47 HJ: FILE NO. 6

SB-88

SENATE BILL 88 (Bar Association)

1. The present Board of Governors, as of 1955, includes 3 members from Southeastern, and 3 from the Second and Fourth Judicial Districts combined.

2. Half of the lawyers, or more, in the state are in the Anchorage area, and under the one-man--one-vote concept, Anchorage has felt that they should have greater representation on the 9-man board.

3. Obviously, the Ketchikan, Juneau and Tanana Valley Bar Associations don't approve, but the situation had almost reached the stage of throat-cutting.

4. Some of the members were even threatening to bolt the organization.

   At the May, 1970 Alaska Bar Association convention, a compromise resolution was approved. That compromise is reflected in this bill, which merely reconstitutes the board as follows:

   a. The Anchorage representation increases from 3 to 4.

   b. One of the 3 members is taken away from the Southeastern representation and one is taken from the 2nd and 4th District, making the apportionment 4--2--2.

   c. The 9th member will be elected on a state-wide basis.

5. All local bar associations and the State Bar, the Board of Governors, have approved the bill.

6. The second half of the bill merely provides that those members currently serving on the board will serve out their allocated terms. Only as each goes off the board will the new plan go into effect.

Offered: 2/2/71
Referred: Judiciary

IN THE SENATE BY THE JUDICIARY COMMITTEE

SENATE BILL NO. 88

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the Alaska Bar Association; and providing for an effective date."

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

* Section 1. AS 08.08.050(a) is amended to read:

(a) Two [THREE] members of the board shall be elected by and from among the members of the association resident in the first judicial district; four [, THREE] members of the board shall be elected by and from among the members of the association resident in the third judicial district; two [, AND THREE] members by and from among the members of the association resident in the combined area of the second and fourth judicial districts; and one member at large from the entire state. [NO MORE THAN TWO MEMBERS MAY BE RESIDENT PRACTICING ATTORNEYS IN THE FOURTH JUDICIAL DISTRICT WHEN THERE ARE FOUR OR MORE RESIDENT PRACTICING ATTORNEYS IN THE SECOND DISTRICT.]

* Sec. 2. AS 08.08.050(c) is amended to read:

(c) Three board members shall be elected annually (on the following triennial rotation:) by the following

(1) in the first year, one member at large and two members from the third judicial district;

(2) in the second year, one member from the combined area of the second and fourth judicial districts, one member from the third judicial district, and one member from the first judicial district; and

(3) in the third year, one member from the first judicial district, one member from the combined area of the second and fourth

SB-99

Box 4 - W
Spenard, Alaska 99503

10 February 1971

State Representative
William Moran
Pouch V
Juneau, Alaska 99801

Dear Mr. Moran:

The bill introduced by Senators Groh, Rader, Ziegler and Ray to rescind certification of the Constitutional Referendum is a direct threat to all elective processes, past, present and future. It also amounts to an outright and outspoken accusation that we who voted for the Convention are dolts who did not know what we were voting for. I resent the implication involved and state categorically that I consider myself an interested and intelligent voter and that I knowingly and willfully voted in favor of the Constitutional Convention. Further, I have made many inquiries among friends and acquaintances and found that each who did vote in favor of the Referendum did so in the same willful and intelligent manner.

It is alarming to realize that a possibility exists within the Legislature to overturn the mass will of the voters at the ballot box. I feel that the Senators who introduced this measure have performed an obvious disservice to the people of the State of Alaska, and on that basis should seriously consider resigning from their present elective seats.

There is a group of us here in the Anchorage area, as well as another group in the Fairbanks area, who are organized to fight the legal action now pending in the courts in Juneau in the same issue. If the courts rule favorably for the plaintiffs and void the Referendum, we are poised to immediately bring the matter back into the courts and will challenge the outcome of all other elections held at the same time (3 November 1970).

There are many valid and serious reasons as to why the Convention must be held and a majority of us are convinced that the changes cannot be accomplished by the Legislature due to the very nature of them.

I thank you for your very kind attention and urge you to defeat the dangerous measure introduced by Senators Groh, Rader, Ziegler and Ray.

Very truly yours,

Jack A. Pearson

Jack A. Pearson

SB 113

March 5, 1971

M E M O R A N D U M

TO: The Honorable John Rader, Chairman
Senate Local Affairs Committee

The Honorable Mike Miller, Chairman
House Local Affairs Committee

FROM: Robert P. Isaac
Assistant to the Commissioner
Department of Education

SUBJECT: Review of Senate Bill 113, Municipal Code

I am herewith transmitting a review of the education provisions in Senate Bill 113. In our opinion the proposed code, if modified as suggested, would meet most of the objections which have been raised.

A small committee of school administrators and school board members would like an opportunity to meet with the respective legislative local affairs committees when hearings are again scheduled to discuss Senate Bill 113 as redrafted.

R. P. I.

RPI:cjb

Attachment

March 5, 1971

M E M O R A N D U M

TO: The Honorable John Rader, Chairman
Senate Local Affairs Committee

The Honorable Mike Miller, Chairman
House Local Affairs Committee

FROM: Cliff R. Hartman
Commissioner of Education

By: Robert P. Isaac, Assistant to the Commissioner

SUBJECT: Senate Bill 133, Revised Municipal Code in Respect to its Educational Provisions

We have reviewed the revised municipal code in respect to its education provisions, and we are especially concerned over the apparent omission of a specific education provision for school districts co-terminus with home rule municipalities.

A number of district superintendents, school board members, and other persons involved in education have also expressed a similar concern.

Section 29.33.050 pertaining to education is almost identical to a similar provision in the present borough law Title 7, (7.15.030). This section in the proposed revision applies only to the operation of schools in general law cities and boroughs.

Section 29.13.100 specifies the limitations on home rule powers and indicates the sections of the general code which may not be modified by a charter. Significantly, Section 29.13.100 does not include Section 29.33.050, Education, thereby giving a home rule municipality considerable latitude in legislating educational matters. It is our contention that education is a State function and delegated to the municipalities for administration and operation. We do not believe this delegation of the administrative-operational responsibility of schools also implies a delegation of the Legislature's legislative prerogatives.

As you may know, there is a local court case which revolves around this very matter; and while a decision has not yet been reached by the court, case law strongly supports State law as being superior to charter provisions if there is a conflict between the two.

Proponents of the concept that a charter may supercede State law argue that home rule municipalities may legislate on matters of local concern, including education, even though it might mean that charter provisions take an opposite view in respect to the law. They further argue that the Legislature, by placing the municipal education provision in the municipal code, have made education a matter of local concern.

We do not agree with this supposition. We believe that the specific provision in the existing borough code, Section 7.15.030 and its proposed successor, Section 29.13.100 in the revised code, are adopted by reference in Title 14 by Section 14.14.065, thereby defining this section as a general education law.

We do not argue that a municipality does not have a local concern or interest in education; however, we do believe that all municipal districts should be governed by the same basic laws and that a home rule municipality charter should not be in conflict with law.

The Department of Education is charged with the general management and supervision of the public school system and must do so in accordance with State law.

If a municipality also has legislative authority in respect to education, it would mean requiring the Department to adjudicate district education matters not only under State law, but under the provisions of home rule charters. As has happened already, we would foresee school boards requesting clarification and interpretation of law when conflicts arise. In this connection, it is likely a request of this nature would be referred to the Department of Law for an opinion. Whatever direction the opinion might give, the Department of Education is required to follow that direction (unless subsequently changed by court or legislative action). In order to write an opinion, the Department of Law would also have to read the charter and law together to arrive at a conclusion. In our opinion, such a procedure would be chaotic and unworkable and would only lead, ultimately, to greater devisiveness between local municipal governing bodies and school boards.

The Legislature, in accordance with the Constitution, has delineated quite clearly its intent in providing for public education. The following sequence of constitutional and State law provisions indicates how this was accomplished and the application of these provisions to the foregoing discussion:

Constitution: Article VII, Health, Education, and Welfare

Section 1. Public Education. The Legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

Title 14:

Section 14.03.010. Establishment of a School System. There is established in the State a system of public schools to be administered and maintained as provided in this title. (Sec. 1, Ch. 98, SLA 1966)

Section 14.14.065. Relationship Between City School District and City. The relationships between the school board of a city school district and the city council and executive are governed in the same manner as provided in AS 07.15.330 for the school board of a borough school district and the borough assembly and executive. (Sec. 1, Ch. 98, SLA 1966)

By reference, Section 14.14.065 adopts 07.15.330 (29.33.050) and establishes it as general law to be observed by city and borough school districts, whether home rule or not.

Although there might be a number of alternatives, it would appear the most feasible recommendation we could make is to include Section 29.33.050 in the home rule limitations, Section 29.13.100. Such a revision would at least maintain the status quo.

If it is believed Section 29.33.050 is not adequate for both general law and home rule municipalities, we would then recommend the Legislature make such revisions as might be necessary. Our only case in point is that the education provisions should be in law and not in the charter, unless the law is repeated in the charter for convenience.

We would be glad to meet with the committees on this matter at their convenience.

RPI:cjb

Attachment

File: 023.1
023.2
022

SB 123

State Shoplifting Laws — A Chains Best Friend

Shoplifting laws have been enacted in forty-nine states. The District of Columbia has no laws which deal with the specific crime of shoplifting. California, while it has no shoplifting law, as such, the law of arrest allows a police officer to make an arrest when he has reasonable cause to believe a felony has been committed by the person arrested without incurring liability for false arrest. Decisions of the State Supreme Court and other appellate courts have held that a merchant or his employee may detain a suspected shoplifter for a reasonable time if he has probable cause to believe goods have been stolen (Collyer v. Kress; 5 California 2d, 175).
The first decision by the high court of any of the 49 states which have shoplifting laws was handed down by the Supreme Court of North Carolina on December 13, 1961. The Decision ruled the law was valid and sustained the conviction of shoplifter. (State v. Hales). The following chart indicates by a dot each state's inclusion in shoplifting laws of the United States.

	1	2	3	4	5
Alabama	●	●	●		
Alaska	●			●	●
Arizona	●	●	●		●
Arkansas	●	●	●	●	●
California (See Above)					
Colorado	●	●	●	●	[A]
Connecticut	●			●	●
Delaware	●	●	●	●	●
Florida	●	●	●		
Georgia	●	●	●		[A]
Hawaii	●	●	●		
Idaho	●			●	●
Illinois	●	●	●		
Indiana	●	●	●	●	●
Iowa	●	●	●	●	●
Kansas *	●		●		[A]
Kentucky	●	●		●	●
Louisiana	●	●	●	●	
Maine	●			●	●
Maryland	●		●		[A]
Massachusetts	●		●	●	
Michigan	●		●		
Minnesota	●	●	●		
Mississippi	●	●	●	●	[A]
Missouri	●	●	●	●	

	1	2	3	4	5
Montana	●	●	●		
Nebraska	●	●	●		
Nevada	●	●	●		
New Hampshire	●			●	●
New Jersey	●	●	●	●	
New Mexico *	●	●	●	●	[A]
New York	●	●	●		
North Carolina	●			●	●
North Dakota	●	●	●		
Ohio **5	●	●			●
Oklahoma	●	●	●	●	●
Oregon	●	●	●		●
Pennsylvania	●	●	●	●	●
Rhode Island	●	●			●
South Carolina	●	●	●	●	●
South Dakota	●	●	●	●	●
Tennessee	●	●	●	●	●
Texas	●	●	●		[A]
Utah	●	●	●		
Vermont	●	●			
Virginia	●		●		●
Washington	●		●		●
West Virginia	●	●	●		[A]
Wisconsin *	●	●	●	●	[A]
Wyoming	●	●	●		●

Chart based on information supplied by the Association of General Merchandise Chains and the Institute of Distribution

*As last amended 1969. **5 Amendment of 1969. *1959, Wisconsin enacted additional law permitting a person to threaten or use force against another for the purpose of preventing or terminating what he believes to be an unlawful interference with his property. Third persons may use similar means to defend another's property provided property belongs to a merchant and third party is his employee or agent of property.

Provisions of Shoplifting Laws

1) Definition of shoplifting or theft of merchandise. This includes any or all of the following: removing unpurchased goods from within the store with intent to steal; concealment of unpurchased goods with intent not to pay for same; alteration of price tag or other markings; transfer of goods to another person or another container with intent to steal. One who assists or abets is also guilty.

2) Right of detention. This includes giving the right to a merchant, his employee or a peace officer to detain a suspected shoplifter for a number of reasons. These vary in different states and can include questioning with regard to ownership of the goods and questioning witnesses to the alleged act. This right is limited to a reasonable time—sometimes defined in the law—with the manner of detention also a reasonable one. Probable cause must exist for believing a crime was committed and the suspect committed the act. Few laws define probable cause and reasonable grounds with the judicial criteria usually being what the careful and prudent man would do under the circumstances.

3) Immunity from suit. This includes immunity from various civil and criminal actions if the merchant, his employee or peace officer takes the suspect into custody to detain him in a reasonable manner and for a reasonable length of time. Such custody and detention does not make merchant, his employee or officer liable for slander, false arrest, false imprisonment or unlawful detention.

4) Presumption of guilt. This includes wilful concealment of goods as *prima facie evidence* that intent to shoplift the items existed with the suspect having the burden to prove that this intent did not exist. This presumption often includes the presumption that finding unpurchased goods indicated that the items were wilfully concealed with intent to steal.

5) Penalties. This includes graduated fines/and imprisonment penalties as a deterrent with some states (indicated by [A] adding felony punishment by imprisonment for not less than one year nor more than 20 years.

