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HOUSE CS FOR CS FOR SENATE BILL NO. 100(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

**Offered:
Referred:**

Sponsor(s): SENATE JUDICIARY COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to services of representation for indigent persons and to the
2 payment by indigent persons for legal services and related costs."

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

4 * **Section 1.** AS 18.85.100(a) is amended to read:

5 (a) An indigent person who is under formal charge of having committed a
6 serious crime and the crime has been the subject of an initial appearance or subsequent
7 proceeding, or is being detained under a conviction of a serious crime, or is on
8 probation or parole, or is entitled to representation under the Alaska [SUPREME
9 COURT] Delinquency or Child in Need of Aid Rules, or is detained under an order
10 issued under AS 18.15.120 - 18.15.149, or against whom commitment proceedings for
11 mental illness have been initiated, is entitled (1) to be represented, in connection with
12 the crime or proceeding, at the level and to the extent required under the United
13 States Constitution and the Constitution of the State of Alaska [BY AN
14 ATTORNEY TO THE SAME EXTENT AS A PERSON RETAINING AN

1 ATTORNEY IS ENTITLED;] and (2) to be provided with the necessary services and
2 facilities of this representation, including investigation and other preparation, at the
3 level and to the extent required under the United States Constitution and the
4 Constitution of the State of Alaska.

5 * Sec. 2. AS 18.85.120(c) is amended to read:

6 (c) The [UPON THE PERSON'S CONVICTION, THE] court may enter a
7 judgment that a person for whom counsel is appointed pay for services of
8 representation and court costs in a criminal proceeding or in a proceeding under the
9 Alaska Delinquency Rules. [ENFORCEMENT OF A JUDGMENT UNDER THIS
10 SUBSECTION MAY BE STAYED BY THE TRIAL COURT OR THE APPELLATE
11 COURT DURING THE PENDENCY OF AN APPEAL OF THE PERSON'S
12 CONVICTION.] Upon a showing of financial hardship, the court (1) shall allow a
13 person subject to a judgment entered under this subsection to make payments under
14 a payment schedule; and (2) shall allow a person subject to a judgment entered under
15 this subsection to petition the court at any time for remission, reduction, or deferral of
16 only the unpaid portion of the judgment [; AND (3) MAY REMIT OR REDUCE THE
17 BALANCE OWING ON THE JUDGMENT OR CHANGE THE METHOD OF
18 PAYMENT IF THE PAYMENT WOULD IMPOSE MANIFEST HARDSHIP ON
19 THE PERSON OR THE PERSON'S IMMEDIATE FAMILY]. Payments made under
20 this subsection shall be paid into the state general fund.

21 * Sec. 3. AS 18.85.120 is amended by adding a new subsection to read:

22 (e) Judgments entered under (c) of this section shall be imposed in accordance
23 with rules adopted by the supreme court, in consultation with the Public Defender
24 Agency and the office of public advocacy, that establish schedules setting the costs for
25 the services of representation and court costs for trial and appellate courts. The
26 schedules shall be reviewed at least biennially and, when appropriate, adjusted to
27 reflect changes in the costs for services of representation and court costs. A trial court
28 schedule must include provisions to impose additional costs in cases where paid expert
29 witnesses are called on behalf of the defendant.

30 * Sec. 4. AS 47.12.120(e) is amended to read:

31 (e) Except to the extent that court costs are actually paid by a person

1 against whom a judgment for court costs has been entered under AS 12.85.120,
2 the [THE] department shall pay all court costs incurred in all proceedings in
3 connection with the adjudication of delinquency under this chapter, including hearings
4 that result in the release of the minor.

Barbara Jo COOPER, Appellant,

v.

STATE of Alaska, Appellee.

In re R. J. M., a Minor.

Christopher K. COOPER, Appellant,

v.

Barbara Jo COOPER, Appellee.

Nos. 4906, 4970.

Supreme Court of Alaska.

Dec. 24, 1981.

Mother and father appealed from orders entered by the Superior Court, Third Judicial District, Anchorage, S. J. Buckalew and Victor D. Carlson, JJ., refusing to award costs or fees to either party in child in need of aid proceeding, dismissing father's petition for modification of child custody, and awarding mother full costs and fees requested against father in child custody proceeding. The Supreme Court, Connor, J., held that: (1) mother's motion for costs and attorney fees in child in need of aid proceeding was properly denied; (2) even assuming that judge had authority to grant mother's motion to dismiss father's petition for modification of custody, which motion had been previously denied by another judge to whom case was assigned for motions, it was error to dismiss petition "with prejudice"; and (3) trial court abused its discretion in custody proceeding in awarding mother costs and attorney fees representing carry-over of substantial portion of costs and fees incurred in child in need of aid proceeding.

Affirmed in part, reversed in part and remanded.

1. Costs ⇌ 173(1)

General authority to make costs and attorney fee awards derives from statute governing costs allowed prevailing party. AS 09.60.010.

2. Infants ⇌ 205

Court has power to appoint counsel, at public expense, to represent minor or parents, in certain situations, in child in need of aid proceedings. AS 47.10.010 et seq., 47.10.050; Children's Procedure Rule 15(a).

