# Senator John B. (Jack) Coghill

Alaska State Legislature

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MEMORANDUM



To: Senator Jan Faiks
Senate Judiciary Committee, Chair

From: Senator Jack Coghill

Re: Sponsor Position: SB 68 relating to Timber Trespass

Date: January 24, 1989

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Intent: This legislation proposes to fill a gap in the management of both public and private timber resources. Presently, our laws protecting timber from theft are not enforceable. This legislation is intended to fill that gap.

Background: During the 15th legislative session this measure worked its way through the committee process and nearly passed both houses.

This bill was originally the work of the late Senator Don Bennett, but in its present form, it has gone through substantial transformation.

I reintroduced the bill this session essentially the same as the last House version we worked on in Senate Resource Committee in 1988.

Attachments: Staff Sectional Analysis, identifying differences between SB 68 and a work draft CS SB 68; and relevant statutes.

Recommendation: I recommend you adopt the attached draft CS SB 68 as a Judiciary Committee Substitute, and pass the CS out of Judiciary Committee with do pass recommendations.

Rational: The draft Committee Substitute for SB 68 contains changes from a resource committee substitute that was put together in the closing hours of the fifteenth legislature. Additionally, the draft before you, removes several flaws I found in both the 1988 House and Senate versions of the bill.

One flaw that should be noted here is that SB 68 spoke to timber trespass or theft, in relation to land ownership. In many cases as you know, the ownership of the timber may be different from the ownership of the land, as in the case of a timber sale on state land. The state owns the land, and the winning competitive bidder, a private entity, owns the timber. Therefore, the draft CS SB 68 speaks to trespass in relation to timber ownership, rather than land ownership.

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Alaska State Legislature

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MEMORANDUM

To: Senator Jack Coghill

From: Bruce Geraghty BRG

Re: Staff Sectional Analysis: SB 68 (Relating to Timber Trespass) in relation to draft CS SB 68.

Date: January 23, 1989

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At your direction legal services has drafted the attached blank committee substitute working draft. This analysis focuses on this CS, making note of the effects changes contained in the CS have on the original bill, SB 68.

CS SECTION 1. AS 09.45.730. is repealed and reenacted as:

AS 09.45.730. TRESPASS BY CUTTING OR INJURING TIMBER.

This section makes a person liable for triple or actual damages for the unauthorized acts of cutting down, injuring, or carrying off timber, owned by a private, state, or municipal interest.

The original bill has the same intent except that the owner of the land was the recipient of the damage award instead of the owner of the timber. This is a clarification of the property interest.
The reference to "village" in lines 21 and 22 was also removed as being redundant.

The existing statute, AS 09.45.730. Trespass by cutting or injuring trees or shrubs[.], expresses similar intent and a copy is attached to this memo. Please note that law was passed in 1962, with revisors amendments in 1988 which had no effect.

CS SECTION 2. AS 41.15 is amended by adding 5 new sections.

1. Sec. 41.15.910. COMMERCIAL FIREWOOD HARVEST PERMITS.

This section requires all commercial harvesters of firewood, above sales of 20 cords or land owners with greater than 10 acres of land, to acquire an annual permit from the

department of natural resources. It also defines the criteria for making application to the commissioner of DNR.

The original bill did not require a permit before the timber was cut and the exemption for owned timber, lines 17-19 page 3 (SB 68), was so broad the legislation would have been unenforceable.

2. Sec. 41.15.915 CIVIL PENALTY FOR SALES WITHOUT PERMIT.

This section establishes civil penalties for firewood sales, in addition to trespass penalties from SECTION 1, for the costs incurred by the timber owner in bringing the civil action. i.e. costs incurred in detection, investigation, attempted correction, reasonable court costs and attorney's fees.

The original bill (SB 68) stated a violator was liable to the state for damages, regardless of timber ownership. A technical change in the draft CS was made to reflect liability to the timber owner.

3. Sec. 41.15.920 HARVESTS WITHOUT PERMIT MADE A VIOLATION.

The act of knowingly harvesting firewood without a permit, or violating a permit term or condition, is made a violation.

The original bill spoke to knowing sales, rather than on knowing harvests. Leaving the emphasis on sales may have resulted in 'locking the barn after the horse had already been stolen.'

This section in SB 68 also contained a subsection (b), lines 6-9 page 4, which allowed a defense in a proceeding brought under this section. The defense was so broad as to make the section unenforceable.

The draft CS deletes subsection (b).

It is also noteworthy that the CS contains less ambiguous criteria for those needing to acquire a harvest permit, Sec.41.15.910(e), making this defense section in SB 68 unnecessary.

4. Sec. 41.15.925 INJUNCTIONS.

This section gives the superior court the authority to enjoin a violation under this legislation and to grant temporary or preliminary relief, "upon a showing of an imminent threat of continued violation and probable success on the merits".

The draft CS contains no changes from the original.

5. Sec. 41.15.930 DEFINITIONS.

This section defines three terms, "commissioner", "firewood", and "permit".

The draft CS contains no changes from the original.

CS SECTION 3. AS 45.50.235(b) OWNERSHIP OF UNBRANDED AND ABANDONED TIMBER PROPERTY is amended.

The section grants a person the right to recover and use state timber for noncommercial purposes, when the timber is unbranded or the brand is not distinguishable and which is located in a coastal water, lake, river, creek or other waterway of the state or on state owned coastline.

AS 45.50.235(a) also cites AS 45.50.230-234 (attached) which sets out a procedure and time lines for recovery of lost, rafted, or drift timber.

The draft CS contains no changes from the original.

**Sec. 09.45.640. Damages for withholding property and value of improvements as setoff.**

NOTES TO DECISIONS

Quoted in Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (9th Cir. 1987).

**Sec. 09.45.690. Failure to pay rent.**

NOTES TO DECISIONS

Cited in Murray v. Feight, Sup. Ct. Op. No. 3210 (File No. S-1378), P.2d (1987).

*Sec. 09.45.720. Actions to recover possession by tenant in dower. [Repealed, § 1 ch 89 SLA 1984.]*

## Article 7. Trespass.



**Sec. 09.45.730. Trespass by cutting or injuring trees or shrubs.** A person who without lawful authority cuts down, girdles, or otherwise injures or removes a tree, timber, or a shrub on (1) the land of another person or on the street or highway in front of a person's house, or (2) a village or municipal lot, or cultivated grounds, or the commons or public land of a village or municipality, or (3) the street or highway in front of land described in (2) of this section, is liable to the owner of that land, or to the village or municipality for treble the amount of damages which may be assessed in a civil action. However, if the trespass was unintentional or involuntary, or the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's own or that of the person in whose service or by whose direction the act was done, or where the timber was taken from unenclosed woodland for the purpose of repairing a public highway or bridge on or adjoining the land, only actual damages may be recovered. (§ 27.01 ch 101 SLA 1962; am § 16 ch 85 SLA 1988)

**Effect of amendments.** — The 1988 amendment, effective June 2, 1988, rewrote the first sentence, and substituted "unintentional" for "casual" and "on or adjoining the land" for "upon the land or adjoining it" in the second sentence.

**Legislative history reports.** — For an analysis of the amendment of this section by sec. 16, ch. 85, SLA 1988 (HCS CSSB 413 (Jud)), see 1988 House & Senate Joint Journal Supplement No. 18, May 10, 1988 p. 4.

NOTES TO DECISIONS

**Instructions.** — In action arising out of automobile accident, the trial court's refusal to take judicial notice of or instruct the jury on this section was not error since it was not applicable to the controversy and any instruction would tend to mislead, confuse, or divert the jury. Shane v. Rhines, Sup. Ct. Op. No. 2750 (File No. 5653), 672 P.2d 895 (1983).

**"Casual" negligence** means negligent conduct not involving an intent or design to enter or harm trees. "Casual" refers to whether the trespasser intended to cut, not the reason for an intended cutting. Matanuska Elec. Ass'n v. Weissler, Sup. Ct. Op. No. 3089 (File No. S-738), P.2d (1986) (decided prior to 1988 amendment).

**"Probable cause" protection.** — The probable cause language in this section protects defendants who honestly and reasonably stray into another owner's property. Matanuska Elec. Ass'n v. Weissler, Sup. Ct. Op. No. 3089 (File No. S-738), P.2d (1986).

**Sec. 09.45.735. Trespass related to geotechnical surveys and mining.** (a) A person who cuts down, girdles, or otherwise injures or carries off a tree, timber, or shrub on the land of another person or on the street or highway in front of a person's house, or of a village, town, or city lot, or cultivated grounds, or on the commons or public grounds of a village, town, or city, or on the street or highway in front of them, without lawful authority, is liable to the owner of that land, or to the village, town, or city for treble the amount of damages which may be assessed in a civil action. However, if the trespass was casual or involuntary, or the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's own or that of the person in whose service or by whose direction the act was done, or where the timber was taken from unenclosed woodland for the purpose of repairing a public highway or bridge upon the land or adjoining it, only actual damages may be recovered.

(b) A person who trespasses upon the land of another to gather geotechnical data or take mineral resources is liable to the owner of the land for treble the amount of damages that may be assessed in a civil action. If the trespass is unintentional or involuntary or the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's own or that of the person in whose service or by whose direction the act was done, only actual damages may be recovered. (§ 1 ch 168 SLA 1988)

**Revisor's notes.** — Enacted as AS 09.45.730(b). Renumbered in 1988.

**Sec. 41.15.900. Observance of Arbor Day.** To increase public awareness of the vital importance of the conservation and propagation of trees and forests to the everyday life of the citizens of Alaska, the third Monday in May of each year is designated "Arbor Day." It shall be observed by appropriate school assemblies and programs and shall be the occasion for other suitable observances and exercises by civic groups and the public in general. (§ 1 ch 11 SLA 1966; am § 1 ch 15 SLA 1973)

**Revisor's notes.** — Formerly AS 41.15.400. Renumbered in 1983.

### Article 6. General Provisions.

Section
950. Enforcement authority

**Sec. 41.15.950. Enforcement authority.** (a) The following persons are peace officers of the state and they shall enforce the provisions of this chapter and the regulations adopted under this chapter:

(1) solely for the purpose of enforcing this chapter, an employee of the Department of Natural Resources, or other person, authorized by the commissioner;

(2) a police officer in the state.

(b) A person designated in (a) of this section may, when enforcing the provisions of this chapter or a regulation adopted under this chapter,

(1) execute a warrant or other process issued by an officer or court of competent jurisdiction;

(2) administer or take an oath, affirmation or affidavit; and

(3) arrest a person who violates a provision of this chapter or a regulation adopted under this chapter. (§ 4 ch 179 SLA 1970)

**Revisor's notes.** — Formerly AS 41.15.700. Renumbered in 1983.

## Chapter 17. Forest Resources and Practices.

Article
1. Administration and Management (§§ 41.17.010 — 41.17.110)
2. Enforcement (§§ 41.17.120 — 41.17.143)
3. State Forest System (§§ 41.17.200 — 41.17.230)
4. State Land Reforestation (§§ 41.17.300 — 41.17.320)
5. Tanana Valley State Forest (§ 41.17.400)
6. General Provisions (§§ 41.17.900 — 41.17.950)

Unless the time for recovery is extended under AS 45.50.237, the rightful transporter or owner of timber property has 90 days from the date the loss is reported to recover the timber property. After 90 days from the date of reporting or upon the expiration of any extension granted under AS 45.50.237, the timber property is considered to be abandoned, no notice is required to be published under AS 45.50.234, and the timber property is presumed to be the property of the state. (§ 2 ch 232 SLA 1976)

**Sec. 45.50.234. Publication of notice of intent to claim abandoned property.** Except as provided in AS 45.50.232, the department shall publish notice of its intent to claim abandoned timber property under AS 45.50.210 — 45.50.325 for not less than 30 days from the date that first notice is published under this section. Notice shall be published once a week for at least three consecutive weeks in a newspaper of general circulation nearest the area where the timber property is located and, if feasible, posted in a centrally located public place within or in close proximity to the area where the timber property is located. (§ 2 ch 232 SLA 1976)

**Sec. 45.50.235. Ownership of unbranded and abandoned timber property.** (a) Timber property which is unbranded or on which a brand is not distinguishable and which is located in a coastal water, lake, river, creek or other waterway of the state or on state owned coastline is presumed to be the property of the state. Timber property which is abandoned property as defined in AS 45.50.230(a)(2) is presumed to be the property of the state 90 days after the period of reporting as required in AS 45.50.232 unless an extension has been granted, or 30 days after the period of notice has expired as provided under AS 45.50.234.

(b) Timber property which becomes state property under the provisions of this section may be sold under terms and conditions established by the director of the division of lands. (§ 4 ch 168 SLA 1970; am § 3 ch 68 SLA 1975; am § 3 ch 232 SLA 1976; am § 5 ch 73 SLA 1978)

**Sec. 45.50.237. Extension of period for recovery of timber property.** The department shall extend the 90-day period for recovery of timber property after reporting specified in AS 45.50.232 if a good faith effort to salvage the timber property is being made by the person requesting the extension. Extensions shall be granted for limited periods only but may be continued until salvage is completed, and guidelines shall be established specifying what constitutes a good faith effort for purposes of extension under regulations adopted by the de-

registered in the name of another person that one brand is not clearly distinguishable from the other. (§ 1 ch 51 SLA 1953; am § 1 ch 191 SLA 1955; am § 1 ch 168 SLA 1970; am § 1 ch 68 SLA 1975)

**Collateral references.** — 52 Am. Jur. 2d, Logs and Timber, §§ 9, 12, 22, 102, 104.

**Sec. 45.50.220. Termination and renewal.** The right to the exclusive use of a registered brand ceases at the end of five years from the date of registration. The brand may be renewed by application before expiration, together with the payment of the prescribed fee. Renewals may be made successively for five-year terms. (§ 2 ch 51 SLA 1953; am § 2 ch 168 SLA 1970; am § 2 ch 68 SLA 1975)

**Sec. 45.50.230. Presumption from display.** (a) Each piece of timber property put or intended to be put in a coastal water, lake, river, creek or other waterway of the state for the purpose of rafting or transporting by floating or towing shall display upon at least one end the registered brand and is presumed

(1) while in the possession and control of the person in whose name the brand is registered, to be the sole property of that person; and

(2) to be "abandoned property" if, 30 days after the time public notice has expired as provided under AS 45.50.234 or 90 days from the date of reporting required under AS 45.50.232 or from the date of expiration of any extended recovery period under AS 45.50.237, it is not in the possession and control of the owner or rightful transporter and is

(A) adrift in the water of the state,

(B) stranded on the beaches, marshes, tide or shoreland of the water of the state, or

(C) partially or wholly submerged in the water of the state.

(b) *[Repealed, § 7 ch 232 SLA 1976.]* (§ 3 ch 51 SLA 1953; am § 2 ch 191 SLA 1955; am § 3 ch 168 SLA 1970; am §§ 1, 7 ch 232 SLA 1976)

**Sec. 45.50.232. Reporting of lost logs to the department.** The owner or rightful transporter of timber property not in the possession or control of the owner or transporter, which has become adrift in the water of the state, stranded on the beaches, marshes, tide or shoreland of the water of the state, or partially or wholly submerged in the water of the state, shall report the loss of the timber property within 15 days from the time the loss is discovered to the department, indicating the probable date lost, the place lost, if known, the probable area of recovery and any other information which the department may require.

# A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 68 ( )

Page 3, lines 21 - 23:

Delete all material and insert:

"(e) The provisions of this section do not apply to

(1) annual harvests of 20 or fewer cords of firewood by a person who harvests the firewood from 10 or fewer acres of timber the person owns; or

(2) the removal of timber from state land by individuals under a personal use timber permit issued by the commissioner."

6-0355E
Bradley
1/24/89

Original sponsors: Coghill and Kerttula

IN THE SENATE

CS FOR SENATE BILL NO. 68 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

. XTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to timber, establishing civil remedies for trespass by cutting or injuring timber, regulating commercial harvest of firewood, and permitting personal, noncommercial use of state-owned unbranded and abandoned timber."

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

* Section 1. AS 09.45.730 is repealed and reenacted to read:

Sec. 09.45.730. TRESPASS BY CUTTING OR INJURING TIMBER. (a) A person who cuts down, injures, or carries off timber without lawful authority is liable for treble the amount of damages that may be assessed in a civil action

(1) to the owner of the timber for destruction or removal of the timber;

(2) to the state for destruction or removal of the timber from state land;

(3) to a municipality for destruction or removal of the timber from the land of the municipality.

