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6317 SENATE JUDICIARY 721

B. [redacted] Right of Privacy Under the U.S. Constitution

Although the United States Constitution has no express privacy provision, the United States Supreme Court has recognized the right of Privacy arising under the "penumbras" of the first, fourth and fourteenth amendments of our federal constitution. See Griswold v. Connecticut, 381 U.S. 479, 485-486 85 S. Ct. 1678, 14 L. Ed. 2nd 510 (1965). A child, merely on account of their minority, is not beyond the protection of our federal constitution. Though, clearly, children do not have the same constitutional protections as an adult. See In re: Gault, 387 U.S. 1, 13, 87 S. Ct. 1428, 1436, 18 L Ed. 2d 527 (1967); McKiever v. Pennsylvania, 403 U.S. 528, 547, 91 S. Ct. 1976, 1987, 29 L. Ed. 2d 647 (1971). The United States Supreme Court has on a number of occasions addressed the importance of a minor's right of privacy and has firmly delineated that, though not equal that of an adult, the state may not override a minor's privacy right without sufficient justification. See Carey v. Population v Population Services International, 431 U.S. 678, 97 S. Ct. 2010, 52 L Ed. 2d 675 (1977); Bellotti v. Baird, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979).

Because a child does not necessarily have the same constitutional rights as an adult under our federal constitution, [redacted] case presents an unusual situation. Initially [redacted] was seventeen (17) years old when placed in the legal custody of DFYS. [redacted] turned eighteen (18) years of age while in state custody. Though for a time she remained in the legal custody of DFYS,[8] [redacted] has recently been released from DFYS' legal custody.[9] Because [redacted] turned eighteen (18) years old while in DFYS custody, she believes she is entitled to the full protection of our federal constitutional rights.

The United States Supreme Court has determined that the state's invasion of a person's privacy can only be allowed when necessary to further a compelling state interest and that the government's regulation must not sweep to broadly. Griswold, 381

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[8] See AS 47.10.080(c), which allows persons to remain in the legal custody of DFYS up to age nineteen.

[9] [redacted] was released from the legal custody of DFYS by order of the Honorable Victor D. Carlson, Judge of the Superior Court, on November 16, 1988. Though releasing [redacted] from the custody of DFYS, the Superior Court has continued the appointment of the Office of Public Advocacy as counsel for [redacted] for purposes of this appeal.

U.S. at 485, 85 S. Ct. at 1682, 14 L. Ed. 2d at 516; Roe v. Wade, 410 U.S. 113, 115, 93 S. Ct. 705, 728, 35 L. Ed. 2d 147, 178 (1973). In the instant case [redacted] federal constitutional right of privacy has been violated because the state refuses to follow the procedures set forth in AS 47.10.090(a) i.e., requesting court approval prior to the release of [redacted] DFYS records to the D.A.'s office.

IV. THE TRIAL COURT ERRED IN HOLDING THAT DFYS' POLICY OF RELEASING [redacted] DFYS RECORDS TO THE D.A.'S OFFICE, WITHOUT PRIOR NOTICE OR COURT APPROVAL, DID NOT VIOLATE [redacted] PSYCHOTHERAPIST-PATIENT PRIVILEGE, A.R.E. 504

Alaska Rule of Evidence 504(a)(3) & (4) state:

> (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. (Emphasis added.)
>
> (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.

Alaska Rule of Evidence 504(b) and (d)(7) State:

(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

Alaska Rule of Evidence (d)(7) states:
(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. (Emphasis added.)

[redacted] was referred to therapy with Gary Lichtenstein, MSW, ACSW, Alaska Psychosocial Services by her DFYS social worker while in the legal custody of DFYS. Though Mr. Lichtenstein is not a physician nor a psychologist, [redacted] contends that her therapy should be protected, pursuant to A.R.E. 504, because she reasonably believed Mr. Lichtenstein to be a psychotherapist. [redacted] reliance on Mr. Lichtenstein being a psychotherapist is analogous to the facts presented in Allred v. State 554, P.2d 411 (Alaska 1976). Allred asserted that his contact with a

psychiatric social worker was in essence a "poor man's psychiatrist" and that there was no justified reason for limiting the psychotherapist-patient privilege from protecting such a relationship. Id. at 411. Because Allred could have reasonably believed the psychiatric social worker would be his counselor, the court determined, in this instance, Allred's communications should be protected by the psychotherapist-patient privilege. Id. at 419-422.

In [redacted] case she was referred and required to go to therapy as part of the CINA proceeding. If ever a person had a reasonable expectation that their therapy would be protected by the psychotherapist-patient privilege, it should be here. [redacted] therapy was completely arranged by DFYS to provide [redacted] treatment for the abuse she had experienced while in [redacted] custody. [redacted] realized her therapy was to be arranged and coordinated between her therapist and social worker for the CINA proceeding but was not informed her records could be released for other purposes.

The psychotherapist-patient privilege belongs to [redacted] not DFYS or the Department of Law, and may not be waived by the social worker or attorneys with the Department of Law. A.R.E. 510. See Fox v. State, 685

P.2d 1267, 1273 n. 8 (Alaska App. 1984); Spencer v. State, 642 P.2d 1371, 1376 and n. 3 (Alaska App. 1982). If the court determines that [redacted] DFYS records are not protected from disclosure pursuant to AS 47.10.090(a), then [redacted] psychotherapist-patient privilege prohibits the release of these records. A minor's privilege under A.R.E. 504, while not applying to CINA 47 proceedings, is not waived to situations outside CINA cases. Wetherhorn, 683 P.2d at 275-76. This court should strictly and literally apply [redacted] privilege in the present case and require DFYS to provide notice and obtain court approval prior to the release of [redacted] DFYS records to the D.A.'s office. Id. at 280 n 12.

V. THE DEPARTMENT OF LAW'S CIVIL AND CRIMINAL DIVISIONS ARE SEPARATE AND DISTINCT FOR PURPOSES OF AS. 47.10.090(a)

The trial court's memorandum of decision found that because the assistant attorneys general and assistant district attorneys are part of a single Department and since the assistant attorneys general and infrequently the assistant district attorneys represent DFYS in CINA proceedings, DFYS could release [redacted] DFYS records to the D.A.'s office without prior

notice or court approval. (R. 56-58) The trial court rejected [redacted] reliance on In re Walton, 676 P.2d 1078, (Alaska 1983), appeal dism., 469 U.S. 801 (1984) for the proposition that the entire Department of Law should not be considered a single law office. (R. 58) [redacted] believes the trial court's decision is incorrect and that the court should find that [redacted] DFYS records should not have been provided to the D.A.'s office without prior notice and court approval.

[redacted] knows of no barrier preventing DFYS from solely producing confidential records to the civil division of the Department of Law. Arguendo, the existence of the disputed Department of Law policy,[10] means that it is not only possible to keep DFYS records solely with the civil division of the Department of Law, but that this is already occurring. [redacted] position is analogous to the Alaska Court of Appeals interpretation of AS 47.17.020(c). In Wetherhorn that court found that where local conditions prevent a report of abuse to DFYS, local law enforcement agencies, who receive the reports of abuse, are acting

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[10] Op. cit footnote 3 at P. 13

as the temporary agents of DFYS for instituting civil CINA proceedings Wetherhorn, 683 P.2d at 279.

The state has asserted that the policies and regulations promulgated by the Department of Law and DFYS,[11] allowing for the production of [redacted] DFYS records to the D.A.'s office, are supported by AS 47.17.040(b). [redacted] believes the state's reliance on this statute is misplaced and equally incorrect. As 47.17.040(b) states in pertinent part "...in accordance with department regulations, investigation reports may be used by appropriate government agencies with child-protection functions, inside and outside Alaska, in connection with investigations or judicial proceedings involving child abuse, neglect or custody." (Emphasis added.) The state's reliance on said statute is misplaced in light of the Alaska Court of Appeals holding that "judicial proceedings", refer to child protective proceedings by DFYS which are civil proceedings, not criminal. Wetherhorn, 683 P.2d at 278-280.

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[11]The state has set forth in their pleadings in the trial court numerous regulations they believe supercede that expressed language of 47.10.090(a). (R. 40-46).

This court has previously established that the Department of Law, as now organized in civil and criminal divisions is not a single law firm for conflict of interest purposes. Walton 676 P.2d, at 1084. [redacted] believes that the Walton decision is applicable to the issues presented by [redacted] herein. [redacted] believes that in light of her constitutional and statutory rights, that the trial court's denial of her motion for a protective order is incorrect and should be reversed.

VI. REMEDY

[redacted] is not seeking to foreclose under all circumstances the release of her DFYS records to the D.A.'s office. Rather, [redacted] believes that after proper notice and court review there may be appropriate reasons and circumstances which could allow the release of all or part of [redacted] DFYS records to the D.A.'s office. The proper procedure for resolving a request to release DFYS records should be for the court, prior to the release of the DFYS records, being apprised of the particular necessity for the release of the DFYS records and the unavailability of this information through non-privileged sources: See: In re J.R., 499 A.2d 1155 (VT. 1985). Before allowing the release of her DFYS records, the court should allow [redacted] to

respond to the state's request for the release DFYS records. [redacted] advocates, that the court next conduct a cautious in camera screening of the records to determine if the release of said records, pursuant to AS 47.10.090(a), would be to persons with a 'legitimate interest' in them. The court, in its review of the DFYS records, should ensure the redaction of the records to excerpt all information which should remain privileged. The court should also impose any additional safeguards deemed necessary to protect [redacted] privacy and the integrity of the juvenile system. See: Matter of Pet. for Cert Rec. of Mcleod Cty., 352 N.W. 22 24 (Minn. App. 1984); Howell v. New York City Human Res. Admin., 467 N.Y. 3.2d 359 (A.D. I Dept. 1983).

CONCLUSION

This court should reverse the Superior Court's order denying [redacted] motion for a protective order regarding the release of her DFYS records.

DATED at Anchorage, Alaska this 25th day of November, 1988.

OFFICE OF PUBLIC ADVOCACY

BRANT McGEE
PUBLIC ADVOCATE

By: Philip J. McCarthy, Jr.
PHILIP J. McCARTHY, JR.
DEPUTY PUBLIC ADVOCATE

MEMORANDUM

State of Alaska
Department of Law

TO: Peter Froehlich
A.G.'s Office
Juneau

DATE: August 12, 1988

FILE NO.:

TEL. NO.: 276-3550

SUBJECT: Changes to AS 47.10.090
Records of children's court

FROM: Pat Kennedy
Assistant Attorney General
Anchorage

For some years now the records section of AS 47.10, which contains a flat prohibition on the "release" of any information kept on a minor by any state, federal or municipal agency in the performance of its duty without a court order has been broken more than it has been followed. We have developed a number of protocols which allow for the exchange of information among agencies. DHSS has promulgated regulations which allow for the release of information in certain circumstances. The regulations allow for the sharing of information with treatment agencies, the police, native groups, the military, foster homes and licensed facilities. DHSS has an agreement with certain school districts which allow for the sharing of information. Yet every time a question comes up about a release of information we reinvent the wheel. The number of opinions about "confidentiality" and the number of problems concerning "confidentiality" are endless and time-consuming for us and our clients.

Recently the issue has come up again pertaining to the possible institution of a case management system for serious habitual juvenile offenders and in the requirements under PL 96-272 for continual review by boards which have to include a neutral party of children in care. In Anchorage we have started a program of early placement review -using citizen panels. Licensing has problems getting information on children in licensed care facilities so they can check on programs and possible abuses.

I have spoken to Yvonne Chase and Martha Holmberg from DFYS Central Office, Pam Montgomery and Jay McCarthy from OPA, Scott Taylor and Cammy Oechsli from the PDs office, the Anchorage Human Services Section, APD, various school district personnel, and Bill Hitchcock, standing master for children's court. They are all in agreement that the statute is outdated and unworkable. There is some trepidation that if we just continue to ignore it things can go on as they have for a while, but if we "fix" it it

might get worse. However, they are all willing to agree to support an attempt to try and fix it. It is possible that there might be some limited opposition from OPA and the PD central administration because of their defense of delinquents and parents who are abusers.

The only other option I can see is to try to get a standing order from the Supreme Court to release certain information in all cases. That might be the next attempt if this goes nowhere.

There should be no fiscal impact other than a negative one - that is it should save staff time, court time and paperwork.

I have not had time to research other state laws.

The only legislator I have spoken to (through his aide) is my own - Rick Halford. His aide thought he would be supportive, particularly if it were tied to a serious habitual offender project. I do not know of anyone right off hand who would object.

I hope the above information fits Bob Evans' memo. If you need further information, please let me know. I have attached for your information a rough draft of the kind of additions I am looking for. I have included most of the current law, and expanded what can be shared and with whom. In addition, I have stretched the confidentiality requirement to cover parents and other parties with whom we have traditionally had serious problems concerning the public release of information. That language is taken from Child in Need of Aid Rule 22.

Thank you for your consideration.

EPK/sd

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

CRIMINAL DIVISION

REPLY TO

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January 17, 1989

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

Dear Senator Halford:

On Thursday, January 12, 1989, I talked to Teresa Maser of your staff about amendments that the Criminal Division of the Department of Law believes should be made to SB78. The intent of the amendments is to ensure that the information needs of the Departments of Law and Public Safety are protected. In addition, we would suggest that the penalty for release of information be reduced from a misdemeanor to a violation.

The specific amendments we believe to be necessary are:

1. Insert the words, "but excluding those relating to offenses listed in AS 47.10.010(b)" after AS 28.15.185: "All information and social records pertaining to a minor 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 <u>but excluding those relating to offenses listed in AS 47.10.010(b)</u>, are privileged and may not be disclosed directly or indirectly to anyone without the court's permission."

Under AS 47.10.010(b), traffic and certain other offenses are excluded from the confidentiality provisions of Title 47. In order for the exclusion to continue in effect, SB78 must be amended.

2. Replace the word "is" with "shall be" on page 2, line 6: "A need for information for a legitimate purpose <u>shall be</u> [IS] presumed in the following circumstance:"

The purpose of this amendment is to clarify that the presumption is mandatory. Using "is" gives rise to a number of questions, such as, how a determination is made of the circumstances under which the presumption applies, and who makes the determination.

3. Insert the words "by or" on page 2, line 17: "(6)

furthering prosecution of crimes committed by or against a minor;"

Although subsection (5) allows for information to be released to further the investigation of crimes committed by a minor, the bill presently does not allow for a similar release of information to further the prosecution of such crimes. Since this information would be of critical importance in cases, for example, where the state is evaluating whether to seek waiver of juvenile jurisdiction to try a minor in adult court, it is important that the statute be amended.

4. Add an additional subsection to AS 47.10.090(b) as follows: "(10) giving or obtaining information for purposes of fingerprinting under AS 47.10.097."

Last session, the Legislature added a section to Title 47 that allowed law enforcement officers to "fingerprint a minor who is 16 years of age or older for reference to or entry into the Alaska automated fingerprint system without a court order when the minor is convicted of, or adjudicated a delinquent for, an offense that is a felony." However, the statute failed to address how a law enforcement officer would know whether a minor had been convicted of a felony. The Department of Public Safety has been unable to implement this law because they have not been able to gain access to confidential juvenile conviction records. The proposed amendment would correct this problem, and allow felony conviction records of minors over the age of 16 to be released to law enforcement officers.

5. Insert the words "shall enter a written order that sets out the specific portions of the record that is released, and" after the word "court" on page 2, line 29: "In releasing the material, the court shall enter a written order that sets out the specific portions of the record that is released, and may issue protective orders that are necessary to balance the child's right to privacy against the defendant's constitutional rights.

The files of records and information relating to a juvenile may be voluminous. As a precautionary measure, and in order both to avoid the inadvertent release of sensitive information, and to protect the privacy rights of juvenile records, the court should set out with specificity the records that are released to a criminal defendant.

6. Insert the words "or to the prosecution, and shall provide copies to the parties" on page 2, line 29: "The court shall release material that is relevant to the defense, or to the prosecution, and shall provide copies to the parties."

As currently drafted, the bill arguably allows confidential records to be released to a criminal defendant and not

to the prosecution. The proposed amendment clarifies that such materials are to be released to both parties in a criminal case.

7. Change the language of the last sentence of subsection (d) on page 3, lines 13-15 as follows: "Prior [FELONY] convictions, or adjudications, for felony offenses of the juvenile shall be released for purposes of determining the length of a presumptive sentence under AS 12.55.155.

The amendment is necessary since juvenile court convictions are often referred to as adjudications.

