SJR

35

HOUSE COMMITTEE REPORT

(11)
Date Referred to Committee: April 18, 1998 **FURTHER REFERRALS:**

Date of Committee Action: 4/28/98

The FINANCE Committee considered: **CSSJR 35(FIN)**

CS FOR SENATE JOINT RESOLUTION NO. 35(FIN) **CONST AM: PARTICIPATION IN ABORTION**

Proposing an amendment to the Constitution of the State of Alaska relating to participation in an abortion.

recommends it be replaced with the following committee substitute HCS CS SJR 35 (FIN) [X] the same title [ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____ [✓] fiscal note(s) ot of gov 2/17/98

[ ] zero fiscal note(s) _____ [ ] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS		DP	DNP	NR	AM
	Therriault	X			
	Hanley	Y			
	MULDER	X			
	Martin	X			
	J. Davies		X		
	grussendorf		X		
	Kohring	X			
	MOSES		X		
	G Davis	X			
	Kelly	✓			
	FOSTER	X			

CO-CHAIR'S SIGNATURE _____ _____
Therriault Hanley

FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. CSSJR35(FIN)

Revision Date (4/8/98)
Dept. Affected: Office of the Governor
Title: Const. Amend: Relating to participation in an abortion
BRU: Elective Operations
Component: General and Primary
Sponsor: Senator Miller
Requester: Senate Finance Committee
Component Serial No.: #22

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual	3.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	3.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	3.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	3.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This figures includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58, and the programming costs for counting votes cast on the measure. However, only four measures can be printed on a single ballot card. If this measure requires printing an additional ballot card, the costs will increase by $56.0.

Prepared by: Gail Fenumiai — Phone: 465-3935
Division: Division of Elections — Date: 4/8/98
Approved by: C Lt. Governor Fran Ulmer — Date: 4/8/98
Agency: Office of the Lieutenant Governor

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

For further distribution information, call the Governor's Legislative Office

(Rev 9/97) 98fnform xls/OMB

Alaska State Legislature

Mailing Address:
P.O. Box 55094
North Pole, Alaska 99705
Ph: (907) 488-0862
Fax: (907) 488-4271

MIKE MILLER
President of the Senate

While in Juneau
State Capitol
Juneau, Alaska
99801-1182
Ph: (907) 465-4976
Fax: (907) 465-3883

Senate District Q

SPONSOR STATEMENT
CSSJR 35 (FIN)

SJR35 proposes to amend Alaska's Constitution to continue to guarantee the freedom of choice for all Alaskans and to restore the rights of all individuals and hospitals that were stripped away by the Alaska Supreme Court on November 21, 1997.

SJR35 will make sure that Alaskans will be granted the same protections that they have been guaranteed for the past 27 years under AS 18.16.010:

- SJR35 will not give any more authority to hospitals or hospital staff than they have had since 1970.
- SJR35 will not change in any way the right for a woman to choose an abortion – it will remain as it has in Alaska for the past 27 years.
- Every hospital in Alaska performs abortions in emergency situations and to save the life of the mother – they always have and they always will. SJR35 will not affect these emergency services in any way (in addition, federal law (EMTALA) requires that these emergency services be provided).
- SJR35 continues to protect all Alaskans' right to choose on the issue of abortion.

In order to continue to guarantee that all Alaskans will have the right to choose, SJR35 proposes to place language similar to Alaska's existing abortion law (AS 18.16.010 (b)) into the Constitution. Alaska's abortion law has been in place for 27 years and should remain the law of the land. SJR35 will preserve the status quo — no more and no less.

AS 18.16.010 (b) is part of the 1970 statute that legalized abortions and was supported by abortion rights advocate Representative Barry Jackson, Chairman of the House Judiciary Committee.

In 1970, Representative Jackson stated the premise of subsection (b):

> The bill also provides that a hospital or person is not required to participate in an abortion and neither shall a hospital or person be held liable for refusing to participate in an abortion. This section was added to insure that abortion is a purely personal decision on the part of all parties to the abortion and to insure that no coercion may be applied to anyone.

House Journal Supplement No. 12 (April 9, 1970)

It is my strong belief that no individual, facility or its staff should be forced by the government to do something to another person that they believe is wrong. Good public policy should seek to protect the rights and freedoms of all citizens as equitably as possible — not just those of a select group.

SJR35, if approved by the Alaska Legislature, will be placed before the voters on the 1998 general election ballot.

I ask for your support to continue the Alaska tradition of true freedom of choice.

FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. CSSJR35(FIN)

Revision Date (4/8/98
Title Const. Amend: Relating to participation in an abortion
Sponsor Senator Miller
Requester Senate Finance Committee

Dept. Affected Office of the Governor
BRU Elective Operations
Component General and Primary
Component Serial No. #22

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual	3.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	3.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	3.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	3.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This figures includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58, and the programming costs for counting votes cast on the measure. However, only four measures can be printed on a single ballot card. If this measure requires printing an additional ballot card, the costs will increase by $56.0.

Prepared by Gail Fenumiai
Division Division of Elections
Phone 465-3935
Date 4/8/98

Approved by Lt. Governor Fran Ulmer
Agency Office of the Lieutenant Governor
Date 4/8/98

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

For further distnbution information, call the Governor's Legislative Office

(Rev 9/97) 98fnform xls/OMB

F.M.H./D.C. MEDICAL STAFF
FAIRBANKS MEMORIAL HOSPITAL/DENALI CENTER
1650 COWLES STREET
FAIRBANKS, ALASKA 99701

4/28/98

March 18, 1998

TO: House Finance Committee

Dear Committee Members

This letter is being written on behalf of the Executive Committee of Fairbanks Memorial Hospital to oppose Senate Joint Resolution 15. The Executive Committee represents physician leaders in our medical community. The committee consists of medical staff department chairpersons and hospital committee chairpersons. Please be aware that it was a unanimous decision by the Executive Committee to oppose this legislation.

SJR 15, as it was originally presented, allowed a constitutional amendment for the November ballot to allow hospital boards to restrict abortions in their hospitals. We feel very strongly that hospital boards should not be able to restrict medical and surgical procedures done in a hospital. We have a very functional, time-tested, and multi-faceted method for doing this ourselves.

This legislation has now been modified to take out the reference to hospital boards. What is now in place in SJR 15 is vague and confusing. Is this really what is intended? We think to push this as a ballot issue, as amendments to the state constitution must be, is irresponsible. We the voters, your constituents, certainly deserve more clarity.

Now the issue of this legislation seems to be one that protects an employee of a health care facility or said health care facility from being required to participate in abortions. Regarding the employee-issue, this is certainly how life is now. For all practical purposes all hospitals are JCAHO-accredited. Even hospitals built by religious organizations must be JCAHO-accredited to accept Medicare funds. The JCAHO requires that certain personnel policies be in place to protect employees from participating in medical and surgical activities they do not want to. The fact is that hospital employees do not need this "constitutional" protection because it is already in place. Proponents of this legislation argue that under the Supreme Court's decision in the Valley Hospital Association v. Mat-Su Coalition for Cho[illegible] hospital staff members who oppose abortion will have to participate in abortion procedures. This is just not true and is clearly stated in The Supreme Court's decision. Again, the JCAHO-required policies protect employees and physicians already.

