ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990

6371 SENATE JUDICIARY

8672

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State of Alaska

Committees

CO-CHAIR, HOUSE JUDICIARY
VICE-CHAIR, HOUSE LABOR AND COMMERCE
HOUSE HEALTH, EDUCATION AND SOCIAL SERVICES

P.O. BOX V
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(907) 465-4712
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(SESSION)

914 CLAY COURT
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Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

November 21, 1989

MEMORANDUM

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Representative Max Gruenberg

RE: CSHB 175 (Judiciary), Children's Laws Revisions

The following summarizes this bill, which is in your committee today.

SUMMARY

The bill establishes a policy for the state adoption code. It makes revisions in the policy statute governing children's cases (child-in-need-of-aid and delinquency). It makes similar revisions in the purposes section of the child abuse reporting code. It sets standards for review hearings in child-in-need-of-aid cases. It requires reporting of child abuse or neglect resulting from mental injury, which is defined.

SECTIONAL ANALYSIS

Section 1. Adopts a purposes section in the adoption code. Requires that adoption laws be construed primarily to protect the best interests of the adopted child, but with regard for the rights of all parties. Modeled on New Jersey and California laws.

Section 2. Amends the purposes section in the child-in-need-of-aid and delinquency code. Present law requires that the child's family ties be strengthened and preserved "whenever possible." Amendment requires family ties to be strengthened and preserved "unless efforts to preserve and strengthen the ties are likely to result in physical or

emotional damage to the child." Also requires, for the first time, that the state make "adequate planning for permanent placement for the child." This will require permanency planning for the children in foster care and stop "foster care drive."

Section 3. Enacts new federal standards for annual court reviews in children's cases (child-in-need-of-aid) and delinquencies). Requires the court to make written findings of fact and conclusions of law as to why the child was removed from the home, the services provided, the visitation history with the parents, whether additional services are needed, when the child can be expected to be returned to the home, or whether other permanency planning (e.g. adoption) should occur.

Section 4. Requires, within 18 months of the initial commitment as a child-in-need-of-aid, that there be a review hearing for the court to look at the placement and services the Division of Family and Youth Services has provided for the child. The court must make specific written findings as to whether the child should be returned to the parent, remain in foster care for a specified period, or remain in foster care permanently or long-term because of special needs, or whether the child should be placed for adoption. It brings Alaska into compliance with federal standards.

Section 5. Amends child abuse reporting statutes, using the same language as in Section 2, requiring reporting to preserve family life unless such efforts are likely to result in physical or emotional damage to the child.

Section 6. Requires reporting of child abuse or neglect resulting form "mental injury." Defines "mental injury" to mean an injury to the intellectual or psychological capacity of the child, as evidenced by an observable and substantial impairment in the child's ability to function within the normal range of performance and behavior, with due regard to the child's culture. This is the definition currently utilized by DHSS. This section is required under federal law. The state receives approximately $100,000 per year, which will be denied in the future unless "mental injury" is included in the reporting statutes. Alaska's last waiver ended on October 1, 1989, so this language must pass the legislature this year or we will lose additional federal money.

Section 7. Repeals AS 47.10.083, which will be incorporated in AS 47.10.080(f) in Section 3 of the bill.

This bill contains extremely important changes for the children's laws. It is short, but vital. I urge your support of the bill in committee and on the Senate Floor.

Thank you.

[memo175.txt]

State of Alaska

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914 CLAY COURT
ANCHORAGE, ALASKA 99503
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Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

May 1, 1989

MEMORANDUM

TO: All House Members

FROM: Rep. Max Gruenberg

RE: CSHB 175 (Jud), Children's Laws Revisions

The following summarizes this bill, which is on the floor today.

SUMMARY

The bill enacts the policy for the state adoption code. It makes revisions in the policy statute governing children's cases (child in need of aid and delinquency). It makes similar revisions in the purpose section of the child abuse reporting code. It sets standards for review hearings in child in need of aid cases. It requires reporting of child abuse or neglect resulting from mental injury, which is defined.

SECTIONAL ANALYSIS

Section 1. Adopts a purposes section in the adoption code. Requires that adoption laws be deliberately construed to protect the best interests of the adopted child, given due regard to the rights of all persons involved. Modeled on New Jersey and California laws.

Section 2. Amends purposes section in child in need of aid and delinquency laws. Present law requires that the child's family ties be strengthened and preserved "whenever possible." Amendment requires family ties to be strengthened and preserved "unless efforts to preserve and strengthen the ties are likely to result in physical or emotional damage to the child." Also requires, for the first time, that the state

make "adequate planning for permanent placement for the child." This will require permanency planning for children in foster care and stop "foster care drift".

Section 3. Enacts new federal standards for annual court reviews in children's cases (child in need of aid and delinquencies). Requires the court to make written findings of fact and conclusions of law as to why the child was removed from the home, the services provided, the visitation history with the parents, whether additional services are needed, when the child can be expected to be returned to the home, or whether other permanency planning (e.g. adoption) should occur.

Section 4. Requires, within 18 months of the initial commitment as a child in need of aid, that there must be a review hearing for the court to look at the placement and services provided for the child. The court must make specific written findings as to whether the child should be returned to the parent, remain in foster care for a specified period or permanently or long-term, or whether the child should be placed for adoption. It brings Alaska into compliance with federal standards.

Section 5. Amends child abuse reporting statutes, using the same language as in Section 2, requiring reporting to preserve family life unless such efforts are likely to result in physical or emotional damage to the child.

Section 6. Requires reporting of child abuse or neglect resulting from "mental injury". Defines "mental injury" to mean an injury to the intellectual or psychological capacity of the child, as evidenced by an observable and substantial impairment in the child's ability to function within the normal range of performance and behavior with due regard to the child's culture. This is the definition currently utilized by DHSS. This section is required under federal law. The state receives approximately $100,000 per year, which will be denied in the future unless "mental injury" is included in the reporting statutes. Alaska is on the last year of a four-year waiver, so this language must pass the legislature this year.

Section 7. Repeals AS 47.10.083, which is now incorporated in Section 3 of the bill. The language of AS 47.10.083 will be incorporated in AS 47.10.080(f) in Section 3 of the bill.

This bill contains extremely important changes for the children's laws. It is short, but vital. I urge your support of the bill on the floor.

Thank you.

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF FAMILY AND YOUTH SERVICES

PERMANENCY FOR DEPENDENT CHILDREN

AN INNOVATIVE PROJECT

March 1989

Every child should have the right to a permanent and safe home.

DOES EVERY CHILD HAVE A PERMANENT HOME?

No! At any time in Alaska 900 to 1,100 children are in out of home care. Today, there are 222 children in the custody of the State of Alaska who have been in continuous out of home care for more than two years.

Although most children in custody will return to their own homes, for some, termination of parental rights is the only way they will ever have a chance for a permanent family. A quick survey throughout the state revealed that there have been approximately 35 cases of nonvoluntary terminations of parental rights during the past 18 months. There have also been five guardianships, 17 relinquishments, and there are approximately 50 cases pending termination. Some parts of the state have not had a termination of parental rights case before the court for ten years.

More must be done to assure a permanent home for every dependent child. Better assessment and focused treatment are needed to help the child's parents, and, when that is unsuccessful, faster, more definitive action is needed to make a permanent, substitute home possible for the child.

WHAT CAN BE DONE TO ASSURE PERMANENCY FOR CHILDREN?

The Division of Family and Youth Services (DFYS), together with the Department of Law, is launching a new project, Permanency for Dependent Children (PDC). This project will be implemented in Nome, Bethel, Barrow, Fairbanks, Juneau, Anchorage, and Ketchikan by July 1, 1989. Training to prepare staff will occur in June.

The goals of PDC are to speed up recognition of those cases in which termination of parental rights, or another permanent plan, should be pursued and to reduce delays in court action necessary to achieve the permanent plan. There are many components to achieving these goals:

Permanency Planning Court Specialists --

At least one permanency planning court specialist will be identified and trained in each of the offices listed above. The social workers will be trained as a team so that standardized procedures are developed statewide and so that these specialists have special support for their work.

The court specialists will conduct periodic reviews of all cases in which a child has been in custody for one year or has been removed from parental care and placed in foster care more than once. The specialists will also be available to consult and assist regarding any child's case where the caseworker or supervisor believes that a permanent plan other than return to the parents may be needed.

In those cases where the parents are not actively involved and progressing, a team decision will be made about whether continued effort with the parents is most appropriate or termination of parental rights should be pursued. In the former cases, further review will occur quarterly to be certain that no "drift" occurs.

In situations where termination of parental rights is identified as the most appropriate permanent plan, the permanency planning court specialist will be responsible for preparing the case for presentation to the court. The specialist will prepare chronologies of events, organize the evidence, interview and prepare witnesses, identify and prepare expert witnesses, and generally assist the ongoing caseworker and the assigned attorney.

Freeing a child for adoption requires the court to terminate the most precious relationship in our society -- that between parent and child. Preparation for these proceedings is extraordinarily demanding, time consuming, and stressful. By assigning specialists, we expect to eliminate delays which occur when ongoing workers are trying to balance this kind of preparation with their day-to-day obligations to respond to the needs of children, parents, and foster parents. The added expertise the specialists can bring to consultation about ongoing cases will also help less experienced workers improve their assessment and treatment skills.

Training regarding Permanency Planning --

In conjunction with the Department of Law, training and orientation for all new social workers will include information concerning legal standards for termination of parental rights, documenting events and services offered throughout a case, and assessing when termination of parental rights or another permanent plan should be pursued.

Updates on these subjects will be included in periodic training for all of the social workers. This will help keep skills current and offer an opportunity to incorporate the findings of the permanency planning court specialists about how best to prepare for court proceedings when they are required.

Specialists will be trained as a team. Their training will focus on legal and child welfare issues associated with permanency planning. The training will include information on how to conduct case reviews, assessment of treatment plans and progress, weighing permanent plan alternatives such as guardianship, adoption and long-term foster care, and preparing for complex legal proceedings.

Department of Law Participation --

In the Fairbanks, Anchorage, and Juneau offices of the Attorney General, arrangements will be made to make attorneys available to assist with training the DFYS specialists and to consult with the specialists and take cases to court. In the other offices, the Assistant Attorneys General assigned to represent DFYS will be offered support and consultation from the three larger offices, as needed.

In Juneau, a paralegal position, which is currently not filled, will be dedicated specifically to child in need of aid termination proceedings.

In Anchorage, the 1990 budget request includes the addition of an attorney and a paralegal to the human services section. Both of those positions will be dedicated to children's proceedings--including consultation with other attorneys handling termination cases. The attorney specialist will also be responsible for developing and implementing the monitoring and evaluation system for all child protection attorneys' cases in Anchorage.

Fairbanks attorneys will continue weekly staffings on all pending cases. The Fairbanks office has been involved in vigorously pursuing termination cases for quite a period of time. They will participate in concerted monitoring of cases, and evaluation of this new statewide effort.

HOW WILL BE KNOW IF WE ARE SUCCEEDING?

No later than August 15, 1990, a report will be jointly issued by the two Departments on the project's first year of operation.

In developing this project, DFYS gathered significant information about the status of permanency planning in Alaska. With the

Department of Law, we closely examined statutes concerning termination of parental rights and the many perceptions about permanency planning and "the best interests of a child." The information we have gathered is set out here as the starting place for the project evaluation, which will be described in the August 1990 report.

The annual report will include an analysis of the impact the project has had on achieving a permanent plan for the children presently in placement more than two years. It will address the project's impact on reducing the average length of time before a permanent plan is achieved for all children in out of home care. It will also include findings about what works and what doesn't and plans and recommendations for further action.

WHY SHOULD WE START THIS PROJECT?

... What is happening to children in the custody of the State of Alaska?

... Are plans for permanency being made in a timely manner?

... What is the Division of Family and Youth Services doing to prevent foster care drift?

... What is in the best interest for each child?

... Are permanent plans being finalized for children?

... What are the barriers to quality care for children in State custody?

For several hundred children, the answers to these questions are vital elements in their day-to-day survival and their future well-being. These are questions considered by policy-makers, legislators, judges, social workers, guardians, and DFYS. These are the questions that drove us to the conclusion that we needed more focused attention than had previously been devoted to permanency planning in Alaska.

Even after a child has been removed from his or her home, the child's immediate safety is not assured. Without continuing appropriate service for the child and the family, the child is at risk of victimization by the protection system. Immediate and long-term goals are necessary for each child who is removed from his or her home. The nationally recognized term for this type of planning is "permanency planning."

WHAT IS PERMANENCY PLANNING?

Permanency planning for children is a concept, a philosophy, and the desired outcome of DFYS intervention with a family. In practice, permanency planning begins with the first act of intervention by the agency. Each child's situation is assessed in two ways: 1) The risk of harm to the child in his own home is determined. 2) The family is assessed to identify needed changes so the family can provide safe, nurturing care for the child.

Through permanency planning, the goal of safe, stable care is achieved individually for each child:

1. When the child's family can be rehabilitated in a reasonable period of time, the permanency planning goal is to reunite the child with his family;

2. When the potential for reuniting a child with his family exists, an interim placement should be found which "could be permanent" if the attempt to reunite the child with his family is unsuccessful. Future planning in this direction reduces the number of placements the child must experience;

3. Sometimes adoption is best for the child and is possible when the child's parents' rights are terminated in court;

4. When the child's family cannot be rehabilitated and relatives can provide a safe, nurturing environment, a permanent relative placement may be the plan;

5. For Alaskan Native children, relatives and tribal members must be considered, and are usually most appropriate to provide the needed permanent placement;

6. Foster families frequently are willing to provide permanent care to a child who cannot be freed for adoption and has no relatives who can provide safe and permanent care;

7. Guardianship is also an avenue for permanency which does not require termination of parental rights. Relatives, tribal members and foster families can be named guardians.

WHERE ARE WE IN MEETING PERMANENCY PLANNING GOALS IN A TIMELY MANNER?

According to a recent analysis (data from December 1985 and the most recent analysis in January 1989), approximately 21% to 23% of the children in state care have been there for more than two years. In Washington, Maine, and Massachusetts the statistic is 30%, 51% and 31%, respectively. Alaska has a lower percentage rate. However, for the 222 children in Alaska who have been in substitute care for more than two years, timely permanency planning has not occurred, and for the 33 children who are between the ages of two and five, out of home care represents the majority of their life span. The following chart shows the region, age, and sex of these children.