8. Change the language of subsection (e) on page 3 as follows: "(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 is convicted of, or adjudicated a delinquent for, a second felony offense [FOUND FOR THE SECOND TIME TO HAVE VIOLATED A LAW, WHICH IF VIOLATED BY AN ADULT WOULD BE A FELONY], shall be made public unless the court, for good cause, in certain individual cases, enters an order prohibiting the disclosure."

As currently drafted, the bill arguably allows for disclosure of the name of an offender who has committed the same crime twice, and not the name of an offender who has committed a different crime for the second time. Thus, if a minor had committed the crime of first degree sexual assault and later committed the crime of manslaughter, the minor's name could not be released. On the other hand, if the minor had committed the crime of burglary twice, the minor's name could be disclosed. The proposed amendment clarifies that conviction for any two felony offenses potentially triggers disclosure of the minor's name.

9. Change the penalty provision in subsection (f) on page 3 from a misdemeanor to a violation: "A person who violates a provision of this section is guilty of a violation [MISDEMEANOR], and upon conviction is punishable by a fine of not more than $500 [OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BY BOTH]."

The current penalty does not fall within the class of criminal penalties defined in Title 12, but rather is a hybrid. The penalty should conform to Title 12, and should be classified as either a violation, a class A misdemeanor, or a class B misdemeanor. For the reasons stated below, we would recommend that the penalty be a violation.

Although it is appropriate to penalize a person who releases confidential records in violation of the statute, and misdemeanor penalties are provided under present law for this type of behavior, neither the Department of Law nor the rest of the

criminal justice system have the resources to pursue such cases as misdemeanors. By reducing the penalty from a misdemeanor to a violation, the need for a jury trial and court-appointed counsel for persons illegally releasing records is eliminated, and the likelihood that such cases will be prosecuted is increased.

I very much appreciate your consideration of the Department of Law's requested amendments. If I can answer any questions, or provide you with any additional back-up materials, please do not hesitate to contact me immediately.

Very truly yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: _____
Laurie H. Otto
Assistant Attorney General

cc: Gayle Horetski, Deputy Commissioner
Department of Public Safety

Bob Evans

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

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

M E M O R A N D U M January 14, 1989

SUBJECT: Sectional Analysis of SB 78
(Work Order No. 6-0419A)

TO: Senator Rick Halford

FROM: Terri Lauterbach
Legislative Counsel

The following is a sectional analysis of SB 78, a bill which, in general, clarifies under what circumstances and with whom court records on juveniles may be released or shared.

AS 47.10.090(a). The new language in this subsection consists of "are not public records" on line 11 and all the language found on lines 13 - 20. The new language on lines 13 - 20 allows access to records by parties and their attorneys or guardians, foster care review boards, and other persons as authorized by statute or court order. Persons with access must maintain the confidentiality of the information.

AS 47.10.090(b). The new language in this subsection includes the reference in lines 23 - 24 to "agent, contractee, or licensee of a federal, state, or municipal agency." This clarifies that these groups may also have access to information about minors if they are acting on behalf of the federal, state, or municipal government. New language in this section also starts in the middle of line 27 and continues on to the end of the subsection. This language specifies when a contractee may share information with another contractee without a court order. The new language includes a list of circumstances under which a legitimate purpose for the information can be presumed.

AS 47.10.090(c). This subsection is all new language. It pertains to the particular situation of a discovery request by a criminal defendant for the records of a child victim in

abuse cases. Records would be released to the court, which would decide which ones to release to the defendant.

AS 47.10.090(d). This subsection does not include two phrases that are found in present law. On page 3, line 7, where there is a reference to the court's "official records," present law also refers to "information and social records." On page 3, line 12, present law restricts the "use" of the records to "an officer of the court" in making a presentencing report. The last sentence of this subsection is also new language. This sentence clarifies that prior felony convictions of a juvenile will be released for purposes of determining the length of a presumptive sentence.

AS 47.10.090(e). The only new language in this subsection is the last sentence. It allows for expedited hearings in situations of escape of a minor in order to determine if the minor's name or picture should be disclosed.

AS 47.10.090(f). There is no new language in this subsection.

I hope you find this description of the bill helpful. If I can be of further assistance, please let me know.

TL:lmb
L6/148

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907·465·3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM January 20, 1989

SUBJECT: Comparison of SB 78 to CSSB 78(Judiciary)
(Work Order No. 6-0419)

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Terri Lauterbach Terri
Legislative Counsel

You have asked for a comparison between SB 78 and CSSB 78(Judiciary), noting the changes made by the CS.

AS 47.10.090(a). In this subsection, the phrase "Duly constituted" has been added on page 1, line 14, and the phrase "or use" has been added on page 1, line 19.

AS 47.10.090(b). In this subsection, the phrase "but excluding those relating to offenses listed in AS 47.10.010(b)" has been added on page 1, lines 26 - 27; paragraph (5) has been added on page 2, lines 17 - 18; paragraph (6) on page 2 has been changed so that records may be exchanged that are helpful in both the prosecution and investigation of crimes committed both by and against a minor; and "protocol" on page 2, line 25, has been limited to "state agency protocol."

AS 47.10.090(c). In this subsection, the sentence that begins on page 3, line 1, has been clarified so that relevant material may be released to both the defense and the prosecution. Also, the court is required to enter a written order that sets out the specific portions of the record that are released; this requirement was not in the original bill.

AS 47.010.090(d). The last sentence of this subsection has been rewritten to clarify that adjudications of delinquency for acts that would have been felonies if committed by an

adult will be released for purposes of presumptive sentencing.

AS 47.10.090(e). Page 3, lines 25 - 28, have been rewritten to clarify that adjudications of delinquency are covered and that there need only be two offenses, not two violations of the same law.

AS 47.10.090(f). The penalty in this subsection has been changed from a misdemeanor to a violation, punishable only by a fine with no imprisonment.

TL:gc
WKG6/014

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPT. OF HEALTH AND SOCIAL SERVICES

P.O. BOX H-05
JUNEAU, ALASKA 99811-0630
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DIVISION OF FAMILY AND YOUTH SERVICES

January 19, 1989

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

Dear Senator Halford:

Enclosed are this Division's recommendations on SB 78. A Division of Family and Youth Services staff person, Frank Barthel, has also contacted Teresa Maser and verbally given her these recommendations to assure that you had them prior to the first committee hearing.

Recommendations:
Section 1, page 1, line 14 specifies that "foster care review boards doing reviews under 42 U.S.C. 671-675" have access to court files without court orders. In order to be more precise, the bill should read "duly constituted review boards doing reviews under P.L. 96.272." This would help avoid a group of persons proclaiming to be a review board and hence eligible to obtain juvenile records.

On page 1, line 18, the words and use should be placed after the words "access" and before the word "may". The court should not only have some control over the access but should also be able to review and control the use of the minor's records.

A further restriction should be added to page 1, line 21. After the word "minor", the words under the jurisdiction of the court should be added. In AS 47.10.090(a), it is only the records brought to the court that are under consideration. Section (b) of AS 47.10.090 is too broad and as stated could include any record of a minor prepared by the agencies listed.

To be consistent with the language in Section 1, page 1, line 21, the words "pertaining to a minor under jurisdiction of the court" should be added to Section 1, page 1, line 28 between the words "information" and "without".

The language on page 2, line 16 should read:

> (6) furthering prosecution of crimes committed by or against a minor; This change would be consistent with the language of (5) which allows sharing information to "further investigation of crimes by or against a minor".

The Division has a concern about the use of the word "protocol" on page 2, line 23. The term is not defined in the bill nor in AS 47.10. The intent of the bill seems to be to allow sharing of information to further the purposes under such agreements as the Statewide Child Sexual Abuse Protocols. The Division believes that is covered under other "legitimate purposes", specified in the same subsection. The Division suggests removing the word protocol from the bill to avoid the broad effect its inclusion may have.

Another suggestion concerns the language on page 3, line 14 relating to release of "prior felony convictions of the juvenile . . . for the purposes of determining the length of a presumptive sentence". This language is incorrect.

The language which should be used is contained in AS 12.55.125(c)(19). A "defendant's prior criminal record" which "includes an adjudication as a delinquent for conduct that would have been a felony if committed by an adult" must be considered as an aggravating factor by the court in imposing sentence under the criminal code. It does not serve as a "prior conviction" for the purpose of enhancing sentences under AS 12.55.125 as the language in SB 78 suggests. In fact, juvenile delinquency adjudications are specifically not considered convictions by statutory definition [AS47.10.080(g)]. Therefore, the language should read: "Prior [felony] convictions, or adjudications 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."

The Division appreciates the opportunity to comment and should you need additional input from the Department, please contact us.

Sincerely,

Yvonne M. Chase, ACSW
Director

YMC/FB/skb
Enclosure
cc: Elizabeth Shaw
Assistant Attorney General
Juneau
Laurie H. Otto
Assistant Attorney General
Criminal Division
Juneau

Sec. 47.10.084. Legal custody, guardianship, and residual parental rights and responsibilities.

NOTES TO DECISIONS

The phrase "reasonable visitation" in subsection (c) does not imply an absolute right to visitation; this section should be read in conjunction with the rest of the chapter to allow parental visits to be barred when the visits are not in the best interests of the child. K.T.E. v. State, Sup. Ct. Op. No. 2877 (File No. S-50), 689 P.2d 472 (1984).

The following procedures should be followed when visitation rights are denied prior to the termination of parental rights: first, the Department of Health and Social Services, Division of Family and Youth Services should have primary authority to set visitation based on the best interests of the child, since the division is in the best position to make this decision in the first instance; and secondly, either the guardian ad litem or the parents should be entitled to request an expedited evidentiary hearing of a denial of visitation, which would consist of an independent determination by the superior court that clear and convincing evidence showed that the child's best interests were served by disallowing parental visitations. K.T.E. v. State, Sup. Ct. Op. No. 2877 (File No. S-50), 689 P.2d 472 (1984).

De facto determination of natural parent's visitation rights. — Where the Department of Health and Social Services decided to allow minor children, who had been adjudicated as children in need of aid, to move from Alaska to Alabama with their foster care family, the state's action constituted a de facto termination of a natural parent's visitation rights; the natural father was unemployed and virtually penniless, the state would not provide airfare so that the father could visit his children on a regular basis, and the father would be limited to phone "visits" because of his lack of funds. D.H. v. State, Sup. Ct. Op. No. 3104 (File No. S-1451), P.2d (1986).

Standard of review of state action constituting de facto termination of natural parent's right of reasonable visitation. — The appropriate standard of review for state decisions which essentially terminate a natural parent's right of reasonable visitation under subsection (c) is an independent determination of whether the state has proved by clear and convincing evidence that termination of parental visitation is in the child's best interest. D.H. v. State, Sup. Ct. Op. No. 3104 (File No. S-1451), P.2d (1986).

Applied in In re B.L.J., Sup. Ct. Op. No. 3039 (File No. S-648), 717 P.2d 376 (1986).

Cited in M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Sec. 47.10.090. Records. (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 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.

(b) 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 is found for the second time to have violated a law, which if committed by an adult would be a felony, shall be made public unless the court, for good cause, in certain individual cases, enters an order prohibiting the disclosure.

(c) A person who violates a provision of this section is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than $500 or by imprisonment for not more than one year, or by both. (§ 10(3)(4) art I ch 145 SLA 1957; am § 1 ch 124 SLA 1972; am § 1 ch 90 SLA 1975; am § 20 ch 63 SLA 1977; am § 4 ch 130 SLA 1988)

Effect of amendments. — The 1988 amendment, effective September 1, 1988, in subsection (a), inserted "including traffic offenses and driver's license action under AS 28.15.185" in the third sentence and "driver's license proceedings under AS 28.15.185" in the next-to-last sentence, and inserted the fifth sentence.

Sec. 47.10.097. Fingerprinting of minors. (a) Except as provided in (b) of this section, a minor in the custody of the department or of a law enforcement agency may not be fingerprinted for reference to or entry into the Alaska automated fingerprint system without a court order upon good cause shown.

(b) A law enforcement officer may fingerprint a minor who is 16 years of age or older for reference to or entry into the Alaska automated fingerprint system without a court order when the minor is convicted of, or adjudicated a delinquent for, an offense that is a felony.

(c) Fingerprint records under this section are not subject to AS 47.10.090. (§ 3 ch 121 SLA 1988)

CHAPTER 36. CONFIDENTIALITY OF CLIENT RECORDS

7 AAC 36.010. SCOPE. This chapter applies to the use or disclosure of information concerning applicants and recipients of services from the division of family and youth services. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.020. INFORMATION TO BE SAFEGUARDED. Information to be safeguarded by the division includes the following:

(1) names and addresses of applicants and recipients of services from the division;

(2) information contained in applications, reports of investigations, evaluations, medical examinations, correspondence and court reports, and other information concerning the condition or circumstances of any person from whom information is obtained, whether or not this information is recorded;

(3) division evaluation of and action taken on the information; and

(4) the identity of any person who reports child abuse or neglect. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.030. PROHIBITIONS AGAINST DISCLOSURE OF INFORMATION. (a) The division shall limit the use of all safeguarded information to purposes directly connected with the administration of family and youth services programs.

(b) The division may not disclose any safeguarded information obtained by a representative, agent, volunteer, or employee of the division in the course of discharging the duties of the division to anyone outside of the department, other than in the administration of the family and youth services programs and as provided in this chapter. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.040. AUTHORIZATION FOR DISCLOSURE OF INFORMATION. The department has exclusive control and custody of the information collected by the division. Any request for disclosure of information not covered by this chapter, or requiring a special determination, should be addressed to the director of the division of family and youth services. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.050. DISCLOSURE OF INFORMATION AT CLIENT'S REQUEST. (a) Upon receipt of written authorization from an adult client, the division shall disclose the requested information concerning the adult to the adult or the adult's designee.

(b) Upon receipt of written authorization from

(1) a child client, the division shall disclose the requested information concerning the child to the child or the child's designee, except that the child may not authorize disclosure of information acquired while the child was the subject of a child-in-need-of-aid or delinquency petition or was a ward of the state;

(2) the parent, guardian, or custodian of a child client of the division, the division shall disclose requested information concerning that child to the parent's, guardian's or custodian's designee, except that

(A) the parent, guardian, or custodian may not authorize disclosure of information acquired while the child was the subject of a child-in-need-of-aid or delinquency petition or was a ward of the state, and

(B) the parent, guardian, or custodian may not, over the objections of the child, authorize disclosure of information which infringes on the right of privacy of the child. Eff. 5/15/83, Register 86)

Authority: AS 09.25.120 AS 47.05.010
AS 25.20.120 AS 47.10.080(f)
AS 47.05.010 AS 47.10.090
AS 47.05.015 AS 47.17.010
AS 47.05.020 AS 47.35.060
AS 47.05.030

7 AAC 36.060. DISCLOSURE OF INFORMATION TO A PARENT OF A CHILD. (a) The division shall disclose information concerning a child client receiving services, acquired while the child was the subject of a child-in-need-of-aid or delinquency petition or was a ward of the state, to the parent or guardian upon the parent's request only

(1) when the information has been procured as part of a court-ordered evaluation program;

(2) when the information is necessary to the parent for the parent's participation in court-ordered treatment, if the right of privacy of the child is not infringed;

(3) when the information is necessary to allow the parent to exercise residual parental rights, as provided under AS 47.10.084(c); or

(4) when the court has ordered that the information be disclosed.

(b) The division shall disclose information concerning a child client receiving services, acquired while the child was not the subject of a child-in-need-of-aid or delinquency petition and was not a ward of the state, to the parent, upon the request of the parent, if the right of privacy of the child is not infringed. (Eff. 5/15/83, Register 86)

Authority: AS 09.25.120 AS 47.05.040
AS 25.20.120 AS 47.10.080(f)
AS 47.05.010 AS 47.10.081(c)
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.070. DISCLOSURE OF INFORMATION TO GUARDIAN AD LITEM. When a recipient of or applicant for services is the subject of a court proceeding in which a guardian ad litem is appointed for that client, the division may release information concerning the client to the client's guardian ad litem. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.10.050
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.030(e)
AS 47.05.030 AS 47.17.010
AS 47.05.040

7 AAC 36.080. DISCLOSURE OF INFORMATION TO ACQUIRE CONSULTATION OR SERVICES FOR A CLIENT. (a) When the division requests consultation or services for an adult client,

the division may disclose information to the agency or person asked to provide that consultation or service only upon authorization from the adult client.

(b) When the division requests consultation or services for a child client who is committed to the care of the department or is a ward of the state, the division may disclose the information concerning the child client as is necessary to acquire the provision of consultation or services.

