

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672

6978 HOUSE JUDICIARY

22

HB

509

(7)
Date Referred: March 4, 1992

HOUSE COMMITTEE REPORT
FURTHER REFERRALS:

Date of Committee Action: 3.18.92

The JUDICIARY Committee considered:

HB 509

HOUSE BILL NO. 509

UNIFORM CUSTODIAL TRUST ACT

"An Act adopting the Uniform Custodial Trust Act."

RECOMMENDATIONS:

be replaced with CS HB 509 (L.C.)

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)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact _____

fiscal note(s) Courts (3.4.92)

zero fiscal note _____

zero fiscal note(s) Courts (3.4.92)

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>[Signature]</i>	<input checked="" type="checkbox"/>				
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		<i>[Signature]</i>		<input checked="" type="checkbox"/>	

[Signature]
CHAIRMAN'S SIGNATURE

FISCAL NOTE

**STATE OF ALASKA
1992 LEGISLATIVE SESSION**

Bill No. HB 509

Revision Date: _____ Department Affected: Alaska Court System
 Title: An Act adopting the Uniform BRU: Trial Courts
 Custodial Act Components: _____
 Sponsor: Gruenberg
 Requestor: Labor & Commerce COMPONENT SERIAL NO. 000 | 000 000 | 788

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
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: 284-8228
 Division: Alaska Court System Date: 03/02/92

Approved by: Arthur H. Snowden, II, Administrative Director
 Agency: Alaska Court System Date: 03/02/92

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

State of Alaska



House Majority Leader
COMMITTEES
HOUSE JUDICIARY
HOUSE RULES
HOUSE STATE AFFAIRS
SPECIAL COMMITTEE
MILITARY AND VET. AFFAIRS
LEGISLATIVE COUNCIL

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

P.O. Box V
JUNEAU, AK 99811
(907) 465-3718
465-4968/4986
(SESSION)

3111 C STREET, SUITE 440
ANCHORAGE, AK 99503
(907) 561-7621

M E M O R A N D U M

March 10, 1992

TO: Members of the House Judiciary Committee
FROM: Representative Max F. Gruenberg, Jr. *Max*
RE: HB 509 (L&C), "An Act adopting the Uniform Custodial Trust Act."

I would very much appreciate your support for HB 509 (L&C).

HB 509 (L&C) adopts the Uniform Custodial Trust Act, (UCTA). The primary purpose of the UCTA is to provide a relatively easy and inexpensive mechanism for the elderly to provide for the future management of their assets in the event their incapacity.

The UCTA provides a simplified procedure for a person to establish a trust. The UCTA also allows provision for the transfer of control of the trust in the event of incapacity.

If you have any questions or comments, please contact me, or my legislative assistant, Mark Handley, at 465-4986.

Thank you.

HB509.SUP\MTH

Date Referred: February 18, 1992

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 3/3/92

The LABOR AND COMMERCE Committee considered:

HB 509

HOUSE BILL NO. 509

UNIFORM CUSTODIAL TRUST ACT

"An Act adopting the Uniform Custodial Trust Act."

RECOMMENDATIONS: CS HB 509 (LTC) [] the same title
be replaced with _____ [] a new title

[] have attached amendments(s)

[] do pass

[] do not pass

[X] no recommendations

[] individual recommendations

[] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): _____ (Dept)

APPROVES PREVIOUS: _____ (Dept/Date)

[] fiscal impact _____

[] fiscal note(s) _____

[X] zero fiscal note Courts

[] zero fiscal note(s) _____

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
		<i>Adrian L. Taylor</i>		X	
		<i>E. Brewer</i>			
		<i>Donna J. Gentry</i>		X	
		<i>John J. ...</i>			
		<i>Kevin Pat ...</i>			

[Handwritten Signature]
CHAIRMAN'S SIGNATURE

State of Alaska

House Majority Leader
COMMITTEES
HOUSE JUDICIARY
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M E M O R A N D U M

February 18, 1992

TO: Representative David Finkelstein
Chair, House Labor and Commerce Committee

FROM: Representative Max F. Gruenberg, Jr.

RE: HB 509, "An Act adopting the Uniform Custodial Trust Act."

I would very much appreciate it if you would schedule HB 509 for a hearing as soon as it is possible.

HB 509 adopts the Uniform Custodial Trust Act, (UCTA). The primary purpose of the UCTA is to provide a relatively easy and inexpensive mechanism for the elderly to provide for the future management of their assets in the event their incapacity.

The UCTA provides a simplified procedure for a person to establish a trust. The UCTA also allows provision for the transfer of control of the trust in the event of incapacity.

If you have any questions or comments, please contact me, or my legislative assistant, Mark Handley, at 465-4986.

Thank you.

HB509.TXT\MTH

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

240 Main Street, Suite 500
Juneau, Alaska 99801-2101

MEMORANDUM

February 27, 1992

SUBJECT: Bill adopting the Uniform Custodial Trust Act (HB 509)

TO: Representative Max Gruenberg
Attn: Mark

FROM: Theresa L. Bannister *TB*
Legislative Counsel

This is a revised memo to accompany HB 509, the bill that you requested to adopt the Uniform Custodial Trust Act in Alaska, and replaces my memo of February 14, 1992.

The bill tracks the uniform language very closely and only diverges when necessary to put the language in our legislative style or to clarify a provision. In addition to other very technical changes, the comments that follow indicate some of the modifications.

1. In various places, "an", "a", or no word was substituted for "any", where "any" did not appear to be meaningful, and "under" was substituted for "pursuant to" when referring to statutes.
2. In AS 13.60.010(a), the comma after beneficiary was removed and an "and" inserted after "transferor,".
3. In AS 13.60.040, \$10,000 was used at your request as per the Virginia statute.
4. In AS 13.60.050(a), "considered" was substituted for "deemed", "married couple" was substituted for "husband and wife" and the bracketed language was deleted at your request.
5. In AS 13.60.060(d), "so" was removed from in front of "identified" and "identifying" and "as required by this subsection" was included in two spots.
6. In AS 13.60.090(b), "by relying" was substituted for "in reliance", and the subsection was broken out.

Representative Max Gruenberg

February 27, 1992

Page 2

7. In AS 13.60.120(c), the Virginia version was used per your request, and in AS 13.60.120(b), the language was adjusted to clarify the paragraph and conform to our drafting style.

8. In AS 13.60.140(a), (a) was broken out into (a) and (b) and a reference to (a) was included in (b); this was to make the subsection conform to our drafting style.

9. In AS 13.60.140(d), "previous" was substituted for "predecessor."

10. In AS 13.60.150(a)(1), a comma was added after "matter", and the language was slightly rewritten to make it clearer.

11. In AS 13.60.150(c), the language was adjusted to clarify the subsection.

12. In AS 13.60.170(a)(2), "from this date" was substituted for "henceforth."

13. In AS 13.60.170(b), "transferor of the property" was substituted for "owner" (this is the Virginia addition you requested).

14. I: AS 13.60.170(c)(2), "set out" was substituted for "prescribed."

If you would like more information on the above, please advise.

TLB:pl

92-139.plm

UNIFORM CUSTODIAL TRUST ACT

Table of Jurisdictions Wherein Act Has Been Adopted

Jurisdiction	Laws	Effective Date	Statutory Citation
Hawaii	1989, Act 76	5-8-1989	HRS §§ 554B-1 to 554B-22.
Idaho	1989, c. 230		I.C. §§ 68-1301 to 68-1322.
Minnesota	1990, c. 476	4-19-1990*	M.S.A. §§ 529.01 to 529.19.
Missouri	1986, S.B. No. 651		V.A.M.S. §§ 404.400 to 404.650.
Rhode Island	1988, c. 623		Gen. Laws 1956, §§ 18-13-1 to 18-13-22.
Virginia	1990, c. 264		Code 1950, §§ 55-34.1 to 55-34.19.

Historical Note

The Uniform Custodial Trust Act was approved by the National Conference of Commissioners on Uniform State Laws in 1987. The complete text of the act, the prefatory note and comments are set forth in this supplement.

PREFATORY NOTE

This Uniform Act provides for the creation of a statutory custodial trust for adults to be governed by the provisions of the Act whenever property is delivered to another "as custodial trustee under the (Enacting state) Uniform Custodial Trust Act." The provisions of this Act are based on trust analogies to concepts developed and used in establishing custodianships for minors under the Uniform Transfers to Minors Act (UTMA). The Custodial Trust Act is designed to provide a statutory standby inter vivos trust for individuals who typically are not very affluent or sophisticated, and possibly represented by attorneys engaged in general rather than specialized estate practice. The most frequent use of this trust would be in response to the commonly occurring need of elderly individuals to provide for the future management of assets in the event of incapacity. The statute will also be available for accomplishing distribution of funds by judgment debtors and others to incapacitated persons for whom a conservator has not been appointed. Since this Act allows any person, competent to transfer property, to create custodial trusts for the benefit of themselves or others, with the beneficial interest in custodial trust property in the beneficiary and not in the custodial trustee, its potential for use is extensive. Although the most frequent use probably will be by elderly persons, it is also available for a parent to establish a custodial trust for an adult child who may be incapacitated; for adult persons in the military, or those leaving the country temporarily; to place their property with another for management without relinquishing beneficial ownership of their property; or for young people who have received property under the Uniform Transfers to Minors Act to continue a custodial trust as adults in order to obtain the benefit and convenience of management services performed by the custodial trustee.

This Act follows the approach taken by the Uniform Transfers to Minors Act and allows any kind of property, real or personal, tangible or intangible; to be made the subject of a transfer to a custodial trustee for the benefit of a beneficiary. However, the most typical transaction envisioned would involve a person who would transfer intangible property, such as securities or bank accounts, to a custodial trustee but with retention by the transferor of direction over the property. Later, this direction could be relinquished, or it could be lost upon incapacity. The objective of the statute is to provide a simple trust that is uncomplicated in its creation, administration, and termination. The potential for tax problems is minimized by permitting the beneficiary in most instances to retain control while the beneficiary has capacity to manage the assets effectively. The statute contains an asset specific transfer provision that it is believed will be simple to use and will gain the acceptance of the securities and financial industry. A simple transfer document, examples of which are set forth in the Act, and a receipt from the custodian, also in the Act, would provide for identification of beneficiaries or distributees upon death of the beneficiary. Protection is extended to third parties dealing with the custodian. Although the Act is patterned on the Uniform Transfers to Minors Act and meshes into the Uniform Probate Code, it is appropriate for enactment as well in states which have not adopted either UTMA or the UPC.

An adult beneficiary, who is not incapacitated, may: (1) terminate the custodial trust on demand (Section 2(e)); (2) receive so much of the income or custodial property as he or she may request from time to time (Section 9(a)); and (3) give the custodial trustee binding instructions for investment or management (Section 7(b)). In the absence of direction by the

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CUSTODIAL TRUST

beneficiary; who is not incapacitated, the custodial trustee manages the property subject to the standard of care that would be observed by a prudent person dealing with the property of another and is not limited by other statutory restrictions on investments by fiduciaries. (Section 7).

A principal feature of the Custodial Trust under this Act is designed to protect the beneficiary and his or her dependents against the perils of the beneficiary's possible future incapacity without the necessity of a conservatorship. Under Section 10, the incapacity of the beneficiary does not terminate (1) the custodial trust, (2) the designation of a successor custodial trustee, (3) any power or authority of the custodial trustee, or (4) the immunities of third persons relying on actions of the custodial trustee. The custodial trustee continues to manage the property as a discretionary trust under the prudent person standard for the benefit of the incapacitated beneficiary.

Means of monitoring and enforcing the custodial trust include provisions requiring the custodial trustee to keep the beneficiary informed, requiring accounting by the custodial trustee (Section 15), providing for removal of the custodial trustee (Section 13), and the distribution of the assets on termination of the custodial trust (Section 17). The custodial trustee is protected in Section 16 by the statutes of limitation on proceedings against the custodial trustee.

Transactions with the custodial trustee should be executed readily and quickly by third parties because their rights and protections are determined by the Act and a third party acting in good faith has no need to determine the custodial trustee's authority to bind the beneficiary with respect to property and investment matters. (Section 11). The Act generally limits the claims of third parties to recourse against the custodial property, with the beneficiary insulated against personal liability unless he or she is personally at fault and the custodial trustee is similarly insulated unless the custodial trustee is personally at fault or failed to disclose the custodial capacity when entering into a contract (Section 12).

As a consequence of the mobility of our population, particularly the mature persons who are most likely to utilize this Act, uniformity of the laws governing custodial trusts is highly desirable, and the Act is designed to avoid conflict of laws problems. A custodial trust created under this Act remains subject to this Act despite a subsequent change in the residence of the transferor, the beneficiary, or the custodial trustee or the removal of the custodial trust property from the state of original location. (Section 19).

General Statutory Notes

Hawaii. While the Hawaii act is a substantial adoption of the major provisions of the uniform act, it departs from the official text in such manner that the various instances of substitution, omission, and additional matter cannot be clearly indicated by statutory notes.

Missouri. While the Missouri act is a substantial adoption of the major provisions of the Uniform Act, it departs from the official text in such manner that the various instances of substitution, omission, and additional matter cannot be clearly indicated by statutory notes.

UNIFORM CUSTODIAL TRUST ACT

Section

1. Definitions.
2. Custodial Trust; General.
3. Custodial Trustee for Future Payment or Transfer.
4. Form and Effect of Receipt and Acceptance by Custodial Trustee; Jurisdiction.
5. Transfer to Custodial Trustee by Fiduciary or Obligor; Facility of Payment.
6. Multiple Beneficiaries; Separate Custodial Trusts; Survivorship.
7. General Duties of Custodial Trustee.
8. General Powers of Custodial Trustee.
9. Use of Custodial Trust Property.
10. Determination of Incapacity; Effect.
11. Exemption of Third Person From Liability.
12. Liability to Third Person.

Section

13. Declination, Resignation, Incapacity, Death, or Removal of Custodial Trustee; Designation of Successor Custodial Trustee.
14. Expenses, Compensation, and Bond of Custodial Trustee.
15. Reporting and Accounting by Custodial Trustee; Determination of Liability of Custodial Trustee.
16. Limitations of Action Against Custodial Trustee.
17. Distribution on Termination.
18. Methods and Forms for Creating Custodial Trusts.
19. Applicable Law.
20. Uniformity of Application and Construction.
21. Short Title.
22. Severability.
23. Effective Date.

§ 1. Definitions.

As used in this [Act]:

- (1) "Adult" means an individual who is at least 18 years of age.

(2) "Beneficiary" means an individual for whom property has been transferred to or held under a declaration of trust by a custodial trustee for the individual's use and benefit under this [Act].

(3) "Conservator" means a person appointed or qualified by a court to manage the estate of an individual or a person legally authorized to perform substantially the same functions.

(4) "Court" means the [_____] court of this State.

(5) "Custodial trust property" means an interest in property transferred to or held under a declaration of trust by a custodial trustee under this [Act] and the income from and proceeds of that interest.

(6) "Custodial trustee" means a person designated as trustee of a custodial trust under this [Act] or a substitute or successor to the person designated.

(7) "Guardian" means a person appointed or qualified by a court as a guardian of an individual, including a limited guardian, but not a person who is only a guardian ad litem.

(8) "Incapacitated" means lacking the ability to manage property and business affairs effectively by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, disappearance, minority, or other disabling cause.

(9) "Legal representative" means a personal representative or conservator.

(10) "Member of the beneficiary's family" means a beneficiary's spouse, descendant, stepchild, parent, stepparent, grandparent, brother, sister, uncle, or aunt, whether of the whole or half blood or by adoption.

(11) "Person" means an individual, corporation, business trust, estate, trust, partnership, joint venture, association, or any other legal or commercial entity.

(12) "Personal representative" means an executor, administrator, or special administrator of a decedent's estate, a person legally authorized to perform substantially the same functions, or a successor to any of them.

(13) "State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(14) "Transferor" means a person who creates a custodial trust by transfer or declaration.

(15) "Trust company" means a financial institution, corporation, or other legal entity, authorized to exercise general trust powers.

COMMENT

(1) "Adult" is a person 18 years of age for the purpose of custodial trusts. The result of this is that a person 18 years of age will be eligible to be a custodial trustee under this Act, although he or she may not be eligible under UTMA since minor custodianships under UTMA may run to age 21 and the minor could in some cases be older than the custodian. As the Comments under Section 1 of UTMA explain, the age of 21 was retained under that Act because the Internal Revenue Code continues to permit a "minority trust" under Section 2053(c), to continue in effect until age 21 and because it was believed that most transferors creating trusts or custodianships for minors would prefer to retain the property under management for the benefit of the young person as long as possible. The difference has little or no practical consequence and serves the purpose of each Act.

(3) "Conservator" is defined broadly to permit identification of a person functioning as a conservator.

(4) "Court" means _____ court. Here the likelihood is that most states would utilize the

same court, e.g., the probate court, that deals with conservators and estates.

(5 and 6) The terms "custodial trust property" and "custodial trustee," are used throughout to identify clearly the statutory trust property and trustee under this Act. The statutory trust concept is used throughout the Act.

(7) A definition of guardian has been included and is based on the Uniform Probate Code Section 5-103(6).

(8) A definition of incapacitated has been included for the purpose of this Act, because incapacity of the beneficiary converts the trust from a revocable trust to a discretionary trust. The definition is taken from the Uniform Probate Code Section 5-101(c) relating to the person who is unable to manage property. Compare Uniform Probate Code Section 5-103(7). Note that Section 10(a)(ii) permits a transferor to direct that the trust shall be administered as one for an incapacitated person. Section 10 deals specifically with the determination of incapacity.

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- (10) The beneficiary's family is broadly defined to identify persons who may have standing to seek judicial intervention or accounting (Sections 13 and 15).
- (11) The definition of a person is taken from Uniform Probate Code Section 1-201(29).

(12) Personal representative is broadly defined and the definition reflects that in the Uniform Probate Code Section 1-201(30).

Action in Adopting Jurisdictions

Variations from Official Text:

- Minnesota. In subsec. (8), substitutes "mental retardation" for "mental deficiency".
- Adds definition as follows: "Holder of the beneficiary's power of attorney" means a person who is a holder of the

beneficiary's unrevoked power of attorney if the document creating the power of attorney grants powers similar or identical to those defined as 'beneficiary transactions' in section 523.24, subdivision 7."

Virginia. In par. (7), substitutes "a person" for "an individual".

Law Review Commentaries

New Durable Power Law and Custodial Trust Act Amendments. Leo E. Eickhoff, Jr. 45 J. of Mo Bar 329 (1989).

Library References

American Digest System

Nature and essentials of trusts in general, see Trusts &1.

Encyclopedias

Definitions of terms in connection with trusts in general, see C.J.S. Trusts §§ 1 to 7.

