions of the 1988 amendments that stated new crimes. For example, if a 19 year old orderly in a licensed facility and a 17 year old orderly in a licensed facility sexually assault a person they know to be mentally incapable, the 19 year old could be prosecuted for an unclassified felony, and the 17 year old would not have violated the law.

In addition, the bill substitutes the word "incapacitated," in AS 11.41.425(a)(2), for the existing law's description of the condition of being incapacitated. This change is made because "incapacitated" is defined in AS 11.41.470(1), and there is no need to repeat the language of the definition.



STEVE COWPER, GOVERNOR

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April 18, 1989

P O BOX K—STATE CAPITOL
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Honorable Fran Ulmer
Alaska House of Representatives
P.O. Box V
Juneau, AK 99811

Re: HB 238

Dear Representative Ulmer:

I received a request from your office for comment on HB 283. Below I have summarized the questions followed by my responses.

1. What would be the effect of addition of the words "or disability" following the word "illness" on line 29 of page 1?

Answer: Present law, AS 09.10.140, states that the statute of limitations is tolled for a person who is "incompetent by reason of mental illness" at the time that the cause of action accrues. The words "mental illness" as used by this statute were liberally interpreted by our supreme court in the case of Adkins v. Nabors Alaska Drilling, Inc., 609 P.2d 15, 23 (Alaska 1980), to include a person who lacks the ability to know or understand his legal rights sufficiently well to manage his personal affairs. The practical effect is that persons who are incompetent, regardless of whether they have become so because of mental illness, are protected by the statute. The proposed amendment -- to add "or disability" -- will not broaden the scope of protection already provided by the statute but will serve to harmonize legislative intent and judicial construction of the statute.

2. Does AS 09.10.140 in its present form toll the statute of limitations for persons who are "incompetent" when the cause of action accrues?

Answer: Yes. See preceding discussion.

3. What does "imputed discovery" of knowledge, as used on page 2, line 23, mean?

Honorable Fran Ulmer
Alaska House of Representatives
Re: HB 238

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Answer: Imputed knowledge means constructive knowledge, that is, knowledge that could have or should have been discovered by the exercise of ordinary care. See State v. Andrew, 718 P.2d 471 (Alaska 1986); Chase v. Shasta, 66 Cal. Rptr. 517 (Cal. App. 1968).

4. Does a person ever have "full" knowledge of the effects of a series of acts?

Answer: In a philosophic sense, it could be argued that the question cannot be answered but this is a question of fact which would be decided by a jury, and consequently, in a legal sense, there can be full knowledge. Tolling of the statute of limitations until the plaintiff has discovery of the full knowledge of the effect of the series of actions would likely have the practical effect of tolling the period of limitations for many years.

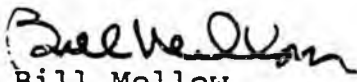
5. What is the age of majority for bringing an action? Is there an inconsistency with the use of the word "minor" in the bill?

Answer: The age of majority in Alaska is 18 years of age. AS 25.20.010. HB 238, at page 3, line 9, defines a minor as a person less than 18 years of age. There is no inconsistency.

If clarification of my comments are needed or you have additional questions, please call.

Sincerely,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: 
Bill Mellow
Assistant Attorney General

WGM/bap

cc: Art Peterson
Ron Lorensen

Testimony re HB 238, relating to legal rights for survivors of childhood sexual abuse.

Submitted by: Elaine Schroeder, Ph.D.
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I am here to support House Bill 238 which would allow survivors of childhood sexual abuse a more appropriate amount of time to seek legal redress. The very nature of the impact of child sexual abuse means that most victims have neither full recall of the abusive events nor fully understand that the painful symptoms they experience are caused by the earlier abuse.

I am particularly interested in this issue because I have worked as a psychotherapist and as a researcher with hundreds of adult and child survivors of childhood sexual abuse.

Let me introduce myself. I am a psychotherapist in private practice; my specialty is working with the victims of sexual abuse, and their families. I have performed substantial research on the subject of high-risk adolescent girls, 80% of whom have a history of sexual abuse.

My testimony will address three issues: (1) how total or partial repression (or amnesia) of painful memories of childhood sexual abuse occurs; (2) how survivors usually do not fully understand until later the relationship between the sexual abuse they experienced as a child and the psychological problems they experience as adults; (3) support for the one year extension of the statute of limitations.

REPRESSION: It has long been understood that people repress painful and traumatic memories. When we cannot cope with events or experiences which are exceedingly painful or unacceptable, we may "forget" them as a way to cope with an unbearable experience. Children and adult victims of war atrocities and natural disasters are known to experience amnesia about these events. The standard mental health diagnosis, as defined by the DSM III (the diagnostic system for all mental health clinicians) for people who have suffered childhood sexual abuse is called "Post Traumatic Stress Disorder." The definition of this diagnosis includes the following:

"the development of characteristic symptoms following a psychologically distressing event that is outside the range of usual human experience. . . The stressor producing this syndrome would be markedly distressing to almost anyone and is usually experienced with intense fear, terror and helplessness. . . The person commonly

Testimony of Elaine Schroeder, Ph.D.

makes deliberate efforts to avoid thoughts or feelings about the traumatic event and about activities or situations that arouse recollections of it. This avoidance of reminders of the trauma may include psychogenic amnesia of an important aspect of the traumatic event."

Many of my clients, while they may remember some of the abusive events, have avoided talking or consciously thinking about them for years. When in therapy, they often begin to recall more memories of the abuse as they look back on their childhood. In fact, I have had clients enter therapy because they say a TV program about incest had triggered a flood of memories. The DSM III I quoted earlier states:

"symptoms characteristic of post-traumatic stress syndrome . . . are often intensified or precipitated when the person is exposed to activities that resemble or symbolize the original trauma. . ."

UNDERSTANDING: My second point concerns survivors' ability to connect the childhood trauma with the adult symptoms. Survivors often try to minimize the impact of the abuse so that they do not upset the family system. If a survivor fully acknowledges the impact of the abuse on her life, she will be flooded with feelings of anger towards the abuser, often her father or a relative. Frequently, survivors enter therapy stating that their problem is depression or anxiety, or an eating disorder, or suicidal thoughts. If they do remember the abuse, they may be reluctant to bring it up in therapy because they do not want to stir up painful memories, or because they are ashamed, or because they blame themselves. Two of the therapeutic tasks in working with incest survivors is to help them recall the memories and to understand the impact the sexual abuse has had on their lives. So, only after an adult survivor has entered therapy (which is usually past the age of 30) can she or he have any meaningful understanding of their injuries.

Some of the abuse-related injuries are visible only during adulthood. Again quoting the DMS III: "symptoms may develop after a latency period of months or years following the trauma." So the survivor may not experience some of the harm until years after the trauma. "Discovery" or recall of childhood sexual abuse may occur well into adulthood. And understanding of harm or injury may occur even later. A victim cannot bring a suit until this time.

STATUTE OF LIMITATIONS: My final point relates to extending the statute of limitations one additional year to allow more time for the survivor to heal or to recover from the abuse before he/she seeks legal remedy. Several years in therapy may be necessary before a survivor has the necessary stamina and emotional stability to withstand the stress which a civil suit will create. Though the legal process is stressful, it can also be therapeutic in that it redresses a wrong, is socially supportive of the survivor and, hopefully, will curtail the incidence of this crime.

SUMMARY OF LEGISLATION
REGARDING THE STATUTE OF LIMITATIONS
IN CIVIL CHILDHOOD SEXUAL ABUSE CASES

The proposed legislation will apply the discovery rule to civil actions based on intentional torts brought by adult survivors of childhood sexual abuse seeking recovery of damages for injuries suffered as a result of that abuse. The discovery rule is a judicially fashioned response to situations in which the traditional statute of limitations, which begins to run as of the date of the wrongful act or omission that is the basis for the plaintiff's claim, is unworkable because injured plaintiffs do not know or cannot be expected to know of their injuries until after the limitations period has expired. The discovery rule provides that the statute of limitations does not begin to run until the plaintiff discovers or through the use of reasonable diligence should have discovered both the injury and its cause.

A survivor of childhood sexual abuse often lacks the means or ability to ascertain his or her injuries and their cause within the traditional limitations period. Many victims of childhood sexual abuse have repressed all memory of the abuse for many years or, if they do remember the abuse, they minimize or deny its effects to the extent that they do not connect the abuse with later injuries. Generally, it is only when an adult survivor of childhood sexual abuse enters therapy that any meaningful understanding of his or her injuries can be developed. This legislation will provide childhood sexual abuse survivors with an opportunity to bring civil actions to recover damages for injuries resulting from the abuse.

Civil suits act as deterrants to unacceptable behavior. No public benefit supports a rule that shields childhood sexual abusers from the consequences of their conduct. The hope is that this legislation, in addition to providing childhood sexual abuse survivors with an opportunity to seek civil redress, will have a chilling effect on potential abusers. Legislative action is essential if the discovery rule is to be applied to childhood sexual abuse cases.

FACT SHEET ON LEGISLATION
APPLYING THE DISCOVERY RULE TO CIVIL SUITS
BROUGHT BY ADULT SURVIVORS OF CHILDHOOD SEXUAL ABUSE

Childhood sexual abuse is a problem of immense proportion in the United States today. The American Psychological Association estimates that 12 million to 15 million women in the United States have suffered incestuous abuse, and that about one-half of these cases involved father-daughter or stepfather-stepdaughter incest. One expert's study estimates that over one-quarter of the population of female children have experienced sexual abuse before the age of 14, and well over one-third have had such an experience by the age of 18 years. D. Russell, Incidence and Prevalence of Sexual Abuse of Female Children, 7 Child Abuse & Neglect 133, 145 (1983). Traditionally, girls were believed to be sexually abused far more often than boys. Recently, it has emerged that boys are abused much more frequently than previously believed. Experts estimate that the average age of a victim of childhood sexual abuse is age 8; victims' ages range from birth to age 16. M. Kirkpatrick, ed., Women's Sexual Experience 133 (1982).

It is estimated that anywhere from 50% to 90% of all sexual abuse of children goes unreported. A central element of childhood sexual abuse is secrecy: childhood sexual abuse happens when the child is alone with the abuser, and the secrecy makes it clear to the child that the activity is something bad and dangerous. The fact that the abuser is often in a trusting and apparently loving position only increases the child's helplessness and powerlessness. The child faced with continuing abuse somehow must achieve a sense of control. This "accommodation syndrome" requires an internalization of the child's rage, fear, confusion, and sadness. This internalization of anger and anxiety is a survival mechanism that often leads to self-destructive and other destructive behaviors.