SB 123

STATE OF WASHINGTON
JOHN J. O'CONNELL
ATTORNEY GENERAL
TEMPLE OF JUSTICE
OLYMPIA, WASHINGTON 98501

May 19, 1967

Honorable Harold E. Wolf
State Representative
Twenty-second District
Clark Road
Yelm, Washington

Dear Representative Wolf:

By letter previously acknowledged you have requested an official opinion of this office on several questions concerning the provisions of chapter 76, Laws of 1967.

For purposes of discussion, we shall set forth in full the language of § 3 of this act, which reads as follows:

> "In any civil action brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise, it shall be a defense of such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer or by the owner of the mercantile establishment, his authorized employee or agent, and that such peace officer, owner, employee or agent had reasonable grounds to believe that the person so detained was committing or attempting to commit larceny or shoplifting on such premises of such merchandise. As used in this section, 'reasonable grounds' shall include, but not be limited to, knowledge that a person has concealed possession of unpurchased merchandise of a mercantile establishment, and a 'reasonable time' shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees

and records of the mercantile establishment relative to the ownership of the merchandise."

Notably, § 2 of the act contains an identical provision with respect to ". . . any criminal action . . ."

Before turning to your questions, we should note and explain that the provisions of §§ 2 and 3 of chapter 76, Laws of 1967, supra, are merely phrased in terms of providing a merchant or a shopkeeper with a defense against civil or criminal liability with regard to matters involved in detaining a suspected shoplifter, where the merchant or shopkeeper has complied with the provisions of the new law. In other words, the new provisions do not purport to authorize any particular activity by a merchant or shopkeeper; rather, they simply provide a defense for him in the event he is sued or prosecuted, assuming that he can show that he acted within the terms of the sections.

The statute itself is patterned after a New York statute (New York Laws of 1960, chapter 1005, codified as General Business Law, § 218). There has been no reported experience under the New York act as of the date of this writing, and the source of the statute is mentioned here only because, knowing the source, it is evident that the new sections of chapter 76 were intended to have at least as broad, and perhaps broader application than the New York statute. The New York statute specified the types of action in which the defense would be available to a shopkeeper. Our statute makes the defense available in any criminal action, in the case of § 2, and in any civil action, in the case of § 3, ". . . brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise. . . ."

Preliminary to answering your questions some general observations concerning the common law right of a shopkeeper to detain a person who is reasonably suspected of having shoplifted an article of merchandise might be helpful to an understanding of our analysis of the questions presented. First, it should be noted that without statutory authority a shopkeeper could detain a customer or patron of his store who apparently had not paid for what he had received, for a reasonable length of time to investigate the circumstances. Rogers v. Sears, Roebuck & Company, 48 Wn. 2d 879, 297 P. 2d 250 (1956);

Honorable Harold E. Wolf
May 19, 1967
Page Three

Restatement of Torts 2d, § 120 A; 22 Am. Jur. 368; 35 C.J.S. 640. Grounded as it was on the right to protect or recapture one's property, the right to detain a shoplifter necessarily ceased upon the return of the goods taken or the expiration of a reasonable time to investigate the taking. See, Teel v. May Department Stores Co., 348 Mo. 696, 155 S.W. 2d 74, 137 A.L.R. 495 (1941); Restatement of Torts, § 120 A, Comment "f". While it is a general rule that whether the detention was lawful must be determined as of the time of the detention (35 C.J.S. 640), some courts have made a distinction between the right to detain for purposes of recaption of property and a detention for the purpose of vindicating public justice, holding in the latter case that a subsequent acquittal or dismissal of criminal charges has a bearing on the lawfulness of the detention. See, Annos. 35 A.L.R. 645; 92 A.L.R. 2d 15; 35 C.J.S. 660.

[illegible] apparently SB 127 would afford protection to merchants not available under common law — Thus, the need for this Statute

In a case where the employee of a drug store was also a deputy police officer, and the act which gave rise to the detention was prosecuted, resulting ultimately in acquittal of the suspect, our court did not see fit to discuss the dual nature of the employee's right to detain the suspect. Instead it based its opinion upon the fact that the employee, a police officer, was entitled to assert a defense of reasonable cause. Sennett v. Zimmerman, 50 Wn. 2d 649, 314 P. 2d 414 (1957). Analysis of that case leaves one with the inference that had the employee not been a police officer the mere fact that he had reasonable grounds to believe that the person detained had taken property from the store in which he was employed would not have been a defense to him or the store in the subsequent suit by the suspect.

In any event, subsequent to that case the legislature passed chapter 229, Laws of 1959 making shoplifting a distinct crime, authorizing a peace officer to make an arrest without a warrant for that misdemeanor, even though it was not committed in his presence, and made "reasonable cause" a defense to certain civil actions brought against the peace officer by a person suspected of shoplifting. The loose language of the last-mentioned section was criticized by Professor Arvil A. Morris, 34 Washington Law Review 308. Repeal of that section and substitution therefor of chapter 70, Laws of 1967 brings us to your questions.

You ask for a legal interpretation of "reasonable grounds" as that term is used in the statute. The statute itself defines the term as follows:

> ". . . As used in this section, 'reasonable grounds' shall include, but not be limited to, knowledge that a person has concealed posession of unpurchased merchandise of a mercantile

establishment . . . "

Because the determination of what "reasonable grounds" might include is susceptible to so many variables, dependent upon the particular circumstances in the context of which the term is sought to be defined, it is impossible to define the term with any precision. Certainly, the fact-finder in a suit in which the new statute is involved will, in most circumstances, decide whether the merchant had reasonable grounds to detain the suspect. Some general observations may be made, however. Whether the detention contemplated by this section is an arrest, it does seem clear that it is something akin to arrest and that the general criteria for determining an officer's right to arrest for a felony provides guidelines. In State v. Massey, 68 Wn. 2d 88, 411 P. 2d 422 (1966) the Washington Supreme Court outlined these rules as follows:

> ". . . (1) An officer has cause for an arrest if he has reasonable grounds for suspicion, together with evidence of circumstances to warrant a cautious man in believing the accused to be guilty. State v. Hughlett, 124 Wash. 366, 214 Pac. 841 (1923). (2) An officer has probable cause to arrest without a warrant if he has knowledge which would convince a cautious but disinterested person that the accused is guilty of a felonious offense. State v. Darst, 65 Wn. 2d 808, 399 P. 2d 618 (1965); State v. Smith, 56 Wn. 2d 368, 353 P. 2d 155 (1960); Beck v. Ohio, 379 U.S. 89, 13 L. Ed. 2d 142, 85 Sup. Ct. 223 (1964); Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 Sup. Ct. 407 (1963). (3) An officer is not required to have knowledge of evidence sufficient to establish the guilt of the accused beyond a reasonable doubt. Draper v. United States, 358 U.S. 307, 3 L. Ed. 2d 327, 79 Sup. Ct. 329 (1959)."

1 By paraphrasing the above rules, substituting shopkeeper where officer appears, detention where arrest appears, and shoplifting where felonious offense appears, it is suggested that a fairly good set of guidelines are set out for a merchant wishing to stay within the terms of the statute being discussed, at least until more precise rules are defined by the courts in construing the term as used in this section.

Your next question—what is a reasonable time? — like the previous question, is not susceptible to precise definition. The definition within the statute is:

> ". . . 'reasonable time' shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise."

(2) It is obvious that here the legislature has expanded the term "reasonable time" beyond the confines inherent in the term as it was understood at common law. Perhaps the most precise statement of what a reasonable time for detention is, absent statutory authority, is found in Comment "f" of the Restatement of Torts 2d, § 120 A, which reads:

> "The privilege is one of detention on the premises for only the time necessary for a reasonable investigation. Investigation does not mean discovery of all of the facts, but only such inquiry as may reasonably be made under the circumstances, promptly and without undue detention. What is a reasonable time will depend upon all of the circumstances, including the nature of the misconduct suspected, the amount involved, the explanation or denial offered by the other, his willingness to cooperate, and the time required to consult readily available sources of information. Normally, such a reasonable time will be short. Fifteen minutes may be too long where all that is necessary is to ask a clerk whether the other has paid. <u>If the detention is continued beyond the time reasonably necessary for investigation, the actor is liable for the excessive detention.</u>"

(3) The statute authorizes detention beyond that set forth in the underscored portion of the quote to the extent that it permits detention for "the time necessary to make a statement or refuse to make a statement." Detention for this purpose was clearly not authorized at common law. See, <u>Teel v. May Department Store Co.</u>, <u>supra</u>.

Does "reasonable time" include the time necessary for an officer to arrive on the scene? Of course, if an officer arrives while the storekeeper is taking a statement or examining employees and records relative to the ownership of the merchandise allegedly taken, clearly the merchant is within the terms of the statute, and the defense afforded by it is available to him. A more knotty problem arises when an officer has not arrived on the scene at the time the statutory purposes have been accomplished. Since the statutory definition is in derogation of the common law, and since a statute in derogation of common law is to be strictly construed, (Sutherland, Statutory Construction, 3d Ed. § 6201,) the cautious answer would be that a detention, after accomplishment of the questioning relative to the statement and investigation of the employees and records of the mercantile establishment, is unlawful; and, consequently the defense afforded by the statute may be lost to a merchant seeking to avail himself of it. (A strong argument can be made, however, reaching the opposite result. The legislature is presumed to be aware of existing statutes relating to the same subject. Hatzenbuhler v. Harrison, 49 Wn. 2d 691, 306 P. 2d 745 (1957). It is thus presumed to be aware of the existence of chapter 229, Laws of 1959. That statute, by singling out shoplifting as a separate offense and authorizing a peace officer to arrest without a warrant when he had reasonable cause to believe a suspect had committed that crime was certainly a legislative attempt to ease the dilemma created by the common law rules regarding unlawful detention and to facilitate prosecution of shoplifters. Morris, 34 Washington Law Review 308. The repeal of section 3 of that act, permitting the defense of reasonable cause to be asserted by a peace officer sued as a result of such a detention, and a substitution therefor of the present section granting a defense not only to peace officers but to the owner of the store and his authorized employees in no way would indicate a recession by the legislature from that position.)

Because both terms, "reasonable grounds" and "reasonable time", are incapable of accurate abstract definition, it is strongly urged that shopkeepers who intend to vigorously avail themselves of their right to detain shoplifting suspects consult with their attorney regarding a standard practice to be followed by the store and its authorized employees relating to shoplifting. Certainly, what that practice might be will vary depending upon the type of business conducted and other circumstances.

Your final question has to do with the responsibility of a shopkeeper to advise a detained suspect of his constitutional rights. There is at present no obligation on the part of a private citizen, or for that matter, on police officers, to advise a detained person of such constitutional rights as the right to remain silent, the right to an attorney, etc. Certainly, whether or not the suspect had been so advised would in no way be material to the question of whether the shopkeeper acted within his rights and within the terms of the statute under discussion. Whether a statement obtained from such a suspect without having first advised him of his constitutional rights would be admissible in a criminal prosecution is an issue we do not reach in this opinion.

We hope this has been of some assistance to you.

Very truly yours,

JOHN J. O'CONNELL
Attorney General

RICHARD A. MATTSEN
Assistant Attorney General

RAM:lm

SB-123

ALASKA RETAIL ASSOCIATION

POSITION PAPER ON SB 123
RELATING TO THE DETENTION OF SUSPECTED SHOPLIFTERS

Nearly everyone will agree that the crime of shoplifting is epidemic throughout the United States. The latest national figures indicate that shoplifting causes losses to the consuming public amount to 3 billion dollars annually. This, indeed, contributes heavily to our present high cost of living. It has been stated, moreover, that shoplifting, coupled with internal theft, is responsible for about 30% of all business failures in the United States.

Specific figures on shoplifting losses for Alaska are not available. However, the Anchorage Chief of Police estimates that retailers of all sizes throughout the State lose an average of $7,000 apiece each year. As there are approximately 2,000 retailers of all types in Alaska, this means that Alaskans are subject to a loss of $14,000,000 annually.

Existing statutes and municipal codes, if enforced, are adequate to help combat the shoplifting problem. The main problem encountered in Alaska, and all other areas, in enforcement is the understandable reluctance of merchants, and even professional store detectives, to apprehend suspected shoplifters for fear of being subjected to false arrest litigation.

SB 123, relating to the detention of suspected shoplifters, would, we feel, provide just the right degree of protection to merchants and their agents against frivolous false arrest suits. This protection would encourage merchants to make apprehensions when a crime is apparently in process, thus helping to combat this very serious crime wave.

SB 123 is designed to allow reasonable protection to the merchant or his agent without promoting undue harassment of customers and without violating the rights of those who may be accused. It requires that the merchant, or his agent, have reasonable grounds to suspect that a crime has been committed before being allowed to detain a suspect. The circumstances of the detention must be such that the merchant or his agent had specific cause to believe a theft was in process before he would have an effective defense under this law and that the detention was accomplished in a reasonable manner and only for a reasonable time.

In summary, the general lack of prosecution is probably the one single factor which has contributed to making the crime of shoplifting so widespread in our country. Professional shoplifters and, indeed, amateur thieves are encouraged in their activities as they feel secure in the knowledge that the merchant is reluctant to prosecute. As this reluctance is caused, in a large part, by the merchant's fear of false arrest suits, or criminal action for false arrest, we feel that the provisions of SB 123 would aid greatly in encouraging retailers to prosecute those who are stealing from all of us.

We respectfully urge your favorable consideration of SB 123 as we are convinced that its provisions will aid significantly in combating a serious and costly crime -- shoplifting.