REGION	AGE AND SEX						TOTAL
	2-5 yrs.		6-10 yrs.		11-18 yrs.		
	M	F	M	F	M	F	
Western	2	6	4	6	3	4	25
Northwestern					1		1
Northern	1		7	5	8	18	39
Southcentral	12	15	18	13	32	41	131
Southeastern		1	4	1	10	10	26
Totals	15	22	33	25	54	73	222
	37		58		127		

Alaska also appears to be doing a better job than some of the other states by not "losing" children for years in the system.

At the same time, the number of moves a child makes from foster home to foster home and from the child's home to a foster home is a measure of the quality of care the child is receiving from the "system". In 1985, 74% of the children in DFYS custody had been in at least two placements and 25% had over five placements.

In comparison, New Jersey reports that 45% of their children in substitute care have had only one placement. However, the other 55% represent multiple placements. Washington State's data for FY 86 indicated that of the 5,745 children placed, 3,858 (67%) received one placement each; 1,114 (20%) received two placements; 711, three to five placements; and 62 children had received more than six placements. The Division's program goals include reducing the number of placements for each child as well as reducing the length of time in placement for children.

HOW DO STATUTES AFFECT THIS PROCESS?

State and federal statutes define standards of proof for termination of parental rights: state statute mandates clear and convincing evidence that the parents' conduct is likely to continue. The Indian Child Welfare Act mandates evidence beyond a reasonable doubt that continued custody by the parents is likely to result in serious physical or emotional damage to the child and proof that active efforts have been made to offer remedial services. The statutes do not give time frames for the filing of a petition to terminate parental rights.

Both the parents' ability to change and to meet the child's needs are key elements. Although there are barriers to the timely planning for children in custody in Alaska, the statutes are rarely, if ever, the barrier. Ideal progression is dependent on the resources and skill of staff in the state agency, the community's resources for assisting the parents to learn to care for their child and to overcome the parents' problems, the skill and availability of the state's attorney, and the wisdom of the court.

Permanent status for some children can be achieved only through the termination of their parents' rights. State and federal statutes give the legal rules and structure to the courts and the state agency to use in deciding when the termination of parental rights can be granted:

> AS 47.10.080 (c)(3) provides that by order, upon a showing in the adjudication by clear and convincing evidence that there is a child in need of aid under AS 47.10.010 (a)(2) as a result of parental conduct and upon a showing in the disposition by clear and convincing evidence that the parental conduct is likely to continue to exist if there is no termination of parental rights, terminate parental rights and responsibilities of one or both parents and commit the child to the department or to a legally appointed guardian of the person of the child, and the department or guardian shall report annually to

the court on efforts being made to find a permanent placement for the child.

The Indian Child Welfare Act (P.L. 95-608) provides in pertinent part that no termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

The Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272) provides in pertinent part that effective October 1, 1983, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home; and it provides for the development of a case plan (as defined in section 475[1]) for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meets the requirements described in section 475(5)(B) with respect to each such child.

The term 'case plan' means . . . a plan for assuring that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own home or the permanent placement of the child . . . 475(5) The term 'case review system' means a procedure for assuring that . . . (B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review . . . in order to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship and

WHAT IS IN THE BEST INTERESTS OF A CHILD?

This question elicits emotional, philosophical, societal, tribal, and sometimes religious responses which are different for every child whose needs have not been met by the child's parents. The court ultimately may have to provide the answer for many children.

We believe it is in the best interest of every child to be loved and cared for by the child's own parents. Unfortunately, even with help to the parents, this is not always possible. The "reasonable efforts" requirement of the Adoption Assistance and Child Welfare Act of 1980 recognized, on a federal level, the bond which a child has with his family and the importance of maintaining that bond. The Indian Child Welfare Act has similar requirements. Both federal laws, like Alaska State law, recognize, however, that this goal may not be attainable for every child. When it is not, another permanent family must be found for the child.

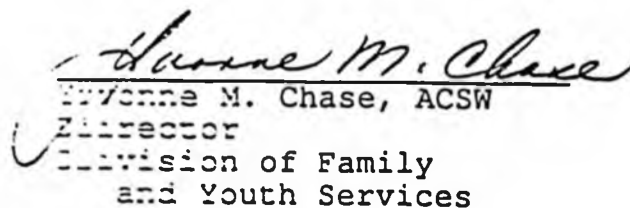
FINALLY --

We will need lots of help to make this project work. We must have enough social workers and lawyers. Treatment providers must recognize the urgency. Tribal advocates and Native organizations must be included so we have the best possible support for parents of Native children and help finding and supporting the most appropriate substitute placements, when that is required. Guardians ad litem must advocate vigorously.

Meeting the goal of a permanent home for every child requires difficult decisions and painful choices. Most important, we need the commitment of every Alaskan to meeting this goal.

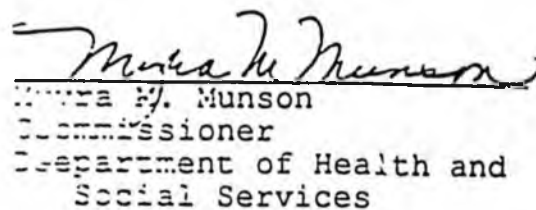
For more information, please contact:

Yvonne M. Chase, ACSW
Director
Division of Family and Youth Services
P.O. Box H-05
Juneau, Alaska 99811-0630
(907) 465-3170



Yvonne M. Chase, ACSW
Director
Division of Family
and Youth Services

Date: 3/8/89



Myra M. Munson
Commissioner
Department of Health and
Social Services

Date: 3/8/89

MEMORANDUM

State of Alaska

TO: The Honorable Max Gruenberg
Alaska State House

DATE: March 14, 1989

FILE NO. HB & 790

TELEPHONE NO: 465-2105

THRU: Yvonne M. Chase
Director
Division of Family and Youth Services

SUBJECT: Mental Injury

FROM: Frank Barthel
SS Program Coordinator
Division of Family and Youth Services

The following information is being provided on mental injury in response to your request. I would be happy to provide further clarification on why the issues described be laws.

AS 47.10.010(a)(2)(B) provides jurisdiction in situations in which a child exhibits the effects of mental injury. However, the child abuse and neglect reporting statute does not include mental injury as a condition that must be reported. Many cases initially identified as psychological maltreatment, but not reported, later enter the system as physical abuse, sexual abuse, or neglect. Early intervention is preferable to later intervention, as it is more likely to succeed and is generally less costly to the State.

An amendment to the present law would expand AS 47.17.072(2)'s definition of "child abuse and neglect" to include "mental injury" and would bring Alaska statutes into compliance with the Federal Child Abuse and Prevention Act 42 V.S.C Sec. 5101 et seq.

Compliance will make the State eligible to continue to receive Federal money for child abuse and neglect programs. States are eligible, based on their compliance, to receive funding from the federal government. That amount is based on a formula involving population. In addition to the amount which is automatic if a State is in compliance, other discretionary funds are available which require compliance with federal law to be "eligible" to even apply. This is the fourth and last year that Alaska will be eligible for a waiver. If Alaska loses federal eligibility, DFYS will lose approximately $100,000 (59,000 in a Basic Grant and another $40,000-$50,000 from the Children's Justice Act).

Initially, there was concern that when States included this additional language in their child protection statutes, their caseloads would dramatically rise. In the annual Title IV-B compliance review of the Division's records by the federal government, it appeared that Alaska was already seeing the majority of these cases, and that an increase in caseloads would be minimum. (arguments to that effect, however, have not been accepted by the federal government because they require the words "mental injury" in the State's reporting statute). Based on present estimates, the increase in reporting would only be approximately 1%.

The Department will submit a zero fiscal note if a mental injury bill is introduced. Although it is recognized that passage of the bill will result in some increased workload, the long term advantages outweigh that consideration. Early intervention would reduce treatment costs from children who might not then enter our system when they suffered more damages, and the continued eligibility for the federally funded Basic Grant in addition to discretionary grants available will result in a positive fiscal impact over time.

FB:rkh

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES

OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

P.O. BOX H
JUNEAU, ALASKA 99811-0601
PHONE: (907) 465-3030

October 19, 1989

REC'D OCT 30 1989

Jim

Representative Max F. Gruenberg
3111 C Street, Suite 440
Anchorage, AK 99503

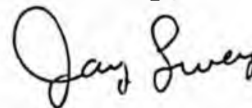
Dear Representative Gruenberg:

I have enclosed recent correspondence received by the Department regarding Alaska's application for NCCAN funds. The correspondence confirms that Alaska's application for a NCCAN grant during federal fiscal year 90 was not funded because "mental injury" is not part of Alaska's child abuse statute.

As you know, the Governor's Office is currently working with our Congressional delegation to secure a waiver for the "mental injury" requirement for Alaska. At this point we do not know if such a waiver, or for that matter the early passage of HB 175, would help us to obtain any funds for the current federal fiscal year. We are working on this but as yet have not worked out a reasonable scenario as to how this might occur.

I hope we all agree that the best and permanent fix for this problem is the passage of HB 175 and that we all continue to work toward that end. If any more information regarding this issue would be helpful to you, please let me know. Thank you for your efforts on behalf of HB 175.

Sincerely,



Jay Livey, Special Assistant,
Legislation
Department of Health & Social
Services

Enclosure

cc: Representative Johnny Ellis

06-F38LH

HB 175

The Health, Education and Social Services Committee considered CS FOR HOUSE BILL NO. 175 (Judiciary) (An Act relating to the construction of laws pertaining to adoption; modifying policy statements relating to strengthening a child's family ties or family life; relating to review of orders in certain children's proceedings; and modifying the definition of 'child abuse or neglect') and a majority of the committee recommended do pass. The report was signed by Senator Fischer, Chair, and concurred in by Senators Jones and Kelly. Senator Adams signed "no recommendation."

Previous House zero fiscal note.

CS FOR HOUSE BILL NO. 175 (Judiciary) was referred to the Judiciary Committee.

HB 233

The Health, Education and Social Services Committee considered CS FOR HOUSE BILL NO. 233 (HESS) am (An Act increasing the limit on the local contribution to a city or borough school district to 23 percent; imposing a required local contribution within a city or borough school district formed after July 1, 1988; and providing for an effective date). Senator Fischer, Chair, and Senator Jones signed "do pass." Senator Adams signed "no recommendation." Senator Kelly signed "do not pass unless amended."

Fiscal note published today from Department of Education.

CS FOR HOUSE BILL NO. 233 (HESS) am was referred to the Rules Committee.

INTRODUCTION AND REFERENCE OF SENATE RESOLUTIONS

SJR 50

SENATE JOINT RESOLUTION NO. 50 by Senator Zharoff,

> Relating to the rule proposed by the United States Fish and Wildlife Service relating to marine mammals.

was read the first time and referred to the Resources Committee.

HB 175

HOUSE BILL NO. 175
"An Act relating to programs and proceedings concerning children; and emphasizing that the best interests of the child must be considered unde certain programs and during certain proceedings involving children."

and recommends it be replaced with the following committee substitute:

CS FOR HOUSE BILL NO. 175 (HESS)
"An Act relating to the construction of laws pertaining to adoption; modifying policy statements relating to removal of a child from the custody of the child's parents and from the child's home; requiring the court to make certain findings and conclusions of law related to children who are delinquent or in need of aid; modifying the definition of 'child abuse or neglect'; and emphasizing that the best interests of the child must be considered under certain programs and during certain proceedings involving children."

Recommending do pass (5): Ellis (Chairman), Goll, Boyer, Jacko, Gruenberg

No recommendation (2): Furnace, C. Davis

LETTER OF INTENT

A letter of intent, signed by Ellis (Chairman), appears below:

House Health, Education & Social Services Committee
Letter of Intent
for
CSHB 175(HESS)

"It is the intent of the House HESS Committee to endorse the Division of Family and Youth Services' 'Permanency for Dependent Children' project as a means of expediting the planning and placement of children in state custody in permanent and safe homes. The Division is requested to report to the Committee on the progress of this project by October 15, 1989."

A zero fiscal note with analysis by the Department of Health & Social Services was published April 7, 1989.

HB 175 was referred to the Judiciary Committee.

HB 185

The Health, Education & Social Services Committee has considered:

Draft - for Johnny E.

TALKING POINTS ON HB 175
by the
HOUSE HESS COMMITTEE

* House Bill 175, which was introduced by the House HESS Committee, make changes to certain laws regarding children.

* It is one of a package of measures proposed or supported by the House HESS Committee, as a result of the Committee's comprehensive interim review of the state's child protection and foster care systems.

* The primary purpose of the bill is to insure that the best interest of the children are the paramount concern in state proceedings regarding the custody of children.

* HB 175 responds to concerns that the Division of Family and Youth Services and the court may not be given clear direction when deciding between the values of preserving family ties and the safety and welfare of children. The bill seeks to clarify that efforts to preserve and strengthen family ties are to be pursued unless such efforts are likely to result in physical or emotional damage to a child.

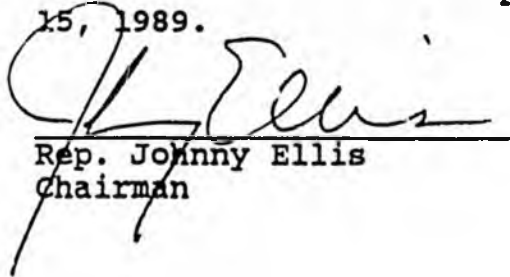
* HB 175 also responds to concerns that abused and neglected children often linger unnecessarily long in foster care. The intent is to document the reason for the child's removal from the home, and to promote parental participation in services leading to a beneficial reunification. The ultimate goal is to expedite the placement of children in a secure and permanent home so they can quickly reestablish family bonds which are so critical to their emotional well-being.

* The Co-Chair of the Judiciary Committee will further elaborate on the provisions of this legislation.

HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE
ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
P.O. BOX V, JUNEAU 99811
(907) 465-3759

HOUSE HESS COMMITTEE
LETTER OF INTENT TO CSHB 175 (HESS)

It is the intent of the House HESS Committee to endorse the Division of Family and Youth Services' "Permanency for Dependent Children" project as a means of expediting the planning and placement of children in state custody in permanent and safe homes. The Division is requested to report to the Committee on the progress of this project by October 15, 1989.



Rep. Johnny Ellis
Chairman

April 6, 1989
Date of Adoption

HB
181

State of Alaska

Committees

CO-CHAIR, HOUSE JUDICIARY
VICE-CHAIR, HOUSE LABOR AND COMMERCE
HOUSE HEALTH, EDUCATION
AND SOCIAL SERVICES

P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4712
465-4968 4986
(SESSION)

914 CLAY COURT
ANCHORAGE, ALASKA 99503
(907) 276-6844

Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

February 28, 1989

MEMORANDUM

TO: Members of the Senate Judiciary Committee

FROM: Rep. Max Gruenberg

RE: CSHB 181, (Judiciary) "An Act relating to the private manufacture of an alcoholic beverage; and providing for an effective date."