(b) Notwithstanding (a) of this section, the person who cuts down, injures, or carries off timber without lawful authority is liable for actual damages to the owner of the timber specified in (a) of this section if

(1) the trespass was unintentional or involuntary;

(2) the defendant had probable cause to believe that the timber that is the subject of the trespass was the defendant's own or

that of the person in whose service or by whose direction the act was done; or

(3) the timber was taken from unenclosed woodland for the purpose of repairing a public highway or bridge that is constructed on the land or adjoining it.

(c) In this section, "timber" means

(1) live trees and shrubs; and

(2) trees and shrubs grown on the land that are dead from any cause and remain on the land.

* Sec. 2. AS 41.15 is amended by adding new sections to article 5 to read:

Sec. 41.15.910. COMMERCIAL FIREWOOD HARVEST PERMITS. (a) A person may not harvest firewood without first obtaining a commercial firewood harvest permit from the commissioner. The commissioner shall make permits available by mail.

(b) The commissioner shall issue a permit to a person who provides the commissioner with adequate proof of the right to harvest the particular timber. The commissioner may accept as proof of the right to harvest

(1) a harvest permit, contract, or other legal instrument issued by the owner of the timber from which the firewood will be harvested or, if the firewood will be harvested from public land, issued by a municipality or a state or federal agency that specifies the

(A) date of execution of the legal instrument and the date of its termination, if any;

(B) name and address of the permittee or contractor who will harvest the firewood;

(C) location, by legal description or legal address,

where the firewood will be harvested; and

(D) estimated amount, volume, and species of the firewood to be harvested from each location;

(2) a bill of sale showing title to the firewood that specifies the

(A) date of execution of the bill of sale;

(B) name and address of the person who sold the firewood to the permit applicant;

(C) name and address of the permit applicant;

(D) amount, volume, and species of the firewood transferred by the bill of sale; and

(E) location, by legal description or legal address, from which the firewood will be harvested; or

(3) a certificate of registration issued as evidence of compliance with AS 45.50.210 - 45.50.325.

(c) The commissioner may include in the permit the terms and conditions that the commissioner believes to be necessary to carry out this section.

(d) A permit is valid for one year and permits the harvest of timber only from the areas described in the permit.

(e) The provisions of this section do not apply to annual harvests of 20 or fewer cords of firewood by a person who harvests the firewood from 10 or fewer acres of timber the person owns.

(f) The commissioner may adopt regulations to implement and enforce this section.

Sec. 41.15.915. CIVIL PENALTY FOR SALES WITHOUT PERMIT. In addition to damages under AS 09.45.730, a person who harvests firewood in violation of AS 41.15.910, who violates a term or condition of the permit issued under AS 41.15.910, or who violates a regulation adopted

under AS 41.15.910 is liable to the owner of the timber in a civil action for the reasonable costs incurred by the owner in the detection, investigation, and attempted correction of the violation, including reasonable court costs and attorney's fees.

Sec. 41.15.920. HARVESTS WITHOUT PERMIT MADE A VIOLATION. A person who knowingly harvests firewood in violation of AS 41.15.910 or who knowingly violates a term or condition of the permit issued under AS 41.15.910 or a regulation adopted under AS 41.15.910 is guilty of a violation.

Sec. 41.15.925. INJUNCTIONS. (a) The superior court has jurisdiction to enjoin a violation of AS 41.15.910 - 41.15.930, a regulation adopted under AS 41.15.910 - 41.15.930, or a permit, or a term or condition of a permit issued under AS 41.15.910 - 41.15.930.

(b) In an action brought under this section, temporary or preliminary relief may be obtained upon a showing of an imminent threat of continued violation and probable success on the merits, without the necessity of demonstrating irreparable physical harm.

Sec. 41.15.930. DEFINITIONS. In AS 41.15.910 - 41.15.930

(1) "commissioner" means the commissioner of natural resources;

(2) "firewood" means natural logs or portions of natural logs suitable for use as a solid fuel that have not been processed beyond cutting to length and splitting;

(3) "permit" means a commercial firewood harvest permit authorized by AS 41.15.910.

* Sec. 3. AS 45.50.235(b) is amended to read:

(b) Timber property <u>that</u> [WHICH] becomes state property under the provisions of <u>(a) of</u> this section may be

<u>(1)</u> sold under terms and conditions established by the

director of the division of lands; or

(2) recovered, without a permit, by any person for personal, noncommercial use.

# SB 70

Offered: 2/8/89
Referred: Judiciary and Finance

Original sponsors: Uehling, Pearce, and Sturgulewski

Perry Lautenbach
6-0231E

IN THE SENATE

BY THE HEALTH, EDUCATION, AND SOCIAL SERVICES COMMITTEE

CS FOR SENATE BILL NO. 70 ~~(HESS)~~ (JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to certain testing in contested paternity actions; amending Rule 35, Alaska Rules of Civil Procedure; and providing for an effective date."

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

* Section 1. AS 25.20.050 is amended by adding new subsections to read:

(e) On request of a party in a contested paternity action to which the state is a party, the court shall order the mother, the child, and the putative parent to submit to a blood test, tissue-type test, protein comparison, or other scientifically accepted procedure designed to determine the statistical probability that the putative parent is a legal parent of the child in question, except that the order may not apply to a person who has been found under applicable federal regulations to have good cause not to cooperate.

(f) If the child support enforcement agency is a party in a contested paternity action, the agency shall request the court to order the tests and procedures described in (e) of this section. The agency may recover the costs of tests as a cost of the action, except that no costs shall be recovered from a person who is a recipient of aid under AS 47.25.310 - 47.25.420 (Aid to Families with Dependent Children). Costs recovered under this subsection may not conflict with requirements of applicable federal regulations.

* Sec. 2. AS 47.23.040(a) is amended to read:

(a) The agency shall appear on behalf of minor children or their

mother or legal custodian or the state and initiate efforts to have the paternity of children born out of wedlock determined by the court on voluntary application by the mother or other legal custodian. When the agency is a party in a contested paternity action, it shall request and pay for tests and procedures under AS 25.20.050(f). The agency may recover the costs of the tests as a cost of the action, except that no costs shall be recovered from a person who is a recipient of aid under AS 47.25.310 - 47.25.420 (Aid to Families with Dependent Children). Cost recoveries authorized under this subsection may not conflict with requirements of applicable federal regulations.

* Sec. 3. AS 25.20.050(e), enacted by sec. 1 of this Act, has the effect of amending Civil Rule 35 by requiring a court in a contested paternity action to order certain genetic tests on the request of a party.

* Sec. 4. This Act takes effect November 1, 1989.

# Senator Rick Uehling

Downtown, Elmendorf, Northeast Anchorage

Co-Chairman, Senate Finance Committee
International Trade & Tourism Committee
State Affairs Committee


MEMORANDUM

TO: Senator Jan Faiks
Chair, Senate Judiciary Committee

FROM: Senator Rick Uehling

DATE: February 8, 1989

RE: CS SB 70: "An Act relating to certain testing in contested paternity actions; amending Rule 35, Alaska Rules of Civil Procedure

I have asked staff to provide the following background and analysis to CSSB 70, which has been referred to the Judiciary Committee. At this time, I respectfully request that this bill be scheduled for hearing.

CS SB 70 is one of a group of companion bills which address new federal requirements mandated by the federal welfare reform act signed into law in October 1988.

CS SB 70 has the effect of amending a court rule by requiring a court in a contested paternity action to order certain genetic tests on the request of a party.

The Committee substitute which passed out of the Senate HESS Committee contains two changes which were worked out between my office and the Department of Revenue. We feel that the changes strengthen the bill. The first change occurs in Section 1 of the bill and serves to tighten up the language to protect the rights of the putative father.

The second changes eliminates the fee structure for recovering the cost of the testing, and substitutes fee recovery as a function of the civil recovery process. The net result of this change is to retain the cost recovery function of the department, but eliminate the fiscal note for the department by eliminating the need for billing clerks.


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# Senator Rick Uehling

Downtown, Elmendorf, Northeast Anchorage

Co-Chairman, Senate Finance Committee
International Trade & Tourism Committee
State Affairs Committee


## Bill Summary: CS SB 70

CS SB 70 has the effect of amending Civil rule 35 by requiring a court in a contested paternity action to order certain genetic tests on the request of a party.

CS SB 70 requires the Child Support Enforcement Agency to pay for tests and procedures which it orders. CS SB 70 also describes the process to be used by the Child Support Enforcement Agency to recover the costs for the tests.

The federal Act provides for a 90/10 federal/state match to pay for the test costs which Child Support Enforcement incurs as a result of this legislation which are not recoverable.

2/8/89


P.O. BOX V, JUNEAU, AK 99811 (907) 465-4821 • 3111 ST. #515, ANCHORAGE, AK 99503 (907) 561-7613

# Senator Rick Uehling

Downtown, Elmendorf, Northeast Anchorage

Co-Chairman, Senate Finance Committee
International Trade & Tourism Committee
State Affairs Committee


## SECTIONAL ANALYSIS CS SB 70

Following is a sectional analysis of CS SB 70, a bill relating to the genetic testing requirements of the Federal Family Support Act of 1988.

Sec. 1 arises from section 111(b) of the federal Act. That section requires the state "to require the child and all interested parties in a contested paternity case to submit to genetic tests upon request of any such party...(except in cases where the individual involved has been found under section 402(a)(26)(B) to have good cause for refusing to cooperate)." AS 25.20.050(e) implements this requirement. AS 25.20.050(f) directs the CSEA to be the requesting party when genetic testing is at issue. This means that CSEA will bear the costs of the tests because court rules place the costs on the requesting party. However, the federal Act allows the state to recover the costs of the test. AS 25.20.050(f) specifies that the agency may recover the costs of the paternity tests through the civil recovery process, except that no person receiving AFDC can be required to pay for the tests.

Sec. 2 makes parallel amendments in the CSEA statutes.

Sec. 3 notes that a court rule is affected by this bill. Genetic testing is currently at the discretion of the court on a showing of good cause. This bill would make the testing mandatory on the request of a party.

Sec. 4 gives the bill the effective date required by the federal Act.


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# Chapter 20. Parent and Child.



## Sec. 25.20.010. Age of majority.

NOTES TO DECISIONS

Quoted in Dowling v. Dowling, Sup. Ct. Op. No. 2809 (File No. 6454), 679 P.2d 480 (1984).

Stated in Lawrence v. Lawrence, Sup. Ct. Op. No. 3044 (File No. S-652), 718 P.2d 142 (1986).

## Sec. 25.20.030. Duty of parent and child to maintain each other.

NOTES TO DECISIONS

A parent is obligated both by statute and at common law to support his or her children, even in the absence of a court order of support. Matthews v. Matthews, Sup. Ct. Op. No. 3206 (File No. S-1693), 739 P.2d 1298 (1987).

A parent's duty of support encompasses a duty to reimburse other persons who provide the support the parent owes, belongs to whomever supported the children, and is simply an action on a debt. However, when a custodial parent seeks a modification of a divorce decree which neglected to address either child custody or child support and also seeks reimbursement for past child support expenditures, he or she may join the claims, and bring both by motion in the original divorce action. Matthews v. Matthews, Sup. Ct. Op. No. 3206 (File No. S-1693), 739 P.2d 1298 (1987).

Applicability of criminal nonsupport statute. — The criminal nonsupport statute, AS 11.51.120, does not extend beyond those individuals expressly made legally responsible for the support of a child by this section and AS 47.25.230; it does not apply to stepparents regardless of their actual relationship to the stepchildren. Olp v. State, Ct. App. Op. No. 719 (File No. A-1812), 738 P.2d 1117 (1987).

Quoted in Dowling v. Dowling, Sup. Ct. Op. No. 2809 (File No. 6454), 679 P.2d 480 (1984).

## Sec. 25.20.050. Legitimation by subsequent marriage, acknowledgment in writing or adjudication.

(a) A child born out of wedlock is legitimated and considered the heir of the putative parent when (1) the putative parent subsequently marries the undisputed parent of the child; (2) the putative parent acknowledges, in writing, being a parent of the child; or (3) the putative parent is judged by a superior court, upon sufficient evidence, to be a parent of the child. Acceptable evidence includes, but is not limited to, evidence that the putative parent's conduct and bearing toward the child, either by word or act, indicates that the child is the child of the putative parent. That conduct may be construed by the court to constitute evidence of parentage. When indefinite, ambiguous, or uncertain terms are used, the court may use extrinsic evidence to show the putative parent's intent.

(b) The Bureau of Vital Statistics, as custodian of the original certificates of birth of all persons born in the state, is designated as the

depository for such acknowledgment and adjudication. The acknowledgment or adjudication shall be forwarded to the bureau in accordance with appropriate regulations of the bureau, and shall be noted on and filed with the corresponding original certificate of birth.

(c) In case of the Alaska birth of any child out of wedlock and the legitimation of the child in accordance with this section, at the written request of the parents, or either of them or of the legal guardian, or of the person when of legal age, the Bureau of Vital Statistics shall prepare and place on file a substitute birth certificate, in accordance with the laws and regulations of the bureau pertaining to new certificates of this type.

(d) The results of a blood test, tissue-type test, protein comparison, or other scientifically accepted procedure shall be admitted and weighed in conjunction with other evidence in determining the statistical probability that the putative parent is a legal parent of the child in question. However, a scientifically accepted procedure that establishes a probability of parentage at 95 percent or higher creates a presumption of parentage that may be rebutted only by clear and convincing evidence. (§ 21-3-3 ACLA 1949; am § 1 ch 57 SLA 1951; am § 1 ch 115 SLA 1957; am § 1 ch 19 SLA 1960; am §§ 3, 4 ch 144 SLA 1984)

**Effect of amendments.** — The 1984 amendment in subsection (a), reworded subsection (a) to provide sex-neutral terminology and added subsection (d).

**Opinions of attorney general.** — On p. 23 of the main pamphlet, the cite for the note beginning "Necessarily involved" should be 1962 Op. Att'y Gen. No. 13.

NOTES TO DECISIONS

**Establishment-preclusion order question of paternity.** — The sup court had discretion to enter an estoppel-preclusion order on the question of paternity, where the alleged father ...ly violated the court's order by providing false evidence. Dade v. State, Child Support Enforcement Div. ex rel. Lovett, Sup. Ct. Op. No. 3126 (File No. S-1194), P.2d (1986).

## Sec. 25.20.060. Custody ... child.

NOTE ...ECISIONS

**Joint custody.** — The mere existence of a custody agreement is not sufficient evidence of a couple's ability to cooperate to warrant joint custody. Wolf v. Wolf, Sup. Ct. Op. No. 3219 (File No. S-1707), P.2d (1987).

There was ample evidence in the record to support a trial court's finding that the parties could not cooperate to the extent necessary to make a joint custody arrangement work, despite the father's argument, that both his and his wife's joint concern for their son's developmental ...oblems, a court-ordered pretrial custody ...angement, and an earlier custody ...ement evinced their ability to cooperate for the benefit of the children. Wolf v. Wo... Sup. Ct. Op. No. 3219 (File No. S-170...), P.2d (1987).

Quoted in S.N.E. v. R.L.B., Sup. Ct. Op. No. 2940 (File No. S-426), 699 P.2d 875 (1985); McClain v. McClain, Sup. Ct. Op. No. 3031 (File No. S-900), 716 P.2d 381 (1986); McDanold v. McDanold, Sup. Ct. Op. No. 3058 (File No. S-915), 718 P.2d 467 (1986).

**Collateral references.** — Responsibility of noncustodial divorced parent to pay for, or contribute to, costs of child's college education. 99 ALR3d 322.

**Sec. 25.20.045. Legitimacy of children conceived by artificial insemination.** A child, born to a married woman by means of artificial insemination performed by a licensed physician and consented to in writing by both spouses, is considered for all purposes the natural and legitimate child of both spouses. (§ 1 ch 122 SLA 1975)

**Revisor's notes.** — Formerly AS 20.20.010. Renumbered in 1982.

**Collateral references.** — 10 Am.Jur.2d, Bastards, § 1; 59 Am.Jur.2d, Parent and Child, § 2.

2 C.J.S., Adoption of Persons, § 2.

Legal consequences of human artificial insemination, 25 ALR3d 1103.

**Sec. 25.20.050. Legitimation by subsequent marriage, acknowledgment in writing or adjudication.** (a) A child born out of wedlock is legitimated and considered the heir of the father who (1) subsequently marries the mother of the child; (2) acknowledges in writing paternity of the child; or (3) is judged to be the father by a superior court, upon sufficient evidence. Acceptable evidence includes, but is not limited to, evidence that the alleged father's conduct and bearing toward the child, either by word or act, indicates that the child is the child of the alleged father. That conduct may be construed by the court to constitute evidence of paternity. Extrinsic evidence may be used by the court to show intent when indefinite, ambiguous, or uncertain terms are used.