In accommodating to an intolerable situation, a victim of childhood sexual abuse will often repress the abuse for many years. As he or she becomes an adult, a childhood sexual abuse survivor will often begin to exhibit signs of trauma. Adult survivors of childhood sexual abuse are more likely than their non-victimized counterparts to manifest depression, self-destructive behavior, anxiety, feelings of isolation and stigma, poor self-esteem, a tendency toward revictimization, and substance abuse. Generally, it is only when an adult survivor of childhood sexual abuse enters therapy that any meaningful understanding of his or her injuries can be developed.

The criminal justice system is largely inadequate to address the issue of childhood sexual abuse. The crime is seldom reported, and the possibility of conviction remote. Consequently, for many survivors of childhood sexual abuse, civil redress becomes the only available legal remedy. The most formidable procedural bar to such suits is the application of statutes of limitation to traditional tort claims. M. Salten, Statutes of Limitation in Civil Incest Suits: Preserving the Victim's Remedy, 7 Harv. Women's L.J. 189, 190 (1984); see also Comment, Tort Remedies for Incestuous Abuse, 13 Golden Gate U. L. Rev. 609, 628-31 (1983).

Traditionally, statutes of limitation begin to run as of the date of the wrongful act or omission which is the basis of the plaintiff's claim. In instances in which injured plaintiffs may not know or be expected to know of their injuries until after the statute of limitations period has expired, courts have fashioned the "delayed discovery" exception. The discovery rule provides that the statute of limitations does not begin to run until the plaintiff discovers or through the use of reasonable diligence should have discovered the cause of action.

The discovery rule is particularly well-suited to cases involving childhood sexual abuse. Indeed, the Surgeon General's Northwest Conference on Interpersonal Violence specifically recommended application of the discovery rule to childhood sexual abuse cases. Conference Recommendations, dated September 23-26, 1987. The Washington Supreme Court, in a 5-4 decision, recently held that the discovery rule does not apply to civil suits brought by survivors of childhood sexual abuse. Tyson v. Tyson, 107 Wn.2d 72, 727 P.2d 226 (1986). Legislative action is therefore imperative.

Application of the discovery rule would mean that the statute of limitations for adult survivors of childhood sexual abuse would not begin to run until the plaintiff's injuries and the fact that they were caused by the abuse are discovered or should have been discovered by the plaintiff. No public benefit supports a rule that shields childhood sexual abusers from the consequences of their conduct. See Comment, Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages, 25 Santa Clara L. Rev. 191, 217-18 (1985). The hope is that this legislation, along with providing victims of childhood sexual abuse with a remedy, will have a chilling effect on potential abusers.

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MEMORANDUM IN SUPPORT OF LEGISLATION
APPLYING THE DISCOVERY RULE TO CIVIL SUITS
BROUGHT BY ADULT SURVIVORS OF CHILDHOOD SEXUAL ABUSE

I. Purpose of the Legislation

The discovery rule, which states that a statute of limitation does not begin to run until a plaintiff discovers or through the use of reasonable diligence should have discovered that she or he is injured and that the injury was caused by the defendant's misconduct, should be applied to civil suits based on intentional torts brought by adult survivors of childhood sexual abuse.¹

II. Facts

Childhood sexual abuse is a problem of immense proportion in the United States today. The American Psychological Association estimates that 12 million to 15 million women in the United States have suffered incestuous abuse, and that about one-half of these cases involved father-daughter or stepfather-stepdaughter incest. Brozan, Helping to Heal the Scars Left by Incest, NY Times, Jan. 9, 1984, at B2, col. 6. One expert's study estimates that over one-quarter of the population of female children have experienced sexual abuse before the age of 14, and well over one-third have had such an experience by the age of 18 years. D. Russell, Incidence and Prevalence of Sexual Abuse of Female Children, 7 Child Abuse & Neglect 133, 145 (1983). There is virtually unanimous agreement that sexual abuse is the fastest growing form of reported child abuse. K. MacFarlane & J. Waterman, Sexual Abuse of Young Children 5 (1986). The vast majority of investigated reports prove valid. R. Summit, The Child Sexual Abuse Accommodation Syndrome, 7 Child Abuse & Neglect 177, 178 (1983).

Experts estimate that the average age of a victim of childhood sexual abuse is age 8; victims' ages range from birth to age 16. M. Kirkpatrick, ed., Women's Sexual Experience 133 (1982). The duration of the abuse, however, may cause age estimations to be artificially high because the age listed as the age of abuse is almost always the victim's age at the time a report is made,

¹Childhood sexual abuse is defined for the purpose of this memorandum as any kind of exploitative sexual contact with persons related or unrelated by blood or marriage before the victim turned 16.

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and sexual abuse often begins long before it is reported. See K. MacFarlane & J. Waterman, supra at 7. Many experts believe that most child victims of sexual abuse were less than 8 years old at the time of initiation. See, e.g., R. Summit, supra at 178.

The abusers are usually family members, friends, and neighbors, and they are predominantly male. D. Finkelhor, Sexually Victimized Children 73-75 (1979). Traditionally, girls were believed to be sexually abused far more often than boys. S. Butler, Conspiracy of Silence: The Trauma of Incest 5 (1978) (citing V. DeFrancis, Protecting the Child Victim of Sex Crimes Committed by Adults 56, 66 (1969) (study concluding that 97% of offenders are adult males and 87% of child victims are females)). Recently, it has emerged that boys are abused much more frequently than previously believed. Surveys of child molesters (who are predominantly male) have demonstrated that as many as 85% of them were themselves abused as children. K. MacFarlane & J. Waterman, supra at 9-10.

It is estimated that anywhere from 50% to 90% of all sexual abuse of children goes unreported. S. Butler, supra at 12-13. A central element of childhood sexual abuse is secrecy: childhood sexual abuse happens when the child is alone with the abuser, and the secrecy makes it clear to the child that the activity is something bad and dangerous. R. Summit, supra at 181. Physical violence and/or the threat of physical violence, threats of harm to the victim's siblings or mother, the threat of abandonment or separation, and other psychologically coercive tactics used by the abuser result in the child becoming virtually incapable of disclosing the abuse. M. de Young, The Sexual Victimization of Children 41 (1982). Moreover, many of the victims are simply too young to be able to communicate effectively the abuse, or may be unaware that the behavior is anything unusual or inappropriate. K. MacFarlane & J. Waterman, supra at 5-7. In any event, children who do break this silence are rarely believed. M. Kirkpatrick, supra at 128-29.

The adult expectation that victims of abuse will exercise self-protection and immediately disclose the abuse ignores the inherent authority of the adult and the corresponding helplessness of the child. R. Summit, supra at 182-84. The fact that the abuser is often in a trusting and apparently loving position only increases the child's helplessness and powerlessness.²

²The normal reaction of child victims is "to 'play possum,' that is to feign sleep, to shift position, and to pull up the covers. Small creatures simply do not call on force to deal with overwhelming threat. Where there is no place to run, they have no choice but to try to hide." R. Summit, supra at 183.

"Adults must be reminded that the wordless action or gesture of a parent is an absolutely compelling force for a dependent child and the threat of loss of love or loss of family security is more frightening to the child than any threat of violence." Id. at 183.

If the child does not seek or receive immediate intervention and protection, the child's only option becomes accommodating to the reality of continuing sexual abuse. The child faced with continuing abuse somehow must achieve a sense of control. He or she cannot safely conceptualize a parent as bad because to do so is tantamount to abandonment.³ Thus, the only acceptable option for the child becomes assumption of responsibility for the abuse. R. Summit, supra at 184-86. This "accommodation syndrome" requires an internalization of the child's rage, fear, confusion, and sadness. This internalization of anger and anxiety is a survival mechanism that often leads to self-destructive and other destructive behaviors. Id. For example, a study of 195 female clients of a community mental health center found that 54.9% of the survivors of childhood sexual abuse reported previous suicide attempts, as opposed to 22.6% of nonvictims. The study further found that 92.9% of the women whose first suicide attempt occurred before age 13 were victims of childhood sexual abuse, and 87.2% of those whose first attempt was during adolescence were childhood sexual abuse victims. J. Briere & M. Runtz, Suicidal Thoughts and Behaviors in Former Sexual Abuse Victims, 18 Can. J. Behavioral Sci. 413 (1986).

In accommodating to an intolerable situation, a victim of childhood sexual abuse will often repress the abuse for many

³This process is described as a "vertical split in reality testing:"

If the very parent who abuses and is experienced as bad must be turned to for relief of the distress that the parent has caused, then the child must, out of desperate need, register the parent--delusionally--as good. Only the mental image of a good parent can help the child deal with the terrifying intensity of fear and rage which is the effect of the tormenting experiences. The alternative--the maintenance of the overwhelming stimulation and the bad parental image--means annihilation of identity, of the feeling of the self. So the bad has to be registered as the good. This is a mind-splitting or mind-fragmenting operation. R. Summit, supra at 184 (quoting Shengold, Child Abuse and Deprivation: Soul Murder, 27 J. Am. Psychoanalytic Ass'n 539 (1979) (emphasis in original)).

years. E.S. Blume, The Walking Wounded: Post-Incest Syndrome, 15 SIECUS Report 5 (1986).

Many, if not most, survivors of child sexual abuse develop amnesia so complete that they simply do not remember that they were abused at all; or, if they do remember, they minimize or deny the effects of the abuse so completely that that cannot associate it with any later consequences. They are the "walking wounded," functional adults who bear, often secretly, lifelong pain and impaired emotional functioning.

Id. (emphasis in original). One study of 53 female outpatients participating in therapy groups for incest survivors determined that 64% of the patients studied did not have full recall of the sexual abuse but reported some degree of amnesia, and 28% of the women reported severe repression. J. Herman & E. Schatzow, Recovery and Verification of Memories of Childhood Sexual Trauma, 4 Psychoanalytic Psychology 1, 4 (1987). A strong association was observed between the degree of reported amnesia and the age of onset and duration of the sexual abuse. Id. For most victims, it takes years to come to terms with the emotional injuries brought on by the sexual abuse. J. Herman, Father-Daughter Incest 177 (1981).