Dean Ehrich
Executive Director

ANCHORAGE NATURAL GAS COMPANY
A Division of Alaska Public Service Corp.

P. O. BOX 6288
ANCHORAGE, ALASKA 99502

3000 SPENARD ROAD
PHONE 277-5551

SB-136

March 16, 1971

Honorable William J. Moran, Chairman
Judiciary Committee
House of Representatives
Juneau, Alaska

Dear Chairman Moran: Bill

While we were writing our comments on SB 136 yesterday, it passed the Senate. Apparently there was little notice of any public hearing, if any. We believe this Bill deserves closer review, for reasons given in the enclosures. Perhaps none of these reasons came to the attention of the Senators during its brief stay in Committee. By telephone today we have requested the opportunity to be heard on this matter (probably before the House Commerce Committee).

In the past, the fuel oil dealers (and subdividers) have entered regulatory proceedings against us, before the Commission. Although they admitted in their testimony that the public should have a free choice among all forms of fuel service, by their practice, and by the proposed amendment (SB 136), they would perpetuate their monopolistic practices.

We believe that the purpose of "regulation" would be thwarted by trailer court operators and subdividers (and where applicable, by apartment house owners) being left free to extract the "kick-back" described by Mr. Hall (Executive Director of the Commission), while refusing to allow natural gas service to be offered to their tenants. Surely the Legislature would not permit these practices to continue unchecked by the authority of the Public Utility Act and Commission.

We would appreciate advance notice and opportunity to appear when hearings are scheduled on this proposed amendment.

Very truly yours,

ANCHORAGE NATURAL GAS COMPANY

By Dale

Dale Teel
President

DT:kl
Enclosures

Alaska Public Service Corporation

P. O. BOX 6288
ANCHORAGE, ALASKA 99502

3000 SPENARD ROAD
PHONE 277-5551

March 15, 1971

Honorable Joe Josephson
and Honorable Ron Rettig
Alaska Senate
Juneau, Alaska 99801

Gentlemen:

We have just received copies of SB136, which would revise the definition of a public utility for the purpose of avoiding "....unnecessary regulatory procedures over petroleum fuel dealers delivering to trailer courts and apartment buildings..." except "when the consumer has no alternative in his choice of supplier of a comparable product at an equal or lesser price."

We have obtained a copy of the comments made by Mr. Don Hall, Executive Director of the Alaska Public Utilities Commission, regarding regulation of fuel dealers in general and this Bill in particular; Mr. Hall's comments were made in response to an inquiry by Mr. Robert Butler, Deputy Commissioner of Commerce. Copy of Mr. Hall's memorandum is enclosed; we believe his enclosures, which are obtainable from Mr. Butler, may be quite helpful to you in following his comments.

We have submitted our own comments on the fuel dealers' formal requests for exemption from regulation (APUC Cause U-7-71 through Cause U-11-71) by letter to the Alaska Public Utilities Commission, and copy of these comments is also enclosed for your review.

We hope you will understand our position--that when the tenants of trailer parks and apartment houses are precluded from the opportunity to receive or have natural gas utility service, an effective monopoly may exist even though it may be shared by two or more fuel oil dealers, which would be allowable without regulation under the language of your Bill (SB136).

The "kickback" referred to in Mr. Hall's memorandum to Mr. Butler is of course a central issue in this matter. We believe that such "kickback," which is referred to in our letter as an "incentive payment," explains the unwillingness of owners and operators of trailer courts and apartment house projects to allow natural gas service to be installed on their properties. In some cases, notably in the trailer court called "Dimond Park Estates," the owners are themselves also owners of the fuel distribution system. This project involves 400 trailer spaces, and may at present dominate the house trailer market of the Anchorage area. No "kickback" may be in effect on this project, but the restraint of competition through refusal to allow natural gas service to be installed still would produce an effective monopoly which is normally cause for regulation.

Anchorage Natural Gas has always welcomed competition and has never sought to impose burdensome regulations upon underground oil and propane utilities. We do seek to see elimination or control of practices which appear to be unfair to consumers as well as to us. We believe that the Certificate of Public Convenience and Necessity which was issued to us by the Alaska Public Utilities Commission is being seriously infringed by continuation of such practices and that the best interest of a large portion of the public in our service area is harmed as a result.

All we ask is the opportunity to compete. We do not favor "...unnecessary regulatory procedures," nor are we seeking any competitive privilege other than relief from "affiliated interest" agreement by our competitors which effectively excludes us from an opportunity to compete. We do not believe SB136 can be administered to achieve the intended purpose and still protect the public interest. We are opposed to this Bill because:

1. It would foster -- and legitimize -- the continuation of "kick-backs" by dealers of oil and propane to owners of trailer courts and apartment houses.

2. It would perpetuate the condition in which Anchorage Natural Gas is being excluded from competition to serve trailer courts and apartment houses.

3. It would allow -- and practically invite -- price fixing by dealers of oil and propane, and would thus be in restraint of competition.

4. It would foster the continuation of shoddy and unsafe installation of underground systems for oil and propane, with obvious hazard to residents of areas so served.

For the foregoing reasons, we would request that if hearings are scheduled on SB136, we and our attorneys (Law Firm of Robison, McCaskey, Strachan, and Hoge) be notified by collect telegram or telephone so that we may have the opportunity to appear and support our position as necessary.

Very truly yours,

Dale Teel

Dale Teel
President

cc: Mr. Don Hall and
Each Commissioner
Alaska Public Utilities Commission

Alaska Public Service Corporation

P. O. BOX 6288
ANCHORAGE, ALASKA 99502

3000 SPENARD ROAD
PHONE 277-5551

March 11, 1971

Alaska Public Utilities Commission
700 MacKay Building
338 Denali Street
Anchorage, Alaska 99501

Cause Nos. U-71-7/U-71-11
Inclusive

Gentlemen:

This letter is in response to the various Notices received from the Commission regarding Certification (or Exemption) of the fuel oil and propane dealers (Applicants) listed in the attached summary.

Alaska Public Service Corporation has been certificated by the Commission to provide natural gas utility service in the greater Anchorage area and on the Kenai peninsula, and is thus in competition with these Applicants to serve the energy requirements of these areas. Our position is that such competition is in the public interest and that regulation should not serve to inhibit such competition. However the practices of various of these Applicants appear to us to warrant an in-depth investigation by the Commission before a decision is made to exempt any of the Applicants from regulation by the Commission.

Specifically, we believe that competition is now being inhibited in many instances, if not generally, through the mechanism of an "incentive" paid to developers or owners of land on which these Applicants' fuel delivery systems are installed. The developers or owners of land served by Applicants underground systems become "affiliated interests" and subject to jurisdiction of the Commission, by their agreements or contracts with the Applicants. We understand the "incentive" is as much as 2¢ per gallon of fuel oil sold to the end users served by these systems, and a lesser amount per gallon of propane. We further believe that as a result of such "incentive payments" the developers or owners are resisting or refusing to allow natural gas distribution systems to be installed in the Applicants' areas of operations, or are discouraging their tenants or customers from giving fair consideration of natural gas utility service where it has been made available, thereby creating an effective monopoly by the fuel dealer serving the area. We further believe that in several cases some of the Applicants or their affiliated interests are owners or otherwise in control of the land served by them and that in such cases natural gas has been placed in an unfair position.

We believe that the Commission can and should move to prohibit the payment of such "incentives" by Applicants to the developers or owners of land and to restrain both applicants and developers and owners of land from discouraging the acceptance of natural gas by the end users of fuel in their areas of operation on such land. We believe moreover that where Applicants are the developers or owners of such land (or affiliated interests thereof), such Applicants should be ordered not to preclude or resist the reasonable and lawful efforts of Alaska Public Service Corporation (or other fuel sources) to compete for, attract, and serve the end users of fuel in such areas, and should be ordered to cooperate with Alaska Public Service Corporation (and others) as to access to the land for the purpose of construction, operation, maintenance of natural gas distribution facilities and appliances on such land.

If the foregoing position were to be adopted by the Commission, then Alaska Public Service Corporation would not oppose Applicants' requests for exemption (more accurately, "partial exemption, under AS 42.05.711(d)") from the full effect of regulation, specifically in whatever of Applicants' areas of operation natural gas service has been made available to end users in such areas.

We recognize the benefits of having the Commission and its staff and resources available to the public for receiving complaints and resolving matters of dispute, and we believe the Commission should not suspend its jurisdiction in this respect, or in the respect of safety (e.g., enforcement of the Pipeline Safety Act of 1969), or in the respect of preventing collusion or conspiracies or practices which would inhibit competition both among the Applicants and by Alaska Public Service Corporation, as a certificated natural gas utility serving most of the subject areas. We believe the Commission is empowered to achieve these benefits without the need for the full extent of filings, hearings, fiscal and other reporting, and formal proceedings which would be costly and burdensome to both the Commission and the Applicants.

Appropriate legal briefs and additional comments will be supplied during the course of these proceedings.

Very truly yours,

Dale Teel

Dale Teel
President

Enc.: Listing of APUC Notifications to which foregoing letter pertains

cc: Each Applicant
Each Commissioner

ALASKA PUBLIC SERVICE CORPORATION
P. O. BOX 6288
ANCHORAGE, ALASKA

Attachment to APSC Letter
to Alaska Public Utilities Commission
Regarding Application of Various Fuel Oil & Propane Dealers
For Exemption from Regulation as Public Utilities

Cause No.	Notice Date	Reply Date	Applicant
U-71-7	February 22	March 12	Standard Oil Company 1689 C Street Anchorage, Alaska 99502
U-71-8	February 23	March 15	Peters Creek Fuel & Service, Inc. Post Office Box 128 Eagle River, Alaska 99577
U-71-9	February 25	March 15	Day and Night Fuel Company, Inc. 608 East Fireweed Anchorage, Alaska 99503
U-71-10	February 25	March 15	Denali Fuel Company et al 1525 East Fourth Avenue Anchorage, Alaska 99501
U-71-11	February 25	March 15	Petrolane-Anchorage Gas Service, Inc. et al 1200 Whitney Road Anchorage, Alaska

(Alaska Public Service Corporation opposes Exemption of above from regulation except in the event, and to the extent, that natural gas service is made available to end users in each of the respective utility systems operated by the above Applicants. Refer to attached letter and Legal Brief for further details.)

Certificate of Service

We hereby confirm that we have served a copy of this letter on Applicant(s) listed above, by mail to the address(es) listed in the Notice(s) of Application; and to each Commissioner by separate mailings.

RECEIVED
MAR 11 '71

March 11, 1971

Alaska Public Service Corporation

EX DIR
DEP DIR
ATTY
ANALYST II
ENGR
ANALYST I
ACCT II
FILE

MEMORANDUM State of Alaska

DEPARTMENT OF COMMERCE

John info to me return Paul.

TO: Mr. Robert E. Butler
Deputy Commissioner
Department of Commerce

DATE: March 3, 1971

FROM: Don Hall
Executive Director
Alaska Public Utilities
Commission

SUBJECT: S. B. 136
Revision of
AS 42.05.701 (2) (E)

SUMMARY

Complying with your request for comments on S. B. 136 is far easier said than done as you can see by the length of this memorandum and the amount of back-up material that accompanies it. Therefore, I thought it might be helpful and time-saving to summarize, at the outset, some of the main points I have developed and documented. Here they are:

1. In my view, the question of whether fuel oil dealers, or any other person or firm, should or should not be regulated, or exempt from regulation, in whole or in part, is properly a matter of legislative policy concerning which administrators, such as I, should not comment. Therefore, I respectfully decline to make any recommendation other than suggest the facts be examined to see if they fully support a finding that regulation of the operations in question is "unnecessary" as indicated in the stated purpose of the Bill.

2. The question should not be resolved solely on the basis of alternative choices by the customer as to comparable products and service related to the price paid. Our research, and some of the enclosures, indicate that the following factors should also be considered:

   A. Public safety as evidenced by faulty construction, faulty maintenance or unsafe practices. At least two trailer homes were destroyed by fire in Anchorage last November, and another badly damaged, resulting in an estimated loss of $40,000. (See Exhibits A and B)

   B. Trailer court owners and housing developers sometimes incur no investment toward the installation of storage and/or pipeline distribution facilities; yet receive a kick-back of 1¢ per gallon on every gallon sold for "dedicating" their trailer court (or housing development) to oil.

C. Complaints have been filed by consumers who looked to the Commission for the redress of grievances stemming from allegations that fuel dealers have failed to restore service quickly during cold weather--even after repeated pleas for help. (See Exhibit B-1)

3. Fuel dealers, such as Petrolane, distribute propane to trailer courts and apartment houses in much the same fashion that fuel oil dealers distribute their product, but they are not exempt. This does not appear to be equal or fair treatment. Nor does it appear reasonable that trailer court and apartment house owners who operate their own oil pipeline distribution systems should be regulated while dealers who operate in other trailer courts and apartments are exempt under certain conditions.

4. The Bill would be even more difficult to administer than sec. 42.05.711 (e) of the present law because of numerous practical difficulties. To put it more bluntly, it would create an administrative nightmare.

5. The Bill is poorly drafted, first, because it amends the wrong section. In my view, it should amend AS 42.05.711 which deals with exemptions, rather than the section containing definitions. Second, it does not clearly state the legislative intent, despite the effort to do so--which, incidentally is one of the questions that seems to bother oil dealers about the present law. They expect us to tell them what the Legislature intended, and we simply don't know. For example, the stated purpose makes reference to trailer courts and apartments but does not mention dealers who distribute fuel oil, by pipeline, to office buildings and housing developments. In my opinion, it would be better to simply exempt fuel dealers from the law completely (and without any qualification), if that is what is desired, rather than attempt to regulate them only under the stated conditions which would invite disputes between dealers and their customers; yet leave the Commission virtually powerless to resolve complaints filed with the Commission.