§ 2. Custodial Trust; General

(a) A person may create a custodial trust of property by a written transfer of the property to another person, evidenced by registration or by other instrument of transfer, executed in any lawful manner, naming as beneficiary, an individual who may be the transferor, in which the transferee is designated, in substance, as custodial trustee under the [Enacting state] Uniform Custodial Trust Act.

(b) A person may create a custodial trust of property by a written declaration, evidenced by registration of the property or by other instrument of declaration executed in any lawful manner, describing the property and naming as beneficiary an individual other than the declarant, in which the declarant as titleholder is designated, in substance, as custodial trustee under the [Enacting state] Uniform Custodial Trust Act. A registration or other declaration of trust for the sole benefit of the declarant is not a custodial trust under this [Act].

(c) Title to custodial trust property is in the custodial trustee and the beneficial interest is in the beneficiary.

(d) Except as provided in subsection (e), a transferor may not terminate a custodial trust.

(e) The beneficiary, if not incapacitated, or the conservator of an incapacitated beneficiary, may terminate a custodial trust by delivering to the custodial trustee a writing signed by the beneficiary or conservator declaring the termination. If not previously terminated, the custodial trust terminates on the death of the beneficiary.

(f) Any person may augment existing custodial trust property by the addition of other property pursuant to this [Act].

(g) The transferor may designate, or authorize the designation of, a successor custodial trustee in the trust instrument.

(h) This [Act] does not displace or restrict other means of creating trusts. A trust whose terms do not conform to this [Act] may be enforceable according to its terms under other law.

Section 2 is the principal provision authorizing the creation of a custodial trust and utilizes the concept of incorporation by reference when the transferee or titleholder of property is designated as custodial trustee under the Act. Section 2 sets forth the general effect of such a transfer. Section 18 provides forms which satisfy the requirements of this section and identifies customary methods of transferring assets to create a custodial trust.

Section 2(a) provides that a trust may be created by transfer to another for the benefit of the transferor or another. This is expected to be the most common way in which a custodial trust would be created. However, a custodial trust may also be created by declaration of trust by the owner of property to hold it for the benefit of another as is provided in Section 2(b). A declaration in trust by the owner of property for the sole benefit of the owner is not contemplated by this Act because such an attempt may be considered ineffective as a trust due to the total identity of the trustee and beneficiary. However, the doctrine of merger would not preclude an effective transfer under this Act for the benefit of the transferor and one or more other beneficiaries. See Section 6.

A custodial trust could be created by the exercise of a valid power of attorney or power of appointment given by the owner of property as one of the transfers "consistent with law."

These alternatives permit the major uses of the custodial trust to be accomplished expeditiously. For example, an older person, wishing to be relieved of management of property may transfer property to another for benefit of the transferor or of the transferor's spouse or child. The declaration may be used to establish a trust of which the owner is trustee to continue management of the property for benefit of another, such as a spouse or child. The trust may include a provision for distribution of assets remaining at the beneficiary's death directly to a named distributee.

This Act does not preclude the creation of trusts under other existing law, statutory or nonstatutory, but is designed to facilitate the creation of simple trusts incorporating the provisions of this Act. The written transfer or declaration "consistent with law" requires that the formalities of the transfer of particular property necessary under other law will be observed, e.g., if land is involved, the requirements of a proper deed and recording must be satisfied.

Section 2(c) provides for the retention of the beneficial interest in the custodial trust property in the beneficiary and, of course, not in the custodial trustee. The extensive control and benefit in the beneficiary who is not incapacitated maintains the simplicity of the trust and avoids tax complexity. The custodial trustee is given the title to the property and authority to act with regard to the property only as is authorized by the statute. The custodial trustee's powers are enumerated in Section 8.

Section 2(e) gives the adult beneficiary, who is not incapacitated, the power to terminate the custodial trust at any time during his or her lifetime. This power of termination exists in any beneficiary who is not incapacitated whether the beneficiary was or was not the transferor. A beneficiary may be determined to be incapacitated or the transferor may designate that the trust is to be administered as a trust for an incapacitated beneficiary under Section 10, in which event the beneficiary does not have the power to terminate. However, the designation of incapacity by the transferor can be modified by the trustee or the court by reason of changed circumstances pursuant to Section 10. The Act precludes termination by exercise of a durable power of attorney if the beneficiary is incompetent (Section 7(f)). If the donor prefers not to permit the beneficiary the power to terminate or to designate the beneficiary as incapacitated under Section 10, an individually drafted trust outside the scope of this Act would seem appropriate.

Upon termination of a custodial trust, the custodial trust property must be distributed as provided in Section 17.

A transfer under this Act is irrevocable except to the extent the beneficiary may terminate it. Hence, a transfer to a trustee for benefit of a person other than the transferor is not revocable by the transferor. If a power of revocation were retained by the transferor, that would be a trust outside the scope of this Act and enforceable under general law pursuant to subsection 2(h).

This Act does not provide for protection of the custodial trust assets from the claims of creditors of the beneficiary, whether those are general or governmental creditors. Other laws of the state remain unaffected. In this regard, unusual problems of handicapped persons and the coordination of resources and state or federal services call for special provision and planning outside the scope of this Act.

Action in Adopting Jurisdictions

Variations from Official Text:

Mississippi. In subsec. (c), substitute "holder of the beneficiary's power of attorney" for "conservator of an incapacitated beneficiary" in the first instance and for "conservator" in the second instance.

Virginia. In subsec. (a), insert "if the property is of a type subject to registration," following "registration".

In subsec. (b), insert "In addition," at the beginning thereof, and insert "if the property is of a type subject to registration," following "registration of the property".

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Combines subsecs. (d) and (e) in one subsection [designat-
D] which reads: "D. The beneficiary, if not incapacitat-
may terminate a custodial trust by delivering to the
custodial trustee a writing signed by the beneficiary declar-
the termination. The conservator of an incapacitated
beneficiary may similarly terminate the custodial trust in

this manner but only if granted the power by the circuit
court that appointed him in a proceeding in which the
custodial trustee is made a party. If not previously termi-
nated, the custodial trust terminates on the death of the
beneficiary. A transferor may not terminate a custodial
trust except as provided in this subsection."

Library References

American Digest System

- Appointment of new trustee, see Trusts ⇨169 (1 to 3).
- Modification of trust, see Trusts ⇨58.
- Nature of estate in trust, see Trusts ⇨129.
- Necessity and sufficiency of delivery of property, see Trusts ⇨37½.
- Recording and registration of instrument creating trust, see Trusts ⇨23.
- Revocation and termination of trusts, see Trusts ⇨59(1 to 4), 61(1 to 4).
- Transfer of legal title to property as creating trust, see Trusts ⇨31.
- Written instruments declaring trusts, see Trusts ⇨19 to 23.

Encyclopedias

- Adding to trust property, see C.J.S. Trusts § 87.
- Essentials of declaration of trust in general, see C.J.S. Trusts §§ 42 to 45.
- Recording or registration of instrument creating trust, see C.J.S. Trusts § 41.
- Revocation and termination of trusts, see C.J.S. Trusts §§ 88 to 90, 92 to 95.
- Right of creator of trust to provide for substitute or successor trustees, see C.J.S. Trusts §§ 212, 213.
- Title of trustee and beneficiary, see C.J.S. Trusts § 175.
- Transfer of title or interest and delivery of trust property, see C.J.S. Trusts §§ 63, 64.

§ 3. Custodial Trustee for Future Payment or Transfer.

(a) A person having the right to designate the recipient of property payable or transferable upon a future event may create a custodial trust upon the occurrence of the future event by designating in writing the recipient, followed in substance by: "as custodial trustee for _____ (name of beneficiary) under the [Enacting state] Uniform Custodial Trust Act."

(b) Persons may be designated as substitute or successor custodial trustees to whom the property must be paid or transferred in the order named if the first designated custodial trustee is unable or unwilling to serve.

(c) A designation under this section may be made in a will, a trust, a deed, a multiple-party account, an insurance policy, an instrument exercising a power of appointment, or a writing designating a beneficiary of contractual rights. Otherwise, to be effective, the designation must be registered with or delivered to the fiduciary, payor, issuer, or obligor of the future right.

COMMENT

This section permits a future custodial trustee to be designated to receive property for the beneficiary of a custodial trust to be effective upon the occurrence of a future event or transfer. To accommodate changes in circumstances during the passage of time, one or more successors or substitute custodial trustees can also be designated. The designation of the future custodial trustee and the beneficiary can be made in an instrument which is revocable or irrevocable depending upon the nature of the transaction or transfer. Any person designated as a future

custodial trustee may decline to serve before the transfer occurs or may resign under Section 13 after the transfer.

The source of this section is Section 3 of UTMA.

The enacting state's rule against perpetuities may limit or affect the creation of a custodial trust upon the occurrence of a future event, but because the use of a custodial trust usually contemplates dispositions for the benefit of living persons, perpetuity problems should rarely arise.

Library References

American Digest System

- Testamentary trusts, see Wills ¶669 to 675.
 Trust by deposit of money in bank, see Trusts ¶34(1 to 4).
 Trust in life insurance payable to another, see Trusts ¶37.
 Trusts taking effect in future, see Trusts ¶14.

Encyclopedias

- Certainty as to subject matter of trust, see C.J.S. § 45.
 Execution of power by appointment in trust, see C.J.S. Powers § 15.
 Testamentary trusts, see C.J.S. Wills, §§ 1004 to 1016.
 Time of vesting, see C.J.S. Trusts § 29.
 Trust of money deposited in financial institution, see C.J.S. Trusts § 54.
 Trust of proceeds of life insurance, see C.J.S. Trusts § 56.

§ 4. Form and Effect of Receipt and Acceptance by Custodial Trustee, Jurisdiction.

(a) Obligations of a custodial trustee, including the obligation to follow directions of the beneficiary, arise under this [Act] upon the custodial trustee's acceptance, express or implied, of the custodial trust property.

(b) The custodial trustee's acceptance may be evidenced by a writing stating in substance:

CUSTODIAL TRUSTEE'S RECEIPT AND ACCEPTANCE

I, _____ (name of custodial trustee) acknowledge receipt of the custodial trust property described below or in the attached instrument and accept the custodial trust as custodial trustee for _____ (name of beneficiary) under the [Enacting state] Uniform Custodial Trust Act. I undertake to administer and distribute the custodial trust property pursuant to the [Enacting state] Uniform Custodial Trust Act. My obligations as custodial trustee are subject to the directions of the beneficiary unless the beneficiary is designated as, is, or becomes incapacitated. The custodial trust property consists of _____

Dated: _____

(Signature of Custodial Trustee)

(c) Upon accepting custodial trust property, a person designated as custodial trustee under this [Act] is subject to personal jurisdiction of the court with respect to any matter relating to the custodial trust.

COMMENT

Although a custodial trust is created by a transfer that satisfies Section 2 of the Act, the responsibility and obligations upon the trustee do not arise until the trustee has accepted the transfer. This detailed section is included to call the attention of the parties to the effective receipt and acceptance by the custodial trustee. Once a custodial trustee accepts the transfer of the custodial trust property, the custodial trustee assumes the obligation of a custodial trustee under this Act. The acceptance can be ex-

pressed or implied, but it is recommended that the written acceptance provided for in Section 4(b) be utilized. By the acceptance the custodial trustee submits to the personal jurisdiction of the courts of the enacting state for the purpose of the custodial trust, despite subsequent relocation of the parties or of the custodial trust property. The principal sources of these provisions are Sections 8 and 9 of UTMA and the analogous provisions under the Uniform Probate Code, Sections 3-602, 5-208, 5-307, 7-103.

Library References

American Digest System

- Acceptance by trustee, see Trusts ¶38.

Encyclopedias

- Acceptance and disclaimer by trustee, see C.J.S. Trusts § 60.

§ 5. Transfer to Custodial Trustee by Fiduciary or Obligor: Facility of Payment.

(a) Unless otherwise directed by an instrument designating a custodial trustee pursuant to Section 3, a person, including a fiduciary other than a custodial trustee, who holds property of or owes a debt to an incapacitated individual not having a conservator may make a transfer to an adult member of the beneficiary's family or to a trust company as custodial trustee for the use and benefit of the incapacitated individual. If the value of the property or the debt exceeds [\$20,000], the transfer is not effective unless authorized by the court.

(b) A written acknowledgment of delivery, signed by a custodial trustee, is a sufficient receipt and discharge for property transferred to the custodial trustee pursuant to this section.

COMMENT

This section is in the nature of a facility-of-payment provision that permits persons owing money to an incapacitated individual to discharge a fixed obligation by a payment to a custodial trustee under this Act. The section does not authorize the custodial trustee to settle claims for disputed amounts but only to acknowledge an effective receipt of property paid or

delivered. It is based primarily on Sections 6 and 7 of UTMA and includes the protections of Section 8 of UTMA as well. It permits a custodial trust to be established as a substitute for a conservatorship to receive payments due an incapacitated individual. Also, see Section 11, which protects transferors and other third parties dealing with the custodial trustee.

Action in Adopting Jurisdictions

Variations from Official Text:
Minnesota. Omits this section.

Virginia. In subsec. (a), substitutes "\$10,000" for "\$20,000".

Library References

American Digest System

Delivery of money or other personal property as creating trust, see Trusts ¶33.
Agreements to hold or convey to use of another as trusts, see Trusts ¶35(1).

Encyclopedias

Delivery or possession of personal property, see C.J.S. Trusts § 55.
Creation of trust by agreement of person acquiring title to hold or convey to use of another, see C.J.S. Trusts § 51.

§ 6. Multiple Beneficiaries; Separate Custodial Trusts; Survivorship.

(a) Beneficial interests in a custodial trust created for multiple beneficiaries are deemed to be separate custodial trusts of equal undivided interests for each beneficiary. Except in a transfer-or-declaration for use and benefit of husband and wife, for whom survivorship is presumed, a right of survivorship does not exist unless the instrument creating the custodial trust specifically provides for survivorship [or survivorship is required as to community or marital property].

(b) Custodial trust property held under this [Act] by the same custodial trustee for the use and benefit of the same beneficiary may be administered as a single custodial trust.

(c) A custodial trustee of custodial trust property held for more than one beneficiary shall separately account to each beneficiary pursuant to Sections 7 and 15 for the administration of the custodial trust.

COMMENT

This Act, unlike UTMA, does not preclude a custodial trust for more than one beneficiary. Adult persons creating custodial trusts are likely to set up custodial trusts in various forms, e.g., parents may wish to set up a custodial trust for their children or for themselves, then for a spouse, etc. However, the interests of each

beneficiary are separate and the custodial trustee is obligated under subsection (c) to account separately to each beneficiary for administration of the beneficiary's interest in the custodial trust.

Subsection (b) allows a custodial trustee who is administering multiple custodial trusts for the

same beneficiary to administer the custodial trusts as a single custodial trust. For example, if multiple trusts are created for an incapacitat-

ed beneficiary, the custodial trustee can administer them as a single custodial trust.

Action in Adopting Jurisdictions

Variations from Official Text:

Rhode Island. In subsec. (1), at end thereof, omits bracketed language.

In subsec. (b), substitutes "single custodial account" for "single custodial trust".

Virginia. In subsec. (a), omits "community or".

Library References

American Digest System

Extent of estate or interest of beneficiary of trust, see Trusts §139, 140.

Encyclopedias

Construction of trust for several beneficiaries, see C.J.S. Trusts § 186.

§ 7. General Duties of Custodial Trustee.

(a) If appropriate, a custodial trustee shall register or record the instrument vesting title to custodial trust property.

(b) If the beneficiary is not incapacitated, a custodial trustee shall follow the directions of the beneficiary in the management, control, investment, or retention of the custodial trust property. In the absence of effective contrary direction by the beneficiary while not incapacitated, the custodial trustee shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other law restricting investments by fiduciaries. However, a custodial trustee, in the custodial trustee's discretion, may retain any custodial trust property received from the transferor. If a custodial trustee has a special skill or expertise or is named custodial trustee on the basis of representation of a special skill or expertise, the custodial trustee shall use that skill or expertise.

(c) Subject to subsection (b), a custodial trustee shall take control of and collect, hold, manage, invest, and reinvest custodial trust property.

(d) A custodial trustee at all times shall keep custodial trust property of which the custodial trustee has control, separate from all other property in a manner sufficient to identify it clearly as custodial trust property of the beneficiary. Custodial trust property, the title to which is subject to recordation, is so identified if an appropriate instrument so identifying the property is recorded, and custodial trust property subject to registration is so identified if it is registered, or held in an account in the name of the custodial trustee, designated in substance: "as custodial trustee for _____ (name of beneficiary) under the [Enacting state] Uniform Custodial Trust Act."

(e) A custodial trustee shall keep records of all transactions with respect to custodial trust property, including information necessary for the preparation of tax returns, and shall make the records and information available at reasonable times to the beneficiary or legal representative of the beneficiary.

(f) The exercise of a durable power of attorney for an incapacitated beneficiary is not effective to terminate or direct the administration or distribution of a custodial trust.

COMMENT

Subsection (b) restates and confirms the control by the beneficiary who is not incapacitated. However, the trustee has a reasonable obligation to act when the beneficiary has not directed him. Under Sections 9 and 10, when a beneficiary becomes incapacitated, the custodial trust becomes a discretionary trust and the trustee is subject to the control of the statute and not the beneficiary's direction. The custodial trustee is subject to the usual trustee's standard as taken

from Section 7-302 of the Uniform Probate Code. The statute also imposes a slightly higher standard on professional fiduciaries acting under the statute. Otherwise, much of this section is taken from Section 12 of UTMA. Whenever recordable assets, such as land, are in the custodial trust, the trustee would be expected to record title to the asset. The section is entitled "general duties" because there are additional

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specific duties identified in other sections such as Section 9.

Action in Adopting Jurisdictions

Variations from Official Text:

Minnesota. In subsec. (b), substitutes "set forth in section 501B.10" for "that would be observed by a prudent person dealing with property of another and is not limited by any other law restricting investments by fiduciaries", and omits last sentence.

Omits subsec. (f).

Virginia. In subsec. (a), substitutes "such person's own property" for "property of another".

Library References

American Digest System

Management and disposal of trust property, see Trusts ¶171 to 269.

Encyclopedias

Duties of trustee, generally, see C.J.S. Trusts § 247.

Duties of trustee as to protection and preservation of property, see C.J.S. Trusts § 270.

Investments of trust funds by trustee, see C.J.S. Trusts §§ 320 to 337.

§ 8. General Powers of Custodial Trustee.

(a) A custodial trustee, acting in a fiduciary capacity, has all the rights and powers over custodial trust property which an unmarried adult owner has over individually owned property, but a custodial trustee may exercise those rights and powers in a fiduciary capacity only.

(b) This section does not relieve a custodial trustee from liability for a violation of Section 7.