As a victim of childhood sexual abuse becomes an adult, he or she will often begin to exhibit signs of trauma. Adult survivors of childhood sexual abuse are more likely than their nonvictimized counterparts to manifest depression, self-destructive behavior, anxiety, feelings of isolation and stigma, poor self-esteem, a tendency toward revictimization, and substance abuse. A. Browne & D. Finkelhor, Initial and Long-Term Effects: A Review of the Research in D. Finkelhor, ed., Child Sexual Abuse: New Theory and Research, 143, 152-163 (1984). Difficulty in trusting others and sexual maladjustment are additional long-term effects reported by empirical researchers. Id. A childhood sexual abuse survivor might have partially or completely repressed the memory of the abuse, but the trauma might nevertheless be reenacted in nightmares, "flashbacks," and periods of disassociation. J. Herman, D. Russell, & K. Trocki, Long-Term Effects of Incestuous Abuse in Childhood, 143 Am. J. Psychiatry 1293 (1986).

A victim of childhood sexual abuse often denies injury as a coping response, and the shame, self-blame, and secrecy associated with childhood sexual abuse often inhibit a victim's understanding of its effects. See R. Summit, supra at 186-190. The accommodation process, in which the child has assumed responsibility for the abuse and internalized his or her feelings of rage and anxiety, often make victims incapable of discovering their

injuries for many years. A genuine understanding of the extent and cause of the injuries sustained by a survivor of childhood sexual abuse is unlikely to be developed until the survivor receives mental health treatment. J. Herman, Father-Daughter Incest, supra at 177-196.

III. Legal Remedies

The criminal justice system is largely inadequate to address the issue of childhood sexual abuse. The crime is seldom reported, and the possibility of conviction remote. See V. DeFrancis, supra at 187-191. One expert has estimated the conviction rate for childhood sexual abuse at 1% of all cases. D. Russell, The Secret Trauma 86 (1986). Consequently, for many survivors of childhood sexual abuse, civil redress becomes the only available legal remedy. The most formidable procedural bar to such suits is the application of statutes of limitation to traditional tort claims. M. Salten, Statutes of Limitation in Civil Incest Suits: Preserving the Victim's Remedy, 7 Harv. Women's L.J. 189, 190 (1984); see also Comment, Tort Remedies for Incestuous Abuse, 13 Golden Gate U. L. Rev. 609, 628-31 (1983).

The Washington Supreme Court, in a 5-4 decision, recently held that the discovery rule does not apply to civil suits brought by survivors of childhood sexual abuse. Tyson v. Tyson, 107 Wn.2d 72, 727 P.2d 226 (1986). A strong dissenting opinion by Justice Pearson discussed the necessity for application of the discovery rule in these cases. 107 Wn.2d at 80-94. The dissent pointed out that the purpose of the discovery rule is

to provide an opportunity for an adult who claims to have been sexually abused as a child to prove not only that she was abused and that the defendant was her abuser, but that her suffering was such that she did not and could not reasonably have discovered all the elements of her cause of action at an earlier time. The policy behind providing this opportunity has been demonstrated: the nature of child sexual abuse . . . is often so secretive, so humiliating, and so devastating that a victim typically represses the events until the abuse is "discovered"--often through psychotherapy, and often well into adulthood.

107 Wn.2d at 93-94 (emphasis in original). The concurring opinion to the majority's decision noted the strength of the dissent's arguments, but stated that "[t]his is the exclusive province of the legislature, and the judiciary must not invade it." Id. at 80. Legislative intervention is therefore appropriate and, indeed, imperative.

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206-355-9710

IV. Application of the Discovery Rule

Traditionally, statutes of limitation begin to run as of the date of the wrongful act or omission which is the basis of the plaintiff's claim. Developments in the Law: Statutes of Limitations, 63 Harv. L. Rev. 1177, 1200-02 (1950). In instances in which injured plaintiffs may not know or be expected to know of their injuries until after the statute of limitations period has expired, courts have fashioned the "delayed discovery" exception. The discovery rule provides that the statute of limitations does not begin to run until the plaintiff discovers or through the use of reasonable diligence should have discovered the cause of action. See U.S. Oil v. Department of Ecology, 96 Wn.2d 85, 633 P.2d 1329 (1981). In determining whether to apply the discovery rule, courts traditionally have balanced the possibility of stale claims against the unfairness of precluding meritorious causes of action. 96 Wn.2d at 93. "That balancing test has dictated the application of the rule where the plaintiff lacks the means or ability to ascertain that a wrong has been committed." Id.

The discovery rule is particularly well-suited to cases involving childhood sexual abuse. Indeed, the Surgeon General's Northwest Conference on Interpersonal Violence specifically recommended application of the discovery rule to childhood sexual abuse cases. Conference Recommendations, dated September 23-26, 1987. The psychological trauma associated with childhood sexual abuse will often result in the victim lacking the means or ability to ascertain his or her injuries and their cause.

The public policy considerations underlying use of the discovery rule clearly support its application in cases involving childhood sexual abuse. The discovery rule, for example, is often applied in breach of trust cases. See, e.g., Peter v. Simmons, 87 Wn.2d 400, 552 P.2d 1053 (1976); Kittinger v. Boeing Co., 21 Wn. App. 484, 585 P.2d 812 (1978); Janisch v. Mullins, 1 Wn. App. 393, 461 P.2d 895 (1969). The same policies supporting application of the discovery rule in breach of trust cases support protection of plaintiffs' remedies in childhood sexual abuse cases: the victim of childhood sexual abuse is typically inexperienced in interpersonal relations and must rely on adults for that knowledge. Moreover, the legitimacy of a child's trust in and reliance on his or her family members historically has been recognized by the courts. See Salten, supra at 209.

Similarly, the discovery rule applies to fraud claims, see RCW 4.16.080(4), and failure by an adult to disclose to the child essential information regarding a child's rights and limitations on that adult's rights may be treated as fraud or constructive concealment. See Salten, supra at 210-11. A delayed discovery

rule is appropriate in cases involving fraudulent concealment. See, e.g., Kicklighter v. New York Life Ins. Co., 145 F.2d 548 (5th Cir. 1944). Moreover, the fact that only the defendant has had full knowledge of the wrongful acts is an important policy justification for application of the discovery rule. See U.S. Oil v. Department of Ecology, 96 Wn.2d at 93-94.

As stated more fully above, it is not unusual for a victim of childhood sexual abuse to repress all memory of the abuse. See E.S. Blume, supra at 5. In any case, most victims will be unable to connect their injuries with the abuse for many years. Id. Moreover, childhood sexual abuse related injuries often include problems in interpersonal relations, low self-esteem, feelings of isolation, and sexual dysfunction, all of which are unlikely to manifest themselves until adulthood. M. Tsai, S. Feldman-Summers & M. Edgar, Childhood Molestation: Variables Related to Differential Impacts on Psychosexual Functioning in Adult Women, 88 J. Abnormal Psych. 407, 414 (1979). Generally, it is only when an adult survivor of childhood sexual abuse enters therapy that any meaningful understanding of his or her injuries can be developed. M. Salten, supra at 202.

Discovery of the cause of a childhood sexual abuse survivor's injuries can also take years. Many victims are convinced that they are to blame for the abuse. See M. de Young, supra at 41. The concept of "blameless ignorance" historically has been a central justification for use of the discovery rule. See Urie v. Thompson, 337 U.S. 163, 170 (1949). That concept is clearly relevant in childhood sexual abuse cases. The trauma associated with sexual abuse causes a victim to be unable to connect his or her injury with the abuse. The victim thus is "blamelessly ignorant" of his or her abuse-related injuries. The abuser, on the other hand, is the direct cause of the victim's trauma, and should not be permitted to profit from the fact that discovery of the cause of a victim's injuries may occur long after the traditional statute of limitations period has elapsed.

No public benefit supports a rule that shields childhood sexual abusers from the consequences of their conduct. See Comment, Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages, 25 Santa Clara L. Rev. 191, 217-18 (1985). Civil suits act as deterrents to unacceptable behavior. The hope is that this legislation, along with providing victims of childhood sexual abuse with a remedy, will have a chilling effect on potential abusers.

V. Conclusion

To apply the traditional statute of limitations "date of wrongful conduct" rule to civil suits brought by adult survivors of childhood sexual abuse is effectively to deny these plaintiffs a remedy. The discovery rule clearly is appropriate in these cases; application of the rule would mean that the statute of limitations for adult survivors of childhood sexual abuse would not begin to run until the plaintiff's injuries and the fact that they were caused by the abuse are discovered or should have been discovered by the plaintiff. The latent nature of many of the injuries and the time required to discover their cause, as well as the offender's role in coercing the child's silence, make application of the discovery rule essential in intentional tort suits alleging injuries resulting from childhood sexual abuse. Indeed, these cases are perhaps the most compelling examples of the need for the discovery rule. Legislative action is essential to provide survivors of childhood sexual abuse with a genuine and meaningful legal remedy.

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Statutes and Miscellaneous

RCW 4.16.080(4)

Surgeon General's Northwest Conference on Interpersonal Violence, Recommendations dated September 23-26, 1987

5487U

Bill Would Empower Abuse Victims

By ANNABEL LUND
THE JUNEAU EMPIRE

Patti Barton was sexually abused by a family member from the time she was 15 months old until she left home at 18 years old, she says. Like many child abuse victims, however, it wasn't until she was 32 and had undergone psychotherapy before she could admit the abuse. Her abuser, like many who sexually assault children, is protected by the statute of limitations and will never have to pay for his crime.

Barton and her husband, Kelly, didn't think that was fair. In 1987, they pioneered a victims' rights law in their home state of Washington - the first of its kind in the country - and have been instrumental in interesting the Alaska Legislature in the legislation. Montana passed such a bill earlier this year.

The Alaska bill, sponsored by Reps. Fran Ulmer, D-Juneau, Peter Goll, D-Haines and Virginia Collins, R-Anchorage, extends the statute of limitations for civil liability in child sexual assault cases, so that a victim may sue his or her assailant years after the actual abuse takes place.

"That's important because many victims - 45 percent according to national statistics - repress or partially repress memories of early abuse. Often it isn't until victims have gone through psychotherapy that they recognize early abuse and correlate it to the many problems and illnesses they typically exhibit later in life. Some victims don't recognize the abuse or don't realize how it's harmed them. The more severe the abuse the more likely the victim is to block it out," Barton says.

"When I told my therapist what had happened to me as a child, my doctor said, 'That's child sexual assault and people go to jail for that nowadays,'" Barton points to a stack of yellow receipts she carries in her notebook. "My therapy cost \$10,000 and it still isn't over. I thought, 'Wouldn't it be fair for my abuser to pay those bills?'"

There was nothing Barton could do, though. At the time, Washington law, like Alaska law, said a lawsuit must be filed two years after the date the act occurred or two years after a victim has reached the age of 21.

