ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
6930 HOUSE JUDICIARY

15. Defendant BP Alaska Pipelines, Inc., a Delaware corporation, is a subsidiary of British Petroleum Company, PLC. Defendant BP Alaska Pipelines, Inc. is a party by assignment to the State Right-of-Way Lease for the Trans-Alaska Pipeline System.

16. Defendant Unocal Pipeline Company, a California corporation, is a wholly-owned subsidiary of Union Oil Company of California. It maintains its principal place of business at Los Angeles, California. Defendant Unocal Pipeline Company is a party by assignment to the State Right-of-Way Lease for the Trans-Alaska Pipeline System.

DEFINITIONS

17. "ANS" means crude oil produced on Alaska's North Slope and transported through the Trans-Alaska Pipeline System pipeline to the marine terminal facilities at Valdez, Alaska.

18. A "barrel" of crude oil means 42 United States gallons of crude oil at 60° Fahrenheit.

19. "Economic damages" includes, but is not limited to, one or more of the following:

a. Injury to the public or private economy of the State, including goodwill, whether or not said injury occurs within the boundaries of the State;

b. Injury to private businesses, individuals, trade organizations, or any other commercial, scientific, educational,

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charitable, cultural, subsistence, or other institution or activity generating direct or indirect economic benefits in the State.

c. Loss or uncertainty of government revenues, including, but not limited to, revenues from licenses, taxes, royalties, fees or other direct or indirect sources;

d. Increases or uncertainty in government expenses, including, but not limited to, internal operating, maintenance, overhead and capital costs, and external costs in the provision of services to other public or private individuals or entities.

20. "Environmental damages" includes, but is not limited to, one or more types of damages to use and enjoyment values derived from State lands, waters and resources:

(1) Use values, including consumptive and nonconsumptive uses;

(2) Nonuse values, including existence, intrinsic, option, bequest, temporal and quasi-option values;

(3) Values derived from the existence of management options and the expertise and data to exercise and support same;

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(4) Values associated with the necessity or desirability of restoration, replacement, assessment or monitoring;

(5) Other ecosystem existence values.

21. The terms "Exxon," "defendant Exxon" and "Exxon defendants" refer collectively to defendants Exxon Corporation, Exxon Pipeline Company and Exxon Shipping Company.

22. The terms "grounding," "spill," and "accident" refer to the grounding and consequent rupture of the hull and oil tanks of the EXXON VALDEZ on March 24, 1989, the second rupture of the hull and the cumulative release of approximately 11 million gallons of crude oil into Prince William Sound. As more fully set forth below, plaintiff alleges that there were at least two separate incidents which caused the discharge of oil into Prince William Sound. Unless stated otherwise, both incidents are included within the meaning of the word "spill" or "accident."

23. "Owner Companies" means the Lessees of the State Right-of-Way Lease or the Assignees of a Lessee's interest in the State Right-Of-Way Lease.

24. The term "pipeline" refers to any pipeline in the Trans-Alaska Pipeline System.

25. The "State lands, waters, and resources" include, but are not limited to, any and all of the interests set forth in (a) below, controlled or influenced by the State

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acting pursuant to law in one or more of the capacities set forth in (b) below.

(a) All real and personal property, together with fixtures and improvements thereon, and any other rights, uses, profits, values, authorities, or other interests or duties respecting any of the following land, resource and environmental components:

(1) Coastal and inland waters and wetlands;

(2) Tide and submerged lands;

(3) Plants and animals, and their habitat, including artificially enhanced habitat;

(4) The surface and subsurface of lands, including minerals and materials;

(5) Air;

(6) Aesthetics, scenic quality, and open space;

(7) Historic, archaeological, cultural, scientific and recreational resources;

(8) Ecological systems, together with the expertise and data necessary or desirable to control or influence same; or

(9) Activities dependent upon or connected to any of (1) through (8).

(b) Capacities include any of the following exercised on behalf of public or private parties, whether or not residents of the State:

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(1) Sovereign;

(2) Proprietor;

(3) Trustee, including trustee for the public trust;

(4) Representative, including parens patriae representative; or

(5) Administrator.

26. "State Right-of-Way Lease" means the lease between the State of Alaska and the Owner Companies dated May 3, 1974, including all stipulations, amendments and other agreements incorporated into or made a part of the lease.

27. The term "terminal facilities" refers to those facilities of the Trans-Alaska Pipeline System, including specifically Port Valdez, at which oil is transferred from the pipeline to vessels or stored for future loading onto vessels.

28. The terms "Trans-Alaska Pipeline System" or "TAPS" refer to the pipeline and terminal facilities used to effect the transfer of ANS crude oil to markets and includes those facilities described in the State Right-Of-Way Lease between the Owner Companies and the State.

29. The term "vessel" or "tanker" refers specifically to the vessel known as the EXXON VALDEZ, which was being used to transport ANS crude oil from the terminal facility at Valdez, Alaska to Long Beach, California, and to other ports in the United States.

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BACKGROUND

30. In 1968, the Prudhoe Bay oil field was discovered by Atlantic Richfield Company. It is the largest commercially developed oil field in North America. It is located on State lands and has been developed pursuant to oil and gas leases issued by the State.

31. In the early 1970s, the initial attempts to develop the Prudhoe Bay oil field were delayed, in part, because concerns were expressed about the potential adverse impact of this development on the sensitive terrestrial and marine environments that would be disturbed and through which the crude oil would be transported. The areas through which ANS oil is transported are considered to be among the last true wilderness areas in the United States, and are renowned for their beauty and natural resources. The defendants knew then and know now that many Alaskans, including commercial fishermen, subsistence users, tour operators, hunting and fishing guides, hoteliers, and many others, depend on these areas for their livelihood. Other Alaskans use, and have used, these areas for recreational activities including, among others, boating, sport fishing and sport hunting. Additionally, many Alaskans have long valued these areas for their scenic and pristine qualities and wilderness environments.

32. In order to persuade state and federal agencies to grant the permits, leases and other authorizations the Owner Companies needed to build and operate the TAPS, the

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Owner Companies and Exxon defendants represented that they would take all action necessary to ensure that a major oil spill would not occur. They further represented that they would utilize the best available oil spill containment and clean up technology and that, if an oil spill did occur, they would be able to contain and clean up the oil spill.

33. Eventually, pursuant to federal and state legislation, implementing regulations and agreements between the United States, the State, and the Owner Companies, which agreements were entered into in reliance upon the representations of Owner Companies and one or more of the Exxon defendants, the construction and operation of TAPS was authorized.

34. TAPS was completed in 1977, and commercial crude oil production began from Prudhoe Bay in June of 1977.

35. Even after the commencement of TAPS operations, Alaska residents, including state officials and legislators, and others remained concerned about the potential adverse impact of an oil spill on the sensitive land, air and marine environments through which ANS crude oil was being transported. The oil industry (including the Exxon defendants, Alyeska and the Owner Companies) repeatedly assured the State and others that the Owner Companies and Alyeska would take all actions that would ensure an oil spill would not occur and, if it did, that they could and would promptly and completely contain and clean up all spilled oil.

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36. Pursuant to state law, administrative regulations and the state and federal Right-of-Way Leases, Alyeska, the Exxon defendants (other than Exxon Shipping Company) and other Owner Companies were required to, and did, prepare and submit an oil spill contingency plan (the "Plan") to the State and federal officials. The Plan was periodically updated.

37. In the Plan, the defendants represented that they had developed, assembled and organized in advance the procedures, protocols, equipment, supplies, and personnel to respond immediately to a major oil spill. The Plan represented that the defendants' oil spill techniques and equipment were "state-of-the-art" and that they were prepared to and could initiate a rapid response to "contain" a spill and to "exclude" a spill from particularly sensitive areas such as hatcheries and spawning grounds. The Plan further represented that Alyeska had a 24-hour task force in Valdez, Alaska, that was fully trained to respond to an oil spill, and that Alyeska could have equipment and personnel on-scene adequate to respond to a major spill in the vicinity of Bligh Island within five hours.

38. Contrary to the representations made by defendants, defendants did not have the best available technology to contain and clean up the oil spill, did not have adequately trained personnel, equipment or supplies available to respond to an oil spill and could not and did not respond adequately to the oil spilled by the EXXON VALDEZ. Defendants

inability to respond to the oil spill was due in large part to defendants' conscious, deliberate, negligent and reckless decision to save money by reducing manpower, training, equipment and maintenance of equipment below those levels which defendants knew, or should have known, were necessary to respond to a major oil spill.

THE GROUNDING

39. On Thursday evening, March 23, 1989, the EXXON VALDEZ, a very large crude oil carrier ("VLCC") and one of Exxon's two largest oil tanker vessels, left the Port of Valdez, Alaska, bound for Long Beach, California.

40. On information and belief, Third Mate Gregory Cousins and other crew members did not have the amount of rest required by statute prior to the EXXON VALDEZ's departure from Port Valdez on the evening of March 23, 1989.

41. Prior to boarding the EXXON VALDEZ on March 23, 1989, Captain Joseph Hazelwood had been drinking alcoholic beverages in Valdez. On information and belief, at the time Captain Hazelwood boarded the vessel, he was intoxicated and in violation of United States Coast Guard ("Coast Guard") regulations and prudent practices concerning the use of alcohol and the physical and mental condition required of captains operating this type of vessel.

42. Under the command of a harbor pilot, the EXXON VALDEZ left the Valdez terminal at approximately 9:15 p.m., March 23, 1989, and passed through the Valdez Narrows. Except for a brief period at the start of the voyage, Captain

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Hazelwood, who at all times relevant hereto was acting within the scope of his employment and as an agent and/or representative of defendant Exxon, was not present on the bridge of the EXXON VALDEZ when the harbor pilot was conning the vessel. In preparation for his departure, the harbor pilot requested, however, that Captain Hazelwood return to the bridge, which Captain Hazelwood did.

43. After the departure of the harbor pilot, Captain Hazelwood informed the Coast Guard that he was changing the vessel's course from the deep-water, normal outbound shipping lane. Captain Hazelwood also informed the Coast Guard that he would notify it when the vessel crossed the traffic separation zone. Captain Hazelwood did not inform the Coast Guard when the vessel crossed the traffic separation zone.

44. Captain Hazelwood directed Helmsman Harry Claar to come to a heading of 200°. Captain Hazelwood then told Helmsman Claar to come to a heading of 180° and put on the autopilot. Helmsman Claar carried out these instructions. In violation of Coast Guard regulations, the Coast Guard was not informed of the second course change, which took the EXXON VALDEZ entirely out of the traffic separation system.

45. Captain Hazelwood directed Third Mate Gregory Cousins to bring the vessel back into the shipping lanes by executing a turn at a point which he identified to Cousins on the navigational chart as a certain "38" (fathoms) notation on the chart. After giving this order, Captain Hazelwood

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departed the bridge, leaving Mr. Cousins in control of the navigation of the vessel. Mr. Cousins did not have the pilotage endorsement required to pilot a VLCC through Prince William Sound. Cousins was unaware that the autopilot was on when he was left in control of the navigation of the vessel.

46. Following Captain Hazelwood's departure from the bridge, Helmsman Claar was relieved by Helmsman Robert Kagan. At all relevant times, Messrs. Cousins, Claar and Kagan were acting within the scope of their employment, and as agents and/or representatives of defendants Exxon.

47. The EXXON VALDEZ continued past the clearly-marked vessel traffic lanes into an area dangerous to vessels due to reefs and other obstructions, including the well-marked Bligh Reef. After traveling approximately three miles east of the inbound shipping lane, and ignoring until too late the buoy and flashing red light at Bligh Reef, the EXXON VALDEZ struck Bligh Reef shortly after midnight on Friday, March 24, 1989. The grounding punctured the single-hulled vessel and resulted in the rupture of several of the vessel's crude oil cargo tanks. When the EXXON VALDEZ went aground, Captain Hazelwood was not on the bridge of the vessel.

48. After the grounding, Captain Hazelwood and Exxon increased the quantity of the oil spilled into Prince William Sound by their attempts to extricate the vessel from Bligh Reef.

49. Exxon defendants have systematically reduced the crew size of tankers in the Valdez trade for the purpose

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of saving money. The crew size of the EXXON VALDEZ was too small for the work responsibilities assigned to the crew. On information and belief, as a result, the crew of the EXXON VALDEZ was overworked, fatigued and not alert on the evening of March 23, 1989.

50. At the time the EXXON VALDEZ struck Bligh Reef, the vessel was incompetently manned within the privity and knowledge of the Exxon defendants, who knew, or had reason to know, that Captain Hazelwood would become intoxicated prior to the vessel's departure. The Exxon defendants had failed to institute adequate and prudent measures to preclude impairment of its officers and crews serving on VLCCs. On information and belief, the vessel was also incompetently manned within the privity and knowledge of the Exxon defendants, who knew, or had reason to know, that Third Mate Cousins would be left in charge of the vessel when he lacked the pilotage endorsement to operate the vessel in Prince William Sound. The Exxon defendants failed to take steps to insure that the EXXON VALDEZ complied with all applicable state and federal laws and regulations relating to the manning of VLCCs in Prince William Sound. On information and belief, the Exxon defendants intentionally or negligently authorized or permitted Captain Hazelwood and the crew of the EXXON VALDEZ to frequently and systematically violate Coast Guard regulations and Exxon policies concerning the manning or operation of the EXXON VALDEZ.

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51. Eleven of the EXXON VALDEZ's tanks were ruptured by either the initial grounding or the subsequent efforts to dislodge the vessel from Bligh Reef, causing the largest oil spill in United States history. Approximately 11 million gallons of crude oil spilled into Prince William Sound from the EXXON VALDEZ.