In 1986 the definition of [illegible] alcoholic beverage was rewritten to encompass privatel[illegible] [illegible]ed alcoholic beverages to eliminate a perceiv[illegible] [illegible]ole in local option statutes. Inadvertently, thi[illegible] [illegible]been interpreted to ban "homebrewing" in all areas of t[illegible] [illegible]te. Although it is within the ABC Board's authority [illegible]ssue licenses for the private manufacture of h[illegible] [illegible]ew, the Board has declined to do so.

HB 181 would exe[illegible] "homebrewing" from most provisions governing alcohol[illegible] beverages -- mainly those related to licensing. Homeb[illegible]ing would still be prohibited in both "damp" and "dry" l[illegible]cal option areas; municipalities would continue to have t[illegible]e authority to regulate "homebrewing" and possession, consumption or sale of homebrew for persons under age 21 would be prohibited.

We amended the bill in the House HESS Committee to prohibit the sale and consumption of homebrew at school events. In the House Judiciary Committee we amended the definition of alcohol to conform to the federal definition. This allows the unlicensed sale of beverages that contain only trace amounts of alcohol.

Thank you.

CSHB 181 (Judiciary) - "An Act relating to the private manufacture of and the definition of an alcoholic beverage."

Section 1 (a) would exempt "homebrewing" from Title 4 EXCEPT for the provisions listed in Section 1 (b) as follows:

(1) possession or consumption by persons under the age of 21 (as 04.16.050);

(2) furnishing or delivery of alcoholic beverages to persons under the age of 21 (AS 04.16.051);

(3) sale and consumption at school events (AS 04.16.080);

(4) municipal regulation of alcoholic beverages (AS 04.21.010);

(5) civil liability of persons providing alcoholic beverages (AS 04.21.020); and

(6) local options areas:
- prohibition of the sale of alcoholic beverages (AS 04.11.490);
- community liquor license; complete prohibition on sales (AS 04.11.492);
- prohibition of sale and importation of alcoholic beverages (AS 04.11.496);
- prohibition of possession of alcoholic beverages (AS 04.11.498); and
- prohibition of the sale of alcoholic beverages except by selected licenses (AS 04.11.500).

Note: The proposed bill would prohibit the private manufacture of "homebrew" in both "damp" and "dry" local option areas. The bill has no mitigating effect on the state's open container law.

At the request of the ABC Board, an unrelated issue which has no impact on "homebrewing" is addressed in section 2.

Section 2 amends the definition of "alcoholic beverage" contained in Title 4 to exclude from state regulation alcoholic beverages that contain less than one-half percent of alcohol by volume.

Section 3 provides for an immediate effective date.

No. 1 Jud

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION : CSHB 181 ~~(HESS)~~
PUBLISH DATE : HOUSE 4/10/89

FISCAL NOTE

REQUEST:

Revision Date:
Title : Private manufacture of an alcoholic beverage
Sponsor : Rep. Gruenberg
Requestor : House HESS Committee

Agency Affected : Department of Revenue
BRU : Alcoholic Beverage Control Board
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	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0

REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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)

Patrick L. Sharrock

Prepared by : Patrick L. Sharrock, Director
Phone : 277-8638
Division : Alcoholic Beverage Control Board
Date : March 1, 1989

Approved by Commissioner : Hugh Malone [signature] for
Date : 3/1/89
Agency : Revenue

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

5/4 talked to P. Sharrock - fiscal impact of CSHB 181 (Jud) still zero
CFrasca

page 1 of 1

HB
188

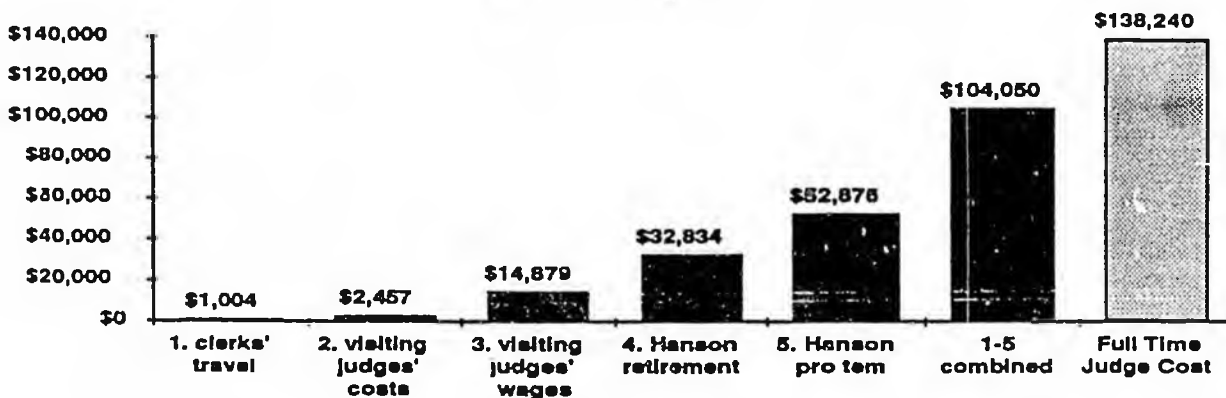
HB 188 - Additional Superior Court Judge at Kenai

Justification Summary

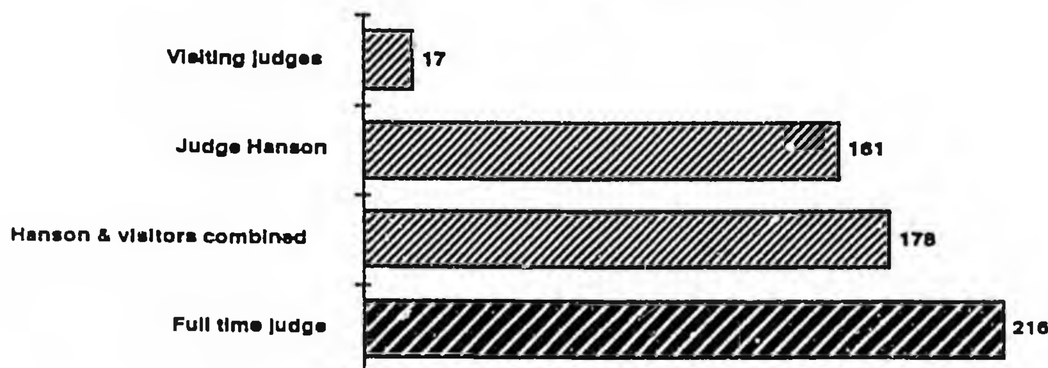
Representative Mike Navarre

In FY88, the Kenai Court:

- had the highest number of filings per judge in the state, 3925 (Palmer 3251; Anchorage 2382; Valdez 395)
- experienced a 26% jump in trial activity
- experienced inordinate delays in routine matters
- assigned all civil trials to visiting judges
- spent almost as much on part-time and visiting judges as a full-time judge costs:



Kenai's retired judge, James Hanson, is budgeted to work pro tem 2 weeks a month but frequently works another 1 or 2 weeks. In 1988, he worked 161 days, which is 75% of what a full-time judge works. Besides Judge Hanson's pro tem work, other judges travelled to Kenai. **Hanson plans to retire completely at the end of June.** This will leave a single judge with the work of almost two judges (see graph below).



FY85 - FY88 the court experienced a 348% increase in children's matters filings, the highest in the state.

In 1986, the Alaska Bar Association unanimously recommended an additional Superior Court Judge for Palmer and Kenai.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

Bill Version: HB 188
Publish Date: 2/21/89

FISCAL NOTE

REQUEST:

Revision Date: 4/6/89
Title: An Act changing the # of superior court judges in the 3rd judicial district
Sponsor: Navarre, Swackhammer, Gruenberg
Requestor:

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Personal Services		68.4	136.9	136.9	136.9	136.9
Travel						
Contractual						
Supplies						
Equipment		2.0				
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	70.4	136.9	136.9	136.9	136.9

CAPITAL						

REVENUE						

FUNDING: (Thousands of Dollars)

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
General Funds	0.0	7[illegible]	136.9	136.9	136.9	136.9
Federal Funds						
Other						
TOTAL	0.0	70.4	136.9	136.9	136.9	136.9

POSITIONS:

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Full-time		4.0	4.0	4.0	4.0	4.0
Part-time		(2.0)	(2.0)	(2.0)	(2.0)	(2.0)
Temporary			0.0	0.0	0.0	0.0

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: Robert G. Fisher, Manager, Fis[illegible] Operations
Phone: 264-8228
Division: Alaska Court System
Date: 04/11/89

Approved by: Arthur H. Snowden, II, Administrative Director (signed FOR)
Date: 04/11/89
Agency: Alaska Court System

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

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

02-576(2/77)

HB 188 - Additional Superior Court Judge at Kenai

Justification Summary

Representative Mike Navarre

In FY88, the Kenai Court:

- had the highest number of filings per judge in the state, 3925 (Palmer 3251; Anchorage 2382; Valdez 395)
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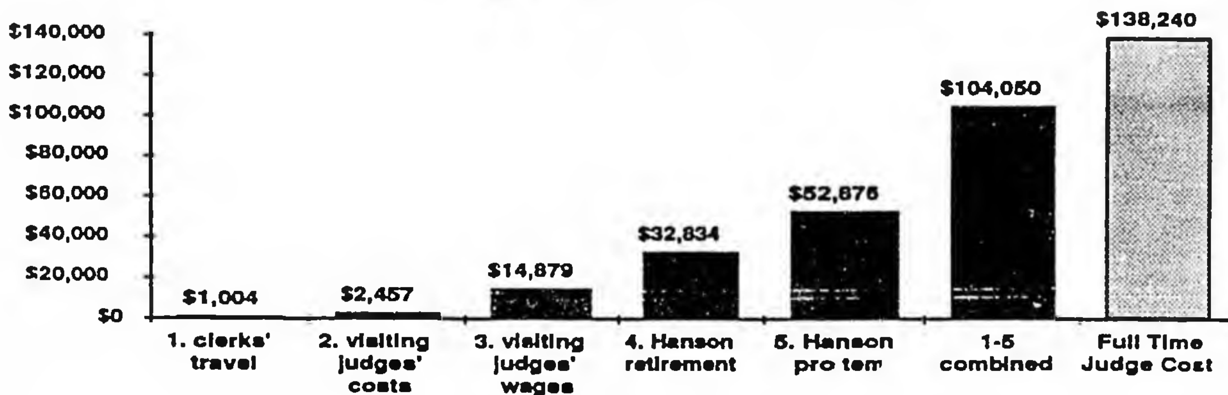
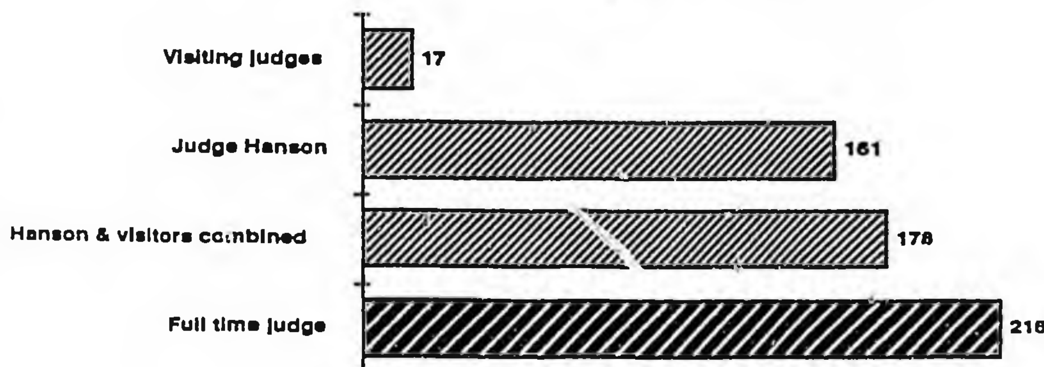
- experienced inordinate delays in routine matters
- assigned all civil trials to visiting judges
- spent almost as much on part-time and visiting judges as a full-time judge costs:



Kenai's retired judge, James Hanson, is budgeted to work pro tem 2 weeks a month but frequently works another 1 or 2 weeks. In 1988, he worked 161 days, which is 75% of what a full-time judge works. Besides Judge Hanson's pro tem work, other judges travelled to Kenai. **Hanson plans to retire completely at the end of June.** This will leave a single judge with the work of almost two judges (see graph below).



FY85 - FY88 the court experienced a 348% increase in children's matters filings, the highest in the state.

In 1986, the Alaska Bar Association unanimously recommended an additional Superior Court Judge for Palmer and Kenai.

Excerpts from attorneys' letters supporting an additional judge.

Judge Cranston spends so much time on the bench hearing disputed criminal and civil cases that he has almost no time to deal with motions and other court proceedings which are generally done in his office. Court matters are so tightly scheduled that there is little ability to meet emergencies or [for lawyers] to simply make an expanded presentation because of the time constraints. Parties and attorneys wait patiently to be heard because they know that a 10 to 12 hour day by Judge Cranston is the normal work day.