The legislation adopted by the Washington Legislature in 1987, however, extends the statute of limitations to three years after a victim recognizes the abuse has occurred. The same proposal is before the Alaska Legislature in House Bill 238. A person bringing such lawsuit would have to verify the abuse occurred, convince a judge and jury of damages and provide the same sorts of proof any court case demands.

"The legislation will empower victims and allow them to make use of the civil system to do something about the situation, emotionally and financially, instead of just feeling guilty or angry," Ulmer says.

The law will put abusers on notice "that we certainly don't want to let the abuser get off scot-free and that even though it's too late for a criminal case, they may be subject to confrontation years down the road," she says.

In Washington, the law passed unanimously. Barton's abuser fled the state a few days before the law took effect. Still, the Bartons say their successful battle to change



Mark Kelley/Juneau Empire

PATTI BARTON

the law was worth it.

The Bartons were in Juneau to testify on the bill before the House Judiciary Committee in April. In May, the bill passed the House by a 38 to 1 vote.

Barton has a special reason for wanting Alaska to adopt the legislation: she lived in Alaska for 23 years before moving to Washington and it was in Fairbanks her abuse first began.

"I was born and raised and abused in Alaska, but I can't file suit here. We are doing what we are doing now so other victims don't have to go through what we had to. I also hope victims will be more inclined to sue. It's important for victims to stand up and say 'This is what happened to me and it isn't right,'" she says.

Though this year's legislative session ended with House Bill 238 in the Senate Judiciary Committee, it will be taken up again by that committee when the Legislature convenes next January.

-Reprinted from The Juneau Empire. ❁

ALASKA NETWORK
ON
DOMESTIC VIOLENCE
AND
SEXUAL ASSAULT

130 Seward, No. 301 • Juneau, Alaska 99801 • (907) 586-3650

Abused Women's Aid in Crisis (AWAIC);
Advocates for Victims of Violence (AVV);
Aiding Women in Abuse and Rape Emergencies (AWARE);
Alaska Women's Resource Center (AWRC); Arctic Women in Crisis (AWIC);
Bering Sea Women's Group (BSWG); Emmonak Women's Shelter;
Kodiak Women's Resource & Crisis Center (KWRCC);
Manilaq Regional Women's Crisis Program: MEN, Inc.;
Safe & Fear-Free Environment (SAFE); Sitkans Against Family Violence (SAFV);
Southwestern Alaska Council for the
Prevention of Child Sexual Assault (SWACPCSA);
South Peninsula Women's Services (SPWS);
Standing Together Against Rape (STAR); Tundra Women's Coalition (TWC);
Valley Women's Resource Center (VWRC);
Women in Crisis Counseling & Assistance (WICCA);
Women in Safe Homes (WISH); Women's Resource & Crisis Center (WRCC)

HB238

THE ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT SUPPORTS HOUSE BILL 238, WHICH ALLOWS SURVIVORS OF CHILD SEXUAL ABUSE TO BRING CIVIL SUIT AGAINST THE PERPETRATOR.

IT IS NOT UNCOMMON FOR VICTIMS OF CHILD SEXUAL ABUSE TO REPRESS MEMORIES OF THE ABUSE. IN A CLINICAL STUDY CONDUCTED RECENTLY IN MASSACHUSETTS, 64% OF THE PATIENTS DID NOT HAVE FULL RECALL OF THEIR SEXUAL ABUSE AND 28% REPORTED SEVERE MEMORY REPRESSION. IT IS IMPORTANT TO NOTE, HOWEVER, THAT IN THE SAME STUDY MOST PATIENTS WHO RECOVERED MEMORIES WERE ABLE TO VERIFY THOSE MEMORIES THROUGH THE RECOLLECTIONS OF FAMILY MEMBERS, DIARIES, OR OTHER MEANS OF VERIFICATION.

BY CHANGING THE STATUTE OF LIMITATIONS THE LEGISLATURE WILL BE HELPING TO INCREASE THE CHANCES THAT ABUSERS WILL HAVE TO PAY FOR THE DAMAGE CAUSED TO THEIR FORMER VICTIM. THIS DAMAGE IS USUALLY EXTENSIVE. A CANADIAN RESEARCH TEAM FOUND THAT 92.9% OF CHILDREN IN THEIR STUDY WHO ATTEMPTED SUICIDE BEFORE THE AGE OF THIRTEEN WERE VICTIMS OF CHILD SEXUAL ABUSE. PROBLEMS FOR VICTIMS CAN CONTINUE THROUGHOUT THEIR LIVES AND REQUIRE MEDICAL AND PSYCHOLOGICAL TREATMENT. THAT COST SHOULD BE PAID BY THE ABUSER, NOT THE VICTIM.

MEMORANDUM

State of Alaska

(HB 238)

TO: Co-chairs Gruenberg & Goll
and Members of the House
Judiciary Committee

DATE: March 31, 1989

FILE NO:

TELEPHONE NO: 274-1684

THRU: Hayden Kayden

SUBJECT:

FROM:

Brant McGee *BGM*
Public Advocate
Office of Public Advocacy

The Office of Public Advocacy supports the clarification of current law and the extension of the statute of limitations contained in HB 238. As guardians ad litem for thousands of abused children every year, we are pleased at this legislative effort to expand these victims' right to seek redress.

Unfortunately, the OPA staff does not have sufficient technical expertise in tort law to comment on most provisions of the bill. However, we would suggest that the committee consider the addition of the words "or disability" at line 29, page 1, in order to broaden the class of victims to include the developmentally disabled.

If the bill passes we hope that the Committee and the bill's sponsors will make a strong effort to assure the widest possible public dissemination of its provisions in order to inform former victims of this enhanced legal remedy.

mw

CSHB 238 (Jud)

October 3, 1989

An Act eliminating the age limitations in the definitions of sexual assault ...

Barbara Miklos
Executive Director
Council on Domestic Violence and Sexual Assault

DEPARTMENT OF PUBLIC SAFETY

The Council on Domestic Violence and Sexual Assault supports CSHB 238 (Jud), which eliminates the age limitations in the definitions of crimes of sexual assault and extends the statute of limitations for civil actions brought by victims of sexual abuse. Extending the statute of limitations for civil actions arising from these crimes is very appropriate because many children are victimized sexually by a family member or someone whom they trusted. Fear and secrecy are generally associated with the abuse. This is so traumatic that the only way child victims are able to deal with the horror, shame, and fear they experience is to totally repress the memory of the abuse. It is often only years later that something will happen that will trigger the memory of the abuse, and they then begin to remember the details. In other cases, an adult will enter into counseling and then realize that childhood sexual abuse is underlying the emotional difficulties they may be experiencing as adults. We believe that extending the statute of limitations for these crimes is important.

Another important section of CSHB 238 (Jud) revises AS 11.41 to correct an inequity which was created in previous legislative changes. In 1988, AS 11.41.420 was revised to provide greater protection against sexual assault for persons who are mentally incapable (ch. 96, SLA 1988). This had the unintended effect of legalizing actions that were previously considered criminal conduct. AS 11.41.420 (a) previously contained a clause which stated:

An offender commits the crime of sexual assault in the second degree if the offender engages in ... (2) sexual penetration with a person who the offender knows (A) is suffering from a mental disorder or defect which renders the person incapable of appraising the nature of the conduct under circumstances in which a person who is capable of appraising the nature of the conduct would not engage in sexual penetration; or (B) is incapacitated.

CSHB 545(Jud) amended this clause to read:

(3) being over the age of 18, the offender engages in sexual penetration with a person who the offender knows is (A) mentally incapable; or (B) incapacitated.

Thus, it is now not a crime for an offender who is 18 or younger to engage in penetration with an incapable or incapacitated person who is not at least three years younger than the offender. The Council supports CSHB 238 (Jud), which remedies this problem by removing the phrase "being over the age of 18" in relevant sections.

Paul A. Holtzki
for Arthur English
Commissioner

STATE OF ALASKA
1989 LEGISLATIVE SESSION

Bill Version: CS HB 238 (Jud)
Publish Date: 4/20/89

FISCAL NOTE

REQUEST:

Revision Date:	Agency Affected:	<u>Alaska Court System</u>
Title: <u>An act eliminating age limits</u>	BRU:	<u>Trial Courts</u>
		<u>... In crimes of sexual assault ...</u>
Sponsor: <u>Ulmer, Goll & Collins</u>	Components:	
Requestor:		

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						
TOTAL OPERATING						

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

General Funds						
Federal Funds						
Other						
TOTAL						

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

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

Approved by: Arthur H. Snowden, II, Administrative Director
 Agency: Alaska Court System

Phone: 284-8228
 Date: 10/02/89

Date: 10/02/89

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

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act extending the statute of limitations for civil actions ..."
Sponsor: Ulmer, Goll, Collins
Requestor: _____

Agency Affected: Public Safety
BRU: Council on Domestic Violence and Sexual Assault
Component: _____

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not included)

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 -
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REVENUE	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -

POSITIONS:

FULL-TIME	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
PART-TIME	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
TEMPORARY	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -

ANALYSIS: (Attach a separate page if necessary)

The bill would apply to civil actions between two private parties. It would have no effect on the Department of Public Safety.

Prepared by: Barbara Miklos, Executive Director *BAM*
 Division: Council on Domestic Violence and Sexual Assault
 Approved by Commissioner: Arthur English *AE*
 Agency: Department of Public Safety

Phone: 465-4356
 Date: 4/6/89
 Date: 4/6/89

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act eliminating age limit-
ation...statute of limitations..."
Sponsor: House Judiciary
Requestor: House Judiciary

Agency Affected: Department of Law
BRU: Prosecution
Components: All

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						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see the attached analysis.

Richard A. Pegues

Prepared by: Richard I. Pegues, Director

Phone: 465-3672

Division: Administrative Services

Date: April 19, 1989

Approved by Commissioner: Douglas B. Bailly, Attorney General Date: April 19, 1989

Agency: Department of Law

Distribution (by preparer):

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 238 (Jud)

Section 1, 2, 3, and 4 extend the statute of limitations for civil actions brought by victims of sexual abuse. These actions do not involve the Department of Law and will not have a fiscal impact on it.

Section 5, 6, 7, 8, 9, and 10 eliminate the age limitations in the definition of the crimes of sexual assault. This corrects a drafting oversight in the law, relating to sexual assault of mentally incapable or incapacitated persons, which passed the legislature last year as CSHB 545 (Jud). Because the changes proposed in these sections of the bill are remedial in nature, there will not be a fiscal impact for the Department of Law.

