

**S B**

**252**

Original sponsor(s): Judiciary Committee

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE BILL NO. 252 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to retirement system exemptions from  
7 execution."

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

9 \* Section 1. AS 09.38.015(b) is amended to read:

10 (b) The right to benefits held by the state on behalf of an  
11 individual that [WHICH] may become payable by reason of disability,  
12 unemployment or illness, amounts held in the teachers', judicial, or  
13 public employees' retirement system, or in the elected public offi-  
14 cers' retirement system under former AS 39.37, and child support  
15 collections made by the child support enforcement agency are exempt.

16 \* Sec. 2. AS 09.38.017(c) is amended to read:

17 (c) The exemptions provided by (a) of this section do not pre-  
18 vent the payment of benefits under a retirement plan to an alternate  
19 payee under a qualified domestic relations order. In this subsection,  
20 "qualified domestic relations order" has the meaning given in 26  
21 U.S.C. 414(p), except as applied to "governmental plans" as defined  
22 under 29 U.S.C. 1002 in which case "qualified domestic relations  
23 order" has the meaning given by the plan or by the law governing the  
24 plan.

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_ Agency Affected: Department of Administration  
 Title: An Act exempting amounts held in BRU: Retirement and Benefits  
the Judicial Retirement System.  
 Sponsor: Judiciary Committee Components: Retirement and Benefits  
 Requestor: \_\_\_\_\_

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER 1034	0	0	0	0	0	0
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)

Please refer to page 2 for discussion of financial implications..

Prepared By: Sally Smith, Director *Sally Smith* Phone: 465-4470  
 Division: Retirement and Benefits *C 120* Date: April 17, 1989  
 Approved by Commissioner: John M. Andrews *for* Date: 4/18/89  
 Agency: Department of Administration

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

*Changes in the State Affairs CS  
 have no fiscal effect. This  
 fiscal note is appropriate.*  
*Schubert* Page 1 of 2  
4-19-89 8/6K2/041410-9/2

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

June 6, 1938

STEVE COWPER, GOVERNOR

P.O. BOX K—STATE CAPITOL  
JUNEAU, ALASKA 99811-0300  
PHONE: (907) 485-3600

Honorable Steve Cowper  
Governor  
State of Alaska  
P.O. Box A  
Juneau, AK 99811

Re: CSSB 508(Fin) -- property ex-  
emptions for homesteads, re-  
tirement plan interests, etc.  
Our file: 883-88-0108

Dear Governor Cowper:

At Judy Fleming's request on your behalf, we have reviewed CSSB 508(Fin), relating to property exemptions for homesteads, retirement plan interests and payments, and other property. The bill raises policy and legal questions, and you might want to consider vetoing it. There are two basic categories of concern: (1) the retirement provisions, and (2) the increases in the exemption values.

This bill was introduced by the Senate Judiciary Committee on April 14, 1988. The Senate Finance Committee Substitute was offered May 3, 1988 and passed by the Senate on May 5, 1988, and the House passed it on May 9, 1988.

We are concerned that the retirement plan provisions in sec. 3 of the bill could be interpreted as requiring the federal definition of "qualified domestic relations order" (QDRO) to apply to the public employees' (PERS) and teachers' (TRS) retirement systems. The statutes for both of those systems include a definition of "QDRO" that differs from the federal definition. The bill also would allow bankruptcy creditors to reach TRS and PERS contributions made by a member within 120 days before the member files for bankruptcy. These are serious and, we believe, unintended effects of the bill.

The Senate Finance Committee's substitute bill (offered six days before the end of the session) doubles the dollar amount of exemptions from claims of creditors. That raises important policy questions. We are concerned about the full effects of that doubling, including the effect on the state's own collection efforts and on the state's private lending institutions. In light of its importance, we believe that the subject merits more

extended consideration than was possible during the extremely brief period that the committee substitute was pending at the hectic end of the legislative session.

As originally introduced, SB 508 related only to exemptions for certain retirement plan interests and payments (i.e., secs. 3, 8, 10, and part of 5 of this final version). The purpose of this part of the bill is not at all clear from the language of the bill itself. However, we have ascertained from documents provided by the Legislative Affairs Agency that, although the only reference to bankruptcy in the proposed AS 09.38.017 is in its subsec. (b), and the basic subsec. (a) is worded in general terms, the purpose is to exclude or exempt from the property of a bankruptcy debtor's estate that is subject to the reach of the debtor's creditors <sup>1/</sup> the bankruptcy debtor's interest in or payments to be received from a pension plan. An understanding of this purpose and the manner in which it is accomplished requires analysis of provisions of federal law, including the U.S. Bankruptcy Code, the Internal Revenue Code, and the Employee Retirement Income Security Act of 1974 (ERISA), as well as the relationship between federal bankruptcy law and state exemption statutes.

This analysis is fairly succinctly provided by the case of Goff v. Taylor, 706 F.2d 574 (5th Cir. 1983). That case explains that, upon filing of bankruptcy, an estate is created that includes all property in which the bankruptcy debtor has a legal or equitable interest. 11 U.S.C. 541(a)(1). An exception for this is that a debtor's interest in a trust that is subject to a restriction under an "applicable nonbankruptcy law" is excluded from the bankruptcy estate. 11 U.S.C. 541(c)(2). The interest in the trust never enters the estate.

After a bankruptcy estate is created, certain property is then exempted from the estate. 11 U.S.C. 522. (Exclusions are different from exemptions.) A bankruptcy debtor may choose whether to take exemptions provided by the Bankruptcy Code (listed at 11 U.S.C. 522(d)) or to take exemptions provided by state law. State law exemptions may be more favorable than the

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<sup>1/</sup> Notwithstanding that apparently intended purpose, this section also has the effect of providing an exemption in situations other than bankruptcy, for interests in certain governmental pension plans that are not currently protected under the Alaska Exemptions Act or any federal law.

law. State law exemptions may be more favorable than the Bankruptcy Code exemptions, or vice versa, depending on the type of property the bankruptcy debtor owns and depending on the specific provisions of state exemption statutes. In Goff, the bankruptcy debtors had chosen state law exemptions which, unlike the Bankruptcy Code, did not provide a limited exemption for Keogh plans. Nevertheless, the debtors argued that ERISA was an "applicable nonbankruptcy law," and that restrictions on assignment and alienation of interests in the Keogh plan under ERISA prevented their interest in the plan from entering the estate.

The court rejected this argument. It found that Congress did not intend to include ERISA plan restrictions in the reference to "applicable nonbankruptcy law." Rather, it found that Congress only intended "spendthrift trusts" to be excluded from the property of the estate. The Keogh plan was found not to be a spendthrift trust, because of the availability of the assets of the plan to the debtors, with only a 10 percent penalty, at any time before reaching retirement age. Under Goff, if a plan is not a spendthrift trust that is afforded protection under state nonbankruptcy law, a debtor's interest in the plan is not excluded from the bankruptcy estate. If the bankruptcy debtor chooses state law exemptions that do not include an exemption for the debtor's interest in a pension plan, the interest is not exempted from the estate. The result is that bankruptcy debtors may be forced to forego favorable exemptions under state law (such as the Texas homestead exemption discussed later in this bill-review letter) in order to gain at least partial protection of their pension plan interests provided by the federal bankruptcy exemptions.

Current provisions of the Alaska Exemptions Act (AS 09.38) do not provide an exemption for interests in retirement plans which is applicable in bankruptcy proceedings. See existing AS 09.38.055. Both the original and final versions of this bill add a new section, AS 09.38.017 (in sec. 3 of the CS), to the Alaska Exemptions Act, which provides an exemption for interests in certain "retirement plans." That exemption will be applicable in bankruptcy proceedings by virtue of the amendment of AS 09.38.055 in sec. 10 of the CS. By the definition of "retirement plan" in the bill, the new exemption is for interests in qualified plans under 26 U.S.C. 401(a), individual employee annuity plans under 26 U.S.C. 403(a), tax sheltered annuity plans under 26 U.S.C. 403(b), individual retirement accounts and annuities and simplified employee pension plans under 26 U.S.C. 408,

and employee stock ownership plans under 26 U.S.C. 409. 2/ No exemption is provided for interests in pension plans that do not qualify for favorable tax treatment under the specified provisions of the Internal Revenue Code.

The definition of "retirement plan" in the bill includes PERS and TRS, since those plans are qualified plans under 26 U.S.C. 401(a). Two problems arise from application of this bill to PERS and TRS. First, the bill provides that the exemptions do not apply to contributions "made by an individual under a retirement plan within 120 days before the individual files for bankruptcy." We believe that the purpose of this provision is to prevent individuals from increasing their contributions to retirement plans shortly before filing bankruptcy in order to shelter additional assets from creditors. However, PERS and TRS member contributions are statutorily fixed and involuntary, thus preventing the kind of abuse addressed by this provision. 3/ Administration of this provision would require changes in the PERS and TRS statutes, since there is currently no way for the systems to make available to creditors an employee's contributions that are made within 120 days before filing bankruptcy. There are no provisions in either PERS or TRS allowing a partial refund of a member's contribution account to pay creditors (either while the member is still employed or after termination of employment), allowing an adjustment of service credit to reflect a reduction in the contribution account, or allowing a member to repay contributions that have been paid to creditors.

Second, the bill provides that the exemptions do not prevent payment of retirement plan benefits to an alternate payee under a qualified domestic relations order (QDRO) as defined by 26 U.S.C. 414(p). Proposed AS 09.38.017(c). The potential problem with this is that the statutes providing for both PERS and TRS include a definition of "QDRO" that is different in a significant respect from the definition of "QDRO" in 26 U.S.C. 414(p). Existing AS 14.25.220(31) and AS 39.35.680(34). Under the federal definition, a QDRO can order payment of a benefit to an

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2/ The federal Bankruptcy Code exemptions provide an exemption for payments under these plans only "to the extent reasonably necessary for the support of the debtor and any dependant of the debtor." 11 U.S.C. 522(d)(10)(E).

3/ This might also be true of some private pension plans that will be affected by this bill.

alternate payee as soon as a member is both vested and old enough to take early retirement, regardless of whether the member has terminated employment or chooses to take early retirement. Unlike the federal definition, the PERS and TRS definition does not allow payment of benefits to an alternate payee before the member begins to receive a benefit. There is no system in place to allow either PERS or TRS to apply the federal QDRO requirements.

We characterize this second problem as a "potential" problem because we believe that, despite the language of the bill, the better argument is that the federal definition of QDRO would not be applicable to PERS and TRS. This is so because 26 U.S.C. 414(p)(9) provides that the federal definition does not apply to any plan to which 26 U.S.C. 401(a)(13) does not apply. 26 U.S.C. 401(a)(13) does not apply to governmental plans, such as PERS, TRS, and municipal plans. Thus, under federal law, the federal definition of "QDRO," by its own terms, does not apply to PERS and TRS or the other governmental plans. Moreover, this proposed state statute says, in subsec. (c), that the exemptions in (a) "do not prevent" payment under a federally defined QDRO. Payment under such an order is not required by the proposed statute. In other words, if a creditor (spouse) has a domestic relations order that is a qualified one under the federal definition, then the exemptions in proposed AS 09.38.017(a) do not bar the creditor from reaching the pension money. But some other statute might do so -- e.g., our PERS and TRS statutes. This raises questions as to what right a person has to enforce a QDRO against a governmental plan other than PERS or TRS if the exemption is enacted.

The bill states a conclusive presumption that a retirement plan that is exempt from claims under the bill is a spendthrift trust. Proposed AS 09.38.017(d). We seriously doubt that this provision provides a bankruptcy debtor with any additional protection. If the debtor chooses state law exemptions, the provisions of the bill already exempt the debtor's interests in or payments from the specified retirement plans. If the debtor chooses federal Bankruptcy Code exemptions, it is unlikely that a bankruptcy court would give any credence to this presumption in considering whether a plan that is clearly not a spendthrift trust is excludable from the bankruptcy estate under 11 U.S.C. 541(c)(2). (PERS and TRS would not appear to qualify as spendthrift trusts, since, although access to their benefits is, by statute, strictly controlled, the portion of the trust money that is the employee's contribution account may be obtained by the employee upon termination of employment before eligibility for retirement benefits.)

The provisions of the bill that were added in the committee substitute amend the dollar amounts of the value of exemptions which may be claimed under the Alaska Exemptions Act. The statutory amounts were doubled. However, the practical effect is less than double because, as required by statute, the amounts had already been adjusted up by regulation, approximately 10 percent, in accordance with the consumer price index. (These amounts may be adjusted upward again by the Department of Labor by operation of AS 09.38.115, which provides for such changes each even-numbered year.) There are no obvious legal problems with these portions of the bill.

There is a significant policy decision to be made, however, with regard to approving the increases. The effect of the increases will be to allow debtors to keep more of their property while restricting the property available to nonsecured or undersecured creditors trying to recover on loans in default. In approving loans, some creditors may have counted on the availability of property or income that would be exempt under this bill.

It is very difficult to predict what economic effect will result if this bill becomes law. Some suggest that greater exemption amounts will encourage more creditor negotiations with debtors and thus reduce bankruptcy filings. Some suggest that debtors will be more encouraged to file bankruptcy because they will be able to keep more property. Another possibility is that increased exemptions will decrease the availability of credit.

It is worth noting that the Alaska Exemptions Act was based on the Uniform Exemptions Act, promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Alaska is the only state to date that has enacted the uniform Act, and Alaska enacted exemptions in higher amounts than were proposed in the uniform Act. We spoke with John McCabe, legal director for the NCCUSL. He informs us that there is no consistent answer on how any state has approached the exemption situation. For instance, several states exempt the homestead completely, but differ in the definition of the "homestead."

Mr. McCabe reported that Texas is noted for having the most liberal homestead provision. The definition requires that the debtor live on the property and then includes all property to the outer boundaries. Thus, a debtor could be in bankruptcy, have an urban home worth hundreds of thousands of dollars sitting on millions of dollars worth of oil and the entire property would be exempt from creditors. Mr. McCabe reported that the Texas homestead provision has been criticized as being an imposition on

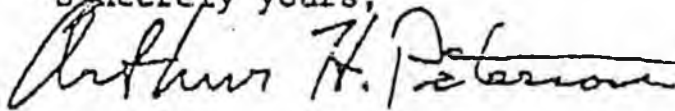
the credit system and unfairly restrictive for creditors.

When drafting the Uniform Exemptions Act, the drafters first determined what kinds of property should be reasonably included. Next, the drafters tried to ascertain reasonable values that would fairly serve the debtor's interests and not unfairly limit creditors. Mr. McCabe stated that the purpose of an exemptions Act is to preserve some assets for the debtor to make a fresh start without making the exemptions so great as to abuse the credit system. He felt that the actual amounts were derived by almost an intuitive consideration of what was fair and reasonable.

We note that only the new exemption of interests in retirement plans does not apply to assets of a bankruptcy estate in a bankruptcy proceeding filed before the effective date of the bill. Section 11 of the bill. Apparently, the legislature intended the increased exemptions added by the committee substitute to apply to pending bankruptcy proceedings.

We make no recommendation as to the resolution of the policy issue raised by the increased exemption amounts, but only bring the issue to your attention. Although there are no obvious legal problems with adopting the increased exemption amounts, the legal problems identified concerning the retirement plan exemption and the significant policy questions raised by the increased exemptions warrant serious consideration of veto. A veto would allow a bill to be drafted during the interim that would clarify the effects on the state's retirement systems and also allow more studied consideration of the policy issues. We would be happy to assist in drafting an appropriate veto message, if you wish.

Sincerely yours,

  
for Grace Berg Schaible  
Attorney General

GBS:VBR:JJ:pjg

**Greg Oczkus Law Offices**

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M. Gregory Oczkus

M. Jane Pettigrew

April 5, 1990

Mr. Andy Hemenway  
c/o Max Gruenberg  
Box V  
Juneau, AK 99811

RE:

Dear Mr. Hemenway:

Enclosed please find the following information: A private pension plan article by Thomas J. Yerbich, a copy of the case of Mackey vs. Lanier Collection Agency 108 S.Ct. 2182, an Attorney General's opinion letter dated June 6, 1988 and a copy of AS9.38.017.

In 1988 the legislature adopted AS9.38.017 which provided for exemption of a persons' retirement plan interest and payments thereunder. Previously the only state exemption for retirement programs was for the PERS or other public sector plans.