Phone: 907-458-5304 Fax: 907-458-5324

Regarding the facility-issue, we believe it is just that. How a facility decides what or which services to offer is certainly an internal and medical community decision. We fail to see how the constitution of Alaska, as it stands now, can be interpreted as compelling a health care facility to provide certain services. So why is this legislation needed? What problem is really being remedied by this legislation? We see the issue of compelling a hospital to provide certain services and the restriction of such services as two separate issues. This has certainly been confused in the history and modification of SJR 35 as well as in testimony on the resolution. The Alaska Supreme Court held that Valley Hospital could not have a policy prohibiting abortions if there were doctors on staff who were willing to perform them. This in no way compels either the hospital or the physician to provide this service.

In addition, we must object to the fact that in the Senate Judiciary Committee hearing o this resolution no testimony was received from the medical community and specifically none from the Fairbanks medical community. It is a shame that Senator Mike Miller of the Senate Judiciary Committee did not solicit testimony from the medical community of his own district.

The Supreme Court of Alaska has affirmed that hospital boards cannot restrict services provided by public or quasi-public hospitals. We believe that the Alaska State constitution was crafted with care to protect individual rights. We applaud the Supreme Court for re-affirming those rights.

In summary, SJR 35 is bad legislation. We see it as vague, unclear, and we fail to see the problem remedied by it. We urge you to take a stand with the Alaska Supreme Court in support of the protection of individual rights. We urge you to oppose SJR 35.

Respectfully,

DANNY [illegible] ROBINETTE, M.D., FACS
Chief of Staff

8-3

- as amended - 4/28/98

CS FOR SENATE JOINT RESOLUTION NO. 35(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE SENATE FINANCE COMMITTEE

Offered: 4/8/98
Referred: Rules

Sponsor(s): SENATORS MILLER, Leman, Green, Parnell, Taylor

A RESOLUTION

Proposing an amendment to the Constitution of the State of Alaska relating to participation in an abortion.

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

*** Section 1.** Article I, Constitution of the State of Alaska, is amended by adding a new section to read:

Section 25. Participation in Abortion not Required. Nothing in this constitution requires a person or health care facility, including a public or private health care facility, to participate in, or provide accommodation for the performance of, an abortion. ELECTIVE

*** Sec. 2.** The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

CURRENT LAW

Sec. 18.16.010. Abortions. (a) An abortion may not be performed in this state unless

(1) the abortion is performed by a physician or surgeon licensed by the State Medical Board under AS 08.64.200;

(2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal government;

(3) consent has been received from the parent or guardian of an unmarried woman less than 18 years of age; and

(4) the woman is domiciled or physically present in the state for 30 days before the abortion.

(b) Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

(c) A person who knowingly violates a provision of this section, upon conviction, is punishable by a fine of not more than $1,000, or by imprisonment for not more than five years, or by both.

(d) In this section, "abortion" means an operation or procedure to terminate the pregnancy of a nonviable fetus. (§ 65-4-6 ACLA 1949; am § 1 ch 103 SLA 1970; am § 22 ch 166 SLA 1978)

Revisor's notes. — Formerly AS 11.15.060. Renumbered in 1978.

In 1986, the section was reorganized to conform to the style of the Alaska Statutes. Subsection (b) was formerly the last sentence of (a); subsection (c) was formerly (b); and subsection (d) was formerly the second sentence of (a).

Cross references. — For power of the State Medical Board to regulate abortion procedures, see AS 08.64.105.

Editor's notes. — For the constitutionality of statutes similar to this one, see Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976), Sendak v. Arnold, 429 U.S. 968, 97 S. Ct. 476, 50 L. Ed. 2d 579 (1976), Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983), Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986), Webster v. Reproductive Health Services, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989), Hodgson v. Minnesota, 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990), Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990), Planned Parenthood of Southeastern Pennsylvania v. Casey, U.S. , 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). See also 1 Am. Jur. 2d, Abortion and Birth Control, § 3 and 1 C.J.S., Abortion, § 2.

Legislative history reports. — For report on ch. 103, SLA 1970 (CSSB 527 (HWE)), see 1970 Senate Journal Supplement No. 10; 1970 Journal Supplements Nos. 12 and 13. Also refer to the following relevant reports on abortion bills: 1970 Senate Journal Supplements Nos. 1 and 4 (re SB 411); 1970 House Journal Supplement No. 11 (re CSHB 776).

Opinions of attorney general. — Separation of responsibilities in AS 18.16.010 is clear: the approval of facilities is granted to the Department of Health and Social Services; the ethical and professional responsibilities of medical doctors are committed to the supervision of the State Medical Board. No language in AS 08.64.105 vitiates any of the responsibilities granted in paragraph (a)(2) to the Department of Health and Social Services. October 7, 1974 Op. Att'y Gen.

Under the language of subsection (a) only paragraph (1) is clearly constitutional; paragraph (2) could be validated by limiting its effect to abortions performed after the end of the first trimester of pregnancy; paragraph (3) is clearly unconstitutional as written; and paragraph (4) is subject to constitutional challenge, as neither the Alaskan or U.S. Supreme Court has dealt with durational residency requirements in the context of abortion. October 21, 1976 Op. Att'y Gen.

NOTES TO DECISIONS

Quoted in Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981).

Cited in Bird v. Municipality of Anchorage, 787 P.2d 119 (Alaska Ct. App. 1990).

Collateral references. — 1 Am. Jur. 2d, Abortion and Birth Control, § 1 et seq.

1 C.J.S., Abortion, § 1 et seq.

Necessity, to warrant conviction of abortion, that fetus be living at time of commission of acts. 16 ALR2d 949.

Pregnancy as element of abortion or homicide based thereon. 46 ALR2d 1393.

Validity of statute or ordinance forbidding or regulating sale or advertisement of contraceptives or abortives, or dissemination of birth control information. 96 ALR2d 955.

THE SUPREME COURT OF THE STATE OF ALASKA

VALLEY HOSPITAL ASSOCIATION, INC., and JAMES G. WALSH, Valley Hospital Executive Director, Appellants, v. MAT-SU COALITION FOR CHOICE, DR. SUSAN LEMAGIE, and JANE DOES I-X, Appellees.	Supreme Court No. S-7417 Superior Court No. 3PA-92-01207 CI O P I N I O N [No. 4906 - November 21, 1997]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Palmer, Dana Fabe, Judge.

Appearances: Brian J. Brundin, Brundin, Inc., Anchorage, and James Bopp, Jr., Bopp, Coleson & Bostrom, Terre Haute, Indiana, for Appellants. Stephan H. Williams, Cooperating Attorney for the Alaska Civil Liberties Union, Anchorage, and Janet L. Crepps and Kathryn Kolbert, Center for Reproductive Law & Policy, New York, New York, for Appellees. Susan Wright Mason, Atkinson, Conway & Gagnon, Anchorage, for Amicus Curiae Alaska State Hospital and Nursing Home Association. Paul Benjamin Linton, Americans United for Life, Chicago, Illinois, and Kenneth P. Jacobus, Kenneth P. Jacobus, P.C., Anchorage, for Amici Curiae Members of the Alaska Legislature. Jeffrey M. Feldman and Susan Orlansky, Young, Sanders & Feldman, Anchorage, for Amici Curiae American College of Obstetricians and Gynecologists and American Medical Women's Association, Inc.