Sentence under former subsection (a)(4) held excessive. — See *Carlson v. State*, Ct. App. Op. No. 448 (File No. A-346), 696 P.2d 178 (1985).

Sentence under former subsection (b) and AS 11.31.100 held excessive. — See *Bolhouse v. State*, Ct. App. Op. No. 402 (File No. 7665), 687 P.2d 1166 (1984); *Hancock v. State*, Ct. App. Op. No. 518 (File No. 7818), 706 P.2d 1164 (1985) (decided under section as it read before 1982 amendment).

Sentence for assault with intent to rape upheld. — See *Fomin v. State*, Sup. Ct. Op. No. 2214 (File No. 5013), 619 P.2d 718 (1980).

Sentence for rape upheld. See *Soper v. State*, Ct. App. Op. No. 675 (File No. A-583), 731 P.2d 587 (1987).

Conditions of probation. — Conditions of probation restricting defendant from unauthorized contact with his daughter and with other girls under 18 years of age were not vague or unduly restrictive of his constitutionally protected right to freedom of association. *Nitz v. State*, Ct. App. Op. No. 759 (File No. A-1830), P.2d (1987).

Applied in *Barry v. State*, Ct. App. Op. No. 334 (File No. 7195), 675 P.2d 1292 (1984); *Fox v. State*, Ct. App. Op. No. 394

(File No. 7483), 685 P.2d 1267 (1984); *Totemoff v. State*, Ct. App. Op. No. 718 (File No. A-1751), P.2d (1987); *Covington v. State*, Ct. App. Op. No. 766 (File No. A-2158), P.2d (1987).

Cited in *D.G. v. State*, Ct. App. Op. No. 811 (File No. A-2431), P.2d (1988).

II. FORMER LAW.

C. Procedure.

Conviction for rape upheld. — See *Kvasnikoff v. State*, Ct. App. Op. No. 314 (File No. 5588), 674 P.2d 302 (1983).

Conviction and sentence for rape upheld. — See *Morgan v. State*, Ct. App. Op. No. 320 (File No. 6991), 673 P.2d 897 (1983).

Conviction reversed. — Convictions for lewd and lascivious acts toward children under former AS 11.15.134(a) and for rape under former AS 11.15.120(a) were reversed where evidence admitted concerning alleged assaults on victims other than those in the case at hand was improper propensity evidence; neither intent nor identity were at issue, and the acts did not constitute an admissible common scheme or plan or prove facts in dispute. *Bolden v. State*, Ct. App. Op. No. 632 (File No. A-754), P.2d (1986).

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

(1) the offender engages in sexual contact with another person without consent of that person;

(2) being over the age of 18, the offender engages in sexual contact with a person

(A) who the offender knows is mentally incapable; and

(B) who is entrusted to the offender's care

(i) by authority of law; or

(ii) in a facility or program that is required by law to be licensed by the Department of Health and Social Services; or

(3) being over the age of 18, the offender engages in sexual penetration with a person who the offender knows is

(A) mentally incapable; or

(B) incapacitated.

(b) Sexual assault in the second degree is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 78 SLA 1983; am § 2 ch 96 SLA 1988)

Effect of amendments. — The 1988 amendment, in subsection (a), deleted "the offender engages in" at the end of the introductory language, added "the of-

fender engages in" at the beginning of paragraph (1), deleted "or" at the end of paragraph (1), rewrote paragraph (2), and added paragraph (3).

Legislative history reports. — For 96, SLA 1988 (CSHB 545 (Jud)), see 1988 legislative letter of intent relating to the House Journal 3065. amendments to (a) of this section by ch.

NOTES TO DECISIONS

Evidence.

Exclusion of expert testimony regarding problems in evaluating the accuracy of eyewitness testimony was reversible error, where the case turned on the testimony of a single witness — the victim, the excluded testimony was central to the defense, and it could not be said that its exclusion did not appreciably affect the jury's verdict. *Skamarocius v. State*, Ct. App. Op. No. 671 (File No. A-1068), 731 P.2d 63 (1987).

Instructions. The trial judge did not err in failing to give an instruction on assault in the fourth degree as a lesser-included offense to the two counts of sexual assault in the second degree where any assault occurred after the consensual sexual contact. *Reischman v. State*, Ct. App. Op. No. 760 (File No. A-1150), P.2d (1987).

For sufficiency of instructions on incapacity of victim, see *Dexter v. State*, Ct. App. Op. No. 302 (File No. 6741), 675 P.2d 144 (1983).

Instruction regarding defendant's awareness of victim's lack of consent to sexual contact held erroneous. — See *Reischman v. State*, Ct. App. Op. No. 760 (File No. A-1150), P.2d (1987).

Lesser included offense. — Assault in the fourth degree is a lesser-included offense of first or second-degree sexual assault in which the defendant claims that sexual contact was consensual, and there is some evidence to show that the defendant assaulted the victim. *Reischman v.*

State, Ct. App. Op. No. 760 (File No. A-1150), P.2d (1987).

Conviction reversed because of insufficient evidence. — See *Brower v. State*, Ct. App. Op. No. 656 (File No. A-716), P.2d (1986).

Conviction and sentence upheld. — See *Contreras v. State*, Ct. App. Op. No. 328 (File Nos. 6797-6799), 675 P.2d 654 (1984).

Sentence held clearly mistaken. — Sentence of eight years with one year suspended for a first offender convicted of assault in the second degree was clearly mistaken. *Benboe v. State*, Ct. App. Op. No. 466 (File No. A-225), 698 P.2d 1230 (1985).

Trial court exceeded scope of sentencing powers by ordering defendant to attend a sexual offender rehabilitation program while incarcerated, where the order was set out as a separate provision of the written judgment and not as a condition of probation, and any failure to abide by the order could not have served as a predicate for a finding of criminal contempt. *Benboe v. State*, Ct. App. Op. No. 711 (File No. A-1529), 738 P.2d 356 (1987); *Cavanaugh v. State*, Ct. App. Op. No. 810 (File No. A-1530), P.2d (1988).

Cited in *Bolhouse v. State*, Ct. App. Op. No. 402 (File No. 7665), 687 P.2d 1166 (1984); *James v. State*, Ct. App. Op. No. 733 (File No. A-1154), 739 P.2d 1314 (1987); *James v. State*, Ct. App. Op. No. 814 (File No. A-2318), P.2d (1988).

Sec. 11.41.425. Sexual assault in the third degree. (a) An offender commits the crime of sexual assault in the third degree if being over the age of 18, the offender engages in sexual contact with a person who the offender knows is

(1) mentally incapable; or

(2) temporarily incapable of appraising the nature of the person's conduct and is physically unable to express unwillingness to act.

(b) Sexual assault in the third degree is a class C felony. (§ 3 ch 96 SLA 1988)

Sec. 11.41.432. Defense. It is a defense to a crime charged under AS 11.41.410(a)(3), 11.41.420(a)(2), 11.41.420(a)(3), or 11.41.425 that the offender is

- (1) mentally incapable; or
- (2) married to the person and neither party has filed with the court for a separation, divorce, or dissolution of the marriage. (§ 4 ch 96 SLA 1988)

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

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

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

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

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

(3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and the victim at the time of the offense is

(A) residing as a member of the social unit in the same household as the offender and the offender is in a position of authority over the victim; or

(B) temporarily entrusted to the offender's care.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 2 ch 78 SLA 1983; am § 3 ch 66 SLA 1988)

Effect of amendments. — The 1988 amendment, effective May 28, 1988, in subsection (a), deleted "or" at the end of paragraph (1), added "or" at the end of paragraph (2)(B), and added paragraph (3).

Legislative history reports. — For House letter of intent on ch. 66, SLA 1988 (CSHB 237 (Jud)), which amended this section, see 1988 House Journal 2330-2337.

NOTES TO DECISIONS

Editor's notes. — Some of the cases cited in the notes below were decided under former AS 11.41.410(a)(4), which provided that a person 18 years of age or older who engaged in sexual penetration with another person under 18 years of age who was entrusted to his care by authority of law or was his child committed sexual assault in the first degree.

Victim's statement held admissible

under hearsay exception. — The victim's statement to a prosecution witness, made two or three days after the incident, that the victim's father came into her bed while she was undressed and "did something wrong" was admissible under the first-complaint hearsay exception. *Nusunginya v. State*, Ct. App. Op. No. 660 (File No. A-1265), 730 P.2d 172 (1986).

Victim's identification of accused. —

contact, and there may have been as many as fifty separate incidents of sexual abuse. *Winther v. State*, Ct. App. Op. No. 783 (File No. A-2148), P.2d (1988).

Where there is evidence from which the trial court could infer that a sentence of incarceration would have destroyed a viable family and cause long-term psychological damage to the victim, sentence under former AS 11.41.410(a)(4) involving no incarceration is not too lenient. *State v. Morris*, Ct. App. Op. No. 364 (File No. 7771), 680 P.2d 1190 (1984).

Sentence under former AS 11.41.410(a)(4) for assault held too lenient. — See *State v. Rushing*, Ct. App. Op. No. 366 (File No. 7777), 680 P.2d 500 (1984); *State v. Woods*, Ct. App. Op. No. 367 (File No. 7779), 680 P.2d 1195 (1984).

Given a series of nine assaults of a stepdaughter by a stepfather, substantial evidence that intercourse was accomplished without consent, and the fact that the victim has left the defendant's home, a sentence of one year of incarceration under former AS 11.41.410(a)(4) was disapproved and a sentence of at least three years recommended. *State v. Couey*, Ct. App. Op. No. 365 (File No. 7776), 680 P.2d 513 (1984).

Remand for resentencing for conviction under former law. — See *State v. Covington*, Ct. App. Op. No. 557 (File No. A-203), 711 P.2d 1183 (1985).

Sentence clearly mistaken. — A sentence of 24 years with four years suspended, upon conviction of three counts of sexual abuse of a minor in the first degree, was clearly mistaken, where the

trial court did not address the 10- to 15-year benchmark established in prior decisions concerning aggravated cases of sexual assault, and nothing in the record established that a sentence in excess of 15 years was necessary to protect the public. *Mosier v. State*, Ct. App. Op. No. 765 (File No. A-1925), P.2d (1987).

Remand for resentencing. — See *Lewis v. State*, Ct. App. Op. No. 536 (File Nos. A-883, A-884), 706 P.2d 715 (1985); *Bodine v. State*, Ct. App. Op. No. 708 (File No. A-1108), 737 P.2d 1072 (1987).