However, the delays are piling up, and it is not unusual to wait several months for a court response to a simple motion in a civil case. The delays add to the cost of the litigation.
--Robert C. Erwin, Anchorage (former Supreme Court Justice)

...the current caseload of the Superior Court judge in Kenai does not allow the judge to devote sufficient time to properly analyze what are often complex legal issues...Further, because of the priority of the criminal docket, civil matters are often delayed. Due to the delays and the problem of inadequate time to properly handle cases, the Borough finds itself in the position of accepting these problems or preempting the local judge in order to try to have the case assigned to a judge who has more time. That generally requires the Borough to travel to Anchorage.
--Thomas R. Boedecker, Soldotna (Kenai Peninsula Borough Attorney)

The system is inefficient because it requires Anchorage judges to block out a week of their calendar to attend to Kenai matters with which they have no familiarity before their arrival in town. The system is unfair to local litigants because it frequently results in the scheduling of substantive hearings, on shortened notice, in Anchorage with the parties being required to bear the expense of transporting themselves and their attorneys to Anchorage for such hearings...civil litigants are always uncertain as to when their case will actually be tried and this uncertainty differs markedly from the date certain calendaring which prevails in Anchorage....It is simply unreasonable, in this day and age, to expect that one superior court judge can handle all judicial matters from juvenile proceedings to criminal cases to complex civil litigation and domestic relations for a population in excess of 20,000 [actually 44,000].
--Peter F. Mysing, Kenai

The persons needing assistance most are particularly affected. Children's matters, custody and juvenile proceedings, injunctive actions and scheduling expedited motions all overburden the system at present and harm those who can least afford it.
--Martin Friedman, Homer

The court backlog in Kenai makes it virtually impossible for citizens of the Peninsula to have adequate and fair access to our judicial system.
--Robinson, Beiswenger & Ehrhardt, Soldotna

As a matter of course the hearings end up being scheduled for Anchorage because of the judge's location. This creates additional costs and expenditures both of time and money on behalf of an attorney's client. This hardly seems fair to the citizens of the Kenai Peninsula that try to utilize their local court facilities.
--Robert M. Cowan, Kenai

Our jury expenses have doubled for FY86 to FY87 and doubled again from FY87 to FY 88, indicating that much more time and judicial resources are being spent in actual trials. Trials, by the way, are the most intensive drain of all on everyone involved, including the Court and the support staff. There is little time left to do anything else and what little is done must be rushed. The net result is a dimunition of the quality of judicial work and decisions, poorer and less predictable decisions, inadvertent injustice, and diminished respect for the Court and the State.
--Joseph L. Kashi, Kenai (President, Kenai Peninsula Bar Association)

STATE OF ALASKA
1989 LEGISLATIVE SESSION

Bill Version: HB 188
Publish Date: 2/21/89

FISCAL NOTE

REQUEST:

Revision Date: 4/6/89
Title: An Act changing the # of superior court judges in the 3rd judicial district
Sponsor: Navarre, Swackhammer, Gruenberg
Requestor:

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Personal Services		68.4	136.9	136.9	136.9	136.9
Travel						
Contractual						
Supplies						
Equipment		2.0				
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	70.4	136.9	136.9	136.9	136.9
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

General Funds	0.0	70.4	136.9	136.9	136.9	136.9
Federal Funds						
Other						
TOTAL	0.0	70.4	136.9	136.9	136.9	136.9

POSITIONS:

Full-time		4.0	4.0	4.0	4.0	4.0
Part-time		(2.0)	(2.0)	(2.0)	(2.0)	(2.0)
Temporary			0.0	0.0	0.0	0.0

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: Robert G. Fisher, Manager, Fiscal Operations
Phone: 264-8228
Division: Alaska Court System
Date: 04/11/89

Approved by: Arthur H. Snowden, II, Administrative Director (signed, for)
Date: 04/11/89
Agency: Alaska Court System

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

ALASKA COURT SYSTEM

Fiscal Analysis

HB 188 – Number of Superior Court Judges

Personal Services:

Position Title	Salary	Benefits	Total
Superior Court Judge, Kenai PFT, 12 months	$82,716	$55,710	$138,426
Law Clerk I, Kenai PFT, 12 months, range 13D	31,476	12,197	43,673
In-Court Clerk, Kenai PFT, 12 months, range 12A	26,604	11,132	37,736
Secretary II, Kenai PFT, 12 months, range 12A	26,604	11,132	37,736
Magistrate V, Homer PFT, 12 months	46,992	15,591	62,583
Total Personal Services			320,154

Adjustments to Personal Services Costs:

Elimination of PPT pro tempore judge and PPT secretary in Kenai (1)	62,500
Elimination of PFT district court judge in Homer	120,784
Total Reduction of Personal Services	183,284
Net Personal Services	136,870

Equipment: (for Law Clerk position, one-time cost)

Desk, chair, typewriter, statutes, rules of court	1,962
Total Cost (first year – implementation at mid year)	$70,397
Total Cost (on-going)	$136,870

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(1) Calculation of Existing Funding:	Amount	Total
FY 82 - Original funding (Free Conference Committee)	$57,200	$57,200
FY 83 - 5% salary increase	2,900	60,100
FY 85 - 5% salary increase (funded at 80% of actual)	2,400	62,500

ALASKA COURT SYSTEM
Fiscal Analysis

HB 188 - Number of Superior Court Judges

This legislation would create an additional full-time superior court judge and support staff in Kenai. The new positions will replace a 6-month pro tempore superior court judge and related part-time secretary.

The accompanying fiscal note is a revision of the court's first note on this legislation. During the analysis of this bill, the district court judge in Homer announced his resignation. In light of the resignation, the court undertook a more comprehensive analysis of caseloads on the entire Kenai peninsula for both the superior and district courts.

Among the proposals reviewed were the possibility of upgrading the judicial position in Homer to the superior court level. Under this staffing plan, the Homer judge would have served both the Homer and Kenai courts. However, superior court filings in Homer and the cost of travel between the courts did not support this proposal.

The other major proposal reduced the judicial position in Homer to the magistrate level and created a superior court judge in Kenai. This proposal was selected as the most appropriate for the caseloads and for cost effectiveness.

As a result of this analysis, the court has revised the fiscal note to incorporate the cost savings of the reduction of the Homer district court position to the magistrate level.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 188
PUBLISH DATE: HOUSE 4/26/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act increasing the number of superior court judges at Kenai..."
Sponsor: Reps Navarre, Swackhammer, Gruenberg
Requestor: House Judiciary and Finance

Agency Affected: Dept. of Administration
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)

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

(See Attachment)

Prepared by: John B. Salemi, Public Defender
Division: Public Defender Agency
Phone: 279-7541
Date: 3-7-89

Approved by Commissioner: John Andrews
Agency: Department of Administration
Date: 3/10/89

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 188

HB 188 adds one additional superior court judge at Kenai, Alaska. With this addition Kenai would have two superior court judges and one acting district court judge. While there would be no immediate fiscal impact on the Kenai Public Defender office, it is expected the numbers of criminal prosecutions would go up with a commensurate caseload increase at the Public Defender Agency. We would be taking a "wait and see" approach to any fiscal impact of this bill on the Public Defender Agency.

No. 4

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 188
PUBLISH DATE: HOUSE 4/26/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act increasing the number of superior court judges at Kenai..."
Sponsor: Rep. Navarre, et. al.
Requestor: House Judiciary & Finance

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)

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Brant McGee, Public Advocate
Division: Office of Public Advocacy
Phone: 274-1684
Date: 3/7/89

Approved by Commissioner: John Andrews
Agency: Department of Administration
Date: 3/10/89

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 188

HB 188 adds one additional superior court judge at Kenai, Alaska. With this addition Kenai would have two superior court judges and one acting district court judge. While there would be no immediate fiscal impact on the Office of Public Advocacy, it is expected the numbers of criminal prosecutions would go up with a commensurate caseload increase to OPA's Kenai contractor. We would be taking a "wait and see" approach to any fiscal impact of this bill on the Office of Public Advocacy.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

Bill Version: HB 188
Publish Date: HOUSE 4/26/89

FISCAL NOTE

REQUEST:

Revision Date: 4/6/89
Agency Affected: Alaska Court System
Title: An Act changing the # of superior court judges in the 3rd judicial district
BRU: Trial Courts
Sponsor: Navarre, Swackhammer, Gruenberg
Components:
Requestor:

EXPENDITURES/REVENUES: (Thousands of Dollars)

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REVENUE						

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Federal Funds						
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POSITIONS:

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Part-time		(2.0)	(2.0)	(2.0)	(2.0)	(2.0)
Temporary			0.0	0.0	0.0	0.0

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: Robert G. Fisher, Manager, Fiscal Operations
Phone: 264-8228
Division: Alaska Court System
Date: 04/11/89

Approved by: Arthur H. Snowden, II, Administrative Director (signed FOR)
Date: 04/11/89
Agency: Alaska Court System

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

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LEGISLATIVE FINANCE

ALASKA COURT SYSTEM

Fiscal Analysis

HB 188 – Number of Superior Court Judges

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(1) Calculation of Existing Funding:	Amount	Total
FY 82 - Original funding (Free Conference Committee)	$57,200	$57,200
FY 83 - 5% salary increase	2,900	60,100
FY 85 - 5% salary increase (funded at 80% of actual)	2,400	62,500

HB
195

STEVE COWPER
GOVERNOR

PHONE
(907) 561-4227

STATE OF ALASKA
OFFICE OF THE GOVERNOR

ALASKA WOMEN'S COMMISSION
3601 C STREET - SUITE 742
ANCHORAGE, ALASKA 99503

RECEIVED
MAR 12 1990
JAN FAIKS
SENATE OFFICE

March 7, 1990

Senator Jan Faiks
Alaska State Legislature
P.O. Box V (MS3100)
Juneau, Alaska 99811

Dear Senator Faiks;

I met with the attorneys that I am working with on HB195 and have discussed with your aide Mr. Christiensen the newly added intent language. We like the first section, page 1, lines 10-14, ending at "dissolution". We are concerned that the second part of this intent language is unnecessary and possibly damaging to the bill. Also, it is unusual to have intent language which tells the Supreme Court that this bill does not do anything. It appears to limit the intent of the legislature.

The purpose of this bill was to simplify for lawyers and persons representing themselves what their rights are. The intent language here tells people to go back to case law, which will be confusing, rather than directly referring them to the language of the statute.

Our intent is to codify the factors to be weighed by the court. The language in the bill does not verbatim track Merrill v Merrill and other cases but incorporates also the trend in our courts and in other states to more fairly allocate the economic impact of divorce. In part this is because Merrill is a 1962 case. The language used in the statute embodies modern terminology, e.g. retirement benefits, health insurance. The legislative intent is to equalize the economic effect of divorce, which is not addressed in case law, and to embrace this as a fair standard for its citizens. It is our impression that this new intent language significantly weakens the statute.

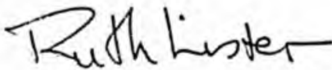
Another issue we raised with Mr Christiensen was that the intent language does not address the other changes in the bill, such as the heightened judicial scrutiny for dissolution. Rather than use intent language to enumerate all the changes in the statute, we feel that this information could more appropriately be addressed in a briefing paper to legislators.

We have two other concerns. First, under the list of factors on pages 4 and 5, factor (E) should be deleted. The Merrill factor here is "conduct of the parties", which is clearly outdated. We suggested "conduct of the parties including the unreasonable depletion of marital assets" because there have been a few cases where this factor was used in this way. These few cases could, however, be addressed under other factors.

Second, we request the deletion of the "," on page 6 line 24 after "persons", so that it is clear that "in the child's best interests" refers to visitation by grandparents and other persons.

Thank you for giving us the opportunity to comment on the proposed CS to HB195.

Sincerely,



Ruth Lister
Executive Director
Alaska Women's Commission

RL/bh

KENNETH C. KIRK
Attorney-at-Law
540 L Street, Suite 206
Anchorage, Alaska 99501
(907) 279-1659

December 27, 1989

State Senator Jan Faiks
P.O. Box V
Juneau, Alaska 99811

Dear Senator Faiks:

I appreciated your interest and courtesy when I recently testified before yourself and Senator Rodey regarding CSHB 195. I wanted to elaborate on an aspect of the bill on which I only touched briefly at the hearing. By now someone will undoubtedly have called your attention to a note in the Alaska Law Review, December 1989, regarding the Nelson v. Nelson case. If you do not have this article yet, please feel free to have your Aide call my secretary, and we will copy it and send it to you immediately. That article has some logical flaws, and I wanted to make sure you are aware of them.

In my testimony, I pointed out that there were three different ways for the court to consider career assets. First, they could simply treat the asset as marital property, and order the professional spouse to pay money or property to the non-professional spouse to balance the ledger. This would partially be prevented by Richmond. Second, they could award some form of alimony to the non-professional spouse based on the professional spouse's increased earnings. Statutorily, such an award would have to be "just and necessary". By "necessary" it is meant that the non-professional spouse does not have sufficient assets or income to meet her reasonable needs. Third, the court can give the non-professional spouse a greater share of the other marital assets on the basis that the professional spouse is better situated financially. This is presently being done under the Merrill factors.

The concern I expressed at the hearing was that the bill in question suggested that the career assets should be taken into account in all three ways; in other words, it should not only be taken into consideration when determining whether alimony should be awarded, but also when determining whether one spouse should receive more than 50% of the marital property, and it should also be valued and distributed as a marital asset. Aside from the possibility of triple-dipping, which I think the Judges here would be able to avoid, I was concerned that the Bill missed the opportunity to give some kind of clear direction to the courts as to which avenue would be preferred.

The Law Review note I mentioned points out correctly that the danger in leaving career assets as only a Merrill factor is that there might not be enough other marital assets to divide. In other words, if the professional degree is not considered marital property, but the non-professional spouse gets a larger percentage of the other marital assets, the court may not be able to do justice unless there are sufficient other marital assets to divide. This would be especially true if the marriage dissolved soon after the professional degree was earned. To this extent, I agree with the article.

Where I disagree with the Law Review note is that it goes on to find property distribution to be preferable as between the other two alternatives. It also says that the property distribution should be in a lump sum, although this makes no sense if the parties do not have the additional assets to make that possible. Assuming, then, that we are talking about payments over a long period of time, classifying those payments as alimony would be fairer to both sides than classifying them as property. For one thing, the IRS has to be taken into account. If the professional spouse is making payments over a long period of time based on the "asset" of the professional degree, he is going to be paying taxes on the full amount of the income he receives, although he does not get to keep it; in the meantime, the non-professional spouse is in effect receiving income with the taxes already paid. Classifying the distribution as alimony means that the professional spouse will pay the taxes on the income he gets to keep, and the non-professional spouse will pay taxes on the income she receives. Another problem is the bankruptcy system. A property settlement based on long-term payments from a professional degree would be a hollow victory if the professional spouse then declared Chapter 7, and was freed from the future obligation. Alimony payments, on the other hand, survive bankruptcy.

The difficulty, under the current Alaska Statutes, with awarding alimony based on career assets is that the statute says that the alimony must be necessary, so if the non-professional spouse also has a decent income, she is not entitled to alimony. This is, however, a statutory point and can be changed by the legislature.

In conclusion, it seems to me that the best and fairest way to handle the question is to continue the use of career assets as a Merrill factor if there are sufficient marital assets to adequately compensate the non-professional spouse; and if there are not, to allow alimony to be instituted when it is not absolutely necessary, provided that it is justified by career assets. In such a case, you might also want to clarify in the

Statute that alimony based on career assets need not necessarily terminate upon remarriage of the payee spouse.

Thank you for taking the time to consider my opinion. If there is anything I can do to assist you in making these difficult decisions, please let me know.