RESPONSE OF DEFENDANTS TO THE OIL SPILL

52. All defendants are responsible for containment and cleanup of the oil spill from the EXXON VALDEZ. By statute, regulation, the provisions of the State Right-of-Way Lease and ordinary prudence, the defendants were required to be prepared to contain and clean up oil spilled by them and to implement the Plan in the event of an oil spill in Prince William Sound. Nonetheless, and contrary to the representations of the defendants, both in their Plan as updated and in other representations to the State and third parties, the defendants both failed to make, and delayed making, an appropriate response to the oil spill from the EXXON VALDEZ. The defendants failed to take prompt and adequate measures to contain the oil spill and to recover oil spilled from the EXXON VALDEZ.

53. Although the Plan does not disclose that Alyeska might surrender its responsibilities for containing and cleaning up an oil spill in Prince William Sound, Alyeska nonetheless withdrew from containing and cleaning up the spill. This withdrawal commenced as early as Friday evening (March 24, 1989) and withdrawal caused delay, uncertainty,

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confusion and ineffective and inefficient use of containment and clean up equipment and manpower and contributed to the failure of defendants promptly to protect sensitive areas by booming as required by the Plan.

54. During the crucial first 48 hours after the oil spill, the weather conditions were well-suited to containing and recovering the spilled crude oil. Nonetheless, as a result of the inadequate equipment, insufficient and inadequately trained personnel, confusion over which defendants were responsible for what actions, virtually no oil was recovered in the first 48 hours. The ultimate assignment of containment and clean up responsibility went to Exxon Shipping Company, an entity which, on information and belief, had no substantial knowledge of the Plan.

55. When the spill occurred, the defendants did not provide the personnel, equipment or response they committed to in the Plan. The defendants did not have present at the oil spill site a trained task force capable of an adequate, sustained, state-of-the-art response. The dock and office workers who were part of the Alyeska oil spill response team had no substantial experience or training with oil spills of substantial size, and a full-time oil spill coordinator was no longer stationed in Valdez, Alaska.

56. During the first 24 hours after the oil spill, none of the defendants had the aircraft, spray equipment, fire booms, other equipment and personnel on-site to commence burning of the oil or full scale application of dispersants.

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During this crucial time period, defendants only action was to start transporting equipment, supplies and personnel from locations as far as 2,000 miles from the oil spill site.

57. At the time of the oil spill, defendants' equipment and materials were not adequate, not state-of-the-art, not operational, not properly maintained and were not effective. The defendants lacked immediate access to adequate containment booms. Alyeska's containment boom deployment barge which was to be used for such emergencies was unloaded or not fully loaded and out of service. Modern self-inflating containment booms designed to contain oil slicks immediately after an oil spill were unavailable for prompt deployment.

58. The skimmer boats used by the defendants for the oil spill clean up were in poor condition and incapable of recovering the amount of oil represented in the Plan to be recoverable by skimming. A 218,000-gallon capacity tanker barge, designed to carry oil from spill sites, had been replaced by a much smaller, second-hand barge.

59. At the time of the spill, the defendants also lacked available or immediate access to equipment needed to exclude spilled oil from environmentally sensitive areas, as committed to in the Plan. Further, the defendants had no communications equipment capable of permitting effective and prompt deployment and coordination of spill response personnel and equipment.

60. Defendants Alyeska and Exxon's response effort to clean up the oil after the first 48 hours was, and

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continues to be, even to the present, insufficient and inadequate. Among other things, defendants have deployed equipment and manpower ineffectively and wastefully. Defendants have failed to clean up and remove all the oil from State lands, waters and resources as required by law.

DAMAGES TO PLAINTIFF

61. As a result of the oil spill from the EXXON VALDEZ, over a thousand square miles of State lands, waters and resources have suffered severe environmental damage. A growing number of coastal and inland sounds and bays, beaches, tidelands, tidal pools, wetlands, estuaries and other sensitive elements of the ecosystems have been devastated; thousands of mammals, fowl and fish have been killed or injured; anadromous streams, near shore environments and other fish and wildlife critical habitats have been contaminated; aesthetics and scenic quality have been destroyed or impaired, together with attendant opportunities for recreational experiences; air quality has deteriorated through the escape of evaporating pollutants; commercial fisheries have been sharply curtailed, with adverse biological and economic consequences; the greater ecosystem in the spill area has been deprived of its pristine condition with attendant damage to the condition of, and interrelationship among, living creatures comprising the system; and the management opportunities available through the knowledge and data base generated from prior experience with the ecosystem have been compromised.

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62. The State has incurred, and will continue to incur, economic damages in the form of extraordinary expenses directly related to the spill including, without limitation: (i) costs of response to the oil spill, investigation and monitoring of the oil spill; (ii) costs of clean up and removal; (iii) costs of damage assessment studies; (iv) increased direct and indirect costs of providing governmental services to persons or entities adversely effected by the oil spill; and (v) the losses due to ordinary government services curtailed or impaired as a result of diversion of State resources caused by State activities related to the spill.

63. The State has suffered, and will continue to suffer, economic damages in the form of extraordinary losses of revenue relating to the spill, including, without limitation: (i) loss of fish processing tax revenue; (ii) loss of salmon enhancement tax revenue; (iii) loss of oil and gas production tax revenue; (iv) loss of corporate income tax revenue; and (v) loss of oil production royalties.

64. On information and belief, the environmental and economic damages caused by the oil spill to property, trades and business, State revenues, fisheries, marine life, various categories of State lands, waters and resources and the enjoyment thereof within, among others, Prince William Sound, Cook Inlet, Kodiak Island and the Gulf of Alaska, will continue for many years.

65. On information and belief, defendants may curtail or abandon their efforts at cleaning up the beaches

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and restoring them to their pre-spill condition. Such curtailment and/or abandonment of the clean up will cause plaintiff irreparable harm because money will not prevent the environmental and other damages which will occur to State lands, waters and resources as a result of defendants' termination of clean up work. On information and belief, defendants have not yet commenced restoration work and the State will incur costs of restoration and replacement of impacted State lands, waters and resources.

COUNT I

NEGLIGENT OR INTENTIONAL FAILURE TO CONTAIN AND CLEAN UP THE OIL SPILL
ALL DEFENDANTS

66. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

67. The containment and removal of the discharged oil which damaged and threatens to further damage State lands, waters and resources and private property was the responsibility of all defendants. Defendants had a duty to plaintiff to have adequate resources available to contain and clean up immediately and effectively the oil spill.

68. Prior to the EXXON VALDEZ oil spill, the defendants had repeatedly represented to the State and others that they had the resources, technology and a plan by which major oil spills could be contained and excluded from environmentally sensitive areas within hours of the occurrence. In the period immediately after the grounding of the EXXON VALDEZ, nothing was done to promptly contain the oil

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spill. Nearly an entire day passed after the oil spill before Alyeska and Exxon representatives even started to place booms or clean up the oil spill. More days would pass before defendants took any effective action to implement exclusionary booming of sensitive areas.

69. The delays in responding to the EXXON VALDEZ oil spill were due to the defendants' lack of preparedness in personnel, equipment and materials to engage in an effective clean up of the EXXON VALDEZ oil spill.

70. Defendants knew, or should have known, that they lacked adequate equipment and materials and trained personnel to contain effectively and to clean up a spill of the magnitude of the EXXON VALDEZ oil spill.

71. The defendants either intentionally or negligently failed to control, contain and clean up the oil spill by, among other things, (i) failing to provide adequately for the containment and clean up of any discharge of oil; (ii) inadequately planning the clean up effort stemming from the EXXON VALDEZ oil spill; (iii) possessing inadequate equipment, supplies and personnel for deployment in the ensuing clean up effort; (iv) unreasonably delaying the ensuing clean up effort; (v) failing to adequately carry out the ensuing clean up effort; and (vi) choosing inadequate tactics in the ensuing clean up effort. All these actions and omissions of defendants served to aggravate and compound the environmental and economic damages to plaintiff.

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72. As a direct and proximate result of the foregoing and other failures by the defendants to exercise that degree of care expected of a reasonably prudent person acting under the same or similar circumstances, the defendants in their own right, as well as by and through their agents, servants and employees, caused plaintiff to suffer substantial and continuing environmental, economic and other damages to State lands, waters and resources, and other interests in amounts to be proven at trial.

COUNT II

NEGLIGENCE
EXXON DEFENDANTS

73. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

74. Captain Hazelwood was not in control of the navigation of the EXXON VALDEZ when the vessel hit the well-marked Bligh Reef. Instead, Third Mate Cousins was in control of the navigation when the vessel ran aground, even though Third Mate Cousins lacked the proper pilotage endorsement and experience to pilot vessels such as the EXXON VALDEZ through the waters of the Prince William Sound.

75. The Exxon defendants and Captain Hazelwood and Third Mate Cousins knew, or should have known, that Cousins did not possess either the required pilotage endorsement or the requisite degree of competence to command the EXXON VALDEZ with reasonable prudence, skill or care. Acting within the scope of their employment, Captain Hazelwood and Third Mate

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Cousins knew, or should have known, that it was unreasonably dangerous and also a violation of applicable Coast Guard rules and regulations for Hazelwood to leave the bridge and relinquish control of the navigation of the vessel to Cousins.

76. The Exxon defendants knew, or should have known, based on the service in which the EXXON VALDEZ was involved, that its single hull, high tensile steel construction was not sufficient to allow it to safely engage in the trade for which it was intended.

77. The negligence of the Exxon defendants, except Exxon Pipeline Company, in the operation of the EXXON VALDEZ specifically includes, but is not limited to, (i) failing to man the EXXON VALDEZ with sufficient and competent crew members so that the crew would not be overworked and fatigued; (ii) permitting Captain Hazelwood to command the EXXON VALDEZ despite his excessive use of alcohol; (iii) allowing the improper relinquishment of control of the navigation of the EXXON VALDEZ to Third Mate Cousins; (iv) using single hull, high tensile steel construction that was not sufficient to allow the tanker to safely engage in the trade for which it was intended; (v) failing to reduce speed when ice was encountered; and (vi) failing to establish proper monitoring and supervision of Captain Hazelwood in light of his known alcohol problem.

78. As a direct and proximate result of the foregoing failures by the Exxon defendants, except Exxon Pipeline Company, to exercise the degree of care expected of a

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reasonably prudent person acting under the same or similar circumstances, the Exxon defendants in their own right as well as by and through their agents, servants and employees, caused plaintiff to suffer substantial environmental and economic damages in amounts to be proven at trial.

COUNT III

INTENTIONAL AND NEGLIGENT MISREPRESENTATION ALL DEFENDANTS

79. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

80. The defendants negligently or intentionally misrepresented to plaintiff and others that they had sufficient personnel, material, knowledge and techniques at their disposal to prevent a major oil spill or to prevent or minimize environmental or other damages if a major oil spill occurred.

81. Contrary to these representations, the defendants were aware, or were negligent or reckless in not being aware, that they lacked sufficient personnel, equipment, knowledge and techniques to prevent an oil spill or to respond adequately to an oil spill on Prince William Sound before it caused substantial environmental and economic damage. Defendants knew and intentionally disregarded, or were reckless in not knowing, that they were ill-equipped and unprepared to respond to an oil spill such as the EXXON VALDEZ spill. Nonetheless, defendants failed to warn state or federal authorities or the public of their unpreparedness and

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the potential adverse impact of such unpreparedness should a substantial oil spill occur in Prince William Sound.

82. Due to these negligent, reckless or intentional misrepresentations or omissions of material facts, the true dangers posed to plaintiff, the citizens of Alaska and State lands, waters and resources were not disclosed.

83. The misrepresentations and omissions of material fact by the defendants were negligently, recklessly or intentionally made to induce plaintiff and others to refrain from taking action which would have required defendants to be prepared to prevent a major oil spill and, if an oil spill should occur, to contain and clean up the spilled oil.

84. The above-mentioned misrepresentations and omissions resulted in inadequate and ineffectual clean up efforts which aggravated and compounded the environmental and economic damages caused to plaintiff by the oil spill.

85. As a direct and proximate result of the misrepresentations and/or omissions of material facts by defendants, plaintiff has suffered substantial and continuing environmental and economic damages in amounts to be proven at trial.

COUNT IV

NEGLIGENCE PER SE
EXXON DEFENDANTS

86. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

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87. The acts and omissions of the defendants violated AS 08.62 and regulations enacted pursuant thereto and other state laws and regulations governing the operation of tanker vessels in Prince William Sound. In so violating these laws, defendants were negligent per se.

88. The defendants are liable to plaintiff for all environmental and economic damages resulting from the accident and discharge on account of the violations of the above-mentioned State law.

89. As a direct and proximate result of the defendants' negligent acts and omissions, the defendants have caused plaintiff to suffer substantial and continuing environmental and economic damages in an amount to be proven at trial.

COUNT V

STRICT LIABILITY FOR INHERENTLY DANGEROUS ACTIVITY EXXON DEFENDANTS

90. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

91. The oil transportation, loading and shipping activities engaged in by the Exxon defendants are so inherently dangerous and potentially devastating to the surrounding environment in the State of Alaska, as well as to its residents, citizens and businesses, that even when conducted under the best of circumstances and with utmost care, such activities constitute inherently and abnormally

dangerous activities for which the defendants are strictly liable.

92. The use of single-hulled vessels for transporting ANS crude oil through Prince William Sound constitutes an inherently and abnormally dangerous activity for which defendants are strictly liable.

93. The above-described inherently dangerous activities engaged in by the defendants directly and proximately caused substantial and continuing environmental and economic damages to plaintiff, in amounts to be proven at trial.

COUNT VI

MARITIME TORT
EXXON DEFENDANTS

94. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

95. By virtue of the above, the Exxon defendants negligently allowed the vessel to sail in an unseaworthy condition and/or negligently allowed the vessel to be navigated in an unprudent manner in violation of the general maritime law. The Exxon defendants' negligence resulted in the grounding of the vessel and was a direct and proximate cause of the environmental and economic damages suffered by plaintiff, in amounts to be proven at trial.

