

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
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a mere binding audit."⁵³ Further, the court noted that at the time of the audit, neither party to the agreement for the binding audit viewed the event as a submission to arbitration. Based on these findings, the court concluded that it could not say as a matter of law that the parties' agreement constituted an agreement to arbitrate, thereby denying the auditors' claim that they were immune from suit.

1) Arbitral Process

A reading of the case law discloses that the doctrine of arbitral immunity includes the arbitral process, much like the expansion of the doctrine of judicial immunity to include the administrative workings of the courts. For example, in *Corbin v. Washington Fire & Marine Ins. Co.*,⁵⁴ the issue before the court was whether evidence given in an arbitration, although allegedly libelous, was unqualifiedly privileged. The court held that the immunity was absolute, ruling that testimony given at the arbitration proceeding was protected. It stated that the principle of absolute immunity was "essential to the maintenance of arbitration," for if:

arbitration is to be safely utilized as an effective means of resolving controversy, the absolute immunity attaching to its proceedings must extend beyond the arbitrators themselves; it must extend to all "indispensable" proceedings. . . . To urge that the immunity should be limited to the arbitrators would be similar to arguing that judicial immunity should go no further than the judge.⁵⁵

53. *Id.* at 722.

54. 1278 F. Supp. 393 (D.S.C. 1968), *aff'd*, 398 F.2d 543 (4th Cir. 1968).

55. 1278 F. Supp. at 398.

2) Arbitral Institutions

A review of pertinent court decisions indicates that the doctrine of arbitral immunity is absolute when it closes the door to collateral attacks for civil liability of arbitrators and arbitral institutions.⁵⁶ One decision in which immunity was granted to both the arbitrator and the arbitration agency is *Rubenstein v. Otterbourg*.⁵⁷

Samuel Rubenstein was a party to an arbitration. At the onset of the hearings, he requested that the Chairman of the three-member panel of arbitrators disqualify himself. The request was denied and the administrative agency, the American Arbitration Association (AAA), refused to resign the arbitrator. An award was rendered and Rubenstein successfully moved to vacate it on the ground of alleged misconduct based on the AAA's refusal to intervene. Rubenstein then filed a second action to recover legal fees incurred during the vacated proceedings. The arbitrator and the AAA moved for summary judgment on the ground that the cause of action was without merit.

The court granted the motion. It found that the arbitrator was entitled to arbitral immunity, and rejected Rubenstein's attempt to distinguish this case from the *Sabylon Milk and Cream Co.* case, deeming it a distinction without a difference. As for the AAA, the court concluded that it, too, "cannot be held liable for [the arbitrator's] actions."⁵⁸ It reasoned that:

bodies such as the [American Arbitration] Association are recognized by the

56. Note that immunity may also be specifically accorded to an arbitral institution pursuant to a statutory provision. See *Griffin v. American Arbitration Association*, 455 N.W.2d 322 (Mich. Ct. App. 1990).

57. 357 N.Y.S.2d 62 (N.Y. Civ. Ct. 1973).

58. *Id.* at 63.

law. . . . They perform with respect to arbitrator's functions similar to those performed by the Judicial Conference, the Administrative Boards and the Appellate Division with respect to judges. They are in effect quasi-judicial organizations; and an expanding umbrella of immunity is . . . extended over them."

Another example wherein a court extended arbitral immunity to an arbitral association is *Corey v. New York Stock Exchange*.⁵⁹ George Corey invested in the stock market under the guidance of a friend who was an account executive with Merrill Lynch, Pierce, Fenner & Smith. His friend suffered a stroke but returned to work and continued to handle Corey's account. He subsequently retired because of medical reasons and Corey's account was transferred to another Merrill Lynch employee. Corey's stock portfolio declined in value and he was forced to liquidate it. Pursuant to the brokerage contract Corey signed when he opened his account, which provided for arbitration under the auspices of the New York Stock Exchange (NYSE), Corey initiated arbitration proceedings against Merrill Lynch. The dispute was whether the brokerage firm should be liable for permitting a stockbroker to continue advising clients while incapacitated. Specifically, Corey alleged that his loss "resulted directly from [his friend's] impaired judgment as a result of the stroke and from Merrill Lynch's negligence in allowing him] to return to work before he was capable of intelligently advising customers."⁶⁰ After two hearings before an NYSE panel, an award was rendered dismissing Corey's claims and assessing costs against him.