(c) When the division requests services for a child client who is not committed to the care of the department and is not a ward of the state, the division shall disclose information only upon authorization of the child, or the child's parent, guardian, or custodian.

(d) The division shall require the recipient of safeguarded information to maintain confidentiality standards comparable to those in this chapter as to information disclosed. (Eff. 5/15/83, Register 86)

Authority: AS 25.20.120 AS 47.10.080(f)
AS 47.05.010 AS 47.10.090
AS 47.05.015 AS 47.10.230
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060
AS 47.05.040

7 AAC 36.090. DISCLOSURE TO PERSON IN DANGER. When an employee of the division learns of a threat by a client to the physical safety of another person, and it appears possible that such a threat might be carried out, the employee shall give notice to that person or a law enforcement officer as soon as possible, and in a way that will cause the least damage to the client's confidentiality. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.100. DISCLOSURE TO CRIMINAL JUSTICE OFFICIALS. (a) The division may not disclose safeguarded information, in the absence of a court order, to federal, state, or local law enforcement officers, or other criminal justice officials unless that information will be used for purposes directly connected with the administration of family and youth services programs. Included in those purposes may be requests for assistance from law enforcement officers in obtaining physical custody of a child, requests for assistance in investigation of harm to an adult or child, and requests for assistance where disclosure is necessary to protect the safety of the client or the public.

(b) When a court order is issued directing the division to disclose information not otherwise disclosable under this chapter to a law en-

forcement or criminal justice agency, the division shall apprise the court of the statutes and regulations concerning confidentiality and ask the court to rule on disclosability before disclosing the information. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.010
AS 47.05.030 AS 47.35.060

7 AAC 36.110. DISCLOSURE IN HEARINGS RELATED TO THE OPERATION OF FAMILY AND YOUTH SERVICES PROGRAMS. A division employee may voluntarily appear, and, if required by a court, shall appear, and give testimony in a hearing which is directly related to the operation of family and youth services programs, including the following:

(1) in a children's, mental commitment, guardianship, or conservatorship proceeding, if a recipient of or applicant for services from the division is the subject of the proceeding;

(2) in a child support, custody, or divorce proceeding to testify concerning the minor children involved; or

(3) in a prosecution for fraud against the program or for a criminal act against a child. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.120. DISCLOSURE IN HEARINGS NOT RELATED TO OPERATION OF FAMILY AND YOUTH SERVICES PROGRAMS. No division employee may testify in a hearing not related to the operation of family and youth services programs with respect to any safeguarded information except where

(1) an adult client has authorized the disclosure of the information; or

(2) a court, having been informed of the existence of the statutes and regulations prohibiting disclosure, orders the disclosure. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.130. DISCLOSURE FOR RESEARCH PURPOSES. The division may disclose otherwise nondisclosable information to a person or organization doing research or maintaining health statistics, if the anonymity of the client is assured, and the division recognizes the project as a bona fide research or statistical undertaking. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.140. DISCLOSURE TO STATE OFFICIALS AND LEGISLATORS. (a) The division may disclose safeguarded information, including lists of clients, to other branches of state government and to municipalities, which fund programs or services used by division clients, if the disclosure is necessary to ensure continued levels of funding and the recipient of the information has confidentiality standards equivalent to those in this chapter.

(b) The division may disclose safeguarded information to a committee of the state legislature only under the following conditions:

(1) the commissioner has approved the disclosure;

(2) only information necessary to accomplish the purpose of the investigation may be disclosed; and

(3) the committee has standards equivalent to the standards of the division for safeguarding the information revealed and restricting the use of the information to purposes directly connected with the purpose of the committee.

(c) The division may make safeguarded information available to auditors working under the authority of the legislature or state administration, if the auditors have written guidelines for safeguarding the confidentiality of information thus obtained.

(d) The division may make safeguarded information available to the state office of the ombudsman if the office of the ombudsman has regulations for safeguarding the confidentiality of information thus obtained. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

Editor's notes. — From the time of the adoption of 7 AAC 36.140 in 1983 until its correction in Register 102 (July 1987), this section jumped from subsection (b) to subsection (d) with no subsection (c) in between. As of Register 102, what was designated (d) became (c) and what was (c) became (d).

7 AAC 36.150. DISCLOSURE OF INFORMATION TO OTHER STATES. The division may disclose to an out-of-state governmental agency with child protection functions information which has a direct bearing on an investigation or judicial proceeding in which the protection of a child from child abuse or neglect or the custody of a child is at issue. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.010
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030

7 AAC 36.900. DEFINITIONS. In this chapter

(1) "child" means a person under 18 years of age, and . . 18 or 19 years of age who is a ward of the state;

(2) "division" means the division of family and youth services in the Department of Health and Social Services;

(3) "department" means the Department of Health and Social Services. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.010
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030

CHAPTER 37. PUBLIC ASSISTANCE

Section
10. Safeguarding information
20. Information to be safeguarded
30. Prohibitions against disclosure of information
40. Authorization for disclosure of information
50. Disclosure to law enforcement officers
60. Disclosure in court or other hearings
70. Staff participation in court or other hearings
80. Disclosure to public officials
90. Disclosure of identifying information
100. Disclosure for research
110. Release of names for charitable purposes
120. Release of information at client's request
130. General information
140. Distribution of these regulations
150. (Repealed)
160. (Repealed)
170. Personnel classification system
180. Appointment of agents
190. Forms
200. Records and reports
210. Residence in state
220. Applicants outside the state
230. Removal of recipient from state
240. Original and continuing eligibility
250. Old age and survivors insurance
260. Suspension of assistance grants
270. Responsible relatives

7 AAC 37.010. SAFEGUARDING INFORMATION. The regulations of the Department of Health and Social Services must provide safeguards which restrict the use or disclosure of information concerning applicants for and recipients of public assistance to purposes directly connected with administration of the assistance programs. (In effect before 7/28/59; am 8/15/82, Register 83)

Authority: AS 47.05.010 AS 47.05.030
AS 47.05.020 AS 47.05.040

7 AAC 37.020. INFORMATION TO BE SAFEGUARDED. Information which must be safeguarded includes the following, whether recorded or not:

(1) names and addresses, including lists, of applicants for and recipients of assistance;

(2) information contained in applications, reports of investigations or medical examinations, correspondence, and other records concerning the condition or circumstances of any person from whom, or about whom, information is obtained; and

(3) records of agency evaluations of the information described in this section. (In effect before 7/28/59; am 8/15/82, Register 83)

Authority: AS 47.05.010 AS 47.05.030
AS 47.05.020 AS 47.05.040

7 AAC 37.030. PROHIBITIONS AGAINST DISCLOSURE OF INFORMATION. The use of all public assistance information and records, including all lists of names and addresses, will be limited to purposes directly connected with the administration of public assistance programs. These purposes include establishing eligibility, determining amounts of assistance, and providing services. No disclosure of any information or list, obtained by any representative or employee of the department, in the course of discharging its duties, may be made directly or indirectly, other than in the administration of assistance programs. (In effect before 7/28/59; am 8/15/82, Register 83)

Authority: AS 47.05.010 AS 47.05.030
AS 47.05.020 AS 47.05.040

7 AAC 37.040. AUTHORIZATION FOR DISCLOSURE OF INFORMATION. (a) The commissioner of health and social services has exclusive control and custody of all public assistance information. For purposes of facilitating administration of public assistance programs, the commissioner delegates authority to the eligibility staff of the department to disclose information. Any request for information not clearly covered by this delegation, or requiring a special determination, will be referred to the director of the division of public assistance by the eligibility staff.

(b) All public assistance information procured by or available to division of public assistance staff, both professional and clerical, may be used by staff members only, in accordance with 7 AAC 37. (In effect before 7/28/59; am 8/15/82, Register 83)

Authority: AS 47.05.010 AS 47.05.030
AS 47.05.020 AS 47.05.040

7 AAC 37.050. DISCLOSURE TO LAW ENFORCEMENT OFFICERS. Public assistance information may not be released to federal, state, or local law enforcement officers, including district attorneys, U.S. marshals, or local police officers, without a court order,

Alaska Foster Parents Association

P. O. BOX 140651 ◦ ANCHORAGE, ALASKA 99508

January 13, 1989

Dear Legislators and Friends of Foster Care:

On the next few sheets, you will find the legislative priorities of Alaska Foster Parent Association for this year. There are many -- too many some might say. But the needs of foster children are many and have been neglected for so long; the needs of those who provide volunteer care and treatment for these children are many and have been forgotten for years. When children must live outside their own family homes, it is everyone's responsibiity to insure they get the best care, treatment, and services possible. In order to insure a good resource of quality foster parents, they must be treated with respect, kindness, and have fair and consistent treatment. These items have been identified over the years, and nationally recognized, to insure the best quality care for children in foster care or fair and equitable treatment for those foster parents who care for them.

Please support these issues. If you need or would like further information, packets are available by writing or call Miriam at 745-2196 days or 373-5239 evenings. Please consider introducing legislation on these items--or cosponsoring. **YOU DON'T HAVE TO BE A FOSTER PARENT TO HELP A FOSTER CHILD.** You can help by insuring the best possible laws and services are available.

Thank you for caring.

Sincerely,

Miriam Sumner, President

necessity) from other agency staff functions, definitions of what foster parents can be investigated for, and clear procedures to be followed. This can be accomplished by contracting out investigative functions, licensing, or contracting all foster care with DFYS retaining investigative functions.

CIVIL LIABIITY OF FOSTER PARENTS:

At this time, all liability of foster parents is in question, so legislation is necessary in at least 3 areas:

1. Covering foster parents under the good samaritan laws.
2. Providing immediate reimbursement for damage or theft by a foster child
3. Providing legal assistance (attorney) as needed for foster parents (lawsuits, licensing actions, etc.)

Since foster parents provide such a valuable, yet volunteer service, we must protect their person, reputation belongings, and sanity through limiting their liability.

CONFIDENTIALITY LAW REVISIONS:

At this time, confidenciality laws make it difficult for DFYS to provide the needed full and accurate information about a youth when placing them in foster care. Without this information foster parents may be taking unnecessary or unwarranted risks, have limited information to work from, may cause harm without knowing, and are excluded from decisions, meetings, psychological/therapy information, etc. that is all vital to meeting the treatment needs of youth in foster care.

Legislation is necessary to revise existing laws to allow for information sharing with foster parents.

CHILD/YOUTH OMBUDSMAN:

We believe the creation of an ombudsman specifically related to children would help insure all children and youth receive necessary services and enable all concerned to guarantee the bests interests of that child are met. Specifically, it would be vital that the Child Ombudsman office have the power to intervene in situations with children and youth in out-of-home care, to investigate, and make necessary changes. This office would/could be located under the states Ombudsman Office to reduce costs but the person hired as Ombudsman must have a strong background in chld welfare issues.

Legislation to create the Office of Child/Youth Ombudsman would provide accountability and higher quality of care and services to youth.

FOSTER CARE ADVISORY BOARD:

Please consider legislation to create a volunteer foster care advisory board on local, regional and statewide levels. These boards must have the authority to make and pursue recommendations regarding all facets of foster care

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M January 19, 1989

SUBJECT: CSSB 78 ( )
(Work Order No. 6-0419E)

TO: Senator Rick Halford

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is a draft of CSSB 78( ). It includes the changes requested by Teresa Maser and the AG's office, with the following exceptions:

(1) In the first sentence of AS 47.10.090(a), I have added a clarification that this section covers cases "involving minors".

(2) On page 2, in line 8, I have retained the word "is" instead of making the AG's requested change to "shall be." In this context, "shall be" would be an archaic legalism, called a false imperative. Its use, in fact, would create doubt about whether the presumption would be self-executing, the very doubt the AG's office was seeking to avoid. The phrase "shall be" is a future tense implying that there might need to be some intervening action or determination; the word "is" is in the active present tense and declares a legal result that inures without action on anyone's part. Because I understand the committee's intention to be that this presumption be automatic in the listed circumstances, I have retained the word "is." If you do not wish the presumption to be automatic, I would be happy to change the phrase to "shall be" and insert whatever type of determination procedures the committee wishes to have.

(3) On page 2, I have combined the former paragraphs (5) and (6) so that "investigation" and "prosecution" are now covered together in paragraph (6). Since the AG wanted both paragraphs to refer to crimes committed by or against a

minor, there is no longer any reason to have separate paragraphs for "investigation" and "prosecution."

(4) In subsections (d) and (e), I have altered the AG's language about felonies and adjudications of "felony offenses" to the language used to describe those offenses in AS 12.55.155(c)(19). I believe the language achieves the AG's purpose.

In addition to these noted exceptions to requested language, I have one comment. It pertains to the changes requested by the AG for subsection (c). It is unclear to me whether the phrase "to the defense or prosecution" is intended to pertain to the kind of relevancy the released material must have or whether it is intended to describe the persons to whom any relevant material is released. The AG's reasoning seemed to indicate the latter interpretation while the suggested language could be construed the first way. The committee should clarify its intent here.

I hope you find this discussion helpful. If I can be of further assistance, please let me know.

TL:gc:kb
WKG6/004

Enclosure

SB

86

Bill No. House Bill 86

Date January 30, 1989

Title "An Act requiring employers to permit employees and former employees to have access to their personnel files."

Contact: Tom Stuart
264-2452
Eileen Plate
465-2700

House Bill 86 requires employers to provide an employee or former employee access to his or her respective personnel records and to permit the employee to make copies of the records. The employer may charge the employee for the costs of duplicating the records.

Employees should have access to employer kept personnel records as provided in this bill. The accuracy of such records may have a direct bearing on a worker's employability should a prospective employer contact the worker's current or former employer as a reference. Under the provisions of this bill, a worker would have an opportunity to at least be aware of any discrepancies in the employer's personnel records.

The Department supports the provisions of this bill which provide workers a right to access and copy employer kept personnel records.

House Bill 86 would not have a fiscal impact on the Department of Labor.

APPROVED

Jim Sampson
Commissioner

POSITION PAPER/Department of Labor

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 86
PUBLISH DATE:

FISCAL NOTE

REQUEST:
Revision Date:
Agency Affected: Labor
Title: "An Act requiring employers to permit ...access to ...personnel files."
BRU: Labor Standards & Safety
Sponsor: House Labor & Commerce
Components: Wage & Hour
Requestor: House Labor & Commerce

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Tom Stuart by AB

Prepared by: Tom Stuart, Director
Phone: 465-2725
Division: Labor Standards & Safety
Date: 1/26/89

Approved by Commissioner: Jim Samson
Date: 1/26/89
Agency: Department of Labor

Distribution (by preparer):
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Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M February 13, 1989

SUBJECT: Scope of HB 86
(Access to personnel files)

TO: Representative Dave Donley

FROM: Teresa B. Cramer TBC
Legislative Counsel

You have asked whether HB 86 requires an employer to keep personnel files on employees. In my opinion, the answer is no. Under subsection (a), if an employer maintains personnel files, the employer must allow access to the information. There is nothing that affirmatively requires that the information be maintained in the first place.

If I may be of further assistance, please advise.

TC:kb
wkk1/119

STEVE COWPER
GOVERNOR

8C

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 9, 1989

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Senator Kelly:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to child custody determinations.

This bill, recommended by the Council on Domestic Violence and Sexual Assault, in the Department of Public Safety, requires that instances of domestic violence, child abuse, and child neglect be taken into consideration in making child custody determinations. Current law requires that the court consider only "a history of violence between the parents," and then only when awarding shared custody. AS 25.20.090(8). There is no similar requirement that domestic violence be considered under AS 25.24.150 in other custody determinations, nor is there any requirement under either statute that instances of child abuse and neglect be reviewed by the court. Although most judges would be likely to receive such information into evidence as a matter of discretion, this bill requires the court to specifically focus on these factors. The bill also makes AS 25.24.150 more consistent with AS 25.20.090 by allowing courts to consider other pertinent information.

I urge your favorable and prompt action on this measure.

Sincerely,

Steve Cowper
Governor

No. 4

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SB 86 (c)
PUBLISH DATE: 1/9/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to child custody determinations"
Sponsor: Rules Committee
Requestor: Governor

Agency Affected: Dept. of Administratio
BRU: Public Defender Agency

Components: Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Prepared by: John B. Salemi, Acting Public Defender
Phone: 279-7541
Division: Public Defender Agency
Date: 11/3/88

Approved by Commissioner: John Andrews
Date: 12/28/88
Agency: Department of Administration

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

No. 4

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SB 86 (b)
PUBLISH DATE: 1/9/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to child custody determination."
Sponsor: Rules Committee
Requestor: Governor

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Brant McGee, Public Advocate
Phone: 274-1684
Division: Office of Public Advocacy
Date: 10/24/88

Approved by Commissioner: John Andrews
Date: 11/10/88
Agency: Department of Administration

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

No. 4

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SB 86
PUBLISH DATE: 1/9/89 (a)

FISCAL NOTE

REQUEST:

Revision Date:
Title: An Act relating to child custody determination
Sponsor: Rules Committee
Requestor: Governor Steve Cowper

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

This bill would apply to child custody determinations between two private parties. It will have no fiscal impact on the Department of Public Safety.