Before: Compton, Chief Justice, Rabinowitz, Matthews, and Eastaugh, Justices. [Fabe, Justice, not participating.]

COMPTON, Chief Justice.

I. INTRODUCTION

Valley Hospital Association (VHA) seeks to reverse the superior court's summary judgment declaring unenforceable and permanently enjoining enforcement of its policy limiting abortion. We affirm the superior court. We hold that (1) Article I, section 22 of the Alaska Constitution encompasses reproductive rights, including abortion; (2) VHA is a quasi-public institution subject to the Alaska Constitution; (3) VHA's abortion policy is an unconstitutional restriction on the right to abortion; (4) AS 18.16.010(b) is unconstitutional to the extent it applies to quasi-public institutions; and (5) the superior court's award of attorney's fees was not an abuse of discretion.

II. FACTS AND PROCEEDINGS

VHA is a nonprofit corporation organized under Alaska law. It owns and operates a thirty-six-bed hospital in Palmer. The hospital is licensed by the State of Alaska (State); it is the only hospital in the Matanuska-Susitna (Mat-Su) Valley. The hospital facility currently in use was rebuilt and expanded in the early 1980s, using $10.7 million in State funds and five acres of land donated by the City of Palmer. VHA is not affiliated with or operated by any religious organization. The corporation "is organized to serve public interests."

VHA's Board of Directors is divided into two boards, the Association Board and the Operating Board. The Association Board raises money and acquires property for the hospital and elects the Operating Board. The Operating Board has all the other powers and

functions of the Board of Directors, including establishing hospital policy.

VHA is a membership organization. Any adult may become a VHA member upon paying a five dollar application fee. Members who are residents of the Mat-Su Borough, denominated "general members," annually elect the Association Board.

Abortion has been permitted in Alaska since 1970, when the state legislature passed the current abortion law.[1] VHA permitted lawful abortion procedures at its facility from 1970 until 1992.[2] In 1992 abortion opponents organized a campaign to

---

[1] AS 18.16.010 provides:

> (a) An abortion may not be performed in this state unless
>
> (1) the abortion is performed by a physician or surgeon licensed by the State Medical Board under AS 08.64.200;
>
> (2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal government;
>
> . . . .
>
> (b) Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

[2] In July 1991 Humana Hospital in Anchorage stopped allowing elective abortions. VHA concedes that except pursuant to the superior court injunction, there is no hospital or other facility available in the Anchorage/Mat-Su area at which a woman (continued...)

enlarge the membership of VHA. In April 1992 a larger-than-usual membership elected the Association Board, which then elected the Operating Board. In September 1992 the Operating Board enacted a new policy on abortion. The policy prohibits abortions at the hospital unless (1) there is documentation by one or more physicians that the fetus has a condition that is incompatible with life; (2) the mother's life is threatened; or (3) the pregnancy is a result of rape or incest. All VHA Operating Board members supported this new policy.

The Mat-Su Coalition for Choice, Dr. Susan Lemagie, and ten unnamed women (Coalition) filed suit against VHA and its executive director, seeking declaratory and injunctive relief. The Coalition then filed a motion for a preliminary injunction against VHA's abortion policy. The superior court granted the motion.[3] Its order temporarily enjoined enforcement of VHA's new abortion policy and restored the status quo existing before the policy was enacted. The court then granted the Coalition's motion for summary

---

[2](...continued)
can have a second trimester elective abortion.

[3] In its order granting the Coalition a preliminary injunction, the superior court determined that the Coalition had shown a clear probability of success in establishing the following propositions: (1) Valley Hospital is a quasi-public hospital; (2) the Alaska Constitution provides greater protection for individual rights than the United States Constitution; (3) the right to choose an abortion is a fundamental right guaranteed by article I, section 22 of the Alaska Constitution; (4) there is no compelling state interest in Valley Hospital's ban on abortions; and (5) AS 18.16.010(b) does not immunize Valley Hospital from violating Alaskans' constitutional right to reproductive choice, including abortions.

judgment[4] and permanently enjoined VHA

> 1. from enforcing any policy, rule, regulation, practice, or custom prohibiting the performance of any lawful abortion procedure at Valley Hospital;
>
> 2. from refusing to permit the facilities of Valley Hospital to be used for the performance of any lawful abortion procedure by qualified medical personnel;
>
> 3. and from imposing any restriction on the performance or scheduling of any lawful abortion procedure at Valley Hospital which is not based on accepted, established medical practices or requirements with respect to such procedures.

The superior court noted that nothing in the permanent injunction required anyone affiliated with the hospital "to participate directly in the performance of any abortion procedure if that person, for reasons of conscience or belief, objects to doing so."

The superior court granted full reasonable attorney's fees in the amount of $110,000 to the Coalition in a separate order. VHA appeals the injunction, the summary judgment, and the award of attorney's fees to the Coalition.

---

[4] The superior court's order granting summary judgment was

> based on the reasons articulated in the Court's earlier decision granting a preliminary injunction, the protections of the right to privacy contained in Article I, § 22 of the Alaska Constitution, and the fact that Valley Hospital is a non-sectarian, non-profit, quasi-public hospital.

(Citation omitted.)

III. DISCUSSION

A. Standard of Review

We apply our independent judgment in reviewing the questions of law presented in this appeal, adopting rules of law which are most persuasive in light of precedent, reason, and policy. Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1979). We review the award of attorney's fees for abuse of discretion. Bromley v. Mitchell, 902 P.2d 797, 804 (Alaska 1995). An abuse of discretion is established only where the court's determination is manifestly unreasonable. Id.

B. The Alaska Constitution Protects Reproductive Autonomy, Including the Right to Abortion, More Broadly Than Does the United States Constitution.

1. The United States Constitution

The Supreme Court's articulation of the United States Constitution's protection of reproductive rights establishes the minimum protection provided to women in Alaska.[5] This protection includes the right to an abortion. Under Roe v. Wade, 410 U.S. 113, 155 (1973), this right could be limited only where required by a compelling state interest. Id. States could regulate abortions performed before a fetus became viable only when such regulation was necessary to ensure the life and health of the mother. Id. at 163.

The compelling state interest test no longer accurately reflects federal constitutional law. Arguably, the prevailing

---

[5] See Planned Parenthood v. Casey, 505 U.S. 833 (1992); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Roe v. Wade, 410 U.S. 113 (1973).

federal view is that a state may regulate abortions so long as their regulation does not impose "an undue burden on a woman's ability" to decide to have an abortion. Planned Parenthood v. Casey, 505 U.S. 833, 875 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter). The O'Connor plurality substituted the undue burden test for the compelling state interest test in recognition of the view that there "is a substantial state interest in potential life throughout pregnancy." Id. at 876. The following paragraphs from the joint opinion in Casey suggest the current state of federal constitutional law concerning reproductive rights:

> (a) To protect the central right recognized by Roe v. Wade while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.
>
> (b) We reject the rigid trimester framework of Roe v. Wade. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.
>
> (c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a

> substantial obstacle to a woman seeking an abortion impose an undue burden on the right.
>
> (d) Our adoption of the undue burden analysis does not disturb the central holding of Roe v. Wade, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.
>
> (e) We also reaffirm Roe's holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Roe v. Wade, 410 U.S. at 164-65.