59. *Id.* at 63-64.
60. 691 F.2d 1205 (1982).
61. *Id.* at 1208.

Instead of appealing the decision, Corey filed an action against Merrill Lynch, claiming that it conspired with the NYSE to deprive him of a fair hearing. The action was dismissed, and Corey filed an action against the NYSE, alleging wrongdoing in the selection of the arbitrators and in the administration of the arbitration hearings. This action was also dismissed and Corey appealed. Agreeing with the lower court's findings and conclusions, the appellate court affirmed the order dismissing the action.

The court found without merit Corey's argument that the NYSE was liable for any alleged wrongdoing by the arbitrators. It further concluded that arbitrators and arbitration-sponsoring agencies are immune from civil liability for arbitrators' acts arising out of contractually agreed upon arbitration proceedings. Specifically, the court pointed out that the extension of "immunity to arbitrators and the boards which sponsor arbitration finds support in the case law, the policies behind the doctrines of judicial and quasi-judicial immunity and policies unique to contractually agreed upon arbitration proceedings."⁶² It stated that:

arbitral immunity is essential to protect the decision-maker from undue influence and protect the decision-making process from reprisals by dissatisfied litigants. . . . Because federal policy encourages arbitration and arbitrators are essential actors in furtherance of that policy, it is appropriate that immunity be extended to arbitrators for acts within their jurisdiction. . . . [W]e believe that arbitral immunity is essential to the maintenance of arbitration by contractual agreement as a viable alternative to the

62. *Id.* at 1209.

judicial process for the settlement of controversies. . . .⁶³

The court went on to conclude that the extension of immunity to "encompass boards which sponsor arbitration is a natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended to arbitrators [would be] illusory."⁶⁴

To date, *Baar v. Tigerman*⁶⁵ appears to be the only commercial case in which an arbitrator and the administrative organization were denied arbitral immunity. This case is an exception, however, and not the rule. *Baar* involved an action against an arbitrator and the administrative agency for breach of contract and negligence because the arbitrator rendered a late award. The hearings had proceeded for more than three years and, after it was closed, an award was supposed to have been rendered within 30 days. The parties agreed to a two-month extension, but the arbitrator still failed to render his award. Objections were filed in writing, to rescind the arbitrator's authority to rule on the case. In addition, an action was filed against the arbitrator and the administrative agency, but it was dismissed on the ground of arbitral immunity. The order dismissing the action was reversed on appeal.

The appellate court held that an arbitrator who breaches his contract to render a timely award is not entitled to arbitral immunity. It further noted that arbitral immunity does not extend to private arbitration associations for actions that are administrative rather than discretionary. The court reasoned that an arbitrator ceases to be judgeline in his actions if he fails to render a timely award. Because the immunity that would protect the sponsor-

ing organization extends from the arbitrator, it concluded that the sponsoring organization cannot claim immunity when the arbitrator has been denied immunity.

Following *Baar*, because of the need to counteract its potentially harmful effects, S.B. 1001 was proposed in California to give arbitrators the same immunity from civil liability accorded to judicial officers when acting in the capacity of arbitrators under statute or contract.⁶⁶ The purpose of the bill was to codify case law extending judicial immunity to arbitrators and to abrogate the *Baar* ruling.⁶⁷ Specifically, proponents of the bill argued that the

limitation of arbitral immunity recognized by *Baar* will have a 'chilling effect' on the utility of arbitration by:

(a) Making it more difficult to find individuals willing to serve as arbitrators.

(b) Placing unfair burdens on arbitrators, especially in complex commercial cases, to render thoughtful and correct decisions (e.g., the arbitrator may become more concerned with rendering a timely decision rather than a well thought out decision).

(c) Fostering the proliferation of lawsuits against arbitrators by those dissatisfied with the award.⁶⁸

The bill was ultimately passed by the Senate and Assembly without a dissenting

63. *Id.* at 1211.

64. *Id.*

65. 189 Cal. Rptr. 834 (Ct. App. 1983).

66. The bill, which was introduced by Senator Ralph Dills, was sponsored by the State Bar Conference of Delegates and drafted by the San Francisco Bar Association.