Enclosed please find an excellent analysis of the impact of Mackey on private pension plans in conjunction with the exemption provided under AS9.38.017. It is very probable that the only portion of AS9.38.017 which remains viable and constitutional is an individual's IRA which qualifies under 28 USC 408. Otherwise, all of the definitions in AS9.38.017(e)(3) fall under the substantive terms of ERISA. This would mean that plans which are qualified under 26 USC 401(a), 403(a), 403(b) and 409 are within ERISA. Any and all state action relating to ERISA Plans is preempted under the Mackey.

You have advised me of Senate Bill 568 as an attempt to force cash distributions out of retirement plans which would otherwise be exempt. It would appear to me that the first step in addressing any qualified domestic relational order issue with respect to the statute would be to repair the statute so that it is not in conflict with the Mackey decision. I do not believe that AS9.38.017 will pass constitutional scrutiny at this time.

Please give me a call after you have an opportunity to read this.

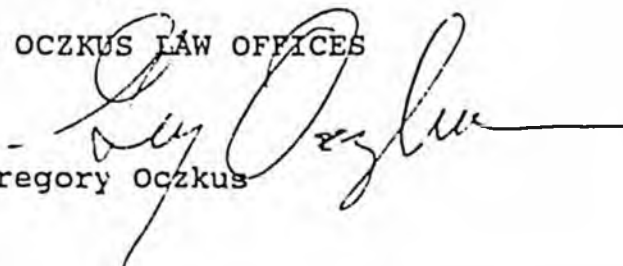
Sincerely,

GREG OCZKUS LAW OFFICES

M. Gregory Oczkus

MGO/eb EB26

No



to Dave

PRIVATE PENSION PLANS EXEMPT OR EXCLUDED? - MAYBE!

By: Thomas J. Yerbich

I. Exemption

Chapter 135, SLA 1988 added new AS § 09.38.017 exempting from claims of an individual's creditors the interest of the individual in and the money or other assets payable to the individual from a retirement plan. As defined in AS § 09.38.017(e)(3) a retirement plan is one which is qualified under §§ 401(a) [qualified pension, profit-sharing and stock bonus plans], 403(b) [certain qualified annuities provided by charitable and educational institutions], 408 [individual retirement accounts], and 409 [tax credit employee stock ownership plans] of the Internal Revenue Code. Barely had the ink dried on the Governor's signature on chapter 135, SLA 1988 when the U.S. Supreme Court effectively, for the the most part, invalidated it.

The problem arises as a result of § 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") which provides, in relevant part, that "the provisions of this title and title IV shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)." ERISA § 4(a) extends ERISA coverage to all employee benefit plans established or maintained by either an employer or employee organization.

Mackey v. Lanier Collections Agency & Service, [486 U.S. \_\_\_, 108 S.Ct. 2182, 100 L.Ed.2d 836] decided June 17, 1988, invalidated a Georgia statute exempting from garnishment employee benefit programs holding: (1) state laws specifically designed to affect employee benefit plans are pre-empted by ERISA § 514(a); and (2) pre-emption extends to those laws which are consistent with ERISA's substantive requirements [108 S.Ct. at 2185]. The holding and result in Mackey are applicable to AS § 09.38.017. That is, to the extent AS § 09.38.017 "makes reference to ERISA plans" it is a statute within the meaning of § 514(a). That AS § 09.38.017, at least in part, makes specific reference to ERISA plans is plainly and patently clear. By reference to retirement plans "qualified" under §§ 401, 403, and 409 of the Internal Revenue Code ("IRC"), AS § 09.38.017 is referring specifically to ERISA covered plans because those sections are contained in ERISA Title II and also fall within the ERISA § 4(a) description. This was the approach initially taken (correctly, in the opinion of this author) in In re Komet, 93 B.R. 498 (Bkrtcy.W.D.Tex. 1988) [opinion withdrawn and rehearing granted] and In re Dyke, 99 B.R. 343 (Bkrtcy.S.D.Tex. 1989) in invalidating a Texas exemption statute substantially similar to AS § 09.38.017. Under this interpretation, ERISA § 514(a) - Mackey pre-empts AS § 09.38.017 to the extent it applies to retirement plans qualified under IRC §§ 401, 403 and 409. [Note that public pension plans, exempt under AS §§ 09.38.015(b), 14.25.200 and 39.35.500, remain unaffected as ERISA § 4(b)(1) excludes such plans from coverage under ERISA.]

On the other hand, the Chief Bankruptcy Judge of the Western District of Texas has held that ERISA § 514(a) - Mackey does not pre-empt the Texas exemption statute [In re Volpe, 1989 Bankr. LEXIS 739 (decided 4/28/89)]. The Volpe opinion is quite lengthy, and to fully analyze it would require nearly as many pages as the opinion itself consumes. However, an abbreviated critical analysis is in order.

It is very evident that the court in Volpe, in narrowly construing the impact of Mackey, in reality disagrees with Mackey's result and the breadth. Unfortunately for debtors, Volpe is at odds with the clear and unmistakable language of Mackey that "[t]he state statute's express reference to ERISA plans suffices to bring it within the federal law's pre-emptive reach," making Volpe somewhat dubious authority. This is particularly true in light of the broader view of the pre-emptive impact of ERISA § 514(a) taken by the Ninth Circuit [E.g., Franchise Tax Board of Calif. v. Construction Laborers Vacation Trust for So. Calif., 679 F.2d 1307 (9th Cir. 1982) rev'd on other grounds 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); Russell v. Massachusetts Mutual Life Insurance Co., 722 F.2d 482 (9th Cir. 1983) rev'd on other grounds 473 U.S. 134, 105 S.Ct. 3085, 87 L. Ed.2d 96 (1985); Scott v. Gulf Oil Corp., 754 F.2d 1499 (9th Cir. 1985); Misic v. Building Service Employees Health & Welfare Trust, 785 F.2d 1374 (9th Cir. 1986)]. A careful reading of those decisions indicates the Ninth Circuit would most likely not adopt the Volpe narrow construction.

Furthermore, Volpe overlooks the clear impact of invalidating the Georgia antigarnishment statute. First, any distinction between an antigarnishment statute and an exemption statute is one one without a difference - both serve the goal of protecting assets from the claims of creditors. Second, adopting as correct the Volpe distinction between "plans" and "benefits" (which is difficult inasmuch as benefits are an integral part of a pension plan), it does not necessarily follow, as Volpe holds, that state exemption of pension plan benefits is not pre-empted. The case for pre-emption of state statutes protective of pension plans is even stronger than that for welfare plans in that Congress in ERISA [§ 206(d)(1)] expressly addressed the question of protection to be accorded pension plan benefits; thus, having spoken on the subject, effectively foreclosed state law application in the same area. Finally, it is evident that applying the Volpe rationale, substituting the Georgia antigarnishment statute for the Texas exemption statute, the conclusion would be opposite to that reached in Mackey. This simply cannot be.

But what about Individual Retirement Accounts or Individual Retirement Annuities ("IRA") under IRC § 408? AS § 09.38.017 also exempts IRAs. An IRA is established and maintained by the individual, not by the employer or an employee organization; therefore, IRAs [not falling within the ERISA §4(a) description] are not covered by ERISA and ERISA § 514(a) does not pre-empt that part of AS § 09.38.017, unless the court should determine that the law is not severable. [This author, having enough on his plate for the moment, will leave severability to others.] The initial Komet decision took the position (by way of dicta referring to "ERISA-qualified individual retirement accounts") that exemption of IRAs was also pre-empted; this author respectfully disagrees with the court on this point because, as noted, IRAs are not covered by ERISA. However, some IRAs are maintained and/or partially funded by employer contributions. If an IRA involves employer participation, Lab.Reg. § 2510.3-2(d) should be examined to determine ERISA coverage. Also, the issue is not as clear with respect to IRC § 408(k) Simplified Employee Pensions. These are excluded from ERISA coverage by regulation if certain conditions enumerated therein are met [Lab.Reg. § 2520.104-~~10~~].

Where does this leave Alaskans with respect to exemption of private retirement plans? If a debtor elects to use the Federal exemptions, § 522(d)(10)(E) of the Bankruptcy Code ("BC") exempts such plans to the extent "reasonably necessary for the support of the debtor and any dependant of the debtor." If a debtor elects to use the state law exemptions alternative under BC § 522(b)(2), an IRC § 408 qualified IRA is probably exempt under AS § 09.38.017 but IRC §§ 401, 403, and 409 qualified plans are not exempt under either the pre-empted AS § 09.38.017 or under other Federal law pursuant to BC § 522(b)(2)(A) [In re Daniel 771 F.2d 1352 (9th Cir. 1985) cert. den. 475 U.S. 1016, 106 S.Ct. 1199, 89 L.Ed.2d 313 (1986)].

## II. Excludability

In the bankruptcy context, a more complex question is presented by the issue of whether or not a qualified retirement plan is excluded from the estate of a bankrupt as a "spendthrift trust," under BC § 541(c)(2). Conventional wisdom has been that BC § 541(c)(2) does not exclude pension plans despite the ERISA § 206(d)(1) requirement that qualified pension plans include a provision restricting alienation or assignment of benefits [See In re Daniel, supra, 771 F.2d at 1360]. Upon what may be euphemistically referred to as "more mature reflection," this author has concluded that "it ain't necessarily so." [A caveat is in order: if the following appears somewhat convoluted, circular and confusing it is only because it probably is. The state of the law in this area is somewhat convoluted, circular and confusing as is often the case when multiple Congressional acts having differing public policy considerations apply to a particular issue. Those who have delved into qualified pension plans and foolhardily made an excursion into the realm of ERISA and its regulations (Labor and Treasury) with their often-times confusing and occasionally contradictory provisions can only too well attest to this point.]

The Ninth Circuit in Daniel specifically held [771 F.2d at 1360] that:

"[T]his Court holds that the phrase 'applicable non-bankruptcy law' in 11 USC § 541(c)(2) was intended to be a narrow reference to state 'spendthrift trust' law and not a broad reference to all other laws, including ERISA and the IRC which prohibit alienation. Therefore, the ERISA and IRC anti-alienation provisions in debtor's pension and profit-sharing plan does not create a Federal non-bankruptcy exclusion under 11 USC § 541(c)(2)." (Emphasis by the court).

The Ninth Circuit Bankruptcy Appellate Panel has held that Mackey did not undermine Daniel and BC § 541(c)(2) may, therefore, be applied [In re Kaplan, 97 B.R. 572, 576 (BAP9 1989)]. Thus, the precise issue of whether or not an ERISA covered pension plan is a spendthrift trust excluded under BC § 541(c)(2) must be determined by reference to the law of Alaska. Unfortunately, there is a paucity of either Alaska decisional or statutory law on the subject. Before one leaps with great exuberance and joy on the language contained in AS § 09.38.017(d) conclusively presuming retirement plans to be spendthrift trusts, consider that that provision (specifically applicable to ERISA covered plans), as well as the exemption of ERISA covered retirement plans, may be pre-empted by ERISA § 514(a) - Mackey.

One may ask where are we going if ERISA § 514(a) - Mackey pre-empts application of state law to ERISA pension plans and Daniel denies the existence of a Federal law exclusion under either BC § 522(b)(2)(A) or BC § 541(c)(2). Fortunately, part III of the Mackey decision, sanctioning application of general state law where it does not conflict with a specific provision of ERISA, left a loop-hole through which we may squeeze.

We start our analysis with Daniel and the three Court of Appeals decisions it followed: Matter of Goff 706 F2d 574 (5th Cir. 1983), In re Graham 726 F2d 1268 (8th Cir. 1984) and In re Lichstrahl 750 F2d 1468 (11th Cir. 1985). All four decisions, applying state law to determine that the pension plan before the court was not a spendthrift trust, held that BC § 541(c)(2) did not exclude the ERISA covered pension plan from the bankruptcy estate. All applied the generally accepted principle of trust law that a settlor may not create a spendthrift trust in the settlor's own favor [See generally Bogert, Trusts § 40 (6th ed. 1987); Bogert, Trusts and Trustees §223 (2d ed.Rev. 1979); IIA Fratcher, Scott on Trusts § 156 (4th ed. 1987); Restatement 2d, Trusts § 156]. Goff involved a

Keough self-employed pension plan while Graham, Lichstrahl and Daniel involved pension and profit sharing plans established by a professional corporation of which the debtor was the (1) sole shareholder, (2) trustee and (3) principal beneficiary. Lichstrahl analyzed and applied Florida law to determine if it was the equivalent of a settlor creating a spendthrift trust in the settlor's favor (disregarding the corporate form because of the broad control debtor had) while Graham and Daniel implicitly determined similar pension plans were not spendthrift trusts under Iowa and California law, respectively. Similar facts would most likely produce the same results applying Alaska law, whether Alaska adheres to Bogert, Scott or the Restatement.

We now turn to the average employee who neither controls the employer-settlor nor is a trustee under the plan. Is such a plan excluded under BC § 541(c)(2)? Under Daniel yes, provided the plan is an enforceable spendthrift trust under Alaska law [See In re West, 81 B.R. 22 (BAP9 1987)]. Unfortunately, neither Alaska decisional nor statutory law [except the ill-fated AS § 09.38.017(d)] illuminates this issue. It may even be questionable whether spendthrift trusts are recognized at all in Alaska. AS §§ 06.05.180 and 06.25.140 refer to spendthrift trusts in relation to the duties of a trustee; however, neither defines or otherwise explicates on what is a spendthrift trust under Alaska law, nor is there any reported decision on the question. These sections, with AS § 09.30.-017(d), are, however, indicative that Alaska recognizes the general validity of spendthrift trusts, following the majority rule in the United States rather than the English and minority U.S. rule that such trusts are invalid or void as against public policy (an unreasonable restraint on alienation). The ultimate answer will be determined by the persuasiveness of counsels' arguments based on one or all of the three principal general authorities (Bogert, Scott or Restatement) and principal cases from other jurisdictions. [Matter of Brooks, 844 F.2d 258 (5th Cir 1988) contains an excellent example of the analytical and factual problems involved with this alternative; see also In re Rabo, 97 B.R. 827 (Bkrtcy.W.D.PA 1989).]

Coming full circle, let us consider a seemingly convoluted theory that AS § 09.38.017(d) is not pre-empted. ERISA § 514(a) only pre-empt's state law, not other Federal law. Keeping this in mind, one might argue that BC § 541(c)(2) (a federal statute) expressly incorporates by reference the applicable non-bankruptcy state law of debtor's domicile, thereby making it an integral part of BC § 541(c)(2). Strange as it may sound, this theory finds support in the very rationale underpinning Daniel and the cases it follows [BC § 541(c)(2) preserved restrictions on the debtor to alienate, enforceable under otherwise applicable state non-bankruptcy law, excluding such nonalienable interests from the estate]. If, as noted, BC § 541(c)(2) incorporates otherwise applicable non-bankruptcy state law, it is the Federal statute incorporating the state law, not the state law incorporated, being applied. It follows, a fortiori, that ERISA § 514(a), because it does not pre-empt BC § 541(c)(2), does not pre-empt AS § 09.38.017(d) to the extent it is incorporated into BC § 541(c)(2). Therefore, BC § 541(c)(2), which incorporates AS § 09.38.017(d), conclusively presumes the ERISA § 206(d)(1) mandated anti-alienation clause creates a spendthrift trust excluded from the debtor's estate. In all candor, this author must note the one case found which addresses this issue, the court rejected this very argument [In re Volpe, supra].

### III. Congressional Inconsistency

To add to the confusion, consider the potential disparate effects between filing and not filing bankruptcy. If a debtor remains outside bankruptcy, the ERISA § 206(d)(1) mandated anti-alienation clause protects an ERISA covered retirement plan from creditors. This clearly reflects Congressional intent to protect ERISA retirement plans from individuals' creditors. On the other hand, if a debtor files for bankruptcy protection under title 11, Goff - Graham - Lichstrahl - Daniel either eliminate or sharply curtail protection of retirement plans. This result appears to be consistent with Congressional intent, expressed in BC § 522(d)(10)(E), to only provide partial or limited protection to retirement plans. Thus, we are faced with two not entirely consistent Congressional expressions of intent. It is no small wonder that we mere mortals are somewhat confused and uncertain in determining which controls.

