

**ALASKA LEGISLATURE COMMITTEE FILES 1905 1906**

**3358**

**HJUD**

**HB**

**474**

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**HB**

**485**

234

what kinds of community resources are available and how to use them. Some public defender offices have in-house psychological counselors or social workers who provide on-the-job training to the GALs in family dynamics, child development, mental health, etc. These counselors can assist in investigating and preparing the GALs recommendations. Also, many of the children's proceeding cases continue for months and years and the public defender's office offers some continuity in at least having a file with notes, observations, etc., if not the same attorney. Finally, the public defender's office frequently has lawyers traveling to bush areas on criminal cases who can participate in and monitor GAL appointment cases without additional expense.

#### D. Public Officials

This is a system whereby the GAL is a part of State government. The Law Guardian Program under the Office of the Public Advocate in New Jersey is part of the executive branch of that State. As of 1980 it had a staff of six attorneys and four social workers. In Alaska this would involve setting up an office inside the court system, such as the newly-created office of public guardian, or outside the court system, like the public defender's office, to do GAL work at State expense.

A subgroup of public official guardians ad litem are programs such as King County, Washington's Court Appointed Special Advocate (CASA) program. These programs involve the use of lay and/or volunteer GALs with specialized family, mental health and legal resources to serve as GALs.

## VII. LAY GALs

### A. Non-lawyer v. Lawyer GALs

The debate of the use of lay GALs or attorney GALs is one that invites frequent comments as follows:

#### Advantages of lawyer GALs are:

1. Lawyers can be of greater assistance to children than lay guardians since most cases are going to involve mixed issues of law and fact as well as complex courtroom procedures.
2. Lawyers have a better understanding of the judicial "system" and how it can be used more effectively for the child's interests.
3. Lawyers are more likely to be familiar with the statutory and case law applicable.<sup>11</sup>

#### Advantages of lay GALs are:

1. Lay guardians are less expensive either as volunteers or at lower fees.
2. Lay guardians have more time and ability to investigate than lawyers.
3. Professionals acting as lay guardians usually have more knowledge of child development, social and psychological issues than lawyers.
4. Lay guardians, if highly motivated, may be more likely to continue representing the child after the dispositional stage.<sup>12</sup>

### B. Types of Lay GALs

There are generally three types of lay or non-lawyer GALs.

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11/ Child Abuse and Neglect Litigation: A Manual for Judges, Nat'l Legal Resources for Child Advocacy and Protection, American Bar Association, DHSS Publ. No. (CHDS) 80-30268, March 1981, p. 59-80.

12/ Id.

The first is the non-trained, non-lawyer GAL. The second is the full or part-time, trained by background or experience, paid GAL. The third is the trained volunteer GAL.

C. Non-trained Non-lawyer GALs

It is the recommendation of this committee that the first type of GAL, the non-trained, non-lawyer GAL should never be used. This is occurring presently in the Fourth Judicial District.

D. Trained, Paid Non-lawyer GALs

The second type of lay GAL is usually highly trained and paid for their work. This person frequently has a background in social work, counseling, psychology or child development. These GALs usually handle several cases and may have an attorney within the office to assist them in the legal proceedings, although in rural areas they may work without assistance of counsel. This system may not be significantly cheaper than paying lawyers but may result in quality GAL work because of the training of the GALs and their commitment to representation of children as a job.

E. Trained Volunteer Non-lawyer GALs

The third general category of lay GALs are trained volunteers. This is the appointment of a volunteer person in the community to be GAL. Some court systems, such as King County's Court Appointed Special Advocate (CASA) program have been very successful. A review of Court Appointed Special Advocate (CASA) programs throughout the country resulted in some of the following findings:<sup>13</sup>

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13/ Ray-Bettineski, Carmen, "How to Develop a Successful Guardian Ad Litem Program Based on the Experience of Thirteen Programs," Protecting Children through the Legal System, American Bar Association, 1981. (This article is attached as Exhibit I)

(These programs all used trained non-attorney volunteers and were limited to abuse and neglect cases - see Exhibit I).

1. Resistance encountered within system.
2. Flooded with volunteers in beginning and several months later supply exhausted. Recruitment and training must be on-going to provide for attrition.
3. Volunteers must be screened by interviewing, application information, reference, providing them with accurate account of job and time demands, and police file checks in some programs.
4. Training is a vital key to the program success varying from seven hours in Seattle to 45 in Los Angeles.
5. A clear written program manual describing the court process step-by-step, the role of GAL, the roles of other parties and agency relationships and resources is a required reference.
6. Readily available legal staff and independent social service staff for case consultation and on-going training.
7. Most programs have an administrative staff with social service and legal background. The Director serves at the pleasure of the Presiding Judge.
8. Duplicate records must be kept by the administrative staff in an up-to-date fashion and clerical staff is needed for this purpose and the preparation of reports and pleadings.

This volunteer system is very tempting for it appears cheap and easy at first glance. However it's applicability to Alaska is doubtful in that such programs have been successful in large population centers such as Los Angeles, Denver and Seattle where there are numerous active public service organizations, and where there is a constant supply of volunteers for there is high turnover of participants. These big cities have graduate schools to draw on for training and volunteers. Furthermore these communities may draw on women with careers as volunteers which Alaska lacks because of the large number of women in the work force.

Finally this system requires money for a first class director, clerical and secretarial staff for administration and report preparation, filing clerks for keeping duplicate files, resource staff for the volunteers in the way of psychological counselors, social workers and attorneys for advice and in-court representation, office machines, office space and funding for accountability reporting from outside the GAL office, and constant recruitment and training. While such a program might possibly work in an area like Anchorage, the supportive cost in small towns and villages is probably prohibitive. A deep commitment would be required by the court system to fund, monitor, support, administer and account for the quality of this model even in Anchorage.

#### VIII. RECOMMENDATIONS FOR ALASKA

A. Preparation and distribution by the court system of an informational pamphlet, similar to the one prepared by this committee, attached hereto as Exhibit "J". The pamphlet should be available in all court buildings, clerks' offices, and distributed through the Alaska Bar Association with an order form for lawyers and agencies to obtain copies to distribute in their offices. This would be a valuable public information tool and would provide those who rely on the representation of a GAL more information about the level of service to which they are entitled.

B. The Supreme Court should review Administrative Rule 13 regarding compensation for GAL services. The committee recommends that payment be increased to \$60.00 per hour for attorneys and \$40.00 per hour for non-attorneys.

C. The Supreme Court should adopt a rule in both the Rules of Civil Procedure and the Children's Rules which states:<sup>14</sup>

The court shall require a guardian ad litem to faithfully discharge his duties, and upon his failure to do so shall discharge him and appoint another.

Such a rule would give litigants a vehicle for bringing the inadequate GAL to the attention of the court. A similar rule is before the Supreme Court in the Proposed Children's Rule 17, attached hereto as Exhibit K.

D. The court system should adopt an administrative system statewide for reporting the total number of GAL appointments, what category they are in, and the amounts paid for GAL services. This could be accomplished by designating a central person within the court system and each judicial district to receive all orders of appointment. The order presently used by some Anchorage judges (Exhibit D) should be used for all appointments.

The appointment order (Exhibit D) and the court appointed counsel billing forms (Exhibit L) for GAL appointments should be sent to a central location. Both forms should be changed to add the following:

- (1) Category of GAL appointment  
(CINA, adoption, paternity, divorce, etc.)
- (2) An order stating "The clerk of court shall send a copy of this document to: (name and address of court system officer to receive orders and billings)."

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14/ Ohio Rev. Code Ann. § 2151.281 (1976).

The billing forms should be revised since the one currently used (Exhibit L) is obviously erroneous in that citations to Rules and Statutes do not correlate. The committee suggests that a billing form exclusively for GAL services be developed to cut down on confusion and be labeled so as not to be confused with other billings such as for criminal or parent representation. The distribution of GAL orders and billings could easily be accomplished by self-duplicating forms. These improvements would result in making GAL appointments a separately accountable part of the court's budget.

Some person within the Central Administration of the court system should have it within their job description and power to monitor quality and administrative affairs of GAL appointments.

E. Development of an on-going, mandatory training program for lay and attorney GALs administered by the court system.

F. In conjunction with the training program the court system should develop a manual for GALs. Several models are available from other states to choose from.

G. The committee recommends that three Model GAL Programs be initiated in this state in an effort to immediately improve representation and to allow evaluation of alternatives. These model GAL Programs are not alternatives to the above recommendations but require the above changes (A - G) in order to increase success. Many plans were explored by the committee and these three Model GAL Programs were

settled on as methods of trying different alternatives while simultaneously meeting the unique needs of different parts of the state.

(1) Anchorage

The Anchorage court has already developed a rudimentary program for selecting GALs and monitoring their performance. Since the Anchorage court makes approximately 210-220 appointments per year (based on 1981 figures), a well-structured administrative program would be warranted here.

The Committee recommends the establishment of at least a half-time position under the general direction of the Trial Court Administrator to operate this program. Placement of this position within the already existing structures of either the Court Custody Investigator's office or the Children's Court Master would take advantage of an administrative structure which deals directly in the day to day operation of many of these cases.

The duties of this position would be to establish appropriate criteria and screening mechanisms for attorneys desirous of serving as GALs; oversee the selection and contracting process whereby a panel of such attorneys is assembled; maintain records on appointments, hours logged, payment and all appropriate fiscal accountability to court administration; and coordinate and administer CLE training for GALs.

It is the Committee's belief that a comprehensive program approach such as this will pay dividends in terms of better quality control of GAL performance and much better fiscal accountability for

program costs. In addition, such a program could easily become a model for similar, though scaled down, approaches in other court locations.

(2) Fourth Judicial District

The court system should work with the Public Defender's office to create and fund a special unit which would handle Fourth Judicial District GAL appointments in all matters. This would combine the model of Legal Clinic and Public Official (pps. 27-29). Such a plan would develop specialized, trained GALs within an already existing administrative framework.

Expanding Public Defender representation beyond GAL work in Child in Need of Aid cases may require an amendment to AS 18.85.100 or Children's Rule 1 and 32. However, the Public Defender Agency has frequently served, without an order, as de facto GAL in divorce cases. This occurs when there are simultaneous Child in Need of Aid and divorce actions, not an uncommon event.

The committee envisions this GAL unit within the Public Defender's office as being staffed by perhaps at least one lawyer, two professional lay assistants and one secretary. The present staff of the Fairbanks Public Defender's office would be in the best position to judge the actual staffing needs, given the agency's current GAL caseload and adding divorce, adoption, guardianships, etc. The goal would be to create a team of trained professional GALs with a lawyer to provide representation and assistance. This lawyer would probably anticipate several hearings per day plus trials in contested cases.

The advantages of creating a GAL unit within the Public Defender's office in the Fourth Judicial District are several. Rather than just serving Fairbanks, the agency serves the entire Fourth

Judicial District, and the GAL unit could do likewise. Secondly, such a unit would hopefully attract and foster a specialized, highly professional and efficient staff since the employees of the unit would do only GAL work and not try to balance GAL work with an overburdened criminal caseload. Thirdly, many of these cases go on for years and the advantage of consistency of representation in one office and hopefully, with some long term staff is obviously cost saving by avoiding repeat reading of voluminous files. Finally this GAL unit would be created within an agency that is already partially providing this function and has an existing administrative structure. The committee recommends that the Fourth Judicial District Area Court Administrator be charged with actively pursuing a course of upgrading GAL representation and providing the administrative function of keeping track of costs, appointments, and conduct quality review so the court system can honestly evaluate this program.