Prepared by: Barbara Miklos, Executive Director BJM
Division: Council on Domestic Violence and Sexual Assault
Phone: 465-4356
Date: 10/28/88

Approved by Commissioner: Arthur English
Agency: Department of Public Safety
Date: 10/31/88

Sec. 25.24.150. Judgments for custody. (a) In an action for divorce or for legal separation or for placement of a child when one or both parents have died, the court may, if it has jurisdiction under AS 25.30.020, and is an appropriate forum under AS 25.30.050 and 25.30.060, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of a child of the marriage, make, modify, or vacate an order for the custody of or visitation with the minor child that may seem necessary or proper, including an order that provides for visitation by a grandparent or other person if that is in the best interests of the child.

(b) If a guardian ad litem for a child is appointed, the appointment shall be made under the terms of AS 25.24.310(c).

(c) The court shall determine custody in accordance with the best interests of the child under AS 25.20.060 — 25.20.130. In determining the best interests of the child the court shall consider

(1) the physical, emotional, mental, religious, and social needs of the child;

(2) the capability and desire of each parent to meet these needs;

(3) the child's preference if the child is of sufficient age and capacity to form a preference;

(4) the love and affection existing between the child and each parent;

(5) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

(6) the desire and ability of each parent to allow an open and loving frequent relationship between the child and the other parent.

(d) In awarding custody the court may consider only those facts that directly affect the well-being of the child.

(e) Notwithstanding the provisions of (d) of this section, in awarding custody the court shall comply with the provisions of 25 U.S.C. 1901 — 1963 (P.L. 95-608, the Indian Child Welfare Act of 1978). (§ 1 ch 160 SLA 1968; am § 1 ch 167 SLA 1975; am § 2 ch 61 SLA 1977; am § 1 ch 63 SLA 1977; am § 1 ch 15 SLA 1982; am §§ 2, 3 ch 88 SLA 1982)

Revisor's notes. — Formerly AS 09.55.205. Renumbered in 1983.

Cross references. — For intent of 1982 amendments, see § 1, ch. 88, SLA 1982, in the Temporary and Special Acts; for enforcement of visitation rights, see AS 25.24.300.

Effect of amendments. — The first 1982 amendment designated the former first sentence as subsection (a), the second sentence as subsection (b), and the rest of the section as subsection (c), inserted "or for placement of a child when one or both parents have died" and "modify, or vacate" in subsection (a), substituted "a child of the marriage" for "any child of the marriage," and the language beginning "that may seem necessary or proper" for "which may seem necessary or proper and may at any time modify or vacate the order" in subsection (a), and substituted "If" for "Any appointment of" and "AS 09.65.130(c)" for "AS 09.65.130" and inserted "is appointed, the appointment" in subsection (b).

The second 1982 amendment, in subsection (c), substituted "under AS 25.20.060 — 25.20.130" for "neither parent is entitled to preference as a matter of right in awarding custody of the child" at the end of the first sentence, deleted "all relevant factors including" from the end of the introductory language in the second sentence, added "if the child is of sufficient

Propriety of exhibition of child to jury to show family resemblance or lack of it on issue of paternity, 55 ALR3d 1087.

Death of putative father as precluding action for determination of paternity or child support, 58 ALR3d 188.

Admissibility, in disputed paternity proceedings, of evidence to rebut mother's claim of prior chastity, 59 ALR3d 659.

Statute of limitations in illegitimacy or bastardy proceedings, 59 ALR3d 685.

Long-arm statutes, obtaining jurisdiction over nonresident parent in filiation or support proceeding, 76 ALR3d 708.

Legitimation by marriage to natural father of child born during mother's marriage to another, 80 ALR3d 219.

Proof of husband's impotency or sterility as rebutting presumption of legitimacy, 84 ALR3d 495; 14 Am. Jur. POF2d, pp. 409-481.

Who may dispute presumption of legitimacy of child conceived or born during wedlock, 90 ALR3d 1032.

Right of indigent defendant in paternity suit to have assistance of counsel at state expense, 4 ALR4th 363.

Right of illegitimate child to maintain action to determine paternity, 19 ALR4th 1082.

Sec. 25.20.060. Custody of the child. (a) If there is a dispute over child custody, either parent may petition the superior court for resolution of the matter under AS 25.20.060 — 25.20.130. The court shall award custody on the basis of the best interests of the child. In determining the best interests of the child, the court shall consider all relevant factors including those factors enumerated in AS 25.24.150(c).

(b) Neither parent, regardless of the question of the child's legitimacy, is entitled to preference in the awarding of custody.

(c) The court may award shared custody to both parents if shared custody is determined by the court to be in the best interests of the child. An award of shared custody shall assure that the child has frequent and continuing contact with each parent to the maximum extent possible. (§ 6 ch 63 SLA 1977; am § 5 ch 88 SLA 1982)

Effect of amendments. — The 1982 amendment added the subsection (a) and (b) designations, substituted "AS 25.20.060 — 25.20.130" for "this section unless an action between the parents is pending under AS 09.55" at the end of the first sentence in subsection (a), substituted "AS 09.55.205(c)" for "AS 09.55.205" at the end of the subsection (a), and added subsection (c).

Editor's notes. — Section 1, ch. 88, SLA 1982, provides: "LEGISLATIVE INTENT. (a) The legislature finds that it is generally desirable to assure a minor child frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing. While actual physical custody may not be practical or appropriate in all cases, it is the intent of the legislature that both parents have the opportunity to guide and nurture their child and to meet the needs of the child on an equal footing beyond the considerations of support or actual custody.

(b) The legislature also finds that it is in the best interests of a child to encourage parents to implement their own child care agreements outside of the court setting."

Collateral references. — 10 Am. Jur. 2d, Bastards, §§ 60-66.

Modification of child support order as justified by change in circumstances, 1 Am. Jur. POF2d, pp. 1-63.

Pleadings in custody litigation, 22 Am. Jur. Trials, pp. 347-516.

Court's power in habeas corpus proceedings relating to custody of child to adjudicate questions as to child's support, 17 ALR3d 764.

Award of custody of child where contest is between child's father and grandparent, 25 ALR3d 7.

Award of custody of child where contest is between child's parents and grandparents, 31 ALR3d 1187.

Modern status of maternal preference rule or presumption in child custody cases, 70 ALR3d 262.

Award of custody of child when contest is between natural parent and step-parent, 10 ALR4th 767.

Right of incarcerated mother to retain custody of infant in penal institution, 14 ALR4th 748.

Propriety of awarding joint custody of children, 17 ALR4th 1013.

Sec. 25.20.070. Temporary custody of the child. Unless it is shown to be detrimental to the welfare of the child, the child shall have, to the greatest degree practical, equal access to both parents during the time that the court considers an award of custody under AS 25.20.060 — 25.20.130. (§ 6 ch 88 SLA 1982)

Editor's notes. — For legislative intent behind the 1982 change in the child custody law, see editor's note to AS 25.20.060.

Collateral references. — Necessity of notice of application for temporary custody of child, 31 ALR3d 1378.

Sec. 25.20.080. Mediation of child custody matter. (a) At any time within 30 days after a petition for child custody is filed under AS 25.20.060 the court may order the parties to submit to mediation. Each party shall have the right to challenge peremptorily one mediator appointed.

(b) Mediation shall be conducted informally as a conference, or by telephone, or series of conferences, as determined by the mediator. The parties to the action and a court-appointed representative of the minor children shall attend.

(c) If the mediator determines that mediation efforts are unsuccessful, the mediator shall terminate mediation and notify the court that mediation efforts have failed. The custody proceeding shall proceed in the usual manner.

(d) Upon submission of the parties to mediation under this section, a pending child custody proceeding shall be stayed for a period of 30 days or until the court is notified that mediation efforts have failed. All court orders made during the pending custody proceeding remain in effect during the period of mediation.

(e) Costs of mediation shall be paid as ordered by the court by one party, by both parties, or by the state if both parties are indigent. (§ 6 ch 88 SLA 1982)

Sec. 25.20.090. Factors for consideration in awarding shared child custody. In determining whether to award shared custody of a child the court shall consider

(1) the child's preference if the child is of sufficient age and capacity to form a preference;

(2) the needs of the child;

(3) the stability of the home environment likely to be offered by each parent;

(4) the education of the child;

(5) the advantages of keeping the child in the community where the child presently resides;

(6) the optimal time for the child to spend with each parent considering

(A) the actual time spent with each parent;

(B) the proximity of each parent to the other and to the school in which the child is enrolled;

(C) the feasibility of travel between the parents;

(D) special needs unique to the child that may be better met by one parent than the other;

(E) which parent is more likely to encourage frequent and continuing contact with the other parent;

(7) any findings and recommendations of a neutral mediator;

(8) whether there is a history of violence between the parents;

(9) other factors the court considers pertinent. (§ 6 ch 88 SLA 1982).

Sec. 25.20.100. Denial of shared child custody. If a parent or the guardian ad litem requests shared custody of a child and the court denies the request, the reasons for the denial shall be stated on the record. (§ 6 ch 88 SLA 1982)

Sec. 25.20.110. Modification of child custody or visitation. An award of custody of a child or visitation with the child may be modified if the court determines that a change in circumstances requires the modification of the award and the modification is in the best interests of the child. If a parent opposes the modification of the award of custody or visitation with the child and the modification is granted, the court shall enter on the record its reason for the modification. (§ 6 ch 88 SLA 1982)

Collateral references. — Putative father's right to visit illegitimate child, 15 ALR3d 887.

Right of jailed or imprisoned parent to visit from minor child, 15 ALR4th 1234.

Sec. 25.20.120. Closure of custody proceedings and records. At any stage of a proceeding involving custody of a child the court may, if it is in the best interests of the child, close the proceeding to the public or order the court records closed to the public temporarily or permanently. The court may modify or vacate an order under this section at any time. (§ 6 ch 88 SLA 1982)

Sec. 25.20.130. Access to records of the child. A parent who is not granted custody under AS 25.20.060 — 25.20.130 has the same access to the medical, dental, school, and other records of the child as the custodial parent. (§ 6 ch 88 SLA 1982)

Chapter 23. Adoption.

Collateral references. — 2 Am. Jur. 2d, Adoption, § 1 et seq.

Proof: equitable adoption, 18 Am. Jur. POF2d, pp. 531-609.

2 C.J.S., Adoption of Persons, § 1 et seq.

Modern status of law as to equitable adoption or adoption by estoppel, 97 ALR3d 347.

Criminal liability of one arranging for adoption of child through other than licensed child placement agency ("baby broker acts"), 3 ALR4th 468.

Validity and application of statute authorizing change in record of birthplace of adopted child, 11 ALR4th 739.

Sec. 25.23.010. Who may be adopted. Any person may be adopted. (§ 1 ch 84 SLA 1974)

Revisor's notes. — Formerly AS 20.15.010. Renumbered in 1982.

Collateral references. — Adoption of adult, 21 ALR3d 1012.

Sec. 25.23.020. Who may adopt. (a) The following persons may adopt:

(1) a husband and wife together;

(2) an unmarried adult;

(3) the unmarried father or mother of the person to be adopted;

(4) a married person without the other spouse joining as a petitioner, if the person to be adopted is not the other spouse, and if

(A) the other spouse is a parent of the person to be adopted and consents to the adoption; or

(B) the petitioner and the other spouse are legally separated; or

(C) the failure of the other spouse to join in the petition or to agree to the adoption is excused by the court by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances constituting an unreasonable withholding of consent.

SB

88

THE FOLLOWING DOCUMENT HAS NOT BEEN FILMED BUT IS AVAILABLE IN THE ORIGINAL FILE

UNIFORM COMMERCIAL CODE

1977 AMENDMENTS

TO

ARTICLE 8, INVESTMENT SECURITIES AND RELATED SECTIONS

APPENDIX

1977 CHANGES IN TEXT AND REASONS FOR CHANGE

WEST PUBLISHING CO.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

☐ *1031 W 4th AVENUE*
SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550

☐ *1st NATIONAL CENTER*
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701-4679

☒ *P.O. BOX K—STATE CAPITOL*
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

RECEIVED
OCT 26 1989
JAN FAIKS
SENATE OFFICE

October 24, 1989

Chris Christensen
c/o Senator Jan Faiks
Senate Judiciary Committee
3111 C Street, Suite 525
Anchorage, Alaska 99503

Re: SB 88 (investment securities under UCC)
Our file: 773-89-0062

Dear Chris:

I recently returned from vacation to find your phone message stating that the Senate Judiciary Committee will be hearing SB 88 on Thursday, November 9, from 1:30 to 4:00 p.m., in Anchorage. The message indicated that you would like to have supporting documents, such as a sectional analysis, and that I and John McCabe, of the National Conference of Commissioners on Uniform State Laws (NCCUSL), are invited to participate, either in person or by phone. The message does not indicate whether this bill is the only one being considered at that hearing. Is it?

In your absence, Mark Riehle, also of Senator Faiks' office, told me that he would doublecheck the files to see exactly what material had been forwarded to Senate Judiciary by Senate Labor and Commerce. Evidently, little if any material was forwarded, and Sheila Peterson, of the Commerce Committee staff, told me in the hallway down here that she is sending it all to Mark.

I have given Sheila, for forwarding to your office, an extra copy of West Publishing Company's green booklet containing the 1977 amendments to Article 8 of the Uniform Commercial Code (i.e., the amendments contained in SB 88). The official NCCUSL commentary under each section in that publication provides the best sectional analysis. You will note that the booklet is in two basic parts: one sets out the revised Article 8, incorporating the 1977 changes, along with the correspondingly changed sections of Articles 1, 5, and 9; the other, beginning at page 173, sets out the amendments of Article 8, using brackets and underlining to show the specific amendments. The discussion at pages 161 -- 172 is also very helpful.

You should have or should be receiving the following items:

-- a fact sheet for these UCC Article 8 amendments;
-- a four-page summary of the amendments;
-- a two-page item labeled "Why Every State Needs The Article 8 Amendments -- Now!";
-- a 1976 article by Martin J. Aronstein, entitled "A Certificateless Article 8? We Can Have It Both Ways," published in the American Bar Association's The Business Lawyer;
-- a 1985 endorsement of the amendments by the Securities Industry Committee of the American Society of Corporate Secretarys;
-- an April 13, 1989 letter to me from J. P. Tangen, expressing the Alaska State Chamber of Commerce's support of SB 88;
-- the West Publishing Company booklet containing the NCCUSL's amendments and commentary.

You are welcome to review down here my rough draft of the bill, which shows how I incorporated the NCCUSL's amendments into the Alaska Statutes. The only changes I've made are ones necessary to conform to Alaska's format and drafting style. As one works with this material, it is helpful to keep in mind that in our trade and commerce title (AS 45) Chapter 1 corresponds to Article 1 of the UCC, Chapter 2 to Article 2, etc.; within each AS chapter, the section numbers are the same as the corresponding UCC article's section numbers. Thus, AS 45.08.306, for example, is the UCC's Article 8, Section 306.

The NCCUSL's John McCabe tells me that he will be available to participate in the hearing, at the committee's pleasure, by telephone on November 9. (Chicago time is three hours ahead of Alaska time.) His title, address, and phone number are as follows: John M. McCabe, Legislative Director and Legal Counsel, National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611; phone (312)915-0195.

I will also be able to participate by phone.

As originally written, Article 8 of the UCC deals with investment securities in a way that relies on pieces of paper to represent those securities. The new Article 8 recognizes modern technology and business practices to provide a statutory basis for dealing with securities without those pieces of paper. Although the amendments necessitate a 58-page bill, they merely present the single basic idea of uncertificated securities. These amendments, already enacted in at least 35 states, are essential.

Please let me know if there's any further assistance that I might be able to provide the committee regarding this bill.