3. Infants ⇌ 212

Neither civil rule governing award of attorney fees to prevailing party in action seeking recovery of money judgment nor statute governing award of attorney fees during pendency of divorce or annulment action applies to actions governed by children's rules. AS 09.55.200, 47.10.010 et seq., Rules Civ.Proc., Rule 82; Children's Procedure Rule 1(b).

4. Infants ⇌ 212

Mother's motion for costs and attorney fees in child in need of aid proceeding was properly denied. AS 09.55.200, 47.10.010 et seq.; Rules Civ.Proc., Rule 82; Children's Procedure Rule 1(b).

5. Infants ⇌ 212

Parent who successfully challenges child in need of aid petition is not a "public interest litigant" entitled to award of costs and attorney fees. AS 47.10.010 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

6. Infants ⇌ 212

Any benefit to public as result of mother's challenge to state's child in need of aid petition was too attenuated to justify award of costs and fees on such basis. AS 47.10.010 et seq.

7. Parent and Child ⇌ 2(16)

Assuming that judge had authority to grant mother's motion to dismiss father's petition for modification of custody after another judge, to whom case was assigned for motions, had denied mother's motion, it was error to dismiss petition "with prejudice." AS 09.55.205.

8. Infants ⇌ 19.3(5)

Statute authorizing court to modify or vacate order for custody of or visitation with minor child during minority of child precludes superior court from denying mo-

tion for change in custody "with prejudice." AS 09.55.205.

9. Infants ⇌ 19.3(5)

Motion to modify custody may be made at any time during minority of child and superior court has obligation to consider such request. AS 09.55.205.

10. Infants ⇌ 19.3(5)

Court may deny any particular request for modification of custody so long as it does not abuse its discretion in doing so, but it cannot preclude future requests for change in custody. AS 09.55.205.

11. Infants ⇌ 19.3(5)

Modification of custody must generally rest upon some substantial change in circumstances. AS 09.55.205.

12. Infants ⇌ 19.3(4)

Parties' relative economic situations and earning powers are relevant to determining whether to order award of attorney fees in custody proceeding.

13. Infants ⇌ 19.3(4)

Factors to be considered in determining whether to award attorney fees in custody proceeding are whether equal amount of fees has been expended by parties, whether equal amount of time and effort has been expended and whether party can plainly be designated as prevailing party.

14. Infants ⇌ 19.3(4)

Decision whether to make award of attorney fees in custody proceeding is committed to sound discretion of trial court.

15. Parent and Child ⇌ 2(16)

Trial court abused its discretion in custody proceeding in awarding mother attorney fees which represented carry-over of substantial portion of costs and fees incurred by her in child in need of aid proceeding. AS 47.10.010 et seq.

* Van Hoomissen and Taylor, Superior Court Judges, sitting by assignment made pursuant to article IV, section 16 of the Constitution of Alaska.

16. Infants ⇌ 19.3(4)

In making award of attorney fees in custody proceeding, court is limited to making award to enable other party to prosecute or defend "the action." AS 09.55.200(a)(1); Rules Civ.Proc., Rule 82(a)(1).

17. Infants ⇌ 19.3(4)

Phrase "the action" in provisions authorizing limited award of attorney fees to enable other party to prosecute or defend "the action" necessarily refers to case in which the award is made and does not authorize awards for costs or fees incurred in any other action, no matter how closely related issues might be. AS 09.55.200(a)(1); Rules Civ.Proc., Rule 82(a)(1).

See publication Words and Phrases for other judicial constructions and definitions.

Wayne Anthony Ross, Anchorage, for appellant-appellee Barbara Cooper.

David T. LeBlond, Asst. Atty. Gen., Anchorage, and Avrum M. Gross, Atty. Gen., Juneau, for appellee State of Alaska.

Jeanne Ames Riley, guardian ad litem for R. J. M.

Max F. Gruenberg, Jr., Gruenberg & Frenz, Anchorage, for appellant Christopher K. Cooper.

Before RABINOWITZ, C. J., CONNOR, and MATTHEWS, JJ., and GERALD VAN HOOMISSEN and WARREN W. TAYLOR, Superior Court Judges.*

OPINION

CONNOR, Justice.

These cases raise the issues of whether the superior court erred in denying a parent her costs and attorney's fees in a child in need of aid proceeding,¹ or in awarding substantially the same costs and fees on a carry-over basis in a subsequent custody proceeding.

1. See AS 47.10; Alaska Rules of Children's Proceedings.

Barbara Jo Cooper (now Tanner) and Christopher K. Cooper were married in February, 1974, and divorced in January, 1978. During their marriage the couple cared for three children, two of whom, R.J.M. and F.J.C., were Barbara Tanner's natural children by former marriages. Only K.M.C. was a natural child of this marriage. The parties' petition for dissolution of their marriage stated that they had agreed that custody of K.M.C. was to be with Barbara Tanner, and that the father, Christopher Cooper, was to have reasonable visitation rights. The petition was silent as to R.J.M. and F.J.C.

Six months after the dissolution, in July, 1978, Christopher filed a motion in the superior court seeking custody of all three children, alleging in part that he was the "psychological parent" of R.J.M. and F.J.C. Christopher made no further filings in the custody action until July, 1979, when he opposed Barbara's motion to dismiss.