COMMENT

This section is taken from Section 13 of UTMA. It grants the trustee very broad powers over the property, subject, however, to the Prudent Person Rule and to the obligations set out in the Act. An alternative approach to subsection (a) that might be taken by an enacting state

is to refer to the existing statutes granting powers to a trustee, such as the Uniform Trustee's Powers Act. For example: [(a) A custodial trustee has the powers of a trustee under the Uniform Trustee's Powers Act.]

Action in Adopting Jurisdictions

Variations from Official Text:

Virginia. In subsec. (a), inserts "which shall include but not be limited to those powers set forth in § 64.1-57 as of

the date the custodian acts" following "individually owned property".

Library References

American Digest System

Authority of trustee in management of trust property in general, see Trusts ¶171.

Encyclopedias

Management of trust property, see C.J.S. Trusts §§ 296 to 376.

§ 9. Use of Custodial Trust Property.

(a) A custodial trustee shall pay to the beneficiary or expend for the beneficiary's use and benefit so much or all of the custodial trust property as the beneficiary while not incapacitated may direct from time to time.

(b) If the beneficiary is incapacitated, the custodial trustee shall expend so much or all of the custodial trust property as the custodial trustee considers advisable for the use and benefit of the beneficiary and individuals who were supported by the beneficiary when the beneficiary became incapacitated, or who are legally entitled to support by the beneficiary. Expenditures may be made in the manner, when, and to the extent that the

custodial trustee determines suitable and proper, without court order and without regard to other support, income, or property of the beneficiary.

(c) A custodial trustee may establish checking, savings, or other similar accounts of reasonable amounts under which either the custodial trustee or the beneficiary may withdraw funds from, or draw checks against, the accounts. Funds withdrawn from, or checks written against, the account by the beneficiary are distributions of custodial trust property by the custodial trustee to the beneficiary.

COMMENT

This section provides that the custodial trustee is obligated to follow the directions of the beneficiary who is not incapacitated in paying over or expending custodial trust property. If the beneficiary is incapacitated, this section imposes duties on the custodial trustee to apply funds for the beneficiary similar to those imposed on custodians for minors under Section 14 of UTMA. In addition, however, subsection (b) authorizes a custodial trustee to pay over or expend custodial trust property for the use and benefit of the incapacitated beneficiary's dependents who were supported by the beneficiary at the time the beneficiary became incapacitated or for whom there is a legal obligation to support.

The use and benefits standard for the expenditure of custodial property is intended to avoid any implication that the custodial trust property can be used only for the required support of the incapacitated beneficiary.

Subsection (c) allows a custodial trustee to maintain a bank account, of an amount reasonable under the circumstances, with the beneficiary whereby both the beneficiary and the custodial trustee may write checks on the account. This may be used as one method of making money available for the beneficiary's personal needs. Many incapacitated persons, unable to manage business affairs, are still competent to pay personal expenses. This type of arrangement would be important to them. A custodial trustee should maintain, of course, a separate bank account for use in managing the custodial trust property and investments.

An alternative approach might be taken to this section that refers to the distributive powers of a conservator under the laws of the enacting state, in the event that state should prefer that incorporation by reference. For example: [The custodial trustee has the distributive powers of a conservator under the Uniform Probate Code.]

Library References

American Digest System

- Expenditure of principal, see Trusts ¶276.
- Payment of income or proceeds of property, see Trusts ¶280, 282.

Encyclopedias

- Payment of income or proceeds of property, see C.J.S. Trusts §§ 351, 353.
- Right to receive and expenditure of principal, see C.J.S. Trusts § 349.

§ 10. Determination of Incapacity; Effect.

(a) The custodial trustee shall administer the custodial trust as for an incapacitated beneficiary if (i) the custodial trust was created under Section 5, (ii) the transferor has so directed in the instrument creating the custodial trust, or (iii) the custodial trustee has determined that the beneficiary is incapacitated.

(b) A custodial trustee may determine that the beneficiary is incapacitated in reliance upon (i) previous direction or authority given by the beneficiary while not incapacitated, including direction or authority pursuant to a durable power of attorney, (ii) the certificate of the beneficiary's physician, or (iii) other persuasive evidence.

(c) If a custodial trustee for an incapacitated beneficiary reasonably concludes that the beneficiary's incapacity has ceased, or that circumstances concerning the beneficiary's ability to manage property and business affairs have changed since the creation of a custodial trust directing administration as for an incapacitated beneficiary, the custodial trustee may administer the trust as for a beneficiary who is not incapacitated.

(d) On petition of the beneficiary, the custodial trustee, or other person interested in the custodial trust property or the welfare of the beneficiary, the court shall determine whether the beneficiary is incapacitated.

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(e) Absent determination of incapacity of the beneficiary under subsection (b) or (d), a custodial trustee who has reason to believe that the beneficiary is incapacitated shall administer the custodial trust in accordance with the provisions of this [Act] applicable to an incapacitated beneficiary.

(f) Incapacity of a beneficiary does not terminate (i) the custodial trust, (ii) any designation of a successor custodial trustee, (iii) rights or powers of the custodial trustee, or (iv) any immunities of third persons acting on instructions of the custodial trustee.

COMMENT

This is one of the more important sections of the Act under which the custodial trustee may determine that the beneficiary is incapacitated so the trust will change from one subject to the control of the beneficiary to a discretionary trust for the beneficiary. Subsection (b) allows the custodial trustee to determine that the beneficiary is incapacitated provided the determination is based upon the certificate of the beneficiary's physician, the prior direction or authority of the beneficiary, or other reasonable evidence. That authority could be evidenced, for example, by a durable power of attorney executed by the beneficiary prior to becoming incapacitated even though that power of attorney is not otherwise effective to control management or termination of the custodial trust. Such a durable power of attorney could be given to a child, spouse, friend, or other trusted individual. In addition, specific authority is provided in subsection (d) for the beneficiary, the custodial trustee, or other interested person to seek a declaration from the court as to the capacity of the beneficiary for the purposes of this Act. This is important to the custodial trustee, as his duties and responsibili-

ties change on the event of the beneficiary's incapacity.

This section is not a proceeding for the appointment of a conservator, and it is not contemplated that such a declaration would lead to court appointment of a conservator or guardian unless other factors would warrant such appointment. The existence of a comprehensive and well-managed custodial trust would be one factor that would tend to avoid the necessity for the appointment of a conservator or guardian of the estate.

This section also does not provide a proceeding to attack the legal competence of a transferor in setting up a trust under Section 2. Rather, Section 10 relates to a management matter in a validly established custodial trust.

Subsection (f) provides that the incapacity of the beneficiary does not terminate the custodial trust. If the beneficiary becomes incapacitated, the authority of the custodial trustee continues and the custodial trustee must follow the statutory provisions of the Act relating to managing custodial trusts for incapacitated individuals.

Action in Adopting Jurisdictions

Variations from Official Text:

Minnesota. In subsec. (a), omits clause (i).

In subsec. (c), substitutes "must administer" for "may administer".

Library References

American Digest System

Determination as to mental disorder in general, see *Mental Health* ¶6 to 18.

Encyclopedias

Determination as to mental disorder in general, see *C.J.S. Insane Persons* §§ 8 to 34.

§ 11. Exemption of Third Person From Liability.

A third person in good faith and without a court order may act on instructions of, or otherwise deal with, a person purporting to make a transfer as, or purporting to act in the capacity of, a custodial trustee. In the absence of knowledge to the contrary, the third person is not responsible for determining:

- (1) the validity of the purported custodial trustee's designation;
- (2) the propriety of, or the authority under this [Act] for, any action of the purported custodial trustee;
- (3) the validity or propriety of an instrument executed or instruction given pursuant to this [Act] either by the person purporting to make a transfer or declaration or by the purported custodial trustee; or
- (4) the propriety of the application of property vested in the purported custodial trustee.

COMMENT

This section is based upon Section 16 of the UTMA and protects third persons who deal in good faith with the custodial trustee.

Library References

American Digest System

Limitations of authority imposed in creation of trust, see Trusts ⇐172.
Rights and title of purchaser from trustee, see Trusts ⇐203.

Encyclopedias

Duty of trustee's mortgagee to ascertain whether mortgage by trustee is in violation of trust, see C.J.S. Trusts § 317.
Lender not required to see to application of money lent, see C.J.S. Trusts § 279.
Notice to persons dealing with trustee of extent and limitation of his powers, see C.J.S. Trusts § 246.

§ 12. Liability to Third Person.

(a) A claim based on a contract entered into by a custodial trustee acting in a fiduciary capacity, an obligation arising from the ownership or control of custodial trust property, or a tort committed in the course of administering the custodial trust, may be asserted by a third person against the custodial trust property by proceeding against the custodial trustee in a fiduciary capacity, whether or not the custodial trustee or the beneficiary is personally liable.

(b) A custodial trustee is not personally liable to a third person:

- (1) on a contract properly entered into in a fiduciary capacity unless the custodial trustee fails to reveal that capacity or to identify the custodial trust in the contract; or
- (2) for an obligation arising from control of custodial trust property or for a tort committed in the course of the administration of the custodial trust unless the custodial trustee is personally at fault.

(c) A beneficiary is not personally liable to a third person for an obligation arising from beneficial ownership of custodial trust property or for a tort committed in the course of administration of the custodial trust unless the beneficiary is personally in possession of the custodial trust property giving rise to the liability or is personally at fault.

(d) Subsections (b) and (c) do not preclude actions or proceedings to establish liability of the custodial trustee or beneficiary to the extent the person sued is protected as the insured by liability insurance.

COMMENT

This section is patterned after Section 17 of the UTMA and that section in turn was based upon Sections 5-428 and 7-306 of the Uniform Probate Code limiting the liability of conservators and trustees. See also Restatement of Trusts, 2d, Sections 265 and 277. The effect of this section is to limit the claims of third parties to recourse against custodial trust property as both the custodial trustee and the beneficiary are protected from personal liability absent personal fault on their part. This section does not alter the obligations between the custodial trustee and the beneficiary arising out of the adminis-

tration of the estate and the accounting for that administration.

There may be cases in which a custodial trustee or beneficiary may have a right to possession of custodial trust property and may insure against liability arising out of possession or control of the property as a named insured, e.g., under homeowner's or automobile liability insurance. In such a case, the beneficiary should be permitted as a party defendant under subsection (d) but only to the extent of the protection of the liability insurance.

Library References

American Digest System

Contracts made in management of trust, see Trusts ⇐209 to 213.
Liability of trustee and trust estate for torts, see Trusts ⇐235.
Rights of action against trustees, see Trusts ⇐250.

Encyclopedias

Contracts made by trustee, see C.J.S. Trusts §§ 275 to 280.

Liability of trustee and trust estate for torts, see C.J.S. Trusts § 252.

Right of action of third person against trust or trustee, see C.J.S. Trusts § 361.

§ 13. Declination, Resignation, Incapacity, Death, or Removal of Custodial Trustee, Designation of Successor Custodial Trustee.

(a) Before accepting the custodial trust property, a person designated as custodial trustee may decline to serve by notifying the person who made the designation, the transferor, or the transferor's legal representative. If an event giving rise to a transfer has not occurred, the substitute custodial trustee designated under Section 3 becomes the custodial trustee, or, if a substitute custodial trustee has not been designated, the person who made the designation may designate a substitute custodial trustee pursuant to Section 3. In other cases, the transferor or the transferor's legal representative may designate a substitute custodial trustee.

(b) A custodial trustee who has accepted the custodial trust property may resign by (i) delivering written notice to a successor custodial trustee, if any, the beneficiary and, if the beneficiary is incapacitated, to the beneficiary's conservator, if any, and (ii) transferring or registering, or recording an appropriate instrument relating to, the custodial trust property, in the name of, and delivering the records to, the successor custodial trustee identified under subsection (c).

(c) If a custodial trustee or successor custodial trustee is ineligible, resigns, dies, or becomes incapacitated, the successor designated under Section 2(g) or 3 becomes custodial trustee. If there is no effective provision for a successor, the beneficiary, if not incapacitated, may designate a successor custodial trustee. If the beneficiary is incapacitated, or fails to act within 90 days after the ineligibility, resignation, death, or incapacity of the custodial trustee, the beneficiary's conservator becomes successor custodial trustee. If the beneficiary does not have a conservator or the conservator fails to act, the resigning custodial trustee may designate a successor custodial trustee.

(d) If a successor custodial trustee is not designated pursuant to subsection (c), the transferor, the legal representative of the transferor or of the custodial trustee, an adult member of the beneficiary's family, the guardian of the beneficiary, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary, may petition the court to designate a successor custodial trustee.

(e) A custodial trustee who declines to serve or resigns, or the legal representative of a deceased or incapacitated custodial trustee, as soon as practicable, shall put the custodial trust property and records in the possession and control of the successor custodial trustee. The successor custodial trustee may enforce the obligation to deliver custodial trust property and records and becomes responsible for each item as received.

(f) A beneficiary, the beneficiary's conservator, an adult member of the beneficiary's family, a guardian of the person of the beneficiary, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary, may petition the court to remove the custodial trustee for cause and designate a successor custodial trustee, to require the custodial trustee to furnish a bond or other security for the faithful performance of fiduciary duties, or for other appropriate relief.

COMMENT

This section follows many of the provisions of Section 18 of UTMA with some substantive changes. It is designed to accommodate in a single section the circumstances in which a custodial trustee would be replaced by another custodial trustee. Under subsection (b), if the beneficiary is incapacitated, a custodial trustee who resigns must give written notice to both the beneficiary and the beneficiary's conservator if one exists. Under subsection (c), a beneficiary

who is not incapacitated may designate, without limitation, a successor custodial trustee. If, however, the beneficiary fails to act or is incapacitated, the procedure to be followed is very similar to that found in UTMA except that the nonincapacitated beneficiary has 90 days to act and if the beneficiary has no conservator or if the conservator declines to act, the custodial trustee may eventually designate a successor custodial trustee.

Under subsection (f), the beneficiary, whether or not incapacitated, can petition the court to remove the custodial trustee for cause and to designate a successor trustee, or the court may require the custodial trustee to give bond or other appropriate relief.

This section, unlike Section 18 of UTMA, does not give the custodial trustee the general power to designate a successor custodial trustee but rather limits that power to the situation in which the procedure for designating successor custodial trustees by others has been exhausted.

Action in Adopting Jurisdictions

Variations from Official Text:

Minnesota. In subsec. (c), inserts "or the holder of the beneficiary's power of attorney," following "incapacitated," in the second sentence and omits the last two sentences.

In subsec. (d), substitutes "the conservator of the beneficiary" for "the guardian of the beneficiary" and adds "in accordance with the procedures set forth in sections 501B.16

to 501B.25" following "designate a successor custodial trustee".

Virginia. In subsec. (c), first sentence reads: "If a custodial trustee or successor custodial trustee is ineligible, resigns, dies, or becomes incapacitated, the successor designated in accordance with the trust instrument or in accordance with § 55-34.3 becomes custodial trustee."

Library References

American Digest System

- Acceptance by trustee, see Trusts ⇐38.
- Appointment and succession of new trustee, see Trusts ⇐169(1 to 3).
- Death and survivorship of trustees, see Trusts ⇐168.
- Disqualification, resignation and discharge, and removal of trustees, see Trusts ⇐162 to 167.

Encyclopedias

- Acceptance or disclaimer of trust by trustee, see C.J.S. Trusts § 60.
- Appointment of trustees and successor trustees, see C.J.S. Trusts §§ 211 to 220.
- Devolution of office on appointment of new trustee, see C.J.S. Trusts § 236.
- Removal of trustees, see C.J.S. Trusts §§ 230 to 235.
- Resignation and discharge of trustees, see C.J.S. Trusts §§ 225 to 229.
- Who may petition court to require bond of trustee, see C.J.S. Trusts § 224.

§ 14. Expenses, Compensation, and Bond of Custodial Trustee.

Except as otherwise provided in the instrument creating the custodial trust, in an agreement with the beneficiary, or by court order, a custodial trustee:

- (1) is entitled to reimbursement from custodial trust property for reasonable expenses incurred in the performance of fiduciary services;
- (2) has a noncumulative election, to be made no later than six months after the end of each calendar year, to charge a reasonable compensation for fiduciary services performed during that year; and
- (3) need not furnish a bond or other security for the faithful performance of fiduciary duties.

COMMENT

This section follows the pattern of Section 15 of the UTMA except it does subject the arrangements for payment of expenses, compensation, and bond to provisions in the custodial trust instrument or agreement of the beneficiary or court order.

As in UTMA, the provisions with regard to compensation are designed to avoid imputed

compensation to the custodian who waives compensation and also to avoid the accumulation of claims for compensation until the termination of the custodial trust....Although the ability to control these matters by the trust instrument or agreement of the beneficiary seems to be implied, as was assumed in UTMA, it is here expressly stated because of the possibility of informal arrangements with persons as trustees.

Library References

American Digest System

- Bond of trustee, see Trusts ⇐161.
- Compensation of trustee, see Trusts ⇐314 to 321.
- Expenditures of trustee, see Trusts ⇐224 to 227.
- Reimbursement and indemnity of trustee, see Trusts ⇐236.

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Encyclopedias

Bond of trustee, see C.J.S. Trusts § 224.

Compensation of trustee, see C.J.S. §§ 395 to 408.

Creation and discharge of claims against estate and reimbursement, see C.J.S. Trusts §§ 275 to 285.

§ 15. Reporting and Accounting by Custodial Trustee; Determination of Liability of Custodial Trustee.

(a) Upon the acceptance of custodial trust property, the custodial trustee shall provide a written statement describing the custodial trust property and shall thereafter provide a written statement of the administration of the custodial trust property (i) once each year, (ii) upon request at reasonable times by the beneficiary or the beneficiary's legal representative, (iii) upon resignation or removal of the custodial trustee, and (iv) upon termination of the custodial trust. The statements must be provided to the beneficiary or to the beneficiary's legal representative, if any. Upon termination of the beneficiary's interest, the custodial trustee shall furnish a current statement to the person to whom the custodial trust property is to be delivered.

(b) A beneficiary, the beneficiary's legal representative, an adult member of the beneficiary's family, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary may petition the court for an accounting by the custodial trustee or the custodial trustee's legal representative.

(c) A successor custodial trustee may petition the court for an accounting by a predecessor custodial trustee.

(d) In an action or proceeding under this [Act] or in any other proceeding, the court may require or permit the custodial trustee or the custodial trustee's legal representative to account. The custodial trustee or the custodial trustee's legal representative may petition the court for approval of final accounts.

(e) If a custodial trustee is removed, the court shall require an accounting and order delivery of the custodial trust property and records to the successor custodial trustee and the execution of all instruments required for transfer of the custodial trust property.

(f) On petition of the custodial trustee or any person who could petition for an accounting, the court, after notice to interested persons, may issue instructions to the custodial trustee or review the propriety of the acts of a custodial trustee or the reasonableness of compensation determined by the custodial trustee for the services of the custodial trustee or others.