Goff - Graham - Lichstrahl - Daniel take the position that BC § 522(d)(10)(E) controls. The reasoning of those courts, in light of customarily applied rules of statutory interpretation, is both logical and persuasive. However, the courts manifestly fail to reconcile the difference in treatment and fundamental conflict in Congressionally expressed public policy. Why should ERISA-qualified retirement plans be totally beyond the reach of creditors if a debtor does not file bankruptcy but, at best, only partially protected if a debtor files bankruptcy? BC § 522, provides either uniform exceptions under BC § 522(d) or, at the option of a debtor if it is more beneficial, the same exemptions that would be available if the debtor did not file bankruptcy. Does this not indicate a Congressional policy determination that a debtor by filing bankruptcy should be in no worse a position in terms of the assets a debtor retains? In other words, a debtor should not be faced, as a debtor may be under existing judicial interpretations, with the unpalatable choice of preserving a qualified retirement plan and foregoing a fresh start, or getting a fresh start and possibly foregoing retirement benefits.

Perhaps, as more than one court has observed, only Congress can resolve this dichotomy. On the other hand, the courts could re-examine Goff - Graham - Lichstrahl - Daniel and determine, as the

Court did in *In re Hinshaw* [23 B.R. 233 (Bkrtcy.D.KN. 1982)], that an ERISA covered pension plan is exempt under BC § 522(b)(2)(A).

It is also interesting to note that an Alaskan teacher or public employee does not face such a dilemma. Not only are such pension plans exempt, but also probably excluded as spendthrift trusts under BC § 541(c)(2) by AS §§ 14.25.200 (teachers) and 39.35.500 (PERS). [But see *In re Goldberg*, 98 B.R. 353 (Bkrtcy. N.D.IL (1989) for potential problems when the employee makes voluntary contributions to the plan; *In re Swanson*, 873 F.2d 1121 (8th Cir. 1989) holding that "statutory" retirement funds are not "traditional" spendthrift trusts and, thus, not excluded.]

A related question is whether the Alaska Legislature can amend AS § 09.38.017(e)(3) to delete the specific reference to ERISA plans and simply adopt definitional language similar to that contained in ERISA § 3(2)(A), thereby avoiding pre-emption by ERISA § 514(a). The answer is probably not because of the language in *Mackey* that state laws "specifically designed to affect employee benefit plans" are pre-empted under § 514(a)." [108 S.Ct. at 2185] Footnote 4 in *Mackey* may be interpreted in a manner giving hope, albeit slim, that a statute exempting all pension plans, whether or not ERISA covered might be sufficiently general to avoid pre-emption by ERISA § 514(a). It appears, however, that only Congress can legislate in a manner which would specifically exempt private retirement plans, except for the plan established or maintained by that extremely rare, if not extinct, employer engaged in a business not affecting interstate commerce.

The legislature might consider enacting a new statute as part of AS 13.36 (dealing with trusts in general) defining enforceable spendthrift trusts in a manner to include pension plans. This alternative, unfortunately, raises significant public policy questions because such a statute could inadvertently extend to attempts by settlors to create spendthrift trusts in their own favor, which is not particularly sound from a public policy standpoint.

#### IV. Summary

In summary, with respect to private retirement plans, the conclusion is that a debtor has a choice of several alternatives, any of which may or may not be satisfactory.

1. Remain outside bankruptcy, relying on ERISA § 206(d)(1) to protect qualified pension plan benefits (other than IRAs) [Part IIIA of *Mackey* indicates that state garnishment statutes may not be used to reach pension plan benefits] and AS § 09.38.017 to protect an IRA.
2. File bankruptcy and elect the Federal exemptions using BC § 522(d)(10)(E) to protect part of a qualified pension plan.
3. File bankruptcy and elect the state exemptions using AS § 09.38.017 to protect an IRA.
4. File bankruptcy and hope that, to the extent not exempt, a pension plan is excluded under BC § 541(c)(2) if the "trust" qualifies as a spendthrift trust under Alaska law. [Note BC § 541(c)(2) is applicable, if at all, irrespective of whether Federal or state exemptions are elected.]
5. Terminate participation in the ERISA covered retirement plan in a manner permitting withdrawal of vested contributions and "roll-over" the funds into an IRA under IRC § 408(a)(1) thereby bringing the funds within that part of AS § 09.38.017 which is perhaps not pre-empted by ERISA § 514(a).

Not one of the alternatives can be considered an iron-clad, fool-proof method of preserving a private retirement plan. Until either Congress deems it appropriate to legislate a resolution or the Ninth Circuit reverses its decision interpreting BC § 522(b)(2)(A) as not exempting pension plans, counsel for debtors (and debtors) will have to proceed using whichever alternative, or combination, which, under the particular facts and circumstances, will most probably preserve the maximum amount of a debtor's assets. Debtor and debtors' counsel may find solace of sorts in the fact that trustees and trustees' counsel face the same uncertain status of the law. Furthermore, there are serious additional problems faced by trustees in "cashing-out" a qualified retirement plan not distributable until the debtor terminates employment. Given the two-sided nature of the problem, it is possible most of the controversies which may arise will be resolved by a negotiated settlement rather than litigated. A point which Judge Ross will undoubtedly welcome, particularly since little else written here provides his Honor much assistance.

Counsel should carefully review all the private pension plan documents (not just the Summary Plan Description furnished employees) and the IRS qualification determination letter. The particular language used in a given plan or the trust instrument may be crucial to a final determination as to whether such plan is excluded under BC § 541(c)(2).

It would also be advisable for counsel to review each case cited in this article and the cases cited in those cases to glean other arguments which may be advanced in support of whichever position is advantageous to counsel's client. Until some court renders a controlling decision, it is "open season."

# Alaska State Legislature



## Senate Judiciary Committee

April 20, 1990

### MEMORANDUM

TO: All Senators

FROM: Senator Jan Faiks, Chairman  
Senate Judiciary Committee

SUBJECT: CSSB 252 (Jud) "An Act relating to retirement system exemptions from execution."

SB 252 is before the Senate for consideration today. This bill was introduced by the Judiciary Committee at the request of the Alaska Court System, and was amended in committee at the suggestion of the Public Employees' Retirement System (PERS) and the Municipality of Anchorage. It makes certain changes to the Alaska Exemptions Act, AS 09.38. This act allows a debtor to protect some of the debtor's property from creditors.

Section 1 of CSSB 252 (Jud) amends AS 09.38.015(b). That section currently provides that in debt collection proceedings other than bankruptcy, a debtor's interest in the Teachers' Retirement System (TRS) or in PERS is exempt from execution by creditors. Section 1 adds the Judicial Retirement System (JRS) and the Elected Public Officers' Retirement System (EPORS) to this list, thus treating all state retirement benefits the same way for purposes of protecting them from seizure by creditors.

Section 2 of CSSB 252 (Jud) amends AS 09.38.017. That section currently provides that in any debt collection proceeding, including bankruptcy, a debtor's retirement accounts (public or private) are exempt from execution by creditors.

However, subsection (c) of AS 09.38.017 provides that this particular exemption does not prevent payment of benefits to an ex-spouse under a qualified domestic relations order (QDRO) as defined in federal law. The most common type of QDRO is a property settlement order issued by a divorce court. It is used to award one spouse a portion of the other spouse's retirement benefits.

The definition of QDRO contained in federal law authorizes the payment of an employee's retirement accounts to an ex-spouse either when the employee retires, or when the employee is eligible to retire. However, this federal definition specifically exempts state and local government retirement plans, which are allowed to adopt their own rules regarding time of payment of retirement benefits to an ex-spouse. In Alaska, the laws and ordinances governing PERS and other state and municipal retirement plans provide that retirement benefits may only be paid to an ex-spouse when an employee actually retires, not when the employee is merely eligible to retire.

Because AS 09.38.017(c) references the federal definition of QDRO, and because this federal definition specifically authorizes government plans to adopt their own rules regarding time of payment of QDRO's, it should be clear that AS 09.038.017(c) does not require state and local government plans to use the federal definition. Section 2 of CSSB 252 (Jud) merely clarifies this, by codifying the federal definition more expressly.

**ANCHORAGE POLICE AND FIRE RETIREMENT BOARD  
ALASKA STATE LEGISLATION ON  
QUALIFIED DOMESTIC RELATIONS ORDERS (QDRO's)**

**FACTS:**

Under current Alaska Law, certain pension benefits are arguably subject to attachment under the Anchorage Police and Fire Retirement System; while those same benefits under PERS and other state retirement plans are not.

**BACKGROUND:**

In 1988, the Alaska Legislature adopted AS 09.38.017 which protects both public and private pension benefits from assignment except under a "Qualified Domestic Relations Order" or QDRO. Under AS 09.38.017, a QDRO is defined by reference to federal law, at U.S.C. 414, as being able to assign a member's pension benefits to satisfy a child or spousal support or property settlement when a member is first eligible to retire, regardless of when or whether the member actually retired.

All government pension plans are specifically exempted by ERISA from federal pension regulations. ERISA allows for government plans to define or restrict application of QDRO's as its regulations see fit. Alaska State Legislation, AS 39.35.370(e), for PERS and TRS has been adopted which states payment on a QDRO may only be made to the alternate payee (i.e. ex-spouse) at the time the member actually retires. The PERS statute AS 39.35.370 (e) does not allow for payment of benefits from the plan until the following requirements are met: (1) the member meets the eligibility requirement of this section, (2) the member terminates employment; and (3) the member applies for retirement. Anchorage Municipality Code (AMC) 3.85.075 was passed in June 1989, which allows the Anchorage Police and Fire Retirement System to make payments to an alternate payee only from the date the member actually retires.

Alaska Statute 09.38.017 may jeopardize the Police and Fire Retirement Board's and the Anchorage Assembly's ability to define or restrict application of QDRO's as allowed by ERISA. AS 09.38.017 clearly denies members of the Anchorage Police and Fire Retirement System equal protection of law by treating them differently from members of PERS and TRS, without apparent justification.

**SOLUTION:**

The problem can be easily solved by merely clarifying AS 09.38.017(c) to exempt governmental pension and retirement plans from the definition incorporated in this statute. This change is fully consistent with the intent of the federal law, which allows governmental plans to define or restrict application of QDRO's.

**CONTACT:** D. Lee Wentworth

(907) 343-6440

MEMORANDUM

TO: Representative H.A. "Red" Boucher, Chair  
House State Affairs Committee

FROM: Dennis J. Burns, Aide  
House State Affairs

DATE: March 28, 1990

RE: HB 568

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The following is in response to your request for background information:

Senator Rodey introduced SB 508 on 4/14/88 as a Senate Judiciary Committee bill. This bill was signed into law on 7/12/88 (Chapter 135 SLA 88).

The language in Section 1. AS 09.38.017(c) of HB 568 originated in SB 508.

The purpose of SB 508 was to prevent the attachment of retirement benefits (PERS and TRS) and IRAs in bankruptcy proceedings. During that time, there were a number of Alaskans who were experiencing financial reverses, and it seemed unfair to allow for the total depletion of their financial assets.

The language in Section 1. AS 09.38.017(c) was recommended by Legal Services. The intent was to recognize that there were some situations (QDRO) which should not be exempt. As I understand the intent of this section, however, the QDRO was to fit under the existing state PERS and TERS definition of QDRO, and if no definition existed then the federal definition would apply.

According to an opinion by the former Attorney General Grace Berg Schaible, there are two definitions of QDRO:

Under the federal definition, a QDRO can order payment of a benefit to a spouse as soon as a member is both vested and old enough to take early retirement, regardless of whether the member has terminated employment or chooses to take early retirement.

According to Ms. Schaible, the PERS and TRS definition of QDRO does not allow payment of benefits to a spouse before the member begins to receive the benefit.

However, it is unclear reading the statutes - AS 14.25.220(31) and AS 39.35.680(34) - whether the QDRO definition as defined by Mr. Schaible is implicit.

Ms. Schaible also noted that the federal definition of QDRO would not be applicable to PERS and TRS because 26 U.S.C. 414(p) provides that the federal definition does not apply to PERS or TRS.

3-5-70

SB 252

Supported by PERS

Is this a clarification of current law or a change?

new sec 3 (temporary law) changes to OR 38.017  
purpose section, that provides that ~~the law~~  
not apply to any QPRO that is in existence at the time of  
its effective date.

problem - this could be interpreted to mean that we are changing  
the law, not clarifying it, and that

changes made

# Municipality of Anchorage



P.O. BOX 196650  
ANCHORAGE, ALASKA 99519-6650  
(907) 343-4295

TOM FINK,  
MAYOR

## POLICE AND FIRE RETIREMENT BOARD

RECEIVED

March 5, 1990

MAR 12 1990

JAN FAIKS  
SENATE OFFICE

The Honorable Jan Faiks  
The State Senate  
The State Capitol, Room 101  
P. O. Box V  
Juneau, AK 99811

Dear Ms. Faiks:

Thank you for taking the time to visit with John Cowdery and I during our visit to Juneau on February 20, 1990. The issue we discussed regarding when an alternate payee (i.e. ex-spouse) may receive payments on a Qualified Domestic Relations Orders (QDRO) is of concern to the Police and Fire Retirement Board, the Retirement System members and retirees.

As discussed with you and your staff, the problems are listed below:

1. All government pension plans are specifically exempted by ERISA from federal pension regulations. ERISA allows for government plans to define or restrict application of QDRO's as its regulations see fit. Thus, Alaska State Legislation for PERS and TRS has been adopted which states payment may only be made to an alternate payee at the time the member actually retires.
2. Alaska Statute 09.38.017, passed in 1988, it allows for the alternate payee to elect to receive their payments from other government plans at the time the member is first eligible to retire, not when they actually retire. As stated above, PERS and TRS legislation does not allow for payment to an alternate payee until the retiree actually retires.

The Honorable Jan Faiks

March 5, 1990

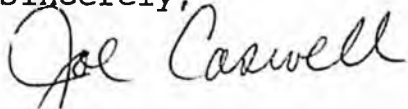
Page 2

3. Subsequently, in June 1989, Anchorage Municipal Code (AMC) 3.85.075 was passed which allows the Anchorage Police and Fire Retirement System to make payment to an alternate payee only from the date the member actually retires.
4. AS 09.38.017 may jeopardize the Police and Fire Retirement Board's and the Anchorage Assembly's ability to define or restrict application of QDRO's as allowed under ERISA. AS 09.38.017 clearly denies members of the Anchorage Police and Fire Retirement pension plan the equal protection of law by treating them differently from members of state governmental plans, without apparent justification.
5. The problem can be easily solved by merely clarifying AS 09.38.017 to exempt governmental pension and retirement plans from the definition incorporated in AS 09.38.017(c). The change is fully consistent with the intent of the federal laws incorporated by reference in AS 09.38.017(c).

As you are aware, the proposed change to State Statute AS 09.38.017 (c) has been reviewed by the State Attorney General's office and has support of the Public Employee Retirement System administration, as well as all the Police and Fire Retirement System members.

If you have any further questions, please call me or the Police and Fire Retirement Board Staff at (907) 343-6440.

Sincerely,



Joe Caswell  
Chairman  
Police and Fire Retirement Board

JC/lh:c  
Attachments

BY THE STATE AFFAIRS COMMITTEE

1 IN THE HOUSE

2

HOUSE BILL NO. 568

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

SIXTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6 For an Act entitled: "An Act relating to the definition of qualified  
7 domestic relations orders for retirement plan inter-  
8 est and payment exemptions."

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

10 \* Section 1. AS 09.38.01(c) is amended to read:

11 (c) The exemptions provided by (a) of this section do not pre-  
12 vent the payment of benefits under a retirement plan to an alternate  
13 payee under a qualified domestic relations order. In this subsection,  
14 "qualified domestic relations order" has the meaning given in 26  
15 U.S.C. 414(p), except as applied to "governmental plans" as defined  
16 under 29 U.S.C. 1002 in which case "qualified domestic relations  
17 order" has the meaning given by the plan or by the law governing the  
18 plan.

**(p) Qualified domestic relations order defined.**

For purposes of this subsection and section 401(a)(13)—

**(1) In general.**

(A) Qualified domestic relations order. The term "qualified domestic relations order" means a domestic relations order—

(i) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(ii) with respect to which the requirements of paragraphs (2) and (3) are met.

(B) Domestic relations order. The term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which—

(i) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(ii) is made pursuant to a State domestic relations law (including a community property law).

(2) Order must clearly specify certain facts. A domestic relations order meets the requirements of this paragraph only if such order clearly specifies—

(A) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(B) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(C) the number of payments or period to which such order applies, and

(D) each plan to which such order applies.