(b) The Bureau of Vital Statistics, as custodian of the original certificates of birth of all persons born in the state, is designated as the depository for such acknowledgment and adjudication. The acknowledgment or adjudication shall be forwarded to the bureau in accordance with appropriate regulations of the bureau, and shall be noted on and filed with the corresponding original certificate of birth.

(c) In case of the Alaska birth of any child out of wedlock and the legitimation of the child in accordance with this section, at the written request of the parents, or either of them or of the legal guardian, or of the person when of legal age, the Bureau of Vital Statistics shall prepare and place on file a substitute birth certificate, in accordance with the laws and regulations of the bureau pertaining to new certificates of this type. (§ 21-3-3 ACLA 1949; am § 1 ch 57 SLA 1951; am § 1 ch 115 SLA 1957; am § 1 ch 19 SLA 1960)

**Opinions of attorney general.** — This section allows a substitute birth certificate when there is legitimization of the child by intermarriage (providing proof is offered that the marriage was between the parents of the child), as well as by court adjudication alone. 1959 Op. Att'y Gen., No. 29.

Only the third method of legitimation is specifically vested in the court. 1962 Op. Att'y Gen., No. 13.

By implication, the Bureau of Vital Sta-

tistics has the power and duty to make its own determination of the fulfillment of the first two conditions of legitimation. 1962 Op. Att'y Gen., No. 13.

Necessarily involved in legitimation is the administrative determination of illegitimacy at the time an original birth certificate is filed. 1962 Op. Att'y Gen., No. 3.

For application of presumption of legitimacy to validity of original birth certificate, see 1962 Op. Att'y Gen., No. 13.

For right of child to legitimation procedures, see 1962 Op. Att'y Gen. No. 13.

An admission under oath or in writing of paternity, in a foreign action, could be recognized as satisfying the requirement of subdivision (a) (2) of this section that a father acknowledge his paternity of the child as a method of legitimation 1962 Op. Att'y Gen., No. 13.

The bureau should recognize foreign marriages as sufficient under subdivision (a)(1) of this section to establish a subsequent intermarriage as a basis for legitimation. 1962 Op. Att'y Gen., No. 13.

For suggested standards of proof to establish that the man subsequently marrying a mother is the father of her child, for purposes of issuing a substitute birth certificate legitimating the child under subdivision (a) (1), see 1962 Op. Att'y Gen., No. 13.

For discussion of what constitutes a sufficient written acknowledgment of paternity under subdivision (a)(2), see 1962 Op. Att'y Gen., No. 13.

Erroneous entries in the original birth certificates of children born to unwed mothers naming the father are significant to show a mother's acknowledgment of paternity corroborating the effect of subsequent intermarriage or written acknowledgment of paternity by the father, if it can be established that the entry was made by the mother or at her request, but such entries have no other evidentiary value. 1962 Op. Att'y Gen., No. 13.

Legitimation may be effected by the bureau even though the acknowledged father is married to another woman, under the general policy of the statute. 1962 Op. Att'y Gen., No. 13.

## NOTES TO DECISIONS

**When acknowledgment of paternity can be filed.** — Under the existing provisions of subsection (a) of this section and AS 20.15.040(a) [now AS 25.23.040(a)], an acknowledgment of paternity can be filed at any time before the entry of a decree of adoption. In re L.A.H., Sup. Ct. Op. No. 1868 (File No. 3853), 597 P.2d 513 (1979).

The filing of an adoption petition does not preclude the biological father from thereafter filing a written acknowledgment of his paternity of the subject child, thereby legitimizing him. In re L.A.H., Sup. Ct. Op. No. 1868 (File No. 3853), 597 P.2d 513 (1979).

Interpretation of the relevant statutes precludes additional consideration of the best interests of the child in determining whether a father may legitimize the adoptee during the pendency of an adoption proceeding and so foreclose adoption absent his consent. In re L.A.H., Sup. Ct. Op. No. 1868 (File No. 3853), 597 P.2d 513 (1979).

Applied in S.L.W. v. Alaska Workmen's Comp. Bd., Sup. Ct. Op. No. 736 (File No. 1333), 490 P.2d 42 (1971).

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**Collateral references.** — 10 Am. Jur., Trials, pp. 653-757.

10 Am. Jur. 2d, Bastards, §§ 45-59, 74-132.

Proofs, generally, 2 Am. Jur. POF, pp. 445-453, 607-624; 14 Am. Jur. POF2d pp. 727-753; 19 Am. Jur. POF2d, pp. 1-44.

Legitimation by subsequent marriage, 27 ALR 1121.

Paternity, legitimacy, or legitimation as determined in action for divorce, separation, or annulment upon vacating or opening decree, 65 ALR2d 1390.

Race or color of child as admissible in evidence on issue of legitimacy or paternity, or as basis of rebuttal or exception to presumption of legitimacy, 32 ALR3d 1303.

Presumption of legitimacy of child born after annulment, divorce, or separation, 46 ALR3d 158.

**Effect of amendments.** — The 1982 amendment added subsection (b). The amendment also, in present subsection (a), substituted the language beginning "subject to AS 47.23.025 and to federal law" and e... "arrearages of support that shall" for "a uniform schedule of fees which may" and "upon notice if child support payments" for "if the child support payments" in subparagraph (2)(C), and added paragraphs (6) and (7).

**Sec. 47.23.025. Rates of penalty and interest.** A penalty imposed under AS 47.23.020(a)(2)(C) may not be at a rate that exceeds the rate of interest imposed on delinquent taxes under AS 43.05.225. The rate of interest imposed under AS 47.23.020(a)(2)(C) ... ll equal the rate imposed under AS 43.05.225 or a lesser rate that is the maximum rate of interest permitted to be imposed under federal law. (§ 6 ch 118 SLA 1982)

**Sec. 47.23.030. Establishment of fund.** There is established in the state general fund a continuing, revolving, reserve account to receive collections and make the authorized disbursements of the agency. (§ 1 ch 251 SLA 1976)

**Sec. 47.23.040. Determination of paternity.** (a) The agency shall appear on behalf of minor children or their mother or legal custodian or the state and initiate efforts to have the paternity of children born out of wedlock determined by the court on voluntary application by the mother or other legal custodian.

(b) The agency may not attempt to establish paternity in any case involving incest or forcible rape, when legal proceedings for adoption are pending, or when it would not be in the best interests of the children or the state. (§ 1 ch 251 SLA 1976; am § 18 ch 126 SLA 1977)

NOTES TO DECISIONS

**Appointment of counsel for indigent defendant.** — In light of the fact that paternity suits, in effect, are brought by the state, the significance of the parent-child relationship involved and the peculiar problems presented in such a proceeding, due process requires the appointment of counsel for an indigent defendant. Reynolds v. Kimmons, Sup. Ct. Op. No. 1505 (File No. 3305), 569 P.2d 799 (1977).

**Sec. 47.23.045. Determination of support obligation.** The agency may appear in an action seeking an award of support in behalf of a child owed a duty of support, and may also appear in an action seeking modification of a support order, decree or judgment already entered. Action under this section may be undertaken upon application of an obligee, or at the agency's own discretion if the obligor is liable to the state under AS 47.23.120(a) or (b). (§ 19 ch 126 SLA 1977)

**Sec. 47.23.050. Legal assistance.** The agency shall contract with the Department of Law to provide needed legal services. (§ 1 ch 251 SLA 1976; am § 20 ch 126 SLA 1977)

The dismissal of a complaint for refusal to comply with an order to produce corporate records is not an abuse of discretion where there is support in the record for the finding that the plaintiff willfully refused to obey the discovery order, in that he himself testified that he had made no efforts to produce corporate records during the 30 days following that order, and where he did not make any satisfactory explanation to the court as to the reason that such records had not been produced. Hart v. Wolff, Op. No. 724, 489 P2d 114 (Alaska 1971).

A prima facie case of control of requested records is all that need be established to justify an order to produce such records. Hart v. Wolff, Op. No. 724, 489 P2d 114 (Alaska 1971).

Liberal construction should be given the civil rules governing discovery. Hart v. Wolff, Op. No. 724, 489 P2d 114 (Alaska 1971).

Erroneous admission of deposition testimony was harmless error since the evidence contained in the depositions was cumulative. Fairbanks North Star Borough v. Tundra Tours, Op. No. 3052, 719 P2d 1020 (Alaska 1986).

## Rule 35. Physical and Mental Examination of Persons.

(a) **Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) **Report of Examining Physician.**

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court, on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaing a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

(Adopted by SCO 5 October 9, 1959; amended by SCO 158 effective February 15, 1973)

## Rule 36. Requests for Admission.

(a) **Request for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, o to the request; he may, s Rule 37(c), deny the mat he cannot admit or deny

The party who has req move to determine the su objections. Unless the objection is justified, it sh served. If the court deter not comply with the requi order either that the mat amended answer be serve the orders, determine th request be made at a p designated time prior to tr 37(a) (4) apply to the awa relation to the motion.

(b) **Effect of Admissi** under this rule is conclusi court on motion permits w of the admission. Subject 16 governing amendmen court may permit withdr the presentation of the m subserved thereby and th admission fails to satisfy or amendment will preju action or defense on the made by a party under thi the pending action only a him for any other purpose him in any other proceedi

(Adopted by SCO 5 Octo SCO 98 effective Septemb by SCO 158 effective Febr

Annot

Cases

A request for admissions as t goods and materials by a concessic performance of work and service tract in an action by creditors of goods and materials was directe issues of the case and was within th this rule. Palzer v. Serv-U Meat C 201 (Alaska 1966).

Where amount owed is admitt to request for admissions, party prove that amount admitted incl Molitor v. ATZ Travel, Inc., Op. 1976).

A summary judgment granted failure to make timely responses t be reversed when the plaintiff on defendant's failure to respond an tunity to reply to an alternative b contained in plaintiff's reply men No. 2340, 627 P2d 64[illegible] Alaska 19

Summary judgment may be such facts are dispositive. Riley v. No. 2534, 648 P2d 961 (Alaska 19

Under this standard, the IV-D agency must:

(a) Use appropriate local locate sources such as officials and employees administering public assistance, general assistance, medical assistance, food stamps and social services (whether such individuals are employed by the State or a political subdivision), relatives and friends of the absent parent, current or past employers, the local telephone company, the U.S. Postal Service, financial references, unions, fraternal organizations, and police, parole, and probation records if appropriate;

(b) Establish working relationships with all appropriate local agencies in order to utilize local locate resources effectively;

(c) Use appropriate State agencies and departments, which as a minimum must include those departments which maintain records of public assistance, unemployment insurance, income taxation, driver's licenses, vehicle registration, and criminal records;

(d) Utilize all appropriate State and local locate sources within 60 days of referral of the case pursuant to § 235.70 of this title or application under § 302.33;

(e) Transmit appropriate cases to the Federal PLS to locate absent parents;

(f) Refer cases to the IV-D agency of any other State if there is reasonable belief that the absent parent may be present in such State. The IV-D agency of such other State shall follow the procedures prescribed in paragraphs (a) through (d) of this section for such cases.

[43 FR 33249, July 31, 1978, as amended at 50 FR 19650, May 9, 1985]

### § 303.4 Establishment of support obligations.

For all cases referred to the IV-D agency or applying under § 302.33 of this chapter, the IV-D Agency must:

(a) When necessary, establish paternity pursuant to the standards of § 303.5;

(b) Utilize appropriate State statutes and legal processes in establishing the support obligation pursuant to § 302.50 of this chapter.

(c) Review the support obligation periodically and whenever the IV-D agency becomes aware of changes in the factors which determine the amount of the support obligation.

[40 FR 27164, June 26, 1975, as amended at 50 FR 19650, May 9, 1985]

### § 303.5 Establishment of paternity.

(a) For all cases referred to the IV-D agency or applying under § 302.33 of this chapter in which paternity has not yet been established, the IV-D agency must:

(1) Attempt to establish paternity by court order or other legal process established under State law; or

(2) Establish paternity by acknowledgment if under the State law such acknowledgment has the same legal effect as court-ordered paternity, including the right to benefits other than child support.

(b) The IV-D agency need not attempt to establish paternity in any case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending, if, in the opinion of the IV-D agency, it would not be in the best interests of the child to establish paternity.

(c) The IV-D agency shall identify laboratories within the State which perform legally and medically acceptable tests, including blood tests, which tend to identify the father or exclude the alleged father from paternity. A list of such laboratories shall be available to appropriate courts and law enforcement officials, and to the public upon request.

[40 FR 27164, June 26, 1975, as amended at 50 FR 19650, May 9, 1985]

### § 303.6 Enforcement of support obligations.

For all cases under the State plan in which the obligation to support and the amount of the obligation have been established, the IV-D agency must maintain an effective system for identifying, within 30 days, those cases in which there is a failure to comply with the support obligation and to contact such delinquent individuals as soon as possible in order to enforce the obligation and obtain the current support obligation and any arrearages.





Such attempts to collect support must include the institution of the following procedures as applicable and necessary:

(a) Contempt proceedings to enforce an extant court order;

(b) Garnishment or similar proceedings if the State's statutes and constitution permit such a procedure and the individual can be brought under the jurisdiction of the courts of the State;

(c) Proceedings to attach real or personal property if the State's law provides for such a procedure and the individual is subject to such procedure;

(d) Any other collection or enforcement procedure described in the State plan pursuant to § 302.17 of this chapter;

(e) Applications to utilize the courts of the United States pursuant to § 303.73 of this chapter, and proceedings to enforce an order in the courts of the United States if such application is certified; and,

(f) Applications for collection of the delinquent support obligation by the Secretary of the Treasury pursuant to § 302.71 of this chapter.

[40 FR 27164, June 26, 1975, as amended at 47 FR 26719, June 8, 1982; 47 FR 57282, Dec. 23, 1982]

### § 303.7 Cooperation with other States.

(a) For all cases referred to the IV-D agency under the State plan of another State, the IV-D agency must assist the other State in locating an absent parent, establishing paternity, or securing support for a child or children and for the spouse (or former spouse) of the absent parent with whom the child or children are living in the other State. Under this standard, the IV-D agency must:

(1) When necessary, locate the putative father or absent parent utilizing the standards prescribed in § 303.3;

(2) When necessary, establish paternity or assist the other State in establishing paternity;

(3) Process and enforce all court orders referred by another State, whether pursuant to the Uniform Reciprocal Enforcement of Support Act or other legal processes. The IV-D agency shall utilize the same remedies normally applied to its own cases;

(4) Collect any support payments from the absent parent and forward them to the State to whom they are owed; and,

(5) Inform the State which initiated the action of the status of the case periodically and on request.

(b) For all cases referred for securing support by the IV-D agency under the State plan to the IV-D agency of another State, the IV-D agency must provide the IV-D agency of the other State sufficient information to act on the case, including but not limited to the following:

(1) Whether the case involves a recipient of aid under the State's title IV-A or IV-E plan;

(2) The amount of the current assistance payment, if any;

(3) Notice of any termination of eligibility for assistance; and

(4) Any other information prescribed by instructions of the Office.

(c) For all cases referred by the IV-D agency under the State plan to the IV-D agency of another State which require location activities, the IV-D agency shall provide sufficient information to assist the IV-D agency of the other State, such as the absent parent's social security account number and other identifying information to the extent it is available.

[40 FR 27164, June 26, 1975, as amended at 47 FR 57282, Dec. 23, 1982; 50 FR 19650, May 9, 1985]

### § 303.10 Procedures for case assessment and prioritization.

(a) The IV-D agency may implement a case assessment and prioritization system statewide or in a particular political subdivision of the State to manage its caseload.

(b) In implementing a case assessment and prioritization system, the IV-D agency must:

(1) Develop written procedures for the evaluation and prioritization of cases upon receipt and upon becoming aware of changes in case circumstances;

(2) Include all of its cases in the system, incuding cases referred from the title the IV-A agency under § 235.70 of this title, cases in which applications for services are received

**§ 302.30 Publicizing the availability of support enforcement services.**

Effective October 1, 1985, the State plan shall provide that the State will publicize regularly and frequently the availability of support enforcement services under the plan through public service announcements. Publicity must include information on any application fees which may be imposed for such services and a telephone number or postal address where further information may be obtained.