The success of this program, creating a GAL unit within the Public Defender's office, rests largely with the court system. The program is doomed to failure if the court system tries to create the program but does not actively and vigorously support the agency in planning and funding. Additional personnel, equipment, travel funds, training, and administrative assistance will be needed and the court system must work hand in hand with the agency for the program to succeed.

### (3) First Judicial District and Other Communities

The presiding judge in Juneau and the superior court judge in other communities should appoint a committee of lawyers and lay people to aid the court in establishing a court administered GAL panel program

in each community. The screening committee should be charged with establishing minimum criteria for appointment as a GAL and screening attorneys and professional lay people, who wish to be on the GAL panel. The criteria for being accepted on the panel should include, but not be limited to a requirement that the applicant participate in specialized training offered by the panel, the court system, or another agency. The court should then only appoint GALs who are on t' s panel.

This model can be used in any community with a superior court judge. There is little, if any, cost involved for the court system except time and administrative assistance. The community can be involved, through the participation of a lay person on the screening committee. The system is adaptable for both attorney and non-attorney GAL applicants. This committee views this as the ideal 4 approach for systemizing and ensuring the quality of GAL appointments in smaller and more rural communities throughout the state. It can also be modified into a contract system like that recommended for Anchorage, if the need arises.

## IX. CONCLUSION

This report has been an effort to advise the court system of the present state of GAL appointments in Alaska, the present deficiencies, and the options available to improve the system. It is impossible to judge the cost of making the recommended changes since the present costs are virtually unknown. We do know that the costs are high. We do know that overall the quality needs improvement. We do know that the numbers of appointments is at least hundreds. And we do know that the responsibility for representation of Alaskan adults who are incompetent, medically or mentally, and representation of thousands of Alaska's children rests with the Alaska court system. The committee does not view the suggested changes as a way of curing all the problems. The program recommendations do not serve all areas of the state. The administrative changes do not guarantee accountability. However, the committee hopes that these beginnings will foster an attitude in the court system administration, among judges on the bench and among the practicing bar that responsibility for Fiscal and Administrative Accountability and for Quality Accountability must rest within the system. Incompetent adults and children cannot complain.

EXHIBIT "A"

ALASKA STATUTES REFERRING  
TO GUARDIAN AD LITEM

A.S. 09.55.590. Removal of Disabilities of Minority. (e) The Court may appoint an attorney or a guardian ad litem to represent the interests of the petitioner at the hearing.

A.S. 09.60.020. Liability of Guardian Ad Litem for Costs. No person appointed guardian ad litem for an infant or incompetent defendant is liable for the costs of the action.

A.S. 09.65.130. Representation of Child.  
(a) The court may, upon the motion of either party or upon its own motion, appoint an attorney to represent the minor with respect to his custody, support, and visitation or in any other legal proceeding involving his welfare. When custody, support, or visitation are at issue in a divorce, it is the responsibility of the parties or their counsel to notify the court that those matters are at issue. Upon notification, the court shall determine whether the child should have legal representation or other services and shall make a finding on the record before trial. The court shall enter an order for costs, fees, and disbursements in favor of the child's attorney and may further order that other services be provided for the protection of the child.

(b) If custody, support, or visitation is an issue, the order for costs, fees, and disbursements shall be made against either or both parents, except that, if one of the parties responsible for the costs is indigent, the costs, fees, and disbursements for that party shall be borne by the state. If either or both parents are only temporarily without funds, as determined by the court, the court may advance payment for legal representation or other services rendered to the child; however, no repayment may be required for those who are receiving legal services for the indigent. The attorney general is responsible for enforcing collections owed the court, and repayment shall be made directly to the court under the provisions of rules governing the administration of the courts. The court shall, if possible, avoid assigning costs

to only one party by ordering that costs of the child's legal representation or other services be paid from proceeds derived from a sale of property belonging to both parties, before a division of property is made.

(c) Instead of, or in addition to, appointment of an attorney under (a) of this section, the court may, upon the motion of either party or upon its own motion, appoint an attorney or other person to serve as guardian ad litem to represent the best interests of a minor in any legal proceedings involving his welfare. The court shall appoint a guardian ad litem when, in the opinion of the court, representation of the child's best interests, to be distinguished from his preferences, would serve the welfare of the child. The person appointed under (a) of this section may also be appointed as guardian ad litem under this subsection. The court in its order appointing a guardian ad litem shall limit the duration of the appointment of the guardian ad litem to the pendency of the legal proceedings affecting the child's interests, and shall outline the guardian ad litem's responsibilities and limit his authority to those matters related to his effective representation of the child's best interests in the pending legal proceeding. The court shall make every reasonable effort to appoint a guardian ad litem from among persons in the community where the child's parents or the person having legal custody or guardianship of the child's person reside. When custody, support, or visitation are at issue in a divorce, it is the responsibility of the parties or their counsel to notify the court that these matters are at issue. Upon notification, the court shall determine if the child's best interests need representation or if the child needs other services and shall make a finding on the record before trial. The court shall enter an order for costs, fees, and disbursements in favor of the child's guardian ad litem and may further order that other services be provided for the protection of the child. (§ 2 ch 167 SLA 1975; am §§ 2, 3 ch 63 SLA 1977)

A.S. 13.06.115. Notice, Waiver. A person, including a guardian ad litem, conservator, or other fiduciary, may waive notice by a writing signed by him or his attorney.

A.S. 13.06.120. Pleadings, When parties Bound by Others; Notice. In formal proceedings

EXHIBIT A

involving trusts or estates of decedents, minors, protected persons, or incapacitated persons, and in judicially supervised settlements, the following apply:

(4) At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate; if not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests, the court shall set out its reasons for appointing a guardian ad litem as part of the record of the proceeding.

A.S. 13.26.112. Appointment of a Guardian Ad Litem [Effective January 1, 1982]. (a) Upon the request of a ward, a respondent, or the attorney of a ward or respondent, the court shall appoint a guardian ad litem to protect the rights of the ward or respondent in proceedings under AS 13.26.090 - 13.26.155 if the court is satisfied that because of impaired ability effectively to receive and evaluate information regarding the proceedings or because of impaired ability to communicate decisions regarding the proceedings, the ward or respondent cannot determine his own interests without assistance, and

- (1) a guardian has not been appointed;
- (2) his interests and those of his guardian conflict; or
- (3) the appointment is otherwise in the interests of justice.

(b) The guardian ad litem shall assist the ward or respondent in determining his interests in regard to the legal proceedings in which he is involved. If the ward or respondent is entirely incapable of determining his own interests, the guardian ad litem shall make that determination and advise the court and counsel for all parties accordingly. The guardian ad litem shall

(1) inquire thoroughly into all the circumstances that a prudent individual in the position of

EXHIBIT A

the ward or respondent would consider in determining his own interests in the proceedings; and

(2) encourage the ward or respondent to participate, to the maximum extent of his capability, in all decisions and to act on his own behalf on all matters in which he is able.

(c) The attorney of the ward or respondent may also be the guardian ad litem for the ward or respondent if there is no other party readily available and able to serve as a guardian ad litem and whose interests would not conflict with those of the ward or respondent. (§ 7 ch 83 SLA 1981)

A.S. 18.85.100. Right to Representation, Services and Facilities. (a) An indigent person who is being detained by a law enforcement officer in connection with a serious crime, or is under formal charge of having committed, or is being detained under a conviction of a serious crime, or is on probation or parole, or is entitled to representation under the Supreme Court Rules of Children's Procedure, or against whom commitment proceedings for mental illness have been initiated, is entitled

(1) to be represented by an attorney to the same extent as a person having his own attorney is entitled; and

(2) to be provided with the necessary services and facilities of this representation, including investigation and other preparation.

(b) The attorney services and facilities and the court costs shall be provided at public expense to the extent that the person, at the time the court determines indigency, is unable to provide for payment without undue hardship. Appointment of any guardian ad litem or attorney shall be made under the terms of AS 09.65.130, to the extent that that section is not inconsistent with the requirements of this chapter. (§ 1 ch 109 SLA 1969; am § 1 ch 16 SLA 1974; am § 3 ch 167 SLA 1975)

A.S. 20.15.100(j). Appointment of a guardian ad litem or attorney for a person to be adopted who is a minor shall be made under the terms of AS 09.65.130.

EXHIBIT A

A.S. 25.25.100. Complaint for a Minor. A complaint on behalf of a minor obligee may be brought by a person having legal custody of the minor without appointment as guardian ad litem.

A.S. 47.15.050. Fees. A counsel or guardian ad litem appointed under the provisions of this compact may be paid as provided in the Rules of Civil Procedure. [Uniform Interstate Compact on Juveniles]

A.S. 47.17.030(e). Action on Reports; Termination of Parental Rights. In all actions taken by the department or a health and social services agency of a local government under this chapter that result in a judicial proceeding, the child shall be represented by a guardian ad litem in that proceeding.

A.S. 47.10.050. Appointment of Guardian Ad Litem or Attorney. (a) Whenever in the course of proceedings instituted under this chapter it appears to the court that the welfare of the minor will be promoted by the appointment of an attorney to represent the minor or an attorney or other person to serve as guardian ad litem, the court may make the appointment. Appointment of a guardian ad litem or attorney shall be made under the terms of AS 09.65.130.

EXHIBIT A



# RECORDS CERTIFICATION



I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

*James O. Smith*  
Signature of Camera Operator

*7/25/89*  
Date

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# STATE OF ALASKA THE LEGISLATURE

## LEGISLATIVE AFFAIRS AGENCY

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May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary	4/2/86	1:30 pm
" "	4/3/86	1:30 pm

**HOUSE  
COMMITTEE REPORT**

(7)

Date referred: 3/5/86

FURTHER REFERRALS:

DATE: \_\_\_\_\_

The JUDICIARY Committee has considered HB 476

"An Act relating to automobile insurance premiums."

and recommends:

- do pass
- do not pass
- do pass with attached amendment(s)
- no recommendation
- replace with CS HB 476 (JUD)  same title
- new title

and recommends \_\_\_\_\_

further referral to the \_\_\_\_\_ Committee

- and attaches:
- letter of intent
  - first fiscal note
  - new fiscal note
  - zero fiscal note

SIGNING DO PASS:

\_\_\_\_\_  
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ROD E. CRADOCK  
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SIGNING OTHER RECOMMENDATIONS:

\_\_\_\_\_  
Don Cloherty - NO REC  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
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\_\_\_\_\_  
W. W. Miller  
Chairman

Bannister  
4/2/86 ✓

Original sponsor: M.M.Miller  
by request

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 476 (Judiciary)  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 FOURTEENTH LEGISLATURE - SECOND SESSION  
5 A BILL

6 For an Act entitled: "An Act relating to automobile insurance premiums."  
7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 \* Section 1. AS 21.36.420(d) is amended to read:

9 (d) An insurer that increases the premium or adds a surcharge to  
10 an automobile insurance policy shall give written notice of the in-  
11 crease or surcharge at least 15 days before it takes effect, stating  
12 the reason for the change and the right of appeal under AS 21.39.090.  
13 This subsection does not apply to a

14 (1) premium increase resulting from a change requested by  
15 an insured, if the insured is notified at the time the request is made  
16 that the amount of the insured's premium will change as a result of  
17 the requested policy change; or

18 (2) rate approved by the director if the insurer gives  
19 written notice of a premium increase to the insured at least 15 days  
20 before the increase takes effect.