Sincerely yours,

KENNETH C. KIRK

KCK/bj

AAUW AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

Linda Koloski · Juneau AAUW.

Rosemary C. Van Der Laan

President Alaska Division
And International Relations Representative

3549 Spinnaker Drive
Anchorage, Alaska 99516

(907) 345-4644

American Association of University Women
Alaska Division

DIVORCE AND DISSOLUTION REFORM

AAUW SUPPORTS LEGISLATION TO CORRECT THE ECONOMIC INEQUITIES THAT OCCUR UNDER CURRENT DIVORCE AND DISSOLUTION LAWS, TO CLARIFY THE RIGHTS OF SPOUSES DURING DIVORCE ACTION, AND TO PREVENT THE IMPROVERISHMENT OF WOMEN AND CHILDREN AS A RESULT OF DIVORCE.

No-fault divorce was hailed as a progressive social reform to lessen the emotional trauma of divorce of all family members. Alaska, one of eight states to adopt such law (enacted in 1976), allows people to fashion their own divorces without legal assistance. Currently about two-thirds of all Alaskan divorces are terminated through dissolution procedures as opposed to the more traditional and structured divorce proceedings. Recent research, however, suggests that many women and children suffer severe "downward mobility" as the unintended result of these reforms. Economic settlements are often unfair, and women and children appear to be losing ground financially because of them.

Current Alaska law does not authorize spousal support while a divorce is pending. In addition, the court often awards insufficient attorney's fees to a spouse already in financial need. Proposed Divorce and Dissolution Reform bills address these problems; furthermore, proposed legislation would clarify that "career assets" are part of marital property under dissolution law.

In addition, reform would require greater judicial scrutiny to ensure that economic settlements would be fair and equitable. This would serve to protect the best interests of children involved and help prevent unfair bargaining power from being exercised by either of the parties.

In the face of a growing body of research which suggests that the current legal system of divorce creates economic hardships for women and children instead of providing greater family equity, AAUW advocates reform in the Divorce and Dissolution laws. Inadequate and poorly enforced child support awards, the near absence of spousal support, and unequal division of marital property are creating a new class of poor. Legislative reform, such as HB 195 introduced by the Governor February 24, 1989, is necessary to correct these inequities.

DIVORCE AND DISSOLUTION REFORM

Testimony before Senate Judicial Committee on HB195 - 11/28/89

AAUW SUPPORTS HB 195 WHICH STRIVES TO CORRECT THE ECONOMIC INEQUITIES THAT OCCUR UNDER CURRENT DIVORCE AND DISSOLUTION LAWS, TO CLARIFY THE RIGHTS OF SPOUSES DURING DIVORCE ACTION, AND TO PREVENT THE IMPROVERISHMENT OF WOMEN AND CHILDREN AS A RESULT OF DIVORCE.

No-fault divorce was hailed as a progressive social reform to lessen the emotional trauma of divorce of all family members. Alaska, one of eight states to adopt such law, allows people to fashion their own divorces without legal assistance. Currently about two-thirds of all Alaskan divorces are terminated through dissolution procedures as opposed to the more traditional and structured divorce proceedings. Recent research, however, suggests that many women and children suffer severe "downward mobility" as the unintended result of these reforms. Economic settlements are often unfair, and women and children appear to be losing ground financially because of them.

Current Alaska law does not authorize spousal support while a divorce is pending. In addition, the court often awards insufficient attorney's fees to a spouse already in financial need. HB 195 addresses these problems. Furthermore, this legislation would clarify that "career assets" are part of marital property under dissolution law. This is especially important as career assets become a larger part of the average couple's "investment portfolio". As home ownership becomes less possible for young people, career assets increasingly may become the only assets acquired during marriage. In addition, reform would require greater judicial scrutiny to ensure that economic settlements would be fair and equitable. This would serve to protect the best interests of children involved and help prevent unfair bargaining power from being exercised by either of the parties.

In the face of a growing body of research which suggests that the current legal system of divorce creates economic hardships for women and children instead of providing greater family equity, AAUW strongly advocates reform in the Divorce and Dissolution laws. Inadequate and poorly enforced child support awards, the near absence of spousal support, and unequal division of marital property are creating a new class of poor. Legislative reform such as HB 195 is necessary to correct these inequities.

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 28, 1990

SUBJECT: Purpose Statement for SCS CSHB 195(Jud)

TO: Senator Jan Faiks
Chair, Judiciary Committee

FROM: Terri Lauterbach TML
Legislative Counsel

As approved by Chris Christensen of your office, this memo proposes a rewrite of the purpose statement requested for SCS CSHB 195(Jud). While I continue incorporating other changes in the SCS, you will have time to review this language and approve it for insertion in the SCS later today.

The proposed language is as follows:

> * Section 1. INTENT. By amending AS 25.24.160(a)(2) and (4) in this Act and by referring to those paragraphs in other sections of AS 25.24 in this Act, it is the legislature's intent to codify the principal factors to be weighed by a court in making an equitable division of property or an award of maintenance in a divorce or dissolution proceeding, as enunciated by the Alaska Supreme Court in the case of Merrill v. Merrill, 368 P.2d 546 (Alaska 1962), and subsequent opinions. Except for AS 25.24.160(a)(4)(F), the factors codified are intended to restate the principal factors found in case law, not to change them, affect the interpretation given to them, or preclude changes or additions to them by future court rulings.

Please let me know if you would like changes in this language. As soon as I get your approval, we will insert the section into the latest draft of the SCS and get a full copy of the draft to you.

TL:pl
WKP2/104

STEVE COWPER
GOVERNOR

PHONE
(907) 561-4227

STATE OF ALASKA
OFFICE OF THE GOVERNOR

ALASKA WOMEN'S COMMISSION
3601 C STREET · SUITE 742
ANCHORAGE, ALASKA 99503

May 1, 1989

Senator Jan Faiks
P.O. Box V
Juneau, AK 99811

Dear Senator Faiks:

HB 195, an act relating to divorce and dissolution, passed the House on April 29. Anticipating that Senate Judiciary will be its first committee of referral in the Senate, I am sending you information on the bill. House Finance has zeroed the $66,500 fiscal note from the court system and so the bill could pass the Senate this year if Senate Finance waives it and if the timelines are expedited.

The bill is similar to HB 189, which went as far as Senate Rules three years ago when time ran out. I have asked John Reese, the attorney who worked on the wording changes from the previous bill, to call you regarding HB 195. I believe that there is good support for this bill in the Senate.

I appreciate your understanding and support of the issues addressed in HB 195 and hope that we can work together to secure its passage.

Sincerely,

Ruth Lister

Ruth Lister
Executive Director

RL/mm

Enclosure

STEVE COWPER
GOVERNOR

PHONE
(907) 561-4227

STATE OF ALASKA

OFFICE OF THE GOVERNOR

ALASKA WOMEN'S COMMISSION
3601 C STREET · SUITE 742
ANCHORAGE, ALASKA 99503

March 17, 1989

POSITION PAPER ON HB 195

In the last two decades, the divorce process has undergone major reform. The introduction of no-fault divorce and the procedure of dissolution for terminating marriages have had a major impact on divorce and its consequences in Alaska. The impetus behind this legislation was to remove the bitter court battles that had traditionally accompanied divorce and to lessen the financial burden of divorce. While emotionally less traumatic and, in the case of dissolutions, much cheaper, we are seeing a serious negative economic impact of divorce on women and children. A recent study by the Alaska Women's Commission showed that women's per capita income declines 33% after divorce and men's increases 17%.

Dissolution is used by 2/3 of Alaskan couples who end their marriages. Alaska is one of only 8 states that permit dissolution. It is also one of the most liberal in its provisions. Most other states do not permit dissolutions if there are minor children, if the marriage is one of long duration, or if the couple has property. Alaska law places no limitations on the use of dissolutions.

What we have found is that women who choose dissolution suffer even more financial hardship than women who go through divorce. Our study indicated that women using dissolutions received only 29% of the marital property. Physical custody of the children was awarded to the mother in 70% of cases using divorce compared with 52% of cases using dissolution. Women are not faring so well with dissolutions because there is often an imbalance of power in marital relationships and women are pressured or threatened to agree to settlements which are not in their or their children's best interests. In Alaska 26% of women report having been in a violent relationship. Domestic violence is a factor in a significantly high number of divorces.

For all of the above reasons, the Alaska Women's Commission believes that there should be heightened judicial scrutiny of dissolutions under certain circumstances. HB 195 would require increased judicial scrutiny for dissolutions where there are minor children, there is evidence of domestic violence, one party has an attorney, or there is a patently inequitable division of property. In addition to statements currently required in a dissolution of marriage petition, parties must state whether either spouse needs medical care, whether a domestic violence complaint has been filed, whether either party has received legal counsel and whether the petition constitutes the entire agreement between the parties. Both parties are required to be present at the hearing except upon a finding that there are compelling circumstances warranting absence.

HB 195, "Divorce/Dissolution Bill"

HB 195 is aimed at correcting some of the deficiencies of Alaska's divorce and dissolution statutes. Divorce and dissolution are two different processes used to achieve the same result: a decree of divorce. Dissolutions allow people to become divorced without retaining attorneys, provided that both parties agree on all issues. Recent research by the Women's Commission (Family Equity at Issue, 1987) indicates that women are agreeing to inequitable divorce settlements for a number of reasons. One reason is that they do not have the financial resources to contest the settlement, and therefore have no alternative but to agree to inequitable terms of a dissolution.

HB 195 clarifies and strengthens the courts prerogative of requiring one spouse to provide reasonable spousal support including attorney's fees while the divorce is pending. This would assist women in contesting inequitable settlements.

Another reason women may be agreeing to unreasonable settlements is that there is a history of violence or an otherwise unequal distribution of power in the relationship. HB 195 would require parties in a dissolution to disclose the following:

- the existence of any domestic violence complaints,
- either party having received legal counsel,
- either party needing medical care,
- that the agreement constitutes the entire agreement between the parties.

In the event that any of the following conditions exist:

- there are minor children,
- there is evidence of domestic violence,
- one party has an attorney,
- there is a patently inequitable division of property.

HB 195 would require heightened judicial scrutiny of the dissolution. This bill would also require that both parties be present at the hearing unless there are compelling circumstances warranting absence.

HB 195 would also give either party the option of changing his or her name as part of the divorce process in addition to the option under current law of keeping the married name or restoring the prior name.

Finally, HB 195 would add language to include career assets to the statutes regarding the division of property and award of spousal maintenance. Career assets are defined as the ability of a spouse to earn money as a result of education, profession, or employment acquired in part through the contributions, including homemaking and child care, provided by the other spouse.

ALASKA WOMEN'S COMMISSION

A second area addressed by HB 195 is the division of property and spousal maintenance. In many marriages the couple's major investments are in the education and career of the primary wage earner, usually the husband. Homemaking and child raising, which are usually done by women, enable the primary wage earner to make career advancements. The value of homemaking and child raising, which are essential to the marriage partnership and thus to the building of career assets, are presently virtually ignored. The division of marital property usually excludes career assets, thus allowing the major wage earner to keep what are often the most valuable assets of the marriage. For example, not only do almost twice as many men as women have retirement benefits, but the median value of the husband's benefits is three times that of the wife's. Retirement benefits were divided by only 20% of couples in our study. Other types of career assets were rarely included in the division of property. By not including career assets we are contributing to the rising number of women and children in poverty.

Alimony or spousal maintenance was awarded in only 10 percent of divorces surveyed. Awards lasted usually for one year, at most two, and averaged $500 month. Yet most who received it had no job, no other income and were of an age which made it difficult to find paid work

In HB 195 career assets are defined as the ability of a spouse to earn money resulting from education, profession or employment acquired in part as a result of the contributions, including homemaking and child rearing, provided by the other spouse. This legislation would require that career assets be considered in the division of property and award of spousal maintenance. Retirement benefits are also specified.

A third area addressed by HB 195 is the ability of the parties involved to obtain legal representation, support and protection prior to a settlement. Half of the women we surveyed felt pressured to reach a divorce settlement by economic factors such as non-support of the children until settlement of the divorce. Only 15% indicated that the other spouse paid any portion of the respondent's attorney fees. HB 195 clarifies and strengthens orders during the pendency of the action providing for spousal maintenance, attorney's fees, child support and protective restraining orders.

Finally, the bill provides for name changes in divorce and dissolution proceedings, which will have the effect of amending Rule 84(a), Alaska Rules of Civil Procedure.

In Alaska, with a divorce rate of 63% compared with 47% nationally, it is imperative that the economic hardships for women and children created by divorce be addressed and increased judicial scrutiny of dissolutions be incorporated into the statute. Divorce laws are based upon the notion that women have achieved equality of opportunity in the job market. Married women earn on average half of what their spouse's earn. Many have put their own careers or education on hold and thus not attained an earning power adequate to support themselves and their children, even with child support. Hardest hit are older homemakers. HB 195 is a critical piece of legislation. The Alaska Women's Commission strongly urges your support.

complete

MEMORANDUM

State of Alaska
Department of Law

TO: Shari Kochman
Legislative Staff Assistant
Office of the Governor

DATE: March 2, 1989

FILE NO.: 773-89-0094

TEL. NO.: 465-3603

SUBJECT: Sectional analysis of HB 195

FROM: Elizabeth L. Shaw
Assistant Attorney General

Attached is a sectional analysis of HB 195. Please let me know if there is anything further needed.

ELS:bap

Attachment

cc: Art Peterson w/copy of analysis
Ruth Lister w/copy of analysis

SECTIONAL ANALYSIS OF HB 195

HB 195 provides expressly for spousal support and attorney fees to be awarded during the pendency of divorce proceedings. It also requires a greater judicial scrutiny of marriage dissolution agreements in specific situations. With some of its clean-up and technical amendments, the bill seeks to simplify the dissolution statutes by removing the present inconsistency in references to the dissolution petition being "filed" or being "brought." (Normally "actions" are "brought," and "petitions" are "filed.") A section-by-section description follows.

Section 1

In sec. 1, the bill amends AS 25.24.100 to eliminate a one year durational residency requirement for divorce proceedings for military personnel stationed in Alaska.

Section 2

In sec. 2, the bill repeals and reenacts AS 25.24.140(a) to deal more specifically with attorney fees and costs, and to state that the court may require one spouse to provide reasonable spousal support, including medical expenses, as well as child support, during the pendency of the divorce proceedings. Existing AS 25.24.140(b) allows the court to restrain either spouse from disposing of property of either party during the pendency of the

action. The bill repeals and reenacts AS 25.24.140(b) to provide that during the pendency of the proceeding, the court may issue an order restraining a spouse from disposing of the property of either spouse, or marital property, without the permission of the other spouse unless there is a court order. The court may also order that each spouse be restrained from subjecting the other spouse or another person living in the household to domestic violence, that one spouse vacate the marital residence, or that one spouse be restrained from communicating directly or indirectly with the other spouse or from entering a vehicle in the possession of or occupied by the other spouse.