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COUNT VII

BREACH OF RIGHT-OF-WAY LEASE AND INDEMNIFICATION OWNER COMPANIES AND ALYESKA

96. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

97. In May, 1974, the State and the defendant Owner Companies or their predecessors in interest entered into the State Right-of-Way Lease. The State Right-Of-Way Lease imposed upon the defendant Owner Companies responsibility for the avoidance of a discharge of oil into or upon the lands, waters and resources of the State, and for the protection of the public and environment from the damages and other effects of any possible oil spill. The Owner Companies' obligations included, without limitation: (i) employment of the best practicable technology available and use of all practicable means to preserve and protect the environment; (ii) prevention of any potential spill of oil or other hazardous substance into or upon the lands, waters and resources of the State; (iii) if such an oil spill occurs, immediate corrective action using the best practicable technology available to abate serious harm or environmental damage; and (iv) restoration of the resources affected by an oil spill.

98. In accordance with State Right-Of-Way Lease, the defendants submitted to the Alaska Department of Natural Resources contingency plans for the prevention, containment and clean up of oil spills, including contingency plans applicable to tanker spills in Prince William Sound.

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99. The defendants have breached the State Right-Of-Way Lease because they failed to comply with their obligation to use the best practicable technology and resources available to adequately prevent and to abate the serious harm and environmental damage threatened and caused to State lands, waters and resources as a result of the oil spill.

100. The defendants have breached the State Right-of-Way Lease because they failed to fulfill their obligations under the Lease to respond, contain and clean up the oil spill in conformity with the Plan for Prince William Sound.

101. Under Section 13 of the State Right-of-Way Lease, defendant Owner Companies must indemnify the State for liabilities, damages or injury incurred by the State caused by operation or maintenance of the TAPS.

102. Plaintiff has suffered damages and injury within the meaning of Section 13 of the State Right-of-Way Lease in an amount to be proven at trial.

COUNT VIII

PUBLIC NUISANCE
ALL DEFENDANTS

103. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

104. The acts and omissions of the defendants created a public nuisance through unreasonable interference with the rights of plaintiff to State lands, waters and

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resources that are free from pollution and contamination by crude oil and other hazardous substances.

105. The unreasonable interference with the rights of the State resulted in special and distinct harm to plaintiff, including, but not limited to, damages to the lands, waters and resources of the State and the revenues derived from the use by third parties of natural resources of the State.

106. The substantial interference with plaintiff's interests were caused by the actions and omissions of the defendants for which they are liable to plaintiff for environmental and economic damages sustained in amounts to be proven at trial.

107. The defendants threaten to continue the acts and omissions complained of herein, and unless permanently restrained and enjoined, will continue to do so, all to plaintiff's irreparable damage. Plaintiff's remedy at law for damages is not adequate to compensate them for the continuing injuries suffered by the State.

COUNT IX

PRIVATE NUISANCE UNDER AS 09.45.230
ALL DEFENDANTS

108. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

109. The acts and omissions of the defendants created a private nuisance through substantial interference

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with the use and enjoyment of plaintiff's interests in property.

110. The substantial interference with the use and enjoyment of plaintiff's interests in property includes, but is not limited to injury or loss to real and personal property, loss of income, loss of means of producing income and loss of economic benefits.

111. Substantial interference with plaintiff's interests was caused by the actions and omissions of the defendants for which they are liable to plaintiff for the damages sustained in amounts to be proven at trial.

112. The defendants threaten to continue the acts and omissions complained of herein, and unless restrained and enjoined, they will continue to do so, all to plaintiff's irreparable damage. Plaintiff's remedy at law for damages is not adequate to compensate them for the continuing injuries suffered by the State.

COUNT X

TRESPASS
EXXON DEFENDANTS

113. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

114. Through the intentional or reckless grounding of the EXXON VALDEZ upon Bligh Reef and the improper transport of crude oil, an ultrahazardous activity for which the Exxon defendants are strictly liable, the Exxon defendants spilled approximately 11 million gallons of crude oil into and upon

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the State's lands and properties. Such actions constitute an unauthorized and continuing trespass upon State lands, waters and resources.

115. As a direct and proximate result of the EXXON VALDEZ's trespass upon the lands, waters and resources of the State, and continuing trespass of the EXXON VALDEZ crude oil upon State lands, waters and resources, the State has suffered and will continue to suffer substantial and continuing environmental and economic damages for which the Exxon defendants are liable in such amounts as will be proven at trial.

COUNT XI

STRICT LIABILITY UNDER AS 46.03.822
EXXON DEFENDANTS

116. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

117. Oil, including the approximately 11 million gallons of crude oil which was released as a result of the grounding and rupture of the EXXON VALDEZ's oil tanks, is a hazardous substance, as that term is defined in AS 46.03.826(4)(B) of the Alaska Environmental Conservation Act.

118. The Exxon defendants owned and/or had control over the oil which was released in and on the waters and subsurface lands of Prince William Sound and other areas of the State.

119. The release of oil from the EXXON VALDEZ caused the State to incur response costs.

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120. Pursuant to AS 46.03.822, the Exxon defendants are jointly and severally strictly liable to plaintiff for all damages to plaintiff, including, but not limited to, injury or loss to real and personal property, loss of revenue, loss of means of producing income, loss of economic benefits, costs of responding, containing and removing the oil, including the cost of monitoring and overseeing the clean up, and all damages to State lands, waters and resources in amounts to be proven at trial.

COUNT XII

AS 46.03.780 LIABILITY FOR RESTORATION ALL DEFENDANTS

121. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

122. All defendants have violated provisions of AS 46.03, AS 46.04 or AS 46.09 and have failed to perform duties imposed by such statutes, which violations have caused, without limitation, injuries and death to fish, animals and vegetation, degradation and other environmental damages to the lands, waters and resources of the State.

123. Pursuant to AS 46.03.780, defendants are liable to plaintiff for an amount equal to the sum of money required to restock injured land and waters, to replenish damaged and degraded resources and to restore the environment to its condition before the injury.

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COUNT XIII

CIVIL DAMAGES UNDER AS 46.03.760(e) EXXON DEFENDANTS

124. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

125. The Exxon defendants permitted the discharge of crude oil from the EXXON VALDEZ in violation of AS 46.03.740.

126. Pursuant to AS 46.03.760(e), Exxon defendants are liable to the State for the full amount of damages suffered by the State, including, but not limited to, all direct and indirect costs associated with the abatement, containment and removal of the oil, restoration of the environment to its former condition and all administrative expenses in amounts to be proven at trial.

COUNT XIV

CIVIL PENALTIES UNDER AS 46.03.758(b)(1) and (2) EXXON DEFENDANTS

127. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

128. Pursuant to AS 46.03.758, Exxon defendants are liable to plaintiff for the penalties in the amounts set forth therein due to the discharge of crude oil from the EXXON VALDEZ and the failure to contain and clean up the discharged oil.

129. The crude oil was discharged from the EXXON VALDEZ because of Exxon defendants' gross negligence. Pursuant to AS 46.03.758(b)(2), the Exxon defendants are

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liable to the State for five times the civil penalty established by AS 46.03.758(b)(1) and 18 AAC 75.500 et seq.

130. Following the crude oil discharge from the EXXON VALDEZ, the Exxon defendants failed to take reasonable measures to contain and clean up the discharged oil from the EXXON VALDEZ. Pursuant to AS 46.03.758(b)(2), defendants are liable to the State for five times the civil penalty established by AS 46.03.758(b)(1) and 18 AAC 75.500 et seq.

COUNT XV

AS 46.03.760(a)
ALL DEFENDANTS

131. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

132. Defendants have violated provisions of AS 46.03 (other than AS 46.03.250-46.03.314, AS 46.03.740 and AS 46.03.758 and provisions of AS 46.04 and AS 46.09 and regulations adopted pursuant to those statutes, including, without limitation, at least the following:

a) AS 46.03.140
b) AS 46.03.710
c) AS 46.04.030
d) AS 46.09.020

133. Pursuant to AS 46.03.760(a), defendants are liable to plaintiff for a civil assessment of not less than $500, nor more than $100,000, for each initial violation, plus not more than $5,000 for each day thereafter for each violation, and for all other damages and costs incurred by plaintiff.

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COUNT XVI

NEGLIGENT OR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ALL DEFENDANTS

134. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

135. The actions of defendarts in discharging crude oil into the waters of Prince William Sound and failing to take adequate measures to contain and clean up the crude oil caused substantial and abnormal environmental and economic damages to the State and its residents. On information and belief, as a result of the actions of the defendants, many state residents are suffering, and will continue to suffer, emotional distress from having witnessed the destruction of the environment in which they live and work and having their livelihoods threatened and their personal and family lives disrupted. As a result of the defendants' acts and omissions, the State has incurred, and will continue to incur, substantial costs in increased demand for social services, mental health treatment and other community services for the severe emotional distress suffered by the citizens of the State.

136. The severe emotional distress suffered by many state residents was a reasonably foreseeable consequence of the grounding of the EXXON VALDEZ and the failure to properly contain and clean up the spilled crude oil.

137. As a direct and proximate result of the defendants' conduct as described above, plaintiff has suffered

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substantial and continuing economic and other damages, in an amount to be proven at trial.

COUNT XVII

PUNITIVE DAMAGES
ALL DEFENDANTS

138. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above.

139. The acts and omissions of defendants alleged in Counts I, II, III, VI, VII, VIII and X were undertaken in deliberate disregard or with reckless indifference to the rights and interests of plaintiff and entitle plaintiff to punitive damages in an amount to be proven at trial.

RELIEF SOUGHT

WHEREFORE, plaintiff prays that this Court:

1. Award all statutorily authorized civil penalties, compensatory, incidental and punitive damages in amounts to be determined by the finder of fact;

2. Award all compensatory and punitive damages authorized under the common law, including, but not limited to, environmental and economic damages.

3. Award all compensatory and punitive damages authorized under the general maritime law.

4. Order that the defendants be permanently enjoined to remove all spilled oil and to restore the surface and subsurface lands, wildlife, waters, fisheries, shellfish and associated marine resources, air and other State lands,

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waters and resources affected directly or indirectly by the spill;

5. Order immediate and continuing environmental monitoring and assessment of the conditions of the air, waters and subsurface and surface lands, fisheries, shellfish and the associated marine resources and other natural resources;

6. For a judgment against defendant Owner Companies for all environmental and economic damages suffered by the State of Alaska by reason of the defendants' breaches of the State Right-of-Way Lease, including, without limitation, the cost of monitoring the clean up of the oil spill, the environmental damages to State lands, waters and resources, damage to the State's economy and lost revenues;

7. For a judgment that the defendant Owner Companies are obligated to reimburse and indemnify the State of Alaska for all environmental and economic damages suffered by the State of Alaska by reason of the defendants' breaches of the State Right-of-Way Lease, including, without limitation, the cost of monitoring the clean up of the oil spill, the environmental damages to State lands, waters and resources, the damage to the State's economy, lost revenues, the costs of all enforcement actions and the costs of all expert studies, consultancies and reports conducted or prepared by or for the State to assess the injury or damages caused by defendants' actions and inactions;

8. Award prejudgment interest, attorneys' fees and the costs of this action; and,

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9. Award such other and further relief as this Court deems just and proper.

DATED this 15th day of August, 1989.

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: Barbara Herman
Barbara Herman
Craig Tillery
Assistant Attorneys General
State of Alaska

PRESTON, THORGRIMSON,
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HB

146

OFFICIAL BUSINESS

Alaska State Legislature

House of Representatives

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BOX V
JUNEAU, ALASKA 99811
(907) 465-3438

TO: House Judiciary Committee Members

FROM: Representative Ramona Barnes

DATE: April 17, 1991

RE: HB 146

HB 146 is scheduled for hearing in House Judiciary on Monday, April 22, 1991. I am forwarding the backup information provided me by Legislative Reseach Agency so that you have time to review the material before the bill is before you in committee.

Alaska State Legislature

Legislative Research Agency

P.O. Box Y
Juneau, AK 99811-3100
Phone: (907) 465-3991
Fax: (907) 463-3351

February 25, 1991

MEMORANDUM

TO: Representative Ramona Barnes

FROM: Patricia Young
Legislative Analyst

RE: **Bifurcated Divorce Proceedings**
Research Request 91.171

You requested information on the number of states which allow bifurcated divorces, i.e., divorces in which the actual divorce and economic and child custody issues are handled separately. You asked for any statistics readily available on the number of divorces handled in this manner and for information on problems and benefits associated with the practice.

Bifurcation is a standard court practice, applicable to a variety of case types. Divorce is one type of case which may be bifurcated. According to Sidney Siller, president of the Institute for the Study of Matrimonial Laws, most states allow for bifurcated divorce actions either by rule or by practice, rather than by statute. Determination of the exact number of states which do bifurcate divorce proceedings is, therefore, difficult to determine. Neither Mr. Siller nor researchers at the American Bar Foundation, which is the research arm of the American Bar Association, were aware of any compilations of data on this subject.

The primary justification generally cited for the practice of bifurcating divorce proceedings is that the separation of divorce from custody or property settlement issues expedites matters, encourages settlements (rather than continued litigation) and allows individuals with irretrievably broken marriages to begin to disentangle their affairs and to restructure their separate lives. Not uncommonly, one or both individuals wish to remarry, and requests for bifurcation issue from a desire to move toward that goal. Sometimes matters are compounded by a sense of urgency to legitimize the birth of an expected child. Bifurcation also allows for certain tax advantages: rather than filing in the less advantageous married-but-separate category, ex-spouses may file as single adults or jointly if they have remarried. Additionally, the practice may allow individuals with irreparably eroded relationships to discontinue financial responsibility for family members for whom they no longer wish to be responsible. The theory behind the practice of bifurcation, as it relates to divorce proceedings, is that people who wish to be divorced ought to be allowed to do so, and should not have their personal lives held hostage to economic demands.

Opponents of bifurcated divorce proceedings contend that allowing individuals to delay such basic human responsibilities as the care of one's children and the resolution of one's financial affairs inevitably complicates and aggravates the original problems. According to Lynn Gold-Bikin, a representative of the American Bar Association on this issue, problems usually outweigh benefits. The following represent the major problems associated with bifurcated divorces.