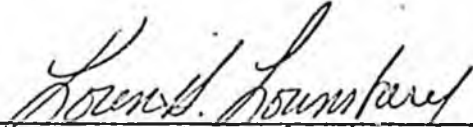
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HB 476: "An Act relating to automobile insurance premiums."

The Department is in favor of this legislation. This proposal is intended to correct a deficiency in Ch 62 SLA 1984. The sponsor of that bill was attempting to provide an appeal mechanism for persons aggrieved by automobile insurance rate increases resulting from surcharges for an accident or violation appearing on that person's driving record, and which is alleged to be inappropriate.

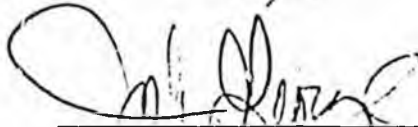
AS 21.36.420(d) was structured to require a notice of all premium increases by an insurer. It is not clear whether a notice is required on increases resulting from other than a change in the individual driving record. Such increases are subject to rate review and approval by the State before use.

This bill would clarify the requirement for notice by specifying the circumstances in which the notice is necessary. It does provide recourse for surcharges or increases that are not appropriate because a person was not convicted of a violation or at fault in an accident.



Loren H. Lounsbury, Commissioner  
Department of Commerce & Economic  
Development

Date: 3/3/86



John L. George, Director of Insurance

Date: 3/3/86

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TIMOTHY R. REDFORD

\* FAIRBANKS OFFICE  
\*\* JUNEAU OFFICE  
\*\*\* VALDEZ OFFICE

March 5, 1986

Representative Mike M. Miller  
Alaska State Legislature  
Pouch Y (MS 3100)  
Juneau, Alaska 99811

Dear Representative Miller:

On Monday, March 3, 1986, the Committee Substitute for HB476 was referred out of the Community and Regional Affairs Committee to the Judiciary Committee. On behalf of State Farm Insurance Company and Allstate Insurance Company, I would urge the Judiciary Committee take prompt action on this piece of legislation. We have before written to you regarding the ambiguity we seek to clarify with this piece of legislation, and our hope is this clarification will be noncontroversial and that it can be resolved this session. We enclose herewith a self explanatory memorandum we sent to Representative Goll regarding this problem, and we thank you in advance for your assistance.

Sincerely,

HUGHES THORSNESS GANTZ  
POWELL & BRUNDIN

By:   
Michael L. Lessmeier

Encl.  
MLL/mf  
0439M

MEMORANDUM

TO: Representative Peter Goll  
Chairman of Community and Regional Affairs Committee

FROM: Michael L. Lessmeier

RE: HB 476

DATE: March 3, 1986

I am writing this memorandum on behalf of State Farm Insurance Company and Allstate Insurance Company regarding A.S. 21.36.420, which was added by the legislature in 1984 via HB 16. This statute deals with premium increases in automobile insurance policies and provides as follows:

(a) An insurer may not increase the premium on an automobile policy unless the increase applies to all insurers of the same class.

(b) An insurer may not increase the premium or add a surcharge to an automobile insurance policy because of the issuance of a citation for a moving traffic violation unless the insured or another person who resides in the insured's household and is covered by the policy has been convicted of the violation.

(c) The director shall adopt regulations to determine circumstances under which an insurer may increase the premium or add a surcharge to an automobile insurance policy.

(d) An insurer that increases the premium or adds a surcharge to an automobile insurance policy shall give written notice of the increase or surcharge at least fifteen (15) days before it takes affect, stating the reason for the change and the right of appeal under A.S. 21.39.090.

A.S. 21.36.42(a)-(d). The difficulty presented by this legislation is the ambiguity in subsection (d). If subsection (d) is read literally, it could be interpreted to require an insurer to send an insured a statement of reasons for a change in premium and a statement of notice of the right to appeal under A.S. 21.39.090 every time a premium is increased, regardless of the reason for the premium increase.

Such an interpretation would require an insurer to send a statement of reasons for the change and a notice of right to appeal whenever a general rate increase is approved by the Division of Insurance, or whenever an insured adds cars, increases coverage, or adds a driver. We do not believe this is what the legislature intended when enacting this statute.

The legislative history we have been able to obtain indicates the focus of the original bill was where an insurer increased the premium of an insured because the insured was either involved in an at fault accident or because of a citation for a moving violation. We found nothing to indicate the legislative intent was to create a blanket requirement of notice and right to appeal any time an insurance premium is increased. Such a requirement would have a significant practical effect on our ability to provide the kind of service we seek to provide. For example, if subsection (d) were interpreted to require written notice of the increase at least fifteen (15) days before it takes effect, stating the reason for the change and the right of appeal, we would be unable to provide immediate coverage for our policy holders who wanted to add a new driver, increase their present coverage, or purchase a new car. If we were to follow the literal interpretation of the present statute, we would not be able to accept coverage in either instance until at least fifteen (15) days after the request in order to assure our insured was informed of his or her proper statutory rights.

Another instance in which difficulties are created is where there is a general rate increase approved by the Division of Insurance. In such a case, it would be illegal for us to charge our insured anything but the filed and approved rate. To suggest by the means of a notice that our insured has a right to appeal a general rate increase is

misleading and could potentially generate wasteful litigation and/or administrative hearings.

In an effort to clarify this ambiguity, we discussed this problem with Representative Miller, and HB 476 was introduced. After discussing this with you and your staff, we have prepared a Committee Substitute for HB 476 which in effect requires an insurer to give written notice of a premium increase at least (15) days before the increase takes effect in all situations except where our insured initiates the change in premium. The notice and the statement of the insured's right of appeal is required in all situations except when a rate increase is approved by the Division of Insurance or where the increase results from a change requested by an insured.

We are only aware of two situations in which an insurer would unilaterally increase a premium because of the driving experience of the insured, i.e., where the increase is based upon an accident or a conviction of a moving traffic violation. However, the Committee Substitute for HB 476 would require notice and the statement of the right of appeal in not just these two situations, but any increase except an increase resulting from a change requested by an insured or a rate increase approved by the Division of Insurance. We believe this Committee Substitute will resolve the ambiguity that presently exists in A.S. 21.36.420(d) without in any way effecting the purpose the statute was intended to accomplish. We urge its prompt passage.

MLL/mf  
0426M

**STATE OF ALASKA 1986 LEGISLATIVE SESSION  
FISCAL NOTE**

Revision Date: \_\_\_\_\_

**REQUEST**

Bill/Resolution No.: HB 476  
Title: Automobile Insurance Premium

**FISCAL DETAIL**

Agency Affected: Division of Insurance  
BRU: \_\_\_\_\_

Sponsor: M. M. Miller  
Requestor: John L. George  
Date of Request: February 19, 1986

Components: \_\_\_\_\_

**EXPENDITURES / REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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**FUNDING: (Thousands of dollars)**

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

**POSITIONS:**

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

**ANALYSIS:** Attach a separate page if necessary.

Prepared by: John L. George, Director  
Division: DIVISION OF INSURANCE

Phone: 465-2515  
Date: February 19, 1986

Approved by Commissioner: [Signature]  
Agency: Commerce and Economic Development

Date: February 19, 1986

Distribution (by Agency preparing fiscal note):

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

COMMUNITY AND REGIONAL AFFAIRS  
Standing Committee  
March 3, 1986  
3:00 p.m.

MEMBERS PRESENT

Representative Peter Goll, Chair  
Representative Kay Wallis, Vice Chair  
Representative Niilo Koponen  
Representative Walt Furnace  
Representative Andre Marrou  
Representative Randy Phillips  
Representative Max Gruenberg

COMMITTEE CALENDAR

HB 476 "An Act relating to automobile insurance premiums."

WITNESS REGISTER

Michael Lessmeier  
Allstate/State Farm  
One Sealaska Plaza  
Suite 203  
Juneau, Alaska 99801  
Telephone: 586-5912  
Position Statement: Supports HB 476 amended.

Don Koch  
Division of Insurance  
Department of Commerce  
and Economic Development  
Juneau, Alaska 99811  
Telephone: 465-2577  
Position Statement: Supports HB 476 amended.

PREVIOUS ACTION

HB 476:	DATE	PAGE	ACTION
	01/15/86 (H)	1799	READ THE FIRST TIME WITH REFERRAL(S) C&RA JUDICIARY RULES

ACTION NARRATIVE

TAPE #67 SIDE ONE  
Recording

Number 001

Chairman Goll called the meeting to order at 3:07 p.m. He asked Michael Lessmeier to testify on behalf of the sponsor.

Number 020

Michael Lessmeier testified on behalf of State Farm Insurance and Allstate Insurance Company regarding AS 21.36.420 which he said was added by the legislature in 1984 via HB 16. A difficulty presented by this legislation is an ambiguity in subsection (d).

If subsection (d) is read literally, it could be interpreted to require an insurer to send an insured a statement of reasons for a change in premium and a statement of notice of the right to appeal under AS 21.39.090 every time a premium is increased regardless of the reason for the premium increase.

Such an interpretation would require an insurer to send a statement of reasons for a change and a notice of right to appeal whenever a general rate increase is approved by the Division of Insurance, or whenever an insured adds cars, increases coverage, or adds a driver. They do not believe this is what the legislature intended when enacting this statute.

Legislative history was researched and if they were to follow the literal interpretation of the present statute, they would not be able to accept coverage in either instance until at least fifteen (15) days after the request in order to assure their insured was informed of his or her proper statutory rights. He discussed difficulties created when there is a general rate increase approved by the Division of Insurance.

In an effort to clarify this ambiguity, they discussed this problem with Representative Mike Miller of Juneau and HB 476 was introduced. Following discussion with this committee, they have prepared a committee substitute for HB 476 which in effect requires an insurer to give written notice of a premium increase at least fifteen (15) days before the increase takes effect in all situations except where their insured initiates the change in premium. The notice and the statement of the insured's right of appeal

is required in all situations when a rate increase is approved by the Division of Insurance or where the increase results from a change requested by an insured.

They believe this committee substitute will resolve the ambiguity that presently exists in AS 21.36.420(d) without in any way effecting the purpose the statute was intended to accomplish. They urge its prompt passage.

Number 082

Representative Koponen moved to adopt committee substitute for HB 476. There were no objections.

Number 105

Chairman Goll suggested language to the committee substitute that subsection (d) does not apply to the premium increase resulting from an automobile insurance policy change requested by the insured where the insured is given written notice of the impact on premiums of this policy change at the time the request is made.

Number 162

Chairman Goll continued suggesting language on line 14, after the word "insured." This subsection does not apply to a premium increase resulting from an automobile insurance policy change requested by the insured, where the insured is notified of the impact on premiums of this policy change at the time the request is made.

Number 183

Representative Koponen moved for adoption of the amendment. There were no objections.

Number 200

Chairman and committee worked on rephrasing the same language in the amendment.

Number 215

Don Koch, Division of Insurance, noticed the Department of Commerce position paper supporting HB 476. This proposal is intended to correct a deficiency in Chapter 62 SLA 1984. The sponsor of that bill was attempting to provide an appeal mechanism for a person aggrieved by automobile insurance rate increases resulting from surcharges for an accident or violation appearing on that person's driving record, and which is alleged to be inappropriate.

This bill would clarify the requirement for notice by specifying the circumstances in which the notice is necessary and the scope of notice required. It does provide recourse for surcharges or increases that are not appropriate because a person was not convicted of a violation or at fault in an accident. They do not object to the notice or premium increase on approved rate filings because it is a fair thing to do. It does generate additional cost for the insurer which will ultimately be passed along to the consumer. It is, however, a reasonable and fair requirement.

Number 220

Chairman Goll asked Mr. Koch to respond to the amendment adopted to the committee substitute. Discussion ensued on written notice and notice of appeal and the burden to the insurer.

Number 310

Chairman Goll asked Mr. Koch for his recommendations on the amendment language. Mr. Koch suggested that he would not place the notice burden on the insurer when the insured is seeking a change. This language may impede the ability of the insured to get a premium change.

Number 330

Chairman Goll suggested the following: This subsection does not apply to a premium increase resulting from an automobile insurance policy change requested by the insured, if the insured is notified at the time the request is made whether an impact on premiums will result from this policy change. This subsection does not apply to a rate increase approved by the director if the insurer gives written notice of the rate increase to the insured at least fifteen (15) days before the rate increase takes affect.

Number 343

Chairman Goll addressed the amended committee substitute and asked if there were any objections. There were no objections from committee, the department or the insurance companies.

Number 359

Don Koch stated that what the committee has done with the notice requirement is fair and the amendment leaves the insured in a position where he is able to negotiate.

Number 392

Representative Marrou moved to pass CSHB 476 amended out of committee with individual recommendations. There were no objections.

Number 395

The meeting was adjourned at 3:40 p.m.

Corrected amendment language: This subsection does not apply to a (1) premium increase resulting from a change requested by an insured, if the insurer notifies the insured at the time the request is made that the amount of the insured's premium will change as a result of the requested policy change; or (2) rate increase approved by the director if the insurer gives written notice of the rate increase to the insured at least 15 days before the rate increase takes affect.

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May 7, 1985

Representative Mike Miller  
Alaska State Legislature  
Pouch V  
Juneau, Alaska 99801

Re: AS21.36.420 HB16

Dear Representative Miller:

I am writing to you on behalf of State Farm Insurance Co. and Allstate Insurance Co regarding AS 21.36.420, which was added by the legislature in 1984 via HB 16. This bill deals with premium increases in automobile insurance policies, and we enclose a copy of this bill as enacted for your information.

We are writing to you because, as we have before indicated, there is an ambiguity in Subsection D. Subsection D if read literally, could be interpreted to require an insurer to send an insured a statement of reasons for a change in premium and a statement of the notice of right to appeal under AS 21.39.090 every time a premium is increased, regardless of the reason for the premium increase. This in effect would require an insurer to send a statement of reasons for the change and a notice of right to appeal every time a general rate increase is approved by the Division of Insurance, an insured adds cars or moves to an area where premiums are higher. We do not believe this was the intent of the legislation, for such an interpretation would in effect require an insurer to give a written notice of an increase, the reasons for the increase, and a notice of right to appeal in cases where the rate has already been approved by the Division of Insurance.

We do not believe this was the intent of this legislation. In fact, the legislative history we have been able to obtain indicates the focus of the original bill was where an insurer increased the premium of the insured because the insured was either involved in an at fault accident or because of a citation

HUGHES THORSNESS GANTZ POWELL & BRUNDIN  
ATTORNEYS AT LAW

for a moving violation. We have found nothing to indicate the legislative intent was to create a blanket requirement of notice and a right to appeal any time an insurance premium is increased.

We believe the ambiguity in this section could be cured simply by tying subsection D to subsection B, to make it clear the notice of increase, stating the reason for the change and the right of appeal, need only be sent in those situations to which the section is addressed, i.e. where a premium is added because of the issuance of a citation for a moving traffic violation to either the insurer or another person who resides in the insured's household and is covered by the policy.

Senator Rodey had suggested we correct this ambiguity through the Revisor's Bill this past session, and the Revisor was willing to do so, if your approval could be obtained, but your staff indicated you felt it more appropriate to correct this legislation through a separate bill, and that you would sponsor such a bill this next session. We have enclosed herewith a proposed draft that would accomplish this correction. We have discussed this with the Division of Insurance and they have indicated they agree the legislation does pose a problem which should be corrected, and with this approach in solving the problem.

We would be most happy to discuss in further detail the difficulties posed by this ambiguity if it would be helpful to you, and we of course are willing to provide any further information on this matter you desire.

Sincerely,

HUGHES THORSNESS GANTZ  
POWELL & BRUNDIN

By: \_\_\_\_\_  
Michael L. Lessmeier

Enclosure  
MLL/mf

HUGHES THORSNESS GANTZ  
POWELL & BRUNDIN

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February 21, 1986

Representative Peter Goll  
Alaska State Legislature  
Pouch V  
Juneau, Alaska 99811

Re: HB 476

Dear Representative Goll:

After our conversation on Tuesday, I contacted my clients and discussed with them the concerns you had regarding HB 476 as it is presently written. We are not aware of any occurrences other than those set forth in the bill, i.e. accident or conviction for moving traffic violation, which would result in an insurer unilaterally increasing the premium of a single insured. I have since confirmed this with the Division of Insurance. There are, of course, situations in which a premium is increased to a class of individuals, for example where the loss experience of a particular vehicle goes up, but those increases are applied across the board to every member of the class. About the only other instance we are aware of that could possibly fall within the area of concern expressed by you is where an insured has a change in marital status and the premium is adjusted accordingly. In this instance, the information for the change is provided to us by our insured, and although the increase does apply to a specific insured, it is because the insured is in a different rating category which has been approved by the Division of Insurance. As you can see, in all cases of premium increases, the insured would be notified of the reasons for the change at least fifteen days before the increase takes effect.


I do hope this draft deals with the concerns you raise. If it does not, or if we can provide further clarification on

HUGHES THORSNESS GANTZ POWELL & BRUNDIN  
ATTORNEYS AT LAW

this matter, please let me know immediately, as we do wish to clarify the ambiguity present in the existing statute this session. I thank you again for your cooperation.

Sincerely,

HUGHES THORSNESS GANTZ  
POWELL & BRUNDIN

By:   
Michael L. Lessmeier

Enclosure  
MLL/mh  
0367A

cc: Mr. Don Koch, Division of Insurance

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\*\*\* VALDEZ OFFICE

February 18, 1986

Representative Peter Goll  
Alaska State Legislature  
Pouch V  
Juneau, Alaska 99811

Re: Insurance Legislation

Dear Representative Goll:

I am writing to you on behalf of State Farm Insurance Company and Allstate Insurance Company regarding AS 21.36.420, which was added by the legislature in 1984 via House Bill 16. This bill deals with premium increases in automobile insurance policies and we enclose herewith a copy of this bill as enacted for your information, as well as a copy of a letter we sent Representative Miller this past session which details the difficulty we are presented with regarding the current version of AS 21.36.420.

Prior to sending this letter to Representative Miller this past session, we researched in detail the legislative history of the 1984 amendment. We spoke to as many of the members of the various committees as we could, and we also examined the documentary information which was available. We found nothing to indicate the legislative intent was to create a blanket requirement of notice and right to appeal any time an insurance premium is increased, and on the contrary, we found the focus of the original bill was simply where an insurer increased the premium of the insured because the insured was either involved in an at-fault accident or because of a citation for a moving violation.

AS 21.36.420, as it now stands, presents significant difficulty to us because of the ambiguity present in

Subsection D. If Subsection D is read literally, it could be interpreted to require an insurer to send an insured a statement of reasons for change in premium and a statement of the notice of right to appeal under AS 21.39.090 every time a premium is increased, regardless of the reason for the premium increase. Such a requirement would significantly affect the practical consequences of the way we operate our business. For example, when a general rate increase is approved by the Division of Insurance, our insureds receive at least fifteen days notice of this increase, and a brief explanation of the reasons for the increase. To present an insured with a statement telling them that they have a statutory right to appeal a premium increase already approved by the Division of Insurance is illusory, because the Department has already approved the rate filing, and it in fact would be illegal for us to charge anything but the approved rate. To suggest by means of a notice that our insured has a right of appeal not only is misleading, but could generate wasteful litigation and/or administrative hearings.

The more practical problems we face are where our insured calls and tells us that he has either added a youthful driver to his policy or purchased a new car. If we follow the literal dictates of the present statute, we simply would not be able to accept coverage in either instance until at least fifteen days after the request was made in order to assure that our insured has been informed of his proper statutory rights of notice and appeal. The same would be true of where our insured moves to a higher rated area. We would not be able to accept coverage unless our insured is able to contact us early enough so we can provide the fifteen-day notice of increase and right of appeal. We do not believe that anyone intended that AS 21.36.420 have this effect, and we sincerely believe that House Bill 476 would correct this ambiguity and would urge its passage.

We do, however, urge that in the interest of clarification one additional correction be made to the current version of House Bill 476. We do request that the language "or adds a surcharge to" be deleted, and instead the word "of" be substituted so the bill would apply to an insurer that increases the premium of an automobile insurance policy. This clarification is necessary simply to ensure that the notice of right to appeal only be given where there is a premium increase as a result of an accident or citation, as opposed, once again to simply a general increase, or an increase which occurs because of a transfer, or addition of a vehicle or driver.

HUGHES THORSNESS GANTZ POWELL & BRUNDIN  
ATTORNEYS AT LAW

We do hope this legislation can be corrected this session, and will be happy to provide any assistance we can in order to accomplish that result.

Sincerely,

HUGHES THORSNESS GANTZ  
POWELL & BRUNDIN

By:

  
Michael L. Lessmeier

Enclosure  
MLL/mh  
348A

MEMORANDUM

TO: Representative Peter Goll  
Chairman of Community and Regional Affairs Committee

FROM: Michael L. Lessmeier

RE: HB 476

DATE: March 3, 1986

I am writing this memorandum on behalf of State Farm Insurance Company and Allstate Insurance Company regarding A.S. 21.36.420, which was added by the legislature in 1984 via HB 16. This statute deals with premium increases in automobile insurance policies and provides as follows:

(a) An insurer may not increase the premium on an automobile policy unless the increase applies to all insurers of the same class.

(b) An insurer may not increase the premium or add a surcharge to an automobile insurance policy because of the issuance of a citation for a moving traffic violation unless the insured or another person who resides in the insured's household and is covered by the policy has been convicted of the violation.

(c) The director shall adopt regulations to determine circumstances under which an insurer may increase the premium or add a surcharge to an automobile insurance policy.

(d) An insurer that increases the premium or adds a surcharge to an automobile insurance policy shall give written notice of the increase or surcharge at least fifteen (15) days before it takes effect, stating the reason for the change and the right of appeal under A.S. 21.39.090.

A.S. 21.36.42(a)-(d). The difficulty presented by this legislation is the ambiguity in subsection (d). If subsection (d) is read literally, it could be interpreted to require an insurer to send an insured a statement of reasons for a change in premium and a statement of notice of the right to appeal under A.S. 21.39.090 every time a premium is increased, regardless of the reason for the premium increase.

Such an interpretation would require an insurer to send a statement of reasons for the change and a notice of right to appeal whenever a general rate increase is approved by the Division of Insurance, or whenever an insured adds cars, increases coverage, or adds a driver. We do not believe this is what the legislature intended when enacting this statute.

The legislative history we have been able to obtain indicates the focus of the original bill was where an insurer increased the premium of an insured because the insured was either involved in an at fault accident or because of a citation for a moving violation. We found nothing to indicate the legislative intent was to create a blanket requirement of notice and right to appeal any time an insurance premium is increased. Such a requirement would have a significant practical effect on our ability to provide the kind of service we seek to provide. For example, if subsection (d) were interpreted to require written notice of the increase at least fifteen (15) days before it takes effect, stating the reason for the change and the right of appeal, we would be unable to provide immediate coverage for our policy holders who wanted to add a new driver, increase their present coverage, or purchase a new car. If we were to follow the literal interpretation of the present statute, we would not be able to accept coverage in either instance until at least fifteen (15) days after the request in order to assure our insured was informed of his or her proper statutory rights.

Another instance in which difficulties are created is where there is a general rate increase approved by the Division of Insurance. In such a case, it would be illegal for us to charge our insured anything but the filed and approved rate. To suggest by the means of a notice that our insured has a right to appeal a general rate increase is

misleading and could potentially generate wasteful litigation and/or administrative hearings.

In an effort to clarify this ambiguity, we discussed this problem with Representative Miller, and HB 476 was introduced. After discussing this with you and your staff, we have prepared a Committee Substitute for HB 476 which in effect requires an insurer to give written notice of a premium increase at least (15) days before the increase takes effect in all situations except where our insured initiates the change in premium. The notice and the statement of the insured's right of appeal is required in all situations except when a rate increase is approved by the Division of Insurance or where the increase results from a change requested by an insured.

We are only aware of two situations in which an insurer would unilaterally increase a premium because of the driving experience of the insured, i.e., where the increase is based upon an accident or a conviction of a moving traffic violation. However, the Committee Substitute for HB 476 would require notice and the statement of the right of appeal in not just these two situations, but any increase except an increase resulting from a change requested by an insured or a rate increase approved by the Division of Insurance. We believe this Committee Substitute will resolve the ambiguity that presently exists in A.S. 21.36.420(d) without in any way effecting the purpose the statute was intended to accomplish. We urge its prompt passage.

MLL/mf  
0426M

CS FOR HOUSE BILL NO. 476  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
THIRTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to automobile insurance premiums."

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

Section 1. AS 21.36.420(d) is amended to read:

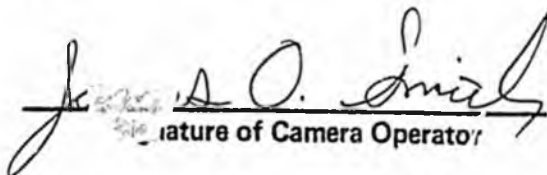
(d) An insurer that increases the premium or adds a surcharge to an automobile insurance policy shall give written notice of the increase or surcharge at least fifteen days before it takes effect, stating the reason for the change and the right of appeal under AS 21.39.090. This subsection shall not apply to increases in premium resulting from a change requested by an insured or to rate increases approved by the Division of Insurance if written notice of the rate increase is given at least fifteen days before it takes effect.



# RECORDS CERTIFICATION



I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

  
Signature of Camera Operator

7/25/89  
Date

H B

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STATE OF ALASKA  
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

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JUNEAU, ALASKA 99811  
907-465-3800

May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary

2/20/86

1:30 pm

COMMITTEE REPORT

(7)

Date referred: 2/7/86

FURTHER REFERRALS:

DATE: \_\_\_\_\_

The JUDICIARY Committee has considered HB 485

"An Act relating to powers and duties of guardians."

and recommends:

- do pass
- do not pass
- do pass with attached amendment(s)
- no recommendation
- replace with \_\_\_\_\_  same title
- replace with \_\_\_\_\_  new title

and recommends \_\_\_\_\_

further referral to the \_\_\_\_\_ Committee

- and attaches:
- letter of intent
  - first fiscal note
  - new fiscal note
  - zero fiscal note

SIGNING DO PASS:

\_\_\_\_\_

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SIGNING OTHER RECOMMENDATIONS:

\_\_\_\_\_

\_\_\_\_\_ NO REC

\_\_\_\_\_ do not pass

\_\_\_\_\_ No Rec

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Chairman

Original sponsors: Sund and  
Gruenberg

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 485 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to powers and duties of guardians."

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

8 \* Section 1. AS 13.26.150(e) is amended to read:

9 (e) A guardian may not

10 (1) place the ward in a facility or institution for the  
11 mentally ill other than through a formal commitment proceeding under  
12 AS 47.30 in which the ward has a separate guardian ad litem;

13 (2) consent on behalf of the ward to an abortion, ster-  
14 ilization, psychosurgery, or removal of bodily organs except when  
15 necessary to preserve the life or prevent serious impairment of the  
16 physical health of the ward;

17 (3) consent on behalf of the ward to the withholding of  
18 lifesaving [LIFE-SAVING] medical procedures; however, a guardian is  
19 not required to oppose the cessation or withholding of lifesaving  
20 medical procedures when those procedures will serve only to prolong  
21 the dying process and offer no reasonable expectation of effecting a  
22 temporary or permanent cure of or relief from the illness or condition  
23 being treated unless the ward has clearly stated that lifesaving  
24 medical procedures not be withheld; a guardian is not civilly liable  
25 for acts or omissions under this paragraph unless the act or omission  
26 constitutes gross negligence or reckless or intentional misconduct;

27 (4) consent on behalf of the ward to the performance of an  
28 experimental medical procedure or to participation in a medical ex-  
29 periment not intended to preserve the life or prevent serious

1 impairment of the physical health of the ward;

2 (5) consent on behalf of the ward to termination of the  
3 ward's parental rights;

4 (6) prohibit the ward from registering to vote or from  
5 casting a ballot at public election;

6 (7) prohibit the ward from applying for and obtaining a  
7 driver's license;

8 (8) prohibit the marriage or divorce of the ward.  
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# STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date: \_\_\_\_\_

**REQUEST**

Bill/Resolution No.: HB 485  
 Title: "An Act relating to powers and duties of guardians."  
 Sponsor: Rep. Sund  
 Requestor: HSS & Judiciary  
 Date of Request: 1/28/86

**FISCAL DETAIL**

Agency Affected: Administration  
 BRU: Office of Public Advocacy  
 Components: Office of Public Advocacy

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES	-0-	-0-				
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>-0-</b>	<b>-0-</b>				
<b>CAPITAL</b>	<b>-0-</b>	<b>-0-</b>				
<b>REVENUE</b>	<b>-0-</b>	<b>-0-</b>				

**FUNDING : (Thousands of Dollars)**

GENERAL FUND	-0-	-0-				
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>	<b>-0-</b>	<b>-0-</b>				

**POSITIONS :**

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

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

Prepared by: Phillip J. McCarthy, Jr. / Grant McGee, Public Advocate Phone: 274-1684  
 Division: Office of Public Advocacy Date: 2/4/86  
 Approved by Commissioner: Eleanor Andrews Date: 1/4/86  
 Agency: Department of Administration

**Distribution (by Agency preparing fiscal note):**

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

**STATE OF ALASKA 1986 LEGISLATIVE SESSION  
FISCAL NOTE**

Revision Date: 2/3/86

**REQUEST**

Bill/Resolution No.: HB 485 #2  
 Title: An Act relating to powers and duties of guardians.  
 Sponsor: Sund & Gruenberg  
 Requestor: \_\_\_\_\_  
 Date of Request: 2/3/86

**FISCAL DETAIL**

Agency Affected: Health & Social Services  
 BRU: Social Services  
Youth Services  
 Components: \_\_\_\_\_

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>		0	0	0	0	0

<b>CAPITAL</b>						
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<b>REVENUE</b>						
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**FUNDING : (Thousands of Dollars)**

GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>		0	0	0	0	0

**POSITIONS :**

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

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

n/a

Prepared by: Michael L. Price, Director Phone: 465-3170  
 Division: Family and Youth Services Date: February 4, 1986

Approved by Commissioner: John R. Pugh, Commissioner Date: 2/5/86  
 Agency: Health and Social Services

**Distribution (by Agency preparing fiscal note):**

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

# STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date: \_\_\_\_\_

**REQUEST**

Bill/Resolution No.: HB 485 #1  
 Title: "An Act relating to powers and duties of guardians."

Sponsor: Rep. Sund  
 Requestor: HBSS & Judiciary  
 Date of Request: 1/28/86

**FISCAL DETAIL**

Agency Affected: Administration  
 BRU: Office of Public Advocacy

Comments: Office of Public Advocacy

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES	-0-	-0-				
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	-0-	-0-				
<b>CAPITAL</b>	-0-	-0-				
<b>REVENUE</b>	-0-	-0-				

**FUNDING : (Thousands of Dollars)**

GENERAL FUND	-0-	-0-				
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>	-0-	-0-				

**POSITIONS :**

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

**ANALYSIS :** Attach a separate page if necessary.

Prepared by Phillip J. McCarthy, Jr. / J.P.  
Frank McGee, Public Advocate  
 Division: Office of Public Advocacy

Phone: 274-1684

Date: 2/3/86

Approved by Commissioner: Eleanor Andrews  
 Agency: Department of Administration

Date: 2/4/86

**Distribution (by Agency preparing fiscal note):**

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

POSITION PAPER  
Bill No. HB485

The Office of Public Advocacy in the Department of Administration performs the duties of the Public Guardian under A.S. 13.26.360-13.26.410. Guardians provide informed medical consents for incapacitated persons (wards) directly impacting the ward's health and safety according to A.S. 13.26.150(c)(5) except as limited by (e) of this section.

PRESENT STATUTE:

A.S. 13.25.150(e) "A guardian may not... (d) consent on behalf of the ward to the withholding of life-saving medical procedures."

PROPOSED AMENDMENT:

A.S. 13.25.150(e) "A guardian may not... (3) consent on behalf of the ward to the withholding of life-saving medical procedures; however, the guardian is not required to oppose the cessation or withholding of life-saving medical procedures when those procedures will serve only to prolong the dying process and offer no reasonable expectation of effecting a temporary or permanent cure or relief from the illness or condition being treated;"

RATIONALE:

The current law could be interpreted as requiring the guardian to insist upon the continuation of "life-saving medical procedures" regardless of the values such procedures might offer the patient in terms of benefits received. The question which needs to be considered is whether the procedure offers relief or cure, versus simply prolonging the dying process by the use of heroic means.

PROBLEM AREAS IN THE PRESENT STATUTE:

(1) A literal reading of the statute would mean that life-saving medical procedures cannot be stopped once they are started. Hence the possibility may arise that non-beneficial and even harmful procedures could not be withdrawn. A further possible effect might be that a different standard of care would be used for wards than for other patients. Also those with guardians might be either overtreated since the treatment could not be stopped or undertreated because the treatment was not begun lest it could not be withdrawn.

(2) the meaning of "life-saving medical procedures" is not clear nor is it defined. An attempt to define the phrase defies the enumeration process, as does a list of the exceptions. Moreover, such a task borders on the impossible because of the nature of the words. The phrase focuses on "procedures" instead of the "relationship" of the treatment to the ward in terms of the benefits received. E.G., chemotherapy or a respirator is life-saving if it is helpful in the restoration of health of the ward, but it would be counterindicated if it simply prolonged the dying process.

(3) An attempt to solve these problems by having the health care provider act independently of the guardian would defeat the purpose of guardianship. Further, such actions by the health care provider would be destructive of the informed consent process.

(4) The statute can create difficulties in the decision-making process for the guardian, ward, physician, health care institution and its personnel, and other health care providers. In addition, it would often conflict with the philosophy of medical ethics.

SUPPORT/HB485:

(1) The amendment more clearly delineates the different types of medical/nursing care involved, thus allowing the guardian to carry out more adequately his/her responsibilities toward the ward.

(2) The amendment allows the guardian to not oppose the cessation or withholding of life-saving medical procedures where they are clearly ineffective and not beneficial to the ward from the perspective of the ward.

(3) The amendment facilitates and keeps open the communication process and dialogue among the guardian and health care providers at all times.

(4) There are no foreseen costs to the OPA with passage of HB485.

*Philip S. McGee, JAT*  
\_\_\_\_\_  
Brant McGee, Public Advocate  
Office of Public Advocacy

*0/3/86*  
\_\_\_\_\_  
Date

*Eleanor Andrews*  
\_\_\_\_\_  
Commissioner Eleanor Andrews  
Department of Administration

*2/7/86*  
\_\_\_\_\_  
Date

POSITION PAPER

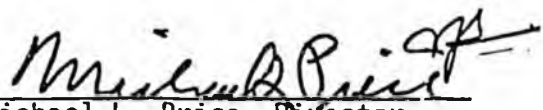
HOUSE BILL NO. 485

For an Act entitled: "An Act relating to powers and duties of guardians."

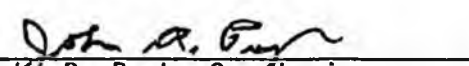
House Bill No. 485 amends Alaska Statute 13.26.150(e) to clarify that a guardian is not required to oppose the cessation or withholding of life-saving medical procedures when those procedures will serve only to prolong the dying process and offer no reasonable expectation of effecting a temporary or permanent cure of or relief from the illness or condition being treated.

It is the department's understanding that some guardians have a felt responsibility to oppose the withholding of medical treatment regardless of their beliefs or judgement. The change would allow the guardian to defer to a more appropriate party, such as a relative, to make critical decisions regarding life saving medical procedures. In addition, the bill is consistent with other federal and State policies requiring review of such decisions.

The department has no objection to the passage of HB 485.

RECOMMENDED:   
Michael L. Price, Director  
Division of Family  
and Youth Services

DATE: February 4, 1986

APPROVED:   
John R. Pugh, Commissioner  
Department of Health  
and Social Services

DATE: 2/5/86

**STATE OF ALASKA 1986 LEGISLATIVE SESSION  
FISCAL NOTE**

Revision Date: 2/3/86

**REQUEST**

Bill/Resolution No.: HB 485  
 Title: An Act relating to powers and duties of guardians.  
 Sponsor: Sund & Gruenberg  
 Requestor: \_\_\_\_\_  
 Date of Request: 2/3/86

**FISCAL DETAIL**

Agency Affected: Health & Social Services  
 BRU: Social Services  
Youth Services  
 Components: \_\_\_\_\_

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>		0	0	0	0	0

CAPITAL						
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REVENUE						
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**FUNDING : (Thousands of Dollars)**

GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>		0	0	0	0	0

**POSITIONS :**

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

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

n/a

Prepared by: Michael L. Price, Director *Michael L. Price* Phone: 465-3170  
 Division: Family and Youth Services Date: February 4, 1986 *46*

Approved by Commissioner: John R. Pugh, Commissioner *JRP* Date: 2/5/86  
 Agency: Health and Social Services

Distribution (by Agency preparing fiscal note):

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

House Bill 485- An act relating to powers and duties of guardians  
Overview prepared by Rep. John Sund's office

#### SECTIONAL ANALYSIS

Section 1, subsection (3) is amended to allow a guardian to accept a medical decision to withhold medical procedures from their ward, when the procedures would only serve to prolong the dying process or provide no hope of relief or cure. The guardian cannot be held civilly liable for such inaction.

#### HISTORY

Current law is being interpreted as requiring that a guardian insist on the continuation of medical procedures, once begun, regardless of a medical judgment that those procedures will not provide relief or cure for the guardian's ward.

The bill does not require the guardian to accept the medical judgment, but gives them permission to accept or reject that judgment as they see fit.

A guardian is appointed by the court with the "same powers and duties respecting the ward that a parent has respecting an unemancipated minor child," except for the responsibility for care and maintenance.

# health association of alaska

319 Seward St., Juneau, Alaska 99801 • (907) 586-1790  
REPRESENTING ACUTE, LONG TERM AND OUTPATIENT FACILITIES

## POSITION PAPER

Chairman of the Board  
Michael Herring  
South Peninsula Hospital  
Homer

Chairman-Elect  
R. Dale Reynolds  
Charter North Hospital  
Anchorage

Immediate Past Chairman  
Edward Zeine  
Cordova Community  
Hospital  
Cordova

Secretary/Treasurer  
Michael Lockwood  
Central Peninsula  
General Hospital  
Soldotna

Delegate to the American  
Hospital Association  
Al M. Camosso  
Providence Hospital  
Anchorage

Alternate Delegate to the  
American Hospital Assoc.  
Sister Barbara Haase  
Ketchikan General Hospital  
Ketchikan

Delegate to the American  
Health Care Association  
Tom Boling  
Our Lady of Compassion  
Care Center  
Anchorage

Alternate Delegate to the  
American Health Care  
Association  
Ronald Olthoff  
Denali Center  
Fairbanks

Delegate to the Association  
of Western Hospitals  
C. Keith Campbell  
Seward General Hospital  
Seward

Alternate Delegate to the  
Association of Western  
Hospitals  
Jane Sabes  
Norton Sound Regional  
Hospital  
Nome

Delegate to the National  
Congress of Hospital  
Governing Boards  
Maxine Robertson  
Ketchikan General Hospital  
Ketchikan

Alternate Delegate to the  
National Congress of  
Hospital Governing  
Boards

Sharon Jean  
Central Peninsula  
General Hospital  
Soldotna

Physician Member of  
the Board  
Morris Horning, M.D.  
Anchorage

President  
Dennis DeWitt  
Juneau

FORMERLY

alaska  
state  
hospital  
association

## GUARDIANSHIP LAW: NO CODE ORDERS

### POSITION:

Guardians should be permitted to consent to the withholding of medical procedures which offer no reasonable expectation of effecting a temporary or permanent cure of or relief from the illness or condition being treated. The current law, AS 13.26.150(e)(3) presently is being interpreted to require the continuation of "lifesaving medical procedures" no matter what value such procedures might offer the patient in terms of benefits received. The question which needs to be considered is whether the procedure offers relief or cure or rather is simply prolongation of the dying process by use of invasive and heroic means.

### ACTION:

Amend AS 13.26.150(e)(3) to provide that a guardian is not required to oppose the cessation or withholding of lifesaving medical procedures when those procedures will serve only to prolong the dying process and offer no reasonable expectation of effecting a temporary or permanent cure of or relief from the illness or condition being treated.

December 6, 1985

health  
association  
of alaska

319 Seward St., Juneau, Alaska 99801

Mr. Chairman, I am Sister Barbara Haase, a member of the Sisters of St. Joseph of Peace, Administrator of Ketchikan General Hospital and former Chairman of the Health Association of Alaska. I am here today to speak on behalf of the Association as well as my own facility. The Health Association of Alaska represents hospitals and nursing homes in Alaska.

We support House Bill 485 by Representatives Sund and Gruenberg. This is a tightly drawn proposal which resolves a very specific and real problem. Under the current law "life saving procedures" may not be withheld from a ward under any circumstance. This is a substantial difference from the standard of medicine which is available to you and me. The guardianship law ought to work to protect the rights of an individual, not to deprive the person of rights.

The purpose of AS 13.26.150(e)(3) was to prevent situations where a guardian, who could benefit from the death of a ward, could decide whether or not the ward should die. It was thought that putting either a guardian or a ward in that position should be avoided. Unfortunately, there have been unforeseen consequences.

Life-saving procedures, once begun, cannot be stopped without a court order. Heroic treatment must always be applied, without regard to its ultimate usefulness. This results in prolonged useless medical treatment.

Let me offer you 2 examples: A 90 year old frail and deteriorating patient with a failing kidney. If the patient suffers acute renal failure, is hemodialysis appropriate? Probably not, unless you are a ward. If the patient goes into cardiac arrest, should defibrillation be administered? Probably not, unless you are a ward. In either case is there a realistic expectation of any positive or prolonged outcome? I would expect not.

Under current law there is no latitude in these cases. This is not the intent of the original law nor is it reasonable or humane treatment of individuals with proper concern for the dignity of the individual.

House Bill 485 offers a simple and realistic solution to this dilemma. It provides that a guardian can accept the advice of the medical community as it relates to the withholding of procedures when those procedures will only serve to prolong the dying process and offer no reasonable expectation of effecting a temporary or permanent cure of, or relief from, the illness or condition being treated. The ward remains protected by the provisions of the guardianship law. The guardian retains the obligation to act on behalf of the ward and to protect the rights of the ward. This measure simply includes the option, not a mandate, to accept medical advice.

We do not believe that the guardian is placed in an impossible situation in this bill. A guardian retains the obligation to review the recommendations and if, in the guardian's opinion, the recommendation is not appropriate, to object. This bill simply says that the objection is not mandated in law. It restores judgement where it should have always been and restores rights to a ward which we believe were unintentionally taken away with the passage of Alaska's guardianship law.

Mr. Chairman, I would like to thank you for this opportunity to testify. I would be pleased to answer any questions.

WILLIAM T. COUNCIL  
THOMAS E. WAGNER

LAW OFFICE  
WILLIAM T. COUNCIL  
A PROFESSIONAL CORPORATION  
424 NORTH FRANKLIN STREET  
JUNEAU, ALASKA 99801

(907) 580-1700

October 5, 1983

Mr. Dennis DeWitt, President  
Alaska State Hospital Association  
319 Seward Street  
Juneau, Alaska 99801

Re: Effect of Appointment of a Guardian  
Under AS 13.26.116 on "No Code" Status of  
Incapacitated Patient in Health Care Facility.

Dear Dennis:

You have asked for our opinion on the question of what effect the appointment of a guardian for an incapacitated nursing home patient would have on an existing "No Code" order for that patient. The principal legal questions raised by your request are: (1) Whether a "No Code" order can be legally entered; (2) whether the guardian has the power or duty to seek withdrawal of the "No Code" order; and (3) whether the physician is required to comply with a guardian's request to withdraw a "No Code" order.

We are unable to give you definitive answers because the law in this area is not settled in Alaska. We will discuss the legal issues involved in this letter, and will suggest procedures for seeking some guidance for your members from the legislature or the courts.

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I. Background - The Legality of "No Code" Orders.

Cardiopulmonary Resuscitation (CPR) is an emergency procedure for the restoration of respiration and pulse in a person whose heartbeat and breathing have ceased. "Code" is medical shorthand for the summoning of a resuscitation team by the announcement of "Code Blue" over a hospital's public address system. A "No Code" order is a treating physician's order to other physicians, nurses, and other health care professionals involved in a patient's care, that no cardiopulmonary resuscitation measures should be undertaken in the event of a cardiac or respiratory arrest.

The legal status of "No Code" orders has not been addressed by either the legislature or the courts in Alaska. Several other authorities have examined this and closely related issues, and their decisions give some indication of the results the Alaska courts might be expected to reach in cases where no guardian has been appointed. I conclude that it is possible that "No Code" orders will be upheld as legal in Alaska, at least in certain circumstances. In the next part (Part II), I will discuss the potential effect on such an order of the appointment of a guardian under AS 13.26.

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Resuscitation after a cardiac arrest involves a series of steps directed toward sustaining adequate circulation of oxygenated blood to vital organs while heartbeat is restored.

Efforts typically involve the use of cardiac massage or chest compression and the delivery of oxygen under compression through an endo-tracheal tube into the lungs. An electrocardiogram is connected to guide the resuscitation team....Various plastic tubes are usually inserted intravenously to supply medications or stimulants directly to the heart. Such medications can also be supplied by direct injection into the heart.... A defibrillator may be used, applying electric shock to the heart to induce contractions. A pacemaker...may be fed through a large blood vessel directly to the heart's surface....These procedures to be effective, must be initiated with a minimum of delay....Many of the procedures are obviously highly intrusive, and some are violent in nature. The defibrillator, for example, causes violent (and painful) muscle contractions which...may cause fracture of vertebrae or other bones.

In Re Dinnerstein, 380 N.E.2d 134, 135-36 (Mass. App. 1978).

Though initially developed for otherwise healthy persons whose heartbeat and breathing failed following surgery or near-drowning, resuscitation procedures are now used with virtually everyone who has a cardiac arrest in a hospital. The initial success rate for in-hospital resuscitation is about one in three for all victims and two in three for patients hospitalized with irregularities of heart rhythm. Among patients who are successfully resuscitated, about one in three recovers enough to be discharged from the hospital eventually. Especially when used on the general hospital population, long-term success is fairly

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rare. In the past decade, health care providers have begun to express concern that resuscitation is being used too frequently and sometimes on patients it harms rather than benefits.

Certain professional organizations have recognized that non-resuscitation is appropriate when the patient's well-being would not be served by an attempt to reverse cardiac arrest. For example, the 1974 standards published by the American Heart Association and the American Academy of Sciences stated:

The purpose of cardiopulmonary resuscitation is the prevention of sudden, unexpected death. Cardiopulmonary resuscitation is not indicated in certain situations, such as in cases of terminal irreversible illness where death is not unexpected or where prolonged cardiac arrest dictates the futility of resuscitation efforts. Resuscitation in these circumstances may represent a positive violation of an individual's right to die with dignity. When CPR is considered to be contra-indicated for hospital patients, it is appropriate to indicate this in the patient's progress notes. It also is appropriate to indicate this on the physician's order sheet for the benefit of nurses and other personnel who may be called upon to initiate or participate in cardiopulmonary resuscitation.

Standards and Guidelines for Cardiopulmonary Resuscitation (CPR) and Emergency Cardiac Care (E.C.C.), 227 J.A.M.A. 837, 864 (1980).

In general, policymakers have had to balance several sometimes competing values in this area. First is the individual patient's right of bodily self-determination as to medical treatment.

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Sometimes this right has been cast in constitutional terms as a right to privacy. In Re Quinlan, 355 A.2d 674 (N.J. 1976); Superintendent of Belchertown v. Saikewicz, 370 N.E.2d 417 (Mass. 1977); Satz v. Perlmutter, 379 SO.2d 359 (Fla. 1980); In Re Colyer, 660 P.2d 738 (Wash. 1983). In other cases, courts have relied upon a common law right to refuse medical treatment. In Re Eichner, 423 N.Y.S.2d 580 (N.Y. Sup. Ct. 1979), modified sub nom. In Re Storar, 420 N.E.2d 64 (N.Y. 1979).

The second value is the well-being of the patient. For some patients, cardiopulmonary resuscitation may simply be an unnecessary prolongation of the dying process, and would probably not benefit the patient in any meaningful sense. For others, it may be of significant medical benefit. The treating physician's assessment of whether a patient stands to benefit from CPR sometimes points to a different result than consideration of self-determination alone. Other interests, such as State's the interests in the protection of innocent third parties (e.g., minor children), in the preservation of life and the prevention of suicide, and in upholding the integrity of the medical profession, may figure in the balance, but the patient's informed choice and the physician's assessment of the potential benefit of CPR are the primary factors to be balanced.

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The analysis differs for patients with decisionmaking competence and those who are incompetent. For the purposes of this discussion, decisionmaking competence means that the individual must have sufficiently stable and developed personal values and goals, an ability to communicate and understand information adequately, and an ability to reason and deliberate sufficiently well to make an informed choice about a particular matter. Competence, in this sense, is a distinct concept from that of legal incapacity, which in Alaska refers to an individual's partial or total inability to care of himself or herself (AS 13.26.113).

A. Competent Patients

1. Where the patient opposes CPR

At least where the physician's assessment is that CPR will not benefit the patient's well-being in the case of cardiac arrest, and there are no minor children involved, a patient's informed refusal to submit to such treatment may possibly be upheld by the Alaska courts. The patient's death following cardiac arrest in such a case may not be considered a suicide because the death, whether or not desired by the patient, would result from natural causes, not from the patient's setting in motion a death

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producing agent which causes his or her own death. See Saikewicz, supra, 370 N.E.2d at 426, n.11, citing Byrn, "Compulsory Life Saving Treatment for the Competent Adult," 44 Fordham L.Rev. 1 (1975).

It could also be maintained that the legal or ethical obligations of the physician would not be breached by entering a "No Code" order in such a case. A physician normally may not treat a person without first obtaining that person's informed consent to the treatment. Although an "implied consent" exception is usually made in emergency situations, such as when an unexpected cardiac arrest occurs, consent will not be implied even in an emergency if the patient has previously stated that he would not consent. In Re Storar, supra, 420 N.E.2d at 70.

According to case law in other jurisdictions, even when a physician believes that CPR will benefit the patient, he or she should usually honor the competent patient's informed refusal to consent to that treatment. Satz v. Perlmutter, supra, (73-year old terminally ill but competent patient had constitutional right to have a life-sustaining respirator removed); Lane v. Candura, 376 N.E.2d 232 (Mass. 1978) (77-year old widow had constitutional right to refuse amputation of gangrenous leg, a decision sure to result in death). There may be cases, however, in which the state interest in the preservation of life is so strong that it

could override the patient's expressed desires, as where CPR could potentially lead to the restoration of a full and vibrant life.

A conflict between the physician's assessment that CPR will benefit the patient's well-being and the patient's choice to forego such treatment calls for careful re-examination by both, further discussion, and perhaps consultation with experts. If neither the physician's assessment nor the patient's preference changes, however, then the competent patient's decision should be honored, according to the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, (hereafter "the President's Commission"), Deciding to Forego Life-Sustaining Treatment, 244-46 (1983). If a physician finds the course of action preferred by a competent patient to be medically or morally unacceptable and is unwilling to participate in carrying out the choice, he or she should help the patient find another physician. Id. There is, of course, no assurance that the Alaska courts would agree with the President's Commission but the Commission's report presents strong evidence of what is acceptable under current medical standards.

2. Where the Patient Expresses No Preference

a. Emergencies

The President's Commission recommends that if the competent

patient has not expressed a preference on the matter, the physician would ordinarily have "implied consent" to administer CPR in an emergency cardiac arrest situation, and should do so unless the physician's assessment is that CPR would not benefit the patient's well-being. Where the potential benefit of CPR is unclear, there should be a presumption in favor of resuscitation. Id. There is some question whether, in an emergency situation where no advance deliberation has led to a decision to withhold CPR, a physician or other health care provider can ever be justified in withholding CPR based on a spur-of-the-moment decision that CPR would not be in the patient's best interest. Alaska law is not settled in this situation. The most prudent legal course, where a "No Code" order has not been entered in advance, is for the medical providers to attempt CPR in all cases of cardiac arrest.

b. Where Cardiac Arrest is Foreseeable

There is also some controversy over whether, when cardiac arrest is foreseeable, a physician has a duty to ascertain the patient's preference, which involves informing the patient of the possible need for CPR and of the likely consequences (both beneficial and harmful) of either employing it or foregoing it if the need arises. The President's Commission has taken the position that

the physician has such a duty, and must secure the patient's consent to any course of treatment, whether involving omissions ("No Code"), or actions (CPR), unless the patient would experience needless harm in such a detailed discussion of resuscitation measures and procedures. The Commission cited a senior attorney at the National Institutes for Health for the countervailing proposition regarding "No Code," however:

"Consent of the patient is irrelevant because we are dealing with a situation in which there is no course of treatment for which to secure consent. This is different from a case in which there is a medically accepted course of treatment, but the patient does not wish to be subjected to this care."

President's Commission, Deciding to Forego Life-Sustaining Treatment, supra, at 241 n.39.

Our opinion is that the most prudent legal course is to obtain the patient's informed consent to any proposed course of treatment, including "No Code," at least where such discussion is not likely to seriously harm the patient. Also, where cardiac arrest is foreseeable, the most prudent course is to develop and follow an established institutional procedure for making an advance decision regarding whether CPR will be appropriate and to review that decision frequently. Such a careful deliberate process, with written documentation of the factors upon which any decision is based, presents far less risk that the physician or

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other health care provider will be charged with negligently making the wrong decision regarding CPR than does making a decision on the spur of the moment once cardiac arrest has occurred.

3. Where the Patient Favors CPR

If the physician's assessment is that CPR will benefit the patient's well-being, and the patient favors CPR, CPR should be performed. If the physician is doubtful about the potential benefit of CPR, the patient's wishes should control. Even where the physician is convinced that CPR would not benefit the patient, it is not clear that the treatment may be withheld when the patient desires it. Once a doctor has undertaken to treat a patient he cannot, without liability, abandon that patient. A few extra days, or even hours of life, even under the most excruciating conditions, may be of considerably different value to different people. Disagreements between doctor and patient regarding the value of CPR may be reason for re-examination by both doctor and patient, but unless the patient changes his or her mind, a physician who enters a "No Code" order for a competent patient who has expressed a preference for CPR treatment runs the risk of being charged with negligence or abandonment. In the future, case law may develop which, based on

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the scarcity of medical resources, allows a physician to withhold CPR treatment if he or she believes it would not serve the patient's well-being, despite the patient's wishes to the contrary, but at this time it would be legally risky to deny such care.

B. Incompetent Patients

Decisionmaking regarding whether "Code" should be initiated is further complicated when the decisionmaking competence of the patient is impaired. Not only is there a problem as to what constitutes sufficient impairment such that ultimate decisionmaking authority should not be left with the patient, but there are also questions regarding who, if anyone, may legally act as a surrogate decisionmaker, and what standards should guide their decisions. Again, Alaskan law offers no clear resolution of these issues, but decisions from other authorities may offer some guidance.

1. When is a Patient Incompetent?

It is important to remember that, for the purposes of this analysis, the concept of decisionmaking incompetence is used to designate a person's inability to adequately comprehend his or

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her situation, form and express a preference regarding CPR treatment, and communicate that preference. This concept is distinct from that of legal incapacity. Under the guardianship laws, a person may be declared partially or totally incapacitated legally if the person is unable to care for himself or herself, and the court may use guardianship or other means to provide for the person's needs. The guardianship statutes provide that:

. . . An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted to the guardian by the court.

AS 13.26.090.

Accordingly, the fact that a person is legally incapacitated, like the fact that the person makes a highly idiosyncratic decision, or the fact that the person has a medical or mental condition similar to others who have been unable to make decisions that advance their own well-being, may alert health care professionals to the possibility of decisionmaking incompetence, but does not conclusively resolve the matter.

The determination of decisional competence focuses on the patient's actual functioning in a particular decisionmaking situation rather than simply on a person's age, ability to care

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for himself or herself, or diagnosis. What is relevant is whether a person is in fact capable of making the decision of whether to forego CPR treatment despite his or her youth, retardation, dementia, or other condition. Health care professionals should make a determination of incompetence only when people lack the ability to make decisions that promote their well-being in conformity with their own values and preferences, and should document the grounds for that determination. Even when a determination of incompetence is made, and the ultimate decisional authority is not left with the patient, reasonable efforts should be made to give the person relevant information about the situation and the available options and to solicit and accommodate his or her preferences. President's Commission, Deciding to Forego Life-Sustaining Treatment, at 121-124.

2. Who, if Anyone, May Act as a Surrogate Decisionmaker?

Courts in other jurisdictions have often relied on surrogate decisionmakers to make decisions for incompetent patients, under the doctrine of "substituted judgment," about whether to forego life-sustaining treatment. In the Quinlan case, the New Jersey court approved the appointment of the patient's father as guardian over the person of a patient in a vegetative comatose state. The father had favored discontinuance of a life-sustaining respirator, while the attending physician opposed it.

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The court specifically authorized the father as guardian to select different attending physicians, and further authorized the attending physicians, if they concluded there was no reasonable possibility of the patient ever emerging from her comatose condition to a cognitive, sapient state, and upon concurrence of the guardian and the family and a hospital "Ethics Committee", to disconnect the life support system.

The Quinlan court thus required the consent of the guardian and the family as surrogates for the patient herself to the withdrawal of life-sustaining treatment, but left the actual decision to the attending physicians. The court stated that the decision to be made was particularly within the field of competence of the medical profession, and that absent a justiciable controversy, court oversight would be unnecessary. It stated that access to the courts would not be foreclosed in such cases, however, where a justiciable controversy existed.

In the Saikewicz case, the Massachusetts court accepted the principle of "substituted judgment," but held that once a justiciable controversy has been presented to the courts, the court itself should "don the mental mantle of the incompetent" (370 N.E.2d at 431) and act as the patient's surrogate decisionmaker regarding whether to forego potentially

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life-prolonging treatment. 370 N.E.2d at 431. The lower courts were instructed to not attempt to shift the decision to any other person or group, such as the guardian, family, attending doctors and hospital "ethics committee" used in Quinlan for that purpose. The Saikewicz court articulated the standard to be used as follows:

The decision should be that which would be made by the incompetent person, if that person were competent, but taking into account the present and future incompetency of the individual as one of the factors which would necessarily enter into the decisionmaking process of the competent person." 370 N.E.2d at 431.

The court in In Re Dinnerstein, 380 N.E.2d 134 (Mass. App. 1978), distinguished a situation in which a "No Code" order was entered in the terminal stages of an unremitting, incurable mortal illness, Alzheimer's disease, a hopeless case in which death would come soon in any event, probably in the form of cardiac or respiratory failure, from the Saikewicz situation where chemotherapy for a 67-year old profoundly retarded leukemia victim was at issue. The Dinnerstein court held that when the Saikewicz court spoke of life-saving or life-prolonging treatments, it referred to "treatments administered, with some reasonable expectation of effecting a permanent or temporary cure of or relief from the illness or condition being treated," and that "'prolongation of life,' as used in the Saikewicz case, does not mean a mere suspension of the act of dying, but contemplates,

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at the very least, a remission of symptoms enabling a return towards a normal, functioning, integrated existence." 390 N.E.2d at 137-8. The Appeals Court in Dinnerstein stated that "the question of what measures are appropriate to ease the imminent passing of an irreversibly, terminally ill patient in light of the patient's history and condition and the wishes of her family" was a "question peculiarly within the competence of the medical profession." 380 N.E.2d at 139. It entered a judgment declaring that a "No Code" order was not contrary to law and that the validity of such an order did not depend on prior judicial approval.

In In Re Spring, 405 N.E.2d 115, 120 (Mass. 1980), the Massachusetts Supreme Court noted in dictum "[w]ithout approving all that is said in the opinion of the Appeals Court [in Dinnerstein]," that the result reached in Dinnerstein was consistent with its Saikewicz holding. The Spring court went on to note that neither the case before it nor the Saikewicz case involved the legality of actions taken without judicial action, and held that its opinions should not be taken to establish any requirement of prior judicial approval that would not otherwise exist. Id. Accord, In Re Colyer, 660 P.2d 738, 746 (Wash. 1983).

In Custody of a Minor, 434 N.E.2d 601 (Mass. 1982), the

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Massachusetts court upheld a "No Code" order entered by the Juvenile Court in the case of an abandoned infant with serious cardiac problems. The order was upheld over the opposition of the health care facility, which had originally sought the order, and the custodian of the child (the state Department of Social Services), a guardian ad litem, and the attorney for the child, each of whom had always opposed the order. All of the parties argued against the continuation of the "No Code" order, and argued that since they were in agreement, the issue was moot and the courts had no further role to play. The court disagreed. It distinguished the Dinnerstein holding, that the decision to enter a "No Code" order on the medical record of an irreversibly terminally ill patient, in consultation with the family or the patient's guardian, does not require prior judicial review, from the Saikewicz holding, that the court itself, once presented with the legal question whether treatment may be withheld, must decide the question and not delegate it to some private person or group. It pointed to the factors enumerated in In Re Spring as affecting when a court order is required:

In Spring, we pointed out that various factors affect the question of when a court order is required. We stated that, among these factors, at least the following were material: [T]he extent of impairment of the patient's mental faculties, whether the patient is in the custody of a State institution, the prognosis without the proposed treatment, the prognosis with the proposed treatment, the complexity, risk and novelty of

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the proposed treatment, its possible side effects, the patient's level of understanding and probable reaction, the urgency of decision, the consent of the patient, spouse, or guardian, the good faith of those who participate in the decision, the clarity of professional opinion as to what is good medical practice, the interests of third persons, and the administrative requirements of any institution involved.

434 N.E.2d at 608. The court held that several of the Spring factors distinguished the case from Dinnerstein, and warranted a "No Code" order despite the position of the parties. It emphasized particularly that the child had no loving family members willing to be involved in the decision, and that the child was already a ward of the state. The court added that the child already was within the jurisdiction of the court before the question arose as to whether a "No Code" order should be issued and continued. It was thus appropriate for the court to decide, under the "substituted judgment" doctrine of Saikewicz, whether "Code" was appropriate. It ordered "No Code."

In Re Conroy, 457 A.2d 1232 (N.J. Super. Ct. 1983) held that if the patient is incompetent and had not earlier given a clear indication of her views, and the family is divided in its views, or the physicians are divided, judicial involvement is indicated.

The New York Court of Appeals appeared to reject the doctrine of "substituted judgment" altogether in the case of a profoundly retarded 52-year old victim of terminal cancer, who had always

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been incapable of understanding or making a reasoned decision about medical treatment, holding that it would be unrealistic to attempt to determine whether he would want to continue potentially life-prolonging treatment if he were competent. In Re Storar, 420 N.E.2d 64, 72 (N.Y.1981). The Storar court therefore assessed the patient's rights as it would those of an infant. Under New York law, the court held, a parent or guardian may not deprive a child of life-saving treatment, no matter how well intentioned. Therefore, blood transfusions to replace blood lost in bleeding from a cancerous bladder could not be terminated. It did not address, however, the Dinnerstein situation where life-saving life-prolonging treatment was not at issue but only "life-sustaining" treatment.

As you can see from the discussion of the above cases, there are complex medical, legal, social and moral issues involved in any attempt to determine who, if anyone, may act as a surrogate decisionmaker for an incompetent patient in deciding whether to forego life-sustaining, but not life-prolonging or life-saving treatment. In general, however, at least in cases where the patient had given no expression of his or her preference while previously competent, or had expressed a preference to forego life-sustaining treatment if his or her situation became terminal and irreversible, and where the patient's medical condition is

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such that no "life-saving" or "life-prolonging" procedures are available which would have a reasonable expectation of effecting a temporary or permanent cure of or relief from the patient's condition, and where there is agreement among the treating physicians and the patient's family that it would be pointless and unnecessarily harmful to the patient to initiate CPR measures which would only prolong the act of dying, courts in other jurisdictions have indicated that family representatives may act as surrogate decisionmakers and consent on the patient's behalf to the withholding of life-sustaining treatment. No judicial involvement would be required. Rather, the physicians in those jurisdictions may simply enter a "No Code" order upon the family's informed consent on behalf of an incompetent patient. The law might be different, however, in situations where the surrogate decisionmaker is not adequately informed or does not give the matter adequate consideration. A "No Code" order was overturned on that basis in Hoyt v. St. Mary's Rehabilitation Center, No. 774555 (Dist. Ct., Hennepin County, Minn., Feb. 13, 1981).

In Alaska, however, the legal status of surrogate decisionmaking may be somewhat different. The Alaska guardianship statutes express a preference for family members over nonfamily members to be appointed as guardians. AS 13.26.145. As will be discussed

further below, even when a court makes a specific determination that a person is incapacitated, after an inquiry designed to reveal, among other things, the extent to which the person retains decisionmaking competence, and the court further determines that the person's needs cannot be met by any means short of guardianship, the court still may not confer on the guardian it appoints, even if that guardian is a family member, the power to "consent on behalf of the ward to the withholding of life-saving medical procedures." AS 13.26.150(e)(3). This suggests that unless the Alaskan courts are willing to distinguish, as the Dinnerstein court did, between "life-saving" medical procedures, as that term is used in AS 13.26.150(e)(3), and "life-sustaining" procedures which offer no reasonable probability of even temporary cure or remission, such as CPR in the case of an irreversibly terminally ill patient, no surrogate decisionmaker, not even a family member appointed as guardian, may give effective consent to a "No Code" order.

I can find no legislative history indicating that the legislature specifically focused on the words "life-saving medical treatment" in AS 13.26.150(e)(3), and meant to either include or distinguish "life-sustaining" procedures as I have defined them above. It is possible that the Alaska courts may make the distinction and follow Dinnerstein in holding that the decision to withhold CPR