Section 3

In sec. 3, the bill amends AS 25.24.160(a)(4) to include retirement benefits in the property that may be divided at the time of the divorce. The amendment also provides that in the property division decisions the court must consider the contribution of each spouse in the acquisition of career assets. Career assets, defined in sec. 17 of the bill, means the ability of a spouse to earn money resulting from the education, profession or employment acquired in part as a result of the contributions, including homemaking and child rearing, provided by the other spouse.

Section 4

In sec. 4, the bill adds a new section which provides that in the divorce or annulment action a court has jurisdiction to change the name of either party. The new section provides a notice and hearing procedure for the change of name to other than a prior name.

Section 5

AS 25.24.200 (a), (b) and (c) are amended in sec. 5 to reflect that property to be distributed in a property settlement in a dissolution proceeding includes retirement benefits and consideration of career assets. AS 25.24.200(c) is also amended to require, through reference to AS 25.24.220(i), that if only one party is represented by an attorney, if a family member has filed a domestic violence complaint, if there are minor children of the marriage, or if there is a patently inequitable division of the marital estate, a spouse may not waive his or her right to answer the petition, or to receive notice of the hearing. A third amendment to AS 25.24.200(c) requires that when a party does execute a waiver he or she must acknowledge under oath that the dissolution petition constitutes the entire agreement between the parties.

Section 6

Section 6 of the bill adds a new subsection to AS 24.25.-200 which specifically states that property division and spousal maintenance must take into consideration career assets.

Section 7

Section 7 makes an amendment in the provision regarding a spouse changing his or her name as part of the dissolution process. A spouse may change his or her name as part of the dissolution action, not merely restore his or her prior name.

Section 8

Section 8 of the bill repeals and reenacts AS 25.24.-210(e) to provide that, in addition to the statements currently required in a dissolution of marriage petition, the parties must also state whether either spouse requires medical care or treatment, whether a domestic violence complaint has been filed during the marriage, whether either party has received the advice of legal counsel, and whether the petition constitutes the entire agreement between the parties. A reference to retirement benefits and career assets has also been added, to correspond to other amendments made by the bill.

Section 9

Section 9 of the bill repeals and reenacts AS 25.24.-220(b) to require that both parties must attend the dissolution hearing personally, and not through counsel if one party is represented by counsel and the other is not, if a domestic violence complaint has been filed during the marriage, or if there are children of the marriage. One of the spouses to be absent from the hearing if the court finds it would be an undue hardship for him or her to attend.

Sections 10 and 12

Section 10 and sec. 12 of the bill make conforming amendments to AS 25.24.220 (c) and AS 25.24.220 (e) to provide consistency in references.

Section 11

Section 11 of the bill amends AS 25.24.220(d) to require that the written agreements of spouses who have filed for dissolu-tion of their marriage under AS 25.24.220(a) constitute the en e agreement between the parties. Other conforming amendments are also made in AS 25.24.220(d). This statute currently using the legalese triplet "fair, just, and equitable" as the standard for acceptable agreements between the spouses. The bill removes the redundancy and relies simply on the word "just."

Section 13

AS 25.24.220(g) is amended in sec. 13 of the bill to require that the court's amendments to written agreements must be agreed to by both petitioners in writing or on the record. Other conforming amendments regarding retirement benefits and career assets are also made in this subsection.

Section 14

AS 25.24.220 is further amended in sec. 14 by adding two new subsections that require that, for a dissolution petition filed under AS 25.24.200(a), the court will use a heightened level of scrutiny if one party is represented by counsel and the other is not, if a domestic violence complaint has been filed during the marriage by a member of the family, or if there are any minor children of the marriage.

Section 15

Section 15 of the bill repeals and reenacts AS 25.24.-230(a) to require that if the dissolution petition is not subject to AS 25.24.220(h), the court, in granting the dissolution, must find that the written agreements regarding spousal support and tax consequences, division of property including retirement benefits and consideration of career assets, and allocation of obligations,

are fair and just. In this case there would be no children of the marriage to consider.

Section 15 also repeals and reenacts AS 25.24.230(b) to require that, if there are children of the marriage, if only one party is represented by counsel, if a complaint for domestic violence has been filed during the marriage, or if the division of the marital estate is patently inequitable (i.e., if the dissolution petition is subject to AS 25.24.220(h)), the standard to be used by the court in review of the written agreements is that the agreements are just.

Under both AS 25.24.230(a) and (b), the court must find that the parties understand the nature and consequence of their action and that they entered into the agreements voluntarily and free from coercion.

The language of existing AS 25.24.230(b) -- (g) appears as AS 25.24.230(c) -- (h) in the bill, with some minor corrections and conforming language changes including a hearing and notice requirement if a spouse seeks a change of a name other than a prior name.

Section 16

AS 25.24.250 is amended in sec. 16 by adding a new subsection that requires that the forms or instructions prepared

by the Department of Law and the Alaska Court System for use by the public must specify that the dissolution petition constitutes the entire agreement between the parties, and the forms or instructions must provide examples of the kinds of property and obligations that are subject to distribution.

<u>Section 17</u>

Section 17 of the bill adds a new section to AS 25.24 to define "career assets." That term relates to the petitioners' property, and is added to AS 25.24 in several places by the bill.

<u>Section 18</u>

Section 18 of the bill notes that the effect providing for hearing and notice procedures for name changes in divorce and dissolution proceedings will have the effect of amending Rule 84(a), Alaska Rules of Civil Procedure.

THE SUPREME COURT OF THE STATE OF ALASKA

DAVID H. NELSON, Appellant, v. DEBBIE L. NELSON, Appellee.	)	File No. S-2311 3AN 86 16230 Civil <u>MEMORANDUM OPINION AND JUDGMENT*</u> [No. 463 - July 26, 1989]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Victor D. Carlson, Judge.

Appearances: David H. Nelson, Pro Se, Anchorage, for Appellant. Julie A. Clark, Anchorage, for Appellee.

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton, and Moore, Justices.

David Nelson appeals from a divorce decree which awarded custody of the parties' three children to Debbie Nelson and ordered him to pay $300 per month per child for their support. We affirm the custody award, and remand for a redetermination of the appropriate amount of child support.

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*Entered pursuant to Appellate Rule 214.

The Nelsons were married in 1980. Mrs. Nelson filed for divorce in December 1986; she sought custody of the children and requested $200 per month per child for their support. In Mr. Nelson's answer, he also sought custody and a like amount for child support. The parties had already divided their marital property. After a one-day bench trial, Judge Victor Carlson awarded sole custody of the children to Mrs. Nelson, as the child custody investigator had recommended. He also ordered Mr. Nelson to pay $300 per month per child for their support.

A review of the record reveals no evidence that plain error[1] was committed in awarding custody of the three children to Mrs. Nelson. The custody investigator reported that both parents "have genuine love and concern for their children," and that, although neither parent's care of the children had been perfect, "Mrs. Nelson would be the best able to make decisions and provide care for the children." In awarding Mrs. Nelson sole custody, the trial court

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1. Mr. Nelson's brief failed to comply with the requirements of Appellate Rule 212. Although we accepted his brief in the form submitted, his noncompliance is substantial and pervasive. We have no clear indication of what he claims as error or the grounds thereof. Since his brief is conclusory and his arguments are sometimes undecipherable, our review is limited to a search of the record for plain error. See Martin v. English, 492 P.2d 105, 106 (Alaska 1971).

followed the recommendation contained in the investigator's detailed report. Mr. Nelson has not shown that the court's custody determination was plain error. We, therefore, affirm on this issue.

Mr. Nelson also argues that the trial court erred in ordering him to pay $300 per month per child for the support of his children. He claims not to have the ability to pay such an amount. Mrs. Nelson contends that the award was proper because the court could infer that Nelson was able to work, but willfully chose not to do so. Thus, she argues, the court did not err in its order.

It is undisputed that Mr. Nelson was unemployed and without assets at the time of trial. He had a shoulder condition which had required surgery, and considered himself permanently disabled. His only income, at that time, was a monthly payment of $280 from the State, Division of Public Assistance, pending a decision on his application for social security insurance benefits based on his disability.

The trial court, nevertheless, ordered Mr. Nelson to pay a total of $900 per month in child support. When Mrs. Nelson's counsel asked whether the court really meant to order $900 in support, Judge Carlson said "[t]hat's right . . . that's what it takes to support youngsters in our community. . . . Now I don't expect that he's going to pay near that much, but . . . there will be a jury trial later

on his failure to make support payments." Earlier, the judge had told Mr. Nelson that he was "facing a jury trial for non-support one of these days," and mentioned that he may need to spend time in "one of the local institutions."

In past cases we have noted that the trial court, in determining child support awards, must "examine the relative financial situations of the parties and the total cost of supporting the children." Lone Wolf v. Lone Wolf, 741 P.2d 1187, 1191 (Alaska 1987); Hunt v. Hunt, 698 P.2d 1168, 1172 (Alaska 1985).

> In general, if a parent has the ability to earn income greater than that actually being earned at the time the support needs are being evaluated, the court can make a finding as to what the actual income would be if the parent were making up to capacity and may enter a child support order accordingly.

1 Lindley on Separation Agreements and Antenuptial Contracts ¶ 15.02 at 15-52 to -53 (1988). See King v. King, 235 S.E.2d 502, 503 (Ga. 1977) ("The ability to earn an income is one factor . . ., and [the] jury may award alimony on this basis although the husband may be temporarily impoverished."); Ellis v. Ellis, 262 N.W.2d 265, 267-68 (Iowa 1978) ("his ability to pay alimony is to be determined on the basis of his earning capacity rather than by the amount of his voluntarily reduced income"); Schuler v. Schuler, 416 N.E.2d 197, 203 (Mass. 1981) (judge "may also consider earning power"); Finn v. Finn, 517 A.2d 317, 318

(Me. 1986) ("The court properly considered the defendant's earning capacity, future prospects and ability to pay."); Dunn v. Dunn, 307 N.W.2d 424, 426 (Mich. App. 1981) (court not "limited to consideration of the parent's actual income and may also look to the parent's unexercised ability to earn") (emphasis in original); Quick v. Quick, 290 S.E.2d 653, 658 (N.C. 1982) ("If the supporting spouse is deliberately depressing income or engaged in excessive spending, then capacity to earn, instead of actual income may be the basis of the award.").

Judge Carlson had sufficient evidence to infer that Mr. Nelson's income at the time of trial was not an accurate measure of his overall earning capacity. The record shows, however, that Judge Carlson based his award, instead, upon his own view of the amount needed to support the children without making a reasoned assessment of Mr. Nelson's future prospects and his true earning capacity. Indeed, Judge Carlson's comments regarding the potential for a non-support trial underscore the fact that he purposefully entered an order with which he knew Mr. Nelson could not comply. Thus, we conclude that the court committed plain

error in setting the amount of the support award. Accordingly, a remand is necessary on this issue.[2]

AFFIRMED in part, REVERSED in part and REMANDED.

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1889
274-9492

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2. We note that on remand, the trial court will be governed by the provisions of Civil Rule 90.3, which became effective subsequent to the date of the original decree.

Christine FLORES, Petitioner,

v.

David FLORES, Respondent.

No. 3832

Supreme Court of Alaska.

July 13, 1979.

In divorce proceeding, the Superior Court, Third Judicial District, S. J. Buckalew, J., ruled that permanent counsel would not be appointed for wife due to lack of funds and that case should proceed with wife unrepresented, and wife filed petition for review. The Supreme Court, Matthews, J., held that due process clause of State Constitution guaranteed wife, an indigent party, the right to court-appointed counsel in a private child custody proceeding in which her spouse was represented by Alaska legal services corporation.

Ordered accordingly.

Connor, J., dissented in part and concurred in part and filed opinion.

1. Constitutional Law ⇐314

Due process clause of State Constitution guaranteed wife, an indigent party, the right to court-appointed counsel in private child custody proceeding in which her spouse was represented by Alaska legal services corporation, where interest at stake was wife's right to direct upbringing of her child, where legal issues were much more complex than usual because of jurisdictional problems and because divorce proceedings were taking place in two states, and where wife lacked funds to come to Alaska and would otherwise have lost custody proceeding by default. Const. art. 1, § 7.

2. Divorce ⇐301

There is a strong state interest in divorce-child custody proceedings, for, unlike commercial contracts, legally binding marriages and divorces are wholly creations of the state and any provision for child custody in a divorce order is fully enforceable by the state.

3. Attorney and Client ⇐23

Where due process clause of State Constitution gave wife, an indigent party who resided in California, the right to court-appointed counsel in a divorce-child custody proceeding in which husband was represented by Alaska legal services corporation, where Alaska legal services corporation did not have regulations relating to such matters as record keeping, access to files, supervision, and physical separation of offices which would have been sufficient to insure that two attorneys employed by corporation could represent conflicting positions in litigation, where children's rules of procedure did not furnish basis for imposing duty of representation on public defender agency, counsel had to be appointed from the private bar, with compensation permitted under administrative rule. Const. art. 1, § 7; Rules of Children's Procedure, rule 12; Rules Governing the Administration of all Courts, rule 15.1.

4. Divorce ⇐301

Children's rule requiring appointment of counsel to represent parents who are financially unable to employ counsel to represent themselves, where issues are complex or have serious consequences was not intended to apply to divorce proceedings. Rules of Children's Procedure, rule 12; Rules Governing the Administration of all Courts, rule 15.1.

Max F. Gruenberg, Jr., and G. R. Eschbacher, Anchorage, for petitioner.

Donald E. Clocksin and Lucinda McBurney, Alaska Legal Services, Anchorage, for respondent.

Dana Fabe, Asst. Public Defender and Brian Shortell, Public Defender, Anchorage, amicus curiae.

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR and MATTHEWS, JJ.

OPINION

MATTHEWS, Justice.

This petition for review presents a single issue: whether an indigent party has the

right to court-appointed counsel in a private child custody proceeding in which her spouse is represented by Alaska Legal Services Corporation (ALSC). We hold that the due process clause of the Alaska Constitution [1] guarantees such a right.