Before the custody action actually went forward, however, R.J.M.'s circumstances changed. In June, 1978, upon the recommendation of the Alaska Community Mental Health Clinic, Barbara agreed to place R.J.M. in the Alaska Psychiatric Institute (API). Subsequent to R.J.M.'s admission, the staff at API advised Barbara that the dispute between her and Christopher over custody of R.J.M. was disturbing R.J.M.'s treatment. The staff advised Barbara that R.J.M. should be insulated from that dispute, and that the best means of accomplishing this would be to make R.J.M. a ward of the state so that he could be placed in a temporary foster home. According to Barbara, the API staff assured her that regaining custody of R.J.M. would be a simple matter. Based on these assurances, Barbara acquiesced and, in October, 1978, the state filed a petition to adjudicate R.J.M. a child in need of aid. See AS 47.10.010(a)(2)(A). Shortly thereafter the court entered an order granting the petition, based on Barbara's acquiescence.

2. Findings of fact and conclusions of law were entered July 27, 1979, specifying that custody

Approximately four months later, in March, 1979, the state filed a notice of its intent to transfer custody of R.J.M. to Christopher. Barbara objected by filing a motion to set aside the child in need of aid adjudication, contending that she misunderstood the consequences of stipulating to state custody of R.J.M. On the same day Christopher moved to intervene, seeking to obtain physical custody of the child but leaving legal custody of R.J.M. in the state. The court allowed Christopher's participation in the matter, although apparently it did not actually rule on his intervention motion. After an evidentiary hearing on April 6, 1979, Barbara's motion was granted, returning legal and physical custody of R.J.M. to her.

Thereafter, on April 10, 1979, the state filed a new, or amended, petition urging adjudication of R.J.M. as a child in need of aid. Christopher also participated in this hearing. The hearing on that petition lasted twenty days, and resulted in an order, on May 7, 1979, denying the state's petition.² Barbara moved for costs of \$967.50 and attorney's fees of \$15,507.75 on the ground that she was the prevailing party. Christopher filed a cross motion for his costs of \$15.00 and attorney's fees of \$11,146.50. The court ruled against both motions, refusing to award costs or fees to either party. Barbara appeals from this decision.

Following the conclusion of the child in need of aid proceeding, Barbara moved to dismiss Christopher's July, 1978, motion for custody. She argued in part that res judicata and collateral estoppel precluded granting him custody of R.J.M. R.J.M.'s guardian ad litem supported the motion to dismiss. Christopher's opposing pleadings stated that he no longer sought custody of R.J.M., but rather merely the implementation of his rights of visitation regarding R.J.M., and the other two children, K.M.C. (his natural daughter) and F.J.C.

On July 26, 1979, Barbara moved to peremptorily disqualify Judge Buckalew. Judge Carlson, apparently as acting presid-

of R.J.M. was with Barbara, and granting Christopher reasonable visitation rights.

ing judge, denied the motion on the ground that Judge Buckalew had spent three weeks on the related child in need of aid case. The next day Judge Buckalew, apparently acting presiding judge for that day, vacated Judge Carlson's order and assigned the case to Judge Ripley for motions only. That same day, July 27, 1979, Judge Ripley denied Barbara's motion to dismiss and ordered the case to go forward on the limited issue of Christopher's visitation rights.

Four days later, on July 31, 1979, Barbara renewed her motion to dismiss. The memorandum attached to that pleading indicates that neither Barbara nor her attorney were aware, at that time, of Judge Ripley's order denying the dismissal motion. That same day Judge Carlson granted Barbara's motion, and dismissed the case with prejudice. Christopher appeals from this dismissal.

Approximately one week later, on August 8, 1979, Barbara moved in the custody proceeding (No. 4970) for costs of \$967.50 and attorney's fees of \$16,892.75. All of these costs and a substantial portion of these fees were sought in the child in need of aid proceeding. Barbara's basic argument was that costs and fees should carry over, because the issues and proofs in the child in need of aid action and in the custody action were "so closely interrelated" as to "be almost totally indistinguishable" and, therefore, her costs and fees should be recoverable pursuant to Civil Rule 82. In opposition, Christopher argued that the costs and fees in the two cases were separable, that the issue of costs and fees was res judicata based on the court's denial of costs and fees

in the earlier action, that there was no jurisdiction for the court to award costs or fees from the prior case, that Civil Rule 82 does not apply to dissolution actions, and that equity did not require an award of costs and fees. On September 14, 1979, the court awarded Barbara the full costs and fees requested against Christopher. Christopher appeals from this ruling.

A. Costs and Fees In The Child In Need of Aid Proceeding

The first issue we must address is whether the superior court has authority to award costs and fees in a child in need of aid proceeding, and, if so, whether it abused its discretion in failing to do so. On appeal Barbara presents several theories in support of her argument that the superior court should have awarded her costs and fees against both the state and Christopher.³

Barbara's first argument is that the character of the litigation under AS 47.10 (children in need of aid) is similar to that in adoption proceedings, see AS 20.15; and in custody proceedings, see AS 09.55.205; and that since costs and attorney's fees are available in those actions, see *Adoption of V. M. C.*, 528 P.2d 788, 795-96 (Alaska 1974); AS 09.55.200(a)(1); that it would, therefore, be inconsistent to not allow costs and fees in a child in need of aid proceeding. Thus she argues that Civil Rule 82,⁴ or AS 09.55.200,⁵ should apply, and that the trial court erred in not awarding her costs and fees.