6. There are approximately 73 fuel dealers in Alaska now subject to regulation that would be affected by S. B. 136. Several of them have filed applications with the Commission for total exemption from AS 42.05 pursuant to AS 42.05.711 (d) thereof, or in the alternative, for a certificate of public convenience and necessity. If S. B. 136 is enacted, these pending

applications would, of course, be dismissed as moot and all other dealers would be relieved from the necessity of even filing applications. Further, any that might be subject to regulation in the future could very easily avoid it by changing their price if the customer was in an area in which he had one of the alternative choices mentioned in the Bill.

7. By order of the Commission all fuel dealers are temporarily exempt from all provisions of AS 42.05 until April 1, 1971 to give them ample opportunity to file applications with the Commission. (See Exhibit D) It was for this reason we stated, on page 16 of our first annual report, that it "...would be no surprise to the Commission if they should seek legislation to specifically exclude their operations from regulation under the APUC Act."

DETAILS

Your request for comments on Senate Bill No. 136 brings up a rather delicate question of policy; namely, whether I, as an administrator of the APUC Act, should take a position as to whether or not petroleum fuel dealers should be exempt from the Act under certain conditons. In the past I have consistently refused to take a position either for or against the regulation (or exemption) of any operation. I see no reason why I should now. However, I owe it to you, and to the Legislature, to report some pertinent background facts that may be of some assistance in arriving at an appropriate decision. (See Exhibit G)

In the first place, the problem does not relate soley to the price the customer pays which seems to be the main thrust of the proposed amendment. There is also the matter of safety to be considered. This was first brought to our attention here in Anchorage on November 23, 1970 when a fire destroyed two mobile homes and bably damaged a third one--all reportedly due to a malfunction in the Shato Trailer Park's community fuel system. The damage was estimated at $40,000 (See Exhibit A, attached).

I am also enclosing photos indicating that sub-standard construction practices are employed in a number of mobile home courts in Anchorage that are served directly or indirectly by local fuel dealers. (See Exhibit B) I cannot honestly affirm that all of the pictures portray systems installed by fuel oil distribution firms as distinguished from those installed by propane distributors (which, I note, are not involved in S. B. 136). Some may be owned and operated by the owners of the trailer parks rather than by dealers. But I understand they all are served via pipelines from central storage tanks and that tenants generally do not have a free choice of furnishing their own individual fuel tanks and of purchasing oil directly from any local fuel dealer they may select.

While on the subject of safety, I must report that the Federal Department of Transportation has entered into an agreement with the APUC whereby the Commission will endeavor to enforce the Federal safety standards which are applicable to all gas pipelines in the State (See Exhibit C). This agreement was made pursuant to Section 5 (b) of the Natural Gas Pipeline Safety Act of 1968, and the rules and regulations issued thereunder (See Exhibit E). If we had not entered into this agreement, the Federal Department of Transportation would have already preempted the entire field of gas utility safety regulation in Alaska. Thus, unless the State desires to lose jurisdiction over gas pipeline safety, by default, it really has no choice but to help the Department of Transportation enforce its regulations. I wrote you a memorandum on this subject dated February 6, 1971, a copy of which is attached hereto as Exhibit F.

The main point of what I have just said about safety is this: How can the State reasonably exempt distributors of oil by pipeline, as to safety, (or as to anything else for that matter) and at the same time subject distributors of propane to all the provisions of AS 42.05 including safety? It would seem that the public need for regulation, or the justification for exemption from regulation, should not rightfully depend upon whether the pipeline distributor sells oil or gas. After all, they both sell an essential fuel that heats trailers and they distribute it by pipeline as well as delivering their product to individual customers. I say this only to point out a basic inconsistency--not because I have taken a position for or against the regulation of either kind of a fuel distributor.

Another inconsistency of S. B. 136 is that it singles out, for special treatment, fuel dealers that distribute petroleum products to the public for compensation while ignoring the fact that many mobile home court owners, who also distribute petroleum products to their own tenants for compensation via pipelines, would still be subject to regulation. This does not appear to be fair or reasonable.

Your attention is invited to the fact that this entire matter is now before the Commission in Docket No. U-70-85 and two orders have been written. A copy of the entire file in this proceeding is attached as Exhibit D of this memorandum. We are now in the process of issuing public notices so that all persons and firms in the entire State that may be utilities under AS 42.05.701 (2) (D) or (E) will have an opportunity to comply with the Commission's order that they must apply for a certificate covering their operation as a condition precedent to considering their applications for exemption. The 6 fuel dealers that have already filed the required applications seek complete exemption from AS 42.05 pursuant to AS 42.05.711 (d). Alternatively, they desire a certificate. They now have until April 1, 1971 to make application pursuant to our order dated February 2, 1971 in U-70-85. But if they can get the law amended to exempt them from regulation, obviously those that have not applied will be spared the trouble of making application and the Commission will simply dismiss the applications then pending.

I understand the fuel dealers are not at all happy with the Commission, mainly because it has not felt free to go along with their contention that the Legislature never intended to regulate them in the first place. This may be so. Maybe it was a legislative oversight that they appear to be utilities, but who are we to say it was? If that is all that is involved, then certainly this Legislature is in a position to correct the oversight.

I am not yet in a position to give you completely reliable figures on the full extent of the problem of regulating oil distributors (as defined by AS 42.05.701 (2) (E)) or of regulating natural or manufactured gas distributors (as defined by AS 42.05.701 (2) (D)), but I do have a pretty good idea from our own research (with the aid of Carl Sullivan representing the Oil Heat Institute) and from other sources including the State Revenue Department. With the above qualifications, this is approximately what it looks like now for the entire State:

Kind of Fuel Distributed by
Pipeline to 10 or More Customers

	Oil	Gas
Number of Cities	7	6
Number of Locations	47	33
Number of Operators	73	2
Number of Customers	2,413	863

From the standpoint of administering AS 42.05 as applied to all utilities presently defined as such by AS 42.05.701 (2) (E), I shudder to think of it as though cold steel were being plunged into my warm quivering human flesh, particularly so if the APUC is going to have its budget cut for next year. Just think of it. We now have 125 regulated utilities. This would increase the total to 198, a 63% increase. How in the world could we reasonable be expected to do an adequate job of regulating that many more utilities, with no more personnel than we now have is incomprehensible. On the other hand, if the Legislature feels that these operations should be regulated we shall just have to do the best we can with the resources placed at our disposal--but, you can depend upon it, we shall be severely criticized. If we had any idea of how many utility operations of this kind there may be, we would have requested a lot more personnel than we did ask for in our great ignorance.

I think the underlined part of S. B. 136 will create administrative problems that just won't quit--ever. For example:

1. Who will decide disputes between consumers and the dealers that serves them as to whether or not the consumer has "no alternative in his choice of supplier of a comparable product and service at an equal or lesser price,"--the dealer, the consumer, or the Commission? If there is a question as to whether the Commission has jurisdiction to entertain the customer complaint, how would it be decided?

2. What is a "comparable product"? Would it include natural or manufactured gas? Would the decision be based upon the BTU content of the fuel?

3. Would the words "and service", following the word "product" include electric service since it might be argued that electricity furnished for space heating is a "comparable" service because both would supply trailer homes and apartments with heat, for cooking and space-heating?

4. In determining whether a comparable product or service could be purchased at "an equal or lesser price", what would be the common denominator for the determination as between heavy (like PS 300) and light oil (like diesel 182), propane, natural gas, and electricity? Who would decide disputes in this regard?

Getting back to the stated purpose of S. B. 136, I note that the expression "unnecessary regulatory procedures" is used. This is precisely the main issue now before the Commission in U-70-85. (See Exhibit D) The law under which gas and propane distributors are now seeking exemption is AS 42.05.711 (d) which provides that the Commission, "... on a finding that no legitimate public interest will be served, may exempt a utility from all or any portion of the chapter." It may develop that the Commission will find, after a public hearing, that they should be exempt from some, all, or no provisions of AS 42.05. S. B. 136, if enacted, would simply mean the Commission would dismiss all the applications then pending, and close the proceeding as the issue would be moot. This is precisely what was done in respect to a case involving the regulatory status of the Kenai Pipeline Company when the law was amended (in 1968) to specifically exclude it.

Another thing I notice about the stated purpose of S. B. 136 is the fact that it includes dealers delivering to trailer courts and apartment buildings, but excludes those that may possibly be delivering to other multi-tenant structures such as office buildings. Still another situation that I actually know of here in Anchorage is not covered by the stated purpose. In this regard, I refer to a dealer here who furnishes oil to an entire housing development via pipelines connected with a central storage tank. It does not seem reasonable that such an installation would be exempt if others of a similar nature, that are mentioned, are included.

In short, Mr. Butler, I think S. B. 136 is poorly drafted and would cause more administrative headaches than it could possible eliminate if it is passed. Further, I do not think it would be fair to exempt petroleum fuel dealers without, also, exempting dealers who distribute propane or manufactured gas.

I hope I have covered the subject adequately.

By Don Hall

DH:eb
Encl.

Colored Photos of Two Trailer Homes Destroyed by Fire and Another Badly Damaged

EXHIBIT A

Photos Indicating Sub-standard Construction Practices in Mobile Home Courts in Anchorage Served Directly or Indirectly by Fuel Dealers

EXHIBIT B

Copy of Complaint Filed Before the Alaska Public Utilities Commission by F. Joseph Tirancelli and Gloria Tirancelli vs. Denali Fuel Company, Inc., John Mlacker, Jack Linton, and Jack Wong, a Partnership under the Name of S.L.M. PARTNERSHIP D/B/A PLAZA 36

and

Newspaper Clipping Regarding Suit Filed in Court

EXHIBIT B-1

Agreement Between the Secretary of Transportation and APUC Under Section 5 (b) of Gas Pipeline Safety Act of 1968

EXHIBIT C

U-70-85

In the Matter of the Certification of:

Alaska Fuel and Transfer, Inc.,
AAA Fuel, Inc.,
Arctic North Star Fuel,
Ace Fuel Service,
Day & Night Fuel, Inc.,
Inlet Fuel Co.,
Spenard Fuel, Inc.,
Peters Creek Fuel,
Denali Fuel Co.,
Fairbanks Fuel,
Petroleum Sales,
Peters Express,
Northern Gas and Oil,
Sourdough Heating, Inc.,
Johnnie's Express

and Others Similarly Situated.

EXHIBIT D

Natural Gas Pipeline Safety Standards

Prescribed by Department of Transportation

Pursuant to Natural Gas Pipeline Safety

Act of 1968

EXHIBIT I.

Memorandum to Mr. Robert E. Butler

dated February 6, 1971

"Gas Pipeline Safety"

EXHIBIT F

Copy of Your Memo to Me of February 24, 1971, and Copy of Senate Bill 136, Requesting My Comments

EXHIBIT G

Copy Corrected
February 24, 1971

NOTICE OF APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

The ALASKA PUBLIC UTILITIES COMMISSION hereby gives notice that the STANDARD OIL COMPANY, an Alaska Corporation, has filed an application (Cause No. U-71-7) for an exemption from Sections 221 - 281 of the Alaska Public Utilities Commission Act (AS 42.05) or, in the alternative (under protest) for a certificate of public convenience and necessity to furnish fuel oil delivery products public utility service in the following areas: Trailer City, 4420 Emard St., South Mountain View, Alaska; Maggies Trailer Court, 4503 Spenard Road, Anchorage, Alaska. The applicant states that the rate charged to its cutomers is 24.4 cents per gallon of fuel oil. More detailed information may be obtained from the applicant through its Attorney in Fact, Mr. Victor S. Schutzky, whose address is 1689 C Street, Anchorage, Alaska. The complete filing is available for inspection at the offices of the Alaska Public Utilities Commission, 700 MacKay Building, 338 Denali Street, Anchorage, Alaska 99501.

Any interested party may file with the Commission by 4:30 P.M. on March 12, 1971, a statement of his views and specific reasons in favor of, or in opposition to, the granting either of the exemption as requested or else of authority to the applicant to operate as a fuel oil delivery products public utility, together with written confirmation that the same statement has also been served on the applicant.

DATED at Anchorage, Alaska this 22nd day of February, 1971.

J. Lowell Jensen
J. Lowell Jensen
Deputy Director

NOTICE OF APPLICATION FOR

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

The ALASKA PUBLIC UTILITIES COMMISSION hereby gives notice that the PETERS CREEK FUEL & SERVICE, INC. has filed an application (Cause No. U-71-8) for an exemption from Sections 221-281 of the Alaska Public Utilities Commission Act (AS 42.05) or, in the alternative, (under protest) for a certificate of public convenience and necessity to furnish fuel oil delivery utility service in the following areas in the vicinity of Eagle River, Alaska: Lazy Mountain Trailer Court, Sunny Slopes Subdivision, Eagle River Trailer Court, Eagle River Heights North Subdivision. The applicant states that the rates charged at present to its central distribution system customers are 24.4¢/gal. for No. 1 heating oil and 23.2¢/gal. for No. 2 heating oil. More detailed information may be obtained from the applicant whose address is P. O. Box 128, Eagle River, Alaska 99577. The complete filing is available for inspection at the offices of the Alaska Public Utilities Commission, 700 MacKay Building, 338 Denali Street, Anchorage, Alaska 99501.