505 U.S. at 878-79.

2. The Alaska Constitution

We sometimes have taken a broad view of our role in defining state constitutional rights:

> [W]e are under a duty to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.

Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970) (extending the constitutional right to a jury trial).[6] Thus, our

---

[6] VHA interprets this language as a two-prong test which must be met before we may find a constitutional right. We did not interpret this language from Baker as VHA now urges us to do when we decided either Breese v. Smith, 501 P.2d 159 (Alaska 1972) (holding that governmental control of personal appearance is antithetical to the concept of personal liberty), or Ravin v. State, 537 P.2d 494 (Alaska 1975) (holding that privacy in the home (continued...)

articulation of the protection of reproductive rights under Alaska's constitution may be broader than the minimum set by the federal constitution. Id. at 401 ("[This court is] at liberty to make constitutional progress in Alaska by our own interpretations, as long as we measure up to the national standards which are required by the United States Supreme Court.").[7]

Article I, section 22 of the Alaska Constitution provides:

> The right of the people to privacy is recognized and shall not be infringed.

This express privacy provision was adopted by the people in 1972. It provides more protection of individual privacy rights than the United States Constitution. Messerli v. State, 626 P.2d 81, 83 (Alaska 1980) (balancing the individual right to personal autonomy

---

[6](...continued)
is a fundamental right), although we found a right to exist under the Alaska Constitution in each of those cases.

[7] Other states have interpreted their constitutions to protect reproductive rights more extensively than does the federal constitution. Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981) (striking down legislation restricting public funding of abortions as unconstitutional under the state's constitutional privacy guarantee); American Academy of Pediatrics v. Van de Kamp, 263 Cal. Rptr. 46 (Cal. App. 1989) (upholding an injunction preventing implementation of restrictions on abortion rights of minors, requiring a compelling state interest before invasion of minors' privacy rights); In re T.W., 551 So. 2d 1186 (Fla. 1989) (reaffirming the right to choose to terminate a pregnancy as a fundamental state constitutional right and striking down legislation restricting abortion rights); Hope v. Perales, 571 N.Y.S.2d 972 (Sup. Ct. 1991) (applying a strict scrutiny standard for fundamental rights and determining that state failure to fund medically necessary abortions violated state constitution); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (extending state constitutional right to privacy beyond federal right in a custody dispute over divorced couple's frozen embryos).

and free speech with the need for an informed electorate); Ravin v. State, 537 P.2d 494, 514-15 (Alaska 1975) (Boochever, J. concurring) ("Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that that right is broader in scope than that of the Federal Constitution.").

A woman's control of her body, and the choice whether or when to bear children, involves the kind of decision-making that is "necessary for . . . civilized life and ordered liberty." Baker, 471 P.2d at 401-02. Our prior decisions support the further conclusion that the right to an abortion is the kind of fundamental right and privilege encompassed within the intention and spirit of Alaska's constitutional language. "[D]ecisions whether to accomplish or prevent conception are among the most private and sensitive." Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469, 479 n.42 (Alaska 1977) (holding that a physician who specialized in contraception and abortion could not be required to disclose the names of his patients); see also Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1080 (Alaska 1981) (holding that abortion clinic protests cause patients to "suffer emotional distress as a result of appellants' invasion of their privacy during a particularly sensitive period"); Ravin, 537 P.2d at 502 (holding that decisions about contraception involve "significantly personal areas").

We stated in Breese v. Smith, 501 P.2d 159, 169 (Alaska 1972), that "few things [are] more personal than one's body."[8] In Breese, a school policy regulating hair length was at issue; the regulation was held unconstitutional because the State failed to show a compelling interest that justified the policy. Id. at 170-72. Surely "few things are more personal" than a woman's control of her body, including the choice of whether and when to have children.

> Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when and how one's body is to

---

[8] Breese was decided before the 1972 passage of the privacy amendment now found in article I, section 22 of the Alaska Constitution. Breese relied exclusively on the inherent rights provision found in article I, section 1 of the Alaska Constitution. The Coalition argues that article I, section 1 of the Alaska Constitution protects abortion as a fundamental right. Because we hold this right is grounded in the privacy provision of the constitution, we do not address whether the right could be based solely on article I, section 1. While Breese's discussion of personal autonomy remains instructive, we choose to analyze reproductive rights under the privacy provision of our constitution, as other states have done. See, e.g., In re T.W., 551 So: 2d at 1193.

The relationship between a woman and her doctor is threatened by VHA's abortion policy, and thus privacy rights are implicated in addition to the notions of personal autonomy that were at issue in Breese. The information exchange between a woman and her doctor about the woman's health and her reproductive choices is intensely private. The reasons a doctor and patient choose a medical procedure, so long as it is legal, must not be subject to the approval of a hospital's board of directors, according to their own values.

Other privacy interests are also implicated. If a woman is unable to obtain an abortion near her home, there is an increased chance that she will have to reveal her pregnancy to others in order to arrange the necessary travel. The fact that a woman has visited a certain doctor can be intensely private, when the doctor is one who specializes in abortion services.

> become the vehicle for another human being's creation; second, when and how--this time there is no question of "whether"--one's body is to terminate its organic life.

Laurence H. Tribe, American Constitutional Law 1337-38 (2d ed. 1988). We agree that "[t]he decision whether or not to have a child is fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman." In re T.W., 551 So. 2d 1186, 1193 (Fla. 1989) (citing Roe, 410 U.S. at 153).

For the above reasons, we are of the view that reproductive rights are fundamental, and that they are encompassed within the right to privacy expressed in article I, section 22 of the Alaska Constitution. These rights may be legally constrained only when the constraints are justified by a compelling state interest, and no less restrictive means could advance that interest. These fundamental reproductive rights include the right to an abortion. The scope of the fundamental right to an abortion that we conclude is encompassed within article I, section 22, is similar to that expressed in Roe v. Wade. We do not, however, adopt as Alaska constitutional law the narrower definition of that right promulgated in the plurality opinion in Casey.

VHA argues that there can be no state constitutional protection for reproductive rights under article I, section 22, because the section was intended to encompass protection from unwarranted surveillance and data collection by the State and private businesses. It cannot extend beyond this "informational"

privacy.[9] To support this argument, VHA cites newspaper articles and other bills introduced contemporaneously with the adoption of article I, section 22.

The only informative legislative history consists of the privacy amendment as originally proposed.[10] The earliest form of the proposed amendment stated:

> Section 22. Right of Privacy. The right of the people to privacy in their opinions, persons, families, reputations and property is recognized and shall not be violated. Neither warrants nor writs of investigation in abrogation of privacy shall issue, except upon probable cause and upon a showing of a legitimate and pressing need, supported by oath or affirmation, particularly describing the information or data sought and the person whose privacy may be affected, and particularly setting forth the reasons for the search or investigation. The legislature shall provide for the prosecution and punishment of public officials and private parties who act in violation of this section, and shall provide civil remedies to redress and prevent such violations. The legislature shall provide for the protection and security of information available to the State to the extent necessary to protect the rights of the individual recognized in this section and shall further provide for the protection and

---

[9] The Alaska State Hospital and Nursing Home Association, argues only that the "legislative" history of the amendment prevents this court from applying the privacy provision of the constitution to private parties. We have already established that proposition. See Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 (Alaska 1989).