3. Barbara's original motion was treated by the parties as seeking fees against both Cooper and the state.

Apart from the general issue of whether costs and attorney's fees can be awarded in an AS 47.10 proceeding, there are subsidiary issues of whether such fees are available against the state, as a sovereign, or against Christopher Cooper, as an alleged intervenor. Because we conclude that the superior court lacked power to award fees, we do not reach these specific issues.

4. Civil Rule 82(a) states, in part:

"(1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such

fees for the party recovering any money judgment therein, as part of the costs in the action allowed by law . . .

Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount."

5. AS 09.55.200 states, in part:

"(a) During the pendency of the action [for divorce or annulment], the court may provide by order

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

Barbara concedes that children's proceedings under AS 47.10 are governed by the Rules of Children's Procedure, see Children's Rule 1(b),⁶ and that these rules contain no provision for the award of attorney's fees. She argues, however, that Children's Rule 1(d) allows the superior court to utilize other authorizations for such an award. Children's Rule 1(d) states:

"Situations Not Covered by Rule.

Where no specific procedure is prescribed by these rules, the court may proceed in any lawful manner, not inconsistent with children's statutes or these rules, which appears most likely to achieve the aims and purposes of such statutes and these rules."

Thus, Barbara's argument is that the phrase "in any lawful manner" encompasses Civil Rule 82, or, alternatively, AS 09.55.200. The guardian ad litem adopts these arguments.

The state, on the other hand, argues that given our holding in *Kodiak Western Alaska Airlines, Inc. v. Bob Harris Flying Service, Inc.*, 592 P.2d 1200, 1204-05 (Alaska 1979), to the effect that Civil Rule 82 is inapplicable to actions governed by the Appellate Rules, it would be inconsistent to now apply Civil Rule 82 to actions governed by the Children's Rules. Further, the state argues that the provision in Children's Rule 1(d) applies solely to procedural matters and, it asserts, since the award of costs and attorney's fees is not a procedural matter, subsection (d) is inapplicable. As regards AS 09.55.200, the state argues that the statute, by its own terms, applies *solely* during the pendency of a divorce or annulment action, neither of which are involved in case No. 4906, which was a child in need of aid proceeding. Finally, it argues that the superior court cannot award costs and fees except when the legislature, or this court by rule pursuant to AS 09.60.010, has deter-

mined to allow such awards. See *State v. Smith*, 593 P.2d 625, 630-31 (Alaska 1979). Since no specific authority exists, it asserts that the superior court properly denied Barbara's motion for costs and fees. Christopher adopts these arguments.

[1-4] We are persuaded by the state's arguments. The general authority to make costs and attorney's fees awards derives from AS 09.60.010. *Stepanov v. Gavrilovich*, 594 P.2d 30, 37 (Alaska 1979). That section states:

"Costs allowed prevailing party. Except as otherwise provided by statute, the supreme court shall determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case."

There is no statute authorizing such awards in child in need of aid proceedings, nor have we promulgated any rule or order authorizing such an award.⁷ Civil Rule 82 does not apply to actions governed by the Children's Rules, see e.g., *Kodiak Western*, 592 P.2d at 1204-05; nor is AS 09.55.200 applicable. Absent any applicable authorization, the superior court properly denied Barbara's motion for costs and attorney's fees in the child in need of aid proceeding.⁸

This result is supported by strong policy considerations advanced by the state. Children in need of aid proceedings are intended to promote an important public interest—the welfare of children. Exposing the state to costs and attorney's fees when a child is ultimately determined not to be in need of aid would significantly chill the state's willingness to commence protective proceedings for children. Such a result is inconsistent with the purposes underlying children's proceedings. Accordingly, we reject Barbara's argument that the court erred in denying recompense for her costs and fees.

child in need of aid proceedings. See AS 47.10.050; Children's Rule 15(a).

6. Children's Rule 1(b) states: "The procedure in children's matters shall be governed by these rules."

7. The court does have the power to appoint counsel, at public expense, to represent the minor or the parents, in certain situations, in

8. Given this resolution we decline to address the parties' arguments concerning who, under Civil Rule 82, the prevailing party may have been in No. 4906.

As alternative grounds for reversal, Barbara urges certain equitable bases for an award, namely, that the state's alleged bad faith in the litigation provides a basis for an award of costs and attorney's fees, or that she is entitled to her expenses, on the ground that the proceeding was one "imbued with the public interest." The superior court, however, specifically rejected a proposed finding that the state acted in bad faith by misleading Barbara and, therefore, the "bad faith" basis for an award was inapplicable on the facts.