Conditions of probation. — Conditions of probation restricting defendant from unauthorized contact with his daughter and with other girls under 18-years of age were not vague or unduly restrictive of his constitutionally protected right to freedom of association. *Nitz v. State*, Ct. App. Op. No. 759 (File No. A-1830), P.2d (1987).

Cited in *Higgs v. State*, Ct. App. Op. No. 344 (File No. A-46), 676 P.2d 610 (1984); *Benboe v. State*, Ct. App. Op. No. 466 (File No. A-225), 698 P.2d 1230 (1985); *Dancer v. State*, Ct. App. Op. No. 596 (File No. A-941), 715 P.2d 1174 (1986); *James v. State*, Ct. App. Op. No. 733 (File No. A-1154), 739 P.2d 1314 (1987); *Patterson v. State*, Ct. App. Op. No. 761 (File No. A-1278), P.2d (1987); *Kirby v. State*, Ct. App. Op. No. 767 (File No. A-2091), P.2d (1987); *Jager v. State*, Ct. App. Op. No. 772 (File No. A-1145), P.2d (1988); *James v. State*, Ct. App. Op. No. 814 (File No. A-2318), P.2d (1988).

Sec. 11.41.436. Sexual abuse of a minor in the second degree.

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

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

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

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

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

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

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

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and the victim at the time of the offense is

(A) residing as a member of the social unit in the same household as the offender and the offender is in a position of authority over the victim; or

(B) temporarily entrusted to the offender's care.

(b) Sexual abuse of a minor in the second degree is a class B felony. (§ 2 ch 78 SLA 1983; am § 4 ch 66 SLA 1988)

Effect of amendments. — The 1988 amendment, effective May 28, 1988, in subsection (a), deleted "or" at the end of paragraph (3)(B), added "or" at the end of paragraph (4), and added paragraph (5).

Legislative history reports. — For House letter of intent on ch. 66, SLA 1988 (CSHB 237 (Jud)), which amended this section, see 1988 House Journal 2330-2337.

NOTES TO DECISIONS

No culpable mental state required. — Under the current statutory definition of "sexual contact," the offense of sexual abuse of a minor in the second degree may properly be established by evidence proving knowing conduct within the scope of AS 11.81.900(b)(52)(A); no secondary culpable mental state need be established with respect to surrounding circumstances. *Van Meter v. State*, Ct. App. Op. No. 747 (File No. A-1510), 743 P.2d 385 (1987).

Burden of proving exclusions. — If some evidence of justification is advanced in the record, the state must bear the additional burden of establishing that the defendant's conduct did not fall within the exclusions of AS 11.81.900(b)(52)(B). *Van Meter v. State*, Ct. App. Op. No. 747 (File No. A-1510), 743 P.2d 385 (1987).

Evidence of prior assault held admissible. — Evidence that defendant had been convicted of sexually assaulting the same victim two years prior to the alleged indictment was admissible because it indicated a significant sexual desire for the specific victim, thus supplying persuasive circumstantial evidence that he had sexually assaulted the victim. *Patterson v. State*, Ct. App. Op. No. 681 (File No. A-978), P.2d (1987).

Mental examination of victim. — De-

fendants' convictions of sexual abuse of a minor in the first degree and sexual abuse of a minor in the second degree were reversed, where the trial court denied defendants' request for a mental examination of the victims after a psychologist's testimony had placed the children's psychological characteristics in controversy. *Anderson v. State*, Ct. App. Op. No. 771 (File Nos. A-1056, A-1075), P.2d (1988).

Admissibility of evidence. — See *Van Meter v. State*, Ct. App. Op. No. 747 (File No. A-1510), 743 P.2d 385 (1987).

Admission of an investigator's statements concerning defendant's sexual fantasies and orientation, at defendant's trial for attempted sexual abuse of a minor in the second degree, was harmless error, where the evidence against defendant was substantial and defendant's attorney demonstrated the irrelevance of the statements on cross-examination. *Stevens v. State*, Ct. App. Op. No. 773 (File No. A-1327), P.2d (1988).

Conviction reversed where evidence of prior incident between victim and defendant improperly admitted. — See *Johnson v. State*, Ct. App. Op. No. 655 (File Nos. A-791, A-794), P.2d (1986).

Imposition of direct no-contact orders. — Where defendant pleads nolo con-

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

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

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

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

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

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

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

NOTES TO DECISIONS

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

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

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

NOTES TO DECISIONS

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

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

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

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

The 1983 amendment rewrote this section.

Legislative history reports. — For a

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

NOTES TO DECISIONS

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

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

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

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

Assault with intent to ravish or rape consenting female under age of consent, 81 ALR 599.

Parent or person in loco parentis, liabil-

ity for rape of minor child, 19 ALR2d 460.

Assault with intent to commit unnatural sex act upon minor as affected by latter's consent, 65 ALR2d 748.

Applicability of rape statute covering children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 ALR2d 874.

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

- (1) the spouses were living apart; or
- (2) the defendant caused physical injury to the victim.

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

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

- (1) an ancestor or descendant of the whole or half blood;
- (2) a brother or sister of the whole or half blood; or
- (3) an uncle, aunt, nephew, or niece by blood.

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

NOTES TO DECISIONS

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

Collateral references. — Aiding and abetting offense of incest by one not related to party, 5 ALR 784; 74 ALR 1110; 131 ALR 1322.

Relationship created by adoption as within statute regarding incest, 151 ALR 1146.

Consent as element of incest, 36 ALR2d 1299.

Sexual intercourse between persons related by half blood, 72 ALR2d 706.

Prosecutrix as accomplice or victim, 74 ALR2d 705.

Rape, incest as included within charge of, 76 ALR2d 484.

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

- (1) sexual penetration;
- (2) the lewd touching of another person's genitals, anus, or breast;
- (3) the lewd touching by another person of the child's genitals, anus, or breast;
- (4) masturbation;
- (5) bestiality; or
- (6) the lewd exhibition of the child's genitals.

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is intended to be used in producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct.

(c) Unlawful exploitation of a minor is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 57 SLA 1983)

Cross references. — For crime of distribution of child pornography, see AS 11.61.125.

Effect of amendments. — The 1983 amendment, in subsection (a), substituted "magazine, or other printed material that visually depicts the conduct listed in (1) — (6) of this subsection, the person" for "or

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

Effect of amendments. — The 1985 amendment rewrote subsection (a).

NOTES TO DECISIONS

Applied in *Jager v. State*, Ct. App. Op. No. 772 (File No. A-1145), P.2d (1988).

Sec. 11.41.450. Incest.

NOTES TO DECISIONS

Cited in *Theodore v. State*, Ct. App. Op. No. 435 (File No. A-554), 692 P.2d 987 (1985).

Sec. 11.41.455. Unlawful exploitation of a minor.

NOTES TO DECISIONS

Conviction and sentence upheld. — See *Depp v. State*, Ct. App. Op. No. 390 (File No. 7002), 686 P.2d 712 (1984).

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

(1) "incapacitated" means temporarily incapable of appraising the nature of one's own conduct and physically unable to express unwillingness to act;

(2) "mentally incapable" means a person who suffers from a mental disease or defect that renders the person incapable of understanding the nature of consequences of the person's conduct, including the potential for harm to that person;

(3) "victim" means the person alleged to have been subjected to sexual assault in any degree or sexual abuse of a minor in any degree;

(4) "without consent" means that a person

(A) with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone; or

(B) is incapacitated as a result of an act of the defendant. (§ 3 ch 166 SLA 1978; am § 5 ch 78 SLA 1983; am § 5 ch 96 SLA 1988)

Revisor's notes. — Reorganized in 1988 to alphabetize the defined terms. Effect of amendments. — The 1988 amendment inserted paragraph (2).



LAWS OF ALASKA

1988

Source

CSHB 545 (Jud)

Chapter No.

96

AN ACT

Amending crimes relating to sexual assault as they relate to persons who are mentally incapable.

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

THE ACT FOLLOWS ON PAGE 1, LINE 9.

UNDERLINED MATERIAL INDICATES TEXT THAT IS BEING ADDED TO THE LAW AND BRACKETED MATERIAL IN CAPITAL LETTERS INDICATES DELETIONS FROM THE LAW; COMPLETELY NEW TEXT OR MATERIAL REPEALED AND RE-ENACTED IS IDENTIFIED IN THE INTRODUCTORY LINE OF EACH BILL SECTION.

Approved by the Governor: June 3, 1988
Actual Effective Date: September 1, 1988

AN ACT

Amending crimes relating to sexual assault as they relate to persons who are mentally incapable.

* Section 1. AS 11.41.410(a) is repealed and reenacted to read:

(a) A person commits the crime of sexual assault in the first degree if,

(1) being any age, the defendant engages in sexual penetration with another person without consent of that person;

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

(3) being over the age of 18, the defendant engages in sexual penetration with another person

(A) who the defendant knows is mentally incapable;

and

(B) who is entrusted to the defendant's care

(i) by authority of law; or

(ii) in a facility or program that is required by law to be licensed by the Department of Health and Social Services.

* Sec. 2. AS 11.41.420(a) is amended to read:

(a) An offender commits the crime of sexual assault in the second degree if [THE OFFENDER ENGAGES IN]

(1) the offender engages in sexual contact with another

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person without consent of that person; [OR]

(2) being over the age of 18, the offender engages in sexual contact [PENETRATION] with a person

(A) who the offender knows is mentally incapable; and

(B) who is entrusted to the offender's care

(1) by authority of law; or

(ii) in a facility or program that is required by law to be licensed by the Department of Health and Social Services; or

(3) being over the age of 18, the offender engages in sexual penetration with a person who the offender knows is

(A) mentally incapable; [IS SUFFERING FROM A MENTAL DISORDER OR DEFECT WHICH RENDERS THE PERSON INCAPABLE OF APPRAISING THE NATURE OF THE CONDUCT UNDER CIRCUMSTANCES IN WHICH A PERSON WHO IS CAPABLE OF APPRAISING THE NATURE OF THE CONDUCT WOULD NOT ENGAGE IN SEXUAL PENETRATION]; or

(B) [IS] incapacitated.

* Sec. 3. AS 11.41 is amended by adding a new section to read:

Sec. 11.41.425. SEXUAL ASSAULT IN THE THIRD DEGREE. (a) ^{As} offender commits the crime of sexual assault in the third degree if, being over the age of 18, the offender engages in sexual contact with a person who the offender knows is

(1) mentally incapable; or

(2) temporarily incapable of appraising the nature of the person's conduct and is physically unable to express unwillingness to act.

(b) Sexual assault in the third degree is a class C felony.