(Approved by the Office of Management and Budget under control number 0960-0385)

[50 FR 19647, May 9, 1985, as amended at 51 FR 37731, Oct. 24, 1986]

**§ 302.31 Establishing paternity and securing support.**

The State plan shall provide that:

(a) The IV-D agency will undertake:

(1) In the case of a child born out of wedlock with respect to whom an assignment under § 232.11 of this title or section 471(a)(17) of the Act is effective, to establish the paternity of such child; and

(2) In the case of any individual with respect to whom an assignment under § 232.11 of this title or section 471(a)(17) of the Act is effective, to secure support for a child or children from any person who is legally liable for such support, using State laws and reciprocal arrangements adopted with other States when appropriate. Effective October 1, 1985, this includes securing support for a spouse or former spouse who is living with the child or children, but only if a support obligation has been established for that spouse and the child support obligation is being enforced under the title IV-D State plan.

(3) When assigned support payments are received and retained by an AFDC recipient, to proceed as follows:

(i) In States that implement the IV-A State plan requirements to count retained support payments as income under 45 CFR 233.20(a)(3)(v), the IV-D agency shall notify the IV-A agency whenever it discovers that directly received payments are being, or have been, retained; or

(ii) In States that do not implement the IV-A State plan requirements to count retained support payments as income to meet need, the IV-D agency shall recover the retained support payments. This recovery by the IV-D agency shall be carried out in accordance with the standards for program operations provided in § 303.80 of this chapter.

(b) Upon receiving notice from the IV-A or IV-E agency that there has been a claim of good cause under § 232.40 of this title, the IV-D agency will suspend all activities to establish paternity or secure support until notified of a final determination by the IV-A or IV-E agency.

(c) The IV-D agency will not undertake to establish paternity or secure support in any case for which it has received notice from the IV-A or IV-E agency that there has been a finding of good cause pursuant to §§ 232.40 through 232.49 of this title unless there has been a determination by the State or local IV-A or IV-E agency that support enforcement may proceed without the participation of the caretaker or other relative. If there has been such a determination, the IV-D agency will undertake to establish paternity or secure support but may not involve the caretaker or other relative in such undertaking.

(Approved by the Office of Management and Budget under control number 0960-0385)

[50 FR 19647, May 9, 1985, as amended at 51 FR 25526, July 15, 1986; 51 FR 37731, Oct. 24, 1986]

**§ 302.32 Support payments to the IV-D agency.**

The State plan shall provide that:

(a) In any case in which support payments are collected for a recipient of aid under the State's title IV-A plan with respect to whom an assignment under § 232.11 is effective, such payments shall be made to the IV-D agency and shall not be paid directly to the family.

(b) As soon as possible but not later than 30 days after the end of a month, the IV-D agency will inform the agency administering the State's title IV-A plan of the amount of the collection which represents payment on the required support obligation for that





month as determined in § 302.51(a). Upon being informed of this amount, the IV-A agency will determine if such amount is sufficient to make the family ineligible for an assistance payment pursuant to the State's IV-A plan (See § 232.20 of Chapter II of this title). If such amount is sufficient to make the family ineligible for an assistance payment, the IV-A agency will notify the IV-D agency and the IV-D agency will distribute the amount collected pursuant to § 302.51 of this part. The IV-D agency will notify the family that it will continue to provide services pursuant to § 302.51(e)(1) of this part.

(c) If the IV-A agency determines that the amount of the collection which represents payment on the required support obligation for the month does not make the family ineligible for an assistance payment, or if a hearing is requested pursuant to § 205.10 of this title, the IV-A agency will notify the IV-D agency of such fact and the IV-D agency will distribute such amount pursuant to § 302.51 of this part.

(d) To the extent any amount collected in a month includes payment on required support obligations for past months, that portion of such amount will be distributed by the IV-D agency pursuant to § 302.51(b) (4) and (5) of this part.

(e) Support collected in a month after any month in which the support collected makes the family ineligible for an assistance payment (pursuant to § 232.20 of this title) but prior to or in the month in which the family receives its last assistance payment, shall be used to reimburse the State for any assistance paid in such months with any excess being paid to the family. This provision will not apply when a hearing is requested pursuant to § 205.10 of this title. In these cases, when the hearing results in a determination that the family was ineligible for an assistance payment, the IV-D agency will determine the amount by which the entire support collection for a month that the family would have received pursuant to paragraph (b) of this section exceeds the amount the family actually received for a month as an assistance payment and pursuant to § 302.51. Such excess shall be paid to the family. If the family is determined to be eligible, distribution will continue to be made pursuant to § 302.51.

(Approved by the Office of Management and Budget under control number 0960-0385)

[40 FR 27159, June 26, 1975, as amended at 47 FR 57281, Dec. 23, 1982; 49 FR 22289, May 29, 1984; 50 FR 19048, May 9, 1985; 51 FR 37731, Oct. 24, 1986]

**§ 302.33 Individuals not otherwise eligible for paternity and support services.**

(a) *Availability of services.* The State plan must provide that the support collection or paternity determination services established under the plan shall be made available to any individual not receiving assistance under the Aid to Families with Dependent Children (AFDC) program who files an application for the services with the IV-D agency. In an interstate case, only the initiating State may require an application under this section.

(b) *Definitions.* For purposes of this section:

"Applicant's income" means the disposable income available for the applicant's use under State law.

(c) *Application fee.* (1) Until October 1, 1985, the State plan may provide for an application fee to be charged each individual who applies for services under this section. If the State elects to charge a fee, the State plan shall specify either:

(i) A flat dollar amount not to exceed $25 to be charged each applicant; or

(ii) A fee schedule to be used to determine the fee to be charged each applicant. Such fee schedule will be based on each applicant's income and will be designed so as not to discourage the application for such services by those most in need of them.

(2) Beginning October 1, 1985, the State plan must provide that an application fee will be charged for each individual who applies for services under this section. Under this

(i) The State shall collect the application fee from the individual applying for IV-D services or pay the application fee out of State funds.

flect the value of the services rendered, or the amount of time given to the agency.

[34 FR 1319, Jan. 28, 1969]

§ 225.2 State plan requirements.

The State plan for financial assistance programs under titles I, X, XIV, or XVI (AABD) of the Social Security Act for Guam, Puerto Rico and the Virgin Islands or for child welfare services under title IV-B of the Act must:

(a) Provide for the training and effective use of subprofessional staff as community service aides through part-time or full-time employment of persons of low income and, where applicable, of recipients and for that purpose will provide for:

(1) Such methods of recruitment and selection as will offer opportunity for full-time or part-time employment of persons of low income and little or no formal education, including employment of young and middle aged adults, older persons, and the physically and mentally disabled, and in the case of a State plan for financial assistance under title I, X, XIV, or XVI (AABD), of recipients: And will provide that such subprofessional positions are subject to merit system requirements, except where special exemption is approved on the basis of a State alternative plan for recruitment and selection among the disadvantaged of persons who have the potential ability for training and job performance to help assure achievement of program objectives;

(2) An administrative staffing plan to include the range of service personnel of which subprofessional staff are an integral part;

(3) A career service plan permitting persons to enter employment at the subprofessional level and, according to their abilities, through work experience, pre-service and in-service training and educational leave with pay, progress to positions of increasing responsibility and reward;

(4) An organized training program, supervision, and supportive services for subprofessional staff; and

(5) Annual progressive expansion of the plan to assure utilization of increasing numbers of subprofessional staff as community service aides, until an appropriate number and proportion of subprofessional staff to professional staff are achieved to make maximum use of subprofessionals in program operation.

(b) Provide for the use of nonpaid or partially paid volunteers in providing services and in assisting any advisory committees established by the State agency and for that purpose provide for:

(1) A position in which rests responsibility for the development, organization, and administration of the volunteer program, and for coordination of the program with related functions;

(2) Methods of recruitment and selection which will assure participation of volunteers of all income levels in planning capacities and service provision;

(3) A program for organized training and supervision of such volunteers;

(4) Meeting the costs incident to volunteer service and assuring that no individual shall be deprived of the opportunity to serve because of the expenses involved in such service; and

(5) Annual progressive expansion of the numbers of volunteers utilized, until the volunteer program is adequate for the achievement of the agency's service goals.

[34 FR 1320, Jan. 28, 1969, as amended at 41 FR 12015, Mar. 23, 1976; 42 FR 60566, Nov. 23, 1977; 45 FR 56686, Aug. 25, 1980; 51 FR 9204, Mar. 18, 1986]

§ 225.3 Federal financial participation.

Under the State plan for financial assistance programs under titles I, X, XIV, XVI (AABD) or for child welfare services under title IV-B of the Act, Federal financial participation in expenditures for the recruitment, selection, training, and employment and other use of subprofessional staff and volunteers is available at the rates and under related conditions established for training, services, and other administrative costs under the respective titles.

[51 FR 9204, Mar. 18, 1986]





## PART 232—SPECIAL PROVISIONS APPLICABLE TO TITLE IV–A OF THE SOCIAL SECURITY ACT



AUTHORITY: Sec. 1102, 49 Stat. 647; 42 U.S.C. 1302.

§ 232.1 Scope.

This part implements provisions of titles IV-A and IV-D of the Social Security Act that are applicable only to the AFDC program and establishes other administrative and fiscal requirements.

(Sec. 1102, Social Security Act, as amended, 49 Stat. 647, as amended; 42 U.S.C. 1302 and Part XXIII of Pub. L. 97-35, 95 Stat. 843)

[47 FR 5674, Feb. 5, 1982]

§ 232.2 Child support program; State plan requirements.

The State plan must specify that the State:

(a) Has in effect a plan approved under Part D of title IV of the Act; and

(b) Operates a child support program in conformity with such plan.

[40 FR 27154, June 26, 1975]

§ 232.11 Assignment of rights to support.

(a) The State plan must provide that:

(1) As a condition of eligibility for assistance, each applicant for or recipient of AFDC shall assign to the State any rights to support from any other person as such applicant or recipient may have:

(i) In his own behalf or in behalf of any other family member for whom the applicant or recipient is applying for or receiving assistance; and

(ii) Which have accrued at the time such assignment is executed.

(2) If the relative with whom a child is living fails to comply with the requirements of paragraph (a)(1), (2), or (3) of this section, such relative shall be denied eligibility without regard to other eligibility factors.

(3) If the relative with whom a child is living is found to be ineligible for assistance because of failure to comply with the requirements of paragraph (a)(1), (2), or (3) of this section, any aid for which such child is eligible (determined without regard to the needs of the ineligible relative) will be provided in the form of protective payments as described in § 234.60 of this chapter.

(4) For new applicants, the requirements of paragraph (a) of this section shall be effective August 1, 1975; and for current recipients, it shall be effective as determined by the State agency but not later than the time of the next redetermination of eligibility required by § 206.10(a)(9) of this chapter and in any event not later than February 1, 1976.

(b) An assignment by operation of State law which is substantially identical to the requirements of paragraph (a)(1) may be utilized in lieu of the assignment described in that paragraph.

(c) If there is a failure to execute an assignment pursuant to this section, the State may attempt to establish paternity and collect child support pursuant to appropriate State statutes and regulations.

[40 FR 27154, June 26, 1975, as amended at 40 FR 52376, Nov. 10, 1975]



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§ 232.12 Cooperation in obtaining support.

The State plan must meet all requirements of this section.

(a) The plan shall provide that as a condition of eligibility for assistance, each applicant for or recipient of AFDC will be required to cooperate (unless good cause for refusing to do so is determined to exist in accordance with §§ 232.40 through 232.49 of this chapter) with the State in:

(1) Identifying and locating the parent of a child for whom aid is claimed;

(2) Establishing the paternity of a child born out of wedlock for whom aid is claimed;

(3) Obtaining support payments for the applicant or recipient and for a child for whom aid is claimed; and

(4) Obtaining any other payments or property due the applicant or recipient or the child.

(b) The plan shall specify that *cooperate* includes any of the following actions that are relevant to, or necessary for, the achievement of the objectives specified in paragraph (a) of this section:

(1) Appearing at an office of the State or local agency or the child support agency as necessary to provide verbal or written information, or documentary evidence, known to, possessed by, or reasonably obtainable by the applicant or recipient;

(2) Appearing as a witness at judicial or other hearings or proceedings;

(3) Providing information, or attesting to the lack of information, under penalty of perjury; and

(4) Paying to the child support agency any support payments received from the absent parent after an assignment under § 232.11 has been made. This includes support payments received in the current month and any amounts due to the IV-D agency under the IV-D State plan provisions for recovery of retained direct support payments at 45 CFR 302.31(a)(3)(ii).

(c) The plan shall provide that, if the child support agency notifies the State or local agency of evidence of failure to cooperate, the State or local agency will act upon that information to enforce the eligibility requirements of this section.

(d) The plan shall provide that, if the caretaker relative fails to cooperate as required by paragraphs (a) and (b) of this section, the State or local agency will:

(1) Deny assistance to the caretaker relative without regard to other eligibility factors; and

(2) Provide assistance to the eligible child in the form of protective payments as described in § 234.60 of this chapter. Such assistance will be determined without regard to the needs of the caretaker relative.

[43 FR 2176, Jan. 16, 1978, as amended at 43 FR 45747, Oct. 3, 1978; 47 FR 43956, Oct. 5, 1982]

§ 232.20 Treatment of child support collections made in the Child Support Enforcement Program as income and resources in the Title IV-A Program.

(a) *Definition.* For purposes of this section, notwithstanding any other regulations in this chapter, support collections, monthly collections and support amounts for a month mean the assigned amount that the support enforcement agency collects from an absent parent or spouse on a monthly support obligation, less the disregarded sum under § 305.51(b)(1).

(b) The State plan must provide that in any case in which support payments are collected for a recipient of AFDC with respect to whom an assignment under § 232.11 is effective:





(1) Upon notification by the IV-D agency of the amount of a support collection, the IV-A agency will use such amount to review eligibility of the assistance unit under § 206.10(a)(9)(ii). This use of these amounts so collected shall not be later than the second month after the month in which the IV-A agency received a report of the monthly collections from the IV-D agency. In determining whether a support collection made by the State's IV-D agency, which represents support amounts for a month as determined pursuant to § 302.51(a) of this title, is sufficient to make the family ineligible for an assistance payment for the month to which the redetermination applies, the State will determine if such collection, when treated as if it were income, makes the family ineligible for an assistance payment. If such treatment makes the family ineligible, the IV-A agency will notify the family and the IV-D agency of the effective date of the family's ineligibility. The IV-D agency will treat the support collection that caused ineligibility in accordance with § 302.32. If such treatment does not make the family ineligible for an assistance payment, the assistance payment will be calculated without regard to such collection except that, when required under § 232.21 supplemental payments must be calculated and issued.

(2) Any payment received pursuant to § 302.51(b) (3) or (5) shall be treated as income in the month following the month to which the redetermination in paragraph (a)(1) of this section applies.

(c) From any amounts of assistance payments which are reimbursed by support collections made by the IV-D agency, the IV-A agency shall pay the Federal government its share of the collections made, after the incentive payments, if any, have been made pursuant to § 302.52 of Chapter III of this title.

(d) The State plan must provide that the IV-A agency, on behalf of the IV-D agency, will promptly pay to the family the sum disregarded under § 305.51(b)(1).

(Sec. 1102, Social Security Act, as amended, 49 Stat. 647, as amended; 42 U.S.C. 1302 and Part XXIII of Pub. L. 97-35, 248, 95 Stat. 843, 96 Stat. 324)

[47 FR 5674, Feb. 5, 1982, as amended at 48 FR 28408, June 21, 1983; 49 FR 35599, Sept. 10, 1984; 51 FR 29229, Aug. 15, 1986]

§ 232.21 Computation of a supplemental payment when there is a support payment.

(a) The purpose of this section is to provide for the computation of a supplemental payment under section 402(a)(28) of the Social Security Act. When used in this section—

"Countable income" means the amount of the recipient's gross income that is used in the computation of the assistance payment after application of all disregards, including work-related expenses.

"Countable support payment" means the support collected on the current month's support obligation less an amount not in excess of the first $50 collected on that obligation. It also means the excess payments paid to the recipient by the IV-D agency under 45 CFR 302.51(b) (3) and (5).

"Disposable income" means the sum of the assistance payment, and the countable income used in determining the amount of the payment.

"Arrearages" means all collections of past due support exclusive of those made through the Federal and State income tax refund offset.

(b) The State plan must provide that, if the redetermination under

§ 232.20 indicates that the support payment made on the current month's support obligation would not cause ineligibility, and the State permitted recipients during July 1975 to retain countable income without an equal reduction in their assistance payment, and it currently has such a policy in effect, a supplemental payment will be computed for the current month.

(1) The supplemental payment for a month shall equal the maximum portion of the total support collected in that month which would not reduce the assistance payment if paid directly to the family. In determining this amount, the State agency will—

(i) First consider income from sources other than the support collection; and

(ii) Include in the amount of support collected the maximum amount of any arrearages paid which would not cause ineligibility if paid directly to the family.