Yours truly,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: Art Peterson
Arthur H. Peterson
Assistant Attorney General

AHP:cb

cc: John M. McCabe
National Conference of Commissioners
on Uniform State Laws
676 North St. Clair Street, Suite 1700
Chicago, Illinois 60611

Willis Kirkpatrick, Director
Division of Banking, Securities, & Corporations
Department of Commerce and Economic Development

Robert Evans, Legislative Liaison
Office of the Governor

Info provided by John McCabe, legal director + general counsel for National Conf of Commissioners on Uniform State Laws

The Article 8 Amendments to the Uniform Commercial Code

INFORMATION

676 North St. Clair St.
Chicago, Ill. 60611
(312) 915-0195

Cost and Value

States provide nearly all of the funds for ULC by means of a system of assessments based on population. Most of the money is used to support the work of the drafting committees, and to explain Uniform and Model Acts to legislators, other government officials and specialized and general audiences.

ULC gets maximum results from minimum budgets because its major asset – drafting expertise – is donated. The only compensation received by Uniform Law Commissioners is that of knowing they have provided states with solutions to their legal problems. They receive no salaries or fees for their work as commissioners.

This means that lawyers devote hundreds and even thousands of hours–amounting in some cases to millions of dollars worth of time–to the development of ULC proposals. No state could afford the bills for the legal expertise that goes into the drafting of each ULC Uniform or Model Act.

In appraising ULC's value to the states, it is also important to look at its impact on their treasuries. Most ULC proposals rely on "private law," or law governing individual relationships without intervention or regulation by any state agency – except where redress is sought in state courts for breach of a legal obligation. By contrast, "public law" provides for regulation, generally by an executive agency. ULC helps states avoid the costs of creating new regulatory agencies.

The Hard Job

When drafting is completed on an act, a Uniform Law Commissioner's work has only begun. Commissioners then work for adoption of the proposal by the states. Normal resistance to anything "new" makes this the hardest part of a commissioner's job. But the result can be workable modern state law that helps keep the federal system alive.

GENESIS of a Law

Anyone can ask JLC to draft a law. But not all requests are pressing enough to claim its time and resources. Determining the need for and feasibility of a proposed new law, then, is an important first step. The decision to draft is preceded by a thorough screening process:

- Initial screening of requests for new drafting projects is done by the Scope and Program Committee. This group evaluates the need, urgency, current state of law in the affected area, and feasibility of enactment before making a recommendation to the Executive Committee to further review the request.
- Executive Committee members look at a request in terms of ULC's financial and member resources as well as the availability of additional expertise and funding to insure success of the draft. If these appear favorable to the project, they appoint a special Drafting Committee.
- Foundation and government grants support some of ULC's drafting efforts, making it possible to expand advisory committee participation, and to retain expert reporter-draftsmen – usually lawyers experienced in the field – for maximum input and assistance to the Drafting Committee.

Drafting proceeds at meetings of this special committee held thoughout the year. After basic premises and philosophy are decided, a "first tentative draft" is developed for circulation to experts both within and outside the legal profession, to draw criticism and suggestions that will shape succeeding drafts.

Uniform and Model Acts are a minimum of two years in preparation, since they must be considered at no less than two annual meetings by all commissioners sitting as a Committee of the Whole.

Before any annual meeting presentation, a Review Committee for each act determines: 1) whether the draft conforms to the assignment; 2) what policy decisions were made by drafters; and 3) whether the draft is ready for scrutiny "line by line" by the entire Conference.

Once ULC as a whole approves an act, its final test is by a vote by states – one vote per state. A majority of states present, and no less than 20 states, must vote approval of an act before it can be officially adopted as a Uniform or a Model Act, Code or Court Rule.

This unique and lengthy process of screening, drafting, revising and polishing is responsible for the fine edge of excellence that marks ULC "products." After receiving the ULC stamp of approval, a Uniform or Model Act is officially promulgated for consideration by the states.

Legislatures are urged to adopt *Uniform Acts* exactly as written, to "promote uniformity in law among the several states."

Model Acts, on the other hand, are designed to serve as guideline legislation, which states can borrow from or adapt to suit their individual needs and conditions.

Commissioners

Each of the 50 states, the District of Columbia and Puerto Rico select lawyers to serve on their uniform state law commissions. Since ULC is a confederation of state commissions, each state sets its own rules for selection. Most have at least three, and the governor usually selects them.

Considered non-partisan, many commissioners receive their first appointment from a governor of one party, then continue under another party, thus serving for decades.

Famous commissioners include President Woodrow Wilson; Supreme Court Justices Louis D. Brandeis and William F. Rehnquist, and the Harvard Law legend, Roscoe Pound.

Updating Acts

Exemplifying a Uniform Act, the Uniform Commercial Code (UCC) structures nearly all commercial transactions in every state in the U.S. Another ULC proposal having wide influence is the Model State Administrative Procedure Act (MSAPA). Most states have adopted it, and look to its provisions to guide their state agencies.

Both UCC and MSAPA are successes that states have benefited from. But even the best of laws is outdated by technological and social change. Thus, one of the duties of the ULC leadership is to constantly review past successes, checking their relevance for today.

Several methods insure that needed updating goes on. For the Commercial Code, the problem is solved by a "Permanent Editorial Board" charged with keeping abreast of developments that require changes in the law.

The Model State Administrative Procedure Act, however, required appointment of a new committee to revise quarter-century-old rules developed before state governments "boomed" in the 60s and 70s.

Whether a ULC proposal is brand new, a revision, or an amendment, state government can be sure that it's in step with the times.

UNIFORM STATE LAWS

What are they?

Uniform State Laws are the products of a unique organization that has been working for the improvement of state laws since 1892. The National Conference of Commissioners on Uniform State Laws, representing both state government and the legal profession, is a genuine confederation of state interests.

Today there are more than 300 practicing lawyers, judges, law professors and government officials serving as Uniform Law Commissioners (ULC). These state-appointed commissioners, selected for their wide range of legal expertise and experience, provide an immeasurable resource for drafting "uniform" and "model" state laws.

ULC Uniform Acts, Codes and Court Rules – needed where differences in state laws create specific interstate and national problems – have ranged from eliminating jurisdictional child custody disputes to addressing the legalities of electronic transfer of stock ownership.

When uniformity is neither practical nor necessary, ULC Model Acts have provided states with a concisely-structured legislative framework adaptable to their particular needs and problems – in areas such as sentencing and correction reform, and state administrative procedures.

Differences in state laws can deter the free flow of goods, credit and services; restrain full economic growth; and invite federal intervention to compel uniformity. Constitutionally, states have wide latitude for cooperating to solve these problems. ULC is their own cooperative institution for doing so, as well as for contributing to the continuing process of law reform and progress.

Back in 1892

The "Gay Nineties" rolled in on the railroad tracks that were tying the nation together. And Americans were beginning to swap horses for bicycles and motor cars. This new mobility was the prime factor from which ULC sprang.

The Alabama State Bar Association recognized, as early as 1881, the legal tangles created by wide variations in state laws. But it was not until August, 1889, that the American Bar Association decided at its 12th annual meeting to work for "uniformity of the laws" in the 44 states.

Within a year, the New York legislature authorized the governor to appoint three commissioners to explore the best way to effect uniformity of law to ease problems developing between increasingly interdependent states. The ABA endorsed New York's action. The result was the first meeting of the "Conference of State Boards of Commissioners on Promoting Uniformity of Law in the U.S."

Seven states sent commissioners to that 1892 meeting. By 1900, 32 states and two territories had law commissioners. By 1905, only Nevada and Alaska were holdouts, and they joined the parade in 1911.

National Conference
of Commissioners
on Uniform State Laws
676 North St. Clair Street
Chicago, Illinois 60611
(312) 915-0195

Uniform Law Commissioners

UNIFORM STATE LAWS

A Tradition of Excellence

A Brief History of ULC & How It Works

It was a century ago that lawyers first recognized how wide variations in state laws could tangle interstate problems. The Alabama State Bar Association is credited with taking the first formal action to encourage development of "uniform" laws to deal with the problem. That came in an 1881 resolution.

But it was not until August, 1889, when the American Bar Association was holding its 12th annual meeting, that there was a formal move to work for "uniformity in the laws" of the then 44 states.

Within a year, the New York Legislature authorized that state's governor to appoint three commissioners "to examine the subjects of marriage and divorce, insolvency, the form of notarial certificates and other subjects; to ascertain the best means to effect an assimilation and uniformity of the laws of the states; and especially to consider whether it would be wise and practicable for the state of New York to invite other states of the Union to send representatives to a convention to draft uniform laws to be submitted for the approval and adoption of the several states. . ."

A few months later, the ABA endorsed the New York action and urged every other state, the District of Columbia and territorial legislatures to follow the example.

In the Beginning – Seven States

Other states heeded the call. When the first meeting of the "Conference of State Boards of Commissioners on Promoting Uniformity of Law in the U.S." was held in Saratoga, N.Y., Aug. 24, 1892, seven states sent commissioners. They were Delaware, Georgia, Massachusetts, Michigan, New York, New Jersey and Pennsylvania.

The new commissioners didn't waste time. They immediately completed and urged states and territories to adopt three acts – Act Relating to Acknowledgments on Written Instruments; Act Validating Wills Lawfully Executed Without the State; and Act Recognizing as Valid, Wills Probated in Another State.

These first commissioners on uniform laws also recommended that states enact laws governing payment of notes; validating contracts; divorce; and marriage. The latter included raising the marrying age to 18 for males and 16 for females.

They also adopted a table of weights and measures after noting "it will probably be a surprise to most people to learn that legal weights of a bushel . . . with the exception of wheat alone, vary in all states."

After this first burst of activity, the Conference produced no other proposals until 1896 when the Negotiable Instruments Act was completed. This was to become the only act adopted by every state and the District of Columbia.

Then There Were 32

By the turn of the 20th Century, 32 states and two territories had appointed commissioners on uniform laws. During their second decade, Uniform Law Commissioners (ULC) concentrated on legislation that made interstate commerce easier. The resulting laws dealt with sales, warehousing and transportation. A majority of states adopted all of them before these pioneer acts – along with the Negotiable Instruments Act – were superseded by the Uniform Commercial Code (UCC).

In 1905, only Nevada and the Territory of Alaska still had not appointed commissioners. But they joined the club in 1911.

In its third decade, the Conference considered and adopted legislative proposals on a number of issues and problems ranging from partnerships to child labor. And in 1915, the organization officially became the National Conference of Commissioners on Uniform State Laws.

The "Roaring 20s" drummed up new problems and ULC responded with proposals in such areas as aviation and public utilities. In the 1930s, commissioners wrestled with machine gun laws as well as torts and trusts.

Fifty-Year Assessment

As the Conference approached its Golden Anniversary year, its leadership began to reassess its role and to try to determine how ULC could better serve the federal system. Though the past had been productive, commissioners decided they could be even more useful in the future if they attacked major problems with comprehensive solutions rather than trying to cope with them a piece at a time.

The result was the launching of the project that produced the Uniform Commercial Code (UCC). In 1940, ULC officially took on the task of drafting a comprehensive code to provide guidelines for all commercial transactions. Work on some of its components already had begun. In 1947, ULC and the American Law Institute joined in a partnership that put all of the components together into a UCC that was offered to the states for their consideration in 1951. Then came the tedious battles for adoption in every state legislature. By 1967, Louisiana was the lone holdout and it still has not adopted all of UCC.

The breadth and depth of UCC is difficult to grasp. It guarantees that "commercial" transactions in California are subject to the same law as those in Maine. A child purchasing penny candy in a neighborhood shop and a manufacturer buying robot welders for his assembly lines both complete their transactions within the framework of UCC. In UCC states, the code encompasses every sale of goods from crude oil to autos; every bank check written; and all commercial paper, stock and bond transactions.

Success of UCC inspired commissioners to produce and work for adoption of a wide variety of comprehensive legislative solutions to basic state problems. These include: the Uniform Probate Code; Uniform Consumer Credit Code; Uniform Marriage and Divorce Act; Uniform Alcoholism and Intoxication Treatment Act; and a package of proposals designed to do for land transactions what UCC did for commercial transactions – provide modern law to deal with modern problems.

While it was forging its major projects over the past two decades, ULC also managed to commence and complete legislation needed by states to deal with more specific problems. These include such proposals as the Uniform Child Custody Jurisdiction Act; Uniform Anatomical Gift Act; Uniform Class Actions Act; and Uniform Determination of Death Act.

Uniform and Model Acts

In addition to "Uniform Acts," which every state is urged to adopt, ULC also drafts "Model Acts" to guide legislatures dealing with issues that need not be treated uniformly by all states. Some models – such as the Model State Administrative Procedure Act – have been adapted for use by most states.

It's important to state treasuries that most ULC proposals fall into the category of "private law" – the body of law based on English common law that governs the basic legal relationships between people. No governmental body intervenes in "private law" relationships. People conduct their affairs without interference. When a breach of a legally enforceable, private obligation occurs, the courts are available to sort out the facts and grant remedies which range from monetary payments to injunctive relief. For example, the Uniform Residential Landlord and Tenant Act governs the contractual relationship between landlord and tenant. This relationship proceeds unfettered unless a party breaches an obligation – such as a landlord's obligation to maintain fit and safe premises. If such a breach occurs, then the wronged party can seek damages and reparations for losses sustained.

This contrasts with "public law" which usually involves using an executive agency, or bureau, as a regulatory body. In that case, legislatures enact laws vesting authority in an administrative agency which then carries out the duties of investigator, rulemaker, regulator and enforcer. Because new agencies must be created to enforce public law, it usually costs more money.

Why the Conference Works

Dedicated commissioners make the Conference work. They include about 250 practicing lawyers, law professors and judges. It is the effort contributed by these people – commissioners receive no salaries or fees for their work with the Conference – that earned NCCUSL the media label of "prestigious." In this century, President Woodrow Wilson and U.S. Supreme Court Justices Louis D. Brandeis and William F. Rehnquist served as commissioners. So did such law school legends as Roscoe Pound of Harvard.

Commissioners are appointed by each of the 50 states, the District of Columbia and Puerto Rico. The number of commissioners appointed (most states have at least three) and the method of appointment varies from state to state. In most states, the governor is responsible for appointments. But commissioners usually are considered non-partisan. This leads to many commissioners being appointed by the governor of one party and reappointed by the governor of another party. In this way, some commissioners serve ULC for decades.

A Two-Part Job

Such dedicated commissioners usually relish both parts of their unpaid service. This includes drafting and then working for enactment of modern legislation designed to solve problems common to all states.

ULC's reputation was built on the high quality of its drafts. That quality is the result of a procedure structured to bring a unique blend of legal minds to bear on a problem. It begins with the choice of a drafting committee whose members are selected to insure that as much expertise and as many viewpoints as possible will be represented at the drafting table.

For example, there were a number of real estate law experts appointed to the committee responsible for preparing preliminary drafts of the land transactions package which includes the Uniform Land Transactions Act (ULTA), Uniform Simplification of Land Transfers Act (USOLTA), Uniform Condominium Act (UCA), Uniform Planned Community Act (UPCA) and Model Real Estate Cooperative Act (MRECA). These included commissioners who were law school professors as well as practicing lawyers specializing in

real estate law. Then lawyer and non-lawyer experts were invited to provide specialized knowlege to the committee. These advisers represented associations of lenders, builders, sellers, lawyers and consumers. But all decisions were made by commissioners who represent only the people of their states.

The Drafting Ordeal

Preliminary drafts of the proposals were prepared and circulated to advisers and others interested in the committee's deliberations. That included every commissioner. Eventually, the committee was ready to present its work at an annual meeting of ULC for "initial consideration" by every commissioner.

During the annual meeting, commissioners assemble for a week or more to spend every day and some nights studying each "tentative draft" prepared by the committees. The drafts are read "line-by-line" and then discussed, debated and changed. With more than 200 pairs of trained eyes probing every concept and word, it's a rare draft that leaves an annual meeting in the same form as it goes in. Because ULC is a confederation of state commissions on uniform laws, close issues are decided by polling state delegations. Regardless of the number of representatives from each state, each state has only one vote.

Shortly after the annual meeting ends, committees with uncompleted drafts begin incorporating changes made during the meeting and dealing with new problems raised by commissioners and non-commissioners.

Proposals are subjected to this rigorous procedure for at least two annual meetings before they become eligible for designation as ULC products. The final decision on whether a proposal is ready for "promulgation" to the states is made near the close of an annual meeting — again on a one-state, one-vote basis. But the procedure can take much longer. Because of the complexities of ULTA, USOLTA, UCA, UPCA and MRECA, a decade elapsed before the proposals were adopted by ULC.

Conference Proposes – State Disposes

When drafting is completed, a commissioner's job has only begun. Each now is obligated to go back to his state and work for adoption of the completed proposals.

Normal resistance to anything "new" makes this the most difficult part of a commissioner's responsibility. Remember, it took 14 years before UCC was adopted by 49 states.