- The granting of a final decree of divorce separate from resolution of custody and/or financial matters may reduce the incentive to finalize those issues expeditiously, particularly for the party with more money. The party who stands to lose assets in an economic distribution may delay settlement in the hope that the dependent party will eventually agree to accept less in order to have the issue finally resolved.

- In cases without the possibility of a mutually agreeable settlement, bifurcation prolongs and exacerbates litigation.

- Unresolved and unreconciled old business hinders the parties' efforts to restructure their lives. Remarriage, although it may satisfy the emotional needs of one or both parties, further complicates matters and almost inevitably further reduces the wealthier party's incentive to resolve financial and/or custody issues.

- Bifurcated divorces, especially when followed by remarriages, may prove very disruptive for children, particularly if they come to believe that their parents consider their own needs and wishes as more important than those of their children.

- Eligibility for medical insurance coverage provided through one party's employment and extending to the spouse and children is no longer available for the ex-spouse. Although alternate insurance may be available, gaps in coverage can occur at a time when individuals are particularly vulnerable due to increased stress.

- The real property ownership status of tenancy by the entirety--which carries a right of survivorship--is available only to married couples. Once a dissolution is final, ownership status converts, by operation of law, to tenancy in common. More like a partnership, tenancy in common does not afford the same protections--such as right of survivorship--as does tenancy by the entirety.

- In a bifurcated divorce proceeding, the party with fewer assets has lost the protection afforded by statute to a spouse and yet has not gained the protection of a valid property settlement agreement. Property owned at the time of divorce may have diminished, increased, or disappeared by the time of economic distribution.

Any of these events may cause thorny problems, particularly if the court has deferred valuation of assets until distribution. Little protection exists for the rightful assets of an ex-spouse if the wealthier party diminishes or hides assets, retires, or declares bankruptcy after the divorce but prior to the property settlement.

In the event of the death of either party, as an ex-spouse without the protection of a valid property settlement agreement, the surviving party or heirs would have difficulty claiming beneficiary status under any life insurance policy the other might have held. Likewise, complex inheritance questions would ensue. Establishing a clear right to inherit would be particularly complex if one or both parties had remarried.

Attached is a copy of *Wolk v. Wolk* 464 A.2d 1359 (PA Super.1983), which is considered the lead case in Pennsylvania. Judges in this case held that although unusual situations could occur in which a single order would not suffice, divorces actions should not be bifurcated as a matter of course. *Wolk v. Wolk* clearly summarizes benefits and potential problems of the practice, and delineates under what conditions and circumstances it should be considered.

Ms. Gold-Bikin notes that in 1979, a judicial inquiry held in New Jersey--generally considered a rather forward-thinking state--produced the Pashman Report which recommended against the practice of bifurcated divorces for many of the reasons noted above, despite the length of time needed to resolve most cases through the overloaded trial courts in that state. Subsequent to the Pashman Report, New Jersey's chief justice sent out a judicial directive against the practice. Since that time, bifurcation of divorce cases in New Jersey is generally discouraged and extremely rare: one must show exceptional circumstances for the court to exercise its discretion to grant bifurcation. The attached copy of *Leventhal v. Leventhal* 571 A.2d 348 (NJ Super.Ch.1989) provides a summary of arguments for and against bifurcation, as discussed in the Pashman Report, as well as a review of case law on the subject.

In its discussion, the New Jersey court noted that New York case law concludes that when complex financial issues are involved, settlements or easy answers may be less likely once dissolutions are granted. (Because of this, according to Mr. Siller, final judgments in New York frequently are not entered until all issues are finalized.) The Florida court was also cited as holding that the split procedure should be used only if *clearly* in the best interests of the parties and children. Florida holds that the "convenience of one of the parties for early remarriage' does not justify" a bifurcation.

Interestingly, the New Jersey court concludes that "realistically, . . . the actual divorce appears to be ancillary to the financial issues." The ideal of the insular family unit--two adults and their biological children--is no longer the reality in this society. Thus, problems which might at first reading seem unlikely may, in fact, be commonplace. Ann Moss, deputy director

of the Pension Rights Center--an independent, nonprofit organization funded in part by the American Association of Retired Persons--cautions that the practice necessitates very carefully worded temporary orders, and that, in general, a more highly sophisticated than normal approach by divorce attorneys is required to adequately protect all parties.

Sources agree that any state which permits bifurcation should think seriously about the potential problems. No divorce is identical to another, however, and no rule is applicable to every situation. A middle ground, in which petitioners have specifically addressed all substantive issues is, therefore, frequently recommended. Public policy that allows courts to evaluate cases on their individual merits and to use discretion in allowing bifurcations when parties have considered the potential problems and no just reasons exist to deny the requests, is generally favored by the courts and by the citizenry as well.

I hope that this information is useful to you. If you have questions or need further information, please don't hesitate to call.

Attachments

BIFURCATE DIVORCE? WELL, . . .

Critics say 2-step process often leads to delay

The bifurcated divorce—granting the divorce first and deciding economic issues later—can give couples a quick break so they can get on with their lives.

But the practice is coming under increasing criticism from lawyers who say it leads to long delays and favors the party with more money.

Divorce attorney Harry Fain of Beverly Hills favors bifurcation for the traditional reason: "When you get into a case and the parties are mortal enemies . . . our public policy in California encourages the two people to get divorced first. That cleanses the air a little bit."

Section 302(a)(4) of the Uniform Marriage and Divorce Act allows the judge to bifurcate the divorce, and many states have adopted the practice even if they have not adopted the uniform act.

Chicago divorce attorney Donald Schiller says the biggest problem with bifurcating economic issues is delay. After the divorce is granted, the party who stands to lose some of his property and paycheck in an economic distribution has no incentive to press for a quick resolution.

Schiller, immediate past chairperson of the ABA Section of Family Law, says some bifurcated cases have dragged on for as long as four years. As a result, Schiller thinks Illinois judges use bifurcation less often.

"When judges started realizing that the cases weren't getting finished, they stopped bifurcating, unless the parties agreed or unless there was a real good reason, because these cases were just lying around and not getting disposed of," Schiller said.

Beverly Anne Groner of Bethesda, Md., chairperson of the ABA Section of Family Law, has even gone so far as to get injunctions to prevent bifurcation.

Groner is one of several lawyers who say that big problems can arise between the dissolution and economic division. For example, what happens when the divorce is granted, and then one spouse dies, or the wealthier spouse spends or hides his assets?

"It opens in some cases a veritable Pandora's Box of problems that weren't contemplated," said Groner.

ABA Journal Staff

▲ Donald Schiller: Bifurcated cases have dragged on for as long as four years.

If the wealthier spouse should die after the dissolution, the other party would not have a clear right to inherit, and would not yet have any rights under the divorce decree, Groner says.

Or, if the economically dependent spouse should die, the heirs may have problems getting property not yet distributed by the divorce decree.

Another problem arises when the property owned at the time of the divorce isn't there at the time of economic distribution. "Assets can diminish, increase, or disappear," Groner said. "There are some who will deliberately hide assets."

State statutes vary as to whether assets should be valued at the time of divorce, or at distribution, according to Groner.

The wealthier spouse could even lose assets in a bankruptcy proceeding, according to Norristown, Pa., attorney Lynne Z. Gold-Bikin. In *In Re Murray*, 31 B.R. 499 (Bkrtcy E.D. Pa. 1983), the bankruptcy court forced the sale of the divorced husband's home, giving only 50 percent of the proceeds to the divorced wife. If the economic distribution had occurred first, the wife could have been entitled to more.

Before the advent of no-fault divorce, property issues were decided more quickly because they were part of the bargaining process. One party would agree to the grounds for a divorce in exchange for property.

For example, in New York, where some degree of fault is still required for a divorce, attorney Sanford S. Dranoff says the bargaining chip is frequently used by the economically dependent party: "I represent the man, and the woman says, 'You don't have any grounds, unless you give me the title to the house.' "

Ironically, with the advent of bifurcation and no-fault, the bargaining chip is now in the hands of the economically superior party.

"The person with the most property wants to give up as little as possible, and he will sometimes prolong the case in the hope that the other party will accept less to get it over with," said DePaul College of Law Associate Dean Vincent Vitullo.

Many who criticize bifurcated divorce as favoring the economically advantaged party—often the husband—say it is part of a larger problem in which women are treated unfairly in divorce proceedings.

But there are some cases when bifurcation actually prevents delay, according to Fain. He has used bifurcation to resolve thorny issues like valuation of a business or the validity of a premarital agreement first. Once those issues are resolved, a quick settlement is likely, he said.

—Debra Cassens Moss

▲ Beverly Anne Groner

Jacob WOLK

v.

Thelma Dym WOLK, Appellant.

Jacob WOLK

v.

Thelma Dym WOLK, Appellant.

Superior Court of Pennsylvania.

Argued May 25, 1983.

Filed Aug. 26, 1983.

Appeal was taken from decree of the Court of Common Pleas of Allegheny County, Civil Division, No. 930 Oct. Term 1980, Kaplan, J., which stated that court would not adjudicate wife's new matter alleging that divorce code was constitutionally defective and that economic claims would be severed from divorce claims. The Superior Court, Nos. 333 and 538 Pittsburgh 1981, Cirillo, J., held that: (1) economic claims may be severed from divorce claims, and (2) trial court failed to exercise its discretionary power in deciding whether to bifurcate the issues; thus, case would be reversed and remanded for new hearing.

Reversed and remanded.

1. Trial ⇐3(5)

Economic claims may be severed from divorce claims under the new divorce code. 23 P.S. § 401(b); Rules Civ.Proc., Rule 1920.52(c), 42 Pa.C.S.A.

2. Trial ⇐3(5)

The decision to bifurcate economic claims from divorce claims, although permissible, should not be made pro forma; rather, such determination should be made only after disadvantages and advantages have been carefully explored and analyzed; each case must be reviewed on its own facts and only following court's determination that consequences of bifurcating case would be of greater benefit than not bifurcating, should permission be granted. 23 P.S. § 401(b); Rules Civ.Proc., Rule 1920.52(c), 42 Pa.C.S.A.

3. Divorce ⇐184(5)

So long as trial judge, in deciding whether to sever economic claims from divorce claims, assembles adequate information, possibly studies information, and then explains his decision regarding bifurcation, the Superior Court will defer to trial court's discretion.

4. Trial ⇐3(5)

Trial court failed to exercise its discretionary powers when it ordered bifurca-

tion of economic claims and divorce claims since its decision to bifurcate was based upon accepted practice in county and not upon particular facts of case; thus, case would be reversed and remanded for new hearing. 23 P.S. § 401(b); Rules Civ.Proc., Rule 1920.52(c), 42 Pa.C.S.A.

John J. Dean, Pittsburgh, for appellant.

Frederick N. Frank, Pittsburgh, for appellee.

Before CAVANAUGH, ROWLEY and CIRILLO, JJ.

CIRILLO, Judge:

The parties were married on October 25, 1959 and lived together until a domestic dispute arose in June, 1975. The husband filed a divorce action on September 3, 1980, alleging that the marriage was irretrievably broken,[1] and requesting equitable distribution of marital property as well as counsel fees. The wife filed an Answer and New Matter averring, *inter alia*, that the Divorce Code was constitutionally defective. She also entered a counterclaim for alimony, alimony pendente lite, counsel fees and maintenance of insurance policies.

A hearing was held on March 2, 1981, at which time the court found the marriage to be irretrievably broken. The court did not adjudicate the New Matter or property rights at that time. On March 3, 1981 the wife appealed at No. 333 Pittsburgh, 1981.

Subsequently, the lower court signed a series of Orders, dated March 2, 1981, which stated that the court would not adjudicate the New Matter, would enter a bifurcated divorce and a decree of divorce dissolving the marriage. These orders were then docketed with the prothonotary and on May 15, 1981 the wife appealed at No. 538 Pittsburgh, 1981.

[1] Initially, we are compelled to address the issue of the propriety of severing economic claims from divorce claims in this matter. The New Divorce Code provides in pertinent part:

> . . . In the event that the court is unable for any reason to determine and dispose of the matters provided for in this subsection within 30 days after the master's report has been filed, it may enter a decree of divorce or annulment . . .

Act of April 2, 1980, P.L. 63, No. 26, § 401, 23 P.S. § 401(b). Similarly, the Pennsylvania Rule of Civil Procedure concerning court hearings in divorce or annulment actions states:

> (c) The court need not determine all claims at one time but may enter a decree adjudicating a specific claim or claims.

Pa.R.C.P. 1920.52(c), Adopted June 27, 1980, effective July 1, 1980.

The preceding language demonstrates a legislative awareness that situations could arise in which a single order would not suffice. It is clear, therefore, that the intent of the legislature is to permit bifurcation. However, there is no requirement which mandates bifurcation nor obligates the court to find clear and compelling necessity before it bifurcates a proceeding.

There are several advantages which appertain to the concept of bifurcation. First, it accelerates the actual dissolution of a marriage found to be irretrievably broken since the time needed to obtain a divorce is substantially shorter than the time needed for the disposition of marital property. This allows the parties to quickly begin the task of restructuring their lives. We note that the objectives of the Assembly in enacting the Divorce Code are set forth in Section 102(a) which provides in pertinent part:

> (a) The family is the basic unit in society and the protection and preservation of the family is of paramount public con-

1. The Act of April 2, 1980, P.L. 63, No. 26, § 201, 23 P.S. § 201(d).

cern. Therefore, it is hereby declared to be the policy of the Commonwealth of Pennsylvania to:

(1) Make the law for legal dissolution of marriage effective for dealing with the realities of matrimonial experience.

. . . . . .

(3) Give primary consideration to the welfare of the family rather than the vindication of private rights or the punishment of matrimonial wrongs.

(4) Mitigate the harm to the spouses and their children caused by the legal dissolution of the marriage.

Act of April 2, 1980, P.L. 63, No. 26, § 102, 23 P.S. § 102(a)(1), (3) and (4).