(3) Order may not alter amount, form, etc., of benefits. A domestic relations order meets the requirements of this paragraph only if such order—

(A) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(B) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(C) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(4) Exception for certain payments made after earliest retirement age.

(A) In general. A domestic relations order shall not be treated as failing to meet the requirements of subparagraph (A) of paragraph (3) solely because such order requires that payment of benefits be made to an alternate payee—

(i) on or in the case of any payment before a participant has separated from service, after the date on which the participant attains (or would have attained) the earliest retirement age,

(ii) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of the benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(iii) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of clause (ii), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(B) Earliest retirement age. For purposes of this paragraph, the term "earliest retirement age" means the earlier of—

(i) the date on which the participant is entitled to a distribution under the plan, or

(ii) the later of—

(I) the date the participant attains age 50, or

(II) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

(5) Treatment of former spouse as surviving spouse for purposes of determining survivor benefits. To the extent provided in any qualified domestic relations order—

(A) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of sections 401(a)(11) and 417 (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and

(B) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 417(d).

A plan shall not be treated as failing to meet the requirements of subsection (a) or (k) of section 401 which prohibit payment of benefits before termination of employment solely by reason of payments to an alternate payee pursuant to a qualified domestic relations order.

(6) Plan procedures with respect to orders.

(A) Notice and determination by administrator. In the case of any domestic relations order received by a plan—

(i) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and

(ii) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(B) Plan to establish reasonable procedures. Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders.

(7) Procedures for period during which determination is being made.—

(A) In general. During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this paragraph referred to as the "segregated amounts") would have been payable to the alternate

payee during such period if the order had been determined to be a qualified domestic relations order.

(B) Payment to alternate payee if order determined to be qualified domestic relations order. If within the 18-month period described in subparagraph (E) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(C) Payment to plan participant in certain cases. If within the 18-month period described in subparagraph (E)—

(i) it is determined that the order is not a qualified domestic relations order, or

(ii) the issue as to whether such order is a qualified domestic relations order is not resolved,

then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there has been no order.

(D) Subsequent determination or order to be applied prospectively only. Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in subparagraph (E) shall be applied prospectively only.

(E) Determination of 18-month period. For purposes of this paragraph, the 18-month period described in this subparagraph is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(8) Alternate payee defined. The term "alternate payee" means any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(9) Subsection not to apply to plans to which section 401(a)(13) does not apply. This subsection shall not apply to any plan to which section 401(a)(13) does not apply. For purposes of this title, except as provided in regulations, any distribution from an annuity contract under section 403(b) pursuant to a qualified domestic relations order shall be treated in the same manner as a distribution from a plan to which section 401(a)(13) applies.

(10) Waiver of certain distribution requirements. With respect to the requirements of subsections (a) and (k) of section 401, 403(b), and section 409(d), a plan shall not be treated as failing to meet such requirements solely by reason of payment to an alternate payee pursuant to a qualified domestic relations order.

(11) Consultation with the Secretary. In prescribing regulations under this subsection and section 401(a)(13), the Secretary of Labor shall consult with the Secretary.

(q) Highly compensated employee.

(1) In general. The term "highly compensated employee" means any employee who, during the year or the preceding year—

(A) was at any time a 5-percent owner,

(B) received compensation from the employer in excess of \$75,000,

(C) received compensation from the employer in excess of \$50,000 and was in the top-paid group of employees for such year, or

(D) was at any time an officer and received compen-

sation greater than 50 percent of the amount in effect under section 415(b)(1)(A) for such year.

The Secretary shall adjust the \$75,000 and \$50,000 amounts under this paragraph at the same time and in the same manner as under section 415(d).

(2) Special rule for current year. In the case of the year for which the relevant determination is being made, an employee not described in subparagraph (B), (C), or (D) of paragraph (1) for the preceding year (without regard to this paragraph) shall not be treated as described in subparagraph (B), (C), or (D) of paragraph (1) unless such employee is a member of the group consisting of the 100 employees paid the greatest compensation during the year for which such determination is being made.

(3) 5-percent owner. An employee shall be treated as a 5-percent owner for any year if at any time during such year such employee was a 5-percent owner (as defined in section 416(i)(1)) of the employer.

(4) Top-paid group. An employee is in the top-paid group of employees for any year if such employee is in the group consisting of the top 20 percent of the employees when ranked on the basis of compensation paid during such year.

(5) Special rules for treatment of officers.—

(A) Not more than 50 officers taken into account. For purposes of paragraph (1)(D), no more than 50 employees (or, if lesser, the greater of 3 employees or 10 percent of the employees) shall be treated as officers.

(B) At least 1 officer taken into account. If for any year no officer of the employer is described in paragraph (1)(D), the highest paid officer of the employer for such year shall be treated as described in such paragraph.

(6) Treatment of certain family members.

(A) In general. If any individual is a member of the family of a 5-percent owner or of a highly compensated employee in the group consisting of the 10 highly compensated employees paid the greatest compensation during the year, then—

(i) such individual shall not be considered a separate employee, and

(ii) any compensation paid to such individual (and any applicable contribution or benefit on behalf of such individual) shall be treated as if it were paid to (or on behalf of) the 5-percent owner or highly compensated employee.

(B) Family. For purposes of subparagraph (A), the term "family" means, with respect to any employee, such employee's spouse and lineal ascendants or descendants and the spouses of such lineal ascendants or descendants.

(C) Rules to apply to other provisions.

(i) In general. Except as provided in regulations and in clause (ii), the rules of subparagraph (A) shall be applied in determining the compensation of (or any contributions or benefits on behalf of) any employee for purposes of any section with respect to which a highly compensated employee is defined by reference to this subsection.

(ii) Exception for determining integration levels. Clause (i) shall not apply in determining the portion of the compensation of a participant which is under the integration level for purposes of section 401(l).

(7) Compensation. For purposes of this subsection—

(A) In general. The term "compensation" means

and the current funding (pay-as-you-go) cost method are not acceptable actuarial cost methods. The Secretary of the Treasury shall issue regulations to further define acceptable actuarial cost methods.

→ (32) The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act (59 Stat. 669).

(33)(A) The term "church plan" means a plan established and maintained (to the extent required in clause (ii) of subparagraph (B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1954 [26 USCS § 501].

(B) The term "church plan" does not include a plan—

(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513 of the Internal Revenue Code of 1954 [26 USCS § 513]), or

(ii) if less than substantially all of the individuals included in the plan are individuals described in subparagraph (A) or in clause (i) of subparagraph (C) (or their beneficiaries).

(C) For purposes of this paragraph—

(i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(ii) The term employee of a church or a convention or association of churches includes—

(I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of the Internal Revenue Code of 1954 [26 USCS § 501] and which

(27) "part-time teacher" means a teacher occupying a position requiring teaching on a regular basis for at least 50 percent of the normal workweek at a teaching assignment, excluding teaching as an assistant or graduate assistant, or teaching on a substitute, temporary, or per diem basis;

(28) "permanent disability" means a physical or mental condition which, in the judgment of the administrator, based upon medical reports and other evidence satisfactory to the administrator, presumably prevents a member from satisfactorily performing the member's usual duties for the member's employer or the duties of another position or job which an employer makes available for which the member is qualified by training or education;

(29) "prescribed rate of interest" means the rate of interest used for computing employer contributions, for preparing actuarial tables used by the system, for crediting interest to members' contributions, and for charging interest on members' indebtedness accounts;

(30) "public school" means a school operated by publicly elected or appointed school officials in which the program and activities are under the control of those officials and which is supported by public funds;

(31) "qualified domestic relations order" means a divorce or dissolution judgment under AS 25.24, including an order approving a property settlement, that

(A) creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a member;

(B) sets out the name and last known mailing address, if any, of the member and of each alternate payee covered by the order;

(C) sets out the amount or percentage of the member's benefit, or of any survivor's benefit, to be paid to the alternate payee, or sets out the manner in which that amount or percentage is to be determined;

(D) sets out the number of payments or period to which the order applies;

(E) does not require any type or form of benefit or any option not otherwise provided by this chapter;

(F) does not require an increase of benefits in excess of the amount provided by this chapter, determined on the basis of actuarial value; and

(G) does not require the payment, to an alternate payee, of benefits that are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order;

(32) "retired teacher or member" means a member who is terminated, who has not received a refund from the system, and who is receiving a benefit, other than disability, from the system;

(33) "retirement" means that period of time from the first day of the month following

CURRENT STATUS: (S) STA

STATUS DATE: 04/11/88

JRN-DATE	JRN-PG		ACTION
04/11/88	2959	(S)	READ THE FIRST TIME - REFERRAL(S)
04/11/88	2959	(S)	STA, THEN FIN

SB 504

"An Act relating to contributions from permanent fund dividends to Yukon Quest International, Ltd.; and providing for an effective date."

PRIME SPONSOR: FINANCE COMMITTEE

CURRENT STATUS: (S) STA

STATUS DATE: 04/11/88

JRN-DATE	JRN-PG		ACTION
04/11/88	2959	(S)	READ THE FIRST TIME - REFERRAL(S)
04/11/88	2960	(S)	STA, THEN FINANCE

SB 505

"An Act establishing the Alaska Children's Commission; and providing for an effective date."

PRIME SPONSOR: JUDICIARY COMMITTEE

CURRENT STATUS: (S) CALFNDAR 5/9

STATUS DATE: 05/09/88

JRN-DATE	JRN-PG		ACTION
04/12/88	2984	(S)	READ THE FIRST TIME - REFERRAL(S)
04/12/88	2984	(S)	STA, THEN HES, FIN
04/28/88	3244	(S)	STA RPT CS 3DP SAME TITLE
04/28/88	3244	(S)	FISCAL NOTE PUBLISHED
05/06/88	3524	(S)	HES REFERRAL WAIVED
05/09/88	3751	(S)	FIN REFERRAL WAIVED
05/09/88	3758	(S)	RULES TO 2ND SUPPLEMENTAL CALENDAR
05/09/88	3758	(S)	NOT TAKEN UP

SB 506

"An Act providing for the issuance of general obligation bonds in the amount of \$64,000,000 for the purpose of paying the cost of highway, road, and trail projects; and providing for an effective date."

PRIME SPONSOR: JUDICIARY COMMITTEE

CURRENT STATUS: (S) TRA

STATUS DATE: 04/12/88

JRN-DATE	JRN-PG		ACTION
04/12/88	2984	(S)	READ THE FIRST TIME - REFERRAL(S)
04/12/88	2984	(S)	TRA, THEN FIN

SB 507

"An Act relating to bonds of contractors for public buildings and works; and providing for an effective date."

PRIME SPONSOR: RULES COMMITTEE

BY REQUEST OF THE GOVERNOR

CURRENT STATUS: (S) TRA

STATUS DATE: 04/13/88

JRN-DATE	JRN-PG		ACTION
04/13/88	3006	(S)	READ THE FIRST TIME - REFERRAL(S)
04/13/88	3006	(S)	TRA, THEN L&C, FINANCE
04/13/88	3006	(S)	ZERO FISCAL NOTE PUBLISHED
04/13/88	3007	(S)	GOVERNOR'S TRANSMITTAL LETTER

SB 508

CSSB 508(FIN)

"An Act relating to property exemptions for homesteads, for certain retirement plan interests and payments, and for other property."

PRIME SPONSOR: JUDICIARY COMMITTEE

CURRENT STATUS: CHAPTER 135 SLA 88

STATUS DATE: 06/08/88

JRN-DATE	JRN-PG		ACTION
04/14/88	3030	(S)	READ THE FIRST TIME - REFERRAL(S)
04/14/88	3030	(S)	JUD, THEN FINANCE
04/21/88	3148	(S)	JUD WAIVED FIVE-DAY NOTIFICATION RULE
04/25/88	3182	(S)	JUD RPT 4DP
04/25/88	3182	(S)	ZERO FISCAL NOTE PUBLISHED
05/03/88	3393	(S)	FIN RPT CS 4DP 2HR NEW TITLE
05/03/88	3394	(S)	ZERO FISCAL NOTE PUBLISHED
05/05/88	3459	(S)	RULES TO CALENDAR
05/05/88	3461	(S)	READ THE SECOND TIME
05/05/88	3461	(S)	FIN CS ADOPTED UNAN CONSENT
05/05/88	3461	(S)	ADVANCED TO THIRD READING UNAN CONSENT
05/05/88	3461	(S)	READ THE THIRD TIME - CSSB 508(FIN)
05/05/88	3461	(S)	PASSED Y20 N-
05/05/88	3485	(S)	TRANSMITTED TO (H)
05/05/88	3515	(H)	READ THE FIRST TIME - REFERRAL(S)
05/06/88	3515	(H)	LABOR & COMMERCE THEN JUDICIARY
05/07/88	3607	(H)	L&C REFERRAL WAIVED
05/08/88	3639	(H)	JUD RPT 4DP
05/09/88		(H)	RULES TO CALENDAR 5/9/88
05/09/88	3685	(H)	READ THE SECOND TIME
05/09/88	3685	(H)	ADVANCED TO THIRD READING UNAN CONSENT
05/09/88	3685	(H)	READ THE THIRD TIME - CSSB 508(FIN)
05/09/88	3685	(H)	PASSED Y35 N- A5
05/09/88	3685	(H)	RETURN TO (S), TRANSMIT TO GOVERNOR NEXT
05/27/88	3812	(S)	1:15 PM 5/17/88 TRANSMITTED TO GOVERNOR
07/12/88	3651	(S)	SIGNED INTO LAW 6/8 CHAPTER 135 SLA 88
07/12/88	3852	(S)	EFFECTIVE DATE OF LAW 9/6/88

## Chapter 115

## AN ACT

Relating to property exemptions for homesteads, for certain retirement plan interests and payments, and for other property.

Section 1. AS 09.38.010(a) is amended to read:

09.38.010(a)

(a) An individual is entitled to an exemption as a homestead of the individual's interest in property in this state used as the principal residence of the [THAT] individual or the dependents of the [THAT] individual, but the value of the homestead exemption may not exceed \$54,000 [527,000].

Sec. 2. AS 09.38.010(b) is amended to read:

09.38.010(b)

(b) If property owned by the entirety or in common is used by one or more individual owners or their dependents as their principal residence, each owner is entitled to a homestead exemption of that owner's interest in the property as provided in (a) of this section. The aggregate value of multiple homestead exemptions allowable with respect to a single living unit may not exceed \$54,000 [527,000]. If there are multiple owners of property exempt as a homestead, the value of the exemption of each individual owner may not exceed the [THAT] individual owner's pro rata portion of \$54,000 [527,000].

Sec. 3. AS 09.38 is amended by adding a new section to read:

09.38.017

Sec. 09.38.017. EXEMPTION OF RETIREMENT PLAN INTERESTS AND PAYMENTS. (a) In addition to the exemption under AS 09.38.015(b), the following are exempt from a claim of an individual's creditor:

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## Chapter 115

(1) the interest of the individual in a retirement plan; and

(2) the money or other assets payable to the individual from a retirement plan.

(b) The exemptions provided by (a) of this section do not apply to a contribution made by an individual to a retirement plan within 120 days before the individual files for bankruptcy.

(c) The exemptions provided by (a) of this section do not prevent the payment of benefits under a retirement plan to an alternate payee under a qualified domestic relations order. In this subsection, "qualified domestic relations order" has the meaning given in 26 U.S.C. 414(p).

(d) A retirement plan exempt from claims under (a) of this section is conclusively presumed to be a spendthrift trust under this section.

(e) In this section,

(1) "alternate payee" has the meaning given in 26 U.S.C. 414(p)(8);

(2) "individual" means an individual who is a participant in, a beneficiary of, or an alternate payee of a retirement plan;

(3) "retirement plan" means a retirement plan that is qualified under 26 U.S.C. 401(a), 26 U.S.C. 403(a), 26 U.S.C. 401(b), 26 U.S.C. 408, or 26 U.S.C. 407 (Internal Revenue Code).

Sec. 4. AS 09.38.020 is amended to read:

Sec. 09.38.020. EXEMPTIONS OF PERSONAL PROPERTY SUBJECT TO CREDIT LIMITATIONS. (a) An individual is entitled to an exemption in property not to exceed an aggregate value of \$3,000 [51,500] chosen by the individual from the following categories of property:

(1) household goods and wearing apparel (exclusively

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## Chapter 135

necessary for one household:

(2) if reasonably held for the personal use of the individual or a dependent, books and musical instruments; and

(3) family portraits and heirlooms of particular sentimental value to the individual.