But the result can be workable, modern state law that helps keep the federal system alive. The work of ULC simplifies the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state. And it insures that problems can be solved close to home in state courts and agencies rather than being lost in overworked federal courts and U.S. departments and agencies.

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QUESTIONS AND ANSWERS ON THE 1977 AMENDMENTS TO ARTICLE 8 OF THE UNIFORM COMMERCIAL CODE

Q: What do the 1977 Amendments to the Uniform Commercial Code (UCC) provide?

A: They permit entities creating investment securities (stocks and bonds are the commonest examples) to issue "uncertificated" securities. This kind of security would not be represented by a "certificate" and would not be transferred by passing a certificate from one person to another. Transfer would take place when the issuer creating the security records the transfer on its books.

Q: How does such a transfer take place?

A: In most instances transfers of uncertificated securities will require computerized records and electronic communications systems. In small corporations that have limited numbers of stockholders and are not publicly traded, uncertificated securities might be created without these technical advances. Under the Amendments, a transfer of any kind follows this basic sequence:

1. The current owner (transferor) of the uncertificated security sends an instruction to the issuer to record a transfer to another person (transferee). The instruction must be in the form required by the issuer.

2. The issuer records the transfer on its records.

3. The issuer returns an identical document to both the transferor and transferee confirming the transfer. This document, called an Initial Transaction Statement (ITS), must be returned within two days after the receipt of instruction. Receipt of the ITS assures that the transaction is complete.

Q: How are uncertificated securities pledged as collateral for a debt?

A: A pledge is a type of transfer under the Amendments. It requires the same sequence as any other transfer, such as a sale or a gift, except that the effect is to preserve on the issuer's books the rights of the creditor in the securities as collateral. A pledge can be recorded in two ways. The creditor can be shown on the issuer's records as the owner of the securities, as collateral for the debt. The pledge, itself, can also be recorded without an actual transfer of ownership, In either case, the creditor's

rights will be protected from any further transfer, since the issuer cannot record any subsequent transfer that conflicts with, or is superior to, the creditor's interest until that interest is removed from the record.

Q: What happens to securities represented by certificates when the Amendments are adopted?

A: There is no change in the legal status of securities represented by certificates. Issuers can continue to offer existing securities and certificates and new issues can be created with certificated securities. The Amendments do not repeal the existing rules, but establish a parallel set of rules for uncertificated securities. It is intended that the law favors neither certificated nor uncertificated securities. When an issuer considers which option to take, the choice will not be influenced by some inherent advantage or disadvantage built into the law, but only by the issuer's perception of the marketing efficiency to be gained. The Amendments expand choices for creating securities. They do not take away anything that is already available.

Q: Can an issuer create both certificated and uncertificated securities at the same time?

A: Yes. It is anticipated that corporations which convert from certificated to uncertificated securities will make the transition over an extended period of time. They will probably have stock issues that are certificated as well as uncertificated. Many issuers may choose a mixed system indefinitely. The Amendments do not restrict any system that an issuer may want to put into effect.

Q: What if the investor wants to have certificates when issued uncertificated securities?

A: If the issuer has a mixed system, with both certificated and uncertificated securities, an investor may demand, and must receive, certificates. If the issuer issues no certificated securities, they do not have to be created to meet the demand of an individual investor. The investor will have to invest elsewhere. This situation arises primarily with stocks, and investors who feel comfortable with the traditional certificates. In most cases, corporations will have mixed systems, and certificates will be available for those who want them.

There are issuers, such as mutual funds, that have never made certificates available - their customers do not expect what has never been offered. Most investors who deal through brokers maintain accounts and never see certificates, even though the large bulk of stocks and bonds are currently certificated. The majority of investors don't expect certificates anymore, and it is likely that the demand will be rare, though they will be available.

Q: Aren't computerized records and electronic transfers more open to fraud and deception than certificated transfers?

A: Securities are valuable property and targets of the unscrupulous and dishonest. Certificates are stolen, signatures are forged; paper may be counterfeited, even after the most elaborate precautions. In short, there are risks inherent for certificated securities, and issuers, financial institutions, brokers, and investors have to take precautions to protect rights represented by certificates. The UCC was never concerned with these problems, except to establish certain basic liabilities. The practices of the securities industry, bolstered by the establishment of these liabilities. The practices of the securities industry, the criminal law, have been primarily responsible for protecting these valuable interests. The system has worked very well, though never perfectly.

The Amendments treat uncertificated securities the same way the UCC has treated certificated securities. Certain basic liabilities are established, but the practices of the securities industry, backed by the criminal law, is the primary defense against fraud and deception. The risks are different with computers and electronic transfer systems, but they are not insurmountable. The banking system already operates largely on electronic transfers of money and while no system of transfers will ever be perfect, it appears that a high level of safety is possible and probable. Indeed, if the market place did not have a high level of safety, nobody would enter the market. That is the best guarantee that systems adopted will be very safe before they are utilized.

Q: Do the 1977 Amendments to the UCC affect securities regulation at the state or federal level?

A: The short answer is no. The UCC has provided the basic transfer rules for investment securities. It has never been concerned with issues of regulation, such as registration of securities issues or disclosure to investors. The Amendments make no change in this pattern. Uncertificated securities are subject to the same regulatory requirements as certificated securities, and the existence or non-existence of the certificate makes no difference whatsoever.

Q: How many states have adopted the 1977 Amendments to the UCC?

A: To date, 35 states, including California, Delaware, Massachusetts, New York, Illinois, and Texas - all states that rank high in quantity of securities trading. With the adoption of the Amendments in Delaware and New York, the opportunity for issues of uncertificated securities expanded enormously. No state that wishes to stay current with the fundamental law respecting investment securities can afford to delay adopting these Amendments.

Q: What will a state gain by enacting the 1977 Amendments to the UCC?

A: Corporations, brokers, financial institutions, mutual funds, and others involved in the creation and sale of investment securities will have the most up-to-date law available to them. They will be able to take immediate advantage of these Amendments. Brokers will also be able to deal in uncertificated securities issued by out-of-state issuers of securities without thought as to the validity of such transfers on behalf of local customers.

WHY EVERY STATE NEEDS THE ARTICLE 8 AMENDMENTS -- NOW!

In each of the 50 states, the trading of corporate securities, typically stocks and bonds, is governed by transfer rules found in Article 8 of the Uniform Commercial Code.

The transfer system established by the original Article 8 is based on the "certificate"; transfer takes place when the certificate is endorsed and delivered by one party to another. The original Article 8 provides:

- Rules for endorsement and delivery of the certificate;
- "Warranties of transfer", or guarantees of the transfer's validity;
- Rules for the use of securities to secure debts.

While the certificated system still dominates securities transfers, electronic transfers may ultimately make the certificate obsolete. The 1977 Amendments to Article 8 were therefore drafted to establish regulations for the newer system that is evolving -- one which eliminates certificates and instead accomplishes transfers by entry on the issue books and appropriate notices to the parties involved.

The Amendments include the same features as the original Article 8, with the important exception of the certificate requirements, and have been carefully integrated into the older Article. They parallel the legal framework the original Article 8 established for certificates, and give priority in the law to neither system of transfer.

But the practical advantages of an uncertificated system are clear: they allow issuers to take advantage of the efficiency and speed of computer technology that can eliminate the sea of paper that afflicts the securities market.

A majority of states have already recognized the need to adopt the Amendments. They include New York, the nation's trading capitol; Delaware, the state of incorporation for large businesses across the country, and most recently Massachusetts. In states which do not adopt the amendments:

- Traders will be less equipped to do business with uncertificated companies.

(over)

- New firms desiring the benefits of certificateless transfer may choose to go elsewhere to incorporate.

Another potential disadvantage for states which don't adopt the Article 8 Amendments stems from the practice of pledging securities to obtain credit. Lenders in any state need an adequate legal basis for transactions involving uncertificated transactions before entering into them. Otherwise, they will withhold credit secured by perfectly valid collateral, and business will suffer.

States should also consider the advantages certificateless securities offer to small and close corporations, whose internal securities transactions are often simple enough that certificates just create unnecessary paperwork. These firms should welcome a simpler, more efficient system of transfer.

AMENDMENTS TO ARTICLE 8
OF THE UNIFORM COMMERCIAL CODE (UCC)

CONTENTS

AMERICAN SOCIETY OF CORPORATE SECRETARIES, INC.

1270 AVENUE OF THE AMERICAS • NEW YORK 10020 • TELEPHONE: 212-765-2620

April 25, 1985

Mr. John M. McCabe
Legislative Director
National Conference of Commissioners
on Uniform State Laws
645 North Michigan Avenue
Suite 510
Chicago, Illinois 60611

Dear Mr. McCabe:

The Securities Industry Committee of the American Society of Corporate Secretaries endorsed the 1977 Amendments to Article 8 of the Uniform Commercial Code at its meeting in New York on October 18, 1983. The Society supports the adoption of these Amendments by all states in the near future so that the laws of the various states pertaining to the transfer of securities can be made wholly uniform.

Very truly yours,

Stephen P. Norman
Chairman
Securities Industry Committee
American Society of Corporate
Secretaries Inc.

SPN:ldk

A Few Facts About

THE ARTICLE 8 AMENDMENTS TO THE UNIFORM COMMERCIAL CODE

PURPOSE: To provide states with a legal framework for the transfer of uncertificated securities, similar to the rules for certificates found in the original Article 8.

ORIGIN: Completed by the Uniform Law Commissioners in 1977, in cooperation with the American Bar Association and the American Law Institute.

ENDORSED BY: New York Stock Exchange
Securities Industry Association
American Society of Corporate Secretaries

STATE ADOPTIONS:

Arkansas	Kentucky	Ohio
California	Maine*	Oklahoma
Colorado	Maryland	Oregon
Connecticut	Massachusetts	Rhode Island
Delaware	Michigan	South Dakota
Florida	Minnesota	Tennessee
Hawaii	Montana	Texas
Idaho	Nevada	Virginia
Illinois*	New Hampshire	Washington
Indiana	New Mexico	West Virginia
Kansas	New York	Wisconsin
	North Dakota	Wyoming

1988 INTRODUCTIONS: District of Columbia
New Jersey

NEED A SPEAKER? These persons are avaible to provide testimony or give presentations on the Article 8 Amendments:

Martin J. Aronstein
Univ. of Pennsylvania
Permanent Editorial
Board for the UCC

Robert Haydock
Boston, Mass.
Permanent Editorial
Board for the UCC

William E. Hogan
New York University
Permanent Editorial
Board for the UCC

Donald Scott
Philadelphia, PA
Permanent Editorial
Board for the UCC

For information on arranging a speaker, contact John McCabe or Katie Robinson at 312-915-0195.

* 1988 Adoptions

ARTICLE 8 AMENDMENTS TO THE UNIFORM COMMERCIAL CODE

Article 8 of the Uniform Commercial Code is entitled "Investment Securities." A "security" is broadly defined as an instrument which:

(1) is issued in bearer or registered form;

(2) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;

(3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

The commonest examples are stocks and bonds. They have a market and are bought and sold, as are "goods" under Article 2 of the UCC, and negotiable instruments under Article 3. The UCC sought to cover all the major kinds of markets in its conception of "commercial transactions." Thus, Article 8 provided a fundamental law for the buying and selling of securities.

Note, however, one aspect of this basic definition. It states that a security is an "instrument." It implies a piece of paper with appropriate writing to identify the obligation the security manifests. Therein lies the kernel for the present revision - paper. The new Article 8 contemplates the elimination of the paper. The term instrument will no longer imply the existence of specific pieces of paper which act as evidence of obligations between people.

There are a number of reasons for this anti-paper revolution. In the late 1960s, the brokers and the exchanges became overburdened with paper. The sheer load hampered the markets. Also, automation has progressed far enough to make the revolution feasible. It is easier and faster to record transfers in the computer. It is efficient and more economical. Thus, the nature of the transactions in securities is fundamentally changing.

Under the revised Article 8, an immediate distinction is made between types of securities. There are "certificated" securities and "uncertificated" securities. The "certificated" security is the one we have long known, represented on and by a piece of paper, an instrument. That piece of paper has been, and remains, the means of transfer and the evidence of obligation - when it exists. But it no longer always exists.

The "uncertificated" security is not evidenced by any piece of paper at all. It exists on its issuer's records. Its key characteristics are found in the definition. It "is not represented by an instrument and the transfer of which is registered upon books maintained for the purpose by or on behalf of the issuer.. ." Without the instrument, the mechanics of a transfer change. Also changed are the manners in which obligations are manifested.

Where there is a certificate, it physically participates in any transfer of the obligations it contains. A security passes upon proper endorsement and physical delivery of the instrument. The instrument takes part in pledges made by owners of the security to secure their own debts. It is also the foundation of the warranties each of the parties gives in a transaction involving a security. The paper is fundamental, and when it is eliminated, some changes commensurate with its elimination must take place.

When a transfer, or registration of a pledge, occurs in the case of an "uncertificated" security, it does so only on the books of the issuer. This means that an "instruction" must be given to the issuer by the appropriate person. The "instruction" normally will be in writing, and obligates the issuer to make the necessary entry on the books. The evidence of completion is a statement back from the issuer within two business days after the registration occurs. It goes to transferror, transferee, and any pledgee.

These two items are the only pieces of paper involved in the transfer, and are designed to be much simpler than the "certificated" security. The last of the two, the "Initial Transaction Statement," is the most important. It provides notice of terms, restrictions, and adverse claims to the addressee, and runs against the issuer if it does not. This is a similar function to the written instrument which constitutes a "certificated" security. The rights of purchasers which depend on this information are affected almost exactly as a purchaser's rights are affected by a "certificated" security.

There are differences, however. A purchaser of an "uncertificated" security, in general, can rise no higher than his transferror in terms of his rights. He takes as if he had his transferror's knowledge, even if he doesn't. A "certificated" security does not hold a purchaser to the knowledge of his transferror, but bases his rights on his own

knowledge. That is a distinct difference between the two forms of security.

Further, an Initial Transfer Statement warrants only that the acknowledged owner is so at the time of its issuance. It does not do so for any following time period. In contrast, a purchaser may normally assume that the holder of a "certificated" security is the owner and entitled to transfer it. In these respects, the Initial Transfer Statement does not offer the assurances of a "certificated" security.

It is perhaps anomalous to think of security interests in a security, which itself may represent a debt of the issuer. People who own securities, which are valuable property, may pledge them for their debts. They create a security interest in the creditor by so doing.

A "certificated" security is merely delivered to the pledgee with a proper endorsement. That creates the security interest. Where "uncertificated" securities are concerned, the security interest must be registered. The procedure for doing this is identical to the procedure for a transfer. An instruction is sent to, and a confirmatory statement returned from, the issuer of the security. Once registered, the owner continues all powers with respect to the security except the power of transfer. That belongs to the registered pledgee.

The "uncertificated" security offers a bit more protection to the pledgee than a "certificated" security does. If a pledge of a "certificated" security is not registered, additional securities and dividends will be distributed to the owner, not the pledgee. The procedure relating to "uncertificated" securities precludes the problem. It is also to be noted that perfection of the security interest is by possession of the instrument for a "certificated" security, and by the mere procedure of creating the interest for "uncertificated" securities. Perfection is the means of determining the priority between competing security interests.

Warranties also differ between "certificated" and "uncertificated" securities. The face of the instrument provides a basis of warranties for "certificated" securities. The presenter to an issuer for registration, the transferror to a purchaser, all warrant aspects of the transaction because of the instrument and its enforcements and signature guarantees. For "uncertificated" securities, the only warranty can be on the part of the originator of an instruction to the issuer. That person warrants that the registration is proper to the issuer, and that the transfer has no defects to a purchaser for value.

Signature guarantees, an essential part of the transfer process for widely held securities, also cannot be the same for "certificated" and "uncertificated" securities. The guarantor of

a "certificated" security warrants that the endorser is an appropriate person acting for the owner. This is evident to the guarantor from the instrument. Without the instrument, the guarantees, are limited to the genuineness of the signature, and that the endorser purports to act for owner or pledgee. There are special, boarder guarantees of an "uncertificated" security which cannot be demanded by an issuer, but which can be made to further secure a transaction.

The difference between a "certificated" security and the items of paper relating to registration of an "uncertificated" security cause a difference in the treatment of a bona fide purchaser for value, also. Essentially, a bona fide purchaser for value is held for only those things on the instrument with respect to a "certificated" security. The bona fide purchaser for value of an "uncertificated" security essentially takes free of what does not appear on the initial transaction statement. Practically, this may expose him to greater liability, but also forces him to seek a clean transaction statement before accepting liability.