It is apparent that a speedy resolution of the divorce issue is within the purview of the Code. Moreover, as the Honorable Eugene B. Strassburger III of the Court of Common Pleas of Allegheny County commented in the case of *Casey v. Casey*, 129 P.L.J. 42, 44 (1981):

> ... [T]hese goals [of the divorce code] can be accomplished only by the prompt dissolution of a marriage that is demonstrably over (as defined by the code), and allowing the parties to restructure their lives. The goals cannot be accomplished by tying the parties to a dead marriage while all of the conflicts and time-consuming financial details are litigated....

Bifurcation separates the termination of the marriage from the distribution of property so that the marriage and each party's personal life are not held hostage to economic demands. At the same time, the dependent spouse is not economically disadvantaged by the fact of the divorce being issued because support and/or alimony pendente lite are required to continue at their pre-divorce levels pending resolution of the economic matters. *Klein v. Klein*, 16 D & C 3d 651 (1980).[2]

There are also several tax advantages that come into play when considering bifurcation, such as; a spouse may remarry and file a joint federal income tax return with the new spouse; a spouse may avoid filing status as married filing separately; stock redemption attribution rules may be avoided [I.R.C. § 318]; losses on transfers and sales between ex-spouses may be recognized [I.R.C. § 267]; an individual spouse may elect the capital gain exclusion on sale of family residence [I.R.C. § 121]; and gain on the sale of depreciable realty may be taxed as capital gain rather than as ordinary income. [I.R.C. § 1239]. *Rounick, Pennsylvania Matrimonial Practice*, Section 18.3, page 148.

Finally, as revealed by the experience in Allegheny County, bifurcation encourages case settlements between the time the divorce decree is issued and the property distribution issues reach trial. These settlements are an obvious benefit to our inundated courts.

On the other side of the coin, there are many disadvantages related to bifurcation. If the cases are not settled by the parties, then oftentimes two hearings are necessary, thus burdening an already overcrowded court calendar. Also, despite the fact that divorce is achieved rapidly, there is still a

2. In *Klein v. Klein*, *supra*, at 657-58 Judge Wettick reasoned:

> Alimony pendent lite, if literally construed, means alimony while the litigation is pending. (citation omitted). Under prior law, the duty to pay alimony pendente lite ended with the divorce because this was the only subject of the litigation. In *Ponthus v. Ponthus*, 70 Pa.Superior Ct. 39 (1918), the court held that alimony pendente lite continued while an appeal from the issuance of a divorce decree is pending. According to this court, the purpose of alimony pendente lite is to permit a dependent spouse to meet the expenses of carrying on or defending an action (including reasonable living expenses), so payments should continue as long as the action is pending. *Also see: Commonwealth ex rel. Entler v. Entler*, 33 Lehigh 23 (1968). Thus so long as any claims raised in the divorce litigation are still pending, the principles enunciated in *Ponthus* bar automatic termination of alimony pendente lite.

significant delay in the resolution of economic issues, thus having a dilatory effect on the parties' efforts to reshape their lives. From a tax standpoint, bifurcation prevents the parties from filing a joint federal income tax return and therefore a favorable tax rate is unavailable.

Another problem which arises where a case has been bifurcated involves the impact that the death of one of the parties, subsequent to the issuance of the divorce decree but prior to a determination of the economic issues, has on the surviving spouse's right to equitable distribution. This issue was painstakingly analyzed in an article authored by the Honorable Lawrence W. Kaplan.[3] Judge Kaplan noted that where a case has been bifurcated and one party dies before there has been a resolution of the ancillary issues, the other spouse is precluded from enjoying the benefits provided under the Probate, Estates and Fiduciaries Code.[4] Furthermore, the death of one of the parties would have an adverse effect on the surviving party's equitable distribution claim. Though this spouse would still have a claim against the decedent's estate under the Divorce Code's equitable distribution process, that claim would be seriously hampered by the surviving spouse being rendered incompetent as a witness by the Dead Man's Rule.[5]

Still another issue which could arise relates to the effect that a bifurcated divorce has on a divorced spouse's right to receive the proceeds of a life insurance policy in which that spouse was named a beneficiary. In *Simpkins v. Dodolak*, 1 Pa.Fiduc.2d 120 (1980), a Clearfield County case, the court held that since the husband had retained the right to change his beneficiary at any time, then under the Act of April 18, 1978, P.L. 42, No. 23, Sec. 8, 20 Pa.C.S.A. § 6111.1, the rights of the wife were revoked regarding the proceeds of the policy in question. Undoubtedly, to this list of detriments associated with bifurcation, numerous other possibilities can be added.

[2] In light of the antecedent discussion, it is obvious that the decision to bifurcate, though permissible, should not be made *pro forma*, as in the case of *Klein v. Klein*, *supra*. Rather, such a determination should be made only after the disadvantages and the advantages have been carefully explored and analyzed. Each case must be reviewed on its own facts and only following the court's determination that the consequences of bifurcating the case will be of greater benefit than not bifurcating, should it grant the petition. In so holding, we reject the rationale of *Smolinsky v. Smolinsky*, 5 Phila. 364 (1981), whereby the trial court required compelling reasons to be shown before granting a petition to bifurcate. Such a strict test is not demanded by the legislature. The eventual decision should be the approach which is fair to both parties.

[3] Since the decision to bifurcate is discretionary, we will review lower court decisions pertaining to bifurcation by using an abuse of discretion standard. So long as the trial judge assembles adequate information, thoughtfully studies this information, and then explains his decision regarding bifurcation, we defer to his discretion. In other words, this determination should be the result of a reflective examination of the individual facts of each case.

This scope of review is consistent with other Superior Court decisions which deal with the Divorce Code. *See: Ruth v. Ruth*, —— Pa.Super. ——, 462 A.2d 1351 (1983); *Gee v. Gee*, —— Pa.Super. ——, 460 A.2d 358

3. Kaplan, "The impact of death on a pending divorce," *Pennsylvania Law Journal—Reporter*, January 18, 1982, at 3 and 24.

4. Act of June 30, 1972, P.L. 508, No. 164, § 2, 20 Pa.C.S.A. § 101 *et seq.*

5. Act of July 9, 1976, P.L. 586, No. 142, § 2, *as amended by* the Act of April 28, 1978, P.L. 202, No. 53 § 10(75), 42 Pa.C.S.A. § 5930.

(1983) (in determining the propriety of property distribution, the Superior Court uses an abuse of discretion standard of review); *See also: Geyer v. Geyer*, —— Pa. Super. ——, 456 A.2d 1025 (1983) (abuse of discretion standard is appropriate when reviewing awards of alimony); *See also: Remick v. Remick*, —— Pa.Super. ——, 456 A.2d 163 (1983) (orders for alimony pendente lite, counsel fees and permanent alimony should be reviewed for an abuse of discretion by the lower court). Likewise, our position in this matter, of requiring the trial judge to articulate reasons for his decision and then reviewing this determination for an abuse of discretion, is analogous to the procedure used under the Sentencing Code.[6] *See: Commonwealth v. Wilson*, —— Pa.Super. ——, 452 A.2d 772 (1982); *Commonwealth v. Rooney*, 296 Pa.Super. 288, 442 A.2d 773 (1982).

The wife in this instance has the burden of proving that the trial judge abused his discretion. In defining this standard, the courts of this Commonwealth have articulated the following:

> . . . When the court has come to a conclusion by the exercise of its discretion, the party complaining of it on appeal has a heavy burden; it is not sufficient to persuade the appellate court that it might have reached a different conclusion if, in the first place, charged with the duty imposed on the court below; it is necessary to go further and show an abuse of the discretionary power. "An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused." (Citation omitted).

Garrett's Estate, 335 Pa. 287, 292–93, 6 A.2d 858, 860 (1939); *See also: Mackarus Estate*, 431 Pa. 585, 246 A.2d 661 (1968); *Campbell v. Heilman Homes, Inc.*, 233 Pa.Super 366, 371, 335 A.2d 371, 373 (1975) (HOFFMAN, J., dissenting).

[4] In the case at bar, the lower court failed to exercise its discretionary powers. Its decision to bifurcate was based upon an accepted practice in Allegheny County, not upon the particular facts of this case. Therefore, we must reverse the Orders and Decree of Divorce entered by the trial court on March 2, 1981 and remand for a hearing in accordance with this opinion. Because of this decision, we need not address the other contentions in appellant's brief. Jurisdiction is relinquished.

Reverse and Remand.

6. Act of December 30, 1974, P.L. 1052, No. 345, § 1, *as amended by* the Act of October 5, 1980,

571 A.2d 348
(N.J. SUPER. CH. 1989)

to the jury were materially deficient and because they did not apprise the jury of the essential elements of the legal malpractice cause of action applied with equal force and effect to the judgment against Conte. The judgment against Conte, therefore, should be reversed. However, because the judgment against Conte is vacated solely for the reason of trial error the matter must be remanded for a new trial. Plaintiffs should be afforded an opportunity to retry their claims against Conte based on conventional proofs, evaluating the value of the medical malpractice suit that was lost against Dr. Brown and the other defendants in accordance with the principles discussed broadly in *Gautam v. De Luca, supra*, 215 *N.J.Super.* at 397–400, 521 *A.*2d 1343 and the cases cited therein.

[370] The other issues raised by plaintiffs on this appeal do not pertain to the trial court's post-judgment order under review. Rather, they all appear to address our prior decision in *Gautam v. De Luca, supra*, and, therefore, are not properly raised on this appeal and we do not address them.

Accordingly, we affirm the order vacating the judgment against Conte and remand the matter to the trial court for a new trial as to Conte only, consistent with the views expressed in this opinion. We leave to the trial court the management of the trial of Conte's cross-claim against De Luca.

239 N.J.Super. 370

[370] **Richard B. LEVENTHAL, Plaintiff**

v.

Rosalyn LEVENTHAL, Defendant.

Superior Court of New Jersey,
Chancery Division,
Family Part, Bergen County.

Decided Oct. 11, 1989.

Party to divorce moved for bifurcation of action. The Superior Court, Chancery Division, Family Part, Bergen County, Krafte, J.S.C., held that party was not entitled to bifurcation of issues of dissolution and custody from those of support and equitable distribution, notwithstanding lengthy delay in trial due to court congestion, in that trial on dissolution, no matter how short, would do nothing to simplify or reduce prospect of further proceedings in case.

Motion denied.

[371] **1. Trial ⇐3(1)**

Decision to bifurcate proceeding should be made only after balancing advantages and disadvantages and determining if there would be greater benefit to court with bifurcation than without; purpose is not to ensure absolute necessity of second proceeding, but rather reduce probability of multiple litigation.

2. Divorce ⇐146

Party to divorce proceeding was not entitled to bifurcation of issues of dissolution and custody from those of support and equitable distribution, notwithstanding lengthy delay in trial due to court congestion, in that trial on dissolution, no matter how short, would do nothing to simplify or reduce prospect of further proceedings in case.

Gary N. Skoloff, Skoloff & Wolfe, Livingston, for plaintiff.

Barry I. Croland, Stern, Steiger, Croland, Tanenbaum & Schielke, Morristown, for defendant.

KRAFTE, J.S.C.

This matter is before the court on a motion requesting the bifurcation of the matrimonial dissolution and custody dispute from the issues of support and equitable distribution. This court finds that there has been no showing of "unusual and extenuating circumstances" which would require affording a preferential treatment to this particular case by granting the husband a divorce prior to a resolution, by trial

or otherwise, of alimony and the equitable distribution issues in this considerable marital estate. . . . . .

The complaint for divorce was filed on February 16, 1987 by the husband, Richard Leventhal. While the parties each sought custody of the two minor children, both teenage girls, ages 16 and 13, have in fact, been living with their father for most of the time since the separation. Mrs. Leventhal is residing in the |372 marital home and was awarded $2500 a week *pendente lite* support. All discovery is complete, per court order of March 20, 1989. The parties express no hope of settlement of the economic issues without proceeding to trial.

Because of extreme calendar congestion, this case has not been reached for trial, there being a considerable number of older cases awaiting trial. Plaintiff is now requesting a bifurcation so that he may be granted an uncontested divorce, reserving the trial of the economic issues to a date to be set by the court, or alternatively, to list the case peremptorily.

As of the date oral argument was heard on the motion for bifurcation, this court had 626 dissolution cases on its individual calendar. Without even considering financial plenary hearings, "*Holder* hearings," true custody and visitation trials, reversals and remands from the Appellate Division, the burden created by the over-crowded calendar is evident. Plaintiff is number 51 of 109 on a special list of cases which have been reached for trial after they were two years or older. Needless to say, all parties placed on that list are also anxious to go to trial, to have their matters resolved, and to bring their lives back to normalcy.

[1, 2] Generally, the rationale behind the use of the procedural device of bifurcation is *judicial* economy. The decision to bifurcate should be made only after balancing the advantages and disadvantages and determining that there would be a greater benefit *to the court* with bifurcation than without. 27A *C.J.*, *Divorce*, § 209(b). The purpose is not to ensure the absolute necessity of a second proceeding, as would be the case here, but rather reduce the probability of multiple litigation. Thus, in a tort action, bifurcation would be proper. Once the issue of liability is resolved, a trial on damages may not be necessary. The decision whether liability should be bifurcated from the issue of damages is within the sound discretion of the court. *R.* 4:38–2(b) provides that liability and damage claims may be, in effect, bifurcated, "whenever the court finds that a |373 substantial savings of time would result from trial on the issue of liability in the first instance...." If this language were somehow deemed to apply to a divorce case, the court would be compelled to find that initially trying the dissolution (liability) aspect would probably afford the referred to time-savings by eliminating or substantially reducing time needed for the financial (damages) issues. *Pressler, Current N.J. Court Rules*, Comment *R.* 4:38–2(b) (1989); *Ventura v. Ford Motor Corp.*, 180 *N.J.Super.* 45, 433 *A.*2d 801 (App.Div. 1981); *Cotton v. Travaline*, 179 *N.J.Super.* 362, 432 *A.*2d 122 (App.Div.1981); *Radigan v. Innisbrook Resort and Golf Club*, 150 *N.J.Super.* 427, 375 *A.*2d 1229 (App.Div. 1977). However, in a matrimonial action, as the one presently before the court, where the economic issues are vast and complicated, a trial on the dissolution, no matter how short, will do absolutely nothing to simplify or reduce the prospect of further proceedings. Plaintiff alleges that there is no possibility of a settlement, so the effect of trying the issues separately would only serve to prolong and exacerbate this litigation. The bifurcation would have no benefit to the already over-burdened court calendar. Its sole effect would be to personally benefit plaintiff in his desire to remarry without addressing his responsibility to reach a final disposition of all other issues involved.