* Sec. 4. AS 11.41 is amended by adding a new section to read:

Sec. 11.41.432. DEFENSE. It is a defense to a crime charged

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under AS 11.41.410(a)(3), 11.41.420(a)(2), 11.41.420(a)(3), or 11.41.425 that the offender is

(1) mentally incapable; or

(2) married to the person and neither party has filed with the court for a separation, divorce, or dissolution of the marriage.

* Sec. 5. AS 11.41.470 is amended by adding a new paragraph to read:

(4) "mentally incapable" means a person who suffers from a mental disease or defect that renders the person incapable of understanding the nature or consequences of the person's conduct, including the potential for harm to that person.

Sec. 11.41.330. Custodial interference in the second degree.**NOTES TO DECISIONS**

Protracted period. — See note under *State, Ct. App. Op. No. 468* (File No. same catchline, AS 11.41.320, *Gerlach v. A-501*), 699 P.2d 358 (1985).

Sec. 11.41.370. Definitions.**NOTES TO DECISIONS**

Cited in *Gerlach v. State, Ct. App. Op. No. 468* (File No. A-501), 699 P.2d 358 (1985).

Article 4. Sexual Offenses.

Section	Section
410. Sexual assault in the first degree	436. Sexual abuse of a minor in the second degree
420. Sexual assault in the second degree	443. Spousal relationship no defense
425. Sexual assault in the third degree	445. General provisions
432. Defense	470. Definitions
434. Sexual abuse of a minor in the first degree	

Sec. 11.41.410. Sexual assault in the first degree. (a) A person commits the crime of sexual assault in the first degree if,

(1) being any age, the defendant engages in sexual penetration with another person without consent of that person;

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

(3) being over the age of 18, the defendant engages in sexual penetration with another person

(A) who the defendant knows is mentally incapable; and

(B) who is entrusted to the defendant's care

(i) by authority of law; or

(ii) in a facility or program that is required by law to be licensed by the Department of Health and Social Services.

(b) Sexual assault in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 3 ch 166 SLA 1978; am § 8 ch 102 SLA 1980; am § 6 ch 143 SLA 1982; am § 10 ch 78 SLA 1983; am § 1 ch 96 SLA 1988)

Effect of amendments. — The 1988 amendment repealed and reenacted subsection (a), which formerly related to the same subject matter.

Legislative history reports. — For

legislative letter of intent relating to the amendments to (a) of this section by ch. 96, SLA 1988 (CSHB 545 (Jud)), see 1988 House Journal 3065.

Sentence under former subsection (a)(4) held excessive. — See *Carlson v. State*, Ct. App. Op. No. 448 (File No. A-346), 696 P.2d 178 (1985).

Sentence under former subsection (b) and AS 11.31.100 held excessive. — See *Bolhouse v. State*, Ct. App. Op. No. 402 (File No. 7665), 687 P.2d 1166 (1984); *Hancock v. State*, Ct. App. Op. No. 518 (File No. 7818), 706 P.2d 1164 (1985) (decided under section as it read before 1982 amendment).

Sentence for assault with intent to rape upheld. — See *Fcmin v. State*, Sup. Ct. Op. No. 2214 (File No. 5013), 619 P.2d 718 (1980).

Sentence for rape upheld. See *Soper v. State*, Ct. App. Op. No. 675 (File No. A-583), 731 P.2d 587 (1987).

Conditions of probation. — Conditions of probation restricting defendant from unauthorized contact with his daughter and with other girls under 18 years of age were not vague or unduly restrictive of his constitutionally protected right to freedom of association. *Nitz v. State*, Ct. App. Op. No. 759 (File No. A-1830), P.2d (1987).

Applied in *Barry v. State*, Ct. App. Op. No. 334 (File No. 7195), 675 P.2d 1292 (1984); *Fox v. State*, Ct. App. Op. No. 394

(File No. 7483), 685 P.2d 1267 (1984); *Totemoff v. State*, Ct. App. Op. No. 718 (File No. A-1751), P.2d (1987); *Covington v. State*, Ct. App. Op. No. 766 (File No. A-2158), P.2d (1987).

Cited in *D.G. v. State*, Ct. App. Op. No. 811 (File No. A-2431), P.2d (1988).

II. FORMER LAW.

C. Procedure.

Conviction for rape upheld. — See *Kvasnikoff v. State*, Ct. App. Op. No. 314 (File No. 5588), 674 P.2d 302 (1983).

Conviction and sentence for rape upheld. — See *Morgan v. State*, Ct. App. Op. No. 320 (File No. 6991), 673 P.2d 897 (1983).

Conviction reversed. — Convictions for lewd and lascivious acts toward children under former AS 11.15.134(a) and for rape under former AS 11.15.120(a) were reversed where evidence admitted concerning alleged assaults on victims other than those in the case at hand was improper propensity evidence; neither intent nor identity were at issue, and the acts did not constitute an admissible common scheme or plan or prove facts in dispute. *Bolden v. State*, Ct. App. Op. No. 632 (File No. A-754), P.2d (1986).

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

(1) the offender engages in sexual contact with another person without consent of that person;

(2) being over the age of 18, the offender engages in sexual contact with a person

(A) who the offender knows is mentally incapable; and

(B) who is entrusted to the offender's care

(i) by authority of law; or

(ii) in a facility or program that is required by law to be licensed by the Department of Health and Social Services; or

(3) being over the age of 18, the offender engages in sexual penetration with a person who the offender knows is

(A) mentally incapable; or

(B) incapacitated.

(b) Sexual assault in the second degree is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 78 SLA 1983, am § 2 ch 96 SLA 1988)

Effect of amendments. — The 1988 amendment, in subsection (a), deleted "the offender engages in" at the end of the introductory language, added "the of-

fender engages in" at the beginning of paragraph (1), deleted "or" at the end of paragraph (1), rewrote paragraph (2), and added paragraph (3).

Legislative history reports. — For legislative letter of intent relating to the amendments to (a) of this section by ch. 96, SLA 1988 (CSHB 545 (Jud)), see 1988 House Journal 3065.

NOTES TO DECISIONS

Evidence.

Exclusion of expert testimony regarding problems in evaluating the accuracy of eyewitness testimony was reversible error, where the case turned on the testimony of a single witness — the victim, the excluded testimony was central to the defense, and it could not be said that its exclusion did not appreciably affect the jury's verdict. *Skamarocius v. State, Ct. App. Op. No. 671 (File No. A-1068), 731 P.2d 63 (1987).*

Instructions. The trial judge did not err in failing to give an instruction on assault in the fourth degree as a lesser-included offense to the two counts of sexual assault in the second degree where any assault occurred after the consensual sexual contact. *Reischman v. State, Ct. App. Op. No. 760 (File No. A-1150), P.2d (1987).*

For sufficiency of instructions on incapacity of victim, see *Dexter v. State, Ct. App. Op. No. 302 (File No. 6741), 675 P.2d 144 (1983).*

Instruction regarding defendant's awareness of victim's lack of consent to sexual contact held erroneous. — See *Reischman v. State, Ct. App. Op. No. 760 (File No. A-1150), P.2d (1987).*

Lesser included offense. — Assault in the fourth degree is a lesser-included offense of first or second-degree sexual assault in which the defendant claims that sexual contact was consensual, and there is some evidence to show that the defendant assaulted the victim. *Reischman v.*

State, Ct. App. Op. No. 760 (File No. A-1150), P.2d (1987).

Conviction reversed because of insufficient evidence. — See *Brower v. State, Ct. App. Op. No. 656 (File No. A-716), P.2d (1986).*

Conviction and sentence upheld. — See *Contreras v. State, Ct. App. Op. No. 328 (File Nos. 6797-6799), 675 P.2d 654 (1984).*

Sentence held clearly mistaken. — Sentence of eight years with one year suspended for a first offender convicted of assault in the second degree was clearly mistaken. *Benboe v. State, Ct. App. Op. No. 466 (File No. A-225), 698 P.2d 1230 (1985).*

Trial court exceeded scope of sentencing powers by ordering defendant to attend a sexual offender rehabilitation program while incarcerated, where the order was set out as a separate provision of the written judgment and not as a condition of probation, and any failure to abide by the order could not have served as a predicate for a finding of criminal contempt. *Benboe v. State, Ct. App. Op. No. 711 (File No. A-1529), 738 P.2d 356 (1987); Cavanaugh v. State, Ct. App. Op. No. 810 (File No. A-1530), P.2d (1988).*

Cited in *Bolhouse v. State, Ct. App. Op. No. 402 (File No. 7665), 687 P.2d 1166 (1984); James v. State, Ct. App. Op. No. 733 (File No. A-1154), 739 P.2d 1314 (1987); James v. State, Ct. App. Op. No. 814 (File No. A-2318), P.2d (1988).*

Sec. 11.41.425. Sexual assault in the third degree. (a) An offender commits the crime of sexual assault in the third degree if being over the age of 18, the offender engages in sexual contact with a person who the offender knows is

(1) mentally incapable; or
(2) temporarily incapable of appraising the nature of the person's conduct and is physically unable to express unwillingness to act.

(b) Sexual assault in the third degree is a class C felony. (§ 3 ch 96 SLA 1988)

Sec. 11.41.432. Defense. It is a defense to a crime charged under AS 11.41.410(a)(3), 11.41.420(a)(2), 11.41.420(a)(3), or 11.41.425 that the offender is

- (1) mentally incapable; or
- (2) married to the person and neither party has filed with the court for a separation, divorce, or dissolution of the marriage. (§ 4 ch 96 SLA 1988)

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

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

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

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

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

(3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and the victim at the time of the offense is

(A) residing as a member of the social unit in the same household as the offender and the offender is in a position of authority over the victim; or

(B) temporarily entrusted to the offender's care.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 2 ch 78 SLA 1983; am § 3 ch 66 SLA 1988)

Effect of amendments. — The 1988 amendment, effective May 28, 1988, in subsection (a), deleted "or" at the end of paragraph (1), added "or" at the end of paragraph (2)(B), and added paragraph (3).

Legislative history reports. — For House letter of intent on ch. 66, SLA 1988 (CSHB 237 (Jud)), which amended this section, see 1988 House Journal 2330-2337.

NOTES TO DECISIONS

Editor's notes. — Some of the cases cited in the notes below were decided under former AS 11.41.410(a)(4), which provided that a person 18 years of age or older who engaged in sexual penetration with another person under 18 years of age who was entrusted to his care by authority of law or was his child committed sexual assault in the first degree.