[5,6] Nor are we persuaded that a parent who successfully challenges a child in need of aid petition is a "public interest litigant." In *Anchorage v. McCabe*, 568 P.2d 986 (Alaska 1977), we articulated three factors which determine whether a case is one in the public interest. These are: first, whether the action effectuated strong public policies; second, whether numerous people received benefits from the plaintiff's litigation success; and third, whether only a private party could have been expected to bring the action. *Id.* at 991. Barbara argues the public was benefited in that the state will no longer "rush into court" without a better examination of the child's existing family situation. We disagree with her basic argument. Barbara was seeking to vindicate her own interests, as well as those of R.J.M. Any benefit to the public as a result of her challenge to the state's petition is too attenuated to justify an award of costs and fees on this basis.

There is no authority for an award of attorney's fees in a child in need of aid proceeding and thus the superior court's denial of costs in No. 4906 is affirmed.

B. The Custody Dispute

1. Dismissal With Prejudice

The first issue in Christopher's appeal is whether the superior court erred in dismissing "with prejudice" his petition for modification of custody. Judge Ripley, to whom the case was assigned for motions, denied Barbara's motion to dismiss Christopher's petition and ordered the case to proceed on

the question of visitation. Subsequently, Judge Carlson dismissed the petition with prejudice.

[7] The order of dismissal and the setting in which it was entered were quite irregular. Christopher, however, does not challenge Judge Carlson's authority to have granted the motion. Rather, he attacks the "with prejudice" provision. Even assuming that Judge Carlson had such authority, we hold that it was error to dismiss the petition with prejudice.

AS 09.55.205 clearly contemplates that parties may seek modification of custody or visitation orders. That section states, in part:

"In an action for divorce or for legal separation the court may, . . . during the pendency of the action, or at the final hearing or at any time thereafter during the minority of the child of the marriage, make an order for the custody of or visitation with the minor child which may seem necessary or proper and may at any time modify or vacate the order." (emphasis added).

[8-11] We think this section precludes a superior court from denying a motion for a change in custody "with prejudice." A motion to modify custody may be made at any time during the minority of the child involved, and the superior court has an obligation to consider such a request. See *Deivert v. Oseira*, 628 P.2d 575, 578 (Alaska 1981); *Sherry v. Sherry*, 622 P.2d 960, 965 (Alaska 1981). The court may, of course, deny any particular request for modification so long as it does not abuse its discretion in doing so. But it cannot preclude future requests for a change in custody. *Sherry*, 622 P.2d at 965. Of course, modification must generally rest upon some substantial change in circumstances. *Deivert*, 628 P.2d at 577-78. The order dismissing the modification motion with prejudice is reversed. We note that no jurisdictional issue is raised in this case as both parties and the child still reside in Alaska.

2. Costs and Fees In The Custody Dispute

Christopher's other argument on appeal is that the superior court erred in awarding Barbara her costs of \$967.50 and attorney's fees of \$16,892.75 in the custody proceeding. He points out that the award clearly encompasses the costs and fees incurred by Barbara in her defense of the child in need of aid petition, and argues that the carry-over was error on grounds: (a) that the denial of costs and fees in No. 4906 was the "law of the case" and therefore precluded the subsequent award; or (b) that the denial in No. 4906 is res judicata or collaterally estops the subsequent award; or (c) that the court abused its discretion, under AS 09.55.200(a)(1), in awarding any costs and fees. Barbara, on the other hand, argues that the issues in the two proceedings were interwoven, and therefore asks us to hold that the costs and fees in the children's proceeding "carried over" to the custody action and are authorized by either AS 09.55.200(a)(1) or Civil Rule 82.

[12-14] We have previously held that in divorce or dissolution actions attorney's fees are not to be awarded solely on the basis of which party is regarded as the prevailing party. *Johnson v. Johnson*, 564 P.2d 71, 76-77 (Alaska 1977); *Burrell v. Burrell*, 537 P.2d 1, 6 (Alaska 1975). The parties' relative economic situations and earning powers

9. The sole authority Barbara relies on is the following language from *United States v. Equitable Trust Co.*, 283 U.S. 738, 51 S.Ct. 639, 75 L.Ed. 1379 (1931):

"The district court apparently included some [fees from] services in other litigation . . . But the circuit court of appeals excluded them, and we think its action was right. The nature of the other litigation was such that it could neither disturb the prosecution of this suit nor affect the outcome."

283 U.S. at 746, 51 S.Ct. at 642, 75 L.Ed. at 1385.

Drawing on this language, she argues that: "The clear negative inference of this holding is that where the nature of another litigation is such that it could disturb the prosecution of a subsequent suit or affect its outcome, legal services rendered in said other litigation might properly be allowed as attorney's fees in the subsequent suit."

are relevant to determining whether to order an award of attorney's fees, *Johnson*, 564 P.2d at 76; *Burrell*, 537 P.2d at 7. Further factors to be considered in this context are whether an equal amount of fees has been expended by the parties, and whether an equal amount of time and effort has been expended. *Johnson*, 564 P.2d at 76-77. Although often there is no party who can plainly be designated as the prevailing party, in other cases, such as the present one, one party clearly has prevailed and that factor too may be weighed in the balance. Finally, the decision of whether to make any award is committed to the sound discretion of the trial court. *Id.*