The State of New Jersey has no specific provision, either by statute or court rule, for bifurcation, where a judge may grant a divorce and defer consideration of the other issues in a matrimonial case. The Supreme Court Committee on Matrimonial Litigation, Interim Report (July 20, 1979) set forth its policy on bifurcation. The report noted the existing controversy regarding

the procedure and the delays inherent in its use. The committee's recommendations encouraged a court rule or directive on bifurcation, but in its absence stated that bifurcation be granted "only in unusual and extenuating circumstances," and then only with the approval of the assignment judge. *Id.* at 24. The actual decision as to the merits of bifurcation of 1374this case has been deferred to this trial court by the assignment judge.

Other jurisdictions have faced similar questions. The New York courts have held that the use of bifurcation in a matrimonial action will not eliminate a further trial on economic issues and that the chance of resolution is best met in one trial of all the interrelated factors. *Finkel v. Finkel*, 120 *Misc.*2d 936, 466 *N.Y.S.*2d 906 (Sup.Ct. 1983). Some of the factors the *Finkel* court considered, in deciding the practicality of bifurcation, were the reduction of hardship, the speed of a just determination and help in clarifying various issues. Without the furtherance of those factors, a court should not grant bifurcation.

Here, the actual divorce itself will be uncontested, so the trial of the dissolution issue would be perfunctory and not protracted. However, it is readily apparent that the second trial on the economic issues would be long and controversial including testimony of a multitude of expert witnesses. Therefore, bifurcation would do nothing to hasten the resolution of the overall matter and would put defendant-wife in a position whereby plaintiff has his divorce but continues to control the pursestrings through the exclusive operation of the single largest marital asset, his business venture. New York agrees that, when there are complex financial issues, a settlement or easy answer may be less likely once the dissolution is granted. *Fiorella v. Fiorella*, 132 *A.D.*2d 643, 518 *N.Y.S.*2d 17 (App. Div.1987), app. den. 70 *N.Y.*2d 796, 522 *N.Y.S.*2d 113, 516 *N.E.*2d 1226 (1987).

In *Glazer v. Glazer*, 394 *So.*2d 140 (Fla. Ct.App.1981) a Florida court held that a split procedure may be used only if it is *clearly* necessary in the best interests of the parties and the children, following the prior state court ruling in *Claughton v. Claughton*, 393 *So.*2d 1061 (Fla.Sup.Ct. 1980). The *Glazer* court emphasized that only in exceptional circumstances should a trial court exercise its discretion to grant bifurcation. Specifically, Florida holds that the "convenience of one of the parties for 1375early remarriage" does not justify the issue of bifurcation. *Claughton*, supra at 1062. The major reason noted by plaintiff to justify the bifurcation of the present action is that he desires to marry the woman with whom he is living. However, deciding the divorce without addressing the extensive financial matters would yield a benefit to absolutely no one but plaintiff.

It must be remembered that the bifurcation procedure is condoned not only when the parties benefit by the clarification of the issues, but the court, too, profits through the easing of its calendar. It is evident that by giving plaintiff preferential treatment afforded no other litigant in a similar bind, neither the court nor its calendar will be served in any way. To grant this relief to plaintiff because of his superior financial status would do tremendous damage to the image of justice in this State.

Pennsylvania permits bifurcation pursuant to its Divorce Code and Rules of Civil Procedure. 23 Pa.Stat.Ann. § 401(b) (Purdon 1955); Pa.R.C.P.1920.52(c) (West 1989). The separation of the divorce from the other issues is at the discretion of the court *as long as it is by agreement of the parties. Jawork v. Jawork*, 378 *Pa.Super.* 89, 548 *A.*2d 290, 292 (Super.Ct.1988). Here, defendant has not agreed to a separate trial on the divorce, so that plaintiff's unilateral request should not be given particular weight.

In spite of a speedy divorce, the delay of the resolution of economic issues may have a negative effect on the parties' lives, since the entire matter is not reconciled. The Pennsylvania Legislature gives no mandate to a trial court to bifurcate but permits the relief only after carefully reviewing the facts and determining that there would be more to gain through bifurcation than not. *See Mackey v. Mackey*, 376 *Pa.Super.* 146,

545 A.2d 362 (Super.Ct.1988); *Leese v. Leese*, 369 *Pa.Super.* 104, 534 *A.*2d 1101 (Super.Ct.1987); *Mosier v. Mosier*, 359 *Pa. Super.* 187, 518 *A.*2d 843 (Super.Ct.1986); *Wolk v. Wolk*, 318 *Pa.Super.* 311, 464 *A.*2d 1359 (1983). Overall, in spite of [376]the explicit authority gleaned from the legislature, the courts in Pennsylvania are cautioned not to grant the use of this procedural device without a finding that the consequences of bifurcation would be highly beneficial. The exclusive benefits of a bifurcation in this case would clearly inure to plaintiff while the court would still have the burden of the second trial and defendant, the uncertainity of her economic future. Neither the court nor defendant would receive any actual or perceived gain.

California, through its Family Law Act, as interpreted by the judicial council rules, has also authorized a trial court to bifurcate dissolution from other issues to be litigated, but the decision still remains squarely within the court's discretion. Bifurcation is granted only when there is no hope of reconciliation and it is found to be in the best interests of all parties. Cal.Civ. Code § 4000 *et seq.* (West 1983); *In re Marriage of Lusk*, 150 *Cal.Rptr.* 63, 86 *Cal.App.*3d 228 (Ct.App.1979); *Gionis v. Superior Court*, 202 *Cal.App.*3d 786, 248 *Ca.Rptr.* 741 (Ct.App.1988).

There is no doubt that even without the express authorization of the Legislature, New Jersey courts may decide whether it is in the best interests of the parties to permit a separate trial of ancillary matters after a divorce has been granted. Realistically, under New Jersey divorce practice as it exists today, the actual divorce appears to be ancillary to the financial issues. The court should decide whether the facts present circumstances which meet the criteria of the Pashman report's "unusual and extenuating circumstances" test. Here, the motion for bifurcation reaches the court after numerous, but unsuccessful, attempts to settle the financial issues. The *pendente lite* questions of support and maintenance have been a constant source of this court's time. Although discovery is closed by court order, the cooperation of plaintiff is still necessary to assure that the marital assets are fairly valued and the interests of defendant are protected as to equitable distribution.

[377]There remains the real danger that once divorce is granted, there will be much less incentive for plaintiff to finalize any other issues. This court cannot find any factor other than plaintiff's personal desire to remarry which, with due respect for plaintiff's sincerity in wishing to move forward with his life, does not reach the standards necessary to employ any special or preferential procedures on his behalf. Every argument propounded by plaintiff to buttress his claim for bifurcation applies with equal force to hundreds of cases pending before this court. If plaintiff is entitled to bifurcation, so are the others. To permit this would be to wreak havoc upon the efficient administration of the divorce calendar. Everyone would be divorced without any basic financial issues finalized, leaving all with hopelessly confused life factors.

Plaintiff contends that the custodial dispute between the parties should trigger bifurcation. While New Jersey generally discourages bifurcation, the State's concern with the best interests of the children provides that a custody hearing be permitted prior to the final hearing of the whole action where the court finds that custody is a genuine and substantial issue. *R.* 5:8–6. Here, the Leventhal children have been residing with their father since the separation almost three years ago, although the ultimate resolution is yet to be reached. While not stipulated, it appears that, because of the ages of the children, their expressed preferences and their residence with plaintiff, there will be no real, genuine or substantial issue of custody. Since the physical custodial arrangement is not of an emergent nature, there is no reason to separate the adjudiciation of this issue from the balance of the case. Additionally, settling the custody issue will do nothing to further plaintiff's main impetus for this motion—the ability to remarry. Thus, granting a separate custody trial would not serve to give the relief desired.

This court finds that it would not be in the best interests of the parties or the

children to bifurcate the divorce from the other issues because the effect would be to complicate, prolong, or otherwise aggravate an already difficult case. It would be 378inequitable to give this litigant preferential treatment by trying his divorce before other parties who also wish to be free to get on with their lives.

The granting of bifurcation would not serve the purpose of eliminating any trial time whatsoever, but would merely permit plaintiff to continue to be in control of the marital assets without the incentive to resolve all other issues. A pending remarriage would inevitably create further barriers. There are absolutely no facts presented which are unusual or extenuating. For the reasons stated herein, the motion for bifurcation is denied.

239 N.J.Super. 378

378Lori ROTH, Donald Litt, Barbara Eidelsberg, Diane Bauer, Daniel M. Litt, Sherry Lackritz, Frederick Litt, Dr. Lawrence Eden, and Joseph E. Gassib, Plaintiffs,

v.

RUTHERFORD RENT BOARD, Eleanor Bocker, Agnes Morris, Anna Hunter, Martha Kellerman, Frances Kasperski, Samuel Bloomfield, Elizabeth Cronin, Catherine Rogers, Albert Van der Veen, Mrs. John Kilroy, Regina Cunningham, Eleanor Noonan, Thomas Griffen, Julia Buhtanic, Angelo De Marco, Emily Hanson, Pearl Fecanin, Alfred Barbera, Edward Noff, Olive MacIntyre, Robert MacFadden, Catherine Brown, Grenville Lloyd, Loretta Donneleers, Grace Broder, Laura Ferucci, David Minor, Lillian Heinrich, Joan Sh..., Lillian Bruder, Mrs. John Soltis, Mrs. Matthew Albonese, a/k/a Jane Albonese, Patricia Murphy, William Barrett, Christine Sudol, Margaret Xigues, William Bidwell, Eleanor Cinquegrana, Laurina379 Day, Dorothy Raabe, Lottie Miller, Betty Balogh, Gertrude Kohn, Minerva Blom, Ruth Clancy, Mrs. David Greenstein, Maria Shine, Mr. and Mrs. Patrick J. O'Byrne, Dorothy Halin, Kap Yi Pak, Martha Doyle, Ludmilla Szayna, Mr. and Mrs. Arthur Hauck, Defendants.

Superior Court of New Jersey, Law Division, Bergen County.

Decided May 31, 1989.

Landlords brought action against rent board and protected tenants to challenge 17% limitation on increase in property tax surcharge imposed on tenants. The Superior Court, Law Division, Bergen County, Harris, J.S.C., held that 17% limitation on property tax surcharge was invalid.

Decision of rent board reversed.

1. Landlord and Tenant ⇐200.68

Rent board must do more than merely set forth its conclusions; it must articulate basis for arriving at conclusions and make factual findings upon which conclusions rely.

2. Landlord and Tenant ⇐356

Rent board's failure to articulate rationale for 17% limitation on increase in tax surcharge by landlords for condominiums and cooperative apartments did not require remand, where board exceeded its powers, and where decision was purely legal.

3. Landlord and Tenant ⇐356

Rent board had no authority to impose 17% limitation on increase in landlords' tax surcharges on tenants, had no power under rent control ordinance to initiate investigation, and improperly imposed burden of proof upon landlords for condominiums380 and cooperative apartments; no contested case was initiated by aggrieved tenant.

4. Landlord and Tenant ⇐200.52

Municipality has power to decide whether to permit landlords to impose tax surcharge on tenants, and failure to permit surcharge is not fatal so long as entire

OFFICIAL BUSINESS

Alaska State Legislature

House of Representatives

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BOX V
JUNEAU, ALASKA 99811
(907) 465-3438

TO: Representative Dave Donley

FROM: Representative Ramona Barnes

DATE: April 3, 1991

RE: Request for hearing on HB 146

I would appreciate your scheduling a hearing on HB 146 at your earliest convenience. This bill will prohibit the Courts from granting a divorce while reserving the issue of property division for a later date unless both parties agree. The committee substitute adopted by the HESS Committee also prohibits the courts from reserving the issue of child custody for a later date unless both parties agree. I support the inclusion of the child custody issue in HB 146.

Current law allows the division of these issues upon the request of one of the parties whether the other party agrees or not. Typically, one spouse controls the majority of the assets. A bifurcated divorce frequently removes the incentives to resolve property division issues and child custody issues. The party not in control of the majority of the assets is often placed in a severly disadvantaged position.

There are many other disadvantages to bifurcated divorces which are outlined in the attached sponsor statement. These disadvantages are discussed in greater detail in the backup material in the file which was provided by the Legislative Research Agency.

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

Bill No. HB 146

Revision Date:
Title: An Act prohibiting a court from reserving property division issues for a later decision...
Sponsor: Barnes
Requestor: HESS

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

COMPONENT SERIAL NO. 000 | 000 | 000 | 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel **Phone:** 264-8228
Division: Alaska Court System **Date:** 03/28/91

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System **Date:** 03/28/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM April 24, 1991

SUBJECT: Bifurcated Divorces - Court Rules
CSHB 146 ( )

TO: Representative Dave Donley
Chair, House Judiciary Committee

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is a draft CS for HB 146. It corrects an oversight in the original bill and the HES CS with regard to court rules and clarifies the applicability section.

With regard to the court rule change, the bill title contains a reference to the court rule, and section 4 has been added to "flag" the change as required by the Uniform Rules.