(b) An individual is entitled to exemption of jewelry, not exceeding \$1,000 [\$500] in aggregate value, if held for the personal use of the individual or a dependent.

(c) An individual is entitled to exemption, not exceeding \$2,800 [\$1,400] in aggregate value, of implements, professional books, and tools of the trade.

(d) An individual is entitled to the exemption of pets to the extent of a value not exceeding \$1,000 [\$500].

(e) An individual is entitled to an exemption of one motor vehicle to the extent of a value not exceeding \$3,000 [\$1,500] if the full value of the motor vehicle does not exceed \$20,000 [\$10,000].

• Sec. 5. AS 09.38.025(a) is amended to read:

(a) Except as provided in this section or AS 09.38.017, an individual is entitled to exemption of unmaturing life insurance and annuity contracts owned by the individual. If the contracts have accrued dividends and loan values available to the individual aggregating more than \$10,000 [\$5,000], a creditor may obtain a court order requiring the individual debtor to pay the creditor, and authorizing the creditor on the debtor's behalf to obtain payment of, the amount of the accrued dividends and loan values in excess of \$10,000 [\$5,000] or the amount of the creditor's claim, whichever is less.

• Sec. 6. AS 09.38.030(a) is amended to read:

(a) Except as provided in (b) and (c) of this section and AS 09.38.050, an individual debtor is entitled to an exemption of the

09.38.025(n)

09.38.030(n)

## Chapter 135

Individual debtor's weekly net earnings not to exceed \$750 [\$375]. The weekly net earnings of an individual are determined by subtracting from the weekly gross earnings all sums required by law or court order to be withheld. The weekly net earnings of an individual paid on a monthly basis are determined by subtracting from the monthly gross earnings of the individual all sums required by law or court order to be withheld and dividing the remainder by 4.3. The weekly net earnings of an individual paid on a semi-monthly basis are determined by subtracting from the semi-monthly gross earnings all sums required by law or court order to be withheld and dividing the remainder by 2.17.

• Sec. 7. AS 09.38.030(b) is amended to read:

(b) An individual who does not receive earnings either weekly, semi-monthly or monthly is entitled to a maximum exemption for the aggregate value of cash and other liquid assets available in any month of \$1,400 [\$700], except as provided in AS 09.38.050. The term "liquid assets" includes deposits, securities, notes, drafts, accrued vacation pay, refunds, prepayments, and receivables.

• Sec. 8. AS 09.38.030(c) is amended to read:

(c) The following property, unless exempt without limitation under AS 09.38.015 or 09.38.017, upon receipt by and while it is in the possession of the individual, shall be treated as earnings, income, cash, or other liquid assets under this section:

(1) benefits paid by reason of disability, illness, or unemployment;

(2) money or property received for alimony or separate maintenance;

(3) proceeds of insurance, a judgment, or a settlement, or other rights accruing as a result of bodily injury of the individual or of the wrongful death or bodily injury of another individual of

Chapter 115

whom the individual was or is a dependent;

(4) proceeds or benefits paid or payable on the death of an insured, if the individual was the spouse or a dependent of the insured; and

(5) amounts paid under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract, providing benefits by reason of age, illness, disability, or length of service.

\* Sec. 9. AS 09.38.050(b) is amended to read:

09.38.050(b)

(b) The exemption amounts under AS 09.38.010 may be increased when the individual submits an affidavit, under penalty of perjury, stating that the individual's earnings alone support the individual's household; by so doing, the maximum part of the individual's aggregate disposable earnings for any week subject to execution may not exceed the amount by which the individual's disposable earnings for that week exceed \$550 [\$275], or, if the individual is claiming an exemption for cash or other liquid assets under AS 09.38.050(b), a maximum amount of \$2,200 [\$1,100] available in a [ANY] month is exempt.

\* Sec. 10. AS 09.38.055 is amended to read:

09.38.055

Sec. 09.38.055. BANKRUPTCY PROCEEDINGS. In a proceeding under 11 U.S.C. (Bankruptcy) [THE BANKRUPTCY ACT (11 U.S.C.)] only the exemptions under AS 09.38.010, 09.38.015(a), 09.38.017, 09.38.020, 09.38.025 and 09.38.030 apply.

\* Sec. 11. AS 09.38.017, added by sec. 1 of this Act, does not apply to the assets of a bankruptcy estate in a proceeding filed under 11 U.S.C. (Bankruptcy) before the effective date of this Act.

Eff. 9/6/88

Chapter 116

AN ACT

Providing for the establishment of the Institute for Circumpolar Health Studies within the University of Alaska; and providing for an effective date.

\* Section 1. FINDINGS. The legislature finds that

(1) the severe health problems of depression, alcoholism, and suicide are endemic to Alaska;

(2) millions of dollars and countless expenditures of energy and time have been spent attempting to solve or at least adequately address these problems in the state, but that major successes have not been achieved and that a new approach to these problems is needed;

(3) other circumpolar areas and nations, including Canada, Siberia, Greenland, and Scandinavia, also suffer from these problems, but that Alaska has failed to exchange research and information with these countries;

(4) the establishment of an Institute for Circumpolar Health Studies within the University of Alaska would be a major new step toward addressing and finding solutions to the health problems of Alaskans and inhabitants of other circumpolar regions;

(5) establishment of the Institute is a concept strongly supported by the International Union for Circumpolar Health and the American Public Health Association's national Arctic health science policy;

(6) Alaska is an especially appropriate location for such an

**Sec. 09.35.130. Third party claims.**

**NOTES TO DECISIONS**

This section is not grant of authority to court to determine title to property that is levied upon; it only deals with the circumstances under which property levied upon may be retained after a claim of ownership or the right of possession by a third party. *Keltner v. Curtis*, Sup. Ct. Op. No. 2913 (File No. S-162), 695 P.2d 1076 (1985).

**Sec. 09.35.160. Postponement of sale.**

**NOTES TO DECISIONS**

This statute's requirements do not apply to nonjudicial deed of trust foreclosure proceedings. *Ostrow v. Higgins*, Sup. Ct. Op. No. 3085 (File No. S-1004), 722 P.2d 936 (1986).

**Sec. 09.35.180. Confirmation of sale or resale.**

**NOTES TO DECISIONS**

**II. Procedure.**

**II. PROCEDURE.**

Civil Rule 60(b) motion not prohibited by subsection (d). — The court rejected the contention that they had judicially repealed subsection (d) of this section, which applies to "any other action or proceeding" and thus precludes collateral

but not direct attacks on orders of confirmation; since a Civil Rule 60(b) motion is a direct attack it is not prohibited by subsection (d) of this section. *Law Offices of Murphy L. Clark v. Altman*, Sup. Ct. Op. No. 2811 (File No. 6501), 680 P.2d 1125 (1984).

**Sec. 09.35.250. Redemption by judgment debtor or successor.**

**NOTES TO DECISIONS**

Quoted in *Law Offices of Murphy L. Clark v. Altman*, Sup. Ct. Op. No. 2811 (File No. 6501), 680 P.2d 1125 (1984).

Cited in *Moening v. Alaska Mut. Bank*, Sup. Ct. Op. No. 3274 (File No. S-1980), P.2d (1988).

**Sec. 09.35.260. Conveyance of property.**

**NOTES TO DECISIONS**

Quoted in *Law Offices of Murphy L. Clark v. Altman*, Sup. Ct. Op. No. 2811 (File No. 6501), 680 P.2d 1125 (1984).

**Sec. 09.35.310. Rights of purchaser and redemptioner.** The purchaser, from the time of sale until a resale or a redemption, or a redemptioner, from the time of redemption until another redemption, is entitled to the possession of the property purchased or redeemed. Where the property is in the possession of a tenant, the purchaser or redemptioner is entitled to receive the rents of the property or the value of the use and occupation of the property. (S 15.31 ch 101 SLA 1962)

Editor's notes. — This section is set out above to correct a minor error in the main pamphlet.

**Chapter 38. Alaska Exemptions Act.**

**Section**

- 10. Homestead exemption
- 15. Property exempt without limitation
- 17. Exemption of retirement plan interests and payments
- 20. Exemptions of personal property subject to value limitations
- 25. Exemption of unmaturred life insurance and annuity contracts

**Section**

- 30. Exemption of earnings and liquid assets
- 50. Increased exemption amount
- 55. Bankruptcy proceedings
- 115. Adjustment of dollar amounts

**Sec. 09.38.010. Homestead exemption.** (a) An individual is entitled to an exemption as a homestead of the individual's interest in property in this state used as the principal residence of the individual or the dependents of the individual, but the value of the homestead exemption may not exceed \$54,000.

(b) If property owned by the entirety or in common is used by one or more individual owners or their dependents as their principal residence, each owner is entitled to a homestead exemption of that owner's interest in the property as provided in (a) of this section. The aggregate value of multiple homestead exemptions allowable with respect to a single living unit may not exceed \$54,000. If there are multiple owners of property exempt as a homestead, the value of the exemption of each individual owner may not exceed the individual owner's pro rata portion of \$54,000.

(c) If property that includes a homestead is sold under an execution, the sale becomes effective upon confirmation by order of the court. The court shall enter the order of confirmation unless, within 60 days after the sale, the individual repurchases the property under this section or the court extends the time for confirmation upon the filing of a timely motion by a party in interest. The individual may repurchase property, including that individual's homestead, at a sale on execution before confirmation by paying into court the costs of the sale plus the lesser of either (1) the difference between the highest bid and the amount of the exemption in the property, or (2) the amount of the

creditor's claim. If the individual does not exercise the repurchase right under this subsection, the clerk of the court shall first remit an amount determined to be exempt to the individual from the proceeds of sale and the balance less the cost of the sale to the creditor. For the purpose of collecting an amount remaining unpaid on a judgment after repurchase of property by an individual under this subsection, the creditor or the creditor's assignee may not make another levy on the property repurchased.

(d) Upon entry of the order of confirmation under (c) of this section and expiration of the time period for repurchase, the clerk may execute a deed to the property and when delivered it shall be sufficient to convey all title of the individual in the premises sold to the purchaser at the sale. (§ 2 ch 62 SLA 1982; am §§ 1, 2 ch 135 SLA 1988)

**Cross references.** — For current exemption amounts, see 8 Alaska Administrative Code 95.030.

**Effect of amendments.** — The 1988 amendment substituted "the individual"

for "that individual" twice in subsection (a) and once in the last sentence in subsection (b), and "\$54,000" for "\$27,000" in subsection (a) and in the last two sentences in subsection (b).

#### NOTES TO DECISIONS

**Avoidance of judicial lien to extent of Impairment of homestead exemption.** — Section 522(f) of the Bankruptcy Code provides that "... the debtor may avoid the fixing of a [judicial] lien on ... property to the extent that such lien impairs an exemption ...". To determine whether there is such an impairment of a homestead exemption, the following steps are taken by the court: (1) all liens are ranked in order of priority (and equity, if any) to the extent of the value of the prop-

erty; (2) the gross amount of the homestead exemption is subtracted from the value of the property; and (3) from the remainder left, each lien is subtracted, one at a time, beginning with the most senior lien, until a judicial lien is reached. Then the judicial lien is subtracted. To the extent that all or any portion of the judicial lien exceeds the remainder derived in (2), above, it is voidable. In re Duncan, 43 Bankr. 833 (Bankr. D. Alaska 1984).

**Sec. 09.38.015. Property exempt without limitation.** (a) An individual is entitled to exemption of the following property:

- (1) a burial plot for the individual and the individual's family;
- (2) health aids reasonably necessary to enable the individual or a dependent to work or to sustain health;
- (3) benefits paid or payable for medical, surgical, or hospital care to the extent they are or will be used to pay for the care;
- (4) an award under AS 18.67 (Violent Crimes Compensation Board) or a crime victim's reparations Act of another jurisdiction;
- (5) benefits paid or payable as a longevity bonus under AS 47.45;
- (6) compensation or benefits paid or payable and exempt under federal law;
- (7) liquor licenses granted under AS 04;
- (8) limited entry permits granted under AS 16.43, except as provided in that chapter.

(b) The right to benefits held by the state on behalf of an individual which may become payable by reason of disability, unemployment or illness, amounts held in the teachers' or public employees' retirement system, and child support collection made by the child support enforcement agency are exempt.

(c) Property of the state, a general law or home rule municipality, the Alaska State Building Authority, the Alaska Municipal Bond Bank Authority, or other state public corporation is exempt.

(d) Real property held by a cemetery association established under AS 10.30 for the purpose of a cemetery and not exceeding 80 acres is exempt. (§ 2 ch 62 SLA 1982)

**Cross references.** — For the applicability of the exemptions from execution in income assignment orders for child support, see AS 09.65.132(g); for provisions exempting teachers' retirement salaries and certain other amounts from garnishment, execution or levy, see AS 14.25.200; for provisions exempting unemployment compensation benefits from levy to enforce collection of a debt, see AS 23.20.405(e); for provisions exempting workers' compensation benefits from levy to enforce the collection of a debt, see AS 23.30.160(b); for provisions exempting amounts held in the public employee pension fund and public employee retirement

benefits from levy to enforce the collection of a debt, see AS 39.35.505; for provisions exempting longevity bonuses from levy to enforce collection of a debt, see AS 47.45.120(b). — applicability of the exemptions from execution in proceedings to enforce payment of child support, see AS 47.23.25.

**Editor's notes.** — This section is set out to reflect the change in the name of the former "Alaska State Housing Authority" to the "Alaska State Building Authority" made by § 1, ch 103, SLA 1986. Implementation of this legislative action is made by the revisor of statutes under AS 01.05.031.

#### NOTES TO DECISIONS

Cited in Municipality of Anchorage v Baugh Constr. & Eng'g Co., Sup. Ct. Op. No. 3083 (File Nos. S-699, S-831), 1/24/1986.

**Sec. 09.38.017. Exemption of retirement plan interests and payments.** (a) In addition to the exemption under AS 09.38.015(b), the following are exempt from a claim of an individual's creditor:

- (1) the interest of the individual in a retirement plan; and
  - (2) the money or other assets payable to the individual from a retirement plan.
- (b) The exemptions provided by (a) of this section do not apply to a contribution made by an individual to a retirement plan within 120 days before the individual files for bankruptcy.
- (c) The exemptions provided by (a) of this section do not prevent the payment of benefits under a retirement plan to an alternate payee under a qualified domestic relations order. In this subsection, "qualified domestic relations order" has the meaning given in 26 U.S.C. 414(p).
- (d) A retirement plan exempt from claims under (a) of this section is conclusively presumed to be a spendthrift trust under this section.

(c) In this section,

- (1) "alternate payee" has the meaning given in 26 U.S.C. 414(p)(8);
- (2) "individual" means an individual who is a participant in, a beneficiary of, or an alternate payee of a retirement plan;
- (3) "retirement plan" means a retirement plan that is qualified under 26 U.S.C. 401(a), 26 U.S.C. 403(a), 26 U.S.C. 403(b), 26 U.S.C. 408, or 26 U.S.C. 409 (Internal Revenue Code) (§ 3 ch 135 SLA 1988).

**Editor's notes.** — Section 11, ch 135, SLA 1988 provides that this section "does not apply to the assets of a bankruptcy estate in a proceeding filed under 11 U.S.C. (Bankruptcy) before September 6, 1988."

**Sec. 09.38.020. Exemptions of personal property subject to value limitations.** (a) An individual is entitled to an exemption in property not to exceed an aggregate value of \$3,000 chosen by the individual from the following categories of property:

(1) household goods and wearing apparel reasonably necessary for one household;

(2) if reasonably held for the personal use of the individual or a dependent, books and musical instruments; and

(3) family portraits and heirlooms of particular sentimental value to the individual.

(b) An individual is entitled to exemption of jewelry, not exceeding \$1,000 in aggregate value, if held for the personal use of the individual or a dependent.

(c) An individual is entitled to exemption, not exceeding \$2,800 in aggregate value, of implements, professional books, and tools of the trade.

(d) An individual is entitled to the exemption of pets to the extent of a value not exceeding \$1,000.