COMMENT

This section requires that the custodial trustee inform the beneficiary of the initiation of the trust and provide reasonably current reports of the administration of the custodial trust to the beneficiary or the beneficiary's legal representative. Even though some custodial trustees may act informally, it seems appropriate that both the trustee and the beneficiary be expected to exchange complete information concerning the administration of the trust at least once each year. In some cases, more frequent exchanges of information between the custodial trustee and beneficiary would be expected; e.g., when they use a bank account to which both have access. This is particularly true with regard to necessary information for tax reporting by the parties involved. This section assumes the usual minimum components of an account, i.e., assets and

values at the beginning of the accounting period, receipts, and disbursements during the accounting period and assets and their values on hand or available for distribution at the close of the accounting period.

Subsection (a) identifies the necessary reports and accountings for the parties; and subsection (b) identifies a broad group of persons who may petition the court for an accounting by the custodial trustee or the custodial trustee's legal representative. Much of the section is drawn from Section 19 of the UTMA modified to fit the custodial trust. Subsection (f) recognizes the inherent power of the court to instruct trustees and review their actions. This paragraph is patterned after Uniform Probate Code Section 7-205.

Action in Adopting Jurisdictions

Variations from Official Text:

Minnesota. Adds a subsec. (g) which reads: "(g) All proceedings described in this section shall be conducted in

accordance with the procedures set forth in sections 501B.16 to 501B.25."

Library References

American Digest System

- Accounting of trustee, see Trusts ¶289 to 313, 322 to 333.
- Actions for enforcement of trust, see Trusts ¶359 to 377.
- Court supervision of execution of trust and instructions to trustee, see Trusts ¶271½.
- Trustee as representative of beneficiary, see Trusts ¶173.

Encyclopedias:

- Accounting and settlement of trust, see C.J.S. Trusts §§ 377 to 394.
- Enforcement of trust, see C.J.S. Trusts §§ 421 to 474.
- Court supervision of execution of trust and instructions to trustee, see C.J.S. Trusts § 261.
- Duty of trustee to give information as to management of trust on request of beneficiaries or their representatives, see C.J.S. Trusts § 247.

§ 16. Limitations of Action Against Custodial Trustee.

not well drafted. Eckhardt.

(a) Except as provided in subsection (c), unless previously barred by adjudication, consent, or limitation, a claim for relief against a custodial trustee for accounting or breach of duty is barred as to a beneficiary, a person to whom custodial trust property is to be paid or delivered, or the legal representative of an incapacitated or deceased beneficiary or payee:

(1) who has received a final account or statement fully disclosing the matter unless an action or proceeding to assert the claim is commenced within two years after receipt of the final account or statement; or

(2) who has not received a final account or statement fully disclosing the matter unless an action or proceeding to assert the claim is commenced within three years after the termination of the custodial trust.

(b) Except as provided in subsection (c), a claim for relief to recover from a custodial trustee for fraud, misrepresentation, or concealment related to the final settlement of the custodial trust or concealment of the existence of the custodial trust, is barred unless an action or proceeding to assert the claim is commenced within five years after the termination of the custodial trust.

(c) A claim for relief is not barred by this section if the claimant:

(1) is a minor, until the earlier of two years after the claimant becomes an adult or dies;

(2) is an incapacitated adult, until the earliest of two years after (i) the appointment of a conservator, (ii) the removal of the incapacity, or (iii) the death of the claimant; or

(3) was an adult, now deceased, who was not incapacitated, until two years after the claimant's death.

COMMENT

In an effort to provide as comprehensive a statute as possible to inform the parties of substantially all of their obligations and rights, statutes of limitation are provided in this section. The limitations provided in this section are derived from the Uniform Probate Code, Sections 1-106 and 7-307, and from the Missouri Custodial Act.

The nature of the limitations imposed by the section are illustrated by the situation in which a custodial trustee is removed, resigns, or dies. If the former custodial trustee accounts as re-

quired under Section 13 on removal or resignation, or the deceased custodial trustee's personal representative accounts, the two-year limitation of subsection (a)(1) applies. Should the former custodial trustee or the personal representative fail to account, then, subsection (a)(2) would apply to limit the time in which a proceeding to assert the claim could be commenced. This time would begin to run on the date the trust terminated. Of course, if the claim is one for fraud or concealment, the longer time limitation of subsection (b) would apply. In any event, should the beneficiary become incapacitated or die be-

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fore the applicable time limitation had expired, the tolling provision of subsection (c) could postpone the time bar until two years after removal of the disability or death.

Library References

American Digest System

- Limitations of actions against trustees, see Trusts ¶256.
- Limitations of actions to enforce trust, see Trusts ¶365(1).

Encyclopedias

- Limitations of actions against trustees as to management of trust, see C.J.S. Trusts § 365.
- Limitation of actions to compel accounting, see C.J.S. Trusts § 387.
- Limitation of actions to enforce trust, see C.J.S. Trusts § 456.

§ 17. Distribution on Termination.

(a) Upon termination of a custodial trust, the custodial trustee shall transfer the unexpended custodial trust property:

- (1) to the beneficiary, if not incapacitated or deceased;
- (2) to the conservator or other recipient designated by the court for an incapacitated beneficiary; or
- (3) upon the beneficiary's death, in the following order:
 - (i) as last directed in a writing signed by the deceased beneficiary while not incapacitated and received by the custodial trustee during the life of the deceased beneficiary;
 - (ii) to the survivor of multiple beneficiaries if survivorship is provided for pursuant to Section 6;
 - (iii) as designated in the instrument creating the custodial trust; or
 - (iv) to the estate of the deceased beneficiary.

(b) If, when the custodial trust would otherwise terminate, the distributee is incapacitated, the custodial trust continues for the use and benefit of the distributee as beneficiary until the incapacity is removed or the custodial trust is otherwise terminated.

(c) Death of a beneficiary does not terminate the power of the custodial trustee to discharge obligations of the custodial trustee or beneficiary incurred before the termination of the custodial trust.

COMMENT

This section controls distribution of the custodial trust property when the custodial trust is terminated under Section 2(e). It is designed to provide for efficient and certain distribution without judicial proceedings. Subsection (a)(3) is an important provision for avoiding complications on distribution and provides that distribution may be controlled first, by the direction of the deceased beneficiary or second, by the custodial trust instrument (see Sections 2, 6 and 18) and, only if no effective prior designation for the payment or distribution of the property on the death of the beneficiary has been made, shall it pass through the beneficiary's estate.

The direction to the custodial trustee by the beneficiary, who is not incapacitated, for distribution on termination of the custodial trust may be in any written form clearly identifying the distributee. For example, the following direction would be adequate under the statute:

I, _____ (name of beneficiary) hereby direct _____ (name of trustee) as custodial trustee, to transfer and pay the unexpended balance of the custodial trust property of which I am beneficiary to _____ as distributee on the termination of the trust at my death. In the event of the prior death of _____ above named as distributee, I designate _____ as distributee of the custodial trust property...

Receipt Acknowledged

Signed

(signature)
Custodial Trustee

(signature)
Beneficiary

Date _____

Date _____

Action in Adopting Jurisdictions

Variances from Official Text:

Minnesota. Subsec. (a) reads:

"(a) Upon termination of a custodial trust, the custodial trustee shall transfer the unexpended custodial trust property:

- "(1) to the beneficiary, if not incapacitated or deceased;
- "(2) to the holder of the beneficiary's power of attorney;

"(3) to the conservator or other recipient designated by the court for an incapacitated beneficiary; or

"(4) upon the beneficiary's death, in the following order:

- "(i) to the survivor of multiple beneficiaries if survivorship is provided for pursuant to section 6;
- "(ii) as designated in the instrument creating the custodial trust; or
- "(iii) to the estate of the deceased beneficiary."

Library References

American Digest System

Distribution of trust property, see Trusts ¶273 to 286.

Termination of trust, see Trusts ¶61.

Encyclopedias

Payment and distribution of property or fund, see C.J.S. Trusts §§ 343 to 355.

Termination of trusts, see C.J.S. Trusts §§ 92 to 96.

§ 18. Methods and Forms for Creating Custodial Trusts.

(a) If a transaction, including a declaration with respect to or a transfer of specific property, otherwise satisfies applicable law, the criteria of Section 2 are satisfied by:

- (1) the execution and either delivery to the custodial trustee or recording of an instrument in substantially the following form:

TRANSFER UNDER THE [ENACTING STATE] UNIFORM CUSTODIAL TRUST ACT.

I, _____ (name of transferor or name and representative capacity if a fiduciary), transfer to _____ (name of trustee other than transferor), as custodial trustee for _____ (name of beneficiary) as beneficiary and _____ as distributee on termination of the trust in absence of direction by the beneficiary under the [Enacting state] Uniform Custodial Trust Act, the following: (insert a description of the custodial trust property legally sufficient to identify and transfer each item of property).

Dated: _____

(Signature); or

- (2) the execution and the recording or giving notice of its execution to the beneficiary of an instrument in substantially the following form:

DECLARATION OF TRUST UNDER THE [ENACTING STATE] UNIFORM CUSTODIAL TRUST ACT

I, _____ (name of owner of property), declare that henceforth I hold as custodial trustee for _____ (name of beneficiary other than transferor) as beneficiary and _____ as distributee on termination of the trust in absence of direction by the beneficiary under the [Enacting state] Uniform Custodial Trust Act, the following: (Insert a description of the custodial trust property legally sufficient to identify and transfer each item of property).

Dated: _____

(Signature)

(b) Customary methods of transferring or evidencing ownership of property may be used to create a custodial trust, including any of the following:

- (1) registration of a security in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance "as custodial trustee for _____ (name of beneficiary) under the [Enacting state] Uniform Custodial Trust Act";

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(2) delivery of a certificated security, or a document necessary for the transfer of an uncertificated security, together with any necessary endorsement, to an adult other than the transferor or to a trust company as custodial trustee, accompanied by an instrument in substantially the form prescribed in subsection (a)(1);

(3) payment of money or transfer of a security held in the name of a broker or a financial institution or its nominee to a broker or financial institution for credit to an account in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for _____ (name of beneficiary) under the [Enacting state] Uniform Custodial Trust Act";

(4) registration of ownership of a life or endowment insurance policy or annuity contract with the issuer in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for _____ (name of beneficiary) under the [Enacting state] Uniform Custodial Trust Act";

(5) delivery of a written assignment to an adult other than the transferor or to a trust company whose name in the assignment is designated in substance by the words: "as custodial trustee for _____ (name of beneficiary) under the [Enacting state] Uniform Custodial Trust Act";

(6) irrevocable exercise of a power of appointment, pursuant to its terms, in favor of a trust company, an adult other than the donee of the power, or the donee who holds the power if the beneficiary is other than the donee, whose name in the appointment is designated in substance: "as custodial trustee for _____ (name of beneficiary) under the [Enacting state] Uniform Custodial Trust Act";

(7) delivery of a written notification or assignment of a right to future payment under a contract to an obligor which transfers the right under the contract to a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, whose name in the notification or assignment is designated in substance: "as custodial trustee for _____ (name of beneficiary) under the [Enacting state] Uniform Custodial Trust Act";

(8) execution, delivery, and recordation of a conveyance of an interest in property in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for _____ (name of beneficiary) under the [Enacting state] Uniform Custodial Trust Act";

(9) issuance of a certificate of title by an agency of a state or of the United States which evidences title to tangible personal property:

(i) issued in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for _____ (name of beneficiary) under the [Enacting state] Uniform Custodial Trust Act"; or

(ii) delivered to a trust company or an adult other than the transferor or endorsed by the transferor to that person, designated in substance: "as custodial trustee for _____ (name of beneficiary) under the [Enacting state] Uniform Custodial Trust Act"; or

(10) execution and delivery of an instrument of gift to a trust company or an adult other than the transferor, designated in substance: "as custodial trustee for _____ (name of beneficiary) under the [Enacting state] Uniform Custodial Trust Act."

COMMENT

This section largely follows Section 9 of the UTMA. It provides instructional detail for forms and methods of transferring assets that satisfy the requirements of the statute. Although many of the customary methods of transferring assets are identified, these methods are not intended to be exclusive since any type of property that can be transferred by any legal means is intended to be within the scope of the statute, provided the requirements of Section 2 are met. The method of transfer or conveyance appropriate to the asset should be used, e.g., if land is involved, a deed or conveyance that satisfies the local requirements would be appropriate. In the effort to make the statute as self-contained and as fully explanatory as possible, these

provisions for implementation are included in the statute rather than being appended or inserted in the Comments.

Action in Adopting Jurisdictions

Variations from Official Text:

Virginia. In subsec. (a), add a provision which reads: "Either form may be modified by the owner to include, for example, a designation of an alternate or successor trustee or the recipient of the custodial property upon termination of the trust."

Library References

American Digest System:

Transactions creating or operating as trusts, see Trusts ¶30½ to 37.

Written instruments creating or declaring trusts, see Trusts ¶19 to 29.

Encyclopedias

Agreements, covenants, and transactions creating or operating as trusts, see C.J.S. Trusts §§ 50 to 59.

Declaration of trust, see C.J.S. Trusts §§ 42 to 49.

§ 19. Applicable Law.

(a) This [Act] applies to a transfer or declaration creating a custodial trust that refers to this [Act] if, at the time of the transfer or declaration, the transferor, beneficiary, or custodial trustee is a resident of or has its principal place of business in this State or custodial trust property is located in this State. The custodial trust remains subject to this [Act] despite a later change in residence or principal place of business of the transferor, beneficiary, or custodial trustee, or removal of the custodial trust property from this State.

(b) A transfer made pursuant to an act of another state substantially similar to this [Act] is governed by the law of that state and may be enforced in this State.

COMMENT

This section is designed to avoid confusion in the event a party or assets are removed from the state.

§ 20. Uniformity of Application and Construction.

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

Library References

Encyclopedias

Similar interpretation of uniform laws adopted in different states, see C.J.S. Statutes § 371.

§ 21. Short Title.

This [Act] may be cited as the "[Name of Enacting State] Uniform Custodial Trust Act."

§ 22. Severability.

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

Library References

American Digest System

Effect of partial invalidity of statutes, see Statutes ¶64(1).

Encyclopedias

Statutory declaration as to effect of partial invalidity, see C.J.S. Statutes § 94.

§ 23. Effective Date.

This [Act] takes effect _____

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HOUSE COMMITTEE REPORT

Date Referred: March 6, 1992

FURTHER REFERRALS:

Finance

Date of Committee Action: 3-23-92

The JUDICIARY Committee considered:

HB 510

HOUSE BILL NO. 510

PROTECT ELDERLY AND DISABLED ADULTS

"An Act relating to criminal offenses and penalties for offenses involving disabled or elderly adults."

RECOMMENDATIONS:

be replaced with CS HB 510 (JUDICIARY) [] 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)

[X] indeterminate - law; Admin. [] fiscal impact _____

[X] zero fiscal note Public Safety; Admin. [] zero fiscal note(s) _____

APPROVES PREVIOUS: (Dept/Date)

[] fiscal note(s) _____

[] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>David Donley</i>	X	<i>Mike Hill</i>		X	
<i>Al Ellis</i>	X				
<i>Bob Hunter</i>	-				

David Donley
CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 510

Revision Date: _____ Department Affected: Public Safety
 Title: "An act relating to criminal offenses involving disabled or elderly " BRU: Alaska State Troopers
 Component: Detachments
 Sponsor: Representative Mackie
 Requestor: Representative Mackie COMPONENT SERIAL NO.

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EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE FUND SOURCE:	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)
 No fiscal impact is anticipated.

1/10
1/25/92
 Prepared By: Francis C. Allan Phone: 269-5691
 Division: Alaska State Troopers Date: 2/24/92
 Approved by Commissioner: *George A. Hovland for* Richard L. Burton
 Agency: Department of Public Safety Date: 2/25/92

Public Safety F/N

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB510

Revision Date February 18, 1992 Dept. Affected Health and Social Service
 Title: "An Act relating to criminal offenses and penalties for offenses involving disabled or elderly adults." BRU: Division of Family and Youth Services
 Sponsor: Representative Mackie Component: SERO, SCRO, NRO
 Requestor: House HESS Committee COMPONENT SERIAL NO. 0254, 0255, 0258

Expenditures/Revenues

(Thousands of Dollars)

	FY93	FY94	FY95	FY96	FY97	FY98
OPERATING						
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
REVENUE	0.0	0.0	0.0	0.0	0.0	0.0

FUNDING:

(Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: **NONE**

ANALYSIS: (Attach a separate page if necessary)

Alaska, like many states in the early 80's, passed but failed to fund a Protection of the Elderly statute. Ten years after Alaska's law was passed, the Department still is not adequately funded for this mandate. There is concern over raising the penalty when mandated professionals fail to report abuse and neglect to elderly persons to the Department as the existing response system is inadequate. This bill, however, if passed, would not directly create an additional workload on the Department.

Prepared by: Brian Saylor, Deputy Commissioner *B254* Phone: 465-3030
 Division: Division of Family and Youth Services Date: March 4, 1992
 Approved by Commissioner: Theodore A. Mala, MD, MFR *[Signature]* Date: 4-3-92
 Agency: Department of Health and Social Services

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

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. CSHB 510 (HES)

Revision Date: March 19, 1992
Title: "...criminal offenses...involving disabled or elderly adults."
Sponsor: Representative Mackie
Requestor: Representative Mackie

Department Affected: Department of Law
BRU: Prosecution
Component: All

COMPONENT SERIAL

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Expenditures/Revenues: (Thousands of Dollars)

85 through 91

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	****	****	****	****	****	****

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	****	****	****	****	****	****
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL						

POSITIONS:

FULL-TIME	****	****	****	****	****	****
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared by: Richard I. Peques, Director
Division: Administrative Services
Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law

Phone: 465-3672
Date: March 19, 1992
Date: March 19, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 510 (HES)

The HES Committee substitute corrected a drafting error in Section 7. Otherwise, the bill is unchanged. Our fiscal note analysis is therefore repeated below.

This bill amends various criminal statutes to increase the penalty for an offense, if the offense is committed against a disabled or elderly adult. The department's analysis follows below.

Section 1. This section amends AS 08.01 to provide that conviction of a person licensed or regulated by the Department of Commerce and Economic Development, for failure to report harm to an elderly person or failure to report physical or sexual assault of a disabled adult, may be considered as grounds for disciplinary proceedings or sanctions against a person who has a duty to make such a report. This section will not have a direct fiscal impact for the Department of Law, nor should there be any impact for the Division of Occupational Licensing, because failure to report occurs rarely.

Section 2. This section amends AS 11.41.200(a) to include recklessly causing serious physical injury to a disabled or elderly adult within the crime of assault in the first degree. Because recklessly causing serious physical injury is currently assault in the second degree, this section will have the effect of raising the penalty for this conduct from a class B felony to a class A felony, if the victim is a disabled or elderly adult.