The petition for review stems from a divorce proceeding in which custody of the couple's child is the only contested issue. The petitioner, Christine Flores, and the respondent, David Flores, are both indigent. Christine is a California resident and has evidently remained in that state throughout the time period relevant here. On or about November 18, 1976, David removed the couple's child from California to Alaska without Christine's consent. He subsequently obtained the services of ALSC and filed for divorce in Anchorage on December 20, 1976, but service was not made on Christine until April of 1977. In the interim, she obtained the services of the Legal Aid Society of Sacramento and filed for dissolution of the marriage in the Sacramento court on January 21, 1977. Service was made on David, and on March 18 the California court found that it had jurisdiction and granted interim custody to Christine. David subsequently obtained service on Christine and was awarded interim custody by an Anchorage court.

At that point, Christine's California counsel contacted a private Anchorage attorney who agreed to make a limited appearance for the sole purpose of requesting appointment of permanent counsel for Christine. An initial hearing was held on August 31, 1977, on a motion to join the Public Defender Agency as the real party in interest since Christine was attempting to require that agency to represent her in the divorce proceeding. It was stipulated that ALSC was unable to take conflicting sides of a divorce and that ALSC was without funds to hire a private attorney. The trial judge subsequently signed an order permitting service on the Public Defender.

A second hearing was held on November 14, 1977, at which an attorney from the Public Defender Agency was present as well as an ALSC attorney representing David Flores and the private attorney representing Christine Flores. The trial judge ruled that permanent counsel would not be appointed due to lack of funds and that the case should proceed with Christine unrepresented.

Petition for review of this ruling was made pursuant to Alaska Appellate Rules 23 [2] and 24,[3] and an entry of default in the divorce-child custody proceeding was stayed pending the outcome of the petition.[4]

We exercised our discretion by granting immediate review because of a substantial likelihood that injustice would result if normal appellate procedure were allowed to

1. Alaska Const. art. 1, § 7.

2. Alaska R.App. P. 23(e) provides:

An aggrieved party, including the State of Alaska, may petition this court as set forth in Rule 24 to be permitted to review any order or decision of the superior court, not otherwise appealable under Rule 5, in any action or proceeding, civil or criminal, as follows:

. . . . .

(e) Where postponement of review until normal appeal may be taken from a final judgment will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship, or other related factors.

3. Alaska R.App. P. 24(a) specifies:

A review is not a matter of right, but will be granted only: (1) where the order or decision sought to be reviewed is of such substance and importance as to justify deviation from the normal appellate procedure by way of appeal and to require the immediate attention of this court; or (2) where the sound policy behind the general rule of requiring appeals to be taken only from final judgments is outweighed by the claim of the individual case that justice demands a present and immediate review of a particular non-appealable order or decision; or (3) where the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative tribunal, as to call for this court's power of supervision and review.

4. Christine Flores is prevented by her indigency from travelling to Alaska to make a court appearance.

take its course.[5] Because of the petitioner's need for immediate representation, we entered an order requiring the superior court to appoint private counsel for her, indicating that an opinion would follow and that the order "is not intended to intimate the view of the court on the ultimate issues."

[1] In holding that the due process clause of the Alaska Constitution [6] guarantees the right to counsel in this case, we recognize that the right is one usually associated with criminal proceedings. We also note, however, that this court has consistently avoided any formalistic categorization of proceedings as "criminal" and "civil" when determining if strict due process safeguards are required. "Due process is flexible, and the concept should be applied in a manner which is appropriate in the terms of the nature of the proceeding." [7] Thus we have previously held that the due process clause of the Alaska Constitution requires that counsel be provided for defendants in civil contempt proceedings, *Otton v. Zaborac*, 525 P.2d 537 (Alaska 1974), and in paternity suits, *Reynolds v. Kimmons*, 569 P.2d 799 (Alaska 1977), where the state supplies counsel to the mother.

The interest at stake in this case is one of the most basic of all civil liberties, the right to direct the upbringing of one's child.[8] This right has consistently been recognized by the United States Supreme Court as being among the "liberties" protected by the due process clause of the Federal Constitution. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *May v. Anderson*, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953); *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Pierce v. Society of the Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

In *Reynolds*, we recognized the importance of the parent-child relationship. Although *Reynolds* was a paternity proceeding, we quoted with approval the decision of the Ninth Circuit in *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974), which was a class action brought by indigent parents seeking injunctive relief and a declaratory judgment to the effect that whenever indigent parents become involved in child dependency proceedings, they are entitled to appointment of counsel. The court refused to adopt an inflexible rule that counsel was required in all child dependency proceedings, but it did hold the following:

> Parents are entitled to a judicial decision on the right to counsel in each case. The determination should be made with the understanding that *due process requires the state to appoint counsel whenever an indigent parent, unable to present his or her case properly, faces a substantial possibility of the loss of custody or of prolonged separation from a child.*

Id. at 945 (footnote omitted) (emphasis added).

[2] It is true that both *Reynolds* and *Cleaver* involved proceedings that were prosecuted by the state, but that does not remove the present case from the scope of their rationale. Although a private individual initiated the proceeding below, he was represented by counsel provided by a public agency. Fairness alone dictates that the petitioner should be entitled to a similar advantage. Furthermore, there is a strong state interest in divorce-child custody proceedings. Unlike commercial contracts, legally binding marriages and divorces are wholly creations of the state.[9] Any provi-

5. *See* note 2, *supra*.

6. "No person shall be deprived of life, liberty, or property, without due process of law." Alaska Const. art. I, § 7.

7. *Otton v. Zaborac*, 525 P.2d 537, 539 (Alaska 1974).

8. Although the divorce proceeding will not sever all parental rights of the petitioner, an award of custody to the respondent will have the same consequences, due to the distance between California and Alaska and the petitioner's indigency.

9. For this reason, the United States Supreme Court in *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), held that divorce proceedings must meet due process requirements. In striking down state procedures

sion for child custody in a divorce order is fully enforceable by the state.[10] In this case, Christine Flores stands to lose a basic "liberty" just as surely as if she were being prosecuted for a criminal offense.

We have noted on previous occasions that "[c]hild custody determinations are among the most difficult in the law."[11] Although the legal issues in a given case may not be complex, the crucial determination of what will be best for the child can be an exceedingly difficult one as it requires a delicate process of balancing many complex and competing considerations that are unique to every case. A parent who is without the aid of counsel in marshalling and presenting the arguments in his favor will be at a decided and frequently decisive disadvantage which becomes even more apparent when one considers the emotional nature of child custody disputes, and the fact that all of the principals are likely to be distraught. This disadvantage is constitutionally impermissible where the other parent has an attorney supplied by a public agency.

In this case, the legal issues are much more complex than usual because of jurisdictional problems and because divorce proceedings are taking place in two states. Regardless of the complexity of the case, however, a denial of the right to counsel will necessarily be fatal to the petitioner's cause, because she lacks the funds to come to Alaska and will therefore lose the custody proceeding by default. Her right to be heard will truly be meaningless unless she is afforded the right to counsel.[12]

[3] Having determined that there is a constitutional right to counsel in proceedings of this nature, it is necessary to further consider who will act as such and who will pay. Three sources from which counsel may be furnished have been suggested. They are ALSC, the Public Defender Agency, and the private bar.

ALSC contends that it cannot furnish attorneys to represent opposing sides in litigation. That conclusion follows if ALSC is viewed as an ordinary law firm to which the rule applies which bars all members of a firm from representing a client when one member of a firm has a conflict of interest.[13]

It is not, however, an inevitable conclusion that ALSC could not under any circumstances furnish counsel to take both sides of a case. Regulations might be developed relating to such matters as record keeping,

that required indigents seeking divorce to pay court fees and service-of-process costs, the Court reasoned:

> [W]e are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery.
>
> . . . Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one. In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum.

401 U.S. at 376–77, 91 S.Ct. at 785, 28 L.Ed.2d at 118.

10. *See Public Defender Agency v. Superior Court*, 534 P.2d 947 (Alaska 1975), where we held that the Attorney General may enforce support orders.

If a parent takes a child under age 12 from the person having lawful custody of the child, without that person's consent, he has committed the criminal offense of child stealing. AS 11.15.290.

11. *Horton v. Horton*, 519 P.2d 1131, 1132 (Alaska 1974); reiterated in *Horutz v. Horutz*, 560 P.2d 397, 399 (Alaska 1977); *Lacy v. Lacy*, 553 P.2d 928, 929 (Alaska 1976).

12. We emphasize that our holding in this opinion is limited to cases involving child custody where an indigent party's opponent is represented by counsel provided by a public agency.

13. *Aleut Corporation v. McGarvey*, 573 P.2d 473 (Alaska 1978); *Borden v. Borden*, 277 A.2d 89 (D.C.1971); *see Estep v. Johnson*, 383 F.Supp. 1323 (D.Conn.1974).

access to files, supervision, and physical separation of offices which would be sufficient to ensure that two attorneys employed by ALSC could represent conflicting positions in litigation, each having undivided loyalty to his client and fully able to exercise that independent professional judgment which is required by the Code of Professional Responsibility.[14] However, there now exist no such regulations and without them ALSC cannot realistically be considered as a source of legal representation.

Both parties contend that the Public Defender Agency has the statutory obligation to furnish counsel in this case. Their argument is that AS 18.85.100(a) requires the public defender to represent "[a]n indigent person who . . . is entitled to representation under the Supreme Court Rules of Children's Procedure . . ." and that Children's Rule 15(a)(3) requires the appointment of counsel in the present circumstances. It provides:

> The court shall appoint counsel to represent the child, his parents, guardian, or custodian, when the assistance of counsel is desired, as follows:
>
> (3) For his parents . . . when they are financially unable to employ counsel to represent themselves and the issues are complex or have serious consequences.

[4] We do not believe that Children's Rule 15(a) was intended to apply to divorce proceedings. The scope of the Children's Rules is defined in Rule 1(b) which provides: "The procedure in children's matters shall be governed by these rules." The term "children's matters" is not further defined. However, reference is made throughout the rules to ch. 10, Title 47 of the Alaska Statutes, which deals exclusively with cases where the state as a party has chosen to interfere with a parent's right of custody, either in a delinquency proceeding, or where a violation of law by the child is alleged, or in a dependency proceeding where a child may need protection. None of the rules is cross-referenced to Title 9 of the Alaska Statutes which governs child custody proceedings in divorce cases, and none of the rules refer to child custody proceedings in divorce cases. Light is cast upon the intended coverage of the Children's Rules by Rule 12 which defines the appropriate subjects of inquiry involved at "the child hearing." Those subjects are, "whether the child is delinquent, dependent, delinquent and dependent, or in need of supervision." For these reasons we conclude that the Children's Rules of Procedure are inapplicable to this case and cannot furnish a basis for imposing a duty of representation on the Public Defender Agency. In reaching this conclusion, we recognize that in several of our cases involving private parties we have referred to various provisions in the Children's Rules.[15] However, in each of those cases, the citation was given to support an analogous procedure adopted in the case in question; we did not hold that the Children's Rules were directly applicable.

Having eliminated ALSC and the Public Defender Agency as present sources of representation, only the private bar remains.[16] Counsel should be appointed from the private bar.

BURKE, J., not participating.

CONNOR, Justice, dissenting in part, concurring in part.

The majority holds today that our due process clause guarantees indigent civil litigants the right to counsel at public expense

14. We encourage such an effort.

15. The decisions are *Reynolds v. Kimmons*, 569 P.2d 799, 802 n. 10 (Alaska 1977); *Veazey v. Veazey*, 560 P.2d 382, 385 (Alaska 1977); *Johnson v. Johnson*, 544 P.2d 65, 72 n. 16 (Alaska 1975); *Carle v. Carle*, 503 P.2d 1050, 1053 n. 5 (Alaska 1972); *Sheridan v. Sheridan*, 466 P.2d 821, 825 n. 16 (Alaska 1970).

16. Administrative Rule 15.1 provides for compensation of attorneys appointed by the court to represent persons "under the Rules of Children's Procedure or pursuant to statute . . ." at the rate of forty dollars per hour. That rule is broad enough to permit compensation in cases such as the present one where the appointment of counsel is constitutionally required.

whenever "[t]he interest at stake . . . is one of the most fundamental of all civil liberties, the right to direct the upbringing of one's child." While I agree that in this case the petitioner, because of the extreme disadvantage to which she is put, should have counsel appointed for her from some source, there are a number of reasons why I am unable to join my colleagues in holding that all indigent child custody litigants are constitutionally entitled to counsel at public expense.

I can find no authoritative precedent, state or federal, to firmly support such an extension of due process rights. In *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), the court merely struck down court fees and service of process fees that effectively denied access to the state courts to indigents seeking divorce. While the court did note the importance of the "basic position of the marriage relationship in this society's hierarchy of values,"[1] the key factor in the decision appears to have been the state monopolization of the means for legally dissolving the marriage relationship.[2] Since a legal divorce in Connecticut could *only* be obtained through the courts, filing fees which significantly impeded indigents' access to those courts and which did not serve a "countervailing state interest of overriding significance"[3] were held to violate due process. In reaching this decision, the majority in *Boddie* carefully avoided any suggestion that the right to counsel was mandated in such cases. Here it is worth noting that, unlike the circumstances presented in *Boddie*, child custody litigants are not compelled to go to court to settle their claims.

Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974), which the majority relies upon in the case at bar, was concerned with child dependency proceedings in which the state of California was a party. The excerpted language from that case which appears in the majority opinion here was uttered only in regard to such dependency proceedings. Moreover, the court in *Cleaver* did not establish a firm constitutional rule requiring court-appointed counsel in every dependency proceeding; rather, it established general guidelines to be applied on a case by case basis.[4]

Similarly, our previous decisions in this area do not require that counsel be provided to indigent civil litigants in private child custody proceedings. In *Otton v. Zaborac*, 525 P.2d 537 (Alaska 1974), we held that an indigent in a contempt proceeding, for nonsupport of his child, had a constitutional right to a court-appointed attorney, stating:

> We base this decision on the right to jury trial in a contempt proceeding for nonpayment of child support recognized in *Johansen v. State*, 491 P.2d 759 (Alaska 1971), and on the underlying rationale of that decision which focuses on the very real threat of incarceration. [footnote omitted].

Otton, supra at 538.

In explaining why the need for assistance of counsel was deemed greater when a jury trial was involved, we quoted the concurring opinion of Mr. Justice Powell in *Argersinger v. Hamlin*, 407 U.S. 25, 45–46, 92 S.Ct. 2006, 2016–17, 32 L.Ed.2d 530, 543 (1972):

> An unskilled layman may be able to [represent] himself in a nonjury trial before a judge experienced in piecing together unassembled facts, but before a jury the guiding hand of counsel is needed to marshal the evidence into a coherent whole consistent with the best case on behalf of the [litigant].