(2) The supplemental payment will be computed as follows:

(i) The State IV-A agency determines the assistance payment which would result from treating as income to the family the largest amount of the month's child support collection, including arrearages, that will not cause ineligibility. Using that assistance payment, and using that amount of the support collection as countable income, disposable income is computed.

(ii) The State agency then determines the amount of the assistance payment for which the family would be eligible if there were no support collection. Using that assistance payment, disposable income is again computed.

(iii) The supplemental payment is the amount of disposable income as computed in step (i) less the amount of disposable income as computed in step (ii).

(iv) *Examples:*

*Example 1.* The State computes the assistance payment by subtracting income from the need standard and pays the deficit or a maximum by family size, whichever is less: (All figures are assumed and do not include income from any other source.)

*Step (i): Treating countable support payment as income.* Subtract a countable support payment of $100 from a need standard of $300. The deficit is $200. Assume the State's maximum for this family size is $150; therefore, the assistance payment would be $150. The assistance unit would have a $150 assistance payment and the $100 countable support payment for a total disposable income of $250.

*Step (ii): Not treating countable support payment as income.* There is no income to subtract from the need standard. Thus the assistance payment would be the maximum of $150 for this family size, which would also be the disposable income.

*Step (iii): Taking the difference.* The supplemental payment is the difference between the disposable income computed under steps (i) and (ii), $250 minus $150, or $100.

*Example 2.* The State computes the assistance payment by subtracting income from a reduced need standard and pays the deficit or a maximum by family size, whichever is less. Assume a need standard of $400, a ratable reduction of 70%, and a maximum assistance payment of $200. Also assume a $500 total child support collection for the month, $200 of which is the current month's support obligation. The State's minimum payment is $5.

*Step (i): Treating countable support payments as income.* Determine the largest part of the $500 child support collection which would not cause ineligibility if counted as income to the assistance unit. This would be $279 because the State's reduced need standard is $280 (70% of $400) and any amount of income over $279 would make the family ineligible. The deficit would be $1. The assistance unit would not receive an assistance payment, however, they would have the $279 support payment as disposable income. No assistance payment is made but the family remains eligible under § 233.20(a)(3)(viii) (C) and (D).

*Step (ii): Not treating countable support payment as income.* There is no income to subtract from the reduced need standard, thus the assistance payment would be the maximum of $200 for this family size, which would also be the disposable income.

*Step (iii): Taking the difference.* The supplemental payment is the difference between the disposal incomes computed under steps (i) and (ii), $280 minus $200, or $80.

(c) A supplemental payment under this section may either be added to the assistance payment for which the unit is otherwise eligible, to make a new total assistance payment for the month or be issued separately. In the examples in paragraph (b)(2)(iv) of this section, the new total assistance payments would be $250 ($150 plus $100) in Example 1, and $280 ($200 plus $80) in Example 2.

[51 FR 29229, Aug. 15, 1986]

### § 232.30 Cost of staff of special administrative units.

Cost of staff of Special Administrative Units (SAUs) providing social and supportive services under the Work Incentive (WIN) program is subject to FFP under title IV-A in all jurisdictions, pursuant to section 403(d) of the Act and 45 CFR 224.14(d). Cost of staff who solely perform other social service functions is not eligible for FFP under title IV-A, except in Puerto Rico, the Virgin Islands, and Guam.

[41 FR 37781, Sept. 8, 1976, as amended at 47 FR 17508, Apr. 23, 1982]

### § 232.40 Claiming good cause for refusing to cooperate.

(a) *Opportunity to claim good cause.* The plan shall provide that an applicant for, or recipient of, AFDC will have the opportunity to claim good cause for refusing to cooperate as required by § 232.12.

(b) *Notice to applicant or recipient.* (1) The plan shall provide that: (i) Prior to requiring cooperation under § 232.12, the State or local agency will notify the applicant or recipient of the right to claim good cause as an exception to the cooperation requirement and of all the requirements applicable to a good cause determination;

(ii) The notice will be in writing, with a copy furnished to the applicant or recipient; and

(iii) The applicant or recipient and the caseworker will acknowledge that the applicant or recipient received the notice by signing and dating a copy of the notice, which will be placed in the case record.

(2) The notice may be in two parts. If the State elects a two part notice:

(i) The first notice shall: (A) Advise the applicant or recipient of the potential benefits the child may derive from the establishment of paternity and securing support;

(B) Advise the applicant or recipient that by law, cooperation in establishing paternity and securing support is a condition of eligibility for AFDC;

(C) Advise the applicant or recipient of the sanction provided by § 232.12 for refusal to cooperate without good cause;

(D) Advise the applicant or recipient that good cause for refusal to cooperate may be claimed; and that if the State or local agency determines, in accordance with this section, that there is good cause, the applicant or recipient will be excused from the cooperation requirement; and

(E) Advise the applicant or recipient that upon request, or following a claim of good cause, the agency will provide further notice with additional details concerning good cause.

(ii) The second notice, which will be provided promptly upon request of the applicant or recipient or following a claim of good cause, shall:

(A) Indicate that the applicant or recipient must provide corroborative evidence of a good cause circumstance (as specified in § 232.43 (b) and (f)) and must, when requested, furnish sufficient information to permit the State or local agency to investigate the circumstances;

(B) Inform the applicant or recipient that upon request, the State or local agency will provide reasonable assistance in obtaining the corroborative evidence;

(C) Inform the applicant or recipient that on the basis of the corroborative evidence supplied and the agency's investigation if necessary, the State or local agency will determine whether cooperation would be against the best interests of the child for whom support would be sought;

(D) List the circumstances (as specified in § 232.42) under which cooperation may be determined to be against the best interests of the child;

(E) Inform the applicant or recipient that the State Child Support Enforcement agency may review the State or local agency's findings and basis for a good cause determination and may participate in any hearings concerning the issue of good cause; and

(F) As applicable, (see § 232.49) inform the applicant or recipient that

either: The State Child Support Enforcement agency will not attempt to establish paternity and collect support in those cases where the applicant or recipient is determined to have good cause for refusing to cooperate; or the State Child Support Enforcement agency may attempt to establish paternity and collect support in those cases where the State or local agency determines that this can be done without risk to the applicant or recipient if done with out their participation.

(3) The State or local agency may, at its option, provide a single combined notice that contains all of the elements in paragraphs (b) (2) (i) and (ii) of this section.

(4) Appendix A to this Part 232 is a suggested two part notice format that meets the requirements of this section.

(c) *Requirements upon applicant or recipient.* (1) The plan shall provide that an applicant for, or recipient of, AFDC who refuses to cooperate and who claims to have good cause for refusing to cooperate has the burden of establishing the existence of a good cause circumstance. Such applicant or recipient will be required to:

(i) Specify the circumstances (see § 232.42) that the applicant or recipient believes provide sufficient good cause for not cooperating.

(ii) Corroborate the good cause circumstances in accordance with § 232.43; and

(iii) If requested, provide sufficient information (such as the putative father or absent parent's name and address, if known) to permit an investigation pursuant to § 232.43(g).

(2) The plan shall provide that if the requirements of paragraph (c)(1) of this section are not met, the State or local agency shall on that basis determine that good cause does not exist.

[43 FR 45747, Oct. 3, 1978]

### § 232.41 Determination of good cause for refusal to cooperate.

The plan shall provide that:

(a) For each applicant for or recipient of AFDC who claims to have good cause, the State or local agency will determine, in accordance with §§ 232.40, 232.42 and 232.43, whether good cause exists.

(b) The State or local agency's final determination that good cause does, or does not exist will:

(1) Be in writing;

(2) Contain the agency's findings and basis for determination; and

(3) Be entered into the AFDC case record.

(c) The State or local agency's determination of whether or not good cause exists will be made within a State established time standard that does not exceed 45 days from the day the good cause claim is made. The State or local agency may exceed this time standard only where the case record documents that the agency needs additional time because the information required to verify the claim cannot be obtained within the time standard or that the claimant did not provide corroborative evidence within the period required by § 232.43(b).

(d) If the State or local agency determines that good cause does not exist:

(1) The applicant or recipient will be so notified and afforded an opportunity to cooperate, withdraw the application for assistance, or have the case closed; and

(2) Continued refusal to cooperate will result in imposition of the sanction provided by § 232.12.

[43 FR 45748, Oct. 3, 1978]

### § 232.42 Good cause circumstances.

(a) *Circumstances under which cooperation may be "against the best interests of the child."* The plan shall provide that the State or local agency will determine that cooperation in establishing paternity and securing support is against the best interests of the child only if:

(1) The applicant's or recipient's cooperation in establishing paternity or securing support is reasonably anticipated to result in:

(i) Physical harm to the child for whom support is to be sought;

(ii) Emotional harm to the child for whom support is to be sought;

(iii) Physical harm to the parent or caretaker relative with whom the child is living which reduces such person's capacity to care for the child adequately;





(iv) Emotional harm to the parent or caretaker relative with whom the child is living, of such nature or degree that it reduces such person's capacity to care for the child adequately; or

(2) At least one of the following circumstances exists, and the State or local agency believes that because of the existence of that circumstance, in the particular case, proceeding to establish paternity or secure support would be detrimental to the child for whom support would be sought.

(i) The child for whom support is sought was conceived as a result of incest or forcible rape;

(ii) Legal proceedings for the adoption of the child are pending before a court of competent jurisdiction; or

(iii) The applicant or recipient is currently being assisted by a public or licensed private social agency to resolve the issue of whether to keep the child or relinquish him for adoption, and the discussions have not gone on for more than 3 months.

(b) *Physical harm and emotional harm defined.* Physical harm and emotional harm must be of a serious nature in order to justify a finding of good cause under paragraph (a)(1) of this section. A finding of good cause for emotional harm may only be based upon a demonstration of an emotional impairment that substantially affects the individual's functioning.

(c) *Special considerations related to emotional harm.* The plan shall provide that, for every good cause determination which is based in whole or part upon the anticipation of emotional harm to the child, the parent or the caretaker relative, as provided for in paragraphs (a)(1) (ii) and (iv) of this section, the State or local agency will consider the following:

(1) The present emotional state of the individual subject to emotional harm;

(2) The emotional health history of the individual subject to emotional harm;

(3) Intensity and probable duration of the emotional impairment;

(4) The degree of cooperation to be required; and

(5) The extent of involvement of the child in the paternity establishment or support enforcement activity to be undertaken.

[43 FR 45748, Oct. 3, 1978]

### § 232.43 Proof of good-cause claim.

The plan shall provide that:

(a) The State or local agency will make a good-cause determination based on the corroborative evidence supplied by the applicant or recipient only after it has examined the evidence and found that it actually verifies the good-cause claim.

(b) The applicant or recipient who claims good cause must provide corroborative evidence within 20 days from the day the claim was made. In exceptional cases where the State or local agency determines the applicant or recipient requires additional time because of the difficulty of obtaining the corroborative evidence, the agency shall allow a reasonable additional period of time upon approval by supervisory personnel.

(c) A good-cause claim may be corroborated with the following types of evidence:

(1) Birth certificates or medical or law enforcement records which indicate that the child was conceived as the result of incest or forcible rape;

(2) Court documents or other records which indicate that legal proceedings for adoption are pending before a court of competent jurisdiction;

(3) Court, medical, criminal, child protective services, social sevices, psychological, or law enforcement records which indicate that the putative father or absent parent might inflict physical or emotional harm on the child or caretaker relative;

(4) Medical records which indicate emotional health history and present emotional health status of the caretaker relative or the child for whom support would be sought; or, written statements from a mental health professional indicating a diagnosis or prognosis concerning the emotional health of the caretaker relative or the child for whom support would be sought;

(5) A written statement from a public or licensed private social agency that the applicant or recipient is being

assisted by the agency to resolve the issue of whether to keep the child or relinquish him for adoption; and

(6) Sworn statements from individuals other than the applicant or recipient with knowledge of the circumstances which provide the basis for the good-cause claim.

(d) If after examining the corroborative evidence submitted by the applicant or recipient, the State or local agency wishes to request additional corroborative evidence which is needed to permit a good-cause determination, the agency will:

(1) Promptly notify the applicant or recipient that additional corroborative evidence is needed; and

(2) Specify the type of document which is needed.

(e) Upon request, the State or local agency will:

(1) Advise the applicant or recipient how to obtain the necessary documents; and

(2) Make a reasonable effort to obtain any specific documents which the applicant or recipient is not reasonably able to obtain without assistance.

(f) Where a claim is based on the applicant's or recipient's anticipation of physical harm as specified and defined in § 232.42 (a) and (b), and corroborative evidence is not submitted in support of the claim:

(1) The State or local agency will investigate the good-cause claim when the agency believes that:

(i) The claim is credible without corroborative evidence; and

(ii) Corroborative evidence is not available.

(2) Good cause will be found if the claimant's statement and the investigation which is conducted satisfies the agency that the applicant or recipient has good cause for refusing to cooperate.

(3) A determination that good cause exists will be reviewed and approved or disapproved by supervisory personnel and the agency's findings will be recorded in the case record.

(g) The State or local agency may further verify the good-cause claim if the applicant's or recipient's statement of the claim required by § 232.40(c)(1)(i), together with the corroborative evidence do not provide sufficient basis for making a determination. When the State or local agency determines that it is necessary, the agency may conduct an investigation of good-cause claims to determine that good cause does or does not exist.

(h) If it conducts an investigation of a good-cause claim, the State or local agency will:

(1) Contact the absent parent or putative father from whom support would be sought if such contact is determined to be necessary to establish the good-cause claim; and

(2) Prior to making such necessary contact, notify the applicant or recipient to enable the applicant or recipient to:

(i) Present additional corroborative evidence or information so that contact with the parent or putative father becomes unnecessary;

(ii) Withdraw the application for assistancse or have the case closed; or

(iii) have the good-cause claim denied.

[43 FR 45749, Oct. 3, 1978]

### § 232.44 Participation by the State IV-D Agency.

The plan shall provide that:

(a) Prior to making a final determination of good cause for refusing to cooperate, the State or local agency will:

(1) Afford the IV-D agency the opportunity to review and comment on the findings and basis for the proposed determination; and

(2) Consider any recommendation from the IV-D agency.

(b) The State or local agency will give the IV-D agency the opportunity to participate in any hearing (under § 205.10 of this chapter) that results from an applicant's or recipient's appeal of any agency action under §§ 232.40 through 232.49.

[43 FR 45749, Oct. 3, 1978]

### § 232.45 Notice to the IV-D Agency.

The plan shall provide that:

(a) If the notice, required by § 235.70 of this chapter, has previously been provided to the IV-D agency, the State or local agency will promptly report to the IV-D agency that good cause has been claimed;

(b) The State or local agency will promptly report to the IV-D agency all cases in which it has determined that there is good cause for refusal to cooperate and if applicable, its determination whether or not child support enforcement may proceed without the participation of the caretaker relative; and

(c) The State and local agency will promptly report to the IV-D agency all cases in which it has determined that there is not good cause for refusal to cooperate.

[43 FR 45749, Oct. 3, 1978]

### § 232.46 Granting or continuation of assistance.

The plan shall provide that the State or local agency will not deny, delay, or discontinue assistance pending a determination of good cause for refusal to cooperate if the applicant or recipient has complied with the requirements of §§ 232.40(c) and 232.43 to furnish corroborative evidence and information.

[43 FR 45750, Oct. 3, 1978]

### § 232.47 Periodic review of good cause determination.

The plan shall provide that the State or local agency will:

(a) Periodically review, not less frequently than at each redetermination of eligibility required by § 206.10(a)(9) of this chapter, those cases in which the agency has determined that good cause exists based on a circumstance that is subject to change; and

(b) If it determines that circumstances have changed such that good cause no longer exists, it will rescind its findings and proceed to enforce the requirements of § 232.12 of this chapter.

[43 FR 45750, Oct. 3, 1978]

### § 232.48 Record keeping in good cause.

The plan shall provide that the State will maintain records of the activities under this section that will make it possible to submit to the Department, upon request, data concerning:

(a) The total number of cases in which the applicant or recipient claimed to have good cause for refusing to cooperate;

(b) The number of cases in which the claim was made without corroborative evidence under the provisions of § 232.43(f);

(c) The total number of cases in which the applicant or recipient was found to have good cause for refusing to cooperate;

(d) The number of cases in which the applicant or recipient was found to have good cause for refusing to cooperate without corroborative evidence under the provisions of § 232.43(f);

(e) The number of cases in which the applicant or recipient was fund to have good cause for refusing to cooperate based solely on an examination of the corroborative evidence supplied by the applicant or recipient with no investigation;

(f) The number of cases where good cause was claimed by an applicant prior to receiving AFDC and the final determination that good cause did not exist was made after the applicant was determined to be eligible for AFDC;

(g) The number of cases in which the applicant or recipient was found to have good cause for refusing to cooperate but there was a determination pursuant to § 232.49 that child support enforcement may proceed without the participation of the caretaker relative; and

(h) For those cases in which good cause was found, which of the circumstances specified in § 232.42 was found to exist.