We cannot determine a fiscal impact for this section because the state does not keep records by the age of the victim, except for minors. Each year there are between 300 and 400 felony assaults referred for prosecution. However, we do not know how many of these assaults are committed against disabled or elderly adults. Increasing the penalty for this crime could cause some additional cost for the department because of the difficulty of proving that the defendant knew that the victim was a disabled or elderly adult.

Section 3. This section amends AS 11.41.210(a) to include recklessly causing physical injury to a disabled or elderly adult within the crime of assault in the second degree. Because recklessly causing physical injury is currently assault in the fourth degree, this section will have the effect of raising the penalty for this conduct from a class A misdemeanor to a class B felony, if the victim is a disabled or elderly adult.

Here again, we cannot determine a fiscal impact due to the lack of information about the age or mental disability of adult victims. It does appear likely, however, that some substantial impact will occur if what is currently a misdemeanor offense is raised to a felony offense. This is because full range felony prosecution includes the grand jury and indictment process, pretrial

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 510 (HES)

motion practice and, in view of the increased severity of the charge, a much more vigorous defense. We would also have to prove that the defendant knew that the victim was a disabled or elderly adult. Currently, about 3,000 misdemeanor assaults are reported under state law each year.

Section 4. This section amends AS 11.41.220(a) to include placing a disabled or elderly adult in fear of imminent physical injury by words or other conduct within the crime of assault in the third degree. This amendment will have the effect of raising the penalty for conduct currently classified as a class A misdemeanor to a class C felony if the victim is a disabled or elderly adult. The department's comments on the impact for Section 3 apply to this section, as well.

Section 5. This section amends AS 11.46.120(a) to provide that a person commits theft in the first degree if the victim of the theft is a disabled or elderly adult. Normally, the value of the property or services must be \$25,000 or more before the criminal conduct reaches theft in the first degree. Consequently, this section will have the effect of making theft with a value in any amount a class B felony, if the victim is a disabled or elderly adult. The department handles 1,000 misdemeanor thefts and 200 class C felony thefts annually.

For the reasons discussed above, we cannot determine what number of misdemeanors, or lesser degree felonies, would be required to be handled as class B felonies if this section is approved. However, some fiscal impact will occur if there is a substantial number of new felonies.

Section 6. This section defines a "disabled or elderly adult" to mean a person 18 years of age or older who has a physical or mental disability, or physical or mental impairment, as defined in AS 18.80.300, or a person 65 years of age or older.

Section 7. This section provides that a person who fails to report suspected harm to an elderly person, as required by AS 47.24.010, is guilty of a class B misdemeanor. The section also provides that the court shall notify a licensing entity when a person who is a member of a profession or occupation regulated by the state is convicted for failure to report. Failure to report is very rare. Consequently, this section should not have a fiscal impact.

Section 8. This section provides that the court shall notify the licensing entity when a person regulated by the state is convicted for knowingly failing or refusing to report suspected physical or sexual assault of disabled adults. Failure to report is rare, and a fiscal impact is not anticipated.

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. CSHB 510 (HES)

Revision Date: _____
 Title: "An Act relating to criminal offenses and penalties
 for offenses involving disabled or elderly adults."
 Sponsor: Mackie
 Requestor: House Judiciary

Department Affected: Administration
 BRU: Office of Public Advocacy
 Component: Office of Public Advocacy

COMPONENT SERIAL NO.

0	0	4	3
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE FUND SOURCE:	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Kevin Brooks, Director
 Division: Administrative Services

Phone: 465-2277
 Date: March 19, 1992

Approved by Commissioner: Nancy Bear Usura *NBCU*
 Agency: Administration

Date: 3/19/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. CSHB 510 (HES)

Revision Date: _____

Department Affected: Administration

Title: "An Act relating to criminal offenses and penalties
for offenses involving disabled or elderly adults."

BRU: Public Defender Agency

Sponsor: Mackie

Component: Public Defender Agency

Requestor: _____

COMPONENT SERIAL NO.

1	6	3	1
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	*	*	*	*	*	*
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	*	*	*	*	*	*

CAPITAL	*	*	*	*	*	*
---------	---	---	---	---	---	---

REVENUE FUND SOURCE:	*	*	*	*	*	*
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FUNDING: (Thousands of Dollars)

GENERAL FUND	*	*	*	*	*	*
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	*	*	*	*	*	*

POSITIONS:

FULL-TIME	*	*	*	*	*	*
PART-TIME						
TEMPORARY	*	*	*	*	*	*

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

(See attached)

Prepared by: John Salemi, Public Defender
Division: Public Defender Agency

Phone: 279-7541
Date: March 9, 1992

Approved by Commissioner: Nancy Bear Usura *NBLL*
Agency: Administration

Date: 3/17/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. CSHB 510 (HES)

ANALYSIS: (continued)

The fiscal impact that will result from treating disabled and elderly adults as a special class of victim is impossible to quantify. However, it is clear that by increasing the seriousness of the penalties (in some cases requiring mandatory jail time) and also increasing the seriousness of the crime (making crimes that formerly were misdemeanors felonies with rights to grant jury and 12-person juries) defense costs will increase as well.

S P O N S O R S T A T E M E N T

HB 510 "An Act relating to criminal offenses
and penalties for offenses involving
disabled or elderly adults"

I have introduced HB 510 because there is occurring in Alaska a number of things which I feel make it critical for the legislature to discuss the subject of elder abuse, elder exploitation, crimes against the elderly, and adult protective services.

The 65+ age group increased by 93.7% in Alaska in the past decade. The number of persons age 65+ living alone increased by 108%. Some areas have far surpassed the growth in the 65+ segment: Haines Borough, in my legislative district - 133%, Mat-Su Borough - 155.62%, and the Kenai Peninsula Borough - 143.65%. When one is aware of the phenomenal rates of growth occurring in this age segment, the specter of declining resources available for protection, intervention and investigation of crimes against this vulnerable group becomes very alarming.

HB 510 creates separate classes of offenses for crimes against the elderly and disabled adults and mandates enhanced penalties for these crimes. Financial exploitation and abuse of the elderly and disabled would become its own class of offense, with persons who commit theft when the victim is a disabled or elderly adult guilty of theft in the first degree.

HB 510 will also requires enhanced penalties for the failure to report harm to the elderly and disabled. If a person convicted of failure to report is a member of a profession regulated by the state, the courts shall notify the licensing, certifying, or regulating entity of the conviction.

The law currently says that a person who fails to comply with the law is guilty of a violation, the least serious state criminal offense and no mention is made of professionals or other licensed occupations.

SPONSOR STATEMENT

HB 510 Relatin to criminal offenses and penalties for offenses involving disabled and elderly adults

Twenty-eight states have penalties for abuse of an elderly person and sixteen states now have some form of enhanced penalties for these crimes. Many states have included statutory language to reflect that elderly and handicapped persons are more vulnerable and disproportionately damaged by crime because they are less able to escape offenders and tend to suffer the greatest relative deprivation as a result of crimes against them. The elderly and disabled are also more susceptible to long-term adverse effects of these crimes and less able to recover from the substantial impact of physical, emotional and financial abuse.

I do not believe that we, as a legislative body, have adequately addressed the issue of adult protective services. I intend to show that the dismal manner in which adult protective services have been funded over the past decade is reflective of how an environment can be created whereby the elderly and disabled become prey to all forms of despicable acts.

We, as legislators, are well aware of those legislative actions that have been taken that now contribute to the growth of Alaska's older population. The State has gone into the nursing home business building Pioneer's Homes; we've eliminated the income tax; we've instituted the Permanent Fund Dividend and the Longevity Bonus Program; and allowed for property and tax exemptions for senior citizens.

I feel that this situation is one of our making. We must address this phenomenal growth in our aged with haste and concern for our responsibilities to this most vulnerable segment of our society.

P E N A L T I E S F O R C R I M I N A L O F F E N S E S

Proposed classifications of offenses involving elderly and disabled adults and attendant penalties:

Offense:	Crime:	Penalty:
Serious physical injury	Assault in the first degree; Class A felony	Not more than 20 years -1st conv.- 5 yrs -1st conv.- 7 yrs with firearm -2nd conv.-10 yrs -3rd conv.-15 yrs AS 12.55.125
Physical injury	Assault in the second degree; Class B felony	Not more than 10 years -2nd conv.-4 yrs -3rd conv.-6 yrs AS 12.55.125
By words or other conduct placing a disabled or elderly adult in fear of imminent harm	Assault in the third degree; Class C felony	Not more than 5 years -2nd conv.-2 yrs -3rd conv.-3 yrs AS 12.55.125
Financial exploitation and abuse	Theft in the 1st degree; Class B felony	AS 12.55.125
Failure to report harm to elderly	Class B misdemeanor	AS 47.24.010(c) AS 12.55.135
Failure to report harm to disabled	Class B misdemeanor	AS 47.24.110(b) AS 12.55.135

Penalty considerations during sentencing are, of course, determined by mitigating and aggravating factors and presumptive sentencing guidelines.

HOUSE HESS COMMITTEE TESTIMONY

REMARKS TO PREFACE HB 510 & 511

I would like to preface my remarks by stating that my constituency includes a populace of elderly and disabled adults who are fiercely independent. Many have devoted their lives to the betterment of their communities and entering a nursing or pioneers home is not considered a viable option. Even if some of those who are on waiting lists to enter urban institutions actually enter a long term care facility it is still viewed as "going to town to die." The reality, though, is that many will die before making it to the top of these waiting lists.

Given the prevailing attitude amongst our elders I must commit my energies to those efforts that will provide quality assurances in the home and community based support services. I cannot proceed without first working towards the attainment of these most fundamental of protections.

The purpose of HB 511 is not to enter the institutional versus home care debate. This is fully intended to be friendly legislation. I am not here to impugn the home care provider industry but to continue the dialogue at the legislative level initiated by Senator Uehling and Project Choice. This dialogue is intended to prepare for a burgeoning older population, increases in the already prohibitive cost of institutional care, and the effort underway to explore and attain Medicaid waivers and options for home and community care.

Home care is not only more efficient and cost effective but highly desired. In fact, many of the elders in rural Alaska view being removed from their families and their native foods and way of life as akin to dying. When I hear a not-so-young man agonizing over the needs of his aged mother with precious few options to consider I know that our state must by dire necessity wholly support home and community based care.

My region, Southeast Alaska, has only 13% of the states population but it has 25% of those age 85 and older in the state, the most expensive age segment to care for in any setting.

Should one of my elders experience abuse or exploitation and is desperate to identify an alternate source of care, there is no "one" phone number to call, no "one" person to go to. Where do they turn from their relatively isolated condition, how are they to know about the availability of services for which they might be eligible? How are they to know they have choices?

Amongst the elderly and disabled there exists an even more critically vulnerable component:

- those who won't or can't go to pioneer or nursing homes
- those not eligible for medicaid services but still in need
- those who reside in communities with no available home and community based services.

Most rural areas of our state do not have home care services, this is a gross inadequacy that demands to be remedied. As we, the legislature, face up to our responsibility to our rural residents these proposed quality assurances will further enhance the lives of our revered elders and those amongst our family, friends and neighbors that are disabled.

The preferred choice of remaining at home, the cultural concerns of many of my constituents, as well as the fierce sense of independence shared by Alaskans demands that I pursue at every turn home care services for my district.

Before we plunge ahead in pursuit of this goal, we must take pause to ensure that that which we seek to attain does not bring grief, abuse, exploitation or convicted criminals into the private residences of our elderly and disabled.

I am anxious and fearful that this legislature will not adequately fund programs to meet the needs of my elderly and disabled constituents. There are those I serve who view the projected revenue shortfall with trepidation and anxiety convinced we will not address this most significant need.

With anticipated future growth of 30% in our senior citizen segment and 100% in the 85 and older sector, I have accepted that public policy considerations of an aging populace will be one of the greatest challenges of my tenure as a legislator.

None will argue that the elderly in my district and throughout rural Alaska are particularly impaired and impoverished.

We know that the percentage of older Alaskans as part of the total population is greater for rural than for urban. Combine this with the fact that Alaska Natives suffer impairment levels approximately double that of white senior citizens and a difficult situation is intensely exacerbated.

DEPARTMENT OF COMMERCE
& ECONOMIC DEVELOPMENT / POSITION PAPER

HB 510: "An Act relating to criminal offenses and penalties for offenses involving disabled or elderly adults."

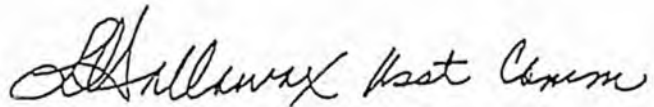
HB 510 gives authority to the appropriate board or the department where no board exists for disciplinary actions against the license or certification of a person under Title 8, for conviction under AS 47.24.010 or 47.24.110.

It instructs the court to notify the department of a conviction which assures it coming to our attention. By allowing the conviction to serve as prima facie evidence that the alleged act was committed, much time and funds will be saved in bringing an action against the license.

We believe this may be a deterrent to a licensed or certified professional who counts on being able to pay a fine but keep on practicing without a blemish in his or her licensing file.

It is our understanding that many of these cases are settled out-of-court with Health and Social Services being the mediator. Therefore, we would recommend that Health and Social Services be included with the court to notify the department when they make a "substantiation of a report of harm." Health and Social Services should be protected from a complaint of invasion of privacy, etc., by the person who is the subject of the report to the department.

The department supports passage of HB 510.



Glenn A. Olds, Commissioner

Date: 2.26.92

GAO/AB/dgl1506D
022592a

Position Paper Commerce

HOUSE BILL 510

"An Act Relating to Criminal Offenses and penalties for offenses involving disabled or elderly adults."

This bill proposes several changes to Alaska's criminal statutes regarding crimes against disabled adults and the elderly. It proposes increasing the penalty for failure of required professionals to report abuse, exploitation, abandonment or neglect of an elderly person to the department; for disabled adults it proposes increasing the penalty for failure to report to law enforcement. It proposes conviction of a professional who fails to report as grounds for disciplinary action by Occupational Licensing, where applicable. The Department supports this bill. Comments focus on Section seven.

Section 7

A February, 1992 Report from the U. S. Health and Human Services Secretary's Task Force on Elder Abuse stated that adult protective services agencies are the principal agencies responsible for the investigation and follow-up on domestic elder abuse cases and are also the primary agencies responsible for investigating institutional abuse cases. The report noted that most states have enacted some type of legislation addressing elder abuse, and that most have established policies, job classes etc., but lack of resources to carry out the mandates have often resulted in protective services programs that are less than adequate. Further the report noted that practitioners in the field sometimes ignore the reporting law because they recognize there is no service system to address cases of abuse.

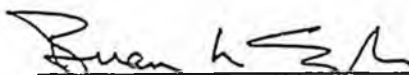
Alaska is no different. Some professionals have openly stated that they will not report because they believe the response from adult protective services is inadequate. Some have stated that they believe they can handle the problem better themselves. Others do not report because they do not recognize that abuse has occurred, or they do not know that they are required to report. For example, physicians and other medical professionals could use training in recognition, just as they needed it for child abuse. Many abuse symptoms are similar to those for children, but medical professionals are not trained to recognize abuse in adults and there are some significant differences.

While the department has not yet brought known instances of failure to report abuse, exploitation or neglect by a caregiver to the attention of the Department of Law for prosecution, it is important to have a strong penalty for blatant disregard of the reporting

requirement. We have been informed by the sponsor that a correction to make the penalty a Class B misdemeanor is being submitted in a sponsor substitute.

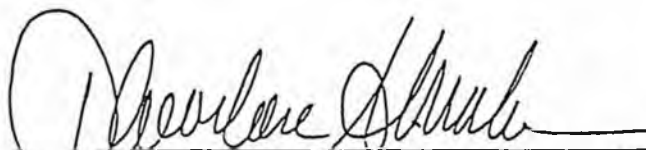
Task Force

Alaska falls into the mold of states referenced in the U. S. Health and Human Services report. Some states like Texas, Maine, Wisconsin and Illinois have established very credible adult protective services systems, but most have not. We are concerned about the vulnerable populations with which we come into contact and believe that lack of an adequate protective services system for vulnerable adults should be addressed, particularly as our aging population increases. We think that this area should be addressed in a planned way to avoid creating an overwhelming surge in reporting as we experienced in the area of child abuse. The Department proposes a task force be convened to address these issues. The task force is more fully discussed in the Department's Position paper for HB 511.



Brian Saylor, PhD, MPH,
Deputy Commissioner/Acting Director
Division of Family and Youth Services

Date: _____



Theodore A. Mala, MD, MPH,
Commissioner
Department of Health and Social
Services

Date: 4 March 1992

STATE OF ALASKA

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

OFFICE OF THE COMMISSIONER

WALTER J. HICKEL, GOVERNOR

THEODORE A. MALA, COMMISSIONER

P.O. BOX 110601
JUNEAU, ALASKA 99811-0601
PHONE: (907) 465-3030

February 26, 1992

Mr. David L. Olerud
P. O. Box 1069
4th and Main Street
Haines, Alaska 99827

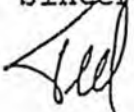
Dear Mr. Olerud:

Thank you for your recent letter regarding your concern on behalf of an elderly citizen of Haines. I appreciate your taking the time to inform me of her financial, physical and mental abuse from a caregiver and am relieved to learn that you and others have worked to improve the situation.

The legislation you mention has been introduced by Representative Mackie. Indeed it responds both to the situation you describe and to other similar cases of abuse by caregivers. In concept the Department is very supportive of the bills. I am informed that Pat O'Brien, Adult Protective Services coordinator, in the Division of Family and Youth Services has been working closely with Representative Mackie's staff. She is also reviewing the two bills, HB 510 and HB 511 with key staff from other affected divisions to ensure that the legislation appropriately addresses the issues.

Again, thank you for your concern. I will watch the progress on these bills with interest.

Sincerely,



Theodore A. Mala, MD, MPH
Commissioner

cc: Brian Saylor, PhD, MPH
Acting Director
Division of Family
and Youth Services
Representative Jerry Mackie

In order to protect our elderly and otherwise incapacitated population, and to keep this incredible scenario from happening again, I feel that the state should take two simple steps by way of new or existing legislation, as follows:

- 1) All doctors or healthcare givers are required to become cognizant of and report any signs of physical or mental abuse to appropriate authorities.
- 2) Anyone providing legal counsel must be required to likewise report to proper authorities their knowledge of any attempt to gain or to take someone's financial resources.

We look forward to continuing our work with Representative Mackey to correct this problem, and hopefully by the end of the current legislative session it will be passed into law. This case is not isolated, and you may well be aware of similar ongoing instances in which this legislation would be very important and beneficial.

Thank you.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "David L. Olerud". The signature is written in dark ink and is positioned below the typed name.