Victim's statement held admissible

under hearsay exception. — The victim's statement to a prosecution witness, made two or three days after the incident, that the victim's father came into her bed while she was undressed and "did something wrong" was admissible under the first-complaint hearsay exception. *Nusunginya v. State*, Ct. App. Op. No. 660 (File No. A-1265), 730 P.2d 172 (1986).

Victim's identification of accused. —

contact, and there may have been as many as fifty separate incidents of sexual abuse. *Winther v. State*, Ct. App. Op. No. 783 (File No. A-2148), P.2d (1988).

Where there is evidence from which the trial court could infer that a sentence of incarceration would have destroyed a viable family and cause long-term psychological damage to the victim, sentence under former AS 11.41.410(a)(4) involving no incarceration is not too lenient. *State v. Morris*, Ct. App. Op. No. 364 (File No. 7771), 680 P.2d 1190 (1984).

Sentence under former AS 11.41.410(a)(4) for assault held too lenient. — See *State v. Rushing*, Ct. App. Op. No. 366 (File No. 7777), 680 P.2d 500 (1984); *State v. Woods*, Ct. App. Op. No. 367 (File No. 7779), 680 P.2d 1195 (1984).

Given a series of nine assaults of a stepdaughter by a stepfather, substantial evidence that intercourse was accomplished without consent, and the fact that the victim has left the defendant's home, a sentence of one year of incarceration under former AS 11.41.410(a)(4) was disapproved and a sentence of at least three years recommended. *State v. Covey*, Ct. App. Op. No. 365 (File No. 7776), 680 P.2d 513 (1984).

Remand for resentencing for conviction under former law. — See *State v. Covington*, Ct. App. Op. No. 557 (File No. A-203), 711 P.2d 1183 (1985).

Sentence clearly mistaken. — A sentence of 24 years with four years suspended, upon conviction of three counts of sexual abuse of a minor in the first degree, was clearly mistaken, where the

trial court did not address the 10- to 15-year benchmark established in prior decisions concerning aggravated cases of sexual assault, and nothing in the record established that a sentence in excess of 15 years was necessary to protect the public. *Mosier v. State*, Ct. App. Op. No. 765 (File No. A-1925), P.2d (1987).

Remand for resentencing. — See *Lewis v. State*, Ct. App. Op. No. 536 (File Nos. A-883, A-884), 706 P.2d 715 (1985); *Bodine v. State*, Ct. App. Op. No. 708 (File No. A-1108), 737 P.2d 1072 (1987).

Conditions of probation. — Conditions of probation restricting defendant from unauthorized contact with his daughter and with other girls under 18-years of age were not vague or unduly restrictive of his constitutionally protected right to freedom of association. *Nitz v. State*, Ct. App. Op. No. 759 (File No. A-1830), P.2d (1987).

Cited in *Higgs v. State*, Ct. App. Op. No. 344 (File No. A-46), 676 P.2d 610 (1984); *Benboe v. State*, Ct. App. Op. No. 466 (File No. A-225), 698 P.2d 1230 (1985); *Dancer v. State*, Ct. App. Op. No. 596 (File No. A-941), 715 P.2d 1174 (1986); *James v. State*, Ct. App. Op. No. 733 (File No. A-1154), 739 P.2d 1314 (1987); *Patterson v. State*, Ct. App. Op. No. 761 (File No. A-1278), P.2d (1987); *Kirby v. State*, Ct. App. Op. No. 767 (File No. A-2091), P.2d (1987); *Jager v. State*, Ct. App. Op. No. 772 (File No. A-1145), P.2d (1988); *James v. State*, Ct. App. Op. No. 814 (File No. A-2318), P.2d (1988).

Sec. 11.41.436. Sexual abuse of a minor in the second degree.

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

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

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

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

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

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

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

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and the victim at the time of the offense is

(A) residing as a member of the social unit in the same household as the offender and the offender is in a position of authority over the victim; or

(B) temporarily entrusted to the offender's care.

(b) Sexual abuse of a minor in the second degree is a class B felony. (§ 2 ch 78 SLA 1983; am § 4 ch 66 SLA 1988)

Effect of amendments. — The 1988 amendments, effective May 28, 1988, in subsection (a) deleted "or" at the end of paragraph (3)(B), added "or" at the end of paragraph (4), and added paragraph (5).

Legislative history reports. — For House letter of intent on ch. 66, SLA 1988 (CSHB 237 (Jud)), which amended this section, see 1988 House Journal 2330-2337.

NOTES TO DECISIONS

No culpable mental state required. — Under the current statutory definition of "sexual contact," the offense of sexual abuse of a minor in the second degree may properly be established by evidence proving knowing conduct within the scope of AS 11.81.900(b)(52)(A); no secondary culpable mental state need be established with respect to surrounding circumstances. *Van Meter v. State*, Ct. App. Op. No. 747 (File No. A-1510), 743 P.2d 385 (1987).

Burden of proving exclusions. — If some evidence of justification is advanced in the record, the state must bear the additional burden of establishing that the defendant's conduct did not fall within the exclusions of AS 11.81.900(b)(52)(B). *Van Meter v. State*, Ct. App. Op. No. 747 (File No. A-1510), 743 P.2d 385 (1987).

Evidence of prior assault held admissible. — Evidence that defendant had been convicted of sexually assaulting the same victim two years prior to the alleged indictment was admissible because it indicated a significant sexual desire for the specific victim, thus supplying persuasive circumstantial evidence that he had sexually assaulted the victim. *Patterson v. State*, Ct. App. Op. No. 681 (File No. A-978), P.2d (1987).

Mental examination of victim. — De-

fendants' convictions of sexual abuse of a minor in the first degree and sexual abuse of a minor in the second degree were reversed, where the trial court denied defendants' request for a mental examination of the victims after a psychologist's testimony had placed the children's psychological characteristics in controversy. *Anderson v. State*, Ct. App. Op. No. 771 (File Nos. A-1056, A-1075), P.2d (1988).

Admissibility of evidence. — See *Van Meter v. State*, Ct. App. Op. No. 747 (File No. A-1510), 743 P.2d 385 (1987).

Admission of an investigator's statements concerning defendant's sexual fantasies and orientation, at defendant's trial for attempted sexual abuse of a minor in the second degree, was harmless error, where the evidence against defendant was substantial and defendant's attorney demonstrated the irrelevance of the statements on cross-examination. *Stevens v. State*, Ct. App. Op. No. 773 (File No. A-1327), P.2d (1988).

Conviction reversed where evidence of prior incident between victim and defendant improperly admitted. — See *Johnson v. State*, Ct. App. Op. No. 655 (File Nos. A-791, A-794), P.2d (1986).

Imposition of direct no-contact orders. — Where defendant pleads nolo con-

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

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

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

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

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

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

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

NOTES TO DECISIONS

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

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

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

NOTES TO DECISIONS

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

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

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

Effect of amendments. — The 1980 amendment rewrote subsection (a). The 1983 amendment rewrote this section.
Legislative history reports. — For a report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, May 28, 1980.

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.
Applied in *Goulden v. State*, Ct. App. Op. No. 201 (File No. 6465), 656 P.2d 1218 (1983).
 Cited in *Stores v. State*, Sup. Ct. Op. No. 2252 (File No. 3595), 625 P.2d 820 (1980); *Hodges v. State*, Ct. App. Op. No. 233 (File No. 7330), 660 P.2d 1203 (1983).

Collateral references. — Civil liability for carnal knowledge with actual consent of girl under age of consent, 45 ALR 780; 79 ALR 1229.
 Assault with intent to ravish or rape consenting female under age of consent, 81 ALR 599.
 Parent or person in loco parentis, liability for rape of minor child, 19 ALR2d 460.
 Assault with intent to commit unnatural sex act upon minor as affected by latter's consent, 65 ALR2d 748.
 Applicability of rape statute covering children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 ALR2d 874.

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

- (1) the spouses were living apart; or
- (2) the defendant caused physical injury to the victim.

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

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

- (1) an ancestor or descendant of the whole or half blood;
- (2) a brother or sister of the whole or half blood; or
- (3) an uncle, aunt, nephew, or niece by blood.

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

NOTES TO DECISIONS

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

Collateral references. — Aiding and abetting offense of incest by one not related to party, 5 ALR 784; 74 ALR 1110; 131 ALR 1322.

Relationship created by adoption as within statute regarding incest, 151 ALR 1146.

Consent as element of incest, 36 ALR2d 1299.

Sexual intercourse between persons related by half blood, 72 ALR2d 706.

Prosecutrix as accomplice or victim, 74 ALR2d 705.

Rape, incest as included within charge of, 76 ALR2d 484.

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

- (1) sexual penetration;
- (2) the lewd touching of another person's genitals, anus, or breast;
- (3) the lewd touching by another person of the child's genitals, anus, or breast;
- (4) masturbation;
- (5) bestiality; or
- (6) the lewd exhibition of the child's genitals.

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is intended to be used in producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct.

(c) Unlawful exploitation of a minor is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 57 SLA 1983)

Cross references. — For crime of distribution of child pornography, see AS 11.61.125.

Effect of amendments. — The 1983 amendment, in subsection (a), substituted "magazine, or other printed material that visually depicts the conduct listed in (1) — (6) of this subsection, the person" for "or

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

Effect of amendments. — The 1985 amendment rewrote subsection (a).

NOTES TO DECISIONS

Applied in *Jager v. State*, Ct. App. Op. No. 772 (File No. A-1145), P.2d (1988).

Sec. 11.41.450. Incest.

NOTES TO DECISIONS

Cited in *Theodore v. State*, Ct. App. Op. No. 435 (File No. A-554), 692 P.2d 987 (1985).

Sec. 11.41.455. Unlawful exploitation of a minor.

NOTES TO DECISIONS

Conviction and sentence upheld. — See *Depp v. State*, Ct. App. Op. No. 390 (File No. 7002), 686 P.2d 712 (1984).

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

(1) "incapacitated" means temporarily incapable of appraising the nature of one's own conduct and physically unable to express unwillingness to act;

(2) "mentally incapable" means a person who suffers from a mental disease or defect that renders the person incapable of understanding the nature of consequences of the person's conduct, including the potential for harm to that person;

(3) "victim" means the person alleged to have been subjected to sexual assault in any degree or sexual abuse of a minor in any degree;

(4) "without consent" means that a person

(A) with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone; or

(B) is incapacitated as a result of an act of the defendant. (§ 3 ch 166 SLA 1978; am § 5 ch 78 SLA 1983; am § 5 ch 96 SLA 1988)

Revisor's notes. — Reorganized in 1988 to alphabetize the defined terms. Effect of amendments. — The 1988 amendment inserted paragraph (2).