[10] The Alaska State Hospital and Nursing Home Association argues that a summary of a House Judiciary Committee meeting during which the proposed amendment was modified is evidence that the privacy clause was intended to apply only to informational privacy. The meeting summary is largely a debate over grammar and style and provides no information which alters our interpretation of article I, section 22. See H. Jud. Comm. minutes at 318-19, 7th Leg., 1st Sess. (May 30, 1972).

security of information gathered under this section by the State.

1972 Senate Joint Resolution No. 68, 7th Leg., 2d Sess. While the initial draft of the amendment attempted to specify privacy interests to be protected, the final constitutional amendment simply protected the right of the people to privacy. The plain language of article I, section 22 is a broad protection of privacy rights. The legislative history is insufficient to limit the general language of the privacy amendment.

C. VHA's Abortion Policy Is Subject to the Provisions of the Alaska Constitution.

We previously have determined that a hospital may be a "quasi-public" institution. Storrs v. Lutheran Hosps. and Homes Soc'y of Am., Inc., 609 P.2d 24 (Alaska 1980). In Storrs, we held that a quasi-public hospital "cannot violate due process . . . in denying staff privileges."[11] Id. at 28. The hospital was quasi-public because: (1) it was the only hospital serving the community; (2) the construction of the hospital was funded in significant part by State and federal grants; and (3) over twenty-five percent of the funds received for hospital services came from governmental sources. Id. Storrs established that a quasi-public medical

---

[11] One state court has rejected this application of procedural due process to private hospitals. See Hottentot v. Mid-Maine Med. Ctr., 549 A.2d 365, 368 (Me. 1988). At least eight other states have concluded that private hospitals must follow procedural due process for physician staffing decisions. Id. at 368 n.4.

facility is bound to protect constitutional rights affected by the administration of the hospital.[12]

The elements that led us to conclude that the hospital in Storrs was quasi-public show that the hospital in this case is quasi-public; thus, the conduct of VHA qualifies as "state action," meaning that it "may be fairly treated as [the action] of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974), quoted in United States Jaycees v. Richardet, 666 P.2d 1008, 1013 (Alaska 1983).

In order to determine whether the hospital operated by VHA is a quasi-public institution, we look to a number of factors, just as we did in Storrs. First, VHA has a special relationship with the State through the State's Certificate of Need program. Under this program, the State must review and approve expenditures of one million dollars or more for construction or alteration of a health care facility. AS 18.07.031. The Department of Health and Social Services determines whether to grant a Certificate of Need

---

[12] VHA argues that constitutional due process was never at issue in Storrs because the hospital stipulated that Dr. Storrs was entitled to due process. We have stated, however, that Storrs was a constitutional due process case. Kiester v. Humana Hosp. Alaska, Inc., 843 P.2d 1219, 1223 n.2 (Alaska 1992); see also Amerada Hess Pipeline Corp. v. Alaska Pub. Util. Comm'n, 711 P.2d 1170, 1180 (Alaska 1986) (relying on Storrs to find the right to an impartial decision maker basic to a guarantee of due process). Furthermore, the Storrs court would not have needed to address whether Dr. Storrs received due process were he not entitled to it. The determination that due process applied was material to the holding.

based on health care demand and resources. AS 18.07.041.[13] This program creates in VHA a type of health care monopoly. Indeed, VHA is the only hospital serving the Mat-Su Valley, just as the hospital in Storrs was the only hospital serving the Fairbanks area. The public need for medical facilities makes this sort of regulation essential. However, such monopoly privileges may not be used by VHA to limit access to lawful medical procedures for moral or religious reasons.

Second, VHA has received construction funds, land, and operating funds from the State, local, and federal governments,[14] including more than ten million dollars for construction from the State and a grant of five acres of public land from the City of Palmer.[15] Money from the city and borough came from pass-through

---

[13] AS 18.07.041 provides:

> The office shall grant a sponsor a certificate of need or modify a certificate of need if the availability and quality of existing health care resources or the accessibility to those resources is less than the current or projected requirement for health services required to maintain the good health of citizens of this state.

[14] VHA's assets totaled $31.7 million as of December 31, 1993. Between 1985 and 1993, VHA provided $37.5 million in unreimbursed care. In 1991, 14.71% and 5.98% of VHA's gross receipts were from Medicare and Medicaid respectively. VHA's April 1993 Certificate of Need application to the State showed that Medicare and Medicaid receipts total approximately $3.75 million to $5.1 million for the 1990, 1991, and 1992 fiscal years. This is approximately 25% of VHA's patient revenues for those three years.

[15] The Alaska State Hospital and Nursing Home Association argues that money received under the federal Hill-Burton Act cannot be used as a basis for requiring hospitals to perform abortions. 42 U.S.C. § 300a-7(b). The record does not show that any Hill-

(continued...)

grants from the State legislature.[16] VHA is required to operate as a "public facility" under State laws governing the pass-through grants from the State to the city and borough. AS 37.05.315(a) and (c). Finally, a significant portion of the operating funds VHA receives for hospital services comes from governmental sources. We also consider the fact that the hospital is a community hospital whose board is elected by a public membership. As the superior court noted, the public governance structure "strongly favors a finding that the hospital is 'quasi-public.'"

VHA argues that the Storrs quasi-public criteria are limited to determining whether a hospital must afford due process in staffing determinations and should not be extended to require hospitals to protect other constitutional rights. VHA relies on language in Kiester, which discusses limitations on judicial review to avoid intruding upon a hospital's recognized expertise in evaluating medical qualifications. Kiester v. Humana Hosp. Alaska,

---

[15](...continued)
Burton money was used when the facilities were rebuilt in the early 1980s.

[16] The statute allowing pass-through grants requires the municipality to agree that the facilities and services provided by the grant will be available for the use of the general public, and that the municipality will operate and maintain the facility for the practical life of the facility. AS 37.05.315(a) and (c). This is an additional indication that VHA is a quasi-public institution. See 1986 Informal Op. Att'y Gen. 1 (Apr. 8, 1982) (stating that municipality accepting funds for construction of a public facility must ensure the operation and maintenance of the facility, even if the facility will be owned and operated by a private non-profit organization); see also 1991 Informal Op. Att'y Gen. 19 (Sept. 22, 1986) (indicating that the State may have a cause of action against a city that allows a facility funded by pass-through grants to be converted to private use).

Inc., 843 P.2d 1219, 1223 (Alaska 1992). However, no medical qualification or decision is at issue here. Neither the issue whether the hospital is quasi-public, nor the issue whether the abortion policy is invalid on constitutional grounds, involves intruding on a medical decision that is within the hospital's expertise. Likewise, VHA has acknowledged that its abortion policy is not a medical policy, but one founded on "sincere moral conscience." The scope and application of the Alaska Constitution to this kind of policy presents a question of law that is within this court's expertise.