Third party claims also provide a difference. For "certificated" securities, notice in writing to the issuer suffices. For "uncertificated" securities, the claim must be in the legal process before the issuer has notice. Judicial liens are also treated differently. Seizure of the security works for "certificated" securities, but not for all the "uncertificated" breed. It is necessary to serve process on the issuer.

These are some of the differences which result from the addition of the "uncertificated" security to the security markets. There has been no need to change the basic pattern of Article 8, which has served its purpose well. The amendments seek to incorporate the "uncertificated" security with the least disturbance possible.

A Certificateless Article 8? We Can Have It Both Ways

By MARTIN J. ARONSTEIN*

IN THE aftermath of the "Paperwork Crunch" which seriously impaired the operation of the securities markets during the late 1960s, the air was filled with proposals for reform. Not surprisingly, many of these proposals focused on the elimination of the most visible manifestation of paperwork problems—the negotiable stock certificate. But it was correctly perceived that "The Certificateless Society" was incompatible with an existing legal regime firmly based on the assumption that shares of corporate stock must inevitably be represented by indispensable instruments. In an effort to resolve this incompatibility, the American Bar Association's Section of Corporation, Banking and Business Law organized a Committee on Stock Certificates. The Committee was charged with the duties of determining what legislation, if any, would be needed to facilitate the elimination of negotiable stock certificates and of drafting such legislation. The Committee issued its Report on September 15, 1975.[1] The author served as the Committee's Reporter.

This article is intended to be neither a summary of nor a substitute for the Committee's Report. Rather, its primary objective is to call the Bar's attention to the Committee's project and to enlist the cooperation of the Bar in the implementation of the Committee's recommendations. Its secondary, and somewhat selfish, objective is to permit the Reporter to express some personal views which are outside the scope of the Report and which are not necessarily shared by the Committee or its other individual members.

At the risk of sacrificing the element of surprise, it should be stated at the outset that the Committee's principal recommendations are two. The first is the relatively minor amendment of state corporation statutes to validate the issuance of stock not represented by certificates.[2] The second is a major and comprehensive revision of Article 8 and related sections in other Articles of the Uniform Commercial Code intended to govern the attributes of uncertificated shares.[3] The Committee does not recommend the adoption of general federal legislation at this time but recognizes that such legislation may be required in the future. One of the circumstances that would seem almost certain to lead to federal intervention would be the failure of the state legislatures

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1. Copies of the Report may be obtained by writing to the Chairman, Donald A. Scott, Esq., The Fidelity Building, Philadelphia, PA 19109. There is a charge of $5.00 per copy.

2. Report of the Committee on Stock Certificates, Appendix A (Proposed Amendments to the Model Business Corporation Act).

3. *Id.*, Appendix B.

to act within a reasonable time. The role that the Bar can play in expediting necessary state adoption is apparent.

The Committee's Objective

The Committee's first order of business was to define the scope of its mission. Amid urgent pleas to legislate the stock certificate out of existence, it was tempting to envision the Committee as identifying or, perhaps, even inventing the ideal certificateless system and then proceeding to draft legislation that would both compel that system's universal adoption and regulate its operation. That vision was soon abandoned in favor of a more limited goal.

Initially it was recognized that any viable system had to be (1) technologically feasible, (2) legally permissible and (3) commercially acceptable. Further analysis revealed, however, that the first two of these elements did not really constitute limitations. We quickly came to the view that, given adequate time and resources, the technology was up to achieving whatever results the industry demanded. The important question was not whether a particular system could be devised but, rather, whether it could be implemented at a cost its users would be willing to pay—in short, whether it was commercially acceptable. Similarly, the drafting of legislation to permit the institution of certificateless systems was a relatively simple task requiring, in the main, amendments of a minor nature to the typical corporation statutes. At least two states have already adopted such amendments.[4] The real burden on the legislative draftsman, as we saw it, was to provide a legal environment within which parties could deal with uncertificated stock with that same high degree of confidence that the present certificate-based law now affords. Or, to phrase it somewhat differently, we attempted to create a legal framework that would not merely permit the issuance of uncertificated stock but would make its use commercially acceptable.

Thus, despite some early notions that we might re-invent the wheel, the Committee wisely decided that the industry and its related technologists were the most logical source of system development. The appropriate task for us lawyers was to assure that the law could accommodate whatever systems the industry devised. The statutory changes recommended by the Committee and set forth in the Appendices to its Report neither compel the adoption of certificateless systems nor prescribe the form such systems should take. Rather, we attempted to construct a law, as did the draftsmen of Article 9, designed to "make it possible for new [systems] . . . as they develop, to fit comfortably under its provisions."[5]

The Legal Basis of Certificatelessness

In the years before and since the Committee's organization, the world has

4 *Michigan Business Corporation Act* § 335, 15 Mich. Stat. Ann. § 21.200(335) (1974), *California Corporations Code* § 416(b)

5. *Uniform Commercial Code* § 9-101, Comment.

not stood still. Out in the marketplace, where stock is actually dealt with, the development of certificateless transfer has proceeded—apace, in the view of some, and with too deliberate speed, in the opinion of others. As the Report describes in some detail, significant strides toward "The Certificateless Society" have already been made without the benefit of any substantial statutory change. Existing certificateless systems, which may be broadly defined as methods to transfer stock without the physical movement of indispensable pieces of paper, masquerade under a variety of appellations. The common legal basis of each of these systems, however, is that somewhere a certificate exists and that someone is holding it as the shareholder's agent-bailee.

The most rudimentary form of certificatelessness is the street name brokerage account.[6] In this arrangement, the broker acts as the agent of the customer, a single undisclosed principal, and holds the certificate as the customer's bailee. Certificate movement is eliminated between customer and broker when the customer buys or sells through his broker-agent. Certificates continue to be used for transactions with the issuer, like presentment for registration of transfer, redemption or exchange, and for transfers for value to or from third party buyers, sellers and pledgees. There is, however, one common transfer for value, the customer's pledge to secure a margin loan from the broker, which, by virtue of the broker's prior possession, can be effected without certificate movement. There is also the comparatively rare transfer for value between two customers of the same broker, when, at the same time, one buys and the other sells the same security. This transfer is effected simply by the entries on the broker's books.[7] By and large, common law principles of agency, reinforced by safeguards imposed by the federal securities law and the self-regulatory organizations, have proved adequate to govern the relationship between the customer and his broker. Article 8's certificate-based law continues to govern the relationships with issuers and other third parties.

The independent securities depository is, in legal effect, an extension of the brokerage account model, but with one important exception. Like the broker, the depository holds certificates in its name and deals with the issuer and other outsiders as the agent of an undisclosed principal. The principal is the aggregate of the depository's customers, usually referred to as participants. Unlike the typical brokerage situation, however, transactions between participants are neither rare nor fortuitous but, rather, are commonplace and by design. Indeed, the primary objective of the depository is to permit transfers between the principals of a common agent without certificate movement.

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6. For the purposes of this analysis, the custody or agency accounts, maintained by the trust departments of banks for their customers, are functionally equivalent to the brokerage account.

7. *Uniform Commercial Code* § 8-313(1)(c). By its terms this section would appear to apply only when there is "a specific security in the broker's possession." It would in no event apply to a bank custodian.

As early as 1962, it was thought desirable to define expressly the legal consequences of intra-depository transfer. This was accomplished by adding section 8-320 to the official text of the Uniform Commercial Code. That section equates "the making of appropriate entries on the books"[8] of the depository to "a delivery of a security"[9] and thereby establishes the rights and duties of the respective participants between themselves and with others with whom they might deal. The developing depository system, with several depositories each maintaining accounts with the others, may be comfortably viewed as an aggregate of agents and sub-agents representing the aggregate of participants in all of them and holding the participants' certificates as bailees or sub-bailees. For the purpose of governing transactions with issuers and non-participants, which are normally effected by certificate delivery, the rest of present Article 8 continues to provide an acceptable legal framework.

The agency rationale is pushed still further, and, we believe, too far, in those systems which conceptualize the issuer or its transfer agent as the agent-bailee of all the shareholders. Existing systems premised on that rationale include the mutual funds, the increasingly popular dividend reinvestment plans and an almost wholly certificateless system which parades under the anomalous description of Transfer Agent Depository.[10] When the issuer is viewed as the bailee of its shareholders' certificates, the situation is functionally identical to that where no certificates exist. It is, so to speak, "The Certificateless Society" built on a legal foundation which was never intended to accommodate it.

The substantial disappearance of certificates from the mutual fund universe is a consequence of the commercial needs of the issuers and shareholders. In open-end mutual funds, the model transactions, the purchase of shares from the issuer and the redemption of shares by the issuer, do not involve third parties. In these two-party transactions which typically involve small numbers of shares and do not require simultaneous exchanges of money, the certificate's utility is reduced to no more than that of a simple statement from the issuer or letter of instructions from the shareholder. The commercial requirements of both parties are better and more economically satisfied without certificates than with them. Outright transfers for value between shareholders are rare, particularly in the no-load funds where the issuer stands always ready to sell or redeem shares at their net asset value.

In pledge transactions of mutual fund shares, however, the certificate continues to be demanded because it performs a necessary function. One could

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8. *Uniform Commercial Code* § 8-320(1).

9. *Id.* § 8-320(3).

10. The "Transfer Agent Custodian" concept should also be included in this group. That relationship arises when, by agreement between a particular shareholder and the issuer, certificates are not delivered to the shareholder but are held in the transfer office subject to the shareholder's instructions for further registration of transfer. It is commonly used by some brokers who have a continuing need for both customer name certificates and certificates of specific denominations to be used in making settlements.

argue, of course, that a security interest in uncertificated mutual fund shares could be perfected under section 9-305 by simply giving notice to the transfer agent in his imagined capacity as the bailee of the debtor's certificate. It is highly doubtful, however, that a prudent lender or his counsel could be persuaded to advance the loan under those circumstances. Furthermore, few, if any, transfer agents would have any institutionalized procedure for dealing with such a notice even if one were received. In the pledge situation, therefore, both the lender and the issuer take refuge in the only procedure now expressly validated by statute—the issuance of a certificate to the shareholder and the delivery of that certificate to the lender. Reliance on the agency-bailment rationale is just not commercially acceptable under the present law.

The dividend reinvestment plans, in which the typical transaction is the purchase of small numbers of shares for participating shareholders,[11] operate without certificates for essentially the same reasons that have led to certificatelessness in the mutual funds. When, however, the participant wishes to deal with his shares in another transaction, issuers respond, in almost every case, by issuing certificates.[12] Unlike mutual fund shares, however, the shares accumulated in the dividend reinvestment plan accounts are the very same intangible interests that are commonly traded in normal market transactions and used as collateral for secured loans. Officials of American Telephone & Telegraph Co., which operates the largest of such plans, are confident that they could develop adequate procedures to deal with both the outright transfer and the pledge of uncertificated shares by book-entry if only a satisfactory legal framework could be provided. The potential demand for such procedures is foreshadowed by the fact that, after only slightly more than two years of operation, AT&T was "holding," as the nominal agent-bailee for some 541,000 shareholders, more than 9 million uncertificated shares.

The Transfer Agent Depository concept differs from the dividend reinvestment plans in two important respects. First, it envisages a system where certificates are issued to a shareholder only when they are expressly requested.[13] Secondly, it contemplates that shares will not only be held in uncertificated form but may be transferred or pledged to third parties by the making of appropriate entries on the issuer's books.[14] The name, "depository," and the

11. The earliest plans and the majority of existing plans pool the dividends payable to the participants and purchase outstanding shares on the market. Each participant's account is then credited with an appropriate portion of the shares purchased. An increasing number of the newer plans use the dividends to purchase newly-issued shares directly from the issuer. AT&T gives participants a 5% discount from the market price.

12. Some corporations now handle so called "legal" transfers, *e.g.*, decedent to personal representative, without first issuing a certificate in the name of the decedent.

13. Conversion from the traditional certificated system to a Transfer Agent Depository would, in fact, require shareholders to "deposit" outstanding certificates with the issuer. A new corporation without certificates outstanding, however, would issue no certificates unless requested to do so.

14. The transfer or pledge by book-entry, validated by section 8-320, is available only to a "clearing corporation." The definition of "clearing corporation" in section 8-102(3) does not include an individual issuer or transfer agent.

contrived rationale imply that the issuer or its transfer agent is holding a certificate as the agent-bailee of the several shareholders. That certificate is either a useless formality or a patent fiction. We are told, for example, that somewhere in the AT&T transfer office there reposes a certificate representing the 9 million shares beneficially owned by those 541,000 dividend reinvestment plan participants. It seems almost ludicrous to imagine that important legal consequences would turn on whether or not that certificate is really there.

While the agency-bailment rationale lends an aura of validity to uncertificated shares that may satisfy a law professor or even a judge, it does not respond to the questions which the prudent businessman or his counsel needs to have answered before he can proceed with confidence. By what means and with what frequency must the issuer evidence the ownership of shares? What must a shareholder do, and what may an issuer require, to effect the registration of transfer? When does a purchaser become the owner of the shares he has bought? By what means can a secured lender perfect a security interest in his debtor's shares? How may an unsecured creditor reach his debtor's shares?

In short, the uncertificated share needs a governing statute to provide clear answers to those dozens of questions that existing law now provides with respect to the certificate. Without such answers, it is unreasonable to expect the expansion of wholly certificateless transfer to the kinds of transactions which account for the bulk of the industry's paperwork problems. The Committee concluded that the requisite degree of confidence, and, hence, commercial acceptability, is unlikely to be reached in the present legal framework that does not even acknowledge the existence of uncertificated shares and, therefore, utterly fails to deal with them.

The Future of System Development

It has been frequently stated that a major roadblock to the elimination of certificates would be the unsophisticated individual investor. Such an assumption is not in accordance with the facts. Holders of mutual fund shares and participants in dividend reinvestment plans have, in preponderant numbers, cheerfully foregone the possession of certificates that were unnecessary to satisfy their commercial requirements. Under existing rules of law, however, certificates are and will continue to be demanded for those transactions which they were originally developed to facilitate—the simultaneous exchange of stock for money between unrelated parties neither of which is prepared to extend unsecured credit to the other. Any system that can successfully displace stock certificates in the typical transfer for value must provide a commercially acceptable alternative to precisely that kind of exchange.

The securities depository is one such alternative. By holding its participants' stock in the depository's name, the depository assures itself that a purported transferor is the owner of the stock to be transferred and has entrusted the transfer power to the depository. By crediting the transferee's account,

the depository, in effect, represents to the transferee that the subject matter of the transfer exists and has been transferred to him. Thus, the transferee receives the same assurance that the receipt of a clean, duly indorsed certificate would afford him. It is in reliance on the depository's representation that the transferee parts with his consideration with confidence that he has received the benefit of his bargain.

The depository concept was a logical outgrowth of the clearing facilities maintained by the various stock exchanges. For years these facilities were utilized to monitor and expedite the transfer of funds and the delivery of securities between exchange members. Although these simultaneous exchanges were nominally between individual members, they were made through the clearinghouse which became a de facto intermediary in the exchange. Viewing the clearinghouse as an independent party, dealing with all members, was a transition more in form than substance. The clearinghouse's function as a depository of both funds and securities followed quite naturally from its function as a mere record-keeper.

The statutory validation of book-entry transfer was initially limited, by the terms of section 8-102(3), to entities wholly-owned by a securities exchange or association. The growth of the depository concept in the United States has, therefore, taken place almost exclusively in conjunction with the exchanges. There is general agreement that the Depository Trust Co., the New York depository which now controls over 2 billion shares of stock, has served its broker participants well. It should be remembered, however, that these brokers were already participating in a system which settled the money side of transactions with essentially the same mechanism by which the securities side is now settled.

The exchange-related depository has also provided a mechanism to facilitate another kind of transfer for value—the broker's loan. In these transactions, lending banks, participating as "pledgees," are satisfied to advance funds to borrowing brokers on the strength of the depository's representation that the broker's stock, by virtue of the depository's book-entry, has been as effectively pledged as would be the case if certificates had been delivered to them by the brokers. The demonstrable saving that can be achieved by eliminating certificate delivery upon pledge and re-delivery upon release has resulted in the substantial use of this procedure by the banks.[15]

The expansion of the exchange-related depositories to include significant participation by banks (other than as pledgees), insurance companies, pension funds and other institutional investors is far from foreordained. These investors are not, as are the brokers, under a constant obligation to make daily settlements with their counterparts through an institutionalized clearing facility. They have typically made independent arrangements for C.O.D. settlements directly or through bank agents. For them, the use of a depository

15 The procedure has also made it feasible for banks located in areas remote from the financial centers to compete with the local banks for the brokers' loan business.

constitutes a departure from their traditional settlement procedures rather than an extension of an already established *modus operandi*.