These additions are necessary because Rule 54(b), Alaska Rules of Civil Procedure, allows a court to enter judgment on separate claims in an action involving more than one claim if the court makes "an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

CSHB 146(HES) and this CS affect Rule 54(b) because they prohibit a court in a divorce action from separating claims, even upon a finding that there is no just reason for delay, unless the parties agree to the separation. Rule 54(b) does not require agreement of the parties. (In my opinion, even if the parties agree to a separation of claims, the court still would have to make a finding that there is no just reason for delay.)

With regard to the applicability section (Sec. 3), it has been clarified with respect to actions in which judgments may have been made on some claims but not on others.

I apologize for the drafting oversights that necessitate this CS. Please let me know if I can be of further assistance.

TML:gc
91-233.glc
Enclosure

PENSION RIGHTS CENTER

918 16th Street, N.W. Suite 704 Washington, D.C. 20006 (202) 296-3776

April 23, 1991

Dear Representative Barnes:

Enclosed is a copy of our new book, Your Pension Rights At Divorce. I have marked several pages that make reference to the loopholes in the pension laws that can make a bifurcated divorce dangerous for the spouse who will be claiming the pension. Please let me know if I can provide additional information.

Sincerely,

Anne Moss

Anne Moss, Director
Women's Pension Project

WALTER J. HICKEL
GOVERNOR

PHONE
(907) 561-4227

STATE OF ALASKA
OFFICE OF THE GOVERNOR

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

April 25, 1991

TO: Representative Ramona Barnes

FROM Glenne Ralls
Alaska Womens Commission

Re: House Bill 146

The Women's Commision has had the opportunity to review House Bill 146,"An Act prohibiting a court reserving property division issues for a later decision when granting certain judgements unless agreed by the parties; and providing for an effective date." We believe granting a final decree of divorce separate from financial matters reduces the incentive to finalize a divorce, particularly for the party with more money. The party who stands to lose assets (usually men) in an economic distribution may delay settlement in the hope that the dependent party will eventually agree to accept less in order to have the issue finally resolved.

In a bifurcated divorce proceedings, the party with fewer assets has lost the protection afforded by statute to a spouse and yet has not gained the protection of a valid property settlement agreement. Property owned at the time of divorce may have diminished, increased or disappeared by the time of economic distribution.

In the event of the death of either party, as an ex-spouse without the protection of a valid property settlement agreement; the surviving party or heirs would have difficulty claiming beneficiary status under any life insurance policy.

We believe it is unfair to reserve the issue of property division for a later time unless agreed to by each party.

5-6-91
Gruenberg HB 146

Bifurcation will be allowed only on:

(a) consent of the parties and guardian ad litem, if any ; or

(b) a showing of good cause and a finding that the interests of the party opposing the motion will not be jeopardized by the bifurcation. In making a determination as to whether bifurcation will jeopardize the interest of the party opposing a bifurcation motion under ~~(b) of~~ this section the court shall consider whether granting the motion will:

1) remove the incentive for the party making the motion to finalize other issues expeditiously;

2) prolong the litigation;

3) put the opposing party's interests substantially at risk due to the death of the other party before a final disposition of the marital property;

4) diminish the ability of the party opposing the motion to protect the value of assets not in their control;

5) be in the best interests of children whose custody will remain unresolved if the motion is granted;

6) have negative tax consequences for the opposing party; ~~and~~ or

7) have negative consequences on the opposing party's ability to maintain health insurance coverage.

Testimony of Judge Reese re: HB 146

My name is John Reese I am a superior court judge in Anchorage but I am speaking individually. I must make the usual disclaimer that I don't speak for the Court System or any of the people here. This is just my opinion. I have reviewed the present version of HB 146 and I do have several thoughts about it that Rep. Barnes wanted me to communicate to the committee.

The issue of bifurcation in a divorce is an important issue that is very frequently overlooked. There are serious problems with it. Granting a divorce does affect the property rights of the parties. A simple severing of the relationship changes the property rights. I don't believe that it makes much difference in custody. I'm not aware of any difference it makes in a custody decision so these comments are strictly limited to the property rights division issue. The three fairly obvious kinds of property rights that are affected by a divorce are the conversion of the way you own real property, the tenancy by the entirety with right of survivorship type of owning property which is what most married couples have. Whoever lives the longest ends up owning it. You don't have to go to probate, you don't have do anything except record the death certificate and that title is changed. If you grant a divorce then you do away with that type of property holding. Property that way converts to what is called tenancy in common by operation of law. A completely different type of property ownership so if you grant the divorce all of a sudden the family home is owned as tenants in common. Then it can be partitioned, it can be subject to separate lawsuits by creditors and third parties of either of the former spouses, it can be taken out from under whoever wants to stay there and who disagrees with whats going on, which is not the case with tenancy by entirety and of course then theres the ultimate problem that one of the people dies before the property is finally resolved between them which means the heirs of the deceased spouse end up owning that spouses share of the property instead of it being in the marital estate subject to division by the divorce court. What happens in that instance, of course, is that a whole lot of lawyers get rich by litigating in probate court or divorce court till they all die. It gets very complicated.

The second property division issue that comes up is the group medical coverage eligibility. If youre not married, the spouse is not eligible generally for group medical coverag. Medical coverage is an

essential right now for anyone and simply by granting the divorce you are destroying the eligibility of one of the spouses. So its a substantial factor.

The third issue is simply probate issues in general whether theres real property involved or not. If you grant the divorce and then one of the parties dies before the marital estate is divided you have very complicated issues of probate law to deal with. You do not have a surviving spouse, so really what you have generated is very expensive multi-sided litigation amoung the heirs of the two parties who were in the process of getting divorced so the heirs of course are going to be more polarized than they might normally be in a probate matter. So again you just created substantial litigation thats going to take a long time to resolve because there are no obivious simple answers to the questions that are raised. The reason for that is because the probate decisions are generally based on what are called legal theories and the divorce decision are based on what are generally called equitably theories. So youve got two different approaches to dispute resolution in confrontation if you have divorce property rights thrown into a probate situation. Now there are a couple of solutions to this, one is something like this bill where you you don't grant a bifurcated divorce unless everybody agrees to it. Another part of that is of course that everybody needs to understand that these issues are present before they can really knowingly agree to do it. If they understand that they are in fact agreeing to a property division when they agree to simply get divorced and they are willing to take these risks and so forth, then there's no reason why they shouldn't be allowed to do it. The problem arises I think when one of the people wants a bifurcated divorce and one objects to it, in which case the court is required to make a decision whether or not separate those issued in a divorce. As a matter of law, you can't separate them so one way of looking at it is that there really should be no such thing as a bifurcated divorce at the present time, even without this legislation. Nobody really looks at it that way. I think what the answer is, that there will be situations where the issues that are affected by the simply granting of the divorce either are so minor that they shouldn't be paid attention to or can be solved in a way that they should no longer be paid attention to. I think the legislation should respond to those situations. I think the granting of a bifurcation should require good cause to grant it if there is objection to it and it should require a finding by the court as to the issues in the marital estate which would be affected by the entry of the divorce, and a finding of how

those issues are to be neutralized so that the effect of the decree is minimized on the rest of the marital estate.

I would say that what you need to do, I don't know anything about legislative drafting, but I did have some unedited suggestions here if you're interested.

Max - We talked a little bit, I guess it was on Friday, before we had to break off. Since then, Mark Handley has drafted up something that I'd like, its conceptual, it hasn't been run through legal services yet, but I'd like to read it to you and get your views on it.

(Get draft.) Max's initial draft comments.

Ithink it's a good idea. My short term memory is going but let me run through it real quick while I remember what you said. The first two I'd like to talk about a little bit longer, I think those are irrelevant. and I don't thin you need those in legislation. I think I need to talk about that a little bit more. I don't think you need to worry about it affecting child custody issues. I have a great deal of trouble thinking of any hypothetical situation where bifurcation would have any affect on a custody decision. I realize that this issue comes up most often when the objecting party, well, when one party or the other thinks that the opposite spouse is trying to drag the divorce out or making it more expensive or holding the property division hostage or for some advantage or I suppose maybe this is an example of custody; give me a divorce or I won't give you custody. That sort of thing. I think those are superficial reasons which really do not have substance in the way these divorce decisions are made. If somebody wants to get divorced and wants to get the property divided incentive has nothing to do with it. And by putting those first two listed reasons in as a reason to be dealt with by the court is sort of putting a premium on divorce by extortion. You don't need to add incentive to it. Incentive has nothing to do with it. If your attorney can't bring it to a head within 3 months, get a new attorney and go to the bar association and get your fees back from the first attorney because you don't need any leverage to bring a case forward and get it resolved appropriately. To say that I'm gonna hold this marriage hostage until you give me a property division either give me the property division I want or give me a property division fast is missing the whole point. That's not what we're supposed to be doing in court and thats certainly not what the legislature has ever wanted people to do when they got divorced. The whole point of getting divorced is to keep people from putting that kind of inappropriate leverage on each other.

I support the
CS HB 146
7-LS 0645\P
5/13/91

Vanessa Barnes

OFFICIAL BUSINESS

Alaska State Legislature

House of Representatives

REPRESENTATIVE
RAMONA L. BARNES
DISTRICT 14

ANCHORAGE
2230 PARSON
ANCHORAGE, ALASKA 99504
(907) 337-7737
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BOX V
JUNEAU, ALASKA 99811
(907) 465-3438

SPONSOR STATEMENT

HB 146

HB 146 would prohibit a court from allowing a divorce decree while reserving property division issues for a later time. Although there may be some advantages to separating the issues, I believe that the disadvantages far outweigh the advantages.

Disadvantages include the following:

Incentive to finalize financial matters is reduced, particularly for the party with the majority of the assets.

Delay prolongs and exacerbates litigation.

Lack of settlement and/or remarriage can complicate new lives for both parties.

Involved parents can seem to put their own needs ahead of those of their children.

Gaps in medical insurance can occur.

Real property title can be in question if one party dies.

The party with fewer assets has no control over the property in question.

If either party dies, the ex-spouse has lost status in life insurance and inheritance rights.

The one advantage that can be cited is that it accellerates the actual disolving of the relationship as the time needed for a divorce is less than the time needed for the settlement and disposition of the marital estate.

I have attached information supplied by the Legislative Research Agency. After reading this material I believe you will agree that the disadvantages far outweigh the advantages and I urge your serious consideration on this matter.

WALTER J. HICKEL
GOVERNOR

PHONE
(907) 561-4227

STATE OF ALASKA
OFFICE OF THE GOVERNOR

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

April, 1991

TO: Representative Pat Carney
HESS Committee

FROM Glenne Ralls
Alaska Womens Commission

Re: House Bill 146

The Women's Commision has had the opportunity to review House Bill 146,"An Act prohibiting a court reserving property division issues for a later decision when granting certain judgements unless agreed by the parties; and providing for an effective date." We believe granting a final decree of divorce separate from financial matters reduces the incentive to finalize a divorce, particularly for the party with more money. The party who stands to lose assets (usually men) in an economic distribution may delay settlement in the hope that the dependent party will eventually agree to accept less in order to have the issue finally resolved.

In a bifurcated divorce proceedings, the party with fewer assets has lost the protection afforded by statute to a spouse and yet has not gained the protection of a valid property settlement agreement. Property owned at the time of divorce may have diminished, increased or disappeared by the time of economic distribution.

In the event of the death of either party, as an ex-spouse without the protection of a valid property settlement agreement; the surviving party or heirs would have difficulty claiming beneficiary status under any life insurance policy.

We believe it is unfair to reserve the issue of property division for a later time unless agreed to by each party.

BACK UP

FISCAL NOTE

No. 1

STATE OF ALASKA
1991 LEGISLATIVE SESSION

Bill Version: CSHB 146(HES)
(H) Publish Date: 4/5/91

Revision Date:
Title: An Act prohibiting a court from reserving property division issues for a later decision...
Sponsor: Barnes
Requestor: HESS

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

COMPONENT SERIAL NO. 000 | 000 | 000 | 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel
Division: Alaska Court System
Phone: 264-8228
Date: 03/28/91

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
Date: 03/28/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

COMMITTEE COPY

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 19, 1991 FURTHER REFERRALS: Judiciary

Date of Committee Action: 4/3/91

The HEALTH, EDUCATION AND SOCIAL SERVICES Committee considered: HB 146

HOUSE BILL NO. 146 PROPERTY DIVISION IN DIVORCES/ANNULMENTS

"An Act prohibiting a court from reserving property division issues for a later decision when granting certain judgments unless agreed to by the parties; and providing for an effective date."

RECOMMENDATIONS:
be replaced with CSHB 146 (HES)
[ ] the same title
[✓] a new title
[ ] have attached amendments(s)
[✓] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact _____
[✓] zero fiscal note AK Court System

APPROVES PREVIOUS: (Dept/Date)
[ ] fiscal note(s) _____
[ ] zero fiscal note(s) _____

SIGNING DO PASS: SIGNING OTHER RECOMMENDATIONS:

	Check appropriate column:	Do Not Pass	No Rec	Amend
Cheri Davis	Davis			
Mark Hanley	Hanley			
Betty J. Davis	Davis			
J. D. Gonzales	Gonzales			
Patrick Carney	Carney			
Lincoln	Lincoln			

Co-Chairman's Signature

HOUSE COMMITTEE REPORT

(7)

Date Referred: April 5, 1991 FURTHER REFERRALS:

Date of Committee Action: 5-13-91

The JUDICIARY Committee considered: HB 146

HOUSE BILL NO. 146 PROPERTY DIVISION IN DIVORCES/ANNULMENTS

"An Act prohibiting a court from reserving property division issues for a later decision when granting certain judgments unless agreed to by the parties; and providing for an effective date."

RECOMMENDATIONS:
be replaced with CS HB 146 (Jud) [ ] the same title [X] a new title

[ ] have attached amendments(s)
[X] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact _____

[ ] zero fiscal note _____

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[X] zero fiscal note(s) AK. Court 4-5-91

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
[illegible]	-	[illegible]		-	
[illegible]					
[illegible]	✓				
[illegible]	✓				
[illegible]	✓	[illegible]		✓	

[illegible]
CHAIRMAN'S SIGNATURE

7-LS0645\M
Lauterbach
4/24/91

CS FOR HOUSE BILL NO. 146 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES BARNES, Brown, Ulmer, Koponen, M.A.Miller

A BILL

FOR AN ACT ENTITLED

"An Act prohibiting a court from reserving property division and child custody issues for a later decision when granting certain judgments unless agreed to by the parties; amending Rule 54(b), Alaska Rules of Civil Procedure; and providing for an effective date."