(e) An individual is entitled to an exemption of one motor vehicle to the extent of a value not exceeding \$3,000 if the full value of the motor vehicle does not exceed \$20,000. (§ 2 ch 62 SLA 1982; am § 4 ch 135 SLA 1988)

**Cross references.** — For current exemption amounts, see 8 Alaska Administrative Code 95.030.

**Effect of amendments.** — The 1988 amendment substituted "\$3,000" for "\$1,500" in the introductory language of

subsection (a) and in subsection (e), "\$1,000" for "\$500" in subsections (b) and (d), "\$2,800" for "\$1,400" in subsection (c), and "\$20,000" for "\$10,000" in subsection (e).

**Sec. 09.38.025. Exemption of unmatured life insurance and annuity contracts.** (a) Except as provided in this section or AS 09.38.017, an individual is entitled to exemption of unmatured life insurance and annuity contracts owned by the individual. If the contract has accrued dividends and loan values available to the individual exceeding more than \$10,000, a creditor may obtain a court

order requiring the individual debtor to pay the creditor, and authorizing the creditor on the debtor's behalf to obtain payment of the amount of the accrued dividends and loan values in excess of \$10,000 or the amount of the creditor's claim, whichever is less.

(b) A judgment creditor or other claimant of an insurer may not levy upon any of the assets or securities held in this state as a deposit for the protection of the insurer's policyholders or policyholders and creditors. Deposits under AS 21.09.270 may be levied upon if provided in the order of the director of insurance, Department of Commerce and Economic Development, under which the deposit is made. (8 2 ch 62 SLA 1982; am § 5 ch 135 SLA 1988)

**Cross references.** — For current exemption amounts, see 8 Alaska Administrative Code 95.030.

**Effect of amendments.** — The 1988

amendment, in subsection (a), inserted "or AS 09.38.017" in the first sentence and substituted "\$10,000" for "\$5,000" twice in the second sentence.

**Sec. 09.38.030. Exemption of earnings and liquid assets.**

(a) Except as provided in (b) and (c) of this section and AS 09.38.050, an individual debtor is entitled to an exemption of the individual debtor's weekly net earnings not to exceed \$350. The weekly net earnings of an individual are determined by subtracting from the weekly gross earnings all sums required by law or court order to be withheld. The weekly net earnings of an individual paid on a monthly basis are determined by subtracting from the monthly gross earnings of the individual all sums required by law or court order to be withheld and dividing the remainder by 4.3. The weekly net earnings of an individual paid on a semi-monthly basis are determined by subtracting from the semi-monthly gross earnings all sums required by law or court order to be withheld and dividing the remainder by 2.17.

(b) An individual who does not receive earnings either weekly, semi-monthly or monthly is entitled to a maximum exemption for the aggregate value of cash and other liquid assets available in any month of \$1,400, except as provided in AS 09.38.050. The term "liquid assets" includes deposits, securities, notes, drafts, accrued vacation pay, refunds, prepayments, and receivables.

(c) A creditor may levy upon earnings exempt under (a) and (b) of this section if the creditor's claim is

(1) enforceable against exempt property under AS 09.38.065(a)(1); or

(2) enforceable under an order of a court of bankruptcy under 11 U.S.C. 1301 — 1330 (Bankruptcy Reform Act of 1978).

(d) If the individual debtor is a nonresident, the limitations on garnishment imposed under 15 U.S.C. 1673 apply.

(e) The following property, unless exempt without limitation under AS 09.38.015 or 09.38.017, upon receipt by and while it is in the

possession of the individual, shall be treated as earnings, income, cash, or other liquid assets under this section:

- (1) benefits paid by reason of disability, illness, or unemployment;
- (2) money or property received for alimony or separate maintenance;
- (3) proceeds of insurance, a judgment, or a settlement, or other rights accruing as a result of bodily injury of the individual or of the wrongful death or bodily injury of another individual of whom the individual was or is a dependent;
- (4) proceeds or benefits paid or payable on the death of an insured, if the individual was the spouse or a dependent of the insured; and
- (5) amounts paid under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract, providing benefits by reason of age, illness, disability, or length of service. (§ 2 ch 62 SLA 1982; am § 36 ch 6 SLA 1984; am §§ 6 — 8 ch 135 SLA 1988)

**Effect of amendments.** — The 1984 amendment changed the federal statutory reference in paragraph (2) of subsection (c).

The 1988 amendment substituted

"\$350" for "\$175" in the first sentence in subsection (a) and "\$1,400" for "\$700" in the first sentence in subsection (b), and inserted "or 09.38.017" in the introductory language of subsection (e).

**Sec. 09.38.050. Increased exemption amount.** (a) An individual debtor who is in possession of money that was obtained as payment for an injury or disability may request the court to order an increase in the exemption amounts under AS 09.38.030. The individual debtor shall submit affidavits or offer testimony in support of the request as required by the court. The court shall determine the exemption amount after consideration of the individual's responsibilities and all the present and anticipated property and income of the individual, including that which is exempt.

(b) The exemption amounts under AS 09.38.030 may be increased when the individual submits an affidavit, under penalty of perjury, stating that the individual's earnings alone support the individual's household; by so doing, the maximum part of the individual's aggregate disposable earnings for any week subject to execution may not exceed the amount by which the individual's disposable earnings for that week exceed \$550, or, if the individual is claiming an exemption for cash or other liquid assets under AS 09.38.030(h), a maximum amount of \$2,200 available in a month is exempt. (§ 2 ch 62 SLA 1982; am § 9 ch 135 SLA 1988)

**Cross references.** — For current exemption amounts, see 8 Alaska Administrative Code 95.030.

**Effect of amendments.** — The 1988

amendment substituted "\$550" for "\$275" and "\$2,200 available in a" for "\$1,100 available in any" in subsection (b).

**Sec. 09.38.055. Bankruptcy proceedings.** In a proceeding under 11 U.S.C. (Bankruptcy) only the exemptions under AS 09.38.010, 09.38.015(a), 09.38.017, 09.38.020, 09.38.025 and 09.38.030 apply (§ 2 ch 62 SLA 1982; am § 10 ch 135 SLA 1988)

**Effect of amendments.** — The 1988 amendment substituted "11 U.S.C. (Bankruptcy)" for "the Bankruptcy Act" and inserted "11 U.S.C." and inserted "09.38.017".

**Sec. 09.38.065. Claims enforceable against exempt property.**

#### NOTES TO DECISIONS

**Execution on limited entry permit.** — Expressions of legislative intent in combination with the clear provisions of the 1982 Exemptions Act are persuasive evidence that the legislature meant what it said in permitting a parent with past due child support claims to execute against an otherwise exempt limited entry permit. *Anderson v. Anderson*, Sup. Ct. Op. No. 3172 (File No. S-1320), 736 P.2d 320 (1987).

**Sec. 09.38.115. Adjustment of dollar amounts.** (a) The dollar amounts in this chapter change, as provided in this section, according to and to the extent of changes in the Consumer Price Index for all Urban Consumers for the Anchorage Metropolitan Area compiled by the Bureau of Labor Statistics, United States Department of Labor (the index). The index for January of the year in which this section becomes effective is the reference base index.

(b) The dollar amounts change on October 1 of each even-numbered year if the percentage of change, calculated to the nearest whole percentage point, between the index for January of that year and the most recent index used to change the exemption amount, is 10 percent or more, but

(1) the portion of the percentage change in the index in excess of a multiple of 10 percent is disregarded and the dollar amounts change only in multiples of 10 percent of the amounts appearing in this chapter on August 26, 1982; and

(2) the dollar amounts do not change if the amounts required by this section are those currently in effect as a result of earlier application of this section.

(c) If the index is revised, the percentage of change is calculated on the basis of the revised index. If a revision of the index changes the reference base index, a revised reference base index is determined by multiplying the reference base index applicable by the rebasing factor furnished by the United States Bureau of Labor Statistics. If the index is superseded, the index referred to in this section is the one represented by the Bureau of Labor Statistics as reflecting most accurately changes in the purchasing power of the dollar for Alaskan consumers.

(d) The Department of Labor shall adopt a regulation announcing

(1) on or before June 30 of each year in which dollar amounts are to change, the changes in dollar amounts required by (b) of this section; and

(2) promptly after the changes occur, changes in the index required by (c) of this section, including, if applicable, the numerical equivalent of the reference base index under a revised reference base index and the designation or title of any index superseding the index.

(e) The Department of Labor shall also provide notification of a change in exemption amounts required under (c) of this section to the clerks of court in each judicial district of the state. (§ 2 ch 62 SLA 1982; am § 37 ch 6 SLA 1984; am §§ 18, 19 ch 14 SLA 1987; am §§ 18, 19 ch 14 SLA 1987)

**Effect of amendments.** — The 1984 amendment substituted "November" for "December" in the introductory language of subsection (b).

The 1987 amendment in the introductory of subsection (b) substituted "Octo-

ber" for "July" and "January of that year and the most recent index used to change the exemption amount" for "November of the preceding year and the reference base index" and substituted "June" for "April" in subsection (d)(1).

## Chapter 40. Provisional Remedies.

### Article

1. Attachment (§ 09.40.050)

#### Article 1. Attachment.

### Section

50. Lien on real estate

#### Sec. 09.40.040. Third party liability.

#### NOTES TO DECISIONS

**Burden on garnishee to establish affirmative defense.** — In an action pursuant to this section, a garnishee has the burden of establishing an affirmative de-

fense such as a good faith reliance on a valid assignment. *Steenmeyer Corp. v. Mortenson-Neal*, Sup. Ct. Op. No. 3154 (File No. S-1410), P.2d (1987).

**Sec. 09.40.050. Lien on real estate.** If real property is attached, the peace officer shall make a certificate containing the title of the cause, the names of the parties, a description of the property attached, the date of attachment, a statement that a writ of attachment has been issued, and the date of issuance, and shall within 10 days deliver the certificate to the recorder of the recording district in which the real property is situated. The recorder shall record the certificate in a book to be kept for that purpose. When the certificate is recorded, the lien in favor of the plaintiff attaches to the real property described in the certificate from the date of the attachment, but if recorded afterwards, it only attaches as against third persons from the date of the

subsequent recording. Whenever the lien is discharged, it is the duty of the recorder, when requested, to record the transcript of an order, entry of satisfaction of judgment, or other proceeding of record whereby it appears that the lien has been discharged. (§ 7.05 ch 101 SLA 1962)

**Revisor's notes.** — Minor word changes related to the recording of documents were made in this section in 1988 because of the enactment of ch 161, SLA 1988

## Chapter 43. Arbitration.

### Article

1. Uniform Arbitration Act (§§ 09.43.160, 09.43.170)

#### NOTES TO DECISIONS

Cited in *City of Valdez v. 18.99 acres*, Sup. Ct. Op. No. 2834 (File No. 6940), 686 P.2d 682 (1984).

### Article 1. Uniform Arbitration Act.

#### Section

160. Appeals  
170. Court, jurisdiction

**Sec. 09.43.160. Appeals.** (a) An appeal may be taken from (1) an order denying an application to compel arbitration made under AS 09.43.020;

(2) an order granting an application to stay arbitration made under AS 09.43.020(b);

(3) an order confirming or denying confirmation of an award;

(4) an order modifying or correcting an award;

(5) an order vacating an award without directing a rehearing; or

(6) a judgment or decree entered under the provisions of AS 09.43.010 — 09.43.180.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action. (§ 1 ch 232 SLA 1968)

**Editor's notes.** — This section is set out above to correct a minor error in the main pamphlet

**Sec. 09.43.170. Court, jurisdiction.** In AS 09.43.010 — 09.43.180, the term "court" means the court with jurisdiction in this state. The making of an agreement described in AS 09.43.010 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under AS 09.43.010 — 09.43.180 and to enter judgment on

creditor's claim. If the individual does not exercise the repurchase right under this subsection, the clerk of the court shall first remit an amount determined to be exempt to the individual from the proceeds of sale and the balance less the cost of the sale to the creditor. For the purpose of collecting an amount remaining unpaid on a judgment after repurchase of property by an individual under this subsection, the creditor or the creditor's assignee may not make another levy on the property repurchased.

(d) Upon entry of the order of confirmation under (c) of this section and expiration of the time period for repurchase, the clerk may execute a deed to the property and when delivered it shall be sufficient to convey all title of the individual in the premises sold to the purchaser at the sale. (§ 2 ch 62 SLA 1982; am §§ 1, 2 ch 135 SLA 1988)

**Cross references.** — For current exemption amounts, see 8 Alaska Administrative Code 95.030.

**Effect of amendments.** — The 1988 amendment substituted "the individual"

for "that individual" twice in subsection (a) and once in the last sentence in subsection (b), and "\$54,000" for "\$27,000" in subsection (a) and in the last two sentences in subsection (b).

#### NOTES TO DECISIONS

**Avoidance of judicial lien to extent of impairment of homestead exemption.** — Section 522(f) of the Bankruptcy Code provides that "... the debtor may avoid the fixing of a [judicial] lien on ... property to the extent that such lien impairs an exemption ... ." To determine whether there is such an impairment of a homestead exemption, the following steps are taken by the court: (1) all liens are ranked in order of priority (and equity, if any) to the extent of the value of the prop-

erty; (2) the gross amount of the homestead exemption is subtracted from the value of the property; and (3) from the remainder left, each lien is subtracted, one at a time, beginning with the most senior lien, until a judicial lien is reached. Then the judicial lien is subtracted. To the extent that all or any portion of the judicial lien exceeds the remainder derived in (2), above, it is voidable. In re Duncan, 43 Bankr. 833 (Bankr. D. Alaska 1984).

**Sec. 09.38.015. Property exempt without limitation.** (a) An individual is entitled to exemption of the following property:

- (1) a burial plot for the individual and the individual's family;
- (2) health aids reasonably necessary to enable the individual or a dependent to work or to sustain health;
- (3) benefits paid or payable for medical, surgical, or hospital care to the extent they are or will be used to pay for the care;
- (4) an award under AS 18.67 (Violent Crimes Compensation Board) or a crime victim's reparations Act of another jurisdiction;
- (5) benefits paid or payable as a longevity bonus under AS 47.45;
- (6) compensation or benefits paid or payable and exempt under federal law;
- (7) liquor licenses granted under AS 04;
- (8) limited entry permits granted under AS 16.43, except as provided in that chapter.

(b) The right to benefits held by the state on behalf of an individual which may become payable by reason of disability, unemployment or illness, amounts held in the teachers' or public employees' retirement system, and child support collections made by the child support enforcement agency are exempt.

(c) Property of the state, a general law or home rule municipality, the Alaska State Building Authority, the Alaska Municipal Bond Bank Authority, or other state public corporation is exempt.

(d) Real property held by a cemetery association established under AS 10.30 for the purpose of a cemetery and not exceeding 80 acres is exempt. (§ 2 ch 62 SLA 1982)

**Cross references.** — For the applicability of the exemptions from execution in income assignment orders for child support, see AS 09.05.132(g); for provisions exempting teachers' retirement salaries and certain other amounts from garnishment, execution or levy, see AS 14.25.200; for provisions exempting unemployment compensation benefits from levy to enforce collection of a debt, see AS 23.20.405(e); for provisions exempting workers' compensation benefits from levy to enforce the collection of a debt, see AS 23.30.160(b); for provisions exempting amounts held in the public employee pension fund and public employee retirement

benefits from levy to enforce the collection of a debt, see AS 39.35.505; for provisions exempting longevity bonuses from levy to enforce collection of a debt, see AS 47.45.120(h); for applicability of the exemptions from execution in proceedings to enforce payment of child support, see AS 47.23.250.

**Editor's notes.** — This section is set out to reflect the change in the name of the former "Alaska State Housing Authority" to the "Alaska State Building Authority" made by § 1, ch. 103, SLA 1986. Implementation of this legislative action is made by the revisor of statutes under AS 01.05.031.

#### NOTES TO DECISIONS

Cited in Municipality of Anchorage v. Daugh Constr. & Eng'g Co., Sup. Ct. Op.

No. 3083 (File No. S-699, S-831), P.2d (1986).

**Sec. 09.38.017. Exemption of retirement plan interests and payments.** (a) In addition to the exemption under AS 09.38.015(b), the following are exempt from a claim of an individual's creditor:

- (1) the interest of the individual in a retirement plan; and
- (2) the money or other assets payable to the individual from a retirement plan.

(b) The exemptions provided by (a) of this section do not apply to a contribution made by an individual to a retirement plan within 120 days before the individual files for bankruptcy.