Considering all factors similar to those found persuasive in Storrs, we conclude that the hospital operated by VHA is a quasi-public hospital. Its policy concerning abortion must comply with the Alaska Constitution.

D. VHA Has Not Demonstrated a Compelling State Interest Justifying Its Abortion Policy.

Since VHA is a quasi-public institution, its policies are subject to the limitations which the Alaska Constitution imposes on legislation and government regulations. Under Alaska's Constitution, there is a protected right to an abortion, and VHA's policy interferes with that right. Since the right is fundamental, it cannot be interfered with unless the interference is justified by a compelling state interest. Further, assuming the existence of such an interest, there also must be no less restrictive means by which the interest might be advanced.[17] In re A.B., 791 P.2d 615,

---

[17] We have used both the compelling state interest/least (continued...)

621 (Alaska 1990) and Vogler v. Miller, 651 P.2d 1, 5 (Alaska 1981). VHA has not demonstrated a compelling state interest justifying its policy. It has not advanced any medical, safety, or other public-welfare interest to justify precluding elective abortions. VHA has stated unequivocally that its policy is a matter of conscience, and not a medical, safety, or economic issue. As VHA cannot raise a free exercise claim,[18] this does not amount to a compelling state interest.

E. Alaska Statute 18.16.010(b) Is Unconstitutional to the Extent It Applies to Quasi-Public Institutions.

VHA argues that even if the Alaska Constitution encompasses the right to an abortion, and even if the hospital is a quasi-public institution, the legislature already has addressed the issue in AS 18.16.010(b),[19] and has determined that a "hospital

---

[17](...continued)
restrictive means test and the legitimate state interest/close and substantial relationship test in the privacy context. See Jones v. Jennings, 788 P.2d 732, 737-38 (Alaska 1990); State v. Erickson, 574 P.2d 1 (Alaska 1978); Ravin, 537 P.2d at 504. However, "[w]here the right to privacy is manifested in terms of interests . . . squarely within personal autonomy," as here, we use the compelling state interest test. Erickson, 574 P.2d at 22, n.144.

[18] See infra note 20. Nothing said in this opinion should be taken to suggest that a quasi-public hospital could have a policy based on the religious tenets of its sponsors which could be a compelling state interest. Recognizing such a policy as "compelling" could violate the Establishment Clause of the First Amendment to the United States Constitution. As this point is not raised, we do not rule on it.

[19] AS 18.16.010(b) provides:

> Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion

(continued...)

may decline to offer abortions for reasons of moral conscience." VHA argues that "[c]onsistent with its previous approach to the highly-sensitive question of abortion, this Court should defer to the considered judgment of the legislature." However, we cannot defer to the legislature when infringement of a constitutional right results from legislative action. The issue before us includes the question whether AS 18.16.010(b) is a permissible limitation on a constitutional right.

VHA has a "sincere moral belief" that elective abortion is wrong.[20] However, constitutional rights "cannot be allowed to yield simply because of disagreement with them." Brown v. Board of Education, 349 U.S. 294, 300 (1955).

The Alaska Attorney General has concluded that AS 18.16.010(b) is invalid, unless construed to be applicable only to sectarian facilities. 1978 Formal Op. Att'y Gen. No. 8 (February 10, 1978). The New Jersey Supreme Court struck down an almost identical statute:

> To interpret this act to empower a non-sectarian non-profit hospital to refuse to permit its facilities to be used for elective abortions would clearly constitute state action . . . [f]or the state to frustrate [the constitutional right to a first trimester

---

[19](...continued)
under this section.

[20] VHA bases its argument in part on Frank v. State, 604 P.2d 1068 (Alaska 1979), a free exercise of religion case based on the First Amendment to the United States Constitution and article I, section 4 of the Alaska Constitution. See Frank, 604 P.2d at 1070 (killing of cow moose for funeral potlatch protected as free exercise of religion). VHA is not affiliated with any religion and cannot raise a free exercise claim.

> abortion] by its action would be violative of the constitutional guarantee.

Doe v. Bridgeton Hosp. Ass'n, 366 A.2d 641, 647 (N.J. 1976).

VHA argues that because the statute states that abortions may be performed only in certain situations, but that individuals and institutions may always refuse to participate in or provide them, "the legislature has determined that the ability to protect one's conscience outweighs the ability to procure an abortion." VHA has no constitutional right at issue; it has at most a statutory right. The legislature, however, may not balance statutory rights against constitutional ones, like the right to an abortion. Therefore, AS 18.16.010(b) is unconstitutional to the extent that it applies to VHA.

F. The Superior Court's Award of Attorney's Fees Was Not an Abuse of Discretion.

The superior court awarded full reasonable attorney's fees to the Coalition. The court based its decision on the factors articulated in Anchorage Daily News v. Anchorage School District, 803 P.2d 402, 404 (Alaska 1990). The superior court concluded that VHA was not a public interest litigant immune from having to pay an award of attorney's fees.[21]

---

[21] A party qualifies as a public interest litigant if (1) the case effectuates a strong public policy, (2) numerous people will benefit from the litigation, (3) only a private party could be expected to bring the action, and (4) the party would not have sufficient economic incentive to bring the lawsuit even if the action involved only narrow issues lacking general importance. Evak Traditional Elders Council v. Sherstone, Inc., 904 P.2d 420, 423 (Alaska 1995).

We review a trial court's determination of a litigant's public interest status under the abuse of discretion standard. Citizens Coalition for Tort Reform, Inc. v. McAlpine, 810 P.2d 162, 171 (Alaska 1991). "Such an abuse is regarded as present only where the trial court's decision appears to be manifestly unreasonable or motivated by an inappropriate purpose." Kenai Lumber Co., Inc. v. LePesche, 646 P.2d 215, 222 (Alaska 1982).

VHA asserts two arguments for challenging the fee award: (1) VHA is a public interest litigant;[22] and (2) VHA relied in good faith on a statute which authorized its policy.

A prevailing public interest plaintiff is normally entitled to full reasonable attorney's fees. Hunsicker v. Thompson, 717 P.2d 358, 359 (Alaska 1986). We have determined that "where both parties are individual, public interest litigants, neither should be made to bear the fees of the other, each should simply pay their own." McCormick v. Smith, 799 P.2d 287, 289 n.5 (Alaska 1990). However, VHA is not a public interest litigant. We

---

[22] The Coalition argues that VHA did not challenge the superior court's determination that VHA is not a public interest litigant in its points on appeal and is barred from doing so now. Alaska Appellate Rule 204(e) provides that this court will consider only points included in the statement of points on appeal. See also Kalenka v. Taylor, 896 P.2d 222, 229 (Alaska 1995) (holding that where appellants failed to properly appeal a fee award and offered no mitigating circumstances to explain the failure, they cannot raise the issue). However, whether VHA is a public interest litigant is a legal issue that can be considered on the record before the court. See, e.g., Oceanview Homeowners Ass'n v. Quadrant Const., 680 P.2d 793, 797 (Alaska 1984). Additionally, although VHA's public interest status is not mentioned in the points on appeal, the issue of fees is raised. See Putnam v. State, 629 P.2d 35, 39 n.2 (Alaska 1980). There is no prejudice to the Coalition in considering the issue on appeal.

are not persuaded by VHA's assertion that its defense of its abortion policy is in the public interest simply because it raises constitutional issues.