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

*** Section 1.** AS 25.24.150 is amended by adding a new subsection to read:

(f) If the issue of child custody is before the court at the time it issues a judgment under AS 25.24.160, the court shall concurrently issue a judgment for custody under this section unless each party expressly agrees on the record to let the court delay the custody decision for a later time.

*** Sec. 2.** AS 25.24.160 is amended by adding a new subsection to read:

(c) Notwithstanding (a) of this section, if one of the parties to an action for divorce or action declaring a marriage void expressly submits to the court the issue of property division and has not withdrawn that issue from the court before judgment, the court shall provide in the judgment for the division of property and may not reserve the issue of property division for a

later time unless expressly agreed to by each party after notice of the court's intent to reserve the issue.

* **Sec. 3.** AS 25.24.150(f) and 25.24.160(c), added by secs. 1 - 2 of this Act, apply to actions for divorce and actions declaring a marriage void for which no judgment on any claim in the action has been entered before the effective date of this Act.

* **Sec. 4.** AS 25.24.150(f) and 25.24.160(c), added by secs. 1 - 2 of this Act, amend Rule 54(b), Alaska Rules of Civil Procedure, by prohibiting separation of claims in certain actions without consent of the parties.

* **Sec. 5.** This Act takes effect immediately under AS 01.10.070(c) but only if sec. 4 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

In the Courts

OPM, Former Spouses at Odds Over Survivor Benefits

By Ellen Rafshoon

The Office of Personnel Management does not want to honor certain divorce property settlements providing for the payment of survivor annuity benefits to former spouses of federal employees.

At OPM's request, a federal appeals court has agreed to review two Merit Systems Protection Board decisions ordering OPM to pay the benefits.

In both cases, the former wives of retired federal employees had secured annuity benefits through court-ordered property settlement agreements which were issued months after the couples' divorces.

When the women sought to obtain the benefits, OPM refused to abide by the court orders. In decisions issued earlier this year, MSPB overturned OPM's decisions.

At issue are decisions involving the former wives of a Veterans Affairs hospital worker and a U.S. Postal Service worker.

A West Virginia state judge in 1987 issued a divorce decree to Esther Penn and Claude Weatherholt, a Martinsburg VA hospital food service worker, after 20 years of marriage. Weatherholt died a year later, before the couple had secured a property settlement.

But in a 1989 court order, Penn secured such a settlement, calling for even distribution of her former spouse's property, including 50 percent of his annuity.

The court order was in line with Weatherholt's wishes; when he retired in 1974, he elected to receive a reduced annuity to provide for annuity payments to his wife in the event of his death.

John W. Love, a retired Oklahoma postal worker, and his wife, Lois, divorced in 1987. The state judge handling their divorce decided to issue one order ending their marriage and another four months later calling for alimony payments and property distribution.

The property decree called for Lois Love to receive a portion of her former husband's annuity in the event he died. Since 1972, when John Love retired, he had been receiving a reduced annuity to provide survivor benefits to his wife.

But OPM officials told the spouses they would be denied the benefits on the grounds that the property settlements were "modifications" of their original divorce agreements. If changes are made in divorce settlements after the death or retirement of the federal employee, the spouse should get nothing, OPM maintained.

The spouses argued that the property settlements were not changes in their divorce settlements. Rather, they were the second part of what is known as a "bifurcated" or two-pronged divorce, with the marriage ended in one agreement and a property settlement in a subsequent agreement.

In agreeing with the spouses, MSPB found OPM had wrongly interpreted a 1984 law governing payment of survivor annuities when it denied benefits to the two spouses.

Under the Civil Service Spouse Equity Act of 1984, a former spouse is entitled to a deferred annuity if the federal worker provides for such payment as part of "any decree of divorce or annulment or any court order or court-approved property settlement incident to such decree."

A "modification" of that order after the death of the retiree cannot provide for a spouse annuity under the law.

In rules published in 1989, OPM interpreted that law to mean that a divorced spouse could receive an annuity payment only if provided in the first order ending the marriage.

In its opinion on Love's case, MSPB found that interpretation to be "unreasonable and erroneous ... insofar as it requires that, in order to award a former spouse annuity in a divorce proceeding following an employee's retirement, a court order must be the first order terminating the marital relationship."

'[OPM's interpretation would] greatly frustrate the statutory purpose of providing for the financial security of former spouses.'

—MSPB

MSPB said Congress wanted OPM to interpret the Spouse Act liberally in order to ensure financial security of former spouses of federal employees. And to deny survivor benefits to spouses who are awarded benefits as a result of two-pronged divorce settlements would "greatly frustrate the statutory purpose of providing for the financial security of former spouses," the board said.

OPM has argued that the board's interpretation of the Spouse Act would allow some retirees to obtain a "free ride." They could retain a full annuity during the period when the divorce is issued and the property settlement is reached.

Even though in the two cases at hand the retirees were not receiving full annuities, OPM maintains the board's ruling would "lead to the absurd result that former spouses in the situations presented in these cases, and no others, could receive survivor annuities without a corresponding reduction in the annuity of the retired federal employee." The remarks were in court papers requesting appeals court review of the decisions.

OPM wants the law applied so that retirees are encouraged to make the decision to provide survivor benefits as early as possible in their lifetime and allow for few changes in that decision.

If a decision is made later in life with a better sense of how long the retiree might live, it provides an "advantage" to the retiree which skews the actuarial calculations that keep the retirement system afloat, OPM has argued in court papers.

The financial viability of the retirement system is based on the premise that some people who elect to provide survivor benefits will outlive the beneficiaries so that the benefits are never paid, OPM explained.

In Esther Penn's case, her husband was already dead when the court order providing her survivor benefits was issued, so the risk that Weatherholt would die before her was obviously gone. Penn, OPM maintained, therefore had an unfair advantage in obtaining her benefits.

Allowing such manipulation of the system would harm the financial security of all retirees, OPM said. *Constance B. Newman v. Lois G. Love and Esther E. Penn, Misc. 303, Circuit Court of Appeals, April 12, 1991. Also see Lois G. Love v. OPM, MSPB DA08318910394, and Esther E. Penn v. OPM, MSPB, PH08318910489, Jan. 28, 1991.*

Retiree Gets Another Shot at Bias Suit After Legal Mishaps

HB

151

Richard H. Parrish
1902 K Street
Anchorage, AK 99503

April 15, 1991

Members of the House Health and Social Services Committee
MS 3100
Alaska State Legislature
Juneau, AK 99811

This letter is being written in support of House Bill 51, which will offer parole eligibility to presumptive offenders in our Corections Centers. Just as important, HB 51 will provide badly needed incentive for convicted sex offenders to complete treatment programming.

Our Alaska Parole Board has a percentage of success rate better than the national average. They are more than capable of screening this large segment of prison population for potential parole measures. HB 51 provides stringent conditions which inmates must meet in order to become eligible for parole.

It is necessary for our State of Alaska to provide incentives for sex offenders to complete programming and treatments, so that their behavior when they are eventually released will be proper.

Thank you.

Sincerely yours,

Richard H. Parrish

Richard H. Parrish

Copy to:

Niilo Koponen
My District 11:
Sen. Drue Pearce
Sen. Pat Rodey
Rep. Dave Donley
Rep. Max Gruenberg

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE KOPONEN

NAME: MARY LOU WIRUM
TITLE:
ADDRESS: 1240 S STREET
CITY: ANCHORAGE ZIP: 99501
PHONE: 276-3628
BILL NO:
SUBJECT: HB 544 AND HB 545/SENTENCING
MESSAGE: PLEASE SUPPORT HB 544 AND HB 545. MANY YOUNG FIRST TIME OFFENDERS, AFTER SERVING APPROPRIATE SENTENCES AND COMPLETING COUNSELING, SHOULD BE GIVEN OPPORTUNITY FOR PAROLE SO THAT GROWTH AND CONTINUED REHABILITATION CAN CONTINUE IN A NORMAL NON-PRISON SETTING. ALTERNATIVE SENTENCING CAN SAVE THE STATE MILLIONS OF DOLLARS AND BENEFIT MANY YOUNG OFFENDERS, SO THEY CAN BECOME CONTRIBUTING MEMBERS OF SOCIETY. /BN

POMID: 03092145
DATE: 03/27/90
TIME: 09:21:45
LIONAME: ANCHORAGE LIO

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BOYER	BROWN	BINKLEY
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DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
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GOLL	GRUENBERG	FISCHER
GRUSSENDORF	HANLEY	FRANK
HOFFMAN	HUDSON	HALFORD
JACKO	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVARRE	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SWACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

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psychiatr. + supports HB 544-545

JOSEPH P. O'LONE, M.D.
PSYCHIATRIST

3-14-90

Representative Niilo Koponen
PO Box ~~[illegible]~~ V
Juneau, AK 99811

Re: HBs 544 + 545

Dear Representative Koponen,

I would appreciate your affirmative vote on HBs 544 + 545.

My interest is as an M.D. psychiatrist who does some court work and who feels that, in worthy cases, more mitigating factors + alternative sentencing should be considered.

Sincerely yours,

Joseph P. O'Lone, M.D.

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SUMMARY OF
THE FINAL SETTLEMENT AGREEMENT AND ORDER
(FSA)
CLEARY V. SMITH
3AN-81-5274 Civ.

Prepared by Michael J. Stark
Assistant Attorney General

Overview

The FSA is a court approved settlement that was implemented on November 1, 1990 after more than nine years of litigation. Settlement discussions took place over 18 months and consisted of more than 350 hours of face-to-face negotiations. These negotiations involved the active participation of high level corrections officials; and drafts of the proposed settlement were circulated to and comments solicited from correctional superintendents, the attorney general's office, the governor's office on policy development, as well as from former Governor Cowper. The end result was a comprehensive 88 page document which resolved a multitude of issues in the case, including an appeal before the Alaska Supreme Court involving more than 20 issues.

The FSA is broken down into 11 sections as follows:

I. Coverage
II. Principles of Judicial Interpretation and Definitions
III. Facility Requirements
IV. Operational Requirements
V. Rights and Opportunities To Be Provided Inmates
VI. Rehabilitation Programs and Services
VII. Classification, Administrative Segregation, Discipline, and Grievances

VIII. Overcrowding
IX. Future Monitoring, Modification and Enforcement of Agreement
X. Resolution of Pending Appeals and Claims
XI. Plaintiffs' Fees and Costs, and Release of Plaintiffs' Counsel

While the FSA is obviously organized along subject matter lines, some comments are common to a number of sections which cross these subject lines.

First, a significant number of the provisions in the FSA were already required by earlier orders of the court in this case, by Alaska's statutes, or by the federal or state constitutions. Thus, the FSA does not change this settled law. These provisions address such subjects under Section III as: heat, lighting and ventilation, non-smoking area, plumbing, gymnasium/recreation area, law library, visitation rooms, and attorney-client rooms; under Section IV as: staffing, staff training, fire and life safety, sanitation, inmate personal hygiene, inmate clothing, bedding, housing, food services, medical and dental care, and mental health services; under Section V as: exercise and recreation, visitation, telephone communication, mail communication, inmate information, access to courts and legal services, access to the law library and legal materials, and religious freedom; under Section VI as: availability of programs for female inmates, counseling, lifeskills program, educational services, vocational training/work programs, rehabilitation services, special women's services, prerelease assessments, parole planning, participation in programs and services, and program supervision: under Section VII as: classification, administrative segregation, discipline, and hearing advisors.

Secondly, a significant number of the provisions in the FSA merely restate practices followed for years by the department of corrections because they are based on principles of sound correctional management. While I will not list these provisions in this summary, they are addressed in the department's regulations and policy and procedures. I am available to discuss these provisions in more detail if that is your desire.

Lastly, a considerable cost savings was realized by the settlement of this case due to the avoidance of the lengthy litigation that would have occurred had the department pursued its appeal of the trial court's decision which followed the trial in this case in 1984. Because of the passage of time since the trial in this case, the supreme court would have remanded the case to the trial court to update the record. This would have resulted in

essentially another trial.[1] The litigation costs that were avoided are separate and apart from the costs that were likely to result from an adverse order of the court, particularly in the areas of mental health and overcrowding.

Major Issues Addressed in the FSA

As is evident by the prior discussion as well as a review of the table of contents of the FSA, most of the issues addressed in the FSA are fairly innocuous, and simply restate much of what the department is obligated to do anyway. There are a number of provisions, however, which have fiscal impact and are therefore potentially controversial. A discussion of these issues follows.

New Facility for Women

Paragraph III. L on page 8 of the FSA obligates the department to establish an additional facility or devote part of an existing facility for long-term sentenced women, to be in operation no later than July 1, 1994. In the event the department does not receive sufficient funding by July 1, 1991 to design the facility, or sufficient funding by July 1, 1992 to construct the facility, the plaintiffs have reserved the right to bring an action challenging the department's policies and practices toward long-term sentenced women offenders.[2] The legislature retains the authority to appropriate the necessary funds or not, as it deems fit.

Mental Health Care

Paragraphs IV. K. 4-7 on pages 21-23 of the FSA obligate the department to establish a 30 bed forensic unit to provide intensive inpatient mental health treatment for acutely and chronically mentally ill inmates who cannot adequately function in the general inmate population. The provisions require that the facility be staffed by a number of mental health professionals and correctional staff.

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[1] The trial in this case took place in 1984, and lasted almost two months.

[2] The department's FY 91 budget contained an appropriation for the design of the women's facility in Juneau. Some question exists as to the appropriation since the department's plan to construct the facility in Juneau has been modified, and it is now planned for the Anchorage bowl area.