(c) The exemptions provided by (a) of this section do not prevent the payment of benefits under a retirement plan to an alternate payee under a qualified domestic relations order. In this subsection, "qualified domestic relations order" has the meaning given in 26 U.S.C. 414(p).

(d) A retirement plan exempt from claims under (a) of this section is conclusively presumed to be a spendthrift trust under this section.

Chapter 38. Alaska Exemptions Act.

Section	
10	Homestead exemption
15	Property exempt without limitation
20	Exemptions of personal property subject to value limitations
25	Exemption of unmatured life insurance and annuity contracts
30	Exemption of earnings and liquid assets
35	Continuing lien on wages
40	Priorities between continuing liens
45	Effective date of continuing lien
50	Increased exemption amount
55	Bankruptcy proceedings
60	Tracing exempt property
65	Claims enforceable against exempt property
70	Limitation on enforcement of certain security interests in exempt goods

Section	
75	Special procedures relating to limited value exemptions
80	Procedures applicable to a levy on property of an individual
85	Contents of notice
90	Assertion of rights by another
95	Judicial relief
100	Debtor's property owned with another
105	Waiver of exemption
110	Federal requirements
115	Adjustment of dollar amounts
120	Protection of property of residents and nonresidents
500	Definitions
510	Short title

Revisor's notes. — Several sections in this chapter were redrafted in 1982 to remove personal pronouns in conformity with AS 01.05.031(c).

Cross references. — For general provisions concerning execution, see AS 09.35 and Civ. R. 69; for legislative intent, see § 1 ch 62 SLA 1982; for transition provisions, see § 15 ch 62 SLA 1982.

Collateral references. — 31 Am. Jur. 2d, Exemptions, § 1 et seq.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one of the joint depositors, 11 ALR3d 1465.

Family allowance from decedent's estate

as exempt from attachment, garnishment, execution, and foreclosure, 27 ALR3d 863.

What is "necessary" furniture entitled to exemption from seizure for debt, 41 ALR3d 607.

Injury to credit standing, reputation, solvency, or profit potential as elements of damage resulting from wrongful execution against business property, 55 ALR3d 911.

Employee retirement pension benefits as exempt from garnishment, attachment, levy, execution, or similar proceedings, 93 ALR3d 711.

Choice of law as to exemption of property from execution, 100 ALR3d 1235.

**Sec. 09.38.010. Homestead exemption.** (a) An individual is entitled to an exemption as a homestead of the individual's interest in property in this state used as the principal residence of that individual or the dependents of that individual, but the value of the homestead exemption may not exceed \$27,000.

(b) If property owned by the entirety or in common is used by one or more individual owners or their dependents as their principal residence, each owner is entitled to a homestead exemption of that owner's interest in the property as provided in (a) of this section. The aggregate value of multiple homestead exemptions allowable with respect to a single living unit may not exceed \$27,000. If there are multiple owners of property exempt as a homestead, the value of the exemption of each

individual owner may not exceed that individual owner's pro rata portion of \$27,000.

(c) If property that includes a homestead is sold under an execution, the sale becomes effective upon confirmation by order of the court. The court shall enter the order of confirmation unless, within 60 days after the sale, the individual repurchases the property under this section or the court extends the time for confirmation upon the filing of a timely motion by a party in interest. The individual may repurchase property, including that individual's homestead, at a sale on execution before confirmation by paying into court the costs of the sale plus the lesser of either (1) the difference between the highest bid and the amount of the exemption in the property, or (2) the amount of the creditor's claim. If the individual does not exercise the repurchase right under this subsection, the clerk of the court shall first remit an amount determined to be exempt to the individual from the proceeds of sale and the balance less the cost of the sale to the creditor. For the purpose of collecting an amount remaining unpaid on a judgment after repurchase of property by an individual under this subsection, the creditor or the creditor's assignee may not make another levy on the property repurchased.

(d) Upon entry of the order of confirmation under (c) of this section and expiration of the time period for repurchase, the clerk may execute a deed to the property and when delivered it shall be sufficient to convey all title of the individual in the premises sold to the purchaser at the sale. (§ 2 ch 62 SLA 1982)

Cross references. — For provisions exempting homestead held by tenants by the entirety from execution on debts to the value specified under subsection (d) of this section, see AS 34.15.140(b).

NOTES TO DECISIONS

Prior law. — For cases construing former statutes, see *Seagreen v. Wendler*, 5 Alaska 715 (1917); *Wendler v. Brenneisen*, 7 Alaska 13 (1923); *Williams v. Thompson*, 7 Alaska 60 (1927). In re *Bocash*, 10 Alaska 206 (1922); *Dalton v. Interior Credit Bureau, Inc.* Sup. Ct. Op. No. 2158 (File No. 4265); 615 P.2d 631 (1980).

**Sec. 09.38.015. Property exempt without limitation.** (a) An individual is entitled to exemption of the following property:

- (1) a burial plot for the individual and the individual's family;
- (2) health aids reasonably necessary to enable the individual or a dependent to work or to sustain health;
- (3) benefits paid or payable for medical, surgical, or hospital care to the extent they are or will be used to pay for the care;
- (4) an award under AS 18.67 (Violent Crimes Compensation Board) or a crime victim's reparations Act of another jurisdiction;

(5) benefits paid or payable as a longevity bonus under AS 47.45;  
 (6) compensation or benefits paid or payable and exempt under federal law;

(7) liquor licenses granted under AS 04.

(8) limited entry permits granted under AS 16.43, except as provided in that chapter.

(b) The right to benefits held by the state on behalf of an individual which may become payable by reason of disability, unemployment or illness, amounts held in the teachers' or public employees' retirement system, and child support collections made by the child support enforcement agency are exempt.

(c) Property of the state, a general law or home rule municipality, the Alaska State Housing Authority, the Alaska Municipal Bond Bank Authority, or other state public corporation is exempt.

(d) Real property held by a cemetery association established under AS 10.30 for the purpose of a cemetery and not exceeding 80 acres is exempt. (§ 2 ch 62 SLA 1982)

**Cross references.** — For the applicability of the exemptions from execution in income assignment orders for child support, see AS 09.65.132(g), for provisions exempting teachers' retirement salaries and certain other amounts from garnishment, execution or levy, see AS 14.25.200, for provisions exempting unemployment compensation benefits from levy to enforce collection of a debt, see AS 23.20.405(e); for provisions exempting workers' compensation benefits from levy

to enforce the collection of a debt, see AS 23.30.160(h), for provisions exempting amounts held in the public employee pension fund and public employee retirement benefits from levy to enforce the collection of a debt, see AS 39.35.500(h); for provisions exempting longevity bonuses from levy to enforce collection of a debt, see AS 47.45.120(h); for applicability of the exemptions from execution in proceedings to enforce payment of child support, see AS 47.23.250.

#### NOTES TO DECISIONS

**Legislative intent as to liquor licenses.** — Former AS 09.35.087 (see now (a)(7) of this section) indicated an overall legislative intent that one general creditor of a liquor license holder should not be allowed to place himself in a preferred position over other general creditors. *C.Y. Inc. v. Brown*, Sup. Ct. Op. No. 1569 (File No. 2781), 574 P.2d 1274 (1978).

Liquor licenses not exempted from coverage under Article D of the

Uniform Commercial Code (AS 45.99). — See *Gibson v. Alaska ABC Bd.*, 377 F. Supp. 151 (D. Alaska 1974), decided under former AS 09.35.087.

As to immunity of real property of University of Alaska from lien attachment or foreclosure, see *University of Alaska v. Simpson Bldg. Supply Co.*, Sup. Ct. Op. No. 1113 (File No. 2196), 530 P.2d 1317 (1975), decided under former AS 09.35.080.

**Sec. 09.38.020. Exemptions of personal property subject to value limitations.** (a) An individual is entitled to an exemption in property not to exceed an aggregate value of \$1,500 chosen by the individual from the following categories of property:

(1) household goods and wearing apparel reasonably necessary for one household;

(2) if reasonably held for the personal use of the individual or a dependent, books and musical instruments; and

(3) family portraits and heirlooms of particular sentimental value to the individual.

(b) An individual is entitled to exemption of jewelry, not exceeding \$500 in aggregate value, if held for the personal use of the individual or a dependent.

(c) An individual is entitled to exemption, not exceeding \$1,400 in aggregate value, of implements, professional books, and tools of the trade.

(d) An individual is entitled to the exemption of pets to the extent of a value not exceeding \$500.

(e) An individual is entitled to an exemption of one motor vehicle to the extent of a value not exceeding \$1,500 if the full value of the motor vehicle does not exceed \$10,000. (§ 2 ch 62 SLA 1982)

#### NOTES TO DECISIONS

**Editor's notes.** — *Gutterman v. First Nat'l Bank*, Sup. Ct. Op. No. 1876 (File No. 3996), 597 P.2d 969 (1979), was decided under former AS 09.35.080.

**Liberal construction.** — Exemption laws are remedial in character and should be liberally construed in favor of the debtor. *Gutterman v. First Nat'l Bank*, Sup. Ct. Op. No. 1876 (File No. 3996), 597 P.2d 969 (1979).

Exemption statute should not be interpreted in a way which completely eliminates a debtor's exemption rights in an item of property within an exempt category because that item's value exceeds the statutory allowance. *Gutterman v. First Nat'l Bank*, Sup. Ct. Op. No. 1876 (File No.

3996), 597 P.2d 969 (1979).

**Purpose of personal and household property exemptions.** — Personal and household property exemptions are designed to ensure that debtors will have necessary items for living in reasonable comfort and for earning a living. *Gutterman v. First Nat'l Bank*, Sup. Ct. Op. No. 1876 (File No. 3996), 597 P.2d 969 (1979).

The proceeds of exempt property are exempt to the debtor for a reasonable time, to enable him to invest the money in other exempt property. *Gutterman v. First Nat'l Bank*, Sup. Ct. Op. No. 1876 (File No. 3996), 597 P.2d 969 (1979).

**Sec. 09.38.025. Exemption of unmatured life insurance and annuity contracts.** (a) Except as provided in this section, an individual is entitled to exemption of unmatured life insurance and annuity contracts owned by the individual. If the contracts have accrued dividends and loan values available to the individual aggregating more than \$5,000, a creditor may obtain a court order requiring the individual debtor to pay the creditor, and authorizing the creditor on the debtor's behalf to obtain payment of, the amount of the accrued dividends and loan values in excess of \$5,000 or the amount of the creditor's claim, whichever is less.

(b) A judgment creditor or other claimant of an insurer may not levy upon any of the assets or securities held in this state as a deposit for the protection of the insurer's policyholders or policyholders and creditors. Deposits under AS 21.09.270 may be levied upon if provided in

the order of the director of insurance, Department of Commerce and Economic Development, under which the deposit is made. (§ 2 ch 62 SLA 1982)

**Sec. 09.38.030. Exemption of earnings and liquid assets.** (a) Except as provided in (b) and (c) of this section and AS 09.38.050, an individual debtor is entitled to an exemption of the individual debtor's weekly net earnings not to exceed \$175. The weekly net earnings of an individual are determined by subtracting from the weekly gross earnings all sums required by law or court order to be withheld. The weekly net earnings of an individual paid on a monthly basis are determined by subtracting from the monthly gross earnings of the individual all sums required by law or court order to be withheld and dividing the remainder by 4.3. The weekly net earnings of an individual paid on a semi-monthly basis are determined by subtracting from the semi-monthly gross earnings all sums required by law or court order to be withheld and dividing the remainder by 2.17.

(b) An individual who does not receive earnings either weekly, semi-monthly or monthly is entitled to a maximum exemption for the aggregate value of cash and other liquid assets available in any month of \$700, except as provided in AS 09.38.050. The term "liquid assets" includes deposits, securities, notes, drafts, accrued vacation pay, refunds, prepayments, and receivables.

(c) A creditor may levy upon earnings exempt under (a) and (b) of this section if the creditor's claim is

(1) enforceable against exempt property under AS 09.38.065(a)(1); or

(2) enforceable under an order of a court of bankruptcy under chapter XIII of the Bankruptcy Act (11 U.S.C., sec. 1301 et seq.).

(d) If the individual debtor is a nonresident, the limitations on garnishment imposed under 15 U.S.C. 1673 apply.

(e) The following property, unless exempt without limitation under AS 09.38.015, upon receipt by and while it is in the possession of the individual, shall be treated as earnings, income, cash, or other liquid assets under this section:

- (1) benefits paid by reason of disability, illness, or unemployment;
- (2) money or property received for alimony or separate maintenance;
- (3) proceeds of insurance, a judgment, or a settlement, or other rights accruing as a result of bodily injury of the individual or of the wrongful death or bodily injury of another individual of whom the individual was or is a dependent;
- (4) proceeds or benefits paid or payable on the death of an insured, if the individual was the spouse or a dependent of the insured; and
- (5) amounts paid under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract, providing benefits by reason of age, illness, disability, or length of service. (§ 2 ch 62 SLA 1982)

**Cross references.** -- For federal provisions placing limitations on garnishment of wages, see 15 U.S.C. § 1673, for provisions exempting permanent fund dividends from execution, see AS 43.23.065.

**Editor's notes.** -- This section must be read with 15 U.S.C. § 1673, which limits garnishments of wages and preempts this section wherever it would permit garnishment in excess of federal limitations. See notes from November 15, 1982, Op. Atty Gen. under heading "Opinions of attorney general," below.

**Opinions of attorney general.** -- This section is incompatible in many respects with 15 U.S.C. § 1673, which places limits on garnishment of wages, and as a result,

where state law would permit garnishment of wages in excess of that permitted by federal law, the state law must give way and federal limitations be applied. November 15, 1982, Op. Atty Gen.

The preemption by 15 U.S.C. § 1673 is limited. Under the provisions of 15 U.S.C. §§ 1673(e) and 1677 as interpreted by various state courts, when a state law conflicts with the federal garnishment provisions, each garnishment must be analyzed on a case-by-case basis, and after consideration of both the federal and state formulas, whichever results in the least amount garnished should be applied. November 15, 1982, Op. Atty Gen.

#### NOTES TO DECISIONS

**Prior law.** -- For case construing prior income exemption statute, see Miller v. Monrean, Sup. Ct. Op. No. 871 (File No. 1490), 507 P.2d 771 (1973).

**Sec. 09.38.035. Continuing lien on wages.** (a) In the case of a garnishment of earnings, when the garnishee's answer reflects that the defendant is employed by the garnishee, the judgment or balance due as reflected on the writ of garnishment shall become a lien on earnings due at the time of service of the writ to the extent that they are not exempt from garnishment, and that lien shall continue as to subsequent nonexempt earnings until the total subject to the lien equals the amount stated on the writ of garnishment, except that the lien on subsequent earnings shall terminate sooner if the employment relationship is terminated, if the underlying judgment is vacated, modified, or satisfied in full, or if the writ is dismissed.

(b) A garnishee shall pay into court all nonexempt earnings of the defendant subject to the continuing lien under (a) of this section. Accrued interest on the judgment or balance due as reflected on the writ of attachment may be garnished under a supplemental writ of garnishment after the principal amount stated on the original writ of garnishment has been paid. (§ 2 ch 62 SLA 1982)

**Sec. 09.38.040. Priorities between continuing liens.** A lien obtained under AS 09.38.035 has priority over any subsequent garnishment lien or wage assignment. A writ creating a continuing lien served upon an employer while a continuing lien imposed by a previous writ is still in effect shall be answered by the employer with a statement that the employer is holding no funds and with a further statement stating when all previous liens are expected to terminate. The subsequent writ has full effect from the termination of all prior liens or until it is otherwise terminated under AS 09.38.035. However, a subsequent writ is not effective if a writ in the same cause of action is pending at the time of service of garnishment. (§ 2 ch 62 SLA 1982)

**Sec. 09.38.045. Effective date of continuing lien.** The effective date of a writ creating a continuing lien is the date of service upon the garnishee. However, if there are, on that date, liens by virtue of previous writs, the effective date is the date all previous writs terminate. (§ 2 ch 62 SLA 1982)

**Sec. 09.38.050. Increased exemption amount.** (a) An individual debtor who is in possession of money that was obtained as payment for an injury or disability may request the court to order an increase in the exemption amounts under AS 09.38.030. The individual debtor shall submit affidavits or offer testimony in support of the request as required by the court. The court shall determine the exemption amount after consideration of the individual's responsibilities and all the present and anticipated property and income of the individual, including that which is exempt.