Thus far, despite the intensive use of depositories by brokers, participation by non-broker eligible entities has been quite limited. There are a number of factors that have militated against bank participation and some of them have been only recently corrected. Nevertheless, there is currently very little hard evidence that the exchange-related depositories are destined to expand into a national comprehensive depository system that will obviate the need for continuing efforts to eliminate the stock certificate and its attendant problems. It should also be observed that the impact of the exchange-related depositories, even in the context of broker-to-broker settlements, is itself a function of the part to be played in the securities markets of the future by the exchanges themselves. To the extent that the exchanges become less significant in the total picture—a distinct possibility in the light of recent events—the ameliorating effect of their depository facilities will be correspondingly reduced.

As a step to encourage the use of depository facilities by non-brokers, the Banking & Securities Industry Committee sponsored an amendment to section 8-102(3) which has already been adopted by more than forty states.[16] The effect of this amendment is to permit the distribution of the capital stock of depositories among their users. This is intended to create a cooperate rather than a proprietary form of ownership and control. Depository Trust Co. has already announced plans to distribute its stock to its users during 1975. Whether this will achieve the objective of increased non-broker participation remains to be seen.

Another effect of the 8-102(3) amendment, however, is to permit the organization of depositories which are not related to a securities exchange. One such depository was organized in 1974 under the sponsorship of a group of bank transfer agents and has already achieved substantial growth.[17] Unlike the exchange-related entities, this depository sees itself only as a communications network which will permit rapid transmittal of transfer instructions to issuers and rapid acknowledgment of registration to prospective buyers and pledgees. Facilities for clearing the money side of transactions are not encompassed within the system and will have to be provided independently. Thus, for non-broker participants, the use of this system will be much less of a departure from their current practices than would be participation in an exchange-related depository. It is much too early for even its own managers to predict the extent to which such a depository will be commercially acceptable.

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16. The text of this amendment does not appear in the Official Text of the Uniform Commercial Code. It is set forth in Appendix B of the Report of the Committee on Stock Certificates.

17. By June 1975, the TAD Depository Corp. had on deposit over 12 million shares in more than 1600 different issues.

What the foregoing discussion suggests is that the concept of certificate immobilization in independent depositories is far from certain to result in a satisfactory reduction in the paperwork problems of the securities industry. The elimination of stock certificates, or, in the current fictionalized parlance, the use of the issuer or its transfer agent as a "depository," may prove to be at least a significant part of the ultimate solution. If that be the case, the burden of developing the mechanisms that will be commercially acceptable alternatives to the simultaneous certificate-for-money exchange rests upon the industry. It is our function, as lawyers, to make sure that the governing law will provide an environment in which industry-developed systems can be implemented with confidence in their legal consequences. Our proposed revision of Article 8 is an attempt to create that environment.

Drafting the Statute

Professor Jolls has suggested that a statute governing the attributes of uncertificated shares need not be nearly so complex as Article 8 and might take the form of an additional article of the Uniform Commercial Code, perhaps denominated Article 8A.[18] Our initial attempts to draft such a separate statute convinced us, for several reasons, that an integration of the rules for certificated and uncertificated shares and, necessarily, a complete revision of present Article 8 would be the more fruitful approach.

The process of putting pencil to paper for the first time exposed a number of problems that would have to be dealt with in a separate article. Parties dealing with uncertificated shares should be able to find, in the governing statute, the answers to all questions answered by present Article 8 except where the question, by its nature, has no application in the absence of a certificate. Could an issuer's lien exist? What is the effect of an issuer's restriction on transfer? Who, if anyone, could be a bona fide purchaser? Were there exceptions to the statute of frauds? Was there a statute of frauds? The dozen or so basic sections that Professor Jolls suggested might constitute an adequate statute grew quickly and substantially in number.

Even more important, our observation of what was taking place in the industry convinced us that the total elimination of stock certificates, even if ultimately realized, was a very long way off. What we saw was a system in which both certificated and uncertificated shares would continue to co-exist, in many cases, within the same issue of securities. Under those circumstances, the rules for each form of stock would, in many instances, require exceptions in the corresponding rules for the other form. For example, the seller's duty to perform, stated in section 8-314, might be satisfied not only by the delivery of a certificate but also by the transfer of an equivalent uncertificated security. Even assuming the ultimate elimination of certificates for a particular issue,

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18 Jolls, *The Uniform Commercial Code and the Certificateless Society*, 26 Bus. Law 627 (1971).

the transitional period until all certificates arrive at the transfer office for cancellation and are replaced by uncertificated shares will require coordinate rules and alternative performance.

The decision to have a single, integrated Article 8 brought with it another decision, perhaps not compelled, but highly desirable, that the rules governing certificated and uncertificated shares should be the same except to the extent that the inherent differences in the form of the shares required distinctions. And, finally, we decided that it would be unwise to complicate our task and, perhaps, to jeopardize prospects for adoption by proposing any changes in the rules for certificated shares. The end result of this series of decisions is a statute which restates the existing rules for certificated shares and conforms the new rules for uncertificated shares to the present law as closely as possible. We do not imply that we necessarily oppose changes in the present law, but only that, if such changes are to come, they should be equally applicable to certificated and uncertificated shares wherever the nature of the change permits. To illustrate, it has been suggested that section 8-403 be amended to eliminate the issuer's duty to make certain inquiries before registering the transfer of stock on the indorsement of a corporation.[19] If that view is ultimately to become generally accepted, it should apply to transfers of all securities, whether or not certificated.

The determination of what new rules for uncertificated stock would, in fact, conform to the present rules for certificated stock was not always clear. For example, our revision provides for the perfection of a security interest in uncertificated shares by registration of pledge by the issuer. The consequences of a registered pledge, set forth in new section 8-207, are that the registered owner continues to be recognized as the owner by the issuer for purposes of dividends, notices, voting rights and the like but that only the registered pledgee, and not the registered owner, has the power to cause the registration of transfer. To that extent, the situation exactly parallels that when a pledgor delivers a certificate to the pledgee and the pledgee does not undertake to have the transfer registered. If, during the continuance of the pledge of a certificate, the issuer should distribute additional stock as a dividend or stock split, the certificates representing the new shares would be sent to the registered owner. Although the additional shares would normally be subject to the pledge, the certificates permit the pledgor to dispose of them, free of the pledge, to a bona fide purchaser. It has been argued that complete parallelism would require that uncertificated shares, issued pursuant to a dividend on or split of uncertificated shares subject to a registered pledge, should be similarly registered free of the pledge thus permitting the pledgor to make a similar wrongful transfer. It was our conclusion that this "loophole" for the dishonest pledgor exists in the present statute not as a matter of policy but, rather, because commercial lending practices produce that result. In new

19 *See* A.B.A. Committee Report, *Developments in Simplification of Transfer of Fiduciary Securities*, 9 Real Prop., Prob. & Tr. J. 611, 614 (1974).

section 8-207(7) we provide that the new shares "shall also be subject to the rights of the registered pledgee."

In one instance, and only one, we departed from our general approach of merely restating the law with respect to certificated shares and purposely extended the coverage of the statute. The rule of present section 8-317, requiring certificate seizure for a valid creditor's lien, is eminently rational when certificates are issued in shareholder name and held by the shareholder. The apparent exclusivity of this remedy is inconsistent with modern security holding practices. To give an extreme, but not uncommon, example, assume that Debtor is the owner of 100 shares of Issuer stock and has asked Broker to hold the stock in street name. Broker has, in turn, deposited certificates for 5,000 shares of Issuer stock with Depository which has credited Broker's account. Depository has then delivered these certificates, together with certificates received from other brokers, to Issuer which has issued to Depository a jumbo certificate, in Depository's name, for 200,000 shares. According to section 8-317, Creditor, wishing to levy upon Debtor's interest in Issuer, can acquire no lien without seizing Debtor's certificate. But Debtor has no certificate unless one conceives that Debtor has an undivided interest in that 200,000 share certificate reposing serenely in Depository's well guarded vault. It is hard to imagine that Depository will voluntarily surrender that certificate to the sheriff or that a court would compel it to do so. Indeed, it is unlikely that Depository will be aware of Debtor's existence. Debtor's interest is known only to Broker. In revised section 8-317, Creditor obtains his lien by garnishment of Broker, thus assuring, as present section 8-317 intends, that Debtor will not be able to transfer his interest to a bona fide purchaser free of Creditor's lien.

It was with some reluctance that we failed to incorporate in the statute provisions for a certified transfer order, suggested by Professor Jolls and others. Such an order would be an instrument, analogous to a certified check, which an issuer would have agreed to honor if timely presented and which could be used in C.O.D. settlements. It was not adopted for two reasons. First, it seemed that a wholly certificateless environment would necessarily have developed commercially acceptable procedures to accomplish the equivalent of the C.O.D. settlement by electronic communication or otherwise. Such mechanisms would make the certified transfer order unnecessary. Secondly, pending the development of the procedures described, it appeared that certificates would necessarily continue to be available to effectuate C.O.D. settlements when they were required.

The Role of the SEC

The Securities Acts Amendments of 1975, for the first time, expressly involve the Securities and Exchange Commission in the regulation of clearance and settlement systems. By amendment to the Securities Exchange Act of 1934, the Commission is empowered to prescribe the form and format of

securities,[20] to facilitate the establishment of a national system for clearance and settlement,[21] to regulate clearing agencies,[22] to regulate transfer agents[23] and to "end the physical movement of securities in connection with the settlement among brokers and dealers."[24] By these amendments, Congress has assuredly not legislated the stock certificate out of existence. Nor has it, expressly or by implication, provided for any system not already sanctioned under existing law. It has, at the most, empowered the Commission to compel broker-dealers to participate in some form of certificateless system without prescribing either what that system should be or setting a time limit for participation. Beyond that, it has merely invited the Commission to submit "its recommendations, if any, for legislation to eliminate the securities certificate."[25]

The newly-granted regulatory powers of the Commission, wisely exercised, could do much to encourage the voluntary adoption and expansion of certificateless systems. The establishment of both financial and operational standards for clearing agencies, which are defined to include depositories, should have the effect of instilling confidence in potential participants in that form of certificateless transfer. SEC supervision is not the equivalent of a government guarantee against operational or financial failure, but it may, to some degree, tip the scales toward participation by some. So long as participation is voluntary, however, it will be the depositories' burden, by means of satisfactory performance and demonstrated economy, to attract additional participants.

The Commission's power to prescribe uniform standards for transfer agent capability is particularly crucial to the development of wholly certificateless systems. When certificates exist, the registration of transfer merely confirms the legal relationships already established by delivery. Without certificates, however, the completion of many transactions will necessarily await registration on the books of the issuer. Inadequate transfer agent performance can be injurious to a system based on certificates. In a system without certificates, it could be fatal.

It is apparently the view of Congress that the industry, motivated by incentives of cost minimization and increased efficiency, gives promise of producing satisfactory clearance and settlement systems without mandatory federal legislation. In effect, Congress views the Commission as a stimulus to facilitate systems development and to encourage participation, but not as a designer of particular systems or an agent to compel participation therein. It goes without saying that if the industry does not measure up to Congress'

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20 *Securities Exchange Act of 1934* § 12(1), 15 U.S.C.A. § 781(1) (Pamphlet 4, 1975).
21. *Id.* § 17A(a)(2), 15 U.S.C.A. § 78q-1(a)(2) (Pamphlet 4, 1975).
22. *Id.* § 17A(b), 15 U.S.C.A. § 78q-1(b) (Pamphlet 4, 1975).
23. *Id.* § 17A(c), 15 U.S.C.A. § 78q-1(c) (Pamphlet 4, 1975).
24. *Id.* § 17A(e), 15 U.S.C.A. § 78q-1(e) (Pamphlet 4, 1975).
25. *Id.* § 23(b)(4)(E), 15 U.S.C.A. § 78W(b)(4)(E) (Pamphlet 4, 1975).

expectations, the propensity for further federal intervention is certain to increase.

The Prospects for Adoption

In the course of its deliberations, the Committee was divided on the issue of whether to recommend legislation by Congress or by the state legislatures. In the end, the state route was espoused on the general principle that corporate and commercial law were areas in which the state legislatures traditionally acted and that this tradition should not be lightly disturbed. The countervailing argument was that federal legislation was the only way to achieve absolute uniformity and probably the best way to assure reasonable promptness. The several years taken by Congress to enact even the limited approach of the 1975 Securities Acts Amendments indicates that promptness at the federal level is far from assured. And, indeed, with respect to amendments to the Uniform Commercial Code, it is possible that promptness, with reasonable uniformity, can be achieved at the state level.

The Permanent Editorial Board for the Uniform Commercial Code provides a unique mechanism for drafting, editing and promulgating commercial statutes at the state level which is perhaps unparalleled in any other area of the law. It is contemplated that a revised Article 8, bearing the imprimatur of the Permanent Editorial Board, might be before the state legislatures as early as 1976. As to the promptness with which the state legislatures will act there is less predictability. On the one hand, the recent amendment to section 8-102(3), proposed initially in 1972, has already been adopted by more than forty states. On the other hand, the current official text which substantially revises Article 9, promulgated in the same year, has been adopted by only fourteen. If the operative distinction between these two proposals is their relative complexity, the prospects for prompt adoption of proposed Article 8 are dim.

There is, however, another important distinction between the two proposals. The 1972 version of Article 9 is intended to displace an earlier statute which addresses the same problems and, in some instances, solves them differently. Secured transactions can, however, still proceed with assurance under the earlier, unamended version. New section 8-102(3) provides for an institution, the non-exchange-owned securities depository, which could not exist under prior law. It was recognized that such an institution might significantly promote the development of comprehensive depository systems and members of the securities industry got behind the amendment and pushed the legislatures for its adoption.

If that is the explanation, the prospects for the prompt adoption of proposed Article 8 are more optimistic. At present there is no statute to govern the attributes of uncertificated stock. By its terms, present Article 8 applies only to "securities" and securities are defined, in section 8-102(1), as "instruments." A share of stock not evidenced by an instrument is without any

legal foundation in the Uniform Commercial Code with the single exception that it would be classified as a "general intangible" for purposes of Article 9.[26] If, as we believe, there is a real need for uncertificated stock the attributes of which will be governed by statutory law rather than by fictitious analogy the impetus for pushing the legislatures should materialize. If it does, the Committee's recommendation to amend the commercial law at the state level is justified both by practicality and by principle.

The situation with respect to the corporate law is different. The Model Business Corporation Act does not enjoy the almost uniform acceptance accorded to the Uniform Commercial Code's official text. State corporation statutes vary widely in both form and content and substantive non-uniformity is the rule rather than the limited exception. Each state corporation statute requires an independent analysis and revision, in sharp contrast to the Uniform Commercial Code for which amendments can be centrally drafted and packaged for export. In short, the prospects for the prompt and uniform adoption of the proposed corporate law amendments by the state legislatures are less than great.

Happily, the necessity for the prompt and uniform adoption of our recommended corporate law amendments is not nearly so pressing. The adoption of enabling legislation in just a few major commercial states would permit the issuance of certificateless stock by a large number of corporations. If only a handful of enterprising corporations incorporated in the adopting jurisdictions could successfully implement the issuance of uncertificated shares to the mutual benefit of themselves and their shareholders, similarly situated corporations in non-adopting jurisdictions can be counted on to urge adoption by their respective legislatures. Furthermore, on the basis of demonstrated successful implementation, it would be neither unexpected nor unwarranted for the Securities & Exchange Commission to recommend that Congress provide this power for all or some categories of corporations registered under the Securities Acts, thus making state adoption irrelevant.[27]

Conclusion

However illogical it may seem, I am convinced that the prompt and uniform adoption of a carefully drafted and rigorously edited commercial statute to govern the attributes of uncertificated shares is of far greater importance than the adoption of statutes to authorize their issuance. Even now, uncertificated shares, without express statutory authorization, are being voluntarily

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26 Uniform Commercial Code § 9-106. The result of that classification is to require the filing of a financing statement as the exclusive means of perfecting a security interest in uncertificated shares. *Id.* § 9-302(1).

27. Significantly, the two state legislatures that have acted have not granted the power to issue uncertificated shares to all corporations. Michigan has limited the power to issuers of "shares or other securities . . . listed on a national securities exchange" and California to "a corporation which is the issuer of securities registered under the United States Securities Exchange Act of 1934." See note 4 *supra*.