Any interested party may file with the Commission by 4:30 PM on March 15, 1971, a statement of his views and specific reasons in favor of, or in opposition to, the granting either of the exemption as requested or else of authority to the applicant to operate as a fuel oil delivery public utility, together with written confirmation that the same statement has also been served on the applicant.

DATED at Anchorage, Alaska this 23rd day of February, 1971.

J. Lowell Jensen

J. Lowell Jensen
Deputy Director

NOTICE OF APPLICATION FOR

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

The ALASKA PUBLIC UTILITIES COMMISSION hereby gives notice that DAY AND NIGHT FUEL COMPANY, INC. has filed an application (Cause No. U-71-9) for an exemption from Sections 221-281 of the Alaska Public Utilities Commission Act (AS 42.05) or, in the alternative (under protest), for a certificate of public convenience and necessity to furnish fuel oil delivery public utility service (through central tank and pipeline distribution systems) within the following service areas: Top Hand Trailer Court, 2409 McRae Road, Spenard, Alaska; Grizzly Trailer Court, 4222 Spenard Road, Spenard, Alaska. The applicant's stated rate is 23.7¢ per gallon of fuel oil. Its tariff also provides for a $25.00 deposit and monthly customer billing. More detailed information may be obtained from the applicant whose address is 608 East Fireweed, Anchorage, Alaska 99503. The complete filing is available for inspection at the offices of the Alaska Public Utilities Commission, 700 MacKay Building, 338 Denali Street, Anchorage, Alaska 99501.

Any interested party may file with the Commission by 4:30 P.M. on March 15, 1971, a statement of his views and specific reasons in favor of, or in opposition to, the granting either of the exemption as requested or else of authority to the applicant to operate as a fuel oil delivery public utility, together with written confirmation that the same statement has also been served on the applicant.

DATED at Anchorage, Alaska this 25th day of February, 1971.

J. Lowell Jensen

J. Lowell Jensen
Deputy Director

NOTICE OF APPLICATION FOR

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

The ALASKA PUBLIC UTILITIES COMMISSION hereby gives notice that DENALI FUEL COMPANY/DENALI DISTRIBUTORS, INC. has filed an application (Cause No. U-71-10) for an exemption from Sections 221-281 of the Alaska Public Utilities Commission Act (AS 42.05) or, in the alternative (under protest) for a certificate of public convenience and necessity to furnish fuel oil delivery public utility service (through central tank and pipeline distribution systems) in the following locations in the Greater Anchorage and Eagle River areas: Alaskan Village Mobile Home Court, Chateau Trailer Court, Clearwater Trailer Court, Cowdery Brothers Construction, Dimond Estates, East Anchorage Trailer Court, Forest Park, Four Seasons, Frank's Trailer Court, Glacier Terrace Courts, Green Acres, Johnson Trailer Court, Kathy C Estates, Kluane Terrace, La Honda Trailer Park, Mountain View Trailer Court, Muldoon Estates, Penguin Trailer Court, Piper Trailer Court, Plaza 36, Rangeview Trailer Park, Rebischke's Court, Riviera Terrace, Scenic View, South Park Estates, Spruce Park Trailer Court, Totem Trailer Court, Trails End Trailer Court, Vagabond Trailer Court, Waterbury Trailer Court, White Birch Trailer Court, Hamilton Park, Ocean View Subdivision and Palos Verdes Subdivision. The applicant has filed a tariff which includes its rates and regulations relating to security deposits, installation charges, connection fees, automatic refueling, service labor charges, billing period, and terms of payment. The stated rates are 23.7¢ per gallon for No. 1 fuel oil and 22.5¢ per gallon for No. 2 fuel oil. The security deposit is $25.00 and the connection fee is $15.00 per customer. More detailed information may be obtained from the applicant whose address is 1525 East 5th Avenue, Anchorage, Alaska 99501. The complete filing is available for inspection at the offices of the Alaska Public Utilities Commission, 700 MacKay Building, 338 Denali Street, Anchorage, Alaska 99501.

Any interested party may file with the Commission by 4:30 PM on March 15, 1971, a statement of his views and specific reasons in favor of, or in opposition to, the granting either of the exemption as requested or else of authority to the applicant to operate as a fuel oil delivery public utility, together with written confirmation that the same statement has also been served on the applicant.

DATED at Anchorage, Alaska this 25th day of February, 1971.

J. Lowell Jensen
Deputy Director

U. 71-10
12 p

DENALI DISTRIBUTORS, INC.

EXHIBIT C

Applicant does not desire to render a service to the public in general, does not wish to hold itself out or offer its service to the public at large and does not wish to dedicate its operations to public use.

The business in which applicant desires to engage itself consists of the delivery of fuel oil to mobile home occupants in trailer courts and the delivery of fuel oil to occupants of dwellings in subdivisions.

The facilities which applicant proposes to utilize consist of bulk storage tanks in excess of 300 gallon capacity located within the trailer courts, pipes extending from the storage tanks in the trailer courts to the trailer spaces in the trailer courts, and separate meters to measure the consumption of each customer in each trailer court. The same facilities are utilized in connection with a housing development, or subdivision.

The type of customers consist of mobile home and permanent home owners and occupants in specified trailer courts and subdivisions. The number and location of the trailer courts and subdivisions is presented in Exhibits I and E attached hereto. The approximate number of maximum potential individual customers in trailer courts ranges from twenty-four at Green Acres Trailer Court and Piper Trailer Court to four hundred at Dimond Estates. At the present time, applicant proposes to deliver fuel oil from pipes connected to a storage tank in each of six subdivisions; namely, Hamilton Park Subdivision, formerly State Manor Subdivision, Ocean View Subdivision, Kluane Terrance Trailer Estates Subdivision, Palos Verdes Subdivision, Muldoon Estates

Subdivision and Sunny Slopes Subdivision. The remainder of applicant's proposed operations will be in trailer courts.

As part of its overall business of fuel oil delivery. Denali Fuel Company presently engages in the delivery of fuel oil to mobile home occupants in trailer courts and to occupants of dwellings in Subdivisions utilizing the facilities outlined above, except Denali Fuel Company presently has no operating facilities at Muldoon Estates Subdivision, Sunny Slopes Subdivision or Palos Verdes Subdivision. Denali Fuel Company does not presently deliver fuel oil to all of the potential customers specified as potential users in Exhibit I, since many of the potential users presently obtain fuel oil, or a different product for heating, from a competitor (See Exhibit III) of Denali Fuel Company. Denali Fuel Company, therefore, requests that the Commission find no legitimate public interest in regulating any of its operations. See Exhibit D.

DENALI DISTRIBUTORS, INC.

EXHIBIT D

No legitimate public interest is served by regulating any of the business of Denali Fuel Company, or applicant herein, because its business is not the type intended to be regulated, does not have the characteristics of a business intended to be regulated, and is already regulated by competition and other governmental requirements. Furthermore, the Commission has no jurisdiction to regulate any of the business of Denali Fuel Company, as no portion of its business is a defined public utility under the Alaska Public Utilities Act, either literally or within the intent of the Legislature.

One of the marks of a public utility is the monopolistic characteristics of its operations. This factor of monopoly gives rise to a reason for public protection through control and regulation. Contrariwise, the fuel oil delivery business, in general, and with respect to centralized delivery systems in trailer courts and housing developments, is a highly competitive business.

The sale of fuel oil by means of tank wagon delivery to a common storage tank in a trailer court or housing subdivision for further delivery through pipes from the common tank to customers in the trailer court or subdivision is a merchandising operation: the sale of a commodity and not of a utility service. A metered sale to individual customers in the trailer court or subdivision does not change the essential nature of the transaction.

Another one of the distinguishing marks of a utility operation is that it is affected with a public interest. The distribution of fuel oil by the use of a centralized storage tank and pipes directing the fuel to customers in a trailer court or subdivision is not affected with a public interest. There is no holding out or offer to service the public at large. The mere fact that it may be considered to be of the nature of one of the necessities of life should not affect an industry with a public interest. A consumer in a trailer court or housing subdivision is no more dependent upon obtaining fuel oil for heating from one supplier at a constant price than he is upon obtaining other fuels such as coal, wood, kerosene, liquefied petroleum gas, or, for that matter, the same type of fuel oil from a different dealer on an individual or pipeline basis. There are many necessities of life, including such prime necessities as food and clothing, whose distribution and sale are made from a centralized location, but are not considered a public utility subject to regulation.

The supply of fuel oil through a pipeline system in a trailer court or housing subdivision makes no demands on the public for privileges peculiar and characteristic of a public utility; such as, the right to use public property and the exercise of eminent domain over private property.

Because of the non-competitive nature of its operation, an ordinary gas company is usually characterized by certain features which are lacking in the case of a fuel oil supplier. The fuel oil supplier employs the technique of marketing his product through a pipeline system in a trailer court or housing development on private property by permission of the owner. The installation of gas utility mains, by which the gas is delivered to users, requires, generally, the use of easements along or across public highways or the exercise of eminent domain over private property.

Furthermore, the operation of a public utility requires a monopolistic form of business. In order to prevent the lack of competition from affecting the service rendered to the public, governmental regulation of such a business becomes a paramount policy consideration. The delivery of fuel oil is a highly competitive business and therefore does not meet the requirements for public utility regulation.

For this Commission to determine under the provisions of the Alaska Public Utilities Commission Act that it is within the public interest to exercise jurisdiction over and regulate the sale of fuel oil, merely because the product is marketed from a central tank through a pipeline system to ten or more people, would also mean that the Commission could assume jurisdiction over and regulate the sale of gasoline through all gasoline service stations in the State of Alaska. Certainly the Legislature of the State of Alaska, in enacting the Public Utilities Commission Act, did not contemplate, and could not have contemplated, any such broad interpretation of the Act. The Legislature specifically included AS 42.05.711(d) in the Alaska Public Utilities Act, authorizing the Commission to exempt an operation from any or all portions of the Act when no legitimate public interest will be served by regulating the operation. There is a distinct difference between the operation of a public utility engaged in the sale and distribution of electricity, gas or water, or the rendition of telephone service and that of one engaged in the delivery and sale of fuel oil. The distributor of electricity, gas or water and the supplier of telephone service are generally the sole suppliers of their particular product or service in and affecting an entire community. The delivery of fuel oil is not so limited. In the Anchorage area alone, there are at least thirteen suppliers of fuel oil, each of whom compete with the others.

Attached hereto as Exhibit IV is a survey of prices posted by all fuel oil suppliers in the Anchorage area. It is obvious from an inspection of this exhibit that there is a variation in pricing and that competition exists. The prices listed in the columns for No. 1 and No. 2 fuel with a storage tank capacity of greater than 300 gallons are, to the best information and belief of Applicant, the rates applied with respect to central delivery systems and are also the rates applied to customers who have a 300 gallon, or greater, tank and who are not connected to a central delivery system.

It is also an attribute of a public utility that it be affected with a public interest. A mere legislative declaration with regard to this is insufficient. This point the United States Supreme Court has made clear in Wolff (Charles) Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 539. The United States Supreme Court has also said the following in Williams v. Standard Oil Company, 278 U.S. 235, 240:

> "A business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. . . . Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance."

In view of this statement, it would seem that the question of whether the business of delivering fuel oil from a central tank through pipes to consumers in a trailer court or subdivision has become clothed with a public interest would turn in some degree upon the question as to whether the public has become peculiarly dependent upon the business and whether the distributor-marketer has evidenced an intent to grant the use of the business to the public. The situation in the case of the centralized supply of fuel oil is very much like that expressed by the United States Supreme Court in the case of Michigan Public Utilities Commission v. Duke, 266 U.S. 570:

> "Plaintiff is a private carrier. His sole business is interstate commerce, and it is limited to the transportation covered by his three contracts. He has no power of eminent domain or franchise under the state, and no greater right to use the highways than any other member of the body public. He does not undertake to carry for the public, and does not devote his property to any public use. He has done nothing to give rise to a duty to carry for others. The public is not dependent on him or the use of his property for service, and has no right to call on him for transportation."

Each consumer in a trailer court or subdivision wherein a centralized supply system is located is perfectly free to obtain his needs from someone other than the system owner. The consumer can have an individual tank, barrel or container positioned at his door for his own individual use.

A private business, operated under private contracts and not devoted to a public use, should not by legislative fiat or order of a public service commission be declared a public utility, since there would be in a sense the taking of private property for public use without just compensation, inconsistent with the due process clause of the Fourteenth Amendment to the United States Constitution.

There is not a dedication to public use of the centralized supply systems for fuel oil in a privately owned trailer court or housing development. Fuel oil, marketed through a pipeline system in a trailer court or housing development, is not sold to the general public like the utility gases. There is no open offer of sale. The supplier is free to refuse to deliver to any individual consumer in the trailer court or housing development. Furthermore, the means of tank wagon transportation, necessary to bring the product to trailer courts and subdivisions, and other incidental matters in connection with the transportation, handling and storage of fuel oil, indicate that the product is not adaptable to the sale, distribution and furnishing to the public at large in unlimited quantities from a single dealer. Necessarily, the service rendered by a public utility must be so dedicated to the public that it becomes affected with the public interest. There must be an offer to sell to and serve the public generally, the right of use of public property, and in most cases condemnation of private property. Such is not the case in the sale of fuel oil to consumers in a trailer court, housing development, or elsewhere. Each sale is an independent sale and transaction between the seller and an individual customer. The fuel oil supplier does not hold himself out, nor should he be expected, to sell to the public generally.