(b) The exemption amounts under AS 09.38.030 may be increased when the individual submits an affidavit, under penalty of perjury, stating that the individual's earnings alone support the individual's household; by so doing, the maximum part of the individual's aggregate disposable earnings for any week subject to execution may not exceed the amount by which the individual's disposable earnings for that week exceed \$275, or, if the individual is claiming an exemption for cash or other liquid assets under AS 09.38.030(b), a maximum amount of \$1,100 available in any month is exempt. (§ 2 ch 62 SLA 1982)

**Sec. 09.38.055. Bankruptcy proceedings.** In a proceeding under the Bankruptcy Act (11 U.S.C.) only the exemptions under AS 09.38.010, 09.38.015(a), 09.38.020, 09.38.025 and 09.38.030 apply. (§ 2 ch 62 SLA 1982)

**Sec. 09.38.060. Tracing exempt property.** (a) If property, or a part of it, that could have been claimed as an exempt homestead under AS 09.38.010, a burial plot under AS 09.38.015(a)(1), a health aid under AS 09.38.015(a)(2), or personal property subject to a value limitation under AS 09.38.020(a)(1), or (2) or 09.38.020(c), has been taken or sold by condemnation, or has been lost, damaged, or destroyed and the owner has been indemnified for it, the individual is entitled to an exemption of proceeds that are traceable for 12 months after the proceeds are received. An individual is entitled to an exemption of proceeds from the voluntary sale of an exempt homestead under AS 09.38.010 that are traceable for six months after the proceeds are received. The exemption of proceeds under this subsection does not entitle the individual to claim an aggregate exemption in excess of the value limitation otherwise allowable under AS 09.38.010 or 09.38.020.

(b) Money or other property and proceeds exempt under this chapter are traceable under this section by application of the principle of first-in first-out, last-in first-out, or any other reasonable basis for

tracing selected by the individual claiming the exemption. (§ 2 ch 62 SLA 1982)

**Sec. 09.38.065. Claims enforceable against exempt property.** (a) Notwithstanding other provisions of this chapter,

(1) a creditor may make a levy against exempt property of any kind to enforce a claim for

(A) child support;

(B) unpaid earnings of up to one month's compensation or the full-time equivalent of one month's compensation for personal services of an employee; or

(C) state or local taxes; and

(2) a creditor may make a levy against exempt property to enforce a claim for

(A) the purchase price of the property or a loan made for the express purpose of enabling an individual to purchase the property and used for that purpose;

(B) labor or materials furnished to make, repair, improve, preserve, store, or transport the property; and

(C) a special assessment imposed to defray costs of a public improvement benefiting the property.

(b) Except as provided in AS 09.38.070 limiting the enforcement of certain security interests, this chapter does not affect any statutory lien or security interest in exempt property.

(c) A creditor having a claim enforceable under (a) of this section against exempt property, before, at the time of, or a reasonable time after making a levy on property of an individual, shall serve on the individual a notice of the levy and of the basis for the creditor's right to make a levy on exempt property. (§ 2 ch 62 SLA 1982)

**Sec. 09.38.070. Limitation on enforcement of certain security interests in exempt goods.** (a) This section applies to a security interest, except a purchase-money security interest, or a security interest in a motor vehicle, in an item of goods (1) possessed by an individual, (2) being used by that individual or a dependent, and (3) exempt under AS 09.38.020(a) — (d).

(b) Unless the individual, after receiving written notice of the individual's rights under this section, voluntarily surrenders to the secured creditor possession of an item of goods to which this section applies, the creditor may not take possession of the item or otherwise enforce the security interest according to its terms without an order or process of court.

(c) The court may order or authorize process respecting any item of goods to which this section applies only after a hearing, upon notice to the individual of the hearing and of the individual's rights at it. The notice shall be as directed by the court. The order or authorization may prescribe appropriate conditions as to payments upon the debt secured

or otherwise. The court may not order or authorize process respecting the item if it finds upon the hearing both that the individual lacks the means to pay all or part of the debt secured and that continued possession or use of the item is necessary to avoid undue hardship for the individual or a dependent.

(d) The court, upon application of the creditor or the individual and notice to the other and after a hearing and finding of changed circumstances, may vacate or modify an order or authorization under this section. (§ 2 ch 62 SLA 1982)

**Sec. 09.38.075. Special procedures relating to limited value exemptions.** (a) Unless a creditor is seeking collection of a claim enforceable against exempt property under AS 09.38.065, the creditor may obtain a levy on an individual's property of a kind listed in AS 09.38.020 only by complying with this section. Before levy, the creditor shall file with the court out of which the process issues

(1) an affidavit stating that the creditor has reason to believe the individual has property of a kind listed in AS 09.38.020 that is not exempt, identifying the property, setting out facts constituting the basis for believing the property is not exempt; and

(2) a request for an order by the court notifying the individual

(A) of the creditor's claim of a right to levy on the property identified as nonexempt,

(B) of the individual's right to contest the creditor's claim of a right to levy by filing with the clerk of the court, on or before a date fixed by the court, but not exceeding 15 days after the issuance of the order, a written objection to the proposed levy and a statement of the grounds for the objection and of the right to describe the property in lieu of setting its value,

(C) of the possible consequences of failure to respond to the notice as provided in (c) of this section, and

(D) of the information required by AS 09.38.085(a).

(b) Notice of an order issued in accordance with a request under (a) of this section, together with the creditor's affidavit, shall be served on the individual. The order shall restrain the individual from removing, encumbering, damaging, or disposing of any property of the kind listed in AS 09.38.020 for 30 days after receipt of the order, unless the court reduces, extends, or otherwise modifies the restraining order during the 30-day period.

(c) If exemption of property identified in a notice served on an individual under (b) of this section depends on its value, the individual may describe the property in the responsive statement and indicate the amount of any indebtedness chargeable against it. If the individual, within the time allowed by the order of the court, fails to respond to a notice served under (b) of this section that the creditor believes the debtor has nonexempt property of a kind listed under AS 09.38.020, the court may order the individual to appear and disclose the description,

location, and value of the individual's property. If the individual fails to appear and disclose the information specified in the order, the individual waives objection to the creditor's levy on property of that kind.

(d) Except to the extent the procedure is prescribed by this section, AS 09.38.080 governs a proceeding for the determination of a contest in respect to a claim to exemption of property under AS 09.38.020.

(e) Costs incurred in making, or proposing to make, a levy on property of a kind listed in AS 09.38.020 shall be paid out of the proceeds of a sale of property of that kind. If the proceeds of a sale of the property are insufficient to cover the costs incurred in proceedings commenced under this section, the creditor shall pay the costs and may not recover them from the individual, notwithstanding any agreement of the parties to the contrary.

(f) The burden of proving the validity of an exemption by a preponderance of the evidence is upon the individual claiming the exemption. (§ 2 ch 62 SLA 1982)

**Sec. 09.38.080. Procedures applicable to a levy on property of an individual.** (a) Except in a proceeding under AS 09.38.065, a creditor shall comply with this section in obtaining a levy on property of an individual. In a proceeding to levy on personal property of a kind listed in AS 09.38.020, a creditor shall comply with this section and AS 09.38.075.

(b) Before, at the time of, or with in three days after levy against property of an individual, the creditor shall file with the court from which the process issued an affidavit stating that the creditor has reason to believe the individual has property that is not exempt, identifying the property, and stating facts constituting the basis for that belief.

(c) Before, at the time of, or within three days after levy, the creditor shall serve on the individual a notice under AS 09.38.085, including a copy of the affidavit filed under (b) of this section.

(d) A bid for property that is less than the amount of the exempt value is not acceptable at a sale of property under a levy. If indebtedness secured by a valid lien is chargeable against the proceeds of the sale, the bid must exceed the amount of the indebtedness secured plus the amount of the exempt value. If a sufficient bid is not received, the officer shall file a notation of the fact with the clerk of the court and return the property to the individual. The costs incurred during levy, offering the property for sale, and returning the property shall be assessed against the creditor and are not recoverable from the individual, notwithstanding any agreement of the parties to the contrary.

(e) If any question arises as to the rights of an individual entitled to an exemption under this chapter, an interested person may file with the clerk of the court from which the process issued a statement of the claim of exemptions and the question raised. The statement shall be referred to the court as soon as practicable thereafter. The court shall

order that notice of a hearing be given. After hearing the matter, the court shall make findings and issue an appropriate order. The court may award to the prevailing party costs of a proceeding under this subsection.

(4) An objection to levy on the ground that the property seized is exempt must be filed with the clerk of the court within 15 days after the levy. The burden of proving the validity of an exemption by a preponderance of the evidence is upon the individual claiming the exemption. Failure to file a timely objection may be held to be a waiver of a claim to exemption in the property, unless for cause shown the court excuses the failure. (§ 2 ch 62 SLA 1982)

**Sec. 09.38.085. Contents of notice.** (a) The notice required by AS 09.38.075(b) and 09.38.080(c) shall include the following information:

(1) the amount and date of the judgment to be enforced by levy and sale or other mode of appropriating the individual's property;

(2) the name and address of the clerk of the court with whom objections must be filed;

(3) the name and address of the creditor and of the creditor's attorney, if any;

(4) a copy of the affidavit filed under AS 09.38.080(b);

(5) a summary statement in lay terminology of the exemptions provided by the laws of this state;

(6) a summary statement in lay terminology of the procedures for claiming exemptions, objecting to a levy on exempt property, changing venue, and exercising the right to repurchase homestead property from a sale before its confirmation; and

(7) a statement in lay terminology of the rights of persons other than the individual as provided in AS 09.38.090.

(b) The supreme court may prescribe forms to be used by creditors, debtors and court officers under this chapter.

(c) A notice substantially complying with this section is effective even though the notice contains errors if those errors do not result in substantial prejudice to the rights of the individual debtor or of the dependents of the individual debtor. (§ 2 ch 62 SLA 1982)

*Revisor's notes.* — Subsection (c) was enacted as the second sentence of (b), but was redesignated in 1982.

**Sec. 09.38.090. Assertion of rights by another.** If an individual fails to select property entitled to be claimed as exempt or to object to a levy on the property or to assert any other right under this chapter, the spouse or a dependent of the individual or any other person authorized by law may make the claim or objection or assert the rights provided by this chapter. (§ 2 ch 62 SLA 1982)

**Sec. 09.38.095. Judicial relief.** (a) An individual or the spouse or dependent of the individual, or any other person authorized by law is entitled to injunctive relief, damages, or both, against a creditor or other person to prevent or redress a violation of this chapter as provided in the Alaska Rules of Civil Procedure. A court may award costs and reasonable attorney fees to a party entitled to injunctive relief or damages.

(b) For cause shown the court may relieve a person from the consequences of failing to take timely action to assert rights under this chapter. (§ 2 ch 62 SLA 1982)

**Sec. 09.38.100. Debtor's property owned with another.** (a) If an individual and another own property in this state as tenants in common or tenants by the entirety, a creditor of the individual, subject to the individual's right to claim an exemption under this chapter, may obtain a levy on and sale of the interest of the individual in the property. A creditor who has obtained a levy, or a purchaser who has purchased the individual's interest at the sale, may have the property partitioned or the individual's interest severed.

(b) A partner's right in specific partnership property is exempt except on a claim against the partnership. If partnership property is attached for a partnership debt, the partners or any of them or the representatives of a deceased partner may not claim an exemption for that property under this chapter. (§ 2 ch 62 SLA 1982)

*Cross references.* — For provisions and other petition of tenancy, see AS making homestead held by tenants for the — 31.15.1000 entirely liable for the debts of either ten.

**Sec. 09.38.105. Waiver of exemption.** A waiver of exemption executed in favor of an unsecured creditor before levy on an individual's property is unenforceable, but a valid security interest may be given in exempt property. (§ 2 ch 62 SLA 1982)

**Sec. 09.38.110. Federal requirements.** If a federal department or agency issues a formal ruling that a section of this chapter relating to public assistance will cause a state plan for the delivery of services or benefits to be out of conformity with federal requirements, the section will not apply to the extent that it causes the program to be out of conformity with federal requirements. (§ 2 ch 62 SLA 1982)

**Sec. 09.38.115. Adjustment of dollar amounts.** (a) The dollar amounts in this chapter change, as provided in this section, according to and to the extent of changes in the Consumer Price Index for all Urban Consumers for the Anchorage Metropolitan Area compiled by the Bureau of Labor Statistics, United States Department of Labor (the index). The index for January of the year in which this section becomes effective is the reference base index.

(b) The dollar amounts change on July 1 of each even-numbered year if the percentage of change, calculated to the nearest whole percentage point, between the index for December of the preceding year and the reference base index, is 10 percent or more, but

(1) the portion of the percentage change in the index in excess of a multiple of 10 percent is disregarded and the dollar amounts change only in multiples of 10 percent of the amounts appearing in this chapter on the effective date of this chapter; and

(2) the dollar amounts do not change if the amounts required by this section are those currently in effect as a result of earlier application of this section.

(c) If the index is revised, the percentage of change is calculated on the basis of the revised index. If a revision of the index changes the reference base index, a revised reference base index is determined by multiplying the reference base index applicable by the rebasing factor furnished by the United States Bureau of Labor Statistics. If the index is superseded, the index referred to in this section is the one represented by the Bureau of Labor Statistics as reflecting most accurately changes in the purchasing power of the dollar for Alaskan consumers.

(d) The Department of Labor shall adopt a regulation announcing

(1) on or before April 30 of each year in which dollar amounts are to change, the changes in dollar amounts required by (b) of this section; and

(2) promptly after the changes occur, changes in the index required by (c) of this section, including, if applicable, the numerical equivalent of the reference base index under a revised reference base index and the designation or title of any index superseding the index.

(e) The Department of Labor shall also provide notification of a change in exemption amounts required under (c) of this section to the clerks of court in each judicial district of the state. (§ 2 ch 62 SLA 1982)

**Sec. 09.38.120. Protection of property of residents and nonresidents.** (a) Residents of this state are entitled to the exemptions provided under this chapter. Nonresidents are entitled to the exemptions provided by the law of the jurisdiction of their residence.

(b) The term "resident" means an individual who is physically present in the state and who intends to maintain a permanent home in Alaska. (§ 2 ch 62 SLA 1982)

**Sec. 09.38.500. Definitions.** In this chapter, unless the context otherwise requires,

(1) "burial plot" means a parcel of real estate used for burial of human remains and which is located within an area designated for cemetery purposes by the state or a general law or home rule municipality;

(2) "debt" means a legally enforceable monetary obligation or liability of an individual, whether arising out of contract, tort, or otherwise;

(3) "dependent" means an individual who derives support primarily from another individual;

(4) "earnings" means money received by an individual for personal services and denominated as wages, salary, commissions, or otherwise;

(5) "exempt" means protected, and "exemption" means protection, from subjection to process or a proceeding to collect an unsecured debt;

(6) "household goods" includes those items that make a residence habitable according to modern standards;

(7) "judicial lien" means a lien on property obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding instituted for the purpose of collecting an unsecured debt;

(8) "levy" means the seizure of property under a writ of attachment, garnishment, execution, or any similar legal or equitable process issued for the purpose of collecting an unsecured debt;

(9) "lien" means a security interest, or a judicial, statutory, or common-law lien, or any other interest in property securing payment of a debt or performance of an obligation;

(10) "principal residence" means the actual dwelling place of an individual or dependents of the individual and includes real and personal property;

(11) "security interest" means an interest in property created by contract to secure payment or performance of an obligation;

(12) "serve notice" means to give the person to be served a written personal notice in the same manner a summons in a civil action is served, or to mail the notice to the person's last known address by first-class mail and by using a form of mail requiring a signed receipt;

(13) "statutory lien" means a lien arising by force of a statute under specified circumstances or conditions, but does not include a security interest;

(14) "value" means fair market value of an individual's interest in property, exclusive of liens of record;

(15) "wearing apparel" means clothing and garments intended and adapted to be worn on the person to protect the person against the elements or to provide personal comfort or decency, or serving to ornament the person but does not include jewelry. (§ 2 ch 62 SLA 1982)

Revisor's notes. — Enacted as AS 09.38.125. Renumbered in 1982.

**Sec. 09.38.510. Short title.** This chapter may be cited as the Alaska Exemptions Act. (§ 2 ch 62 SLA 1982)

Revisor's notes. — Enacted as AS 09.38.130. Renumbered in 1982.