Otton, supra at 540.

In a later case, *Reynolds v. Kimmons*, 569 P.2d 799 (Alaska 1977), we extended the right to counsel to an indigent defendant in a paternity suit brought by the state on behalf of the mother. In reaching that result, we relied heavily on the fact that in

1. *Boddie v. Connecticut, supra*, 401 U.S. at 374, 91 S.Ct. at 784, 28 L.Ed.2d at 116.

2. *Id.*

3. *Id.* 401 U.S. at 377, 91 S.Ct. at 785, 28 L.Ed.2d at 118.

4. *Cleaver v. Wilcox, supra*, at 945.

such proceedings defendants suffer serious exposure to criminal liability.[5] We also noted that any resultant paternity and support decree would be likely to have a major impact on the defendant's life and would be *res judicata* in later contempt proceedings that could result in incarceration.[6] Furthermore, we reasoned that the need for counsel was heightened because the defendant was being prosecuted by the state with all of its resources and power.[7] The *Reynolds* decision, therefore, was not simply based on the significance of the parent-child relationship, but was founded on other important factors as well.

Notwithstanding this absence of authoritative precedent, I am particularly troubled by the failure of the majority to give full consideration to those procedural aspects of private child custody proceedings which help to insure that even unrepresented litigants will have a full, fair opportunity to be heard.

First, as in any case, the court itself may call, question, and cross-examine witnesses in an effort to determine the best interests of the child. In this regard it is noteworthy that a Divorce Reform Task Force report of the National Council on Family Relations has recommended that child custody determinations should no longer be a product of adversarial proceedings. See, 1 Family Law Reporter 2026 (1974). Although the report does not specify any alternative procedures, its conclusion suggests that it may be preferable to leave the examination of witnesses in such proceedings solely to the province of the judge, thereby diminishing some of the adversarial aspects of these hearings.

Second, the Alaska legislature has, by statute, provided for the appointment of counsel to represent children who are the subject of private custody proceedings. AS 09.65.130. These attorneys, in fulfilling their obligations to their clients, must call, examine, and cross-examine witnesses for both sides and make appropriate evidentiary objections. This, too, helps to insure that the strength and weaknesses of each opposing side will be fully and properly aired even without the assistance of counsel.

Finally, unlike other types of civil litigation, there is no right to a jury trial in private child custody proceedings. The determination of the best interest of the child is made solely by the court. AS 25.20.060. Thus, as implied in *Otton, supra*, there is no special need for "the guiding hand of counsel . . . to marshal the evidence into a coherent whole" for a jury; rather, the judge, experienced in piecing together unassembled facts, is capable of fully evaluating the evidence in favor of, and against, both sides.

In light of these considerations, I believe there is no sound basis for concluding that a private child custody litigant cannot be provided with a meaningful opportunity to be heard without the assistance of counsel. On the contrary, certain procedural aspects of child custody proceedings—the exclusive fact-finding role of the judge and independent counsel for the children—support the view that unrepresented child custody litigants may actually be afforded more due process "protection" than other private civil litigants, threatened with deprivation of other important rights, who do not have an attorney.

This brings me to a third troubling aspect of today's holding, namely, the extent to which the majority's reasoning, applied with basic notions of equal protection, logically requires counsel for other indigents in private litigation involving other rights. There, too, complex and emotional issues may be involved, along with important state interests in the outcome. These factors, the majority opinion suggests, enhance the need for assistance of counsel, and this would be especially true where the fact-finding role is delegated to a jury, as it often would be in other cases. *See, Otton, supra* at 540. Thus, I am unable to see

5. *Reynolds v. Kimmons, supra*, at 802.

6. *Id.*

7. *Id.* at 803.

how, logically, this court will be able to limit its holding today, consonant with equal protection, to deny appointed counsel to other indigent persons involved in such private civil litigation.[8] This point was made by Chief Judge Breitel in a related case, *In the Matter of Smiley*, 36 N.Y.2d 433, 369 N.Y.S.2d 87, 330 N.E.2d 53, 57 (1975), where the New York Court held that there was no constitutional right to counsel in divorce cases:

> It merits added comment that among the many kinds of private litigation which may drastically affect indigent litigants, matrimonial litigation is but one. Eviction from homes, revocation of licenses affecting one's livelihood, mortgage foreclosures, repossession of important assets purchased on credit, and any litigation which may result in the garnishment of income may be significant and ruinous for an otherwise indigent litigant. In short, the problem is not peculiar to matrimonial litigation. The horizon does not stop at matrimonial or any other species of private litigation.[9] [footnote added]

Finally, there is another aspect of the court's decision which requires comment, and that is the cost to the public. Whether we place responsibility on the private bar or the state treasury, the cost ultimately will be borne by the public. Even if the initial burden were cast upon the private bar, the expense of providing counsel for indigent civil litigants eventually would be paid for from some other source. So far as I know, we lack reliable data on the legal needs of the poor in civil cases in Alaska and the expense of meeting those needs. Without such information, it seems to me hazardous to create an inflexible constitutional right, the impact of which we can only vaguely discern. In this regard, I think it unfortunate that the state has not been heard before the court takes this major constitutional step, as the state has an obvious interest in the ramifications of this decision.

For these reasons, I would hold that the petitioner is not entitled to counsel as a matter of constitutional right, but rather is entitled to appointed counsel in the discretion of the court.[10]

PURITAN LIFE INSURANCE COMPANY, Appellant,

v.

Carolyn S. GUESS, Appellee.

No. 3807.

Supreme Court of Alaska.

July 20, 1979.

Beneficiary under life policy brought action against insurer. The Superior Court, Third Judicial District, J. Justin Ripley, J., entered judgment in favor of beneficiary, and insurer appealed. The Supreme Court,

8. The majority opinion expresses the belief that a "public agency" supplied Mr. Flores with counsel in this case. I disagree. The Alaska Legal Services Corporation is a non-profit enterprise organized pursuant to 42 U.S.C. § 2996b, which established the national Legal Services Corporation. It is clear that the national Legal Services Corporation is not an agency of the federal government, nor are its staff members federal employees. 42 U.S.C. § 2996c(c); 42 U.S.C. § 2996d(e)(1). *Spokane County Legal Services, Inc. v. Legal Services Corporation*, 433 F.Supp. 278, 280 (E.D.Wash. 1977). In my view, the Alaska Legal Services Corporation is a private corporation and not an agency of the state or federal government. Therefore, I conclude that a "public agency," in the sense of being an agency of the government, did not provide Mr. Flores with counsel in this case.

9. *See also* the opinion of Mr. Justice Black, dissenting from a denial of a petition for certiorari in *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 954, 91 S.Ct. 1624, 29 L.Ed.2d 124 (1971).

10. It should be noted that AS 25.30.100(c) grants the superior court authority to order "another party" to pay "travel and other necessary expenses" of an out-of-state party if this would be "just and proper under the circumstances."

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THE SUPREME COURT OF THE STATE OF ALASKA

ROBERT L. RICHMOND, Appellant,	)	File No. S-2209 3AN-84-9889 CI
v.	)	OPINION
MARGARET T. RICHMOND, Appellee.	)	[No. 3500 - September 15, 1989]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Victor D. Carlson, Judge.

Appearances: James D. Gilmore and Jeffrey M. Feldman, Gilmore & Feldman, Anchorage, for Appellant. Robert H. Wagstaff, Wagstaff, Pope & Clocksin, Anchorage, for Appellee.

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton and Moore, Justices.

COMPTON, Justice.
RABINOWITZ, Justice, dissenting.

This appeal is from the property division, alimony, child support, and attorney fees and costs judgment in a domestic proceeding between Robert and Margaret. Robert asserts that the professional goodwill of an attorney is unmarketable and hence the trial court erred by including

his professional goodwill in the marital estate. He also contends that the trial court erred by accepting an improper value for his law firm's tangible assets, awarding Margaret $3,000 per month alimony for six years, $1,000 per month per child for child support, and approximately $80,000 in attorney fees and costs.

I. FACTUAL AND PROCEDURAL BACKGROUND

At the time Margaret and Robert were married in 1967, Robert was attending law school on the "G.I. Bill." Both Robert and Margaret worked while Robert was in law school. After Robert graduated, they came to Alaska, and Robert began practicing law. At the time this proceeding was filed, Robert was the sole shareholder of his professional corporation.

Although Margaret did some work at the law firm for Robert and managed the couple's condominiums and personal finances, she was primarily a homemaker, raising the couple's three children.[1]

Robert and Margaret separated on October 24, 1984. The division of property, alimony, child support and attorney fees and costs were determined at trial in 1986. Child custody was settled by stipulation. The trial court

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1. At the time of trial in this case, the three children were 14, 13 and 9 years of age.

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awarded Margaret approximately $1.2 million in marital assets. This was essentially all the marital estate except Robert's law practice, which was awarded to him. The law practice was valued by Margaret's expert at $1.125 million; her expert valued the tangible assets of the law practice at $457,000 and Robert's goodwill at $550,000. These values were accepted by the trial court. Robert's expert valued Robert's law practice at $189,500. His expert valued Robert's goodwill at between $5,000 and $15,000.

The trial court also awarded Margaret $3,000 per month alimony for six years, $3,000 per month child support ($1,000 per month per child), and approximately $80,000 for attorney fees and costs. Judgment was entered April 30, 1987. Facts pertinent to each issue are addressed in the discussion.

II. DISCUSSION

A. PROPERTY DIVISION

Robert appeals the property division. He argues that his professional goodwill is unmarketable and therefore not part of the marital estate. He also objects to the valuation of his law practice's tangible assets.

Property divisions are reviewed to determine "whether the trial court abused the broad discretion given it under AS 25.24.160(a)(4)." Moffitt v. Moffitt, 749 P.2d 343, 346 (Alaska 1988). The trial court must use a

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three-step process in dividing property: First, the trial court is to determine what property is available for division; this determination is reviewed under an abuse of discretion standard "although it may involve legal determinations, which this court reviews independently." Id. Second, the trial court is to value the property; this is a factual inquiry to be reversed only if clearly erroneous. Id. Third, the trial court is to equitably allocate the property; this determination is reviewed applying an abuse of discretion standard and set aside only if clearly unjust. Id. Because Robert raises the legal question whether goodwill is available for distribution, this court will independently review the trial court's decision to include goodwill in the marital estate.

1. Marketability of Robert's Professional Goodwill.

The goodwill of a professional corporation is property which may be includable in the marital estate in a divorce proceeding. See Rostel v. Rostel, 622 P.2d 429, 430-31 (Alaska 1981). In Rostel we held that income earning capacity attributable solely to the expertise, talents and personality of one spouse is property subject to division by the court. Id. No distinction was made between marketable and unmarketable goodwill. Id. We narrowed our position on professional goodwill in Moffitt, 749 P.2d at 347. There we held that only marketable goodwill was to be included in the marital estate. Id. The court chose this approach "because

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to award the value of an unmarketable asset to an ex-spouse might restrict the liberty of the spouse who possesses that asset." Id. at n.3. In order that an ex-spouse's liberty not be restricted, this court will not divide goodwill that cannot be sold. Id.

Robert contends that his law practice has no marketable professional goodwill, and that the trial court erred by including his professional goodwill in the marital estate. We continue to adhere to the view we expressed in Moffitt and conclude that Robert is correct.

In Moffitt, we articulated a two-part test for assessing the divisibility of professional goodwill. Moffitt, 749 P.2d at 347 The trial court must first determine if goodwill exists. Id. If the trial court determines that goodwill exists, "it then must determine whether the good will could actually be sold to a prospective buyer." Id. "If the trial court determines either that no good will exists or that the goo. will is unmarketable, then no value for good will should be considered in dividing marital assets."[2] Id.

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2. Our dissenting colleague disagrees with our view that it is unfair to include unmarketable goodwill in the marital estate. [Dissent at 4-5] The dissent finds the criticism of Moffitt by L. Golden, Equitable Distribution of Property § 6.21, Supp. at 107 (1983 & Supp. 1988), persuasive. [Dissent at 4-5] We do not.

(Footnote Continued)

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We express no opinion regarding the marketability of a multi-lawyer law firm's professional goodwill.[3] It may be that marketable professional goodwill exists in a multi-lawyer firm, for example, upon evidence of sales or purchases of partnership interests.

In this case it is clear that Robert's goodwill is unmarketable. The uncontroverted evidence established that his law practice's goodwill could not be sold.[4]

(Footnote Continued)

As noted by Golden, unmarketable goodwill represents the reputation and future earning capacity of the professional spouse. The portion of unmarketable goodwill that reflects increased earning capacity is accounted for in the property division. Merrill v. Merrill, 368 P.2d 546, 547 n.4 (Alaska 1962). As to the professional spouse's personal reputation in Nelson v. Nelson, 736 P.2d 1145 (Alaska 1987), we held that because a professional degree was personal to the holder, it was not subject to division. Id. at 1146. In the context of this case, Robert's professional goodwill is personal to him and stands on the same footing as a professional degree.

3. Contrary to the dissent's assertion, the central question here is not whether a multi-lawyer firm has divisible goodwill. Robert was the sole shareholder of his firm. The firm employed associates and is a multi-lawyer firm in that sense. However, it is not a multi-lawyer firm in the sense of having multiple-shareholders or partners.

4. At trial Margaret's expert testified that a law practice, including its goodwill, could not be sold. Robert's expert stated that in his opinion Robert's law firm does not have marketable professional goodwill.

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We conclude that Robert has no marketable professional goodwill in his law practice, and that the trial court erred by including his professional goodwill in the marital estate.

2. Valuation of the Law Firm's Tangible Assets.

Robert contends that three errors were made in valuing the tangible assets of the law firm. He asserts errors in valuing the accounts receivable, equipment, and work in progress.

Margaret's expert valued Robert's law firm's accounts receivable at their book value of $202,454. He made no provision for bad debts. He reasoned that no bad debt reserve was warranted because Robert's practice was primarily insurance company defense. Thus, he felt 100% of the accounts were collectible.

Robert's expert valued Robert's law firm's accounts receivable at $180,018. He arrived at his figure by using the actual amount collected out of the $202,454 receivable as of October 24, 1984. He determined that $22,436 of the accounts receivable on October 24, 1984, had been written off.

It was clearly erroneous for the trial court to rely on Margaret's figures. The trial court had the actual figures before it and did not have to rely on Margaret's expert's incorrect assumption.

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