67. From commentary on S.B. 1001 by Chairman Bill Lockyer, Senate Committee on Judiciary (1985-86 Regular Session) and Chairman Elinu M. Harris, Assembly Committee on Judiciary (1985).

68. *Id.*, Harris at 2-3 (1985).

vote.⁶⁹ It is codified in California Civ. Proc. Code § 1280.1. On September 12, 1990, S.B. 1951 was signed into law, extending the repeal date of Section 1280.1 from January 1, 1991, to January 1, 1996.⁷⁰ Note that this law supplements, and does not supplant, common law immunity.

Again, the ruling in *Baar* is an overruled exception, not the rule. More recently, in fact, a federal court has reaffirmed the policy of extending arbitral immunity to encompass the administrative organization. In *Austern v. The Chicago Board Options Exchange, Inc.*,⁷¹ the court held that an action could not be maintained against the Chicago Board Options Exchange (CBOE) for mental anguish and expenses arising from defending a motion to confirm an arbitration award.

Esther Austern and her husband were parties to a limited partnership agreement with Fried Trading Company. A dispute arose and Fried filed a petition with the CBOE for arbitration pursuant to their agreement. The matter was accepted by the CBOE. The Austerns subsequently withdrew their appearance, answer, and counterclaim in the arbitration upon learning that Fried was a differently configured entity from the company with which they expected to arbitrate. Arbitration proceeded and an award was rendered in favor of Fried. Fried moved to confirm and the Austerns opposed. Confirmation was denied on the ground that the Austerns were not given adequate notice of the hearings. The Austerns then filed an action against the CBOE for damages for mental

anguish and for expenses incurred in defending against Fried's confirmation petition.

The CBOE argued that it was protected from suit under the quasi-judicial immunity doctrine, and the court agreed. The court noted that the doctrine of arbitral immunity arose from policy considerations underlying judicial immunity—namely, to protect the "integrity of the decision-making process from the fear of reprisals by dissatisfied litigants."⁷² Immunity, the court continued, was "extended to arbitrators [because of] the functional comparability of the arbitrators' decision-making process and judgments to those of judges...."⁷³

The court also stated that a second policy reason for the extension of immunity was to develop and maintain a pool of qualified individuals willing to act as arbitrators.

Because notice of the proceeding is "integrally related to the process of arbitration," the court rejected the Austerns' argument that mailing notice of the hearing was a ministerial and not a quasi-judicial act.⁷⁴ It also ruled that the Austerns had already received the appropriate relief that was sought when they successfully defeated the confirmation of the award because such defeat is the result of the corrective review provided for in the FAA. Consequently, the Austerns' complaint was dismissed on the ground of arbitral immunity. The Austerns appealed.

The appellate court stated that the central question on appeal was "whether a commercial organization sponsoring a contractually agreed upon arbitration is immune from civil liability for improperly noticing the arbitration hearing and improperly selecting the arbitration panel."⁷⁵ It concluded in the affirmative and declined

69. S.B. No. 1001—Dills, Senate Weekly History, California Legislature at Sacramento, 1985-86 Regular Session (Friday, September 13, 1985).

70. This was also introduced by Senator Ralph Dills.

71. 716 F. Supp. 121 (S.D.N.Y. 1989); *aff'd*, 898 F.2d 882 (2d Cir. 1990).

72. 716 F. Supp. at 124.

73. *Id.*

74. *Id.*

75. 595 F.2d at 883.

to accept the Austerns' contention that the conduct of the CBOE fell outside the scope of arbitral immunity.

The court found persuasive case law reflecting the view that the "scope of quasi-judicial immunity is defined not by the identity of the actor but by the nature of the function performed, namely freeing the adjudicative process and those involved therein from harassment or intimidation."⁷⁵ Reviewing the "functional comparability" between an arbitrator's role in a contractually agreed upon arbitration proceeding to that of a judicial counterpart, the court found that other "Courts of Appeals that have addressed the issue have uniformly immunized arbitrators from civil liability for all acts performed in their arbitral capacity."⁷⁶ It agreed with the policy concerns stated by the appellate courts that arbitral immunity is "essential to protect the decision-maker from undue influence and protect the decision-making process from reprisals by dissatisfied litigants."⁷⁷

The court rejected the Austerns' contention that the acts complained of were merely ministerial and outside of the decision-making process. It stated that the extension of arbitral immunity to include agencies sponsoring arbitration is a natural and necessary product of the policies underlying arbitral immunity because to do otherwise would render illusory the immunity extended to arbitrators. Moreover, the court reasoned, there would be little value to the whole arbitral procedure if one were to shift the liability to the sponsoring association. Accordingly, the CBOE, as the commercial sponsoring organization, was entitled to immunity for all functions that

are integrally related to the arbitral process.

The court also explained that the Austerns' choice of words to describe the acts complained of as ministerial or administrative, as opposed to discretionary, "mis[s]e[d] the mark, since the scope of arbitral immunity is defined by the functions it protects and serves."⁷⁸ It went on to explain that the acts at issue were "performed directly in the CBOE's management of contractually agreed upon arbitration [and] were sufficiently associated with the adjudicative phase of the arbitration to justify immunity."⁷⁹ The court reasoned further that "[f]educing the CBOE's immunity based on the arbitral deficiencies present here would merely serve to discourage its sponsorship of future arbitrations—a policy that is strongly encouraged by the Federal Arbitration Act."⁸⁰

Because the court was "unwilling to undermine this policy by parsing the arbitration process," it held that "arbitrators in contractually agreed upon arbitration proceedings are absolutely immune from liability in damages for all acts within the scope of the arbitral process [and that] the CBOE is immune from liability in damages for its conduct in sponsoring the arbitration proceedings in question."⁸¹ The judgment of the lower court in dismissing the Austerns' complaint was affirmed.

Another example is *City of Milan v. Bruce A. Rankin & Associates*.⁸² The Milan Downtown Development Authority (DDA) contracted with Bruce A. Rankin & Associates for architectural, planning and financial consultation services. An arbitration provision was included in their contract. A dispute arose, and Rankin filed a claim

75. 898 F.2d at 883.

76. *Id.* at 885.

77. *Id.* at 886.

78. *Id.* (quoting from *Corey*, *supra* note 60, 691 F.2d at 1211).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 887.

83. Slip op., No. 96-39080-AZ (Mich. Cir. Ct. Sept. 17, 1990).

with the American Arbitration Association (AAA) against both the City of Milan and the DDA. The City filed its response with the AAA, alleging that it was not a party to the contract and had not agreed to arbitration. The AAA considered this as an "issue of arbitrability" and left it to the arbitrators for resolution. Arbitration was held and an award was rendered jointly and severally against the City and the DDA. An action was filed by the City against Rankin, the AAA, and the arbitrators, alleging that the arbitrators "exceeded their jurisdiction." The City also sought to enjoin enforcement of the award, as well as damages from each of the defendants.

The issue before the court was whether the AAA and the arbitrators enjoy "quasi-judicial" immunity from suit. It noted that the Uniform Arbitration Act (UAA), which was adopted in Michigan, does not contain any grant of immunity. The court did not find this to be a problem since many other states that have adopted the UAA also "have subscribed to such an immunity."⁸⁴ It found that arbitrability of a dispute is one for the court, not the arbitrators, to decide. In this instance, however, neither of the parties sought a determination by the court on the issue of arbitrability prior to the arbitration proceedings. Consequently, the matter was decided by the arbitrators. The court disagreed with the City's contention that immunity ought not to be extended in this case because the arbitrators exceeded their scope of authority by arbitrating a claim against

84. *Id.* at 4.

someone who did not agree to arbitration. It found that an analogy to judicial immunity was appropriate in this case, noting that the

mere fact that a tribunal may subsequently be found to be without jurisdiction over a party does not necessarily strip the court of the cloak of immunity and render the judge liable to that party for damages for exercising such jurisdiction. [The court reasoned that t]his concept is even more compelling in the realm of arbitration because the protesting party has a means of resolving the "jurisdiction" question of arbitrability without being first required to go through a hearing on the merits.⁸⁵

In this instance, the City sued the AAA and the arbitrators for damages for making a decision on the arbitrability issue, even though it elected to forgo the pre-arbitration remedy of an application for a stay of the arbitration proceeding. The court concluded that the decision of the arbitrators on the arbitrability issue "was not so outside the scope of their authority as to subject them, or the [A]ssociation, to liability for damages for making the decision."⁸⁶ It reasoned that, "[g]iven the lack of a contrary judicial order, the arbitrators were in fact required to make the threshold determination of arbitrability."⁸⁷

85. *Id.* at 5.

86. *Id.* at 6.

87. *Id.*

HOWARD v. DRAPKIN

Cite as 271 Cal.Rptr. 893 (Cal.App. 2 Dist. 1990)

DISPOSITION

We reverse the judgment and direct the trial court to deny the writ of mandate and reinstate the revocation order.

The parties are to bear their own costs.

DEVICH, Acting P.J., and VOGEL, J., concur.



Vickie HOWARD, Plaintiff and Appellant,

v.

Robin DRAPKIN, Defendant and Respondent.

Civ. B041689.

Court of Appeal, Second District, Division 3.

July 31, 1990.

Mother brought action against psychologist who was hired by both parents to evaluate child's allegations that father had sexually abused child, for purposes of custody dispute, alleging professional negligence, intentional infliction of emotional distress, negligent infliction of emotional distress and fraud. The Superior Court, Los Angeles County, Aurelio Munoz, J., dismissed action, and appeal was taken. The Court of Appeal, Croskey, J., held that: (1) psychologist was entitled to common-law immunity as quasi-judicial officer participating in judicial process, and (2) psychologist was entitled to statutory privilege for publication in judicial proceeding.

Affirmed.

Danielson, J., filed opinion concurring in part and dissenting in part.

1. Judges 4-36

"Judicial immunity" bars civil actions against judges for acts performed in exercise of their judicial functions, and applies to all judicial determinations, including those rendered in excess of judge's jurisdiction, no matter how erroneous or even malicious or corrupt they may be.

See publication Words and Phrases for other judicial constructions and definitions.

2. Judges 4-36

In order to determine whether individual has quasi-judicial immunity, court evaluates connection between individual's activity and judicial process rather than status of individual.

3. Judges 4-86

Nonjudicial persons who fulfill quasi-judicial functions intimately related to judicial process are entitled to absolute quasi-judicial immunity for damage claims arising from their performance of duties in connection with judicial process.

4. Arbitration 4-47

Judges 4-86

Absolute quasi-judicial immunity is extended to those neutral third-parties for their conduct in performing dispute resolution services which are connected to judicial process and involve either making of binding decisions, making of findings or recommendations to court or arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes.

5. Physicians and Surgeons 15(23)

Psychologist who was hired by parents to evaluate facts and circumstances surrounding child's accusation that father had sexually abused child, for purposes of custody dispute, was entitled to absolute quasi-judicial immunity from mother's action alleging professional negligence, intentional infliction of emotional distress, negligent infliction of emotional distress and fraud; psychologist was engaged in evaluation for purpose of resolving pending dispute.

absurd, whether or traffic lane, partially gainst the curb. In the intoxicated driver away upon being police officer, posing enasa.

es on People v. Garcia, pp.3d Supp. 1, 262 he proposition that vehicle movement. epartment of the su-Garcia's conviction of nder the Influence n.Codes, § 664). Gar-y the officers in the lane" (id. Supp. at 6, a freeway. Garcia, a in the driver's seat, art the engine. The vehicle roll 15 to 20 rectly concluded this ficient evidence that ehicle." (Id. Supp. at

As Garcia properly ovement" of the ve-et evidence that the riven." [Citation.] 335) 176 Cal.App.3d : 540].)" (People v. al.App.3d at Supp. 4,

vehicle movement in nactive of the distinct dity of respondent's ved the sufficiency of conviction of guilt for driving offense under vision (a) and Penal is clear such a convic-e the absence of direct e., movement) if there ntantial evidence of n. Wilson, supra, 176 . 9, 222 Cal.Rptr. 540.) nd Officer Brann sub-ably believed a misde-being committed in his respondent exercised ntrol over the vehicle within the meaning of vision (a).

6. Torts ¶16

Psychologist who was hired by parents to evaluate child's allegations that father had sexually abused child, for purposes of child custody dispute, was immune from mother's action alleging professional negligence, intentional infliction of emotional distress, negligent infliction of emotional distress and fraud pursuant to statutory privilege for publication in judicial proceeding; alleged wrongful communications by psychologist were made in judicial proceeding, publications had connection to case, psychologist was invited, and ultimