ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
5335 SJUD HB 85 - HB 122

907

HB

85

NFIB National Federation of Independent Business

The Guardian of Small Business

TO: Senate Judiciary Committee
Alaska Senate

March 16, 1987

SUBJECT: HB 85-KEY SMALL BUSINESS ISSUE

FROM: Gary L. Jenkins, Dir., Gov't Relations
NFIB/Alaska

We urge you to carefully consider the impact of this issue on all businesses in Alaska. If adopted, this legislation will have an unjustified detrimental effect on every Alaska business. Our position is based on the vote of our over 3,300 Alaska members of which 73% voted in favor of keeping the exemption currently in Alaska law.

ISSUE: Repeal of the Alaska small business $750.00 exemption in the Unclaimed Property Act.

NFIB POSITION: We strongly oppose the original Governor's bill as well as the House Judiciary Committee CS which passed the House.

SUMMARY STATEMENT. We oppose this legislation for the following reasons:

1. It will cost Alaska businesses $5,750,000 per year ($100 per business) to comply but will generate a guestimated $500,000 in revenue per the Dept. of Revenue. That revenue estimate is only a guess and the revenue will likely be much less than that amount.

2. Regarding uniformity with other states, all other state legislatures have exercised the prerogative of making modifications to the Act. The exemption for Alaska small businesses is not detrimental to the effective operation of the Act.

3. Alaska adopted all the interest and civil penalty provisions of the income tax law as well as specific criminal penalties which will apply to those small businesses who do not comply with the Act. These are very harsh penalties for failing to account for a $30.00 deposit or a $25.00 customer overpayment. Do you really want to impose these penalties on every business in Alaska?

4. The House version of the bill only confuses the issue since it identifies only two kinds of unclaimed property which will be exempted up to the $100.00 limit. The exemption of $750.00 in present law should be retained.

For further information, feel free to contact the NFIB/Alaska office.

NFIB/ALASKA
Legislative Office
P.O. Box 210194
Auke Bay, AK 99821
907/586-4100

STEVE COWPER
GOVERNOR

1.P.25

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 29, 1987

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to reporting of unclaimed intangible property.

The Uniform Unclaimed Property Act, promulgated in 1981 by the National Conference of Commissioners on Uniform State Laws, was enacted in Alaska last year (ch. 133, SLA 1986). During the hectic final days of the 1986 legislative session, two amendments to the bill proposing the Uniform Act were adopted to exempt holders of unclaimed and abandoned intangible property from filing a report with the Department of Revenue if the total amount held by a particular holder is less than $750. (See AS 34.45.280 and compare sec. 17 of the Uniform Act.) Those two amendments, significantly increasing the breadth and depth of AS 34.45.280(f)'s exemption (already in the then pending, but not the original, version of the bill), grossly intensified the problem of AS 34.45.280(f) itself. I am convinced that their effect was not fully analyzed before adoption. The most appropriate solution is the complete repeal of AS 34.45.280(f), and that is what this bill does.

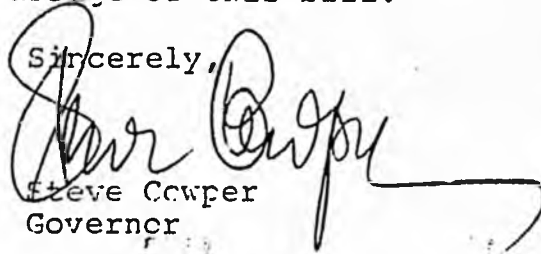
Not only is AS 34.45.280(f) inconsistent with the Uniform Act, retaining it would preclude the state and eventually the people of the state from being reunited with hundreds of thousands of dollars of property. It is important that this subsection be repealed at the earliest possible date, before holders of unclaimed property become accustomed to its exemption and get in the habit of not filing a report for this property.

One primary reason for enacting the Uniform Act was to give the state the authority to require holders located outside of this state to turn over property held for persons with a last known address in this state. It is believed that millions of dollars are held by thousands of out-of-state

businesses, especially banks and other financial institutions, in amounts less than the $750 specified in AS 34.45.280(f). Repeal of that subsection would enable the state to reclaim most of that money.

For the good of the state and its people, and to help provide uniformity with other states enacting the Uniform Act, I strongly urge your prompt passage of this bill.

Sincerely,



Steve Cowper
Governor

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: CSHB 85(Jud)
Publish Date: HOUSE 3/6/87

REQUEST

Revision Date: 2/18/87
Title: An act relating to reporting of unclaimed property
Sponsor: Rules/Governor
Requestor: Finance

Agency Affected: Revenue
BRU: Audit
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
OPERATING						
PERSONAL SERVICES	-	-	-	-	-	-
TRAVEL	-	-	-	-	-	-
CONTRACTUAL	-	-	-	-	-	-
SUPPLIES	-	-	-	-	-	-
EQUIPMENT	-	-	-	-	-	-
LANDS & STRUCTURES	-	-	-	-	-	-
GRANTS, CLAIMS	-	-	-	-	-	-
MISCELLANEOUS	-	-	-	-	-	-
TOTAL OPERATING	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
CAPITAL	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
REVENUE	500.0	500.0	500.0	500.0	500.0	500.0

FUNDING: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
GENERAL FUND	-	-	-	-	-	-
FEDERAL FUNDS	-	-	-	-	-	-
OTHER	-	-	-	-	-	-
TOTAL	-	-	-	-	-	-

POSITIONS:

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
FULL-TIME	-	-	-	-	-	-
PART-TIME	-	-	-	-	-	-
TEMPORARY	-	-	-	-	-	-

ANALYSIS: See attached.

Prepared By: Steven E. Kettel
Division: Audit
Phone: 465-2320
Date: 2/18/87

Approved by Commissioner: Hugh Malone
Agency: Revenue
Date: 2/18/87

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

Fiscal Note Analysis
CSHB 85

During the final hours of the 1986 legislative session, an amendment to the Uniform Act was offered by a local businessman. The amendment, AS 34.45.280(f) exempts holders of unclaimed property and abandoned property from filing a report with the Department if the total amount held is less than $750.00. The Department was not given an opportunity to testify on the amendment and would have been in extreme opposition to it. The Uniform Act was adopted primarily to give this State the authority to require holders located outside this State to turn over property held for persons with a last known address in Alaska. We believe millions of dollars are held by thousands of financial institutions, often in increments much less than the $750.00 minimum contained in 280(f). Retaining this amendment will preclude the State, and eventually its citizens, from being reunited with hundreds of thousands of dollars of their property. Repeal of this section must be enacted immediately before holders become accustomed to its provisions allowing them exemption from filing a report.

109 of 193 holders that filed a 1986 report with the Department were lower 48 companies that paid less than $750.00 each. Much of the property being reported to us consists of dividends paid to shareholders on the company's stock. The state is entitled to receive these unclaimed dividends annually and after seven dividends are abandoned the underlying shares are also subject to being reported to the State. These companies, many of them Fortune 500 companies, represent the "tip of the iceberg" as far as the number of foreign corporations and businesses that should be reporting unclaimed property to us. Many others are not yet aware of our new legislation. However, because of the number of requests we have received for copies of our law, we also believe that hundreds of companies have not exceeded the $750 threshold and have legally not filed a report this year. Interestingly, only five Alaska corporations with unclaimed property of less than $750.00 have reported it to us.

The compromise language in the committee substitute bill is not expected to greatly impact revenues that otherwise are expected to be received.

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF REVENUE

STATE OFFICE BUILDING
P.O. BOX SA
JUNEAU, ALASKA 99811-0400

April 9, 1987

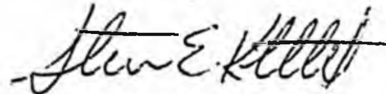
The Honorable Jay Kerttula
Chairman - Senate Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

APR -- 9 1987

Dear Senator Kertulla:

Attached is a list of approximately 100 foreign corporations which have filed a 1986 unclaimed property report and paid over less than $750.00. We believe this represents less than one-percent of the foreign corporations that should otherwise be filing an annual report with this State. What is interesting to note is that under the present statute even these 100 companies were not required to file a report. We suspect that these companies were not aware of Alaska's deviation from the uniform filing requirements adopted by the other states in which they file. We can only assume that unless CSHB 85 is enacted, even these few foreign corporations will discontinue reporting unclaimed property to us.

Sincerely,



Steven E. Kettel
Acting Director of Audit
(907) 465-2320

SEK/sp

87-73

Enclosure

cc: Committee Members

Unclaimed Property Unit
Foreign Companies Reporting $750 or less
As of February 1, 1987

Prepared by:
Steven E. Kettel
Audit Division
February 6, 1987

USX CORPORATION
F. W. WOOLWORTH CO.
ZURICH INSURANCE CO., U.S. BRANCH
COLEMAN COMPANY, INC.
LOUISIANA-PACIFIC CORPORATION
TAISHO MANAGAEMENT CORP.
SPERRY CORPORATION
BANKAMERICA CORPORATION
ITT CORPORATION
NORTHERN LIFE INSURANCE CO.
NATIONAL GENERAL INSURANCE CO.
NATIONAL WESTERN LIFE INSURANCE CO.
NCR CORPORATION
NORTHWESTERN NATIONAL LIFE INSURANCE CO.
PENNSYLVANIA LIFE INSURANCE CO.
PILLSBURY COMPANY, THE
POLAROID CORPORATION

ROCKWELL INTERNATIONAL CORP.
SECURITY LIFE INS. CO. OF AMERICA
SUNSET LIFE INSURANCE CO. OF AMERICA
TEXACO INC. & SUBSIDIARIES
TEXAS GAS TRANSMISSION CORPORATION
TICOR TITLE INSURANCE
TRUST SERVICES OF AMERICA
UNION CARBIDE CORP.
UNITED AIRLINES, INC.
FIRST FARWEST CORP.
FIRST NATIONAL BANK OF ANCHORAGE
FORT CAMPBELL FEDERAL CREDIT UNION
GENERAL ELECTRIC

HERCULES INC.
HONEYWELL, INC.
IDS FINANCIAL SERVICES, INC.
JERMAIN, DUNNAGAN & OWNES, P.C.
LA MEXICANA, INC.
MERCK & CO., INC.
MIDLAND NATIONAL LIFE INSURANCE CO.
MOBIL OIL CORPORATION

WARNER COMMUNICATIONS, INC.
YOSEMITE INSURANCE COMPANY
ZURN INDUSTRIES, INC.
CONOCO, INC.
GEORGIA-PACIFIC CORP (BANK OF AMERICA)
CENVILL INVESTORS, INC.
FUQUA INDUSTRIES, INC.
SAFEWAY STORES, INC.
ARMCO, INC.
MUTUAL PROTECTIVE INSURANCE CO.
NATIONAL HOME LIFE ASSURANCE CO.
NATIONWIDE MUTUAL INSURANCE CO.
NEW HAMPSHIRE INSURANCE GROUP
NORWEST CORP.
PENTAGON FEDERAL CREDIT UNION
PMI MORTGAGE INSURANCE CO.
R. L. POLK & CO.
RAINIER MORTGAGE COMPANY
ROYAL INSURANCE
SHELL OIL CO. AND SUBSIDIARIES
TEACHERS INSURANCE CO.
TEXAS EASTERN CORPORATION
TEXAS INSTRUMENTS INC.
TITLE INSURANCE AGENCY
UAL, INC.
UNIROYAL, INC.
UNITED GUARANTY RESIDENTIAL INS CO OF IOWA
FIRST INTERSTATE BANK OF OREGON, N.A.
FORD AEROSPACE & COMMUNICATIONS CORP.
GENCORP, INC.
GENERAL ELECTRIC MTG INS CORP
HALLIBURTON COMPANY
HOME SAVINGS OF AMERICA
HOUSEHOLD FINANCE CORP & FINANCE SUBS
INVESTORS INSURANCE CORP
KIEWIT HOLDINGS
MANAGMENT & TECHNICAL SERVICES CO.
APCO LIQUIDATING TRUST
MINNESOTA MINING & MANUFACTURING
A.I. CREDIT CORPORATION

ALLEGHENY INTERNATIONAL, INC.
ALLIED-SIGNAL, INC.
AMERICAN GEN'L LIFE INS. CO. OF DELAWARE
AMERICAN LIFE & CASUALTY INS. CO.
AMP INCORPORATED
ARGONAUT INSURANCE CO.
ARKANSAS LOUISIANA GAS CO.
BECHTEL, INC.
B. F. GOODRICH COMPANY, THE
BRUNSWICK CORPORATION
CAMPBELL SOUP COMPANY
CATERPILLAR, INC.
CHASE MANHATTAN BANK, N.A.
CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS
CITIES SERVICE OIL & GAS CORP.
COLONIAL PENN LIFE INSURANCE COMPANY
CONSOLIDATED PAPERS, INC.
CONTROL DATA CORPORATION
CREDIT THRIFT FINANCIAL MANAGEMENT
DANIEL INTERNATIONAL CORPORATION
EASTMAN KODAK COMPANY
EMPLOYERS INSURANCE OF WAUSAU A MUTUAL COMPANY
EMPLOYERS REINSURANCE CORPORATION
FARMERS NEW WORLD LIFE INS. CO.

HB
86

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 19, 1987

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the definition of "veteran" for purposes of veterans' preference rights for state employment. This bill conforms the current definition of "veteran" found in AS 39.25.150(19)(A) to the federal definition in 5 U.S.C. sec. 2108.

In essence, the bill extends the period of time of active duty in the United States armed forces which qualifies an individual as a veteran for employment preference. The Alaska statute currently sets November 7, 1975 as the service cut-off date for qualifying as a veteran, while federal law establishes October 14, 1976 as the date. The bill amends AS 39.25.150(19)(A) to reflect the October 14, 1976 date, thereby conforming the federal and state periods of service for being considered a veteran to receive employment preference rights.

Sincerely,

Steve Cowper
Governor

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version: HB 86
Publish Date: HOUSE 2/11/87

Revision Date: 02/09/87
Title: Definition of "Veteran" for purposes of employment preference
Sponsor: Rules Committee
Requestor: Governor

Agency Affected: Administration
BRU: Personnel
Components:

(41)

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES	-0-	-0-	-0-	-0-	-0-	-0-
GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

ANALYSIS: (Attach a separate page if necessary)

The State Affairs Committee intends for all advertising to be done through public service announcements and veterans organizations.

Prepared by: Fran Ulmer, Chair — Phone: 465-4963
Division: House State Affairs Committee — Date: February 9, 1987

Approved by Commissioner: ______ Date: ______
Agency: ______

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

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: 1/30/87

REQUEST

Bill/Resolution No.: Law Log #773-87-0002
Title: Definition of "Veteran"

Sponsor: Rules Committee
Requestor: Governor
Date of Request:

FISCAL DETAIL

Agency Affected: Military & Veterans Affairs
BRU:

Components:

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

No fiscal impact on this department.

Prepared by: R.L.R. Richard L. Rountree, Director
Phone: 465-4600
Division: Administrative & Support Services
Date: 10/13/86

Approved by Commissioner: for Richard L. Rountree MG Edward G. Pagano
Date: 10/13/86
Agency: Dept. of Military & Veterans Affairs

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

9/16/86

HB56

1/30/87

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: ______

REQUEST	FISCAL DETAIL
Bill/Resolution No.:	Agency Affected: Administration
Title: Definition of veteran for purposes of employment preference	BRU: Personnel
Sponsor:	Components: Personnel
Requestor:	
Date of Request:	

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	1.7	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	1.7	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
GENERAL FUND	1.7	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	1.7	0	0	0	0	0

POSITIONS:

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: Attach a separate page if necessary Cost of running 2" x 4" display ad in newspapers around the state to notify applicants of the change--$1,700. Assumes an effective date in FY 87.

Prepared By: Frank Raye Phone: 465-4430
Division: Personnel Date:

Approved by Commissioner: Eleanor Andrews Date:
Agency: Department of Administration

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

Page 1 of 1 Rev. 9/16/86

19/4K1/1009-04

HB
88

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 29, 1987

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that makes clear the right of a business to bring a private civil action to enjoin, or to recover for damages caused by, a competitor's unfair trade practice.

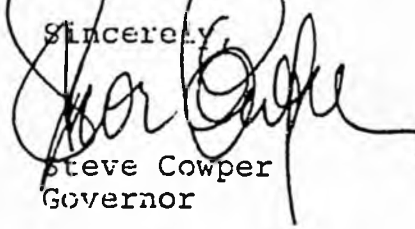
Consumers have a private cause of action for violations of Alaska's Unfair Trade Practices and Consumer Protection Act (UTP Act) but businesses do not, even if harmed by the unfair or deceptive acts or practices of a competitor. Therefore, under present law, only the state (by the attorney general) can bring an action for injunctive relief to stop the unfair trade practices. Private enforcement by businesses aids the attorney general's enforcement efforts.

Specifically, this bill amends AS 45.50.531 to provide that a business that is injured has a private cause of action against the competitor. This cause of action may be inferred in the current UTP Act, but, in order to enhance the rights of private business competitors to guard their own place in the market against unfair competition, a clearly spelled-out private cause of action for the injured competitor is needed. Businesses that often have the resources to pursue private causes of action should not have to depend on state action to stop unfair practices by their competitors.

This would be a desirable change in the statute from a budgetary viewpoint as well. In a slowdown economy, the need for additional state enforcement efforts might also increase; coupled with decreases in revenue, adequate enforcement levels may not be possible. To some extent, this problem might be avoided by allowing private enforcement of the Act. Regularly the consumer protection section of the Department of Law receives calls and complaints from businesses that are concerned about the actions

of their competitors. While the state may act on these cases to stop any violations of law, the state is not, nor should it be, in a position to recover any damages for the honest competitor that is harmed. Nevertheless, the honest competitor should have a remedy that would encourage the seeking of such damages, assuming that the competitor could prove that the violations caused the injury to the business.

Sincerely,



Steve Cowper
Governor

HB 88 11/30/87

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : ______

REQUEST

Bill/Resolution No. : ______
Title : "...relating to private causes of action by businesses under the Alaska Unfair Trade Practices & Cons. Prot. Act"
Sponsor : House Rules/Request of the Gov.
Requestor : Office of the Governor
Date of Request : November 3, 1986

FISCAL DETAIL

Agency Affected : Department of Law
BRU : Consumer Protection
Components : Consumer Protection

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING : (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

- Please see attached. -

Richard I. Pegues
Prepared by : Richard I. Pegues, Director — Phone : 465-3672
Division : Administrative Services — Date : 11/05/86

Richard I. Pegues /For/
Approved by Commissioner : Harold M. Brown, Attorney General — Date : 11/05/86
Agency : Department of Law

Distribution (by Agency preparing fiscal note) :
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

9/16/86

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. ____________

This bill amends AS 45.50.531 to provide that a business, that is injured by a competitor's unfair trade practice, has a private cause of action against that competitor, under Alaska's Unfair Trade Practices and Consumer Protection Act. Currently, only the state can bring an action to stop unfair trade practices. In view of substantial reductions to the state's consumer protection program, extending a private cause of action to businesses, to cure unfair trade violations, will help avoid some of the increase in unfair trade practices that often occurs during an economic downturn.

HB

106

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU ALASKA 99811
907 465-3800

MEMORANDUM April 14, 1988

SUBJECT: Draft SCS CSHB 106 (Judiciary)

TO: Senator Jay Kerttula, Chair
Senate Judiciary Committee
ATTN: Beth Kerttula

FROM: Jack Chenoweth
Legislative Counsel

This draft incorporates the changes requested for the committee into the House-passed version of HB 106.

Please consider the relationship between the presumptions established in this bill.

Bill section 1 reworks AS 12.55.045(a) so that the statute now establishes a presumption [page 1, lines 14 - 16] that the defendant is able to pay restitution unless the defendant carries the burden of showing otherwise.

Bill section 3 adds language to AS 12.55.051(a) [page 2, lines 6-12] to the effect that, if the state presents evidence that the defendant has failed to pay restitution, the law permits the court to make the presumption that the defendant either has intentionally refused to pay or has not made a good faith effort to pay, unless the defendant presents "some" evidence to the contrary.

Assuming a defendant who is silent or who is unprepared to offer "some" evidence, the pair of presumptions may operate together so that the state

(1) need not prove the ability of a defendant to pay restitution; and

(2) in a "show cause" proceeding, has the benefit of the presumption that may permit the court to imprison that defendant until the court ordered restitution is satisfied.

I just want to make sure that the committee understands that there are two presumptions made in this proposed committee substitute and how those two may "fit."

Enclosure

JBC:gc
WKG2:116

5-0378T

Chenoweth
4/14/88

Original sponsors: Davidson, Brown, Goll, et al.

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE

2 SENATE CS FOR CS FOR HOUSE BILL NO. 106 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the payment of criminal fines and
7 restitution."

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

9 * Section 1. AS 12.55.045(a) is repealed and reenacted to read:

10 (a) The court may order a defendant convicted of an offense to
11 make restitution as provided in this section, including restitution to
12 the victim, to a public, private, or private nonprofit organization
13 that has provided counseling, medical, or shelter services to the
14 victim, or as otherwise authorized by law. A defendant is presumed to
15 have the ability to pay restitution unless the defendant establishes
16 the inability to pay by a preponderance of the evidence. In determin-
17 ing the amount and method of payment of restitution, the court shall
18 take into account the

19 (1) public policy that favors requiring criminals to com-
20 pensate their victims;

21 (2) financial burden placed on the victim as a result of
22 the criminal conduct of the defendant; and

23 (3) financial resources of the defendant and the nature of
24 the burden its payment will impose.

25 * Sec. 2. AS 12.55.045(d) is amended to read:

26 (d) In <u>any case, including</u> a case in which the defendant is
27 convicted of a violation of AS 11.46.120 - 11.46.150 and [IN WHICH]
28 the property is commercial fishing gear as defined in AS 16.43.990,
29 the court shall consider the victim's <u>loss</u> [NEED FOR,] and may order

1 [,] restitution that may include compensation for loss of income.
2 * Sec. 3. AS 12.55.051(a) is amended to read:
3 (a) If the defendant defaults in the payment of a fine or any
4 installment or of restitution or any installment, the court may order
5 the defendant to show cause why the defendant should not be sentenced
6 to imprisonment for nonpayment. <u>If the state presents evidence of the</u>
7 <u>defendant's failure to pay restitution, the court may presume that the</u>
8 <u>defendant has intentionally refused to pay the fine or restitution or</u>
9 <u>has not made a good faith effort to pay the fine or restitution unless</u>
10 <u>the defendant presents some evidence that the defendant's failure to</u>
11 <u>pay the fine or restitution was not intentional or that the defendant</u>
12 <u>has made a good faith effort to pay the fine or restitution.</u> If the
13 court finds by a preponderance of the evidence that the default was
14 attributable to an intentional refusal or failure to [illegible] good faith
15 effort to pay the fine or restitution, the court may order the de-
16 fendant imprisoned until the order of the court is satisfied. A term
17 of imprisonment imposed under this section may not exceed one day for
18 each $50 of the unpaid portion of the fine or restitution or one year,
19 whichever is shorter. <u>The state may enforce payment of a fine and the</u>
20 <u>restitution recipient may enforce payment of a restitution order</u>
21 <u>against a defendant under AS 09.35 as if the order were a civil judg-</u>
22 <u>ment enforceable by execution.</u> Credit shall be given toward satisfac-
23 tion of the order of the court for every day a person is incarcerated
24 for nonpayment of a fine or restitution.
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RE: HB·106

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Daniel JOHANSEN, Appellant,

v.

STATE of Alaska, Appellee.

No. 1309.

Supreme Court of Alaska.

Nov. 30, 1971.

Contempt proceeding against father for nonpayment of child support. The Superior Court, Third Judicial District, Anchorage, Harold J. Butcher, J., entered a contempt order, and father appealed. The Supreme Court, Dimond, J., held that defendant, in contempt proceeding for nonpayment of child support, was entitled to a jury trial. The Court further held that in contempt proceedings for nonpayment of child support, determination whether defendant has ability to comply with child support order should be made without all criminal safeguards—with exception of jury trial—even though incarceration hangs on outcome, but certain guidelines must be followed because of relative positions of parties. The Court further held that defendant, who was born and raised in a fishing village, who had been trained for no other occupation but fishing, who was heavily in debt to a local cannery, who owed about $7,200 on his fishing vessel, who had made attempts to find other employment but was unsuccessful, and who was continuing his occupation as a fisherman while waiting for a good fishing season to make up his losses and make a profit, could not properly be required to change his place of residence and seek employment in an urban community as a condition of not being held in contempt for nonpayment of child support.

Reversed and remanded with directions.

1. Appeal and Error ⟹792

Where circumstances which might render appeal moot arose after briefs were filed, appellee's failure to raise issue would not preclude consideration of it by the Supreme Court.

2. Appeal and Error ⟹781(4)

Courts have power, as a matter of sound judicial policy, to dismiss moot appeals.

3. Appeal and Error ⟹792

Rule that courts have power, as a matter of sound judicial policy, to dismiss moot appeals should apply even when mootness issue is not raised by the appellee, if reason is because events causing appeal to be mooted occur after briefs were filed.

4. Divorce ⟹312

Although ex-husband, who was found in arrears in his child support obligations in amount of $4,876, who was found in civil contempt and sentenced to serve 60 days in jail, and whose sentence was deferred until October 1, with provision that sentence could be further deferred if a payment on child support obligation was made commensurate with ex-husband's income, was not imprisoned on October 1, or at any time thereafter as result of order, and thereafter ex-husband made a payment of $750 to court trustee, and court trustee took no further action in connection with the case, case was not moot.

5. Parent and Child ⟹3.3(9)

In appropriate circumstances the Supreme Court has discretion to entertain child support contempt cases so that important public questions may be decided without delay by the Supreme Court.

6. Jury ⟹13(21)

Defendant, in contempt proceeding for nonpayment of child support, was entitled to a jury trial. AS 09.50.010–09.50.060, 09.50.010(5), 09.50.030, 11.35.010, 12.80.-010.

7. Parent and Child ⟹3.3(9)

In contempt proceedings for nonpayment of child support, determination whether defendant has ability to comply with child support order should be made without all criminal safeguards—with exception of jury trial—even though incarcer-

ation hangs on outcome, but certain guidelines must be followed because of relative positions of parties. AS 09.50.010–09.50.060, 09.50.010(5), 09.50.030, 11.35.010, 12.80.010.

8. Jury 🔑13(21)
Parent and Child 🔑3.3(9)

In contempt proceeding for nonpayment of child support, it should be determined at outset whether alleged contemnor contests assertion that he has ability to comply with child support order; in event defendant makes no issue of his ability to comply, then the defendant can be imprisoned in order to compel compliance without intervention of a jury trial; on other hand, if defendant asserts that he lacks ability to comply with court's order of child support, then he is entitled to a jury trial on this issue.

9. Parent and Child 🔑3.3(9)

In a contempt proceeding for nonpayment of child support burden of proving noncompliance, by a preponderance of evidence, with child support order should be on plaintiff, who initiates the action. AS 09.55.210(5); Rules of Civil Procedure, rule 67(b).

10. Parent and Child 🔑3.3(9)

In contempt proceeding for nonpayment of child support, burden of proof on issue of defendant's ability to comply with child support order rests with defendant. AS 09.55.210(5); Rules of Civil Procedure, rule 67(b).

11. Parent and Child 🔑3.3(5)

Defendant, in contempt proceeding for nonpayment of child support, need only to show by a preponderance of evidence that he is unable to pay. AS 09.55.210(5); Rules of Civil Procedure, rule 67(b).

12. Contempt 🔑20

Disobedience of a lawful order of court connotes more than mere failure to comply with such order; the word "disobey" has connotation of willfully failing to comply, without some lawful or reasonable excuse for not complying; if such an excuse does exist and it is established, there can be no contempt of the authority of the court.

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

13. Parent and Child 🔑3.3(9)

Defendant, who was born and raised in a fishing village, who had been trained for no other occupation but fishing, who was heavily in debt to a local cannery, who owed about $7,200 on his fishing vessel, who had made attempts to find other employment but was unsuccessful, and who was continuing his occupation as a fisherman while waiting for a good fishing season to make up his losses and make a profit, could not properly be required to change his place of residence and seek employment in an urban community as a condition of not being held in contempt for nonpayment of child support.

14. Parent and Child 🔑3.3(9)

In contempt proceeding for nonpayment of child support by defendant, who was born and raised in a fishing village, who had been trained for no other occupation but fishing, who was heavily in debt to a local cannery, who owed about $7,200 on his fishing vessel, and who had made attempts to find other employment but was unsuccessful, there was a jury question as to existence of a lawful excuse for noncompliance with child support order.

15. Parent and Child 🔑3.3(9)

In a contempt proceeding for nonpayment of child support, the father will not be permitted to succeed on defense of having a legitimate reason or excuse for not complying with child support order where he has not made a reasonable effort to employ his earning capacity in directions other than one he has chosen as his chief means of livelihood.

16. Appeal and Error 🔑1043(8)

Error, if any, in denying change of venue, which defendant claimed had effect of keeping out certain testimony, would be viewed as harmless, where there was no controversy regarding facts in question, and further testimony would have been at best

cumulative. AS 22.10.030; Rules of Civil Procedure, rule 61.

17. Contempt ⟹56

Rule dealing with indirect contempts authorizes use of a bench warrant for contempts only if there is a reason to believe the defendant will not appear in response to a show cause order. Rules of Civil Procedure, rule 90(b).

Robert J. Doyle, John S. Hedland, Meredith A. Wagstaff, and Robert Kocsis, Alaska Legal Services, Anchorage, for appellant.

G. Kent Edwards, Atty. Gen., Juneau, Sanford M. Gibbs, Asst. Atty. Gen., Wayne A. Ross, Court Trustee, Anchorage, for appellee.

Before BONEY, C. J., and DIMOND, RABINOWITZ, CONNOR and ERWIN, JJ.

OPINION

DIMOND, Justice.

Appellant's wife divorced him in May 1966. The divorce decree required appellant to pay $100 a month for the support of his two children.

Between the date of the divorce and April 1970, appellant paid only $148 in child support. A bench warrant was issued by the superior court, and appellant was arrested and brought before the court to show cause why he should not be held in contempt of court for failure to pay child support as required by the divorce decree.

Following the hearing in May 1970, the superior court entered an order finding that appellant was in arrears in his child support obligation in the amount of $4,876. The court further found appellant in "civil contempt" and sentenced him to serve 60 day in jail. Commencement of the sentence was deferred until October 1, 1970. The court also provided that the sentence "may be further deferred if a payment on child support obligation herein is made by Daniel Johansen commensurate with his income or if, at that time, it can be shown that Daniel Johansen has no money to pay child support through no fault of his own."

From this contempt order an appeal has been taken. Appellant argues (1) that the contempt proceeding, although denominated as civil in nature, was in reality criminal, and that he was denied the constitutional safeguards guaranteed to him by the Alaska Constitution in criminal proceedings; (2) that there was no evidence before the superior court upon which to base a finding of contempt; and (3) that the court's denial of appellant's motion for a change of venue from Anchorage to Dillingham was an abuse of discretion. The case raises two additional points which we shall pass upon. They concern the possibility that this appeal has been rendered moot by events occurring after the entry of judgment in the superior court and the procedure to be utilized by a court to bring a similarly situated defendant before it.

Mootness

[1-3] The circumstances which might be thought to render this case moot arose after the briefs were filed. Hence, appellee's failure to raise the issue will not preclude our consideration of it. Courts have the power, as a matter of sound judicial policy, to dismiss moot appeals. *See, e. g.*, Moore v. Smith, 160 Kan. 167, 160 P.2d 675 (1945). This rule should apply even when the mootness issue is not raised by the appellee, if the reason is because the events causing the appeal to be mooted occur after the briefs were filed.

The appellant was not imprisoned on October 1, 1970, or at any time thereafter as a result of the order quoted above. Further, on October 6, 1970, the appellant made a payment of $750 to the court trustee. The court trustee has taken no further action in connection with this case. Under these circumstances, it may be thought that the appellant has satisfied the decree and the case is moot.

[4, 5] We decline to reach this result for two reasons. First, a careful reading

of the lower court's order indicates that the events described above have not necessarily relieved the defendant of the threat of incarceration based on the order itself. The key clause says only that "commencement of said sentence *may* be further deferred if a payment on child support obligation herein is made by Daniel Johansen commensurate with his income." (emphasis added.) That appellant's sentence apparently has been deferred to this date does not necessarily mean that at some future time the appellant might not be incarcerated on the basis of this order alone. Second, this case presents an issue which is "capable of repetition yet evading review"; that is, an issue which falls within the public interests exception to the mootness doctrine. In re G.M.B., 483 P.2d 1006, 1008 (Alaska 1971); quoting Southern Pacific Terminal Company v. I. C. C., 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911). *See also* Deaconess Hospital v. Washington State Highway Commission, 66 Wash.2d 378, 403 P.2d 54, 67–68 (1965). The imposition of conditional jail sentence in child support contempt cases is a question of broad public interest because of the great number and the importance of such cases, and it is likely to recur. In these circumstances we have discretion to entertain such cases so that important public questions may be decided without delay by this court.

Procedural Safeguards in Contempt Proceedings in Nonsupport Cases.

Appellant argued at trial that the proceedings contained criminal elements and that he was entitled to various criminal procedural safeguards. The court ruled that the proceedings were for civil contempt and therefore the criminal rules were inapplicable. The issue presented—whether a contempt hearing to compel compliance with the child support order is a civil or criminal proceeding—is one of first impression in this state.

[6] Recourse to statutory law is helpful but not dispositive of the issue.[1] However, the statutes do furnish some guidance. AS 09.50.010 speaks of the acts or omissions which constitute contempt. Subdivision (5) of that section, with which we are concerned here, provides that it is a contempt of the authority of the court to disobey a lawful judgment, order, or process of the court. AS 09.50.030 further provides:

> A person who is charged with contempt of court not committed in the presence of the court, where the act or thing so charged as a contempt is of such nature as to constitute also a criminal offense under a statute of the United States or a law of this state, has a right to jury trial.

AS 11.35.010 makes wilful failure without lawful excuse to support a child a crime.[2] Thus, it is clear that, for purposes of the right to a jury trial, our statutes classify indirect contempts for nonsupport, such as that alleged in the case at bar, as a crime and a jury trial is available. Appellant was not afforded the right to jury trial in the case at bar. On this basis alone, the superior court's order of contempt must be reversed.

Our conclusion concerning appellant's right to a jury trial, however, does not dispose of this appeal, for here appellant seeks the full panoply of criminal procedural protections, and we must decide whether he and others in his position should receive them. Our statutes speak no further on this subject. It is necessary, therefore, to consider in some detail the contours of contempt doctrine to determine the proper

1. Even the location of the contempt laws in the state statutes permits ambiguous inferences. The contempt provisions are found in AS 09.50.010–09.50.060, part of the Code of Civil Procedure, but these sections are specifically made applicable to "criminal actions" by AS 12.80.010, part of the Code of Criminal Procedure.

2. Although AS 11.35.010 does not specifically concern the duty to support minor children after divorce, we find that AS 11.35.010 includes a person's post-divorce obligation to support as well as the obligation which exists during marriage.

scope of courts' powers and defendants' rights in contempt proceedings for nonsupport.

As we noted recently in State v. Browder,[3] contempt was originally regarded as a crime, punishable by criminal sanctions. Whether this was because "[t]he original law of contempt embraced only what is now known of as criminal contempt,"[4] or because every contempt inevitably contains an element of disrespect for the authority of government (one of the hallmarks of criminal contempt) is not clear. It is certain, however, that "the genesis of modern day contempt was a crime."[5]

The common law soon began to categorize contempts, and one of the earliest distinctions was between criminal and civil contempt.[6] The exact development of the distinction is not clear, although it has been traced at least[7] as far back as the 18th century.[8] Significantly, the earliest explications of civil contempt evidence little agreement as to exactly what distinguished it from criminal contempt.[9]

> Halsbury reported that older English law distinguished criminal contempts by their procedural implementation as much as by any innate substantive differences which might have existed between them and other offenses.[10]

Nonetheless, that there is a distinction between civil and criminal contempt appears to have become firmly established, both in England and in this country,[11] by the late 19th century.[12] It now remains to explore what that distinction is, and whether it is based on sound reasoning.

The leading case is Gompers v. Buck's Stove & Range Company,[13] where the United States Supreme Court held:

> It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.[14]

These polar concepts—"remedial" (or "coercive") v. "punitive"—seem clear enough, and, indeed, this distinction has been "widely accepted."[15] Yet even *Gompers* noted that the distinction was far from absolute:

> Contempts are neither wholly civil nor altogether criminal. . . . It is true

3. 486 P.2d 925 (Alaska 1971).

4. *Id.* at 933, quoting R. Goldfarb, The Contempt Power 11–12 (1963).

5. 486 P.2d at 933.

6. R. Goldfarb, The Contempt Power 49 (1963); Wright, Byrne, Haukh, Westbrook and Wheat, Civil and Criminal Contempt in the Federal Courts, 17 F.R.D. 167 (1955).

7. Beale, Contempt of Court, Criminal and Civil, 21 Harv.L.Rev. 161, 169 (1908), indicates that civil contempt was utilized as early as the time of Richard III. *See also* Comment, The Coercive Function of Civil Contempt, 33 U.Chi.L.Rev. 120, 120–21 & n. 3 (1965).

8. Comment, Civil and Criminal Contempt in the Federal Courts, 57 Yale L.J. 83, 90 & n. 40 (1947).

9. In attempting to enforce his decrees, the chancellor could commit a recalcitrant party "to prison till he obey." 27 Henry VIII 15. "This imprisonment was by no means a punishment, but was merely to secure obedience to the writ of the king." Beale, note 7 *supra*, at 170. This is now referred to as the "classic example" of civil contempt: imprisonment for purposes of coercion, not punishment. *See* Comment, note 7 *supra*, at 120–22.

10. Goldfarb, note 6 *supra*, at 49. *See* 7 Halsbury's Laws of England (Contempt of Court) (2d ed.).

11. Beale, note 7, *supra*, at 168–69. The federal courts in this country were somewhat slower to accept it than the state courts. Comment, note 8 *supra*, at n. 49.

12. Beale, note 7 *supra*, at 168–69.

13. 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911).

14. *Id.* at 441, 31 S.Ct. at 498, 55 L.Ed. at 806.

15. Moscovitz, Contempt of Injunctions, Civil and Criminal, 43 Colum.L.Rev. 780, 786 (1943), citing cases from 31 jurisdictions.

that punishment by imprisonment may be remedial as well as punitive . . .

. . . .

It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindiction of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent repetition of the disobedience.[16]

Despite this weakness, the main test remains that suggested by the *Gompers* case: The character and purpose of the punishment serve to distinguish civil from criminal contempt. This remedial-punitive distinction is not perfectly sharp. We must now decide whether, whatever its faults, the remedial-punitive distinction is sharp enough to justify complete procedural cleavage between civil and criminal contempt.

Elements of punitive as well as remedial punishment are almost invariably present in every civil contempt.[17] If coercive imprisonment is imposed in order to effectuate compliance with a court order and thus aid a private litigant (remedial punishment), it nonetheless also has the effect of deterring contemptuous conduct in the future[18] and of punishing the contemnor for his act of noncompliance[19]—both of which are clearly attributes of criminal sanctions. This overlapping is tolerable if in civil contempt cases the court provides that imprisonment is conditional upon the defendant's continued refusal to comply with the court's order. This step, which insures that the defendant indeed does "carry the keys of [his] prison in [his] own pockets,"[20] assuming he has the ability to comply,[21] would be sufficient to establish the coercive aspect of the imprisonment as its dominant one. Theoretically, once confronted with the reality and imminence of a stay in jail as a result of his noncompliance, the contemnor could immediately purge himself and avoid incarceration completely. If he did this, punishment would not be present at all, and deterrence would not be nearly as significant as the coercive (hence remedial) aspects of the proceedings. Under these circumstances, the characterization of the action as civil is not doctrinally objectionable, and the civil-criminal distinction is reasonably clear.[22]

16. 221 U.S. at 441 and 443, 31 S.Ct. at 498, 55 L.Ed. at 806. An earlier commentator saw the blurred line between civil and criminal incarceration perhaps more clearly:

> I venture to say that every 'civil' contempt whose contumacy is carried to the point at which the contemnor may be committed is a 'criminal' contempt as well. . . .

Nelles, The Summary Power to Punish for Contempt, 31 Colum.L.Rev 956, 961 (1931).

17. *See* Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 443, 31 S.Ct. 492, 55 L.Ed. 797, 806 (1911); Comment, note 7 *supra*, at 124.

18. *Cf.* Comment, note 7 *supra*, at 124.

19. [T]he possibility that coercive relief may become actual punishment is necessarily present in every civil contempt proceeding.

Comment, note 8 *supra*, at 105. *See also* Goldfarb, note 6 *supra*, at 61.

20. In re Nevitt, 117 F. 448, 461 (8th Cir. 1902). For a scathing criticism of this "rationalization [which] has since become a staple in the rhetoric of contempt," see Goldfarb, note 6 *supra*, at 58–61.

21. *See* text accompanying notes 25–26 *infra*.

22. There are two disadvantages to the character-of-the punishment test which affect primarily the trial courts and to which we call attention here. The first is that punishment is not determined until the end of the proceeding, whereas the need for classification exists from the beginning. Trial courts may overcome this in most instances by announcing at the outset the goal of the contempt action, specifying whether the action is designed primarily to vindicate the court's authority or to coerce compliance with one of its orders for the benefit of a third party. The second is that the alleged contemnor, at the time of his wrongful act, has no

There is a more serious problem inherent in the civil contempt doctrine. Although imprisonment—indeed, potentially unlimited incarceration[23]—is at stake, the civil contempt defendant is afforded no more procedural protection than the ordinary civil litigant. This is because of the belief that civil contemnors do not need criminal procedural safeguards since they are not placed under the criminal sanction of a fixed sentence; that is, they "carry the keys of their prison in their own pockets."[24] However, this may not be true:

> Both compliance and inability to comply are complete defenses to coercive imprisonment proceedings. The contemnor may have already complied or be incapable of doing so, *yet the determination of these facts is made without criminal safeguards even though imprisonment hinges on the outcome of that determination.*[25]

A better rationale for denying procedural safeguards rests on the position of the plaintiff. In criminal contempt, where the government initiates the action, the granting of procedural safeguards does not conflict with the rights of any individual. "But granting additional safeguards to the defendant in a civil contempt proceeding is directly opposed to the interests of the complainant to whom the defendant owes a duty by reason of a prior judicial decree."[26] If this is so, where should the balance be struck?

The competing interests are strong in the instant case. Defendant, faced with incarceration, has an interest in receiving those procedural protections which insure that he has been accorded a fair trial. Defendant's children have an interest in receiving support for the sustenance of life. Defendant's former wife, now charged with the responsibility of raising the children, needs contributions from the children's father in order to meet her responsibility. Further, the interests of both children and wife are heightened in that they seek enforcement of a prior judicial decree. The state has an interest in the welfare of the children as the ultimate source of their support in the event that their parents fail them.

In these circumstances we find it appropriate to delineate the rights of the parties in such a way that all legitimate interests will be protected as fully as possible, departing from traditional contempt doctrine in those areas where we have found it to be deficient or where strict adherence to it would not lead to the soundest

way of knowing whether he has committed a civil or criminal contempt or what his sanction will be. Goldfarb, note 7 *supra*, at 66. We deem this disadvantage outweighed by the benefits of an otherwise workable classificatory scheme and mitigated, for purposes of due process notice requirements, by the trial court's announcement, at the beginning of the proceedings, of the purpose of any punishment imposed.

23. *See* Uphaus v. Wyman, 364 U.S. 388, 397–400, 81 S.Ct. 153, 5 L.Ed.2d 148, 154–156 (1960) (Black, J., dissenting); Goldfarb, note 6 *supra*, at 61. The duration of civil incarceration (e. g., to compel testimony "on occasion has lasted much longer than punishment in more grievious criminal contempt cases." *Id.* Justice Black, in *Uphaus*, *supra*, cites one example, "of many" where a civil contempt defendant in England died in prison after a period of years, having been jailed for refusing to testify.

AS 09.50.050 is potentially open-ended. It provides:

> When the contempt consists of the omission or refusal to perform an act which is yet in the power of the defendant to perform, he may be imprisoned *until he has performed it.* (emphasis added.)

24. In re Nevitt, 117 F. 448, 461 (8th Cir. 1902). *See also* Uphaus v. Wyman, 364 U.S. 388, 403–404, 81 S.Ct. 153, 5 L.Ed. 2d 148, 157 (1960) (Douglas, J., dissenting on other grounds).

25. Comment, note 7 *supra*, at 125 (footnote omitted) (emphasis added). *See also* Comment, note 8 *supra*, at 105:

> Unless his refusal to obey an order of the court is based upon sheer stubborness in which event the metaphor is probably appropriate, he may not actually *possess* the 'keys to his prison.'

26. Comment, note 7 *supra*, at 125.

rule of law in terms of all the parties' interests.

[7, 8] The purpose of contempt proceedings for nonpayment of child support decrees is to coerce the defendant to pay money. It is not to punish him for his past failure to pay.[27] What we are dealing with here is the question of imprisonment to compel performance of an act. In this regard AS 09.50.050 states:

> When the contempt consists of the omission or refusal to perform an act which is yet in the power of the defendant to perform, he may be imprisoned until he has performed it.

Thus, it is necessary to determine whether defendant has the resources with which to satisfy the court order, that is, whether he has the ability to comply with an order of support. Should this determination be made without all criminal safeguards—with the exception of jury trial—even though incarceration hangs on the outcome? We believe that it should, subject to the following guidelines, because of the relative positions of the parties. At the outset, it should be determined by the trial judge whether the alleged contemnor contests the assertion that he has the ability to comply with the court's order of child support. In the event the defendant makes no issue of his ability to comply, then the defendant can be imprisoned in order to compel compliance without the intervention of a jury trial. On the other hand, if the defendant asserts that he lacks the ability to comply with the court's order of child support, then he is entitled to a jury trial on this issue.

[9, 10] At the contempt trial, the burden of proving noncompliance, by a preponderance of the evidence, with the court's order should be on the plaintiff, who initiates the action. Since all payments in child support cases in Alaska are made through the office of the court trustee, pursuant to AS 09.55.210(5) and Civil Rule 67(b), proof of noncompliance should be a simple matter. In almost all child support contempt cases, the crucial issue will concern the defendant's *ability to comply*. This was the situation in the instant case. The burden of proof in this respect should remain with the defendant.[28] This is where it presently rests, in this state[29] and in other jurisdictions;[30] such allocation of the burden of proof is appropriate. Defendant is already under a court order to pay a certain amount of money; presumably the prior adjudication was based on evidence that the amount fixed was fair and in proportion to defendant's ability to pay.[31] Further, putting the burden on the plaintiff (of proving defendant's ability to pay) seems unfair. Defendant, as a father, is under a general duty to support his children. AS 11.35.010. He is further under a specific obligation to pay a certain sum by virtue of the court order. By the time these cases reach trial stage, the father usually has failed to fulfill these obligations for a considerable period of time. He should be required to present the rea-

27. Of course, the prosecuting authority can always seek conviction for violation of AS 11.35.010, or initiate proceedings for criminal contempt under AS 09.50.010(5) for past wilful flouting of the court's authority, but either of these occurrences would initiate a criminal proceeding in which defendant would have to be afforded full criminal procedural safeguards. This distinction should be made clear at the outset of the contempt nonsupport proceedings.

28. That is, defendant must prove his inability to comply with the court order. Put in procedural terms, inability to comply is an affirmative defense.

29. *E. g.*, Houger v. Houger, 449 P.2d 766, 770 (Alaska 1969).

30. *E. g.*, Bailey v. Bailey, 77 S.D. 546, 95 N.W.2d 533 (1959); Roper v. Roper, 242 Ky. 658, 47 S.W.2d 517 (1932). 2 W. Nelson, Divorce and Annulment § 16.25a, at 440–41 (2d ed. 1961 rev.).

31. It is no answer that the prior adjudication was then or is now incorrect. Defendant has already had one day in court on this issue; that he did not contest the divorce or the amount of support requested cannot be charged against his children. Further, he can always seek modification of the support order. AS 09.55.220.

sons, if there are any, for his failure to meet his legal obligation to support his children. Further, the particular facts regarding his inability to pay will be known to him, whereas his former wife and his children generally will know little of his financial situation or earning capacity.[32]

[11] The shifting of the burden of proof entails a partial change of the ordinary standard employed in criminal cases. But this is still advantageous to both parties. The defendant's protection increases as the burden of proof is shifted. He needs only to show by a preponderance of the evidence that he is unable to pay. Once he has met this burden, incarceration, as a coercive method, serves no useful purpose. At the same time the interest of the complainants in receiving money which defendant is able to pay, is protected under this approach.

It is now evident that traditional contempt doctrine cannot satisfactorily answer whether child support contempt hearings are "criminal" or "civil" in nature. We have, instead, looked to a balancing of the parties' interests to determine what procedure should be followed in such cases. We have drawn from both sides of the law. We have found a jury trial not only mandated by our statutes but warranted as a procedural protection to the defendant facing incarceration. On the other hand, we have left inability to comply as an affirmative defense, thereby keeping the burden of proof on the central issue on defendant. Doubtless, further procedural questions will arise in future cases. We shall continue to weigh the interests as we have done here. All we do today is attempt to delineate the procedural aspects of contempt proceedings in nonsupport cases where the purpose is to coerce the defendant's performance of his obligation.

Sufficiency of the Evidence

AS 09.50.010(5) provides that it is a contempt of the authority of the court to disobey a lawful judgment, order, or process of the court. Under this statute, the purpose of the contempt proceeding in this case and a resulting sentence of imprisonment was either to coerce the appellant into paying support money for his children or to punish him for his past failure to pay, or both. The question is whether the evidence was sufficient to justify finding appellant in contempt and sentencing him to a term of imprisonment.

[12] Disobedience of a lawful order of the court connotes more than the mere failure to comply with such order. The word "disobey" has the connotation of wilfully failing to comply, without some lawful or reasonable excuse for not complying.[33] If such an excuse does exist and it is established, there can be no contempt of the authority of the court.

Appellant is an Alaskan Native born in the Native village of Ekuk and raised in the nearby Native fishing village of Dillingham. In appellant's brief, it is stated that he is uneducated. Appellant's experience is sharply limited. His whole life, with the exception of four years in the military, has been spent in the village. His only occupation has been fishing, except for some very limited experience as a waiter in Dillingham working a few nights a month as work was available. He has been trained for no other occupation but fishing.

32. Although the United States Supreme Court has held that the "comparative convenience" test is insufficient by itself to justify shifting the burden of proof in criminal cases, Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943), leaving inability to comply as an affirmative defense is justified by our finding that child support contempt is not wholly a criminal proceeding and by the strong policy reasons discussed above in the text.

33. This is not unlike the situation in a criminal case where we have held that conduct cannot be criminal unless it is shown that the one charged with criminal conduct had criminal intent, that is, an awareness or consciousness of some wrongdoing. Speidel v. State, 460 P.2d 77, 78, 80 (Alaska 1969).

Appellant's last good fishing season, when he cleared $3,200, was in 1965, before his divorce. Since that time he has cleared no more than $700 in any year because of poor fishing conditions. Appellant has been and is heavily in debt to a local cannery in Dillingham. In addition to other sums owed the cannery, appellant owes about $7,200 on his fishing vessel.

Appellant has made attempts to find other employment. But he was unsuccessful, principally, it appears, because prospective employers would not hire fishermen. Appellant testified that he could not quit fishing because he owes so much money to the cannery. He did not know of any way of making more money than as operator of a fishing vessel. In the 1969 fishing season, the year prior to the hearing on this matter, appellant testified that he had gone "in the red." In that year he went deeper in debt to the cannery. Appellant testified that he might have gotten a full time job with Wien Consolidated Airlines in Dillingham if he had given up fishing as his occupation, but that he could not be certain of this. From his testimony, it appears that appellant was continuing his occupation as a fisherman while waiting for a good fishing season to make up his losses and make a profit.

At the conclusion of the hearing, the judge stated that he could not contemplate issuing a judgment which would in effect order the appellant to go somewhere else to live and work at another job. But then the judge reversed his position by stating that appellant had remained in a depressed area year after year hoping for the big strike that had never come, that he ought not to stay in Dillingham, and that he was in contempt of court. The question here is whether one may be required to change his place of residence as a condition of not being held in contempt in a case of this type.

[13] In these circumstances, we cannot agree with the trial judge's suggestion that appellant leave his home in Dillingham and seek employment in an urban community, such as the city of Anchorage. There is no indication from the record that such a move would hold a promise of success within appellant's inherent but unexercised capabilities. Rather, it seems that it would be a gamble, based on little more than hope, that an untrained person could earn more in an urban environment doing an undetermined job than he could in his home locality at his life-long occupation.

We need not close our eyes to the serious problem of unemployment in the city of Anchorage which is more serious for the unskilled. Further, our recent decision in Alvarado v. State, 486 P.2d 891 (Alaska 1971), discusses in detail the wide ranges of difference between life in rural Alaska and life in the city. We found them to be "vastly dissimilar," noting an "order of differences which distinguishes one culture from another." [34]

We hesitate now to adopt a rule allowing a superior court to force a man to move from one community to another, in the process renouncing his life-long occupation to seek an undetermined one, on the penalty of being found in contempt for failure to do so. In short, leaving Dillingham to seek employment elsewhere would be outside the reasonable effort we require of a father in such cases.

We are remanding this case for a trial before a jury. We recognize it is within the function of the jury to make a factual determination as to whether appellant has presented a sufficient excuse for not complying with the order of child support. But we are determining as a matter of law, rather than leaving the question to the jury, that in the circumstances of this case, it is not contempt for a father to refuse to leave his village and seek more promising work in the city.

[14, 15] On the other hand, we hold there is a jury question as to the existence of a lawful excuse for non-compliance with

34. 486 P.2d 891, 900 (Alaska 1971).

the child support order while the appellant resides in Dillingham. In Houger v. Houger[35] we spoke of a father's primary and continuing obligation to support his children and of the fact that the inability of a father to engage in his chosen trade may not excuse him from that obligation. We said:

> But there may be other kinds of work which appellee could engage in despite any disability he may have. He should be required to seek such other work with respect to his obligation to support his children even though such work may not appeal to him, because there is no room for professional or occupational pride where the duty of child support is involved.[36]

We adhere to *Houger* and hold that in a contempt action such as we have here, the father will not be permitted to succeed on the defense of having a legitimate reason or excuse for not complying with an order of child support where he has not made a reasonable effort to employ his earning capacity in directions other than the one he has chosen as his chief means of livelihood.[37]

In this situation a jury question is involved. Considering the evidence of appellant's life-long vocation of being a fisherman, his indebtedness to the local cannery, the existence of other type of employment in Dillingham, and his attempts to seek other such employment, we find there can be a difference of opinion among reasonable men[38] as to whether appellant did establish by preponderance of the evidence a legitimate and reasonable excuse for failure to comply with the order of child support.

Change of Venue

Appellant's final point on appeal is that the superior court erred in refusing to grant a motion for a change of venue from Anchorage to Dillingham.[39] We need not reach the merits of this argument. Even assuming, *arguendo*, that error was committed, it could have been no more than harmless error. *See* Love v. State, 457 P.2d 622, 631 (Alaska 1969).

Appellant sought a change of venue to Dillingham for purposes of calling witnesses who could testify to "the employment potential, the fishing season, and the conduct and good faith of the defendant." Appellant's defense to the contempt charge was that he had no money with which to make support payments, that he had worked hard to earn money, and that conditions in Dillingham were such that he could earn very little money. Appellant sought the change of venue to Dillingham so that he could introduce witnesses to testify to these facts.

[16] There was, however, no controversy regarding these facts. The court accepted them fully as to appellant's financial condition, as to his good faith attempts to earn money, and as to the adverse economic conditions in Dillingham. In short, the trial judge appears to have been fully convinced by appellant's testimony on these matters. Further testimony would have been at best cumulative. In these circumstances an incorrect ruling that such testi-

35. 449 P.2d 766, 770 (Alaska 1969).

36. *Id.*

37. *See* Hopp v. Hopp, 279 Minn. 170, 156 N.W.2d 212, 217–218 (1968); 2 W. Nelson, Divorce and Annulment § 16.25, at 436–37 (2d ed. 1961 rev.).

38. Taylor v. Interior Enterprises, 471 P.2d 405, 407 (Alaska 1970).

39. The motion was made pursuant to AS 22.10.040, which provides:

> Change of venue. The superior court in which the action is pending may change the place of trial in an action from one place to another place in the same judicial district or to a designated place in another judicial district for any of the following reasons:
>
> . . . . .
>
> (2) when the convenience of witnesses and the ends of justice would be promoted by the change;
>
> . . . . .

mony is inadmissible will be found to be harmless error under Alaska Civil Rule 61. *See* Palfy v. Hepp, 448 P.2d 310, 311 (Alaska 1968); Mallonee v. Finch, 413 P.2d 159, 164 (Alaska 1966). The court's denial of change of venue, which appellant claims had the effect of keeping out certain testimony, is exactly analogous here to a ruling on admissibility of testimony at trial. It should be treated in the same way. Thus, even if error was committed, it must be viewed as harmless.

We note under this issue, however, the recent enactment of SLA 1971, Chapter 126 (effective September 2, 1971), which relaxes Alaska's venue statutes and is bottomed on an "intent . . . to make the administration of justice more accessible to people of the rural areas of the state." [40]

Id., section 3. It can be expected that courts hearing nonsupport contempt cases in the future may choose in some cases to make use of the discretionary authority vested in them by the new law and will grant changes of venue, and thereby obviate claims of error such as the present one.

Use of Bench Warrant

The present action was initiated by the court trustee who, after notifying Johansen of his noncompliance, obtained simultaneously a show cause order and a bench warrant for appellant's arrest. While such methods may have been appropriate at the time the court trustee acted, we note that recent amendments to the Criminal Rules would preclude the use of bench warrant and arrest as a means of bringing child support contempt defendants into court, absent a showing that they have refused to appear and answer.

[17] Civil Rule 90(b), which deals with indirect contempts, provides that upon a proper showing by ex parte motion supported by affidavits, "the court shall *either* order the accused party to show cause at some reasonable time . . . why he should not be punished for the alleged contempt, *or* shall issue a bench warrant for the arrest of such party." (emphasis added.) In determining which of these approaches should be used, Criminal Rule 4 [41] is helpful. Subdivision (1) of Criminal Rule 4(a) now provides in part:

> (a) . . . a warrant for the arrest of the defendant shall issue . . . if the person taking the complaint has reason to believe that the defendant will not appear in response to a summons.

And Rule 4(a) (2) specifies that

> (a) summons instead of a warrant should issue if the person taking the complaint has reason to believe that the defendant will appear in response thereto . . . .

This specific criminal rule controls the court's authority under Civil Rule 90(b) to use either a show cause order or a bench warrant, and, moreover, makes it clear that Civil Rule 90(b) authorizes the use of a bench warrant for contempt only if there is a reason to believe that the defendant will not appear in response to the show cause order.

The judgment of contempt is reversed and the case is remanded to the superior court for further proceedings not inconsistent with this opinion.

40. SLA 1971, ch. 126, § 1 provides in relevant part:

> [A] trial and any precedent or antecedent hearings in an action shall be conducted in an election district within the judicial district at a location which would best serve the convenience of the parties and witnesses.

41. The criminal rules are applicable here for a number of reasons. A criminal sanction, incarceration, is a possible outcome of these proceedings. A criminal procedural device, arrest, is being used. *See generally* discussion at 706–707 *supra*.

STATE OF ALASKA
HOUSE OF REPRESENTATIVES
Box V, Juneau, Alaska 99811
(907) 465-2487 • 465-2498

REPRESENTATIVE CLIFF DAVIDSON   District 27   Box 746, Kodiak, Alaska 99615

M E M O R A N D U M

TO: Senator Kertulla, Chairman
Senate Judiciary Committee

FROM: Representative Cliff Davidson

DATE: April 12, 1988

SUBJECT: House Bill 106

I have introduced House Bill 106 because I feel violence has reached a disturbing and unacceptable level in our society. People injured by violence are often affected for the rest of their lives. They need shelter care, counselling, and medical attention. These are costs the victim should not have to pay.

The focus of this bill is restitution. Quite simply, restitution is compensating any loss, damage or injury one person inflicts on another. In a court of law, a convicted criminal must pay restitution to the victim of the crime. CSHB106(FIN)AM, the bill before you, tries to ensure and enforce this concept in the following ways:

1) When a defendant is convicted and the court is deciding sentence restitution, it is the responsibility of the defendant to prove by a preponderance of evidence his inability to pay restitution.

2) If the defendant defaults on this restitution payment, he is then responsible for proving, by a preponderance of evidence, that it was in good faith and unintentional.

3) This bill makes the loss of income suffered by the victim part of restitution.

4) CSHB106(FIN)AM allows organizations that help victims recover also eligible to receive the restitution.

I urge your consideration and passage of this legislation to help victims of criminal acts. CSHB106(FIN)AM sends a message that crime does not pay, but that criminals will pay the costs for their victims.

Thank you.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION : CSHB106(FIN)am
PUBLISH DATE : ________

FISCAL NOTE

REQUEST: ________

Revision Date: ________
Title : An Act relating to the payment of criminal fines & restitution
Sponsor : Davidson, Brown, Goll, et.al
Requestor : Senate Judiciary

Agency Affected : Public Safety
BRU : Council on Domestic Violence and Sexual Assault
Components : ________

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

KGS JAN 1/25/88

Prepared by : Barbara Miklos, Executive Director BJM
Phone : 465-4356
Division : Council on Domestic Violence & Sexual Assault
Date : 1/25/88
Approved by Commissioner : [signature], Dep. Commr.
Date : 1-28-88
Agency : Public Safety

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

page ____ of ____

JAN 22 1988

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CS HB 106
PUBLISH DATE: 3/18/87

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to the payment of criminal fines and restitution"
Sponsor: Representative Davidson
Requestor: House Rules

Agency Affected: Dept. of Administration
BRU: Public Defender Agency
Components: Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
GENERAL FUND		-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
FULL-TIME		-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Dana Fabe, Public Defender
Division: Public Defender Agency
Phone: 279-7541
Date: January 19, 1988

Approved by Commissioner: John Andrews
Agency: Department of Administration
Date: 1/21/88

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

POSITION PAPER

CS HB 106

The Alaska Public Defender Agency and the Office of Public Advocacy are totally reactive agencies which provide representation to indigent persons when appointed by the court. These agencies do not make policy nor do they initiate litigation. Only proposed legislation with fiscal or program ramifications for these agencies can be said to have a direct agency impact. Thus, the Public Defender Agency and Office of Public Advocacy submit position papers for legislation which will affect these agencies fiscally or programatically or will require these agencies to litigate constitutional issues raised by the legislation.

Fiscal impact: X None — See attached fiscal note ____

Program impact: ____ None — See analysis below X

Constitutional impact: ____ None — See analysis below X

This bill makes three major changes in the restitution scheme:

1. It changes the burden of proof at sentencing to require a defendant to prove that he or she does not have the ability to pay full restitution. Currently the prosecution must prove that the defendant does have the ability to pay.

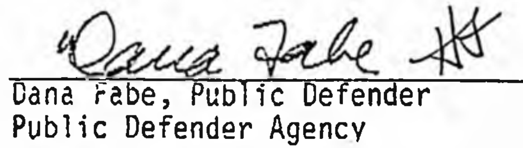
The Public Defender Agency agrees that requiring a defendant to establish his inability to pay restitution rather than requiring the prosecution to establish his ability to pay, makes good sense. The defendant will usually have better access to the types of records necessary to establish an inability to pay and the prosecution may often be groping in the dark to try to establish an ability to pay.

2. It shifts the burden to the defendant of proving that he or she did not intentionally refuse or fail to pay the fine.

Section 3 of the bill, which shifts the burden of proof of a probation violation from the prosecution to the defendant, is problematical. The prosecution normally has the burden to prove that a defendant has violated a condition of probation. This provision of the bill will require the defendant to prove that he did not violate his probation. The bill requires a defendant to establish by a preponderance of the evidence that he did not intentionally fail to pay his fine or restitution. This reversal of the burden of proof departs drastically from the requirement in all other probation violations that the prosecution must prove the defendant's violation. Since imposition of jail time may result, this situation differs from the one discussed above.

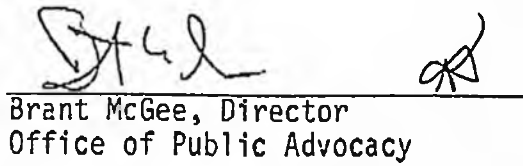
3. It streamlines enforcement and collection of a fine or restitution.

The section streamlining collection and enforcement of fines and restitution will help victims collect restitution without being required to relitigate the issue in civil court.



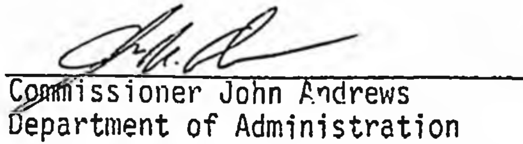
Dana Fabe, Public Defender
Public Defender Agency

1/20/88
Date



Brant McGee, Director
Office of Public Advocacy

1/20/88
Date



Commissioner John Andrews
Department of Administration

1/21/88
Date

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: SCS CSHB 106 (Jud)
PUBLISH DATE: ______

FISCAL NOTE

REQUEST:

Revision Date: ______
Title: An Act relating to the payment of criminal fines & restitution
Sponsor: Davidson, Brown, Goll, et.al
Requestor: Senate Judiciary

Agency Affected: Public Safety
BRU: Council on Domestic Violence and Sexual Assault
Components: ______

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						

REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

KGS JM 1/25

Prepared by: Barbara Miklos, Executive Director BJM
Division: Council on Domestic Violence & Sexual Assault
Phone: 465-4356
Date: 1/25/88

Approved by Commissioner: [signature], Dep. Comm.
Date: 1-28-88
Agency: Public Safety

update 4/22/88

Distribution (by preparer):
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- Impacted Agency(ies)

page ___ of ___

SENATE CS FOR CS FIN

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 106 (JUDICIARY)

PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to the payment of criminal fines and restitution."
Sponsor: Rep Davidson, Brown, Goll, et al
Requestor: House Judiciary

Agency Affected: Department of Corrections
BRU: Operations

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Susan E. Knighton

Prepared by: Susan E. Knighton, Director
Division: Administrative Services

Phone: 465-3376
Date: 4-22-88

Susan Humphrey-Barnett

Approved by Commissioner: Susan Humphrey-Barnett
Agency: Department of Corrections

Date: 4-22-88

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

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version: CSHB 106(Fin)
Publish Date: HOUSE 3/18/87

Revision Date:
Title: An Act relating to restitution

Agency Affected: Public Safety
BRU:

Sponsor: Davidson
Requestor: House Finance Committee

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

AA

Prepared by: Al Adams, Chair
Phone: 465-3706
Division: House Finance Committee
Date: 3/17/87

Approved by Commissioner:
Date:
Agency:

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

POSITION PAPER / DEPARTMENT OF PUBLIC SAFETY

BILL NO: CSHB 106 (Finance) am

DATE: March 31, 1987

TITLE: An Act relating to the payment of criminal fines and restitution

CONTACT: Barbara Miklos
Executive Director
Council on Domestic Violence and Sexual Assault

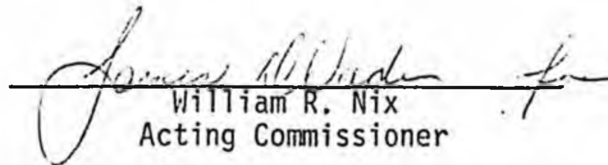
APR 7 1987

CSHB 106 (Finance) am, Section 1 (a), permits payment of restitution by a defendant convicted of an offense to a public, private or private nonprofit organization that has provided counseling, medical or shelter services to the victim, as well as to the victim.

Since many agencies that provide services to victims have inadequate funding, additional financial support is needed. It is difficult to determine if this provision will engender much money for domestic violence and sexual assault programs because its use may not be appropriate in most cases. Domestic violence and sexual assault programs cannot reveal clients' identities without the express permission of the victim and guarantee for the victim's safety. However, there may be instances where this could be accomplished and the perpetrator should be held accountable to the victim and pay for harm done to her as well as services received.

Section 2 clarifies AS 12.55.045(d) to enable the court to provide restitution for loss of income to a victim of any crime. The legislation originally specified theft of commercial fishing gear.

The Council on Domestic Violence and Sexual Assault supports these two provisions. The Council is not commenting on Section 3 due to lack of expertise in that area.



William R. Nix
Acting Commissioner

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : CS HB 106 (Finance) am
Publish Date :

REQUEST:

Revision Date:
Title : An Act relating to the payment of criminal fines and restitution
Sponsor : Davidson, Brown, Goll, et al.
Requestor : Senate Judiciary

Agency Affected : Public Safety
BRU : Council on Domestic Violence & Sexual Assault
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Section 1 may provide additional funding for domestic violence and sexual assault programs by permitting restitution to these programs from defendants convicted of an offense.

JNR 3/31/87

Prepared by : Barbara Miklos, Executive Director BM
Division : Council on Domestic Violence and Sexual Assault
Phone : 465-4356
Date : 3-31-87

Approved by Commissioner : [signature]
Agency : Department of Public Safety
Date : 4/2/87

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

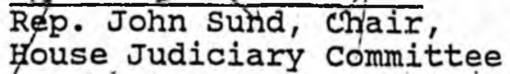
page ___ of ___

HB

121

LETTER OF INTENT
HOUSE JUDICIARY COMMITTEE
HOUSE BILL 121

By repealing AS 12.45.150, the Legislature does not intend to limit the present practice allowing the filing, by private parties, of motions for orders to show cause for criminal contempt of court.



Rep. John Sund, Chair,
House Judiciary Committee

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 10, 1987

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that repeals AS 12.45.150, an obsolete statute that provides for the payment of costs for "malicious prosecutions" brought by private persons. 1/ This provision has been the cause of some confusion regarding who has the authority to institute criminal charges. In recent months several persons in the Kenai area have attempted to file "criminal charges" against other persons, primarily police officers who have arrested them, citing AS 12.45.150 as their authority to do so.

Well-established principles of statutory construction require that the language of AS 12.45.150 be interpreted in conjunction with AS 44.23.020(b)(3), which places responsibility in the attorney general to "prosecute all cases involving violation of state law." 2/ Thus AS 12.45.150 does not provide authority for

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1/ The precursor of present AS 12.45.150 appears to first have been adopted in 1900; it was apparently based upon an 1882 statute from Oregon. See Ann. Alaska Codes, Pt. II, ch. 19, § 193-194 (Carter 1900). The provision was included in the first codification of Alaska's criminal laws after statehood. See § 6.16, ch. 34, SLA 1962. Except for minor technical amendments (for example, ch. 8, SLA 1971, a revisor's bill which made technical corrections relating to the court system, inserted the word "judge" in four places in the statute), the language of AS 12.45.150 has remained virtually unchanged since 1900.

2/ There are rare instances in solely private disputes where it might be appropriate for private litigants to "prosecute" cases of criminal contempt as a way of

(Footnote Continued)

the private prosecution of a criminal case (i.e., motions, pretrial hearings, trial, appeals, etc.). Instead, the statute refers only to a person who unilaterally, and without the advice or concurrence of the police or prosecutors, "voluntarily appears before a judge" to complain about a matter or before a grand jury to testify. At that point the attorney general, through a state prosecutor, has the statutory authority under AS 44.23.020 to review the matter and to handle the case as appropriate. 3/

The primary purpose of AS 12.45.150 was not to authorize the filing of criminal actions by private persons, but rather to make it clear that malicious accusations, or those lacking probable cause, will subject the complainant to immediate judgment "for the costs of disbursements of the action." However, the statute is poorly drafted and, as already noted, has created confusion in lay persons as to their independent authority to file private criminal actions. Moreover, to the extent that the statute provides for a judgment of costs to be rendered automatically and "immediately" it is probably unconstitutional as a violation of due process. It does not allow a person to have his "day in court" to try to show that the accusation was in good faith. Thus the statute might also be a disincentive for people who might otherwise bring close or marginal cases to the attention of a judge or grand jury. The repeal of the statute will eliminate any lingering confusion regarding the existence of "private prosecutors", while leaving the common law protections against malicious prosecutions intact.

The filing of a criminal action is obviously a very serious matter. The fact that a criminal charge has been filed against a person may have a negative effect upon that person's reputation, position in the community, employment opportunities, etc. The need to defend oneself against criminal charges may also impose a

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(Footnote Continued)

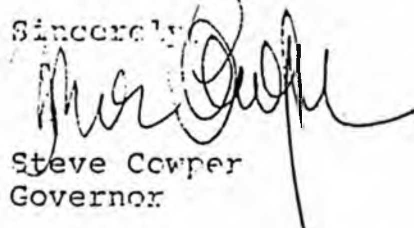
enforcing orders in contested divorce cases. See, e.g., Diggs v. Diggs, 662 P.2d 950 (Alaska 1983). In all other situations, however, AS 44.23.020(b)(3) gives the attorney general sole responsibility for handling criminal matters.

3/ Also see Rule 7(c), Alaska Rules of Criminal Procedure, which permits prosecution by indictment only if the indictment is signed by the prosecuting attorney.

great deal of financial expense and emotional strain. Thus the power to institute criminal proceedings ought not to rest with a private party involved in some sort of vendetta or a personal dispute with another.

There is no such thing as a "private prosecutor" in Alaska, nor should there be. Because AS 12.45.150 is apparently being interpreted by some persons as implicitly recognizing such a procedure, and because it probably violates due process requirements, this obsolete statute should be repealed.

Sincerely,



Steve Cowper
Governor

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill version: HB 121
Published Date: 2/11/87

REQUEST

Bill/Resolution No.: Law Log 773-87-0067
Title: An Act repealing a provision related to payment of costs by private prosecutor
Sponsor: Rules
Requestor: Governor
Date of Request:

FISCAL DETAIL

Agency Affected: Alaska Court System
BRU: Trial Courts

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -

POSITIONS:

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
FULL-TIME	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

The Alaska Court System concurs with this legislation.

Prepared by: Karla Forsythe
Phone: 264-8228
Division: General Counsel, Alaska Court System
Date: 1-5-87

Approved by Commissioner: Arthur H. Snowden II
Date: 1-5-87
Agency: Alaska Court System

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

9/16/86

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill version: HB 121
Published Date: 2/11/87

REQUEST

Bill/Resolution No.:
Title: "An Act repealing a provision related to payment of costs by private prosecutors."
Sponsor: House Rules/By req. of the Gov.
Requestor: Office of the Governor/OMB
Date of Request: December 29, 1986

FISCAL DETAIL

Agency Affected: Department of Law
BRU: Prosecution

Components: All

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING : (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Please see the attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services
Date: 12/30/86

Richard I. Pegues /for/ Ronald W. Lorensen,
Approved by Commissioner: Acting Attorney General
Date: 12/30/86
Agency: Department of Law

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 121

2/11/87

This bill repeals AS 12.45.150, which provides that malicious accusations, or those lacking probably cause, will subject the complainant to immediate judgment "for the costs of disbursements of the action." This statute, drafted in 1900, has also created confusion in lay persons as to their independent authority to file private criminal actions. This authority simply does not exist in Alaska. Both the Department of Law and the Alaska Court System are recommending repeal of the statute due to the confusion and the cost involved when lay persons attempt to bring complaints as "private prosecutors."

HB
122

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 10, 1987

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that would prohibit the "civil compromise" of criminal cases arising from domestic violence situations. This proposed legislation was requested by the Council on Domestic Violence and Sexual Assault and is supported by the Alaska Network on Domestic Violence and Sexual Assault.

Under existing law (AS 12.45.120 -- 12.45.140), a misdemeanor crime for which the injured party has a civil remedy may, except under certain circumstances, be ordered dismissed by the court if the defendant and the victim reach a civil compromise (in other words, if the defendant pays the victim money in recompense). This bill amends AS 12.45.120 to add crimes that arise from a domestic violence situation to the list of crimes that may not be civilly compromised.

Alaska's civil compromise statute, originally adopted in 1900, is modelled upon an 1813 New York statute. The statute apparently was based on the belief that there are some minor cases (such as libel, trespass, or simple assault) that, while technically public offenses, are, in reality, primarily private disputes between two parties. In such cases, it was believed, the public interest would be better served if the parties could reach an amicable resolution of their private dispute outside of the courtroom. Although such provisions were widespread at the turn of the century, many states, including New York, have since repealed their civil compromise statutes. There are only about 15 states, including Alaska, which now retain some form of civil compromise statute.

Unfortunately, in recent years the civil compromise statute has been used by abusive spouses as an easy and cheap way of obtaining the dismissal of criminal charges pending against them. In the recent case of State v. Nelles, 713 P.2d 806 (Alaska App. 1986), the Alaska Court of Appeals upheld a Fairbanks judge's decision to dismiss criminal charges against a man who had struck his girlfriend in the face

with his fist, injuring her and requiring stitches. Nonetheless, the court expressed concern "that domestic assaults not go unpunished merely because the victims wish to withdraw their complaints in the hope that no further abuse will occur." 713 P.2d at 810. The court was unwilling to judicially create an additional exception to the civil compromise statute, however. The court stated:

> The statute, in its current form, does not exempt domestic disputes. Amendment to create additional exceptions is clearly a matter of legislative, rather than judicial, concern.

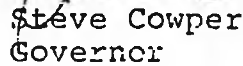
713 P.2d at 810; footnote omitted.

In recent years, there has been an increasing awareness in our society of the pervasive problem of domestic violence: the physical and sexual abuse of women, children, and the elderly. In 1980, the Alaska legislature adopted a tough new domestic violence law that allows the victim of domestic violence to go to court to obtain a restraining order for protection against an abusive spouse or family member (AS 25.35.010 -- 25.35.060). Under certain circumstances, violation of such a court order is a crime (see, e.g., AS 11.61.120(a)(6)). Because of the need to protect victims from domestic abuse, the legislature amended the state's criminal procedure code in 1978 to allow a peace officer to arrest an offender for certain types of domestic crimes, even if the crime was a misdemeanor not committed in the officer's presence. This is an exception to the general rule. See AS 12.25.030(b).

Battered wives, young children, and elderly parents are often in an extremely precarious position. The victim may be dependant upon the offender for food, shelter, and emotional support, and may therefore be particularly vulnerable to threats or coercion. In recent years, state prosecutors have handled several homicide and felony assault cases where the victims had been repeatedly beaten by their husbands or boyfriends. In some of these cases, criminal charges had been filed, only to be later dismissed at the victim's request. It makes little sense to toughen the state's civil and criminal laws against domestic violence on one hand but, on the other hand, to continue to allow abusers to pressure their victims into "civilly compromising" the charges against them.

This bill recognizes that we have an obligation to protect those who are too young, too old, or too emotionally vulnerable to be able to effectively protect themselves. The abuse of women, children, and the elderly is an offense against every member of a civilized society; it is emphatically not a "private dispute" for which a civil compromise is appropriate. I urge your prompt and favorable action on this bill.

Sincerely,



Steve Cowper
Governor

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 122
Published date: 2/11/87

REQUEST
Bill/Resolution No.: 773-87-0072
Title: An Act relating to the authority to compromise certain misdemeanors.

Sponsor:
Requestor:
Date of Request 12/16/86

FISCAL DETAIL
Agency Affected: Public Safety
BRU: Council on Domestic Violence & Sexual Assault

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
GENERAL FUNDS	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: Attach a separate page if necessary

Prepared by: Nina Keeler, Program Coordinator — Phone: 465-4356
Division: Council of Domestic Violence & Sexual Assault — Date: 12/16/86

JMR 12/16/86 Approved by Commissioner: [signature] — Date: 12/16/86
Agency: Public Safety
Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

No. 2

STATE OF ALASKA, 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 122
Publish Date: HOUSE 3/20/87

REQUEST:

Revision Date:
Title: An Act relating to the authority to compromise certain misdemeanors
Sponsor: Rules/Governor
Requestor: House Finance

Agency Affected: Public Safety
BRU: Council on Domestic Violence and Sexual Assault
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

JNR 3/12/87

Prepared by: Barbara Miklos, Executive Director
Phone: 465-4356
Division: Council on Domestic Violence & Sexual Assault
Date: 3/5/87

Approved by Commissioner: [signature]
Date: 3/12/87
Agency: Department of Public Safety

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

CIVIL COMPROMISE: Law's use worries prosecutors

By SHEILA TOOMEY
Daily News reporter

Men who beat their wives can escape prosecution as long as their victim says it's all right under an old, rarely used law that now has Anchorage prosecutors and family counselors worried.

The procedure, called a civil compromise, is routinely used to kill Fairbanks domestic violence cases, according to the district attorney's office there. It is rarely used at all in Anchorage, but has been invoked in a domestic violence case now pending in District Court.

"It could have some serious effects," said Assistant Municipal Prosecutor John McConnaughy.

The prosecutor's office has a four-year-old policy of taking domestic assault cases to court even if the victim — usually a battered woman — changes her mind about wanting to prosecute her attacker. Professionals in the field believe nearly all such victims are physically or emotionally coerced into dropping charges.

The usual deal offered a first offender is to complete a year of counseling in return for having his record wiped clean.

Benito Mendoza was arrested on June 21 and charged with fourth-degree assault, the misdemeanor charge used in most domestic violence cases. The victim, Virginia Slatts, told police Mendoza punched her in the face and kicked her in the thigh. Police photographed her injuries, including what turned out to be a broken nose.

On June 27, defense attorney Ron Offret asked Judge Michael Wolverton to dismiss the charge against Mendoza because Slatts had signed a civil compromise agreement.

"For $1 and other valuable consideration," the agreement reads, "Virginia R. Slatts does herby release and forever discharge Benito Mendoza from any and all acts and actions and damages as a result of the incident occurring on June 21 . . . and agrees that she does not wish to pursue the above matter."

By law, filing the agreement took the decision of whether the case should be prosecuted out of the hands of the prosecutor and gave it to the judge.

McConnaughy asked for a hearing to present evidence that civil compromise is generally not appropriate in domestic violence cases, and would be particularly inappropriate in this case, where there is a history of abuse.

At an Aug. 5 hearing, he produced evidence of two other assaults against Slatts by Mendoza from August 1985 to June 1986. There was no prosecution, but hospital personnel testified to the extent of Slatts' injuries. Police were called regarding an assault on Aug. 24, 1985 when Slatts was pregnant, according to testimony. She was treated but no charge was filed.

At the hearing, Wolverton delayed making a decision because Slatts did not show up and he could not ask her if she had been pressured. When Slatts failed to show for a second hearing, he issued a bench warrant for her arrest.

So now the victim is technically a fugitive, a situation both sides say they deplore.

Few cases go this far, but Fairbanks District Court Judge Ed Crutchfield says this is one of the reasons he "compromises" about six domestic violence cases a year. His use of civil compromise was upheld earlier this year by the Alaska Court of Appeals. However, the court included a warning in its opinion:

"In cases of domestic violence that appear to involve a continuing danger

of injury to the victim, it could well be an abuse of discretion for the trial court to order dismissal."

Crutchfield said Fairbanks judges generally follow this guideline and civil compromises are not used "if someone had any type of history of domestic violence, whether convicted or not convicted."

"I would think I should be nailed to the yardarm if I have compromised a case where there was a history and a chance it will reoccur."

Ken Roosa, head of the special assault unit in the Fairbanks district attorney's office, sees it differently. "It's unusual for the court to refuse to accept" a compromise, he said. As soon as charges are filed, defendants "make an effort to contact the victim and offer her a little money to settle."

Even if restricted to first offenders, the law should not be available in domestic violence cases, said Anchorage Municipal Prosecutor Jim Ottinger. "The whole point is to get the first offender into treatment so there won't be second offense."

Frances Purdy, head of the city's abuse prevention program, testified for the prosecution at the Mendoza hearing. "I don't believe someone who lives in viole[nce] as a victim can make a f[ree] choice about what a rem[edy] is," she said later.

When abusers kn[ow] victims can't get the char[ges] dropped, prosecutors a[nd] counselors said, they st[op] pressuring the victim ab[out] the case and start thinki[ng] about accepting t[he] counseling "deal." T[he] availability of ci[vil] compromise short-circui[ts] this, McConnaughy said.

Purdy and others tried [to] get the civil compromise la[w] changed during the la[st] legislative session, but t[he] Fairbanks judges objecte[d] partly, Crutchfield sai[d,] because he and his colleagu[es] were angry at charges th[ey] were abusing their discretio[n.] "That's completely not true," he said.

"We don't just sign the[m] because someone sticks the[m] in front of us . . . I thin[k] every one of these cas[es] should be addressed on i[ts] own merits."

Meanwhile, defens[e] attorney Offret, the man wh[o] started all the fuss b[y] presenting the civ[il] compromise in the Mendoz[a] case, said he realizes "th[e] problem that's raised by th[e] whole thing." But the law ha[s] been on the books since 196[?] he said, and prosecutors' fea[rs] have not materialized.

Alaska's civil compromis[e] law derives from an 1813 Ne[w] York law meant to ge[t] private nuisance cases out o[f] court. In Oregon, wher[e] Offret first ran into such [a] law, it was used primarily i[n] shoplifting cases, he said.

RECEIVED FEB 11 1986

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE COURT OF APPEALS OF THE STATE OF ALASKA

STATE OF ALASKA, Appellant,	)	File No. A-995
v.	)	OPINION
BRUCE NELLES, Appellee.	)	[No. 578 - February 7, 1986]

Appeal from the District Court of the State of Alaska, Fourth Judicial District, Fairbanks, H. E. Crutchfield, Judge.

Appearances: Jeffery O'Bryant, Assistant District Attorney, Harry L. Davis, District Attorney, Fairbanks, and Harold M. Brown, Attorney General, Juneau, for Appellant. Raymond Funk, Assistant Public Defender, Fairbanks, and Dana Fabe, Public Defender, Anchorage, for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

BRYNER, Chief Judge.

The state appeals from a district court dismissal of a misdemeanor assault charge against Bruce Nelles. Judge H.E. Crutchfield dismissed the charge pursuant to the misdemeanor civil compromise statute. We affirm.

BACKGROUND

While intoxicated, Nelles struck his girlfriend, Mary M. Henry, on the mouth with his fist. Henry's injury required four stitches. She filed a citizen arrest form seeking Nelles' arrest.

At a bail hearing before Judge Crutchfield, Nelles' attorney moved for dismissal. He submitted a statement titled "Compromise of Criminal Action," which was signed by Henry and stated:

> Comes now the injured party in the above-entitled action, Mary Henry, and hereby acknowledges that he/she has received satisfaction for the injury to his/her person and further states that he/she does not wish to proceed with this action, since he/she has received satisfaction for injury to his/her person from the Defendant, Bruce Nelles.

The state opposed Nelles' motion for dismissal. The court allowed Nelles' counsel to examine Henry under oath. Henry testified that she and Nelles intended to marry, that he had never assaulted her on any other occasion during their one year together, that none of her clothes had been torn, that she had not incurred any medical expenses, that she was unemployed at the time of the assault, had lost no wages, and that she did not want any civil compensation from Nelles.

Judge Crutchfield further questioned Henry:

Court: (to witness) I don't know whether Mr. Wildridge, in taking this written statement from you, explained the provisions of Title 12.45.120-130, which I'm obviously looking at. And, I think the basis for this is to not prosecute some cases but by the same time the legislature recognizes that the court system and the police, and the prosecutor should not be some type of a buffer zone and have their time taken up with boy-girl relations, okay?

Henry: I understand.

Court: And, there's some provisions for costs and I've never been clear about who the costs should be assessed against, whether it's the defendant or the witness who brings the charges, and, then -- you are aware, of course, that there's a possibility that if I grant it, that I may, based upon the court's time and everybody's time, I may have to assess some costs -- before it would be dismissed? Did you understand that?

Henry: (inaudible)

Court: Okay.

. . .

Court: You're not frightened of Mr. Nelles I take it then, you, he didn't try to talk you into doing this or threatening you in any way?

Henry: No.

Judge Crutchfield initially denied Nelles' motion to dismiss. After Nelles moved for reconsideration, however, Judge Crutchfield ordered the case dismissed "pursuant to the civil compromise provisions" and "upon payment of $100 costs." The state has appealed the order of dismissal.

DISCUSSION

"In theory there should be no compromises of criminal cases." Miller, The Compromise of Criminal Cases, 1 So. Cal. L. Rev. 1 (1927). And in practice, "the civil and criminal law operate independently of one another so that resolution of a victim's civil rights and remedies has no effect upon criminal prosecution." People v. Moulton, 182 Cal. Rptr. 761, 766 (Cal. App. Dep't. Super. Ct. 1982). "An exception to this principle exists, however, where a statute specifically authorizes a compromise of the criminal, as well as the civil, liability arising out of certain conduct." Annot., 42 A.L.R.3d 315, 318, § 2[a]. Many states, including Alaska, have adopted such statutes, allowing judicially-sanctioned compromises and dismissals of criminal charges.[1]

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[1]. AS 12.45.120-.140; Ariz. Rev. Stat. Ann. § 13-3981 (1978); Cal. Penal Code § 1377-79 (West 1982); Idaho Code Ann. § 19-3401-3403

(footnote continued)

It appears that Alaska's civil compromise statutes derived from the same source as most other similar statutes, a 1813 New York statute that read:

> That in all cases where a person shall, on the complaint of another, be bound by recognisance to appear, or shall, for want of surety, be committed, or shall be indicted for an assault and battery, or other misdemeanor, to the injury and damage of the party complaining, and not charged to have been done riotously or with intent to commit a felony, or not being an infamous crime, and for which there shall also be a remedy by civil action, if the party complaining shall appear before the magistrate who may have taken the recognisance, or made the commitment, or before the court in which the indictment shall be, and acknowledge to have received satisfaction for such injury and damage, it shall be lawful for the magistrate in his discretion to discharge the recognisance, &c. or for the court also in their discretion, to order a <u>nolle prosequi</u> to be entered on the indictment.[2]

(footnote 1 continued)

(1979); Mass. Gen. Laws Ann. ch. 276, § 55 (West 1972); Nev. Rev. Stat. § 178.564-568 (1983); Okla. Stat. Ann. tit. 22, § 1291-94 (West 1958); Or. Rev. Stat. § 135.703-709 (1983); Pa. Stat. Ann. tit. 19, 26 (Purdon 1964); Utah Code Ann. §§ 77-50-1 to -3 (1978).

2. In large part, the laws of Alaska are derived from those of Oregon. F. Brown, <u>The Sources of the Alaska and Oregon Codes</u>, Part I, 2 U.C.L.A.-Alaska L. Rev. 15, 16 (1972). The Alaska civil compromise statutes appear to first have been adopted in 1900 and to have been derived from the Oregon Civil Compromise Statutes. <u>See</u> Ann. Alaska Codes, Pt. II, ch. 28, §§ 253-256 (Carter 1900) (the Alaska statute refers to the Oregon law, presumably as its source). <u>See</u> <u>infra</u>. n.3. The Alaska statutes also had virtually identical wording to the Oregon statutes. <u>Compare</u> Ann. Alaska Codes, Pt. II, ch. 28, §§ 253-256 (Carter 1900) <u>with</u> Gen. Laws of Or., Code of Crim. Proc., ch. XXX, §§ 315-318 (Deady 1845-1864); renumbered, Ann. Laws of Or., Crim. Code. tit. I, ch. XXX, §§ 1519-1522 (Hill 1892); renumbered, Or. Laws, tit. XVIII, ch. XV, §§ 1696-1699 (Lord 1910).

The laws of Oregon, and therefore Alaska, are derived in large part from those of New York. Although, "[t]he major borrowing took place in Oregon in 1853-1854 . . . . Oregon's celebrated Judge Matthew P. Deady and others reworked the Oregon law in 1862-1864, using as their major sources the 1854 codes and the draft codes prepared for New York by a commission by David Dudley Field. The Field Commission had also relied heavily on the older New York statutes . . . ." F. Brown, <u>The</u>

(footnote continued)

1 N.Y.R.L. § 19 (1813), quoted in People v. Moulton, 182 Cal. Rptr. 761, 765 (Cal. App. Dep't. Super. Ct. 1982). The purpose of the statute was to encourage the amicable resolution of disputes that were primarily private in nature:

> The policy underlying compromise statutes was explained by the New York Commissioners on Practice and Pleading in 1849 as follows:
>
> > There are many cases, which are technically public offenses, but which are in reality rather of a private than a public nature, and where the public interests are better promoted by checking than by encouraging criminal prosecutions. Of this class are libels, and simple assaults and batteries; or those which according to [the civil compromise statute], are not committed by or upon an officer of justice, while in the execution of the duties of his office, or riotously, or with an intent to commit a felony. With these exceptions, cases of this nature have by the policy of our statutes, always been considered fit subjects of compromise . . . ; a policy which has been carried by the courts, still further than the terms of the statute.

People v. Moulton, 182 Cal. Rptr. at 766 (citations omitted).

Alaska's civil compromise statutes are contained in AS 12.45.120-12.45.140, which state:

> Sec. 12.45.120. Authority to compromise misdemeanors for which victim has civil action. When a defendant is held to answer on a charge of misdemeanor for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised except when it was committed
>
> (1) by or upon a peace officer, judge or magistrate while in the execution of the duties of that office;

(footnote 2 continued)

Sources of the Alaska and Oregon Codes, Part II, 2 U.C.L.A. - Alaska L. Rev. 87 (1973).

(2) riotously;
(3) with an intent to commit a felony;
(4) larcenously.

Sec. 12.45.130. Acknowledgment of satisfaction by injured party. If the party injured appears before the court in which the defendant is bound to appear, at any time before trial, and acknowledges in writing that satisfaction has been received for the injury, the court may, on payment of the costs incurred, order the prosecution dismissed and the defendant discharged. The order is a bar to another prosecution for the same crime.

Sec. 12.45.140. Compromise or stay upon compromise by other means prohibited. A crime may not be compromised or the prosecution or punishment upon a compromise dismissed or stayed except as provided by law.[3]

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[3]. The statutes, as originally adopted in 1900, read:

Sec. 253. What crimes may be compromised. That when a defendant is held to answer on a charge of misdemeanor, for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised, as provided in the next section, except when it was committed--

First. By or upon an officer of justice while in the execution of the duties of his office;

Second. Riotously; or

Third. With an intent to commit a felony; or

Fourth. Larcenously.

Laws. Oreg., Oct. 19, 1864; Hill's Ann. Laws, s. 1519.

Sec. 254. Compromise by permission of the court; order thereon. That if the party injured appear before the court at which the defendant is bound to appear, at any time before trial on an indictment for the crime; and acknowledge in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs and expenses incurred, order all further proceedings to be stayed upon the prosecution and the defendant to be discharged therefrom; but the order and the reasons therefor must be entered on the journal.

Laws Oreg., Oct. 19, 1864; Hill's Ann. Laws, s.

(footnote continued)

In this case, the state initially contends that these statutes violate the separation of powers doctrine. The state relies upon State v. Carlson, 555 P.2d 269, 271-72 (Alaska 1976), and Public Defender Agency v. Superior Court, 534 P.2d 947, 951-52 (Alaska 1975). It argues that the district court's order of dismissal amounts to "a usurpation of the executive power residing in the state district attorney's office to bring charges and determine their disposition." We find this argument to be without merit.

In State v. Carlson, the defendant was indicted for murder, but the trial court, against the state's opposition, agreed to accept a guilty

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(footnote 3 continued)

> 1520; Saxon v. Hill, 6 Oreg., 383.
>
> Sec. 255. Order a bar to another prosecution. That the order authorized by the last section, when made and entered, is a bar to another prosecution for the same crime.
>
> Laws Oreg., Oct. 19, 1864; Hill's Ann. Laws, s. 1521.
>
> Sec. 256. No crime can be compromised, except. That no crime can be compromised, nor can any proceeding for the prosecution or punishment thereof be stayed upon a compromise, except as provided in this chapter.
>
> Laws Oreg., Oct. 19, 1864; Hill's Ann. Laws, s. 1522.

The statutes appear unchanged from the original version in Comp. L. Ann., tit. XV, ch. 28, §§ 2362-2365 (1913); Comp. L. Ann., §§ 5431-5434 (1933), and Comp. L. Ann., tit. 66, ch. 18, §§ 66-18-1 to 66-18-4 (1948). In 1962, a number of minor amendments were made to the language of the statutes. See SLA, ch. 34, § 6.13 (1962). Additionally, the first exception in Sec. 253 was expanded from the original "an officer of justice" to "a peace officer or magistrate," in 1962, SLA, ch. 34, § 6.13 (1962), and expanded to "a peace officer, judge or magistrate," in 1971. SLA, ch. 8, § 15 (1971). Also, Sec. 255 was consolidated with Sec. 254 in 1962. SLA, ch. 34, § 6.13 (1962).

plea to the lesser offense of manslaughter. No statute or rule permitted the trial court to accept such a plea. The supreme court reversed, finding that the trial court's decision would "usurp the executive function of choosing which charge to initiate. . . .." 555 P.2d at 272. In Public Defender Agency v. Superior Court, the trial court ordered the state to prosecute a civil action for child support. The supreme court similarly concluded that the separation of powers doctrine had been violated, holding that "the Attorney General cannot be controlled in either his decision of whether to proceed, or in his disposition of the proceeding." 534 P.2d at 950.

In the present case, there was no judicial interference with the prosecution's initial decision to charge Nelles. Judge Crutchfield did subsequently exercise his discretion to dismiss the case. Yet this dismissal was expressly authorized by the legislature. AS 12.45.120, 12.45.130. There is no suggestion in the civil compromise statutes that the court's power to dismiss is conditioned upon the agreement of the prosecutor. In fact, the contrary appears to be the case. See Annot., 42 A.L.R.3d 315, 319 (a common condition precedent under compromise statutes is the consent of either the court or the prosecutor). See also Hoines v. Barney's Club, Inc., 170 Cal Rptr. 42, 47 (Cal. 1980) (in explaining the civil compromise statute, the court stated that the prosecutor has no role in a dismissal of civil compromise). The state has cited no case purporting to hold that prosecutorial consent to a civil compromise is necessary as a matter of constitutional law, and we are aware of none. Because the court's authority to compromise misdemeanors has been expressly conferred by the legislature, we find the present case readily distinguishable from State v. Carlson and Public Defender Agency

v. Superior Court, and we conclude that there is no separation of powers violation made out here.

The state's next argument is that crimes arising from domestic disputes should not be amenable to civil compromise. Certainly, the state has a valid concern: that domestic assaults not go unpunished merely because the victims wish to withdraw their complaints in the hope that no further abuse will occur. However, the state cites no support for the argument that public policy mandates a judicially created exception to the civil compromise statute. The statute, in its current form, does not exempt domestic disputes. Amendment to create additional exceptions is clearly a matter of legislative, rather than judicial, concern.[4]

Moreover, we note that, under the Alaska civil compromise statute, the decision whether to dismiss or prosecute is vested in the sound discretion of the trial court, and no right to dismissal is conferred upon the accused. In cases of domestic violence that appear to involve a continuing danger of injury to the victim, it could well be an abuse of discretion for the trial court to order dismissal. In the present case, however, the state has not suggested any ongoing danger to the victim, and the record contains nothing to indicate that Judge Crutchfield abused his discretion in this regard.

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4. We note that California has amended the civil compromise statute to create an exception barring civil compromise when the injury arises from a second willful and knowing violation of a restraining order imposed to prevent domestic violence. Cal. Penal Code § 1377 (West 1982) (statute amended 1979). It should also be noted that any willful infliction of physical injury resulting in a "traumatic" condition upon a cohabitant of the opposite sex is a felony under California law. Cal. Penal Code § 273.5 (West 1970) (adopted 1977).

The state further argues that the civil compromise statute engenders conflict with the Alaska Code of Professional Responsibility, Disciplinary Rule 7-105(A), which states that "[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." See, e.g., MacDonald v. Musick, 425 F.2d 373 (9th Cir. 1970) (prosecutorial misconduct where charge of resisting arrest was introduced as "bludgeon" behind the attempt to defeat a possible civil action by the arrestee for false arrest). This rule is plainly inapplicable here. Dismissal of a case upon civil compromise simply does not imply that the case was prosecuted "solely to obtain an advantage in a civil matter."[5]

Judge Crutchfield's dismissal of the case is AFFIRMED.

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[5]. The state has also argued that Alaska's civil compromise statute is unconstitutionally vague. We find this argument to be frivolous.

463-3153 - Suzanne Tryck - JRO.

MUNICIPALITY OF ANCHORAGE

MEMORANDUM

DATE: March 5, 1987

TO: Suzanne Tryck, Department of Intergovernmental Affairs

FROM: Frances Purdy, Program Manager, Abuse Prevention Program

SUBJECT: Testimony on HB 122 - Civil Compromise on Misdemeanors

This bill is the same bill that was introduced in the 1986 legislature. The Special Committee on Domestic Violence encouraged the Municipality of Anchorage to support its passage. The Municipality took an active role in supporting this bill, then HB 463; hopefully, we can continue to work for it becoming law..

The bill would delete the loophole in the current Alaska Statutes that allows a misdemeanor assault to be handled through a civil compromise in lieu of criminal prosecution. This is not the preferred method for closing a domestic violence case. When there is a civil compromise, the victim states to the court that she does not want the criminal action against her abuser pursued. If the judge rules that the compensation (usually a promise of no hitting in the future and a $1.00 remuneration for pain and suffering) offered by the abuser is adequate, the judge then dismisses the criminal case (not allowing the prosecutors to bring criminal charges) and rules favorably (approves) the terms of the (agreement) civil compromise..

The current method for handling these cases is for the prosecution to subpeona an expert witness, like myself, to testify. The expert testimony includes why the victim is unable to fully understand the implications of accepting this compromise. This involves testimony about the history of violence victim has been subjected to and/or the history of violence in this relationship, the level of blame the victim has internalized, the victimization pattern in this relationship, the probability of reoccurrence of the abuse, and the need for a public policy that includes the protection of the victim, children and the abuser from incurring future harm as a result of this progressively deteriorating behavior pattern. The reason for such extensive testimony is to establish grounds for an appeal should the judge grant the civil compromise.

As you can see handling these cases by establishing a record for appeal in each case is lengthy and costly. It is also quite difficult on the victim since she has to be in the court room to testify and explain in front of the abuser the reasons she has for believing that she will not be hurt again. Also, the experience gained in other jurisdictions is that the couple will be back in court later when the violence again erupts. Generally the violence is more traumatic to the victim and the alleged batterer the second time they have to appear in court.

It does not appear to be good public policy to wait for a repetition of harm before intervening. We changed the police procedure in Anchorage and in Alaska to not ignore the first call specifically because our experience had been that the violence generally does intensify over time. By having a judge rule that it is merely a "civil matter" between two "equal" parties, only reinforces that society condones domestic violence. It is also counterproductive to tell law enforcement personnel to respond to these calls and arrest whenever possible or at least take full reports, if on the other hand we legislatively allow a process that circumvents the criminal justice system.

By closing this loophole now we prevent this compromise to be utilized in settling child and elder abuse cases as well.

IDENTIFIED PROBLEM AREAS IN THIS BILL:

1. Absolutely no exclusion for dissolutions:
   There is absolutely no intermediary between the partners seeking a dissolution. Theoretically, the judge should not allow a dissolution that is the least bit slanted to favor an abuser if there is any history or hint of domestic violence. On the practical side, it is not always discernible that "joint custody" is a coerced arrangement if there is no paper trail of violence in the relationship.

2. No exclusion for divorces:
   Pending divorces (prior to the abuse) would continue to subject the victim to intimidation with threats of future violence if she doesn't agree to the conditions of divorce and a civil compromise. A problem already exist in divorces because the victim of domestic violence often agrees to many conditions that will later be found detrimental to the children, be an unjust property settlement, or unwanted even by the victim's partner once the power struggle of the divorce process is over.

   Ethical conduct for attorneys dictates that civil actions not be bargained against the threat or promise of criminal actions. To add an exclusion for a pending divorce case gives the appearance of one action being bargained against another. This could also raise some issues related to equal protection for persons in the process of divorces.

   If the existence of a pending criminal case does, in fact, delay the divorce proceeding, it is likely that the victim will not be penalized since the court can take judicial notice of the criminal case and save the victim's attorney the court time that would have been needed to present similar information for a contested divorce. It is also important that the court should be advised about the history of violence in its determination of child custody or visitation and the closing of case through civil compromise may not be drawn to the court's attention.

3. Inclusion of larcenously:
   In cases that involve the abuse of elderly individuals, a sizable percentage of the abuse is concurrent with the withholdin of monies belonging the the elderly person. To allow civil compromises in these cases of domestic violence would seriously hamper the intervention into elder abuse cases.

4. Civil compromise erroneously assumes individuals have equal power.
Individuals involved in domestic violence do not enjoy a coequal relationship. One of the unfortunate results of domestic violence is that one individual becomes a victim or at least a person who is intimidated, coerced, and frightened (and often physically and/or sexually assaulted) into behaving in a manner more acceptable to the partner. The typical threats to the victim includes: no one will believe her version of the truth, people will believe her partner, and if they do believe her then he will have to go to jail or in some other way have his life ruined. It is not surprising that when his attorney approaches the victim with a civil compromise to avoid the court process, many victims will gullibly believe their problems to be over. Alas, this of course is not true!

5. Civil compromise should only occur when both parties are represented by independent counsel:
This is one method for attempting to restore the two parties to equal power for negotiating purposes. With independent counsel, the victim's attorney would be able to instruct her about all the consequences to this action and the realities of the criminal case outcome.
Only allowing individuals who can afford independent counsel is of course unconstitutional since it penalizes individuals who cannot afford their own attorneys. This would place the state in a position of having to provide counsel through a public agency such as the Public Defender's office. This would carry quite a fiscal note since the offender would have little to lose by trying a compromise each misdemeanor prior to preparing a defense in the criminal charges.
Currently, it is the prosecutor who must take this role. This is confusing for the victim since her partner's attorney has generally explained that the role of the prosecutor is to take her partner to court. It is also an unacceptable cost since it forces the prosecutor's office to bear the burden of first convincing a judge that the case should not be compromised and later having to prepare the criminal case.

6. Why can't judges continue to use their discretion?
Unfortunately most judges do not have the time to verify the past or current existence of restraining orders, arrests, diversions, Suspended Imposition of Sentence, or convictions regarding domestic violence and the individuals requesting a civil compromise. It is quite possible for these actions to have occurred in another court's jurisdiction and for the paperwork to be unavailable.
This places the judge in a position to cross examine the victim and determine the degree of coercion and determine the probability of future violence while the victim must speak "honestly" in front of the abuser. I do not believe a judge will be more capable of accomplishing this than has anyone else. Counselors know that lethality assessments are not reliable when done with both members of the couple present at the interview.

It is interesting to note that at least one of the cases compromised in Fairbanks in November 1985 has resulted four additional assaults culminating in State v. Wharton (4FA-S87-313). Other cases in Fairbanks have also had reoffenses, some have been reported to law enforcement and some have not.

7. What really happens in a civil compromise:

From the perspective of the alleged offender: The charges have been filed by the prosecutor. After the alleged offender is unable to convince the prosecutor to drop the charges. He attempts to convince the victim that nothing else will happen and that it is in both their interest not to have him go to court. He then finds an attorney that will explain to the victim why it is in her best interest to not have pursue criminal charges. Once the judge agrees to the compromise, the alleged offender continues to maintain his promise to not assault or intimidate the victim.
The difficulty with his maintaining that promise is his lack of skills to understand his emotional needs, communicate his needs, recognize the stress involved in getting what he wants, and nonviolently handle his disappointments. He will "grit his teeth" and "put up" with disappointments or rejection for a while but eventually will blame someone, generally his partner. for "making too many demands [on him] and not giving enough to him]". As a last resort, he forces his partner to do what he wants her to do or punish her for not doing the "right thing".

From the perspective of the attorney: The alleged offender has explained that the violence was minimal, accidental or at least unintentional, and that it will not happen again. The attorney then encourages the victim to give the alleged offender another chance. The general objective is to add as little tension to this couple's relationship as possible. The victim is asked to sign a prepared statement about her wish to settle this because she believes her partner will not repeat the behavior. Attorneys generally attempt to present the signed document without having to bring the victim into court. When judges require her presence to substantiate the written document, the attorney limits the questions to issues related to the believability of the partner's statement that this will not occur in the future. The emphasis is placed on the harmony the couple has enjoyed since agreeing on this compromise.

From the perspective of the victim: The victim has given interviews to the police and the prosecutor's office. Her partner's attorney now states that all of this can be forgotten if she just signs a statement that she does not want the criminal charges to continue against her partner. Her partner has generally not been violent since the arraignment on the criminal charges and may have begun counseling (substance abuse, anger management, pastoral. self help). There doesn't appear to be much reason to not give him one more chance.