We have decided one case where we determined that attorney's fees should not be awarded against a losing private party in public interest litigation, because an award might have the effect of deterring citizens from litigating issues of public concern. Whitson v. Anchorage, 632 P.2d 232, 233 (Alaska 1981). In Whitson, the defendant was an individual who had placed an initiative on the next municipal election ballot, and the plaintiff was the City of Anchorage, which had obtained a judgment finding the initiative illegal and ordering it removed from the ballot. We found it significant that Whitson would have been a traditional private party plaintiff seeking relief against the governmental entity had the city not "beat[en] him to the courthouse steps," making him the nominal defendant. Id. at 234. Had the city refused to place his initiative on the ballot, rather than doing so and then suing him to get it removed, Whitson would likely have sued the city and been the traditional private party plaintiff seeking relief against the governmental entity. Id. at 233-34. In this case VHA is not an individual raising a public interest defense against a governmental entity. Rather, VHA is a quasi-public institution whose policy has infringed a constitutional right.

VHA also cannot assert its good faith reliance on AS 18.16.010(b). As discussed above, that statute cannot

constitutionally be applied to a quasi-public hospital. See Part III.D. Because VHA is not a private defendant, as it asserts, it cannot escape liability for attorney's fees by arguing that it relied in good faith on AS 18.16.010(b).

The superior court did not abuse its discretion in awarding fees to the Coalition.

IV. CONCLUSION

The superior court's summary judgment and injunction are AFFIRMED. The superior court's award of attorney's fees was not an abuse of discretion and is AFFIRMED.

Providence | Health System

3200 Providence Drive
P.O. Box 196604
Anchorage, Alaska
99519-6604

Tel 907 562 2211

CS SJR 35: An issue of Choice

Providence Health System in Alaska supports the constitutional amendment SJR 35 because it provides choice: the ability or right for us to choose not to do elective abortions in our facilities.

We are disappointed the proponents of choice do not support the same for us.

Providence respects the beliefs and conscience of others. We have respected the right of physicians to follow the dictates of their conscience in their own offices. We simply ask for the same right in our hospitals.

SJR 35 takes the language and intent of the original 1970 abortion statute and places it into the State Constitution. It is the statute under which all health care facilities considered themselves governed until the 1997 State Supreme Court ruling regarding Valley Hospital. That ruling mandated that Valley could not refuse to do elective abortions because it was a "quasi-public" facility.

Upon legal review of that ruling, we have been advised by a number of attorneys that the definition of "quasi-public" could be applied to every hospital in the state--including Providence Alaska Medical Center. * In addition, the ruling has troubling language that suggests "religious tenets" may not accepted as a compelling reason for chosing not to do abortions.

While we all wish the matter had not become a constitutional issue, we feel the State Supreme Court left us with no other option.

In summary, it is our position this constitutional amendment:

- **Does allow** hospitals (and their boards) local control to **continue their current policies** in regard to elective abortions--whether they do them or do not provide them.

- **Does allow** hospitals to choose not to do abortions because of religious beliefs or for reasons of conscience.

- **Does allow** women continued access to elective abortions in any physician offices and clinics currently offering the service.

- **Maintains the current status** affording women hospital admission and emergency abortions when their life is at risk--the same response they have always received in Alaska hospitals. It does not violate federal law--specifically the Emergency Medical Treatment and Labor Act (EMTALA)--or expose hospital boards and physicians to personal liability, as some opponents would suggest. In fact, EMTALA assures this emergency service will not end.

* We receive Medicare and Medicaid funds and/or other public funds, State Certificates of Need, and use of public property (in Anchorage our current site was donated by the Federal government) or property and buildings as in Seward and Kodiak.

Providence Health System

3200 PROVIDENCE DRIVE
P.O. BOX 196604
ANCHORAGE, ALASKA
99519-6604

Tel 907 562-2211

February 18, 1998

The Honorable Robin Taylor
Chairman, Senate Judiciary Committee
Alaska State Legislature
State Capital
Juneau, AK 99801

Re: Support for Senate Joint Resolution 35

Dear Senator Taylor:

On behalf of the Providence Health System, I wish to express our strong support for Senate Joint Resolution 35 (SJR35), which would address an issue recently raised by the State Supreme Court regarding the forced provision of abortion in this state.

The Providence Health System has and will continue to support the right of individuals and organizations to opt out of service that they find objectionable. We respect the beliefs and conscience of others. While we clearly make known our values, we do not seek to impose our values on others nor do we want others' values imposed on us.

SJR35 will ensure that this kind of mutual respect will continue to exist with regard to the performance of abortion. The Alaska State Supreme Court decision identified a need for recognition of this mutual respect of choice to be added to the actual language of the state constitution. Without SJR35, the Court found that the state law, which currently allows hospitals a freedom of choice, is unconstitutional "as applied to quasi-public hospitals." Yet, the definition given of "quasi-public hospitals" is so broad that it could apply to every single hospital in the state of Alaska. The Court, in essence, found that without the language of SJR35 actually being in the constitution, there could be a giant leap in this state from recognition of a right to choose to be involved in abortion to a mandate to participate in abortion services.

We are very thankful that Senator Miller has introduced SJR35 and strongly encourage you to vote for its passage. If you have questions, please contact us at Providence Alaska Medical Center by calling (907) 261-5059. Thank you.

Sincerely,

Gene L. O'Hara

Gene L. O'Hara, Administrator
Providence Alaska Medical Center

ALASKA STATE

HOSPITAL & NURSING HOME

ASSOCIATION

April 8, 1998

Senator Mike Miller
State Capitol
Juneau, AK 99801-1182

Dear Senator Miller:

I am writing in support of SJR 35. The Association has had several discussions regarding "Freedom of Conscience" and "Right to Privacy". Those discussions have ranged from one end of the spectrum to the other -- should we have an amendment that is very broad so it can cover any potential service the hospital might offer, or should it be very narrowly worded so that it is very clear to the individual voter what he/she is voting on?

The Alaska State Hospital and Nursing Home Association favors a narrowly defined amendment to be placed on the ballot...one that speaks specifically to abortion and the rights of an individual or facility to be able to refuse to be involved in a procedure. Therefore, ASHNHA is in support of SJR 35.

Sincerely yours,

Laraine L. Derr

Laraine L. Derr
President/CEO

319 SEWARD STREET #11 • JUNEAU, AK 99801 • (907) 586-1790 • FAX (907) 463-3573

Order Regarding Fees and Costs

Valley Hospital Association, et al. v. Mat-Su Coalition for Choice, et al.

Supreme Court No. S-07417

Date of Order: 11/21/97

Under Appellate Rules 508(f)(1) and 508(e) or 508(g)(2), costs and full reasonable attorney's fees are awarded to the Appellees. On or before December 1, 1997, the Appellees shall serve and file with this court an affidavit of services rendered on appeal and an itemized and verified bill of costs.

Entered at the direction of Justice Compton on November 21, 1997.