[43 FR 45750, Oct. 3, 1978]

### § 232.49 Enforcement without the caretaker's cooperation.

The State plan may provide that:

(a) If the State or local agency makes a determination that good cause exists it will also make a determination of whether or not child support enforcement could proceed without risk of harm to the child or caretaker relative if the enforcement or collection activities did not involve their participation;

(b) This determination will be in writing, contain the agency's findings

and basis for determination, and be entered into the AFDC case record;

(c) If the IV-A agency excuses cooperation but determines that the IV-D agency may proceed to establish paternity or enforce support, it will notify the applicant or recipient to enable such individual to withdraw their application for assistance or have the case closed; and

(d) Prior to making a determination under this paragraph, the State or local agency will afford the IV-D agency an opportunity to review and comment on the findings and basis for the proposed determination and consider any recommendation from the IV-D agency.

[43 FR 45750, Oct. 3, 1978]

## Appendix A—Model Two-Part Good Cause Notice

This suggested two-part notice format meets the notice requirements of § 232.40(b)(2). The first notice should be provided prior to requiring the applicant's or recipient's cooperation. The second notice should be promptly provided if the applicant or recipient so requests or following a claim of good cause. Receipt of the notice will be acknowledged by the applicant's or recipient's and the worker's signatures. The signed copy should be placed in the AFDC case record with one copy retained by the applicant or recipient.

Before being used by a State this model should be adapted by substituting the appropriate agencies' names.

### Notice of Requirement To Cooperate and Right To Claim Good Cause for Refusal To Cooperate in Child Support Enforcement

#### BENEFITS OF CHILD SUPPORT ENFORCEMENT

Your cooperation in the child support enforcement process may be of value to you and your child because it might result in the following benefits:

- Finding the absent parent;
- Legally establishing your child's paternity;
- The possibility that support payments might be higher than your welfare grant; and
- The possibility that you and your children may obtain rights to future social security, veterans, or other government benefits.

#### WHAT IS MEANT BY COOPERATION?

The law requires you to cooperate with the welfare and child support agencies to get any support owed to you and any of the children for whom you want AFDC, unless you have good cause for not cooperating.

In cooperating with the welfare or child support agency, you may be asked to do one or more of the following things:

- Name the parent of any child applying for or receiving AFDC, and give information you have to help find the parent;
- Help determine legally who the father is if your child was born out of wedlock;
- Give help to obtain money owed to you or the children receiving AFDC; and
- Pay to the State any money which is given directly to you by the absent parent (you will continue to get your full AFDC grant from the State).

You may be required to come to the welfare office, child support office, or court to sign papers or give necessary information.

#### WHAT IS MEANT BY GOOD CAUSE?

You may have good cause not to cooperate in the State's efforts to collect child support. You may be excused from cooperating if you believe that cooperation would not be in the best interest of your child, and if you can provide evidence to support this claim.

#### IF YOU DO NOT COOPERATE AND YOU DO NOT HAVE GOOD CAUSE

- You will be ineligible for AFDC.
- Your children will still be eligible for AFDC for their own needs. Your children's grant will go to another person, called a "protective payee."

#### HOW AND WHEN YOU MAY CLAIM GOOD CAUSE

- If you want to claim good cause, you must tell a worker that you think you have good cause. You can do this at any time you believe you have good cause not to cooperate.
- If you claim "good cause" you must be given another notice. This second notice will explain the circumstances under which the Welfare Agency may find good cause, and the type of evidence or other information the Welfare Agency needs to decide your claim. You may also ask for this second notice to help you decide whether or not to claim good cause.

I have read this notice concerning my right to claim good cause for refusing to cooperate.

_____

(Signature of applicant/recipient)

_____





(Date)

I have provided the applicant/recipient with a copy of this notice.

_____

(Signature of worker)

_____

(Date)

### Second Notice of Right To Claim Good Cause for Refusal To Cooperate in Child Support Enforcement

#### GOOD CAUSE CIRCUMSTANCES

You may claim to have good cause for refusing to cooperate if you believe that such cooperation would not be in the best interests of your child. The following are circumstances under which the Welfare Agency may determine that you have good cause for refusing to cooperate:

- Cooperation is anticipated to result in serious physical or emotional harm to the child;
- Cooperation is anticipated to result in physical or emotional harm to you which is so serious it reduces your ability to care for the child adequately;
- The child was born after forcible rape or incest;
- Court proceedings are going on for adoption of the child; or
- You are working with an agency helping you to decide whether to place the child for adoption.

#### PROVING GOOD CAUSE

It is your responsibility to:

- Provide the Welfare Agency with the evidence needed to determine whether you have good cause for refusing to cooperate (If your reason for claiming good cause is your fear of physical harm and it is impossible to obtain evidence, the Welfare Agency may still be able to make a good cause determination after an investigation of your claim.)
- Give the necessary evidence to the agency within 20 days after claiming good cause. The Welfare Agency will give you more time only if it determines that more than 20 days are required because of the difficulty in obtaining the evidence.

The Welfare Agency may:

- Decide your claim based on the evidence which you give to the agency, or
- Decide to conduct an investigation to further verify your claim. If the Welfare Agency decides an investigation is needed, you may be required to give information, such as the absent parent's name and address, to help the investigation. The agency will not contact the absent parent without first telling you.

Note: If you are an applicant for assistance, you will not receive your share of the grant until you have given the agency the evidence needed to support your claim, and, if requested, the information needed to permit an investigation of your claim.

#### EXAMPLES OF ACCEPTABLE EVIDENCE

The following are examples of acceptable kinds of evidence the Welfare Agency can use in determining if good cause exists.

If you need help in getting a copy of any of the documents, ask the Welfare Agency. The Welfare Agency will give you reasonable assistance which is needed to help you obtain the necessary documents to support your claim.

- Birth certificates, or medical or law enforcement records, which indicate that the child was conceived as the result of incest or forcible rape;
- Court documents or other records which indicate that legal proceedings for adoption are pending in court;
- Court, medical, criminal, child protective services, social services, psychological, or law enforcement records which indicate that the alleged or absent father might inflict physical or emotional harm on you or the child;
- Medical records which indicate emotional health history and present health status of you or the child for whom support would be sought; or written statements from a mental health professional indicating a diagnosis or prognosis concerning the emotional health of you or the child;
- A written statement from a public or private agency confirming that you are being assisted in resolving the issue of whether to keep or give up the child for adoption; and
- Sworn statements from individuals, including friends, neighbors, clergymen, social workers, and medical professionals who might have knowledge of the circumstances providing the basis of your good cause claim.

#### CHILD SUPPORT AGENCY PARTICIPATION AND ENFORCEMENT

The Child Support Enforcement Agency may review the Welfare Agency's findings and the basis for a good cause determination in your case. If you request a hearing regarding this issue of good cause for refusing to cooperate, the Child Support Enforcement Agency may participate in that hearing.

The Notice must include one of the following statements, as applicable depending on the State plan option chosen. See § 232.40.

*Option 1*

If you are found to have good cause for not cooperating, the Child Support Enforcement Agency may attempt to establish paternity or collect support only if the Welfare Agency determines that this can be done without risk to you or your child. This will not be done without first telling you.

*Option 2*

If you are found to have good cause for not cooperating, the Child Support Enforcement Agency will not attempt to establish paternity or collect support.

I have read this notice concerning my right to claim good cause for refusing to cooperate.

_____

(Signature of applicant/recipient)

_____

(Date)

I have provided the applicant/recipient with a copy of this notice.

_____

(Signature of worker)

_____

(Date)

[43 FR 45750, Oct. 3, 1978]

## PART 233—COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS



AUTHORITY: Sec. 1102, 49 Stat. 647; 42 U.S.C. 1302.

### § 233.10 General provisions regarding coverage and eligibility.

(a) *State plan requirements.* A State plan under title I, IV—A, X, XIV, or XVI, of the Social Security Act must:

(1) Specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not





result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act. Under this requirement:

(i) A State shall impose each condition of eligibility required by the Social Security Act; and

(ii) A State may:

(A) Provide more limited public assistance coverage than that provided by the Act only where the Social Security Act or its legislative history authorizes more limited coverage;

(B) Impose conditions upon applicants for and recipients of public assistance which, if not satisfied, result in the denial or termination of public assistance, if such conditions assist the State in the efficient administration of its public assistance programs, or further an independent State welfare policy, and are not inconsistent with the provisions and purposes of the Social Security Act.

(iii) There must be clarity as to what groups are included in the plan, and which are within, and which are outside, the scope of Federal financial participation.

(iv) Eligibility conditions must be applied on a consistent and equitable basis throughout the State.

(v) A plan under title XVI must have the same eligibility conditions and other requirements for the aged, blind, and disabled, except as otherwise specifically required or permitted by the Act.

(vi) Eligibility conditions or agency procedures or methods must not preclude the opportunity for an individual to apply and obtain a determination of eligibility or ineligibility.

(vii) Methods of determining eligibility must be consistent with the objective of assisting all eligible persons to qualify.

(2) Provide that the State agency will establish methods for identifying the expenditures for assistance for any groups included in the plan for whom Federal financial participation in assistance may not be claimed.

(3) In addition, a State plan under title IV-A, X, XIV, or XVI of the Act, must: Provided that no aid or assistance will be provided under the plan to an individual with respect to a period for which he is receiving aid or assistance under a State plan approved under any other of such titles or under title I of the Act.

(b) *Federal financial participation.* (1) The provisions which govern Federal financial participation in assistance payments are set forth in the Social Security Act, throughout this chapter, and in other policy issuances of the Secretary. Where indicated, State plan provisions are prerequisite to Federal financial participation with respect to the applicable group and payments. State plan provisions on need, the amount of assistance, and eligibility determine the limits of Federal financial participation. Federal financial participation is excluded from assistance payments in which the State refuses to participate because of the failure of a local authority to apply such State plan provisions.

(2) The following is a summary statement regarding the groups for whom Federal financial participation is available. (More detailed information is given elsewhere.)

(i) OAA—for needy individuals under the plan who are 65 years of age or older.

(ii) AFDC—for:

(*a*) Needy children under the plan who are:

(*1*) Under the age of 18, or age 18 if a full-time student in a secondary school, or in the equivalent level of vocational or technical training, and reasonably expected to complete the program before reaching age 19;

(*2*) Deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or unemployment of a principal earner, and

(*3*) Living in the home of a parent or of certain relatives specified in the Act.

(*b*) The parent or other caretaker relative of a dependent child and, in certain situations, the parent's spouse.

(iii) AB—for needy individual's under the plan who are blind.

(iv) APTD—for needy individuals under the plan who are 18 years of age or older and permanently and totally disabled.

(v) AABD—for needy individuals under the plan who are aged, blind, or

# SB 78

6-0419E
Lauterbach
1/20/89

Original sponsor: Halford

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 78 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to information concerning minors."

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

* Section 1. AS 47.10.090 is repealed and reenacted to read:

Sec. 47.10.090. RECORDS. (a) The court shall make and keep records of all cases brought before it. The court's official records are not public records and may be inspected only with the court's permission and only by persons having a legitimate interest in them. Parties and their attorneys or guardians may have access to the court file. Duly constituted foster care review boards doing case reviews under 42 U.S.C. 671 - 675 may have access to the court file on a case under review without court order. Other persons may have access to the court files as authorized by statute, or court order for good cause shown after notice to the parties, but conditions on their access or use may be set by the court. A person with access shall maintain the confidentiality of all information in the court's file.

(b) All information and social records pertaining to a minor under the jurisdiction of the court and prepared by an employee of the court or by a federal, state, or municipal agency or an agent, contractee, or licensee of a federal, state, or municipal agency, in the discharge of official duties, including those relating to driver's license action under AS 28.15.185 but excluding those relating to offenses listed in AS 47.10.010(b), are privileged and may not be disclosed directly or indirectly to anyone without the court's permission. However, the employee, agency, agent, licensee, or contractee

may exchange information without a court order with another employee, agency, or contractee who needs the information for a legitimate purpose. Exchanged information retains its privileged status. Notwithstanding this subsection, the court shall forward a record of adjudication of an offense described in AS 28.15.185(a) to the Department of Public Safety, if the court imposes a license revocation under AS 28.15.185. A need for information for a legitimate purpose is presumed in the following circumstances:

(1) giving or obtaining information to enforce a court order;

(2) giving or obtaining information to make a report to the court;

(3) giving or obtaining information for purposes of treatment;

(4) giving or obtaining information for purposes of placement of the minor;

(5) giving or obtaining information for purposes of fingerprinting under AS 47.10.097;

(6) furthering investigation or prosecution of crimes committed by or against a minor;

(7) furthering investigation of child abuse or neglect reports;

(8) enforcing licensing statutes and regulations; or

(9) when disclosure is authorized by statute, court rule, state agency protocol, or regulation.

(c) When a discovery request is made by a criminal defendant for the records of a child victim where the charge is child exploitation, sexual assault, physical assault, abuse, or neglect, the records shall be released to the court. The court shall review the records in

camera. The court shall release relevant material to the defense and the prosecution, and shall provide copies to the parties. In releasing the material, the court shall enter a written order that sets out the specific portions of the record that are released. The court may issue protective orders related to the material that are necessary to balance the child's right to privacy against the defendant's constitutional rights.

(d) Within 30 days of the date of a minor's 18th birthday or, if the court retains jurisdiction of a minor past the minor's 18th birthday, within 30 days of the date on which the court relinquishes jurisdiction over the minor, the court shall order sealed all the court's official records pertaining to that minor, including records of all driver's license proceedings under AS 28.15.185, criminal proceedings against the minor, and punishments assessed against the minor except for traffic offenses. A person may not use these sealed records for any purpose except that the court may order their use for good cause shown or may order their use in making a presentencing report for the court. Prior felony convictions of the juvenile and prior adjudications of the juvenile as a delinquent for conduct that would have been a felony if committed by an adult shall be released for purposes of determining the length of a presumptive sentence under AS 12.55.155.

(e) The name or picture of a minor under the jurisdiction of the court may not be made public in connection with the minor's status as a delinquent child or a child in need of aid unless authorized by order of the court, except that the name of a minor who has committed more than one felony, has been adjudicated as a delinquent more than once for conduct that would have been a felony if committed by an adult, or has a combination of a felony and such an adjudication, shall be made public unless the court, for good cause, in certain

individual cases, enters an order prohibiting the disclosure. If a minor has escaped from a detention facility, the court may hold an expedited hearing to determine if the minor's name or picture should be disclosed in order to protect the minor or the public.

(f) A person who violates a provision of this section is guilty of a violation, and upon conviction is punishable by a fine of not more than $500.

Call re CS for Thursday

WORK DRAFT WORK DRAFT WORK DRAFT

6-0419E
Lauterbach
1/19/89

Original sponsor: Halford

IN THE SENATE

CS FOR SENATE BILL NO. 78 ( )

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(b) All information and social records pertaining to a minor under the jurisdiction of the court and prepared by an employee of the court or by a federal, state, or municipal agency or an agent, contractee, or licensee of a federal, state, or municipal agency, in the discharge of official duties, including those relating to driver's license action under AS 28.15.185 but excluding those relating to offenses listed in AS 47.10.010(b), are privileged and may not be disclosed directly or indirectly to anyone without the court's

permission. However, the employee, agency, agent, licensee, or contractee may exchange information without a court order with another employee, agency, or contractee who needs the information for a legitimate purpose. Exchanged information retains its privileged status. Notwithstanding this subsection, the court shall forward a record of adjudication of an offense described in AS 28.15.185(a) to the Department of Public Safety, if the court imposes a license revocation under AS 28.15.185. A need for information for a legitimate purpose is presumed in the following circumstances:

(1) giving or obtaining information to enforce a court order;

(2) giving or obtaining information to make a report to the court;

(3) giving or obtaining information for purposes of treatment;

(4) giving or obtaining information for purposes of placement of the minor;

(5) giving or obtaining information for purposes of fingerprinting under AS 47.10.097;

(6) furthering investigation or prosecution of crimes committed by or against a minor;

(7) furthering investigation of child abuse or neglect reports;

(8) enforcing licensing statutes and regulations; or

(9) when disclosure is authorized by statute, court rule, state agency protocol, or regulation.