David L. Olerud

/lao

P. O. Box 1069
Haines, AK 99827

May 9, 1991

State Representative Johnny Ellis
Seventeenth Alaska State Legislature
Interdepartmental Mail Stop
P. O. Box V
Juneau, AK 99811

Dear Representative Ellis:

This letter is in regard to the subject of protection for the elderly population of Alaska, and also in response to my telephone conversation with Vickie. I wholeheartedly feel that we can and must provide a blanket of protection to our elderly and those who are incapacitated in any way. These objectives could best be met by placing into law the following:

1. Those persons providing either public or private care/services to the elderly or otherwise incapacitated people, would be denied the following perogatives:
 - a) Caregivers could not assume or be placed under any powers of attorney, last wills or testaments, or joint bank accounts.
2. Responsibility should be placed upon those who provide outside physical, mental, or material services. A degree of responsibility must be constantly maintained so that any physical neglect or mental abuse must be reported to the proper authorities. In other words, the elderly and disadvantaged should also be allowed the same lawful protection currently given to young people in relationship to child abuse.

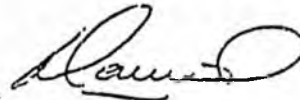
Page Two

Recent personal experiences which I related in my earlier letter to State Representative J. Mackie (copy enclosed) have led me to believe that the state of Alaska has allowed a tremendous void to take place in relation to this particular grouping of people. The sad part is that each of us could undoubtedly have a high percentage chance of being in this same situation, and thus state mandated protection is extremely necessary.

With your abilities and dedication, I know that this problem can be corrected. If I can assist in way, I would be more than honored to do so.

Thank you for your time and effort.

Sincerely,



David E. Olerud

/lao
Enclosure

cc: State Representative Jerry Mackie (w/o encl.)

P. O. Box 1069
Haines, AK 99827

State Representative Jerry Mackie
Seventeenth Alaska State Legislature
Interdepartmental Mail Stop 3100
P. O. Box V
Juneau, AK 99811

Dear Representative Mackie:

In response to our telephone conversation today, I wish to recap in writing the subject of our discussion, which I feel should be very closely evaluated.

In the last few months, I've received an educational experience pertaining to personal and legal problems confronting an elderly lady with whom my wife and I have been close friends for almost 30 years. And, it occurs to me that this situation is undoubtedly representative of similar occurrences elsewhere.

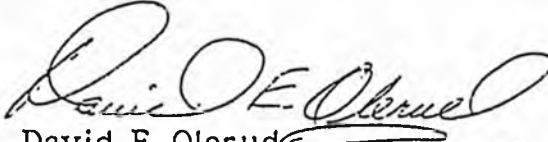
This particular individual is suffering from advanced stages of Parkinson's disease. In her prime she was extremely sharp, and quite possibly one of the most dynamic and mentally alert persons in our community, at which time she took great pains to organize the necessary papers, etc., that would oversee her desires upon her death. We now find her to be maybe one-hundredth of her mental capabilities, but most unfortunately, we are seeing tremendous stress being placed on her in relation to the wealth that she accumulated during her lifetime. The situation is a prime example of how older or otherwise incapacitated people can become very susceptible to outside mental control. One of the ways I believe we can protect these people, and give greater security with less pressure later on in life, is legislation that mandates those who provide care or services for innumeration in any way, be barred from holding power of attorney, participation in wills, or even joint-bank accounts. I very strongly believe that a third party outside of those who provide personal services, should act as a buffer to prevent mental intimidation and transfer of wealth.

Page Two

I will look favorably upon any legislation that will protect these people who are so vulnerable. I realize your time is in great demand, and I very much appreciate your phone call and interest.

Thank you, and if I can be of any assistance, it would be my pleasure.

Sincerely yours,



David E. Olerud

March 25, 1991

Bruce Abramson
2900 Boniface, #323
Anchorage, Alaska 99504

March 21, 1992

Rep. Dave Donley
Alaska State Legislature
Juneau, Alaska 99801-1182

Via Fax (465-2299)

Re: HB510 (Crimes Against Disabled and Elderly Adults)

Dear Representative Donley:

I have been a District Attorney in Alaska, an Assistant Public Defender, and victim - on several occasions - of violent crimes. Looking at HB510 (Crimes Against Disabled and Elderly Adults) from these three perspectives, the bill makes no sense. Not only does current law give special added protection to vulnerable victims, but this bill is grossly discriminatory.

I assume the purpose of the bill is to give added protection to extremely vulnerable citizens, the disabled and the elderly. The bill, in fact, does not do this.

Disabled Adults

When I think of protecting "disabled" adults, I picture a vulnerable blind man or a woman in a wheelchair. But the definition of "disabled" was not written specifically for the criminal code. Instead, the bill (under Section 6) incorporates the definition from Title 18 written for an entirely different purpose. A "disabled" person under A.S. 18.80.300 includes: a person who has lost a sense of smell; a person with a disfiguring birthmark; an impotent man; an infertile woman; a person with a reading disorder. Look at the statutory definition of "disabled"; it is extremely broad and has no bearing to the kind of real vulnerability that a criminal may prey on:

"Physical or mental impairment" means:

(A) physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemich and lymphatic, skin, and endocrine;

(B) mental or psychological disorder, including mental retardation, organic

Representative Dave Donley
March 21, 1992
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brain syndrome, emotional or mental illness, and specific learning disabilities; [AS 18.80.300 (13)]

It makes no sense to treat all these "disabled people", as defined by Title 18, as so vulnerable that they need a special criminal law to protect them. (Note also that "disabled" children are not included in the bill.)

Elderly

The bill also stereotypes people over 65 as being so vulnerable, so feeble, that they should be treated differently than everyone else. This simply is a false stereotype: a robust 65 year old is not comparable with a bedridden 85, nor with a "95 pound weakling" who is 35 years of age, nor to a child. Note that Section 5 of the bill applies not to assaults but to property crimes, in which actual physical vulnerability is typically irrelevant. Under the bill, taking a stick of gum from the seat of a Winnebago owned by a 65 year old is equal in criminality to stealing \$25,000 from a 62 year old widow, or from a single mother with three kids, or from an unemployed laborer, etc., etc. This is ridiculous.

Vulnerable Victims Already Receive Special Protection

Vulnerable victims already receive special protection. Under the current sentencing statute, a victim's vulnerability is an aggravating sentencing factor. AS 12.55.155 (c)(5) allows the court to increase a sentence if:

The defendant knew or reasonable should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance.

Justice must be individualized, that is, individual characteristics of a defendant and individual characteristics of a victim must be considered in applying the criminal law. The sentencing statute already does this by looking at individual vulnerability, not on the basis of crude stereotypes. The bill crudely lumps together a vigorous 65 year old with a 90 year old, and lumps an impotent 25 year old with a blind man in a wheelchair. By contrast, the current sentencing law individualizes justice to protect the truly vulnerable.

The Bill Discriminates Against Classes of Victims

What the bill really does is create two classes of citizens: "disabled adults" and the "elderly" are made first-class citizens with special status in the law, while the rest of us are put in second-class. This bill tells me that it is less serious, and therefore more desirable, for a criminal to steal \$24,000 from me than steal a golf ball from a retired millionaire. I resent being treated as a "preferred victim".

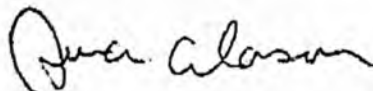
Representative Dave Donley
March 21, 1992
Page 3 of 3

The law must protect all citizens, and must give special protection to the especially vulnerable. The current law does this as sentencing. The bill however is based on gross stereotypes, which, in effect divides victims into first and second class citizens.

If the current law is failing to protect certain citizens, and if that failure lies not in the enforcement of the law but in the definition of crimes, then a carefully tailored amendment must be drafted to address the specific, real-life problems.

I strongly oppose Sections 2 through 6 of HB510. Please give copies of this letter to all House Judiciary Committee Members. Thank you.

Sincerely,



Bruce Abramson

BA/dp

AVCP

Association of Village Council Presidents
P.O. Box 219 • Bethel, Alaska 99559 • Phone 543-3521

March 13, 1992

Dave Donley, Chairman
House Judiciary Committee
State Capitol
Juneau, Alaska 99801-1182

RE: HB 510 and HB 511

The Association of Village Council Presidents is interested in the quality of life for our elders. House Bill 510 and House Bill 511 are of particular interest to us, in it the bills will enhance much needed protection for the elderly and disabled. And it will mandate harsher penalties for crimes committed against them.

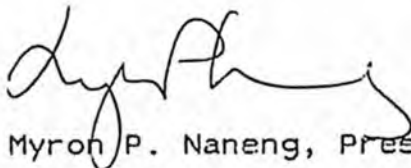
In this area we value the wisdom and the direction the elders give us. Crimes against the elderly and disabled cannot be tolerated, as well as the failure to report such abuse.

We hope that HB 510 and HB 511 introduced by Representative Mackie, Representative Ellis and Representative Lincoln will be passed into law.

House Bills 510 and 511 have our full support.

Sincerely,

ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS
Willie Kasayulie, Chairman



Myron P. Naneng, President

D. DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

240 Main Street, Suite 500
Juneau, Alaska 99801-2101

MEMORANDUM

February 24, 1992

SUBJECT: Sectional Summary - CSHB 510() (Work Order No. 17-LS2051\D)

TO: Representative Jerry Mackie
Attn: Vickie Irwin

FROM: Jerry Luckhaupt *JEL*
Legislative Counsel

You have requested a sectional summary of HB 510, an Act relating to criminal offenses and penalties for offenses involving disabled or elderly adults. You have also asked that I compare the enhanced penalties provided by this Act with any existing penalties. Be advised that a sectional summary is not an authoritative interpretation of the bill. The bill itself is the best statement of its contents.

Section 1 of the bill provides that a conviction under AS 47.24.010 or 47.24.110, relating to requirements for reporting harm or abuse of disabled or elderly adults, may be considered grounds for disciplinary action if the person convicted is licensed under AS 08.

Section 2 of the bill amends AS 11.41.200(a) by providing that a person who recklessly causes serious physical harm to a disabled or elderly adult is guilty of assault in the first degree, a class A felony, and can be sentenced as provided in AS 12.55.125(c). Currently this offense could only be prosecuted as assault in the second degree, a class B felony, and punished as provided in AS 12.55.125(d).

Section 3 of the bill amends AS 11.41.210(a) by providing that a person who recklessly causes physical harm to a disabled or elderly adult is guilty of assault in the second degree, a class B felony, and can be punished as provided in AS 12.55.125(d). Currently a person who recklessly causes physical harm to another person may be punished for third degree assault, a class C felony, if they use a dangerous weapon in the commission of the offense, or for fourth degree assault, a class A misdemeanor, without a dangerous weapon. A class C felony is punishable as provided in AS 12.55.125(e) and a class A misdemeanor is punishable as provided in AS 12.55.135(a).

Sectional Analysis

Section 4 of the bill amends AS 11.41.220(a) by providing that a person who recklessly by words or physical conduct places a disabled or elderly adult in fear of imminent physical injury is guilty of assault in the third degree, a class C felony and may be punished as provided in AS 12.55.125(e). Currently a person that does this against another person may only be punished for assault in the fourth degree, a class A misdemeanor, with a sentence as provided in AS 12.55.135(a).

Section 5 of the bill amends AS 11.46.120(a) by providing that a person who commits theft (as defined in AS 11.46.100) and the victim is a disabled or elderly adult, commits theft in the first degree, a class B felony, punishable as provided in AS 12.55.125(d). Currently a theft committed against another person is adjudged first (class B felony), second (class C felony), or third degree theft (class A misdemeanor), based on the value of the property stolen or in some cases the type of property.

Section 6 of the bill provides a definition of disabled or elderly adult.

Section 7 of the bill amends AS 47.24.010(c) to provide that a person listed in AS 47.24.010(a) who fails to report that a disabled or elderly adult has suffered harm is guilty of a class B misdemeanor and requires the court to notify the licensing entity of the person of the conviction. Currently, this section only provides for punishment by way of a non-criminal violation.

Section 8 of the bill amends AS 47.24.110(b) by providing that the court that has convicted a person listed in AS 47.24.110(a) for failing to report that a disabled or elderly adult has been physically or sexually assaulted, shall report the conviction to the licensing entity of the person.

GPL:pl
92-124.plm

Table 1.
Statutory Penalties for Adult Abuse

State	Crime Class	Penalty
Alabama	Class B felony Class C felony Class A misdemeanor	Two to 20 years One year one day to 10 years Not more than one year
Arizona	Endangerment, injury, or neglect by caretaker: Class 1 misdemeanor	Not more than six months
Arkansas	Class D felony Class B misdemeanor Class C misdemeanor	Determinate sentences not to exceed six years Not less than five years or more than 20 Not less than three years or more than 10
Delaware	Patient or resident abuse, neglect: Class A misdemeanor Serious injury: Class D felony Death: Class A felony Board member, manager who fails to take corrective action: Class A misdemeanor	10 years, plus fine or other court conditions Life imprisonment Not more than two years, plus fine or other court conditions
Florida	2nd Degree felony 3rd Degree felony 1st Degree misdemeanor	Maximum 15 years, \$10,000 Maximum five years, \$5,000 Maximum one year, \$500
Georgia	Misdemeanor	
Hawaii	See Table 2 for special provisions	
Illinois	Abuse, neglect in long-term care facility: Class 3 felony "Business offense": Class 4 felony Criminal neglect, financial exploitation of elderly: Class 2, 3, or 4 felony	Two to five years, \$10,000 One to three years, \$10,000
Kentucky	Caretaker abuse, neglect, exploitation: Class C felony Class A misdemeanor	Five to 10 years Not more than 12 months
Maryland	Caregiver abuse, neglect: misdemeanor Abuse of facility residents' funds: misdemeanor	Fine not exceeding \$5,000 or imprisonment for not more than five years or both. (In addition to other sentence for conviction arising from same facts and circumstances) Fine not exceeding \$500
Massachusetts	Attorney General may impose civil penalty on person who abuses, neglects, mistreats patient, resident of facility	Not specified
Nebraska	Knowing and intentional abuse of vulnerable adult: Class IV felony	Up to five years' imprisonment, or \$10,000, or both
Nevada	Gross misdemeanor (unless more severe common penalty applies)	Not less than one year nor more than six years
New Hampshire	Gross misdemeanor unless more severe penalty applies	Not more than one year
North Carolina	Abuse or neglect in health care or residential care facilities causing serious bodily injury: Class C felony for intentional conduct; Class G felony for culpably negligent conduct; Class H felony for conduct which proximately causes injury	Up to 50 years Up to 15 years Up to 10 years
Ohio	Assault, abuse, neglect of "functionally impaired," Assault by caretaker: 4th degree felony Repeat offense by caretaker: 3rd Degree felony; Caretaker reckless failure to provide care resulting in physical harm: 1st Degree misdemeanor; Repeat offense: 4th Degree felony. Caretaker reckless failure to provide care: 2nd Degree misdemeanor; Repeat offense: 4th Degree felony	18 months to five years Two to 10 years

State	Crime Class	Penalty
Oregon	"Criminal mistreatment": 1st Degree: Class C felony 2nd Degree: Class A misdemeanor	Maximum five years Maximum one year
Pennsylvania	Abuse, neglect, mistreatment in long-term health facility Pattern of harassment in long-term health facility	\$3,000, three years, or both \$500, one year, or both
Rhode Island	See Table 2 for special provisions	
South Carolina	Misdemeanor	Not less than \$500 or more than \$5,000, or imprisonment of not less than 90 days or more than five years
South Dakota	Abuse: Class 6 felony Theft by exploitation: Class 1 or Class 2 misdemeanor	Not more than one year One year jail or \$1,000 or both. 30 days' jail or \$100 or both. Restitution also may be ordered
Tennessee	Willful abuse, neglect, exploitation: Class A misdemeanor	Not more than 11 months 29 days, or fined more than \$1,000, or both
Texas	1st Degree felony 3rd Degree felony Class A misdemeanor	Five years to life Two to 10 years Maximum one year jail, fine not to exceed \$2,000, or both
Utah	3rd Degree felony	Not to exceed five years (unless firearm used)
Vermont	Abuse/exploitation of elderly Abuse/exploitation of elderly by caregiver	Fine of not more than \$10,000, imprisonment not more than one year, or both Same as above; however, court may on motion of party on its own motion defer such sentence and place defendant on probation
West Virginia	Abuse, neglect by one with care, custody, or control over incapacitated adult: guilty of felony	Two to 10 years penitentiary; not more than 12 months' jail or \$1,500 (at court's discretion)
Wisconsin	Cruel maltreatment: Class A misdemeanor Abuse, neglect, or ill-treatment of residents of facilities: Class E felony	Fine not to exceed \$10,000, or imprisonment not to exceed nine months, or both Fine not to exceed \$10,000, or imprisonment not to exceed two years, or both
Wyoming	Abuse, neglect, exploitation, abandonment: misdemeanor	Not more than \$1,000, or one year county jail, or both Repeat conviction: state penitentiary not more than five years

States listed are the only ones known to have set penalties in elder-specific or adult protection laws.

In its 1989 enactment concerning "criminal neglect and financial exploitation of an elderly or disabled person," the Illinois General Assembly created a Class 4 felony for adult abuse "business offenses." The resulting penalty is imprisonment for one to three years and a fine of \$10,000; or the judge may impose a larger fine if the financial exploitation involved more than \$10,000.

An NCSL analysis of state statutes has found that 14 states include financial exploitation among offenses for which a special penalty can apply or have created a separate, specific penalty for financial abuse. Florida, for example, created a 3rd Degree felony for "improper or illegal use or management of the funds, assets, property, power of attorney or guardianship of such an aged person or disabled adult for profit" (Fla. Stat. § 415.111 [1989]). To be convicted of this offense could carry a maximum sentence of five years in prison and a \$5,000 fine.

Like Illinois, Maryland deals separately with financial exploitation that takes place in an institution. This measure creates a misdemeanor for "abuse of a facility resident's funds."

By including financial exploitation in its 1989 statute that sets penalties, Alabama now can prosecute cases that before might have fallen through the cracks of the criminal code, according to Stephens in the Alabama Attorney General's Office. Conning elderly boarding home residents has been too common, according to Stephens, who described situations where an elderly resident might consent to a payee

Table 2.