The nature of the business of fuel oil delivery and the methods employed for marketing its products, together with the fact that there exists competition among the various dealers, contradicts common dedication to the public use. It is the factor of monopoly, absent in the case of centralized supply systems herein under consideration, which gives rise to a reason for public protection through control and regulation. Since the supply of fuel oil in trailer courts and housing developments is a highly competitive industry, to regulate the owners of the centralized systems, designed to more effectively market their product in such locations, would effectively eliminate this competition. The effect of an elimination of competition in an already competitive industry was noted as follows by the Ohio Supreme Court in Paramount Gas Utilities Co. v. Public Utilities Commission (1932), 125 Ohio St. 211, 180 N.E. 897:

> "If any mercantile establishment, selling its goods to the public in general, could have its business adjudged as falling within the jurisdiction of the Commission, and thereby eliminate, or at least greatly diminish competitors from unfairly coming into a determined

> field, evidently all distinction between mercantile operations, carried on by persons, partnerships, corporations, or associations, and public utilities, as now generally recognized by law, would promptly disappear, and the Commission would, quite, as promptly, be completely swamped in any effort the Commission might make to take care of the situation thus arising, and the general provisions of the public utilities law would become broadened far beyond anything that the legislature ever had in mind in the enactment of the public utilities statutes."

Denali Fuel Company, and Applicant under protest herein, further contend that none of its operations are subject to the Commission's jurisdiction because none of its operations fall within the definition of public utility stated in AS 42.05.701(2). The Commission contends that a central supply system for fuel oil in a trailer court and housing development falls within the definition of AS 42.05.701(2)(E). This Subsection requires the owning, operating, managing or controlling of a pipeline or system for distribution of petroleum products to the public for compensation. Denali Fuel Company does not charge its customers for the delivery of fuel oil through the centralized system located in trailer courts and housing developments; i.e., there is no charge to the customer for the use or maintenance of the centralized system. Therefore, Denali Fuel Company is not being compensated for the customer's use of a pipeline or system.

The Commission is also referred to Applicant's Exhibit B herein, for an illustration of other governmental means by which standards are set with respect to various aspects connected with central fuel oil delivery systems, thus illustrating that there are already regulations imposed in the interests of the consumer's health and safety.

EXHIBIT IV

COMPETITION SURVEY-FUEL OIL SUPPLIERS - ANCHORAGE

Name of Business	No. 1 Fuel (Stove Oil) Price per Gal. 300 gal. tank or greater	No. 2 Fuel (Furnace Oil) Price per Gal. 300 Gal. tank or greater	No. 1 Fuel (Stove Oil) Price per Gal. Less than 300 gal. tank	No. 2 Fuel (Furnace Oil) Price per gal. Less than 300 gal. tank	Burner Service Work Yes or No	Hourly Rate Burner Service a. Regular Time B. Overtime	Minimum Charge Per Delivery	Twenty-Four Hour Service Yes or No
Ace Fuel	24.7 ¢	23.5 ¢	25.7 ¢	24.5 ¢	No	---	$ 10.00	No
Arctic North Star	24.4 ¢	23.2 ¢	25.4 ¢	24.2 ¢	Yes	a. $ 12.00 b. $ 18.00	None	No
Burnie Heating	22.7 ¢	21.5 ¢	22.7 ¢	21.5 ¢	Yes	a. $ 12.00 b. $ 18.00	Under 100 gal.	Yes
Day and Night Fuel	23.7 ¢	22.5 ¢	24.75¢	23.5 ¢	Yes	a. $ 18.00 b. $ 27.00	20 gal.	Yes
Denali Fuel	23.7 ¢	22.5 ¢	24.7 ¢	23.5 ¢	Yes	a. $ 13.00 b. $ 19.50	$ 10.00	Yes
Inlet Fuel	24.7 ¢	23.5 ¢	25.7 ¢	24.5 ¢	Yes	a. $ 12.00 b. $ 14.00	None	Yes
Katmai Oil	22.7 ¢	21.5 ¢	24.7 ¢	23.5 ¢	No	---	$ 15.00	No
Union Oil	22.7 ¢	No Delivery	22.7 ¢	21.5 ¢	No	---	5 Gal. Minimum	No
Spenard Fuel	23.7 ¢	22.5 ¢	24.7 ¢	23.5 ¢	Yes	a. $ 12.00 b. $ 18.00	$ 10.00	Yes
Peters Creek Fuel	23.7 ¢	22.5 ¢	26.7 ¢	25.5 ¢	Yes	a. $ 12.00 b. $ 12.00	25 Gal. Minimum	Yes
Alaska Heat	23.7 ¢	22.5 ¢	25.7 ¢	24.5 ¢	Yes	a. $ 16.00 b. $ 24.00	$ 10.00	Yes
Norgas	21.0 ¢	20.5 ¢	24.0 ¢	23.0 ¢	No	---	Under 71 Gal.	No
Standard Oil	21.1 ¢	No Delivery	23.1 ¢	21.9 ¢	No	---	None	No

DENALI DISTRIBUTORS, INC.

EXHIBIT F

Applicant proposes to charge, for fuel oil delivered through individual metered units connected to applicant's system in a trailer court or subdivision, a price not to exceed the retail price of the least expensive oil of a class suitable to such customer's needs based on the delivered price appertaining to 300 gallon capacity tanks posted in the Greater Anchorage area.

RATES

Stove oil : $0.237 per gallon - No. 1 Fuel

Furnace oil : $0.225 per gallon - No. 2 Fuel

SECURITY DEPOSIT

Per Customer: $25.00

INSTALLATIONS

No charge to customer for installation of storage tank, pipeline from tank to location or meter setting.

CONNECTION FEE

Per Customer: $15.00
This charge is made only if necessary to install copper tubing from the meter to customer's furnace and for firing furnace.

REFUELING

Automatic checking and refilling of the storage tank provided without additional charge to customers.

SERVICE LABOR CHARGE

No charge to customers for repair to meters, storage tank or pipes between them.

Furnace Service (If requested): $13.00 per hour
$19.50 per hour overtime

CYCLE BILLING PERIOD

Monthly

TERMS

1% service charge if bills not paid within sixty (60) days.

Denali Fuel Company, as it presently operates, posts the above rates for customers in trailer courts and subdivisions connected to a common storage tank located at the court or subdivision. These rates are the same posted rates for all customers having a storage tank with a capacity greater than 300 gallons. These rates do not exceed the posted rates for customers having a storage tank with a capacity less than 300 gallons, who are not connected to a trailer court or subdivision system.

No charge is made to any customer for the use or maintenance of the centralized distribution system.

NOTICE OF APPLICATION FOR

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

The ALASKA PUBLIC UTILITIES COMMISSION hereby gives notice that PETROLANE-ALASKA GAS SERVICE, INC., PETROLANE-ANCHORAGE GAS SERVICE, INC., and PETROLANE-QUEEN GAS, INC. have filed a joint application (Cause No. U-71-11) for an exemption from Sections 221-281 of the Alaska Public Utilities Commission Act (AS 42.05) or, in the alternative, an application (under protest) of PETROLANE-ALASKA GAS UTILITIES, INC. for a certificate of public convenience and necessity to operate as an LP-Gas fuel delivery public utility in the following areas: Dimond Estates, Plaza 36, Kathy O' Estates, Frank's Trailer Court, Alaska Village, Trailer City, Top Hand, Maggie's and East Anchorage Mobile Home at Anchorage; Best View at Chugiak; Badger Mobile Homes, Wayne's Trailer Park, Lakeview Terrace, Birdview and Wildwood Trailer Court at Fairbanks; Ocean Crest, Mt. View Trailer Court, and M.B. Development at Ketchikan; Mobil Haven and Thunder Mt. at Juneau; Perron's Trailer Court at Valdez. The application contains tariffs which include rates and regulations relating to deposits, connection fees, installation, automatic refueling, service labor charges, credit policies, taxes, billings, terms of payment, and other provisions for service. Seperate rate schedules are included for Anchorage, Fairbanks, Juneau, Chugiak, Valdez and Ketchikan. More detailed information may be obtained from the applicant whose address is 1200 Whitney Road, Anchorage, Alaska 99501. The complete filing is available for inspection at the offices of the Alaska Public Utilities Commission, 700 MacKay Building, 338 Denali Street, Anchorage, Alaska 99501.

Any interested party may file with the Commission by 4:30 P.M. on March 15, 1971, a statement of his views and specific reasons in favor of, or in opposition to, the granting either of the exemption as requested or else of authority to the applicant to operate as an LP-Gas fuel delivery public utility, together with written confirmation that the same statement has also been served on the applicant.

DATED at Anchorage, Alaska this 25th day of February, 1971.

J. Lowell Jensen

J. Lowell Jensen
Deputy Director

SB-248

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

MEMORANDUM

January 25, 1972

TO: Members of the House Judiciary Committee

FROM: Russell E. Mulder

SUBJECT: Uniform Probate Code

At various times since the adjournment of the 1971 session, the Legislative Council has solicited the courts, the Alaska Bar Association, local bar associations and individual bar members to study the proposed Uniform Probate Code and submit their comments and suggestions. Attached are the replies received which you will probably wish to consider concerning SB 248.

It is encouraging to note that while both the Alaska Bar Association and Probate Master Gray have offered various suggested changes, they both are in agreement that the Uniform Probate Code is an acceptable approach for probate revision.

I am also attaching a series of correspondence between Professor Richard V. Wellman (chief drafter of the UPC), Frederick O. Eastaugh (one of Alaska's members of the National Conference of Commissioners on Uniform State Laws) and Charles Horowitz (also a member of the National Conference) relating to the need for the retention of certain provisions in the UPC which have been objected to by some. The sections in question are AS 13.16.040 and AS 13.16.455. I believe Professor Wellman's explanations should be helpful.

Att.

REM:ic

Superior Court

State of Alaska

THIRD JUDICIAL DISTRICT

941 FOURTH AVENUE, ROOM 224

ANCHORAGE, ALASKA

99501

KEIFER L. GRAY

STANDING MASTER

PROBATE MASTER

June 15, 1971

Honorable Edward V. Davis
Acting Presiding Judge
Superior Court
Anchorage, Alaska

Dear Judge Davis:

In response to your request that I furnish you suggestions in connection with the revision of the Probate Code to be presented at the City Council chambers in this City on June 25 and 26 since I will not personally be here at that time, you are informed that the following suggestions are made.

It is suggested that wherever the word "county" is used that we substitute instead "judicial district."

ESTATES

Section 1-401, regarding notices under paragraphs (1) and (2), it is suggested "10 days" rather than "14 days" as set forth in the proposed code.

Section 2-109, paragraph (1), add "provided the Native rights through blood of any person so adopted may be retained if provided for in the decree of adoption."

Section 2-401, the homestead allowance should be a minimum of "$8,000" instead of "$5,000" as listed in the proposed bill.

Section 2-502, add a paragraph (a) which states "Wills other than self-proving wills under Section 2-504 may be proven by the affidavits of the two witnesses to the will or, where one witness is deceased or cannot be located, by the testimony of one subscribing witness and other proof satisfactory to the Court."

Add Section 2-903. [Procedure for Non-Intervention Wills.]

If the last will and testament of a decedent provides that the estate shall be settled without the intervention of any Court, title of the decedent passes to the devisee or heirs on death. It is necessary only that the executor, or person or corporation nominated in his place if he fails to serve, submit the will to the Court, prove it, secure letters testamentary, file an inventory, and submit proof of solvency. Thereafter, the estate shall be managed and settled without the intervention of any Court. However, notice to creditors requiring them to submit their claims within three months shall be published once each week for four weeks in a newspaper of general circulation in the judicial district where the will is probated. The party probating the will may file a final account with the Court if he desires and he shall make a report of any inheritance tax due the State or the United States and pay the same from estate funds. Nothing contained in this section shall be construed to prevent the Court from ordering the filing of a final account if a petition demanding a final account is filed by an heir, devisee, legatee, creditor, the State or Federal Government or a person showing he is adversely affected by the failure to file the account. Provided further that a full and complete report must be submitted to the Court within one year from the date of filing such will for probate and that proof of final distribution should be filed simultaneously. Extensions beyond this period of time may be granted only on a specific order by the Court for good cause shown and then not to exceed six months.

Section 3-203(f), paragraph (1), substitute the figures "19" for the figures "21."

Section 3-706, the last paragraph after the comma, instead of "he may file the original of the inventory with the court" it should read "he shall file the original of the inventory with the court," substituting the word "shall" for the word "may."

Section 3-1201(1), change the value from "$5,000" to "$6,000."

Section 3-1204, add paragraph (d), "The Superior Court may authorize the disposal in a manner it prescribes of personal property which has not been disposed of under this section by the end of six months if no heirs or claimants have been located."

Add Section 3-1205. [Settlement Directed by Court.]
When a judge receives information that a person has died in his judicial district leaving an estate of $6,000 or less and no qualified person has appeared to take charge of the assets, the judge may immediately appoint some person, corporation, or attorney to settle the estate in the manner provided for in Section 3-1201 through 3-1204 of this chapter or the appointee may administer the estate in the manner provided for in the administration of small estates.

GUARDIANSHIPS

Section 5-103, item (1), the age should be "19 years."

Section 5-104, the time should be "not exceeding one year unless sooner revoked."

Section 5-204, add "or has failed to properly exercise his duties as such."

Section 5-207(e), add this paragraph to read, "A bond in the amount to be fixed by the Court may be required of the guardian as the circumstances require."

Section 5-209(d), add "at least once every year unless ordered sooner."

Section 5-424, change the age from "18" to "19."