Clerk of the Supreme Court

Cheryl Jones, Deputy Clerk

cc: Authoring Justice
Trial Court Appeals Clerk

Distribution:

James Bopp, Jr.
Bopp Coleson and Bostrom
1 South 6th Street
Terre Haute, IN 478073510

Janet L. Crepps
Center for Reproductive Law
300 E 8th Ave Ste 100
Denver, CO 80203

Kenneth P. Jacobus
Attorney at Law
425 G Street #920
Anchorage, AK 99501

Brian J. Brundin, C.P.A.
Hughes, Thorsness, et. al.
509 West 3rd Avenue
Anchorage, AK 99501

Susan W. Mason
Atkinson, Conway & Gagnon
420 L Street, Suite 500
Anchorage, AK 99501

Susan C. Orlansky
Young & Feldman
500 L. Street, Suite 400
Anchorage, AK 99501

Kathryn Kolbert
The Center for Reproductive Law
120 Wall Street, 18th Floor
New York, NY 10005

Kevin G. Clarkson
Perkins Coie
1029 West 3rd Avenue, Suite 300
Anchorage, AK 99501

Stephan H. Williams
Law Office of Stephan Williams
500 L Street, Suite 400
Anchorage, AK 99501

Paul Linton
American United for Life
343 S. Dearborn St. Suite 1804
Chicago, IL 60604

ALASKA STATE LEGISLATURE

Please enter into the record my testimony to the House Finance
Committee Name

Committee on SJR 35 Dated 4-28-98
Bill / Subject

We support your efforts through this bill to place the power in the hands of the citizens! Keep up the good work. It is amazing that the ACLU if they truly were for civil liberties is not helping on this one! No person in this country should be forced to kill or aid in the killing of preborn babies. The citizens of Alaska need the opportunity to reconfirm this basic right to protect life rather than destroy it! Our hearts are with you in these last difficult weeks.

SIGNED: Patti Young
Testifier

Co-President, Alaska Right to Life Int.
Representing

2325 - 30th Avenue, Fairbanks, Alaska 99701
Address / Phone Number

To: All Representatives

I am the local representative of the Unitarian Universalist Service Committee and would like to speak in opposition to SJR-35.

The Unitarian Universalist Association has taken a number of pro-choice stands on abortion. Even before 1973, some Unitarian Universalist clergy were part of an "underground railroad" for women seeking safe abortions. They referred and directed, they drove and escorted, they arranged and helped to fund what many Unitarian Universalists believed was a private and religious choice. For them, the only role for government was to ensure that safe, legal abortion was the law.

It was toward this end that in 1987, the UU General Assembly went on record in one of its many pro-choice stands. They reaffirmed our "historic position, supporting the right to choose contraception and abortion as legitimate aspects of the right to privacy." In addition, the Assembly stated its opposition to "all legislation, regulations and administrative action, at any level of government, intended to undermine or circumvent the *Roe v. Wade* decision."

The passage of this amendment to our Constitution will only serve to provide more roadblocks to those women seeking a safe place for abortion. This is another end-run attempt by those persons opposed to Roe V. Wade to hinder access to safe, Constitutionally protected abortions. It will not provide any additional protection to those staff persons who are opposed to participating directly with an abortion. The debate and decisions over the public policy concerning this issue belongs in the legislature not in the hospital boardrooms.

I urge you all to oppose this resolution. Thank-you.

Richard Kemnitz
Unitarian Universalist Service Committee (Local Representative)
P.O.Box 84734
Fairbanks, Alaska 99708
907-457-9009 (home)
rkemnitz@polarnet.com

Lisa Peñalver
President,
FAIRBANKS COALITION FOR CHOICE
P.O. Box 74264, Fairbanks, Ak 99707
457-1458, fx 457-4243

FAIRBANKS COALITION FOR CHOICE

For House Finance Committee

April 28, 1998

Testimony Re: SJR 35: Proposed amendment to the Constitution of the State of Alaska relating to participation in an abortion

Dear Representatives,

SJR 35 is a bill which will cause manyproblems, and which serves no purpose (State law ALREADY protects people who wish to avoid participating in abortion services)!

1. This amendment could lead ALL hospitals in Alaska, even public ones, to ban constitutionally protected abortions. Some hospitals may even refuse to allow an exception to save the life of the woman - no abortions would be allowed, NOT EVEN TO SAVE A WOMAN'S LIFE !!! This endangers the health of all women.

Supporters of this bill are trying to give public hospitals the power to do something they themselves can't do, which is to BAN abortions legalized by the Roe V. Wade decision.

2. This amendment *IS A NIGHTMARE FOR PUBLIC HOSPITAL BOARDS:*

- INCREASED HOSPITAL LIABILITY! Refusal to provide abortion services violates federal law, and could expose hospital boards to serious liability problems/federal penalties!

- The legislation shifts the political battle over abortion from the Legislature to every public hospital boardroom in the state. The Pro-Choice movement in Alaska will be forced to do battle in EVERY HOSPITAL BOARD ELECTION and fight for EVERY APPOINTMENT made by a municipal assembly to a local hospital board. Whenever the makeup of a hospital board changes, one side or the other in the ugly debate will have reason to renew the battle.

- It will be an issue that *will consume hours and hours of TIME every year for each hospital board* and IT WILL NEVER GO AWAY.

- PROTESTS AND DEMONSTRATIONS AT HOSPITALS will become commonplace by one side or the other on this issue. Do public hospitals really want to deal with that?

- The legislature should not dump this contentious issue on hospital boards. Debate and decisions over public policy on abortion should remain in the Legislature.

3. Proponents of this legislation argue that, under the Supreme Court's decision in Valley Hospital Assoc. v. Mat-Su Coalition for Choice, hospital staff members who oppose abortion will have to participate in abortion procedures. That is NOT TRUE. The decision states: "*Nothing* in the permanent injunction granted as part of this Final Judgment *shall require any member of the medical staff of Valley Hospital, or any other officer, agent, servant, or employee of Valley Hospital, to participate directly in the performance of any abortion procedure if that person, for reasons of conscience or belief, objects to doing so.*"

4. Proponents of this legislation have argued that if no employees of Valley Hospital want to perform an abortion, the hospital will have to hire additional staff in order to provide abortions. That is NOT TRUE. All the Supreme Court held was that the hospital could have not a policy prohibiting abortions *if there were doctors on staff who were willing to perform them.*

5. Proponents of this legislation also argue that, under the Valley Hospital case, hospitals cannot assert a religious basis for restricting abortions. That also is NOT TRUE. *Private hospitals*, such as Providence, are not covered by this decision. The court ruled that Valley Hospital, a nonsectarian hospital built with state funds, did not and could not assert a religious basis for its restrictive abortion policy.

Supporters have said that this bill promotes "local control" *Nothing could be further from the truth.* Just a few Board members may become empowered to impose their religious views on an entire community! It could lead to a ban on all constitutionally protected abortions in most, if not all, Alaska communities. Anyone supporting this bill is taking an anti-choice position because passage would provide a barrier against women making a private decision in consultation with their doctor. PLEASE VOTE AGAINST THIS AMENDMENT.

Sincerely,

Lisa M. Peñalver

CC: all Senators and Representatives

SUBJECT INDEX