Statutory Enhanced Criminal Penalties for Crimes Against the Elderly

State	Crime	Enhancement/Penalty
Arizona	Class 4, 5, or 6 felony Class 2 or 3 felony	Sentence may be increased by up to 25% when the victim is 65 or older or handicapped. Sentence may be increased up to 100% when the victim is 65 or older
California	Prior conviction for burglary; robbery; kidnapping; kidnapping for ransom, extortion, or robbery; rape; sodomy; mayhem; and committed against person 65 or older or one who is blind, paraplegic, quadriplegic, or under 14 years. Assault, battery or assault with a deadly weapon, against person 65 or older	Two-year enhancement Restitution may be ordered as a condition of probation
Colorado	On victim age 60 or over or disabled: 2nd Degree assault becomes Class 3 felony; 3rd Degree assault becomes Class 5 felony; Robbery of elderly (60+) or disabled becomes Class 3 felony; Theft from elderly or handicapped becomes Class 3, or Class 5 felony (depending on value of items). Theft by means other than force, threat, or intimidation: Class 4 felony regardless of value of things taken	Four to six years One to five years. Restitution also may be ordered and probation revoked for nonpayment Four to six years Four to six years One to five years. Restitution also may be ordered and probation revoked for nonpayment Two to eight years
Connecticut	Assault of victim 60 or older: 1st Degree assault, a Class B felony	Five years' sentence may not be suspended or reduced by the court
Delaware	2nd Degree robbery of person 65 or older by repeat offender: Class D felony	Mandatory one-year minimum during which no furlough, work release, or other supervised release allowed
Florida	When committed against person 65 or older: Aggravated battery goes from 2nd Degree felony to 1st Degree felony; Aggravated assault goes from 3rd Degree felony to 2nd Degree felony; Battery goes from 1st Degree misdemeanor to 3rd Degree felony; Assault goes from 2nd Degree misdemeanor to 1st Degree misdemeanor	Mandatory minimum term of three years, plus fine of not more than \$10,000, and restitution and community service ordered
Hawaii	In committing or attempting to commit felony, causes death or serious or substantial injury to person 60 years or older, blind, paraplegic, quadriplegic, eight years or younger: 2nd Degree murder Class A felony Class B felony	Mandatory minimums, no parole, apply as such: 15 years Six years, eight months Three years, four months. However, law also provides "authority to withhold sentence of imprisonment" and grant probation <i>except for</i> Class A felony, repeat offender, felony firearm offender, death, or serious or substantial bodily injury
Illinois	Sexual assault of person 60 or older, or handicapped, becomes "aggravated" Class X felony. Sexual abuse of person 60 or older, or handicapped, becomes "aggravated" Class 2 felony	Six to 30 years Three to seven years

State	Crime	Enhancement/Penalty
Indiana	Battery against elderly person becomes Class D felony. Home improvement fraud is Class D felony when committed against person 60 or older and cost of fraud is more than \$10,000	Fixed term two years
Massachusetts	Assault, battery with dangerous weapon on person 65 or older. Repeat offense. Assault with dangerous weapon on person 65 or older. Repeat offense. Assault with intent to rob or murder with dangerous weapon on person 65 or older. Repeat offense	Not more than 10 years' state prison, \$1,000, or jail more than 2-1/2 years. Mandatory minimum of two years, during which no probation, parole, furlough, work release, or good time allowed. Not more than five years' state prison, \$1,000, or jail more than 2-1/2 years. Mandatory minimum of two years, during which no probation, parole, furlough, work release, or good time allowed. Not more than 20 years' state prison. Mandatory minimum of two years, during which no probation, parole, furlough, work release, or good time allowed
New Mexico	Noncapital felonies	One-year sentence enhancement that can't be suspended or deferred. Two-year enhancement if serious bodily injury
Oklahoma	Assault, battery, or assault and battery with dangerous weapon; 2) Aggravated assault and battery; 3) Burglary in second degree; 4) Use of firearm or offensive weapon; 5) Grand larceny; 6) Extortion; 7) Fraud; 8) Embezzlement against elderly (62 years or older) or incapacitated persons	30-day mandatory minimum jail term in addition to subsequent probation; restitution and community service required; fine also may be imposed. Repeat offense against elderly results in 10-year mandatory minimum for crime with sentence normally exceeding five years. Third offense enhancement also created in statute
Pennsylvania	Sets mandatory minimums. Crimes committed by persons under 60 against person over 60: Aggravated assault Rape Involuntary deviate sexual intercourse Theft by deception	Not less than two years Not less than five years Not less than five years Not less than 12 months (minimum sentence discretion where the court finds justifiable cause and explains in writing). Parole should not be granted until minimum term of imprisonment has been served
Rhode Island	Assault/battery of person 60 years or older causing serious bodily injury becomes felony. Assault/battery by person responsible for care of person 60 years or older causing bodily injury becomes felony. Assault/battery by person responsible for care of person 60 years or older causing serious bodily injury becomes felony	Imprisonment not less than three years but not more than 20 years, or fine not more than \$10,000, or both. Mandatory restitution and/or community service. Imprisonment not exceeding five years, or fine not exceeding \$2,500, or both. Health care facility also may be fined, not exceeding \$5,000. Imprisonment mandatory two years but not more than 20 years, or fine not more than \$10,000. Health care facility also may be fined not more than \$15,000
Texas	Aggravated robbery of person 65 or older or disabled person that causes bodily injury or places person in fear of imminent bodily injury or death becomes 1st degree felony	Five years to life
West Virginia	Assault, battery, or assault during commission of or attempt to commit felony against person 65 or older	Sentence mandatory, not subject to probation or suspension

Appendix A

Elder Abuse/Adult Protective Statutes

Nevada	Nev. Rev. Stat. § 200.5093 to 200.599 (1985) Protective services for adults 60 and over. Reporting. Penalties.	South Carolina	S.C. Code Ann. § 43-29-10 to 43-29-100 (Law. Co-op 1979) Adult protective services. Abuse, neglect, exploitation. Penalties.
New Hampshire	N.H. Rev. Stat. Ann. § 161-D:1 to 161-D:6 (1983) Adult protective services. Reporting. Registry. Penalties.	South Dakota	S.D. Codified Laws Ann. § 22-46-1 to 22-46-4 (1986) Penalties for abuse of disabled adult, theft by exploitation.
New Jersey	N.J. Stat. Ann. § 52:276-1 to 52:276-16 (West 1987) Protection of institutionalized elderly. Abuse, exploitation, reporting.	Tennessee	Tenn. Code Ann. § 71-6-101, 71-6-118 (1986) "Tennessee Adult Protection Act." Adult protective services. Abuse, neglect, exploitation. Reporting. Penalty.
New Mexico	N.M. Stat. Ann. § 27-7-14 to 27-7-31 (1989) Adult Protective Services Act. Abuse, neglect, exploitation.	Texas	Tex. Human Resources Code Ann. § 48.002 (Vernon 1987) Protective services. Abuse, neglect, exploitation. Reporting. Court attendants for elderly. Tex. Penal Code Ann. § 22.04 (Vernon 1989) Penalties for injury to child, elderly, invalid. Tex. Stat. Ann. art. 442c. (Vernon 1987) Reports of institutional abuse, neglect. Reporting. Registry.
New York	N.Y. Social Service Law § 473 & 473a (McKinney 1985) Adult Protective Services. Reporting.	Utah	Utah Code Ann. § 62A-3-301 to 62A-3-312 (1988) Protective services for abused, neglected, exploited disabled adults. Protective services. Reporting. Penalties.
North Carolina	N.C. Gen. Stat. § 108A-99 to 108A-111 (1976) Adult protective services. Reporting. N.C. Gen. Stat. § 14-32.2 (1989) Abuse, neglect of residents, patients of care facilities. Penalties.	Vermont	Vt. Stat. Ann. tit. 18, § 1150 to 1159 (1989) Protective services. Registry. Public education. Penalties for abuse, exploitation of elderly or disabled adult.
North Dakota	N.D. Cent. Code § 14-07.1 (1979) and § 14-07.1-09 (1989) Protective services for adult abuse. Reporting.	Virginia	Va. Code § 63.1-55.1 to 63.1-55.8 (1986) Protective services for persons 60 and over, incapacitated adults. Abuse, neglect, exploitation. Reporting. Va. Code § 32.1-127.2 (1989) Requires nursing home facilities to report injuries to patients to Dept. of Health semiannually.
Ohio	Ohio Rev. Code Ann. § 5101.60 (Page 1989) Adult protective services for persons 60 or over. Abuse, neglect, exploitation in "independent living arrangement" (not licensed facilities). Reporting. Ohio Rev. Code Ann. § 2903.10, 2903.13, 2903.16 (Page 1989) § 2903.11, 2903.12, 2903.14, 2903.15 (Page 1987) Penalties for abuse, neglect, assault of "functionally impaired" persons. Ohio Rev. Code Ann. § 3722.12 (Page 1989) Abuse in adult care facilities. Allows civil course of action.	Washington	Wash. Rev. Code § 74.34 (1989) Abuse, neglect, exploitation of "vulnerable adults." Protective services. Reporting. Crime information.
Oklahoma	Okla. Stat. Ann. tit. 43A, § 10-101 (West 1986) Protective services for elderly or incapacitated persons. Abuse, neglect, exploitation. Reporting.	West Virginia	W.Va. Code § 9-6-2 to 9-6-15 (1989) Protective services for incapacitated adults. Reporting. Penalties.
Oregon	Or. Rev. Stat. § 410.610 to 410.700 (1983) Reporting. Or. Rev. Stat. § 441.630 to 441.680 (1987) Reporting of patient abuse in health care facilities. Or. Rev. Stat. § 163.200 and 163.205 (1973) Penalties for criminal mistreatment of "dependent person."	Wisconsin	Wis. Stat. Ann. § 46.90 (West 1984) Elder abuse protective services. Abuse, material abuse, neglect. Voluntary reporting. Wis. Stat. Ann. § 940.285 (West 1986) Penalties for abuse to "vulnerable adults."
Pennsylvania	Pa. Stat. Ann. tit. 35, § 10211 to 10224 (Purdon 1987) "Older Adults Protective Services Act." Abuse, neglect, abandonments, exploitation. Reporting.	Wyoming	Wyo. Stat. § 35-20-101 to 35-20-109 (1985) Protective services for vulnerable adults, elderly. Abuse, neglect, exploitation, abandonment. Reporting. Penalties.
Rhode Island	R.I. Gen. Laws § 23-17.8-1 to 23-17.8-10 (1989) Abuse in health care facilities. Reporting. Penalties. R.I. Gen. Laws § 11-5-10.1, 10.3 - 10.4. (1988) Penalties for assault, including those responsible for care. Facility penalties.		

Appendix B

Enhanced Penalty Statutes

Ariz. Rev. Stat. Ann. § 13-702 (1987)

Cal. Penal Code § 667.9 (West 1987)
Two-year enhancement.

Cal. Penal Code § 1203.1j (1990)
Defendant knew or reasonably should have known elderly status of victim.

Colo. Rev. Stat. § 18-3-209(4) (1986)
Assault, Felony several classes.

Colo. Rev. Stat. § 18-4-401 (1989)
Theft, Felony.

Colo. Rev. Stat. § 18-4-304 (1986)
Robbery, Felony.

Conn. Gen. Stat. § 53a-60c (1981)

Del. Code Ann. tit. 11, § 831 (1983)
Repeat offender. No furlough, work release, other supervised release during minimum sentence.

Fla. Stat. Ann. § 784.08 (West 1989)
Aggravated assault, aggravated battery. Mandatory sentencing, fine, restitution.

Hawaii Rev. Stat. § 706 (1988)
Mandatory minimum without parole. Sets sentence lengths.

Ill. Ann. Stat. ch. 38, § 12-14 (Smith-Hurd 1989)
Aggravated sexual assault.

Ill. Ann. Stat. ch. 38, § 12-16 (Smith-Hurd 1989)
Aggravated criminal sexual abuse.

Ind. Code Ann. § 35-42-2 (Burns 1989)
Battery, Felony.

Mass. Gen. Laws Ann. ch. 265, § 15a, 15b, 18 (1981)
Dangerous weapon. Penalty. Mandatory minimum for repeat offenses.

N.M. Stat. Ann. § 31-18-16.1 (1980)

N.C. See "abuse."

Ohio Rev. Code Ann. § 2903.10 - 2903.16 (Page 1988)
Penalties for offenses committed by a caretaker.

Okla. Stat. Ann. tit. 22, § 991a-6 to 991a-12 (West 1989)

Pa. Cons. Stat. Ann. tit. 42, § 9717 (Purdon 1982)

R.I. Gen. Laws § 11-5-10.1 (1988)
Assault. Serious bodily injury.

R.I. Gen. Laws § 11-5-10.3 (1988)
Assault. Responsible for care. Includes fine for health care facility that either condoned the act or attempted to conceal it.

R.I. Gen. Laws § 11-5-10.4 (1988)
Assault. Serious bodily injury. Responsible for care. Includes fine for health care facility that either condoned the act or attempted to conceal it.

Tex. Penal Code Ann. § 22.04 (Vernon 1989)

Tex. Penal Code Ann. § 29.03 (Vernon 1989)
Aggravated robbery.

Vt. Stat. Ann. tit. 18, § 1159 (1989)

W. Va. Code § 61-2-10a (1984)

Appendix C

Fraud/Consumer Trickery

Ind. Code Ann. § 35-43-6-1 to 35-43-6-14 (Burns 1987)
Home improvement fraud is Class D felony when committed against person 60 or older and cost of such fraud is more than \$10,000.

Minn. Stat. § 325F.71 (1989)
Imposes additional civil penalty of up to \$10,000 for deceptive trade practices, false advertising, consumer fraud perpetrated against senior citizen or vulnerable adult. Authorizes separate cause of action, including attorney's fees.

N.Y. Gen. Bus. Law § 349(c) to 349(e) (McKinney 1989)
Does not specify elderly but does specify medically related fraud. Prohibits fraudulent use of the title *doctor*.

STATE OF MONTANA

respect to the person acted in bad faith or with malicious purpose.
History: En. Sec. 7, Ch. 623, L. 1983; Sec. 53-5-514, MCA 1989; red. 52-3-814 by Code Commissioner, 1991.

Cross-References
Unsworn falsification to authorities, 45-7-203.

52-3-815. Evidence of abuse or neglect to be gathered and submitted. (1) A person or agency receiving a report of suspected abuse or neglect under 52-3-811 shall prepare a written description of the conditions regarded as evidence of abuse or neglect and may, with the consent of an allegedly abused or neglected older person or developmentally disabled person or without consent of the person if it appears that the person is an incapacitated person, take or cause to be taken photographs of an area of trauma visible on the body of the allegedly abused or neglected person and regarded as evidence of abuse or neglect.

(2) A physician required to report under 52-3-811 may, with the consent of an allegedly abused or neglected older person or developmentally disabled person or without consent of the person if it appears that the person is an incapacitated person, require x-rays or other appropriate medical tests or procedures that would, in the professional opinion of the physician, assist in establishing evidence related to the allegation of abuse or neglect.

(3) Evidence authorized to be gathered under this section must be submitted with the report required under 52-3-811 to the authorities designated in 52-3-811 as soon as possible after submission of the report.

History: En. Sec. 3, Ch. 716, L. 1991.

Compiler's Comments
Codification Not Followed: Section 4, Ch. 717, L. 1991, provided that this section was intended to be codified as an integral part of Title 53, ch. 5, part 5. The Code Commissioner has codified this section as part of Title 52, ch. 3, part 8, to reflect the renumbering of former Title 53, ch. 5, part 5, as Title 52, ch. 3, part 8.

52-3-816 through 52-3-820 reserved.

52-3-821. Admissibility of evidence. In any proceeding resulting from a report made pursuant to the provisions of this part or in any proceeding where the report or its content is sought to be introduced into evidence, the report or its content or any other fact related to the report or to the condition of the person who is the subject of the report may not be excluded on the ground that the matter is or may be the subject of a privilege granted in Title 26, chapter 1, part 8, except the attorney-client privilege granted by 26-1-803.

History: En. Sec. 8, Ch. 623, L. 1983; amd. Sec. 8, Ch. 198, L. 1989; Sec. 53-5-521, MCA 1989; red. 52-3-821 by Code Commissioner, 1991.

52-3-822 through 52-3-824 reserved.

52-3-825. Penalties. (1) Any person who purposely or knowingly fails to make a report required by 52-3-811 or discloses or fails to disclose the contents of a case record or report in violation of 52-3-813 is guilty of an offense and upon conviction is punishable as provided in 46-18-212.

plaits an older person or a developmentally disabled person is guilty of an offense and upon a first conviction may be fined an amount not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both, and upon a second or succeeding conviction may be imprisoned for a term not to exceed 10 years and may be fined an amount not to exceed \$10,000, or both.

History: En. Sec. 10, Ch. 623, L. 1983; amd. Sec. 2, Ch. 608, L. 1985; amd. Sec. 1, Ch. 411, L. 1987; amd. Sec. 9, Ch. 198, L. 1989; Sec. 53-5-525, MCA 1989; red. 52-3-825 by Code Commissioner, 1991.

Cross-References
When no penalty is specified — misdemeanor, 46-18-212.

CHAPTER 4 SERVICES TO THE DISABLED

Part 1 — Developmentally Disabled—Protective Services

- 52-4-101. Definitions.
- 52-4-102. Legislative findings and directives.
- 52-4-103. Application for protective services.
- 52-4-104. Protective and supportive services provided.
- 52-4-105. Department as conservator of small estate of person adjudicated developmentally disabled.
- 52-4-106. Bond not required — exception.
- 52-4-107. Costs of protective services.
- 52-4-108. Reports required.
- 52-4-109 reserved.
- 52-4-110. Acceptance and expenditure of donated funds.

Part 2 — Physically Disabled—Community Home Licensing

- 52-4-201. Purpose.
- 52-4-202. Definitions.
- 52-4-203. Licensing.
- 52-4-204. Health and safety standards.
- 52-4-205. Rulemaking.

Part 1

Developmentally Disabled — Protective Services

Part Cross-References
Persons under disability guardianship and conservatorship, Title 72, ch. 5.

Montana

to dir use of the estate for the needs of the person and for the general relief of the person.

(i) No civil rights are relinquished as a result of any protective placement under this chapter. Nothing in this chapter shall be construed to authorize or require medical care or treatment for a person in contravention of his stated or implied objection thereto upon the grounds that such medical care and treatment conflict with his religious beliefs and practices.

(j) As far as is compatible with the mental and physical condition of the adult in need of services or claimed to be in need of services under this chapter, every reasonable effort shall be made to assure that no action is taken without the full and informed consent of the person. (Acts 1977, No. 780, p. 1340, § 4; Acts 1989, No. 89-825, p. 1652, § 2.)

Code commissioner's note. — Section 5 of Acts 1989, No. 89-825 provides: "Nothing contained in this Act shall be deemed to repeal any other section of Code of Alabama, 1975."

Waiver of right to jury trial. — The right to a jury trial under this section is not of a mandatory nature and thus is capable of waiver. *Tillery v. State Dep't of Pensions & Sec.*, 481 So. 2d 386 (Ala. Civ. App. 1985).

Agreement entered into by all the parties, with the assistance of capable legal counsel, and adopted by the court, operated as an implied waiver of any right to trial by jury as provided for under subsection (a) of this section. *Tillery v. State Dep't of Pensions & Sec.*, 481 So. 2d 386 (Ala. Civ. App. 1985).