From my examination of the Uniform Probate Code the above suggestions for changes have been made. It is felt that the code itself embodies an excellent change and one which sets forth clearly the law in every case which would be a distinct advantage to our present code since a great deal of our present code has been built up solely through practice and does not set forth the facts as it should. It is my belief that the adoption of this code will greatly strengthen and simplify the handling of probate matters in the State and it is recommended that it be adopted.

Very truly yours,

Keifer L. Gray

Keifer L. Gray
Probate Master

KLG:ljd

Officers
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ANCHORAGE, ALASKA 99501
JAMES BRADLEY
1ST VICE-PRESIDENT
JUNEAU
GEORGE L. GUCKER
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BOARD OF GOVERNORS
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JAMES M. POWELL
JOSEPH L. YOUNG

November 29, 1971

Legislative Affairs Agency
The Legislature
State of Alaska
Pouch Y State Capitol
Juneau, Alaska 99801

Attention: Russell E. Mulder, Deputy Director

Subject: Proposed Probate Code

Gentlemen:

In response to your memorandum on this subject dated October 4, 1971 addressed to members of the Alaska Bar Association, and at the direction of the Board of Governors of the Alaska Bar Association I report herewith the comments of the Real Property, Probate and Trust Committee of the association as reported to the Board of Governors at Anchorage, 6 November 1971. These comments and suggestions set forth the views of the Board of Governors. They are not intended to be totally exhaustive, but do reflect the views of the Association as expressed by the said committee, as follows:

1. The committee, based upon comments of reviewers in other states, considered recommending elimination or revision of Part 3 of the UPC (Informal Probate and Appointment Proceedings), (Article 3 of the work draft copy of the Legislative Affairs Agency). Objections were voiced in the belief that insufficient controls to protect creditors and heirs was afforded. However, it is concluded that sufficient safeguards are provided in the uniform code and no objections are taken to Article 3 as set forth in the redraft.

2. On the whole the UPC is acceptable, to the committee with few exceptions which are listed below.

a. UPC Section 2-401, Article II, Exempt Property and Allowances (Article 4, Sec. 13.11.125 et seq. of work draft copy). The use of a description such as "Homestead Allowance" for the widow of decedent and for minor and dependent children might well be confused with the "Homestead Exemption" provided under A.S. 09.35.090, and the exemptions provided in Sec. 13.11.130 of the work draft copy may be confused with the exemptions provided by A.S. Sec. 09.35.080. We read the probate allowances and exemptions to be in addition to the homestead exemption and other exemptions as now provided under A.S. 09.35.080 and 09.35.090. We recommend that the probate code eliminate the description "Homestead Allowance" and substitute "Widow's and Childrens' Allowance". Likewise, we recommend the description "Exempt Property" be changed to "Personal Property Allowance".

b. Section 13.16.450 of the work draft copy in conformance with the uniform code allows four months for presentation of claims by creditors. We recommend this be changed to ninety (90) days to conform to our present probate code. Ninety days is considered sufficient, and will shorten the length of the probate proceedings.

c. We disagree with the power given a foreign personal representative under Section 4-201 of the UPC, which requires only that the non-resident fiduciary may secure removal of assets of a non-resident decedent from Alaska upon furnishing a copy of his appointment and an affidavit as to death, Alaska administration, and entitlement to payment. Nothing is said or provided concerning Alaska debts of the non-resident decedent, except that should a creditor in Alaska know of the death and the whereabouts of assets in Alaska, that creditor may object. This is considered inadequate and likely to result in no recovery in most cases. Suit against the foreign representative in the foreign jurisdiction is not a good remedy. We recommend that Sec. 4-201 be expanded to require some notice to Alaska creditors prior to removal of the assets from Alaska. We would add the following additional requirement to Sec. 4-201.

> "In addition to the foregoing requirements the domiciliary foreign representative shall furnish to any person having possession or control of personal property, or other asset sought to be removed from Alaska, proof that notice has been published in a newspaper of general circulation in the Borough or City where such assets are

located, at least once a week for three (3) weeks, that such property or other asset will be removed unless objections are made. Such notice shall specify the personal property or asset and its location in Alaska."

d. Section 2-901 UPC (Sec. 13.11.315 of draft copy) provides for deposit of wills with any court. This should be restricted to the Superior Courts inasmuch as the inferior courts, particularly in sparsely settled areas will not have the personnel or facilities to administer this provision. Basically we feel that Sections 2-901 and 2-902 might well be eliminated since they will burden the courts with additional duties, although it is assumed that the rules of court would require a charge to be made? The commentary to the UPC suggests that a central filing system be established soon and a statute be enacted requiring the registrar of the will to notify the central bureau so that any inquiries could be directed to the central bureau. All this seems unnecessary, and will require no end of additional court rules, record keeping, etc.

Should any further comments be desired it is suggested that you direct any inquiries directly to Kenneth McCaskey, Chairman, Real Property, Probate and Trust Committee, Alaska Bar Association, 921 W. Sixth Avenue, Anchorage, Alaska 99501.

Respectfully Yours,

Peter LaBate

Peter LaBate, President
Alaska Bar Association

Joint Editorial Board for the Uniform Probate Code
1155 East 60th St., Chicago, Illinois 60637 — (312) 493-0533, Ext. 297

November 24, 1971

F. O. Eastaugh, Esq.
Commissioner on Uniform State Laws
P. O. Box 1211
Juneau, Alaska 99801

Dear Commissioner:

Thank you very much for your letter of November 18, 1971 and the most welcome news contained therein that the Uniform Probate Code now stands a good chance of passage at the forthcoming session of the Alaska legislature.

I have examined with interest the proposed changes summarized in Mr. Mulder's memorandum addressed to the members of the Alaska Bar Association and your own comments.

Because of the pressures of my work, I will be unable to do much more than call attention to a matter which I hope will be reconsidered. It is your Item (4), which expresses a doubt concerning the wisdom of establishing an absolute three-year limit on commencing probate. I have talked to our chief reporter, Richard V. Wellman, and have asked him to write to you directly so that you may have the benefit of his views on the importance that the three-year limitation plays in the Code. Would it be possible at the same time for you to send him a copy of the material which you sent me so that if anything occurs to him that should be called to your attention he may be in a position to write you concerning the matter. Will you please send me a copy of your letter so that both he and I will be aware of what each is doing.

Again, my thanks to you and my personal regards to both yourself and Mrs. Eastaugh.

Sincerely,

Charles

CHARLES HOROWITZ

CH:vm

P.S. While talking to Professor Wellman I was informed that he had just received a letter from Professor Richard Effland of Arizona State University that Arizona will probably be introducing the Code at the next legislative session.

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48104

Ltrs. to Comm. Disc.

RECEIVED
DEC - 3 1971
ROBERTSON, MONAGLE, EASTAUGH & BRADLEY

November 29, 1971

Frederick O. Eastaugh, Esq.
Box 1211
Juneau, Alaska 99801

Dear Fred:

Charles Horowitz telephoned recently to tell me that an important Alaskan committee had decided to make affirmative recommendations to your Legislature regarding the Uniform Probate Code. This is very good news. It puts Alaska with Arizona which, as I learned only a day or so ago, now has a totally favorable recommendation from a Law Revision Commission committee that spent a year in study of U.P.C.

Charles also indicated that he understood from your account to him that the Alaskan committee's recommendation would delete §3-108 which puts a three year from death time limit on proceedings to probate wills or administer estates. He asked me what I thought of this deletion and I responded that it would make hash out of much that Article III is designed to accomplish. He urged me to get my views on to you. This letter is designed to do just that.

The Committees and Reporters who created U.P.C. were not certain that three years from death was the correct deadline for probate and administration proceedings, but they were unanimously of the view that <u>some</u> cut-off on the possibility of probate and administration was necessary.

In <u>Model Probate Code</u>, §83 proposes a 5 year from death time limit on probate and administration proceedings. The statutory notes to M.P.C. report variations in state statutes prescribing probate limitations ranging from one year to twenty.

We know that at common law, there was no fixed time limit barring probate of a will. But, it was also true at common law that a will of land was like a deed in that no probate was essential as a preliminary to use of a will in evidence as a muniment of title.

But quite apart from historic sources concerning limitations on probate, §3-108 serves so many purposes in the functioning of Article III of U.P.C. that its deletion will cause serious difficulties unless it is offset by some careful re-drafting.

Consider these points:

(1) 3-108's three year limitation on probate serves as the time limit for contest of an informally probated will.

(2) 3-108's limitation serves to end questions concerning late-discovered wills that turn up after an estate has been distributed as intestate.

(3) 3-108's limitation period settles an estate as intestate and as lien-free if no will is probated and no administration is commenced. The public has been demanding a way by which inheritances can be perfected without an official act. Section 3-108 teams up with 3-101 to provide such a way. Few heirs will be content with the fact that inheritances will be non-marketable for the period prescribed by 3-108, so it's unlikely that many will avail themselves of the possibility. Nevertheless, it's quite important for good will purposes, and to restore public confidence in probate, that the possibility be available. Even those who use it may find title examiners insisting on a court determination of heirship (not barred by 3-108), but then again, not all heirship patterns are disputable or difficult to prove.

(4) The bar of 3-108 on administration bars the elective share proceedings under Article II, Part 2.

(5) The limitations in §3-1006 will not make any sense if 3-108 is deleted.

(6) Deletion of 3-108 seriously undercuts the effort reflected in Article II, Part 1 to make intestacy a recommended estate plan for many persons of ordinary means. This objective, in turn, is integral to the effort to re-establish confidence in sole ownership until death, and in state laws governing inheritance.

(7) Leaving 3-108 in the Code will not reduce the incentive for many inheritors and fiduciaries to use protective adjudications. The time for the end of questions relating to inheritances can be accelerated very appreciably by use of the formal proceedings provided in Article III, Part 4 and in §3-1001 and 3-1002.

I hope you can get your committee to reconsider the proposal to abandon this important time limit. Please let me know if I can be of any assistance in clarifying the matter.

Sincerely,

Dick

Richard V. Wellman

RVW:cjk

cc: The Honorable Charles Horowitz

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December 3, 1971

COPY

Professor Richard V. Wellman
The University of Michigan Law School
Hutchins Hall
Ann Arbor, Michigan 48104

Re: Uniform Probate Code

Dear Dick:

Thank you for your letter of November 29 which contains exactly the information I was about to write you for.

I can accept all of the reasons you so aptly demonstrated for the questioned provision in the Code regarding the three year period of limitations for proceedings to probate wills or commence the administration of estates.

However, we have a problem in Alaska that might not be shared in the Lower 48. Most of us have at one time or another been faced with the necessity of probating estates some ten or more years after death in order to clear title to realty. We usually find it necessary to probate one or two estates in order to clear title and are sometimes able to do so for a nominal cost less than the cost of a quiet title action.

As you suggest 3-108 may be the perfect solution to such problems, and if the limitation period of this section will not satisfy the title companies it could well be that the suggested court determination of heirship could be handled at nominal cost to solve most problems.

Your comments or further suggestions would be helpful.

Our Legislative Council met this past Monday and it is my understanding this point was discussed but left for legislative committee action when the bill is introduced. I am accordingly taking the liberty of sending copies of this letter and of your letter, to Senator Robert Ziegler, who is Chairman of our Legislative Council and who will be most influential in determining the action to be taken in the forthcoming session, and also to John Elliott who as you know is Director of Legislative Affairs.

As Charles Horowitz suggested, I am enclosing a copy of the Code modified to conform to the Alaska Bill Drawing Manual with the accompanying memorandum from Russell E. Mulder, Deputy Director of Legislative Affairs.

I was in Anchorage last week to attend Bob Eastaugh's wedding. Jim Bradley came up for it. Avrum Gross is reviewing the Code for the Juneau Bar Association. Both Jim and Av wanted to be remembered to you.

Sincerely,

F. O. Eastaugh

FOE:bh
Encs.
cc: The Honorable Charles Horowitz
Senator Robert Ziegler Sr.
John Elliott, Esq.

UNIFORM PROBATE CODE—ILLEGITIMACY—Inheritance and the Illegitimate: A Model for Probate Reform

I. INTRODUCTION

On May 20, 1968, the United States Supreme Court handed down landmark decisions in *Levy v. Louisiana*[1] and *Glona v. American Guarantee & Liability Insurance Company*.[2] In *Levy*, five illegitimate children sued under article 2315 of the Louisiana Civil Code[3] for damages for the wrongful death of their mother. The suit was dismissed by the Louisiana district court, which held that illegitimate children had no cause of action under the Louisiana statute. In *Glona*, a Texas domiciliary brought a diversity action in federal district court in Texas for the wrongful death of her illegitimate son, caused by an automobile accident in Louisiana. The Texas district court dismissed the suit, holding that under Louisiana law the mother had no cause of action for the death of her illegitimate child. The Supreme Court granted the petition for certiorari in *Glona*[4] and noted probable jurisdiction in *Levy*.[5] With Justice Douglas writing for a majority of six in each case,[6] the Court reversed both decisions, holding that the Louisiana wrongful-death statute denied equal protection of the law both to illegitimate children and to their parents.

Levy and *Glona*, read narrowly, stand only for the proposition that a state wrongful-death statute cannot discriminate between beneficiaries solely on the basis of legitimacy. Read in their broadest sense, however, the opinions in the two cases condemn generally any classification based on legitimacy. A major problem with the opinions is that Justice Douglas did not specify the grounds on which he based his decision. Thus, the potential scope of the holdings is open to question. Several recent cases[7] have interpreted *Levy* to condemn all classifications based on legitimacy. Similarly,

1. 391 U.S. 68 (1968).

2. 391 U.S. 73 (1968).