(c) When a discovery request is made by a criminal defendant for the records of a child victim where the charge is child exploitation, sexual assault, physical assault, abuse, or neglect, the records shall

be released to the court. The court shall review the records in camera. The court shall release relevant material ~~that is relevant~~ to the defense or to the prosecution, and shall provide copies to the parties. In releasing the material, the court shall enter a written order that sets out the specific portions of the record that are released. The court may issue protective orders related to the material that are necessary to balance the child's right to privacy against the defendant's constitutional rights.

(d) Within 30 days of the date of a minor's 18th birthday or, if the court retains jurisdiction of a minor past the minor's 18th birthday, within 30 days of the date on which the court relinquishes jurisdiction over the minor, the court shall order sealed all the court's official records pertaining to that minor, including records of all driver's license proceedings under AS 28.15.165, criminal proceedings against the minor, and punishments assessed against the minor except for traffic offenses. A person may not use these sealed records for any purpose except that the court may order their use for good cause shown or may order their use in making a presentencing report for the court. Prior felony convictions of the juvenile and prior adjudications of the juvenile as a delinquent for conduct that would have been a felony if committed by an adult shall be released for purposes of determining the length of a presumptive sentence under AS 12.55.155.

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shall be made public unless the court, for good cause, in certain individual cases, enters an order prohibiting the disclosure. If a minor has escaped from a detention facility, the court may hold an expedited hearing to determine if the minor's name or picture should be disclosed in order to protect the minor or the public.

(f) A person who violates a provision of this section is guilty of a violation, and upon conviction is punishable by a fine of not more than $500.

STATE OF ALASKA / STEVE COWPER, GOVERNOR

OFFICE OF PUBLIC ADVOCACY

900 W. 5TH AVENUE
SUITE 525
ANCHORAGE, ALASKA 99501
PHONE: (907) 274-1684

January 26, 1989



The Honorable Rick Halford
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

ATTN: Ms. Theresa Maser

RE: Senate Bill 78

Dear Senator Halford and Ms. Maser:

Pursuant to my telephone conversations of January 24th and 25th, with Ms. Maser, I have enclosed a copy of a brief the Office of Public Advocacy recently filed with the Alaska Supreme Court regarding the issue of confidentiality of a child's Division of Family and Youth Services (DFYS) records. Currently this case is being reviewed by the Alaska Supreme Court to determine whether or not the appeal is moot due to the Department of Law having recently decided not to initiate criminal proceedings.

The Office of Public Advocacy is committed to future litigation to protect the privacy rights of children who are in the legal custody of DFYS. It is OPA's position that a child's DFYS file contains highly sensitive information which should not be released for purposes other than the child in need of aid (CINA) proceeding unless there has been prior notice and court review of the file to determine what information, if any, can be released.

The Office of Public Advocacy will be sending a position paper in the near future after we have had an opportunity to fully review SB78 and recent amendments. Please apprise us ahead of time as

to when SB78 will be reviewed by the Senate Judiciary Committee. Thank you for your assistance and cooperation. Please do not hesitate to contact me if you have any questions.

Sincerely,

OFFICE OF PUBLIC ADVOCACY

Philip J. McCarthy, Jr.
Deputy Public Advocate

PJM:lgr

cc: Charles S. Christensen III
Counsel
Senate Judiciary Committee
P.O. Box V
Juneau, AK 99811

Brant G. McGee
Public Advocate
Office of Public Advocacy

Enclosure

THE SUPREME COURT OF THE STATE OF ALASKA

| | |
|---|---|
| In the Matter: [redacted], | ) |
| A Minor Under the Age of Eighteen (18) Years. | ) |
| [redacted] Appellant, | ) |
| vs. | ) |
| State of Alaska and [redacted], | ) |
| Appellees | ) |

NO. S-2915

APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT
HONORABLE JUDGE VICTOR D. CARLSON

# BRIEF OF APPELLANT

OFFICE OF PUBLIC ADVOCACY

Brant McGee, Public Advocate

Philip J. McCarthy, Jr.,
Deputy Public Advocate
900 W. 5th Avenue, Suite 525
Anchorage, Alaska 99501
(907) 274-1684

Filed in the Supreme Court
for the State of Alaska this
25th day of November, 1988.

DAVID A. LAMPEN, Clerk
APPELLATE COURTS

Deputy Clerk

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## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES RELIED UPON

### Constitutional Provisions

United States Constitution, Amendment I [1791] provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for a redress of grievances.

Amendment IV [1791] provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV [1868], Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alaska Constitution, Article 1, § 22 provides:

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

Statutes

Alaska Statute 22.05.010(a) and (b)

> (a) The supreme court has final appellate jurisdiction in all actions and proceedings. However, a party has only one appeal as a matter of right from an action or proceeding commenced in either the district court or the superior court.
>
> (b) Appeal to the supreme court is a matter of right only in those actions and proceedings from which there is no right of appeal to the court of appeals under AS 22.07.020 or the the superior court under AS 22.10.020 or AS 22.15.240.

Alaska Statute 47.10.070

> Hearings The court may conduct the hearing in an informal manner in the courtroom or in chambers. A hearing may be held before a young adult advisory panel in accordance with AS 47.10.075. The court shall give notice of the hearing to the department and it may send a representative to the hearing. The court shall also transmit a copy of the petition to the department. The representative of the department may also be heard at the hearing. The public shall be excluded from the hearing, but the court, in its discretion, may permit individuals to attend a hearing, if their attendance is compatible with the best interests of the minor. Nothing in this section may be applied in such a way as to deny a child's rights to a public trial and to a trial by jury. (§10(1) art I ch 145 SLA 1957; am § 1 ch 49 SLA 1966; am § 53 ch 71 SLA 1972)

Alaska Statute 47.10.080(c) and (i)

> (c) If the court finds that the minor is a child in need of aid, it shall

(1) order the minor committed to the department for placement in an appropriate setting for a period of time not to exceed two years or in any event past the date the minor becomes 19 years of age, except that the department may petition for and the court may grant in a hearing (A) two-year extensions of commitment which do not extend beyond the minor's 19th birthday if the extension is in the best interests of the minor and the public; and (B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it; the department may transfer the minor, in the minor's best interests, from one placement setting to another, and the minor, the minor's parents or guardian, and the minor's attorney are entitled to reasonable notice of the transfer;

(2) order the minor released to the minor's parents, guardian, or some other suitable person, and, in appropriate cases, order the parents, guardian, or other person to provide medical or other care and treatment; if the court releases the minor, it shall direct the department to supervise the care and treatment given to the minor, but the court may dispense with the department's supervision if the court finds that the adult to whom the minor is released will adequately care for the minor without supervision; the department's supervision may not exceed two years or in any event extend past the date the minor reaches age 19, except that the department may petition for and the court may grant in a hearing

(A) two- year extensions of supervision which do not extend beyond the minor's 19th birthday if the extension is in the best interests of the minor and the public; and

(B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it; or

(3) by order, upon a showing in the adjudication by clear and convincing evidence that there is a child in need of aid under

AS 47.10.010(a)(2) as a result of parental conduct and upon a showing in the disposition by clear and convincing evidence that the parental conduct is likely to continue to exist if there is no termination of parental rights, terminate parental rights and responsibilities of one or both parents and commit the child to the department or to a legally appointed guarding of the person of the child, and the department or guardian shall report annually to the court on efforts being made to find a permanent placement for the child.

(i) A minor, the minor's parents or guardian acting on the minor's behalf, or the department may appeal a judgment or order, or the stay, modification, setting aside, revocation, or enlargement of a judgment or order issued by the court under this chapter.

Alaska Statue 47.10.090(a)

(a) The court shall make and keep records of all cases brought before it. The court's official records may be inspected only with the court's permission and only by persons having a legitimate interest in them. All information and social records pertaining to a minor and prepared by an employee of the court or by a federal state or city agency in the discharge of the employee's or agency's official duty, including traffic offenses and driver's license action under AS 28.15.185, are privileged and may not be disclosed directly or indirectly to anycne without the court's permission. However, a state or city law-enforcement agency shall disclose information regarding a case which is needed by the person or agency charged with making a preliminary investigation for the information of the court. The court shall forward a record of adjudication of a violation of an offense listed in AS 28.15.185(a) to the Department of Public Safety, if the court imposes a license revocation under AS 28.15.185. Within 30 days of the date of a minor's 18th birthday or, if the court

retains jurisdiction of a minor past the minor's 18th birthday, within 30 days of the date on which the court relinquishes jurisdiction over the minor, the court shall order sealed all the court's official records, information and social records pertaining to that minor, as well as records of all driver's license proceedings under AS 28.15.185, criminal proceedings against the minor and punishments assessed against the minor except for traffic offenses. A person may order their use for good cause shown or may order their use by an officer of the court in making a presentencing report for the court.

Alaska Statute 47.17.020(c)

(c) If the person making a report of harm under this section cannot reasonably contact the nearest office of the department and immediate action is necessary for the well-being of the child, the person shall make the report to a peace officer. The peace officer shall take immediate action to protect the child and shall, at the earliest opportunity, notify the nearest office of the department.

Alaska Statute 47.17.025

(a) A law enforcement agency shall immediately notify the department of the receipt of a report of harm to a child from abuse. Upon receipt from any source of a report of harm to a child from abuse, the department shall notify the Department of Law and investigate the report and, within 72 hours of the receipt of the report, shall provide a written report of its investigation of the harm to a child from abuse to the Department of Law for review.

(b) The report of harm to a child from abuse required from the department by this section shall include:

(1) the names and addresses of the child and the child's parent or other persons responsible for the child's care, if known;

(2) the age and sex of the child;
(3) the nature and extent of the harm to the child from abuse;
(4) the name and age and address of the person known or believed to be responsible for the harm to the child from abuse, if known;
(5) information that the department believes may be helpful in establishing the identity of the person believed to have caused the harm to the child from abuse. (§ 6 ch 104 SLA 1982)

Alaska Statute 47.17.040(b)

(b) Investigation reports and reports of harm filed under this chapter are considered confidential and are not subject to public inspection and copying under AS 09.25.110 and 09.25.120. However, in accordance with department regulations, investigation reports may be used by appropriate governmental agencies with child-protection functions, inside and outside Alaska, in connection with investigations or judicial proceedings involving child abuse, neglect, or custody. A person, not acting in accordance with department regulations, who makes public information contained in confidential reports is guilty of a misdemeanor. (§ 1 ch 100 SLA 1971; am § 2 ch 222 SLA 1976)

Rules

Alaska R. Criminal P.16(a) and (b)(1)

(a) Scope of Discovery. In order to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, and the adversary system.
(b) Disclosure to the Accused.
(1) Information within Possession or Control of Prosecuting Attorney: Except as

is otherwise provided as to matters not subject to disclosure and protective orders, the prosecuting attorney shall disclose the following information within his possession or control to defense counsel and make available for inspection and copying:

(i) The names and addresses of persons known by the government to have knowledge of relevant facts and their written or recorded statements or summaries of statements.

(ii) Any written or recorded statements and summaries of statements and the substance of any oral statements made by the accused;

(iii) Any written or recorded statements and summaries of statements and the substance of any oral statements made by a co-defendant;

(iv) Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons;

(v) Any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in the hearing or trial which were obtained from or belong to the accused; and

(vi) Any record of prior criminal convictions of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

Alaska R. of Evidence 504(a)(3) & (4)

Physician and Psychotherapist-Patient Privilege

(a) Definitions. As used in this rule:

(3) A psychotherapist is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the

diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or (B) a person licensed or certified as a psychologist or psychological examiner under the laws of any state or nation or reasonably believed by the patient to so be, while similarly engaged.

(4) A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonable necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional conditions, including alcohol or drug addiction, among himself, his physician or psychotherapist, or persons who are participating in the diagnosis or

(d) Exceptions. There is no privilege under this rule:

(7) Criminal Proceeding. For physician-patient communications in a criminal proceeding. This exception does not apply to the psychotherapist-patient privilege.

Alaska R. of Evidence 510.

Waiver of Privilege by Voluntary Disclosure

A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses

or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

## STATEMENT OF JURISDICTION

[redacted] appeals to the Supreme Court from the Final Order of the Superior Court denying her motion for a protective order. The Superior Court's order was entered on July 26, 1988 by the Honorable Victor D. Carlson, Judge of the Superior Court at Anchorage, Alaska. (R. 55). Notice of Appeal was timely filed by [redacted] (R. 59).

This appeal is brought as a matter of right pursuant to AS 22.05.010(b) and AS 47.10.080(i). This court has jurisdiction pursuant to AS 22.05.010(a) and (b).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The trial court erred in holding that DFYS' policy of releasing, without prior notice or court approval, [redacted] DFYS records to the D.A.'s office is not in violation of AS 47.10.090(a).

2. The trial court erred in holding that DFYS' Policy of freely disseminating [redacted] DFYS records to the D.A.'s office, without notice or prior court approval, did not violate [redacted] constitutional right of privacy.

3. The trial court erred in holding that DFYS' policy of releasing [redacted] DFYS records to the D.A.'s office, without notice or prior court approval, did not violate [redacted] psychotherapist-patient privilege, A.R.E. 504.

4. Whether the Department of Law's civil and criminal divisions are separate and distinct for purposes of AS 47.10.090(a).

## STANDARD OF REVIEW

The superior court reached its decision to deny [redacted] motion for a protective order as matter of law. Review of the legal analysis employed at the trial court level is predicated upon this court's independent judgement and the questions are afforded a de novo review. Wanberg v. Wanberg, 664 P.2d 568, 570 (Alaska 1983); Matter of J.M., 718 P.2d 150, 154 (Alaska 1986).

## STATEMENT OF THE CASE

### Statement of Facts

A petition alleging [redacted] to be a child in need of aid (hereinafter CINA) was filed on or about April 30, 1987. (R.1-2). The CINA petition requested [redacted], then age 17, be placed in the temporary custody of the State of Alaska, Department of Health and Social Services, Division of Family and Youth Services, (hereinafter DFYS) due to a history of being physically abused by her father, [redacted].

The CINA petition alleged the most recent incident of [redacted] physically abusing [redacted] was on April 28, 1987. The probable cause hearing, regarding the CINA petition, was held on May 1, 1987, whereupon the Children's Court Master recommended approval of the parties stipulation placing [redacted] in the temporary legal and physical custody of DFYS. (Tr. 3-9) An amended CINA petition was filed by DFYS on or about June 9, 1987, which corrected previous errors contained in the original CINA petition. The amended CINA petition recited the same factual basis for [redacted] being a child in need of aid as did the original CINA petition. (R. 6-7). An order placing [redacted] in the temporary custody of DFYS was signed by the Honorable

Peter A. Michalski, Judge of the Superior Court, on June 11, 1987. (R. 8-9).

A motion for an order requiring [redacted]. to file a Parental Financial Statement, to determine [redacted] ability to reimburse DFYS for the costs of [redacted] care, was filed by DFYS and an order was signed by the Honorable Peter A. Michalski, Judge of the Superior Court, on October 2, 1987. (R. 12-13). [redacted] opposed DFYS' motion for a Parental Financial Statement stating he was not the natural nor adoptive father of [redacted] (R. 14-15). DFYS filed a reply to [redacted] opposition asserting the doctrines of estoppel and res judicata barred [redacted] denial of parenting to [redacted] DFYS cited, as authority for invoking the doctrines of estoppel and res judicata, [redacted] declaration to being [redacted] natural parent in pleadings filed in 1983 with the Superior Court of New Jersey and said court's order granting a name change for the child [redacted], the appellant herein, now known as [redacted] (R. 20-21).

The parties reached a stipulation resolving [redacted] obligation to pay DFYS child support. (R 25-26). An order of adjudication and disposition, based upon the stipulation of the parties, was signed by the Honorable Peter A. Michalski, Judge of the Superior

Court, on February 12, 1988. (R-27).

Since April of 1987, [redacted] has continuously resided in DFYS foster care. Though not reflected in the CINA petition, [redacted] revealed to her foster parent in early June of 1987, that [redacted] had sexually abused her. Upon [redacted] reporting [redacted] had sexually abused her, a second report of abuse was filed by DFYS and a criminal investigation undertaken by State and military law enforcement agencies. Currently, there is an ongoing criminal investigation of [redacted] report of being sexually abused by [redacted] Because of the trauma experienced by [redacted], she was referred to Gary Lichtenstein, MSW, ACSW, Alaska Psychosocial Services for therapy.