Once guardian was appointed to represent mother, plaintiff-daughter no longer had capacity to sue on behalf of her mother pursuant to the Adult Protective Services Act; the guardian had stepped into the plaintiff-daughter's shoes to ensure that her mother's interests were protected. Should the

plaintiff-daughter take issue with the guardian's representation of her mother, suit would lie thereto. *Burnett ex rel. Fridny v. Burnett*, 497 So. 2d 511 (Ala. Civ. App. 1986).

Standard of proof. — The proper standard is one which requires that the burden of proof be met by a preponderance of the evidence with regard to the "least drastic alternative" chosen for the protected person. *Tillery v. State Dep't of Pensions & Sec.*, 481 So. 2d 386 (Ala. Civ. App. 1985).

Placement in nursing home upheld. — Trial court's conclusion finding that the least restrictive means of caring for adult in need of protective services at her home was not feasible and ordering her placed in a nursing home would be upheld where the evidence sufficiently showed that she could not be adequately protected in her home given continued actions by her son to interfere with her care. *Tillery v. State Dep't of Pensions & Sec.*, 481 So. 2d 386 (Ala. Civ. App. 1985).

§ 38-9-7. Abuse, neglect and exploitation prohibited; initiation of charges; penalty.

(a) It shall be unlawful for any person to abuse, neglect or exploit any adult subject to protection under the provisions of this chapter. Charges of such abuse, neglect or exploitation may be initiated upon complaints of private individuals or as a result of investigations by social service agencies or on the direct initiative of law enforcement officials.

(b) Any person who intentionally abuses or neglects a person in violation of the provisions of this chapter shall be guilty of a Class B felony if the intentional abuse or neglect causes serious physical injury.

(c) Any person who recklessly abuses or neglects a person in violation of the provisions of this chapter shall be guilty of a Class C felony if the reckless abuse or neglect causes serious physical injury.

the provisions of this chapter, shall be guilty of a Class C felony if the intentional abuse or neglect causes physical injury.

(e) Any person who recklessly abuses or neglects a person in violation of the provisions of this chapter, shall be guilty of a Class A misdemeanor if the reckless abuse or neglect causes physical injury.

(f) Any person who emotionally abuses a person in violation of the provisions of this chapter shall be guilty of a Class A misdemeanor.

(g) Any person who exploits a person in violation of the provisions of this chapter shall be guilty of a Class C felony, where the value of the property, assets or resources exceeds \$100.00.

(h) Any person who exploits a person in violation of the provisions of this chapter shall be guilty of a Class A misdemeanor, where the value of the property, assets or resources does not exceed \$100.00.

(i) If a violation of this section is also a violation of any other Alabama criminal statute, then a conviction or acquittal under either statute bars prosecution under the remaining statute. (Acts 1977, No. 780, p. 1340, §§ 5, 11; Acts 1989, No. 89-825, p. 1652, § 3.)

Code commissioner's note. — Section 5 of Acts 1989, No. 89-825 provides: "Nothing contained in this Act shall be deemed to repeal any other section of Code of Alabama, 1975."

§ 38-9-8. Reports by physicians, etc., of physical abuse, neglect or exploitation — Required; method of reporting; contents.

(a) All physicians and other practitioners of the healing arts having reasonable cause to believe that any adult protected under the provisions of this chapter has been subjected to physical abuse neglect or exploitation shall report or cause a report to be made as follows:

(1) An oral report, by telephone or otherwise, shall be made immediately, followed by a written report, to the county department of human resources or to the chief of police of the city or city and county, or to the sheriff of the county if the observation is made in an unincorporated territory.

(2) Within three days following such oral report, an investigation shall be made by the county department of human resources or the law enforcement official, whichever receives the report, and a written report prepared which will include the following:

- Name, age and address of such person.
- Nature and extent of injury suffered by such person.
- Any other facts or circumstances known to the reporter which may aid in the determination of appropriate action.

(b) All such reports prepared by a law enforcement official shall be forwarded to the county department of human resources within 24 hours. (Acts 1977, No. 780, p. 1340, § 6.)

Alabama

A R I Z O N A

LEGISLATION

GROUPS COVERED

Elder abuse is covered by Arizona's Adult Protective Services Legislation contained in ARS 46-451; 452; 453; 454; and ARS 14-5310.01. ARS 46-453 and 454 were enacted in 1984. The remainder were enacted in 1980. This legislation covers incapacitated adults. Incapacity includes mental illness, mental deficiency, mental disorder, physical illness or disability, advanced age, chronic intoxication or other cause to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions.

DEFINITIONS

Abuse

"Abuse" means: (a) Intentional infliction of physical harm; (b) Injury caused by negligent acts or omissions; (c) Unreasonable confinements.

Neglect

"Neglect" means a pattern of conduct resulting in deprivation of services necessary to maintain minimum physical and mental health.

Exploitation

"Exploitation" means the illegal or improper use of an incapacitated adult or his resources for another's profit or advantage.

REPORTING

Who Must Report

A physician, hospital intern or resident, surgeon, dentist, psychologist, social worker, peace officer or other person who has responsibility for the care of an incapacitated adult and whose examination or observation yields a reasonable basis to believe that abuse or neglect has occurred.

The guardian or conservator of an incapacitated adult shall immediately report or cause reports to be made.

An attorney, accountant, trustee, guardian, conservator or other person who has responsibility for preparing the tax records of an incapacitated adult or a person who has responsibility for any

other action concerning the use or preservation of the adult's property and who, in the course of fulfilling that responsibility, has reason to believe that exploitation of the adult's property has occurred shall report or cause reports to be made.

Who May Report

The law authorizes protective service workers to receive from any source information regarding an adult who may be in need of protective services.

Procedures

Persons required to report shall immediately make an oral report to a municipal or county peace officer or to a protective service worker of the Department of Economic Security. A guardian reports suspected incident to the superior court. The oral report must be followed by a written report within 48 hours.

Central Registry

Not addressed in the law.

INVESTIGATIONS

Upon receipt of a report, a protective service worker of the Department of Economic Security shall make an evaluation to determine the need for protective services and what services are needed. If access is denied, the protective services worker may file a petition with the court for a special visitation warrant. The public fiduciary may investigate alleged incidents of exploitation.

PENALTIES

Failure to Report

The legislation does not specify a penalty for failure to report.

For Perpetrators

If any person is found to be responsible for abuse, neglect or exploitation of an incapacitated adult in a criminal or civil action, the court may order the person to make restitution, as the court deems appropriate.

IMMUNITY

Reporter

Any person making a complaint, providing information or otherwise participating in the program, authorized by this chapter or in a judicial proceeding resulting from the reports submitted pursuant to the law is immune from any civil or criminal liability, unless the person has been charged with or is suspected of being the abuser.

ARKANSAS

LEGISLATION

GROUPS COVERED

Arkansas does not have specific elder abuse legislation. It is covered, however, by the adult protective services legislation contained in Arkansas Statute 99-1301. This statute provides protection for incapacitated, endangered persons age 18 and older. An endangered adult is defined as being in a situation or condition which poses imminent risk of death or serious bodily harm to such person and who demonstrates the lack of capacity to comprehend the nature and consequence of remaining in that situation or condition.

DEFINITIONS

Abuse

"Abuse and Maltreatment" means any willful or negligent act which results in negligence, malnutrition, physical assault or battery, physical or psychological injury inflicted by other than accidental means and failure to provide necessary treatment, rehabilitation, care, sustenance, clothing, shelter, supervision, or medical services.

Exploitation

"Exploitation" means any unjust or improper use of another person for one's own profit or advantage.

REPORTING

Who Must Report

Whenever any physician, surgeon, coroner, dentist, osteopath, resident intern, registered nurse, hospital personnel (engaged in the administration, examination, care or treatment of persons), social service worker, mental health professional, peace officer, or law enforcement official has reasonable cause to suspect that an endangered adult has been subjected to conditions or circumstances which would reasonably result in abuse, he shall immediately report or cause a report to be made.

Whenever such person is required to report under this Act in his capacity as a member of the staff he shall immediately notify the person in charge of such institution, facility or agency, or his designated agent, who shall then become responsible

for making a report or causing such a report to be made.

Who May Report

Any other person may make a report if such person has reasonable cause to suspect that such adult has been abused or neglected.

Procedures

Persons required to report must make immediate reports to the Central Registry maintained by the Department of Human Services. If requested, oral reports must be followed within 48 hours by a written report. If the person alleged to be abused died as a result of the alleged abuse, the report is made to the medical examiner or coroner.

Central Registry

Establishes within the department a statewide Central Registry for reports of abused adults, sexual abuse, or neglect made pursuant to this act.

INVESTIGATION

The Department of Human Services is required to make a prompt, thorough investigation upon receipt of a report. The investigation must include a visit to the abused adult's home. If the abused adult or next of kin or other responsible person refuses entry to the protective services worker, the probate court may order that the protective service worker be allowed entry. In the event of a death caused by abuse, the medical examiner or coroner shall investigate and report his findings to the police and district attorney.

PENALTIES

Failure to Report

(1) Any person, official, or institution required by this Act to report a case of suspected adult abuse, sexual abuse, or neglect, who willfully fails to do so shall be guilty of a Class C misdemeanor and shall be punished accordingly.

(2) Any person, official or institution required by this Act to report a case of suspected adult abuse, sexual abuse, or neglect, and who willfully fails to do so shall be civilly liable for damages caused by such failures.

For Perpetrators

(1) Whoever, willfully or by culpable negligence causes great bodily harm, permanent disability or permanent disfigurement shall be guilty of a Class D felony.

(2) Whoever, willfully or by culpable negligence permits the physical or mental health of an adult

ILLINOIS

LEGISLATION

GROUPS COVERED

The Domestic Violence Act is the only statewide legislation that provides protection from abuse for elders. Illinois does have an Elder Abuse Demonstration Act. This act permitted the state to fund four elderly abuse demonstration projects. Each project tests a different approach to the problem of elder abuse. The Domestic Violence Act provides protection to spouses, individuals who were formerly spouses, individuals sharing a common household, parents and children, or persons related by blood or marriage. This analysis reflects only the Domestic Violence Act.

DEFINITIONS

Abuse

"Abuse" means the act of striking, threatening, harassing or interfering with the personal liberty of any family or household member by any other family or household member, but excludes reasonable discipline of minor children.

Neglect

Not addressed in the law.

Exploitation

Not addressed in the law.

REPORTING

Who Must Report

Every law enforcement officer investigating an alleged incident of abuse between family or household members shall make a written police report of any bona fide allegation and the disposition.

Who May Report

A person may seek a protection order for himself or herself, on behalf of a minor child, or on behalf of any person prevented by physical or mental incapacity or because of advanced age from seeking a protection order on his or her behalf.

Procedures

A person may seek an order of protection for himself or on the behalf of any person prevented by physical or mental incapacity or because of advanced age from seeking an order of protection on his own behalf. The petition to the court must allege abuse by a family or household member and be verified or accompanied by an affidavit. A

complaint of abuse by a family or household member may be made to a law enforcement agency.

Central Registry

The Department of Law Enforcement shall maintain a complete and systematic record and index of all valid and recorded orders of protection. The data is used to inform all dispatchers and law enforcement officers at the scene of an alleged incident of abuse or violation of a protection order of any recorded prior incident of abuse involving the abused party and the dates and terms of any protection order.

INVESTIGATION

A law enforcement officer may investigate any alleged incident of abuse between family members.

PENALTIES

Failure to Report

Not addressed in the law.

For Perpetrators

Upon a finding of abuse, the court shall issue a protection order with any or all of the remedies listed below. These remedies shall be in addition to other civil or criminal remedies which may be available: (1) ordering the respondent to refrain from striking, threatening, harassing or interfering with the personal liberty of the petitioner or other family or household member; (2) granting possession of the residence or household to the petitioner, to the exclusion of the respondent or ordering the respondent to provide suitable, alternate housing for the petitioner or minor children in lieu of excluding the respondent from the actual residence or household; (3) requiring or recommending the respondent to undergo counseling for a specified duration; (4) restraining the respondent from improperly using an aged family member's resources, financial or otherwise, for respondent's profit or advantage, or for the profit or advantage of another person; (5) requiring the respondent to pay temporary support for the petitioner when the respondent has a legal obligation to support that person; (6) requiring the respondent to pay the petitioner actual monetary compensation for losses suffered as a direct result of abuse; and (7) entering injunctive relief as may be necessary or appropriate and referring to the aging network petitioners over age sixty.

To: PAULA SAVERA	From: O'CONNOR
Co.	Co.
Dept: DT# 2	Phone #
Fax #	Fax #

KENTUCKY

LEGISLATION

GROUPS COVERED

Kentucky has two statutes which may be used in elder abuse cases, the Protection of Adults Act and the Domestic Violence and Abuse Act. Only the Protection of Adults Act is included in this analysis. This act provides protection to persons age 18 or older who because of mental or physical dysfunctioning, or who are the victims of abuse or neglect inflicted by a spouse, are unable to manage their own resources, carry out activities of daily living, or protect themselves from neglect, hazardous or abusive situations without assistance from others and who have no one available, willing, and responsible to assist them.

DEFINITIONS

Abuse or Neglect

"Abuse or neglect" means the infliction of physical pain, injury, or mental injury, or the deprivation of services by a caretaker which are necessary to maintain the health and welfare of an adult, or a situation in which an adult, living alone, is unable to provide or obtain for himself the services which are necessary to maintain his health and welfare or a situation in which a person inflicts physical pain or injury upon a spouse or deprives a spouse of reasonable services necessary to maintain the health and welfare of his spouse.

Exploitation

"Exploitation" means the improper use of funds by a caretaker which have been paid by a governmental agency to an adult or to the caretaker for the use or care of the adult.

REPORTING

Who Must Report:

Any person, including, but not limited to, physician, law enforcement officer, nurse, social worker, department personnel, coroner, medical examiner, alternative care facility employee, or caretaker with reasonable cause to suspect abuse shall report or cause reports to be made. The death of the adult does not eliminate the reporting responsibility.

Who May Report

Not addressed in the law.

Procedures

An oral or written report must be filed immediately with the Department of Social Services upon knowledge of the occurrence of suspected abuse, neglect, or exploitation.

Central Registry

Not addressed in the law.

INVESTIGATION

Upon receipt of a report the Cabinet for Human Resources is required as soon as practical to notify the appropriate law enforcement agency and initiate an investigation. The law gives any representative of the cabinet entry to any health facility or health service licensed by the cabinet and access to the mental and physical health records of the adult which are in the possession of any individual, hospital, or other facility. Any representative of the cabinet may, with the consent of the adult or caretaker, enter any private premises where any adult alleged to be abused is found. If the adult or caretaker does not consent to the investigation, a search warrant may be issued upon a showing of probable cause.

PENALTIES

Failure to Report

Anyone required to report who knowingly and willfully fails to report shall be punished by a fine of no less than \$25 or more than \$200. Each violation shall constitute a separate offense.

For Perpetrator

Any caretaker who knowingly and willfully abuses, neglects or exploits an adult and in so doing causes serious physical or mental injury or permanent disability is guilty of a Class C felony, or if such abuse, neglect or exploitation causes minor physical or mental injury or temporary disability to the adult, the caretaker is guilty of a Class A misdemeanor.

KENTUCKY

IMMUNITY

Reporter
Investigator

Anyone acting upon reasonable cause in the making of a report or investigation, participating in filing a petition for injunctive relief, (rendering) protective services or emergency protective services, or participating in a judicial proceeding has immunity from any civil or criminal liability that might otherwise be incurred or imposed.

MISSISSIPPI

LEGISLATION

GROUPS COVERED

Mississippi has two laws which may be used in certain instances to provide protection for elder abuse: the Adult Protective Services Act of 1982, the Protection from Domestic Abuse Law, and the Mississippi Vulnerable Adults Act of 1986. The Domestic Abuse Law provides protection to spouses, former spouses, persons living as spouses, parents, children, or other persons related by consanguinity or affinity. The Domestic Abuse Law is not included in the analysis below. The Adult Protective Services Act of 1982 provides protection to persons age 18 and older residing in a personal care home and in need of protective services. The provisions of the Adult Protective Services Act of 1982 are very similar to the provisions of the Mississippi Vulnerable Adults Act of 1986. Therefore, a separate analysis of it is not provided below. The Mississippi Vulnerable Adults Act of 1986 provides protection to persons age 18 or older or any minor not covered by the Youth Court Act and who, regardless of residence, is unable to protect his own right, interests, and/or vital concerns and who cannot seek help without assistance because of physical, mental impairment or emotional status. The law becomes effective October 1, 1986.

DEFINITIONS

Abuse

"Abuse" means the willful inflicting of physical pain, injury or mental anguish on an adult, the unreasonable confinement of an adult, or the willful deprivation by a caretaker of services which are necessary to maintain the mental and physical health of an adult. (The Division of Medicaid, licensed nursing homes, and licensed hospitals are not included in the definition of "caretaker.")

Neglect

"Neglect" means either the inability of any vulnerable adult who is living alone to provide for himself the food, clothing, shelter, health care, or other services which are necessary to maintain his mental and physical health, or failure by a caretaker to supply the vulnerable adult with the food, clothing, shelter, health care, supervision or other services which are necessary to maintain his mental and physical health.

Exploitation

"Exploitation" means the illegal or improper use of an adult or his resources for another's profit or advantage.

REPORTING

Who Must Report

Any person having reasonable cause to believe that a vulnerable adult has been or is being abused, neglected or exploited shall report such information.

Who May Report

Not addressed in the law.

Procedures

Reports may be made orally or in writing to the state Department of Public Welfare or the county welfare department where the vulnerable adult is located. Oral reports must be followed by a written report.

Central Registry

The Commissioner of Public Welfare is required to establish a statewide central register capable of receiving reports seven days per week, 24 hours per day via a single toll-free statewide telephone number. The central register must include but is not limited to: the name and identifying information of the individual reported; the local welfare department responsible for the investigation; the names, affiliations and purposes of any person requesting or receiving information.

MISSISSIPPI

INVESTIGATION

The Department of Public Welfare shall initiate an investigation within 48 hours of the receipt of the report. If a caretaker refuses to allow the department reasonable access to conduct an investigation, the department may petition the court for an order enjoining the caretaker from interfering with the investigation.

PENALTIES

Failure to Report

Not addressed in the law.

For Perpetrators

Any caretaker or other person who willfully inflicts physical pain or injury upon a vulnerable adult shall be guilty of felonious abuse and/or battery and may be punished by imprisonment for not more than 10 years.

Any caretaker or other person who willfully commits an act or omits the performance of any duty, which act or omission contributes to, tends to contribute or results in the abuse, neglect or exploitation of any vulnerable adult shall be guilty of a