3. LA. CIV. CODE ANN. art. 2315 (West Supp. 1969).

4. 389 U.S. 969 (1967).

5. 389 U.S. 925 (1967).

6. Justices Black and Stewart joined Justice Harlan, dissenting, in both cases. 391 U.S. at 76.

7. *See* King v. Smith, 392 U.S. 309 (1968), especially Justice Douglas, concurring, at 392 U.S. at 336 (AFDC payments); Munn v. Munn, 450 P.2d 68 (Colo. 1969) (support); R—— v. R——, 431 S.W.2d 152 (Mo. 1968) (support); *In re* Estate of Jensen, 162 N.W.2d 861 (N.D. 1968) (inheritance). *But see* Strahan v. Strahan, 304 F. Supp. 40 (W.D. La. 1969) (inheritance).

several commentators have argued persuasively that the *Levy* reasoning should be extended by a test of "close scrutiny" under the equal protection clause of the fourteenth amendment,[8] to areas of the law other than wrongful death and should be extended with equal force to the child-father relationship as well as the child-mother relationship.[9]

One area of the law in which there traditionally has been discrimination against the illegitimate is that of inheritance. While most states allow an illegitimate to inherit from his mother by intestate succession on an equal footing with legitimate offspring,[10] only three states[11] allow an illegitimate to inherit from the father equally with legitimate offspring. Rather, most states require the father formally to recognize or acknowledge his illegitimate offspring in order for the child to be able to inherit from the father by intestacy.[12] In a few other states a judgment in a paternity action gives the illegitimate child the right to inherit from his father.[13] Not all states allow illegitimates to inherit from the mother's family, and only a few allow them to inherit from the

---

8. The courts tend to apply a close-scrutiny test over classifications when the interests at stake are deemed fundamental (*see* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting) and Douglas v. California, 372 U.S. 353 (1963) (right of the criminally accused to a proper defense)), or when the classification involved is inherently suspect (*see* Brown v. Board of Educ., 347 U.S. 483 (1954) (race)).

9. The general consensus among the commentators seems to be that either a close-scrutiny test should be applied or, in any event, the traditional state interests in supporting discrimination against illegitimates—to encourage marriage, to discourage promiscuity, and so forth—should no longer be considered "rational." *See generally* Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967); Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338 (1969); Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1 (1969); Comment, *The Expanding Rights of the Illegitimate*, 3 CREIGHTON L. REV. 135 (1970); Note, *Equal Protection and the Applicability of Levy v. Louisiana to Succession Law*, 44 TUL. L. REV. 640 (1970); Note, *Inheritance Rights of Illegitimate Children Under the Equal Protection Clause*, 54 MINN. L. REV. 1336 (1970); Recent Development, 21 CASE W. RES. L. REV. 292 (1970).

10. *See* Note, *Illegitimacy*, 26 BROOKLYN L. REV. 45, 76-79 (1959).

11. Arizona, North Dakota, and Oregon have abolished illegitimacy as a legal status. *See* ARIZ. REV. STAT. ANN. § 14-206 (1956) ("A. Every child is the legitimate child of its natural parents. . . . B. Every child shall inherit from its natural parents and from their kindred heir, lineal and collateral, in the same manner as children born in lawful wedlock. . . ."); N.D. CENT. CODE § 56-01-05 (Supp. 1969) ("Every child is hereby declared to be the legitimate child of his natural parents. . . . He shall inherit from his natural parents, and from their kindred heir, lineal and collateral. . . ."); ORE. REV. STAT. § 109.060 (1968) ("The legal status and legal relationships and the rights and obligations between a person and his descendants, and between a person and his parents, their descendants and kindred, are the same for all persons, whether or not the parents have been married.").

12. *See* Note, *Illegitimacy*, 26 BROOKLYN L. REV. 45, 76-79 (1959).

13. *Id.*

father's family.[14] Furthermore, when a testator makes a bequest to his "children" in a will, many states have construed that term to include only legitimate children.[15] Thus, most states discriminate against illegitimates in their inheritance laws, although there are local variations concerning the manner and extent of the discrimination.

In light of *Levy* and *Glona*, and their progeny, the state inheritance statutes that discriminate on the basis of legitimacy are of dubious constitutionality.[16] Moreover, there has been over the past decade a perceptible trend in state and federal laws to bring the illegitimate child into a position of parity with his legitimate counterpart with regard to various legal rights.[17] Furthermore, commentators such as Norman Dacey[18] have soundly criticized probate laws on various grounds, and have exerted discernible pressure for a reform of probate law into a system more responsive to present-day needs. In light of these developments, therefore, it is likely that many states will be revising their inheritance statutes to provide illegitimates with certain legal rights that compare favorably with those accorded legitimate offspring.

The Uniform Probate Code (Code),[19] which was approved by the American Bar Association in August 1969, deals with the prob-

14. *Id.*

15. *See* Annot., 34 A.L.R.2d 4 (1954) (Right of Illegitimate Child To Take Under Testamentary Gift to "Children").

16. The commentators have painstakingly explored the constitutional issues involved. *See* sources cited at note 9 *supra*. In general, the consensus seems to be that while the right to inherit by intestacy—being a matter of statutory grace—is probably not a basic civil right, any classification based on legitimacy is probably inherently suspect—just as is a classification based on race. Thus the strict test of close scrutiny under the equal protection clause should apply. *See* note 8 *supra*. Furthermore, myths of a "rational purpose" (for a statement of the rational-purpose or reasonable-basis test of equal protection under the fourteenth amendment, see Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911)) to support discrimination against illegitimates—discouraging promiscuity, preserving the family unit, promoting morality—have been largely exploded by the same commentators. On the other hand, a federal district court in Strahan v. Strahan, 304 F. Supp. 40 (W.D. La. 1969), recently held Louisiana's intestacy statute, which denies to unacknowledged illegitimates the rights of inheritance enjoyed by legitimate issue of an intestate decedent, to be reasonable under the rationality test of the equal protection clause—the test that the court felt was applicable. The court identified two rationales sufficient to justify the statutory discrimination: (1) encouraging marriage and discouraging promiscuity, and (2) Louisiana's interest in maintaining stability of land titles. 304 F. Supp. at 42. The *Strahan* decision is criticized in Comment, *The Expanding Rights of the Illegitimate*, 3 CREIGHTON L. REV. 135, 155 (1970); Note, *Equal Protection and the Applicability of Levy v. Louisiana to Succession Law*, 44 TUL. L. REV. 640, 642 (1970); Recent Development, 21 CASE W. RES. L. REV. 292, 293-94 (1970).

17. *E.g.*, WIS. STAT. ANN. § 852.05 (Supp. 1970), and official comment. *See* Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962).

18. *See, e.g.*, N. DACEY, HOW TO AVOID PROBATE (1966).

19. The Uniform Probate Code [hereinafter UPC] was promulgated by the National Conference of Commissioners on Uniform State Laws, and approved by the House of Delegates of the American Bar Association in August 1969.

lem of inheritance by illegitimates both with regard to intestate succession—section 2-109—and also with regard to the construction of a bequest to "children" by will—section 2-611. This Note will examine the issue whether the Code, which presents a comprehensive model for probate reform, deals with the problem of inheritance by illegitimates in an appropriate, desirable, and constitutional manner. The Code provisions concerning illegitimacy relate to many other provisions of the Code in which childhood status is relevant;[20] therefore, it will be useful to analyze these other provisions in order to assess the over-all effect of section 2-109 and section 2-611 in an integrated probate system. On the other hand, the formulae set out in sections 2-109 and 2-611, if constitutional, could constitute a desirable model for probate reform—even apart from the entire reform package of the Code—for those states that wish to, or, indeed, who are forced to, reform their laws in this important area.

II. The Illegitimate and Intestate Succession Under the Uniform Probate Code

A. *Section 2-109*

1. *Meaning*

Article 2 of the Code deals with intestate succession and wills. Under that article, section 2-109 defines "child" for the purpose of intestate succession. Furthermore, since section 1-201, the general definitional section of the Code, adopts the section 2-109 definition of "child," that definition is established for all purposes throughout the Code.[21] Section 2-109 provides:

> If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person,
>
> (1) an adopted person is the child of an adopting parent and not of the natural parents except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and that natural parent.
>
> (2) In cases not covered by (1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:
>
> (i) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or
>
> (ii) the paternity is established by an adjudication before the death of the father, or is established thereafter by clear and con-

20. *See* pt. II. B. *infra*.

21. UPC § 1-201(3) provides: "'Child' includes any individual entitled to take as a child under this Code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild or any more remote descendant."

> vincing proof, except that the paternity established under this subparagraph (ii) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child.

The language of the statute seems to be clear for the most part, but there may be an ambiguity that could best be dealt with in a comment to the statutory language. Subsection (2) is intended to define the right of an illegitimate who is not subsequently adopted under subsection (1) to inherit by intestacy. Such a person is always the "child" of the mother, and is also the "child" of the father if he is legitimated by the marriage of his natural parents or if he or his mother can establish the identity of the natural father to the satisfaction of subparagraph (2)(ii) of the section. Although the language of subsection (2) seems to be clear on its face, it appears to contain a latent ambiguity in that subparagraph (2)(i) runs headlong into "one of the strongest presumptions" in this area of the law—the presumption of legitimacy.[22] This doctrine, which derives from English law[23] and which is very common in American jurisdictions,[24] raises a strong presumption, usually rebuttable only by proof of impotency or nonaccess, that any child born in wedlock is legitimate.[25] The presumption is an outgrowth of the time when bastardy was not only a source of reproach and ridicule, but also a source of grave material and legal disadvantage. Although the stigmas attached to bastardy, both personal and legal, have gradually dissipated somewhat over the years, the presumption has remained.[26] The source of the crucial ambiguity lies in the fact that the term "wedlock" is used in a more narrow sense in the Code than it is in the presumption of legitimacy.

It seems clear from a reading of section 2-109 that the policy of that section is to enable illegitimates to inherit from their natural parents—hence "wedlock" is intended to mean marriage between the natural parents of a child. The policy of the presumption of legitimacy, however, is to avoid bastardization of as many children as possible—hence "wedlock" simply means any marriage at all. Accordingly, the presumption has been held to override an acknowledgment by the true father from an adulterous relationship when there was no clear proof of nonaccess or impotence of the legal husband.[27] Therefore, since the policy of section 2-109

22. *See* Lanford v. Lanford, 151 Colo. 273, 377 P.2d 115 (1962).

23. Banbury Peerage Case, 1 Sim. & St. 153, 57 Eng. Rep. 62 (Ch. 1811).

24. *See, e.g.*, Lanford v. Lanford, 151 Colo. 273, 377 P.2d 115 (1962); Ellis v. Woods, 214 Ga. 105, 103 S.E.2d 297 (1958).

25. *See, e.g.*, Gravely v. Gravely, 353 S.W.2d 333 (Tex. 1961).

26. *See* V. SAARIO, STUDY OF DISCRIMINATION AGAINST PERSONS BORN OUT OF WEDLOCK 143-47 (1967).

27. Reyes v. Flemming, 138 F. Supp. 566 (D.P.R. 1958); George v. Bertrand, 217

dictates that "wedlock" means marriage only between the natural parents, that interpretation should be made explicit either in the statute or in a comment to that section, and the presumption of legitimacy should be similarly limited in those jurisdictions that may adopt the Code formulation of section 2-109.

2. *Constitutionality*

Assuming that section 2-109 can be read literally, subject to the above qualifications, it must, of course, pass the test of the equal protection clause of the fourteenth amendment in order to be valid. While Justice Douglas did not clearly specify the equal protection test which he applied in *Levy and Glona*,[28] it appears that section 2-109 would be valid vis-à-vis inheritance by illegitimate children under either the rationality test[29]—the basic test of equal protection—or under the close-scrutiny test[30]—the test applied when a basic civil right or an inherently suspect classification is involved.[31] The provision would be valid for the simple reason that it makes no classification on the basis of illegitimacy. Section 2-109(1) makes no distinction whatever between legitimates and illegitimates, and section 2-109(2) merely establishes a burden of proof[32] of paternity in the child-father relationship which the illegitimate must meet before he can inherit from his natural father. Substantively, section 2-109(2) takes the position that all children have the right to inherit equally from their natural parents. The draftsmen of the provision recognized, however, that while there are few, if any, problems of proof in ascertaining the child-mother relationship, such problems may be substantial indeed in ascertaining the child-father relationship. Thus, section 2-109(2)(ii) sets out a standard of proof for the illegitimate or his next friend to meet in establishing paternity if it has not been established by adoption under subparagraph (1). By imposing a burden of proof, then, section 2-109(2) does not entail a classification that must pass muster before the appropriate equal protection test, but rather, it entails a standard that must be measured by due process considerations.

S.2d 47 (Ct. App. La. 1968), *writ of review denied*, 253 La. 647, 219 S.2d 177, *cert. denied*, 396 U.S. 974 (1969).

28. *See* text accompanying notes 7-9 *supra*.

29. *See* Morey v. Doud, 354 U.S. 457, 465-66 (1956). *See also* note 16 *supra*.

30. *See* McLaughlin v. Florida, 379 U.S. 184 (1964); Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944). *See also* note 8 *supra*.

31. Gray & Rudovsky, *supra* note 9, at 15, suggest that perhaps the Court in *Levy* and *Glona* has taken a middle ground between the rationality and strict-scrutiny tests.

32. In *Glona*, Justice Douglas suggested that the danger of fraudulent claims is properly handled by an appropriate burden of proof rather than by making a classification which amounts to a denial of equal protection. 391 U.S. at 75-76.