[redacted] having turned eighteen years of age on April 13, 1988, requested the appointment of Office of Public Advocacy as her attorney and the termination of Office of Public Advocacy's guardian ad litem appointment. (R. 32). [redacted] request for an attorney appointment and termination of the guardian ad litem appointment was granted by the court. (R. 33).

The policies and procedures of the State of Alaska, Department of Law provide, in pertinent part, that upon a report of abuse, pursuant to AS 47.17.025,

that if "a criminal division attorney requests access to a child's file held by DFYS, or to information contained in that file, . . ., the AAG [assistant attorney general] should advise the social worker to cooperate in providing the requested access without first insisting on a court order for disclosure". (Emphasis added.) (R. 36-37). Prior to DFYS' release of [redacted] records to a Department of Law, Criminal Division attorney, (hereinafter D.A.), [redacted] filed a motion for a protective order. [redacted] motion requested a protective order which would prohibit DFYS from releasing her DFYS file or other information to the D.A.'s office without prior notice to [redacted] and court review. (R. 34-37).

DFYS, (not the Department of Law), filed an opposition to [redacted] motion for a protective order on May 10, 1988. (R 40-46) Oral argument on [redacted] motion for a protective order was held before the Honorable Victor D. Carlson, Judge of the Superior Court, on June 16, 1988. (Tr. 11-25) On July 26, 1988, Judge Carlson issued an order and memorandum of decision denying [redacted] motion for a protective order. (R. 55, 56-58). [redacted] filed a timely notice of appeal on July 29, 1988. (R. 59).

## ARGUMENT

### I. CONFIDENTIALITY OF TITLE 47 PROCEEDINGS

Legal proceedings relating to a minor under eighteen (18) years of age residing or found in the State of Alaska are governed by Title 47 of Alaska Statutes. If a minor is found to be (1) delinquent; or (2) a child in need of aid, due to abuse or neglect, they may be placed in the legal custody of DFYS. Because DFYS is mandated to protect the best interests of the child, and since proceedings pursuant to AS 47.10 and 47.17 are confidential, the psychotherapist-patient privilege is not applicable to these proceedings. State v. R.H., 683 P.2d 269, 281 (Alaska App. 1984).[1] AS.47.10.090(a) prohibits court records and/or social records pertaining to minor, which are prepared by an employee of the court or federal, state or city agency in the the discharge of their official duty, from being disclosed directly or indirectly to anyone without court approval.[2] [redacted] contends AS

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[1] State v. R.H., is more commonly referred to as the 'Wetherhorn' decision and will hereinafter be cited by its popular name.

[2] AS 47.10.090 Records (a): The court shall make and keep records of all cases brought before it.
(Footnote Continued)

47.10.090(a) prohibits the release of her DFYS records to the D.A.'s office without prior notice and court approval.

The principal purpose for the enactment of AS 47.10.090(a) is to protect the child from the adverse effects of unauthorized revelations of their social

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(Footnote Continued)
The court's official records may be inspected only with the court's permission and only by persons having a legitimate interest in them. All information and social records pertaining to a minor and prepared by an employee of the court or by a federal, state or city agency in the discharge of the employee's or agency's official duty, including traffic offenses and driver's license action under AS 28.15.185, are privileged and may not be disclosed directly or indirectly to anyone without the court's permission. However, a state or city law enforcement agency shall disclose information regarding a case which is needed by the person or agency charged with making a preliminary investigation for the information of the court. The court shall forward a record of adjudication of a violation of an offense listed in AS 28.15.185(a) to the Department of Public Safety, if the court imposes a license revocation under AS 28.15.185. Within 30 days of the date of a minor's 18th birthday or, if the court retains jurisdiction of a minor past the minor's 18th birthday, within 30 days of the date on which the court relinquishes jurisdiction over the minor, the court shall order sealed all the court's official records, information and social records pertaining to that minor, as well as records of all driver's license proceedings under AS 28.15.185, criminal proceedings against the minor and punishments assessed against the minor except for traffic offenses. A person may not use these sealed records for any purpose except that the court may order their use for good cause shown or may order their use by an officer of the court in making a presentencing report for the court.

records. In re P.N., 533 P.2d 13 (Alaska 1975). Title 47 mandatory reports of child abuse and neglect are intended for use in child protection proceedings and are not intended for use in criminal proceedings. Wetherhorn, 683 P.2d at 280. In Wetherhorn, the Alaska Court of Appeals explicitly reserved the issue regarding whether or not DFYS files may be made available to the D.A.'s office for criminal prosecution purposes. Wetherhorn, 283 P.2d at 282 n. 16. In Strehel v. State, 722 P.2d 226, 228, (Alaska App. 1986), the Alaska Court of Appeals held that reliance by the D.A.'s office on child abuse reports, (not complete DFYS files), pursuant to AS 47.17.025, for initiating a criminal prosecution is not prohibited.

In the context of criminal proceedings, recent U.S. Supreme Court and Alaska Court of Appeals decisions clearly establish a criminal defendant is not entitled by right to a child's social service records. These decisions establish that the trial court must conduct an in camera review of the child's records to determine if they contain relevant evidence which must be disclosed to the defendant. See Pennsylvania v. Ritchie, ___ U.S. ___, 107 S. Ct. 989, 94 L. Ed. 2d 690 (1987); Sledge v. State, ___ P.2d ___, Alaska App., opinion No. 866 (November 10, 1988). While the

Ritchie, Wetherhorn, Strehel and Sledge decisions provide guidance for the release of a child's social services records in criminal proceedings, they do not resolve the issues presented in [redacted] appeal: namely is it a violation of [redacted] constitutional and statutory rights to allow DFYS to disseminate her records, for purposes other than the CINA case, without prior notice or court approval.

II. THE TRIAL COURT ERRED IN HOLDING THAT DFYS' POLICY OF RELEASING, WITHOUT PRIOR NOTICE OR COURT APPROVAL, [redacted] DFYS RECORDS TO THE D.A.'S OFFICE IS NOT IN VIOLATION OF AS 47.10.090(a).

The Wetherhorn and Strehel decisions establish that: (1) mandatory reports of child abuse are intended for child protective procedures and not criminal proceeding; and (2) the initial report of child abuse may be utilized to initiate a criminal prosecution. The Wetherhorn and Strehel decision leave unanswered whether or not AS 47.10.090(a) prohibits DFYS from providing the D.A.'s office a child's DFYS records, without prior notice or court approval, to be reviewed in furtherance of a criminal case.

The Alaska Court of Appeals, in the context of addressing a criminal defendant's access to a child's DFYS and CINA files, stated access can only

occur with the court's approval and only by persons having a legitimate interest in the records. Sledge v. State,, ___ P.2d ____, Alaska App., Opinion No. 866, at P.11, n.2. (November 10, 1988). The Sledge decision, when considered with the Alaska Supreme Court decision, In re P.N. supports [redacted] contention that the court should strictly construe AS 47.10.090(a). [redacted] believes AS 47.10.090(a) requires the Department of Law and/or DFYS, (prior to the release of DFYS records to the D.A.'s office) to provide [redacted] notice and obtain court approval for releasing DFYS records or other information.

AS 47.10.090(a) has two categories of records which require court approval: (1) the court's official CINA or delinquency records; and (2) all information and social records regarding a child kept by the court and federal, state and city agencies. [redacted] DFYS records fall in this latter category. The state does not dispute that their policies, procedures and the normal day to day practice of DFYS is to provide, upon the request of the D.A.'s office, without notice or court approval, a child's DFYS file to the

D.A.'s office.[3] [redacted] believes that a straight forward interpretation of AS 47.10.090(a) prohibits this practice. As will be discussed in more detail herein, [redacted] request for this court's strict statutory interpretation of AS 47.10.090(a) is warranted to avoid a conflict with [redacted] constitutional right of privacy.

[redacted] interpretation of AS 47.10.090(a) will not inhibit law enforcement agencies and the D.A.'s office in pursuing a criminal proceeding. Nor, does a strict interpretation of AS 47 10.090(a) necessarily mean the child is not willing in all other ways, as is the case herein, to cooperate with a criminal investigation. [redacted] intentions are to protect personal and emotionally sensitive information, contained in [redacted] DFYS records, from being released without any safeguards to protect [redacted] privacy.

A child's DFYS records can contain sensitive information which has been gathered in the course of CINA or delinquency proceedings to assist the child in resolving their emotional problems. A child's DFYS file can contain statements to social workers or

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[3] See Department of Law, General Policies and Procedures on child sexual abuse cases, D., coordination with criminal case, at P.8. (R. 36-37).

therapists about the child's feelings of betrayal by the adult accused of abusing him or her. The DFYS records can contain therapist's reports or comments from the therapist which the social worker has recorded. A child's DFYS file can contain information regarding the child's fears which may go beyond the injuries for which a report of abuse was made pursuant to AS 47.17.025. A child's DFYS records can contain information on a child's sexual relationship with other youths or their rejection by a boyfriend or girlfriend. DFYS records can contain a child's statements revealing their low self-esteem and belief that they are ugly and different from other children. DFYS records can recite a child's feeling of betrayal and anger towards the non-abusive parent or their current custodian such as a foster parent. DFYS records can contain a child's statements concerning events which may be in violation of ordinances and laws. The DFYS records can contain the child's unfaltering statements about law enforcement personnel or even the assistant D.A. reviewing the DFYS records. The DFYS records can reveal the child's inner most fears and secrets.

In all the above-recited examples, the State can answer that should this information be contained in

DFYS records it would not be utilized in any criminal proceeding. This answer ignores the real issue and exemplifies that institutions often lack an understanding of the child's feelings. The breach of the child's trust and rights occurs when their DFYS records are released to persons other than those individuals involved in establishing or providing treatment for the child in the CINA or delinquency proceeding. The breach of the child's trust and constitutional and statutory rights is the release of DFYS records to the D.A.'s office without court approval, not when and if said records or information are used in a criminal proceeding.

Finally one must not forget, despite one's own individual views, that many children in DFYS custody may still love their abuser. The abused child will experience many conflicting feelings about their abuser, e.g., anger, betrayal, sorrow, and depression. Because so many children are abused by adults they love and trust, it is not inconceivable and frequently occurs that a child may want the adult to stop abusing them but does not want to testify against their abuser

or see them go to jail.[4] The purpose of CINA proceedings is to protect and provide treatment for children who have been physical or sexually abused or neglected. Thus, the practice of DFYS freely disseminating a child's record, without prior notice or court approval, violates and distorts the purpose of CINA cases. The policies of the Departments of Law and DFYS, which allow free access by the D.A.'s office to a child's DFYS records, ignore the fact that AS 47.10.090(a) requires the court and not other institutions to determine what information, if any, should be released. Likewise, it is the court who is to decide if the release of a child's DFYS records is to persons with a 'legitimate interest' in said

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[4]See Generally: Berliner and Barbieri, The Testimony of the Child Victim of Assault, J. Social Issues, Vol. 40, No. 2., 125, 128 (1984); Libai, The Protection of the Child Victim of Sexual Offense in the Criminal Justice System, 15 Wayne L.R. 977, 984 (1969); Melton, Child Witnesses and the First Amendment: A Psychological Delimma, J. Social Issues, Vol. 40, No. 2, 109 (1984); Meyers, When Children Take the Stand, 11 Student Lawyer 14, 15 (No. 1, Sept. 1982); Ramsey, Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity, Family L.Q., Vol. 17, No.3, 287, 316 (Fall 1983); Goodman, The Child Witness: An Introduction, J. Social Issues, Vol. 40, No.2, 1, 15 (1984); Wood, The Child as Witness, Family Advocate, Vol. 6, No.4, 14, 15 (Spring 1984).

records. The current policy of DFYS and the Department of Law ignores the abused child's needs of privacy and to have individuals in whom the child can place their trust. In a very real sense, the release of an abused or neglected child's DFYS records is just another example of the child's continued victimization.

III. THE TRIAL COURT ERRED IN HOLDING THAT DFYS' POLICY OF FREELY DISSEMINATING [redacted] DFYS RECORDS TO THE D.A.'S OFFICE WITHOUT NOTICE OR PRIOR COURT APPROVAL, DID NOT VIOLATE [redacted] CONSTITUTIONAL RIGHT OF PRIVACY.

A. [redacted] Right of Privacy Under the Alaska Constitution

The right to privacy is specifically set forth in Alaska Constitution, art. 1, § 22:

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

The court has defined the right to privacy as"....The right 'to be let alone,' the right of persons 'to determine for themselves when, how, and what extent information about them is communicated to others,' and the right which protects 'the individual's integrity as a human being.'" State v Glass, 583 P.2d 872, 880 (Alaska 1978).

Whereas [redacted] federal right of privacy is derived from a broad reading of the due process clause

of the fourteenth amendment and from "emanations" from other federal constitutional provisions,[5] [redacted] right of privacy is explicit in our state constitution. The express right to privacy in the Alaska Constitution is broader than that afforded by the United States Constitution. See: Messerli v. State, 626 P.2d 81 (1980). [redacted] relationship with her DFYS social worker and therapist, while not a relationship previously recognized as deserving of protection under the privacy guarantee of our state constitution, should in this instance be found to be protected by [redacted] right of privacy. Support for [redacted] position can be found in this court's previous determination that the physician-patient relationship is protected by the right of privacy under our state constitution. See Falcon v Alaska Public Offices Commission, 570 P.2d 469, 480 (Alaska 1977). The Alaska Court of Appeals has also recognized that requiring a psychologist to testify in a criminal proceeding, regarding confidential communications with a patient who had entered therapy as a result of a CINA proceeding, would

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[5] See [redacted] discussion of her federal constitutional right of privacy at P. 22 herein.

most certainly raise serious constitutional questions under out state's right of privacy. See Wetherhorn, 683 P.2d at 281 (Alaska App. 1984).

The test for what interests are protected under Alaska's constitutional right to privacy is stated in Hilbers v. Municipality of Anchorage, 611 P. 2d 31, 42 (Alaska 1980), quoting from Justice Harlan's concurrence in Katz v. United States, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L.Ed. 2nd 576 (1967):

> First, that a person has exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as "reasonable".

See also Glass, 583 P.2d at 875.

There can be little doubt that [redacted] has both a subjective and an objective expectation of privacy which is reasonable under the circumstances. [redacted] having been placed in the legal custody of DFYS pursuant to a CINA proceeding, knew CINA proceedings were confidential and closed to the public. AS 47.10.070. Likewise, therapy for [redacted] was arranged by her DFYS social worker.

Under the Alaska constitution, the required level of state justification for its infringement of a citizen's right of privacy turns on the precise nature of the privacy interest involved. In [redacted] case, her

being an abused child and having her relationship with social workers and therapist initiated through a CINA proceeding, so as to insure she would receive treatment for her trauma, mandates an extremely high level of justification for state interference with these relationships.[6] Falcon, 570 P.2d at 476. In order for the state to invade the privacy of [redacted] relationship with her social worker and therapist, the state should be required to show that their policy is necessary to fulfill a compelling state interest.

In the context of CINA cases the state cannot justify their invasion of [redacted] privacy interests. Protecting [redacted] relationship with her social worker and therapist will in no way hinder the state in it's ability to initiate a criminal investigation. Nor is the state hindered from interviewing [redacted] for purposes of a criminal proceeding. In appropriate situations and upon a showing of justification, the state can request the court conduct an in camera review of [redacted] DFYS records to determine if any relevant information

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[6]Since [redacted] case clearly involves state action, she will not address this prerequisite requirement for triggering application of her constitutional right of privacy. See Allred v. State, 554 P.2d 411 (Alaska 1976).

contained therein should be released to the D.A.'s office. The current policies of the state show a total disregard for [redacted] privacy and do not allow for safeguards to protect [redacted] from the state's unwarranted invasion of her personal life.

The state's current policy of invading [redacted] relationship with her therapist and social worker, without any court imposed restrictions, means, pursuant to Rule 16 (a) and (b)(1), AK Rules of Criminal Procedure, that [redacted] abuser may request full access to [redacted] DFYS records at his criminal trial. Regardless whether or not a criminal defendant can successfully obtain [redacted] DFYS records,[7] [redacted] knowledge of the possible release of her records to the defendant is in and of itself further emotional trauma. Because of the importance of [redacted] constitutional right of privacy under our state constitution, the court should construe AS 47.10.090(a) in a manner which avoids a conflict with [redacted] right of privacy. Gunnerud v. State, 611 P.2d 69, 72 (Alaska 1980).

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[7] See Pennsylvania v. Ritchie, ___ U.S. ___, 107 S.Ct. 989, ___ L. Ed. 2d ___ (1987); Thorton v. State, 527 So. 2d 143 (Ala Cr. App 1987); Yarborough v. State, 514 So. 2d 1215 (Miss. 1987).