[15] The superior court in this case did not specify its reasons for awarding Barbara all the costs and fees she sought. Even so, in awarding her a total of \$17,860.25, we conclude that it abused its discretion. Barbara concedes that this award amounts to a carry-over of a substantial portion of the costs and fees incurred in the child in need of aid proceeding. In that proceeding she requested a total of \$16,475.25. The difference between that figure and the award in the custody proceeding is \$1,385.00; this figure reflects Barbara's actual costs and attorney's fees in the custody proceeding. We can find no authority for the carry-over of the costs and fees of the earlier proceeding,⁹ nor do we accept Bar-

She then argues that the litigation in *In re R. J. M.*, the child in need of aid proceeding, "clearly disturbed the prosecution of this action and clearly affected its outcome" in that the prior action vested custody in her, and had the effect of changing Christopher's original petition from one for custody to one for visitation. We disagree with the proffered negative inference and, in any case, with Barbara's analysis. The child in need of aid proceeding involved a custody dispute, as it regarded R.J.M., between Barbara and the state. The custody proceeding, on the other hand, involved a custody dispute between Barbara and Christopher, and extended to R.J.M., F.J.C., and K.M.C. Barbara's success against the state did not per se preclude Christopher's success in the custody proceeding. In the former, the central issue was whether Barbara was a fit and suitable parent. See AS 47.10. In the latter, however, the issue is broader: which parent should have custody in light of the child's best interests. See AS 09.-

bara's argument that such an award is "proper and justifiable" on policy grounds.

[16, 17] In making the award of attorney's fees the court is limited to making an award to enable the other spouse to prosecute or defend "the action." See AS 09.55-200(a)(1); Civil Rule 82(a)(1). The phrase "the action" necessarily refers to the case in which the award is made. It plainly does not authorize awards for costs or fees incurred in any other action, such as a child in need of aid proceeding, no matter how closely related the issues might be. Absent such an authorization the award cannot stand. Further, allowing such a carry-over would have the effect of making Christopher liable for Barbara's defense of litigation commenced by the state. Notwithstanding the evidence that the state intended to eventually place R.J.M. with Christopher, the state initiated and prosecuted the action. Given Christopher's limited role in the proceedings,¹⁰ it would be manifestly unjust to hold him liable for Barbara's defense costs and fees. Christopher, at most, can be ordered to pay that amount which was necessary for Barbara to defend in case No. 4970, the continued dissolution and custody action between those two parties. The award of costs and attorney's fees in No. 4970 is vacated and the case is remanded for the superior court to exercise its discretion in determining what award of costs and fees, if any, to make to Barbara¹¹ for her defense in No. 4970.

AFFIRMED in part, REVERSED in part, and REMANDED.

BURKE and COMPTON, JJ., not participating.

55.205. It is possible that Barbara can be a fit parent yet that a child's best interests compel that custody be placed in Christopher. Even if the interrelation between the issues was complete, the award of costs and fees must still rest upon some statute, court rule, or recognized rule of equity, not on inferences from language in an unrelated decision from another jurisdiction.

10. The court did not officially grant Christopher's motion to intervene, although it did allow him to participate in the proceeding. Even so, he did not initiate or prosecute the action.

George Gary FARNSWORTH and Sandra Kay Farnsworth, Appellants,

v.

H. J. STEINER, Personal Representative of the Estate of Michael R. Steiner, Deceased, Appellee.

No. 5345.

Supreme Court of Alaska.

Dec. 24, 1981.

Plaintiff won a jury verdict in personal injury suit. Before trial, defendant had made an offer of judgment pursuant to Civil Rule 68, which defendant rejected. Since the Superior Court, Fourth Judicial District, Fairbanks, Warren W. Taylor, J., found defendant's offer to have been in excess of plaintiff's recovery, it awarded defendant costs and attorney fees from the time of his offer through the date of verdict. Upon an appeal and cross appeal, the Supreme Court, 601 P.2d 266, affirmed as to all matters except the award of attorney fees and interest, and remanded for recomputation of those awards. On remand, the Superior Court, Taylor, J., entered a judgment from which plaintiff appealed, objecting to the court's denial of postjudgment interest during the pendency of his initial appeal. The Supreme Court, Burke, J., held that: (1) inclusion of prejudgment interest as Rule 68 "costs" to be denied plaintiff offeree was incorrect; rather, since pre-

His participation was limited; he did not testify or offer any witnesses.

11. We reject Christopher's arguments that the denial of fees in the child in need of aid proceeding precludes an award of fees, under theories of the "law of the case," *res judicata*, or collateral estoppel, in a dissolution action. The two actions are distinct and, further, as we have ruled today, fees are unavailable as a matter of law in the former but statutorily authorized in the latter. Logically, therefore, a denial of fees in the former can in no manner compel the same result in the latter proceeding.

Alaska Civil Liberties Union

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POSITION PAPER

To: House Judiciary Committee
From: Jennifer Rudinger, Executive Director
Date: Thursday, May 13, 1999

Re: CSSB 100 (An Act relating to the payment by indigent persons for legal services and related costs.)

The Alaska Civil Liberties Union is a non-profit, non-partisan organization dedicated to preserving and defending the principles of individual liberty guaranteed in the U.S. Bill of Rights and in the Alaska Constitution. We urge you not to pass SB 100 out of the House Judiciary Committee, because it infringes the right to counsel guaranteed by the Sixth Amendment and Article 1, Section 11 of the Alaska Constitution.

Senate Bill 100 actually requires the court to order a person for whom counsel is appointed to repay court costs and legal service fees regardless of whether the person is convicted of a crime! Only after this judgment has been entered does any opportunity to demonstrate financial hardship arise, but SB 100 does not guarantee such a hearing. SB 100 does not explicitly provide the defendant with notice and opportunity to be heard on the issue of financial hardship, nor does it provide any standards for the court to apply in making that determination. Perhaps the most offensive element of SB 100 is its application to people who are wrongly haled into court in the first place, are found not guilty, or for whom the charges are ultimately dropped by the State. SB 100 will have the effect of coercing indigent people into plea bargaining or waiving their right to counsel, even if they are innocent, for fear of going bankrupt and putting their families out on the street if they try to defend themselves.

The landmark Supreme Court ruling which established the fundamental right of indigent people accused of crimes to have court-appointed counsel provided for their defense is (*Gideon v. Wainwright*, 372 US 335 (1963)). The Court based its ruling on the Sixth Amendment's guarantee of counsel and observed that reason, logic and fundamental fairness require that any person haled into court by the government must be afforded the opportunity to be represented by counsel. Senate Bill 100 flies in the face of the spirit of *Gideon v. Wainwright* by treating court-appointed counsel as a luxury which must be bought rather than as a necessity or a fundamental right.

It is true that eleven years later, the Supreme Court upheld a recoupment formula which conditioned probation on repayment to the state of the costs of a free legal defense, where the defendant had in fact gained a subsequent ability to pay. *Fuller v. Oregon*, 417 US 40 (1974). However, it was critical in that case that the defendant had at least been convicted of a crime! In *Fuller*, the defendant tried to make the reverse argument of what we are making to you today. Mr. Fuller argued that it was an Equal Protection violation

to require him to repay his legal fees as a condition of probation when defendants who were acquitted were not required to reimburse the state for the costs of their defense. Not only did the Supreme Court reject Mr. Fuller's argument that this constituted invidious discrimination, but the Court actually lauded the decision of the Oregon legislature to exempt innocent people from the repayment obligation as an "effort to achieve elemental fairness" in the judicial system. *Fuller*, 417 US at 50.

In defense of the Oregon legislature's limitation of the repayment obligation to only those people who have ultimately been found guilty of a crime, the Court wrote, "A defendant whose trial ends without conviction or whose conviction is overturned on appeal has been seriously imposed upon by society without any conclusive demonstration that he is criminally culpable. His life has been interrupted and subjected to great stress, and he may have incurred financial hardship through loss of job or potential working hours. His reputation may have been greatly damaged." *Fuller*, 417 US at 50. Thus, while the state may demand repayment from convicted people who can later afford to pay (under a theory of retribution), the state has no justification for demanding payment from people who are wrongfully haled into court in the first place or who ultimately are found not guilty of the crime with which they are charged. SB 100, however, would add insult to injury by forcing the court to enter a judgment against people whose only "crime" is not being able to afford an attorney.

The defendant in *Fuller* was in fact convicted of a crime, as we have pointed out. The Supreme Court has not been faced with a case in which an indigent person who was acquitted challenged such a recoupment statute. Likewise, to our knowledge, no Court of Appeals has been faced with such a case. However, the dicta in *Fuller* cited above clearly indicate that the state's interest is much weaker and the liberty interest of the individual is much stronger where the defendant is acquitted of all charges.

In fact, a group of acquitted indigent defendants successfully challenged the statute passed by the Oregon legislature after *Fuller*, and the statute was struck down on the grounds that the statute impermissibly chilled indigent defendants' exercise of their Sixth Amendment right to counsel and that it violated the due process clause. *Fitch v. Belshaw*, 581 F.Supp. 273 (1984). Although District Judge Panter did not issue a broad ruling in *Fitch* that a recoupment statute is per se unconstitutional when applied to acquitted defendants, the particular defects in the Oregon statute which were found to violate the Sixth Amendment are also present in the scheme proposed by SB 100. In striking down the statute, Judge Panter pointed out that "[d]espite the constitutional success of Oregon's recoupment formula for convicted defendants, the Oregon Legislature enacted [the statute in question] in 1979 with none of the safeguards approved in *Fuller*..." *Fitch*, 581 F.Supp. at 276. The missing *Fuller* safeguards Judge Panter was referring to which are also lacking in SB 100 are: (1.) restriction of repayment requirements to only convicted defendants, (2.) specific standards for courts to apply in determining whether a defendant is able to pay, and (3.) assurance that a defendant unable to make payments may demonstrate that the default was not attributable to an intentional refusal to obey the order of the court or due to bad faith on his part. *Id.* This last point is supported by Section 5-6.2 of the A.B.A. Standards for Criminal Justice,

which recommends that payment be sought only where defendants have made fraudulent representations concerning indigency in order to obtain free counsel. The commentary to the Standard states that reimbursement requirements "may serve to discourage defendants from exercising their right to counsel." American Criminal Procedure: Cases and Commentary (4th Ed.). Ed. By Stephen A. Saltzburg and Daniel J. Capra, (St. Paul, West Publishing Co., 1992), P. 636.

The Alaska Constitution generally has been interpreted to provide greater protections for civil liberties than the U.S. Constitution. The Alaska Supreme Court has held that the due process clause of the Alaska Constitution guarantees the right to counsel not only in criminal cases but in some civil cases as well, such as: child custody cases [*Flores v. Flores*, 598 P.2d 893 (Alaska 1979)]; civil contempt proceedings [*Flores*, 598 P.2d at 895, citing *Ottom v. Zaborac*, 525 P.2d 587 (Alaska 1974)]; and paternity suits [*Flores*, 598 P.2d at 895, citing *Reynolds v. Kimmons*, 569 P.2d 799 (Alaska 1977)]. It is true that the Alaska Supreme Court has upheld Rule 39 recoupment in the case of convicted indigent defendants. *State v. Albert*, 899 P.2d 103 (Alaska 1995). However, there appears to be no case exactly on point in Alaska with respect to recoupment from acquitted defendants, and SB 100 does not provide the safeguards approved in *Fuller* which the *Fitch* court deemed to be essential. The AkCLU believes that in the case of acquitted defendants, Article 1, Section 11 would be interpreted to provide at least the same level of protection for the right to counsel as the Sixth Amendment under which the Oregon recoupment statute was struck down in *Fitch*. The Alaska Supreme Court has stated, "[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, 401-402 (Alaska 1970) (extending the constitutional right to a jury trial).

We therefore urge the House Judiciary Committee to kill SB 100 in committee. Please feel free to call me at (907) 258-0044 if you wish to discuss this matter further. Thank you for your careful consideration.

Rule 39

ALASKA RULES OF COURT

year in which the defendant qualifies for a dividend until the judgment is paid in full.

(B) Defendant may oppose entry of judgment by filing a written opposition within 10 days after the date of notice, as defined in Criminal Rule 32.3(c), of the court's intent to enter judgment. The opposition shall specifically set out the grounds for opposing entry of judgment. The prosecuting authority may oppose the amount of the judgment by filing a written opposition within the same deadline.

(C) If no opposition is filed within the time specified in section 39(c)(1)(B), the clerk shall enter judgment against defendant for the amount shown in the notice. If a timely opposition is filed, the court may set the matter for a hearing and shall have authority to enter the judgment.

(D) The judgment must be in writing. A copy of the judgment shall be mailed to defendant's address of record. The judgment shall bear interest at the rate specified in AS 09.30.070(a) from the date judgment is entered.

(2) Collection.

(A) The judgment has the same force and effect as a judgment in a civil action in favor of the prosecuting authority and is subject to execution.

(B) All proceedings to enforce the judgment shall be in accordance with the statutes and court rules applicable to civil judgments. The judgment is not enforceable by contempt. Payment of the judgment may not be made a condition of a defendant's probation. Default or failure to pay the judgment may not affect or reduce the rendering of services on appeal or any other phase of a defendant's case in any way. A defendant does not have a right to be represented by appointed counsel in connection with proceedings under subparagraph 39(c) or any proceedings to collect the judgment.

(C) Upon showing of financial hardship, the court shall allow a defendant subject to a judgment under this rule to make payments under a repayment schedule. A defendant may petition the court at any time for remission, reduction or deferral of the unpaid portion of the judgment. The court may remit or reduce the balance owing on the judgment or change the method of payment if the payment would impose manifest hardship on the defendant or defendant's immediate family.

(D) Notwithstanding section 39(c)(2)(B), a defendant may be held in contempt for failing to comply with an order under this rule to apply for a permanent fund dividend.

(3) Appeal.

(A) If defendant appeals the conviction, enforcement of the judgment may be stayed by the trial court or the appellate court upon such terms as the court deems proper.

(B) If defendant's conviction is reversed, the clerk shall vacate the judgment and order the prosecuting authority to repay all sums paid in satisfaction of the judgment, plus interest at the rate specified in AS 09.30.070(a).

(d) Schedule of Costs. The following schedules govern the assessment of costs of appointed counsel under paragraph 39(c). If a defendant is convicted of more than one offense in a single dispositive court proceeding, costs shall be based on the most serious offense of which the defendant is convicted. If a defendant is otherwise convicted of more than one offense, costs shall be separately assessed for each conviction. For good cause shown, the court may waive the schedule of costs and assess fees up to the actual cost of appointed counsel, including actual expenses.

Misdemeanors			
Trial			\$500.00
Change of plea			200.00
Post-conviction relief or contested probation revocation proceedings in the trial court			250.00
Felonies			
	Class B & C	Class A and Unclassified (Except (Murder)	Murder in the 1st and 2nd Degrees
Trial	\$1,500.00	\$2,500.00	\$5,000.00
Change of plea after substantive motion work and hearing and before trial commences	1,000.00	1,500.00	2,500.00
Change of plea post-indictment but prior to substantive motion work and hearing	500.00	1,000.00	2,000.00
Change of plea prior to indictment	250.00	500.00	750.00
Post-conviction relief or probation revocation proceeding in trial court	250.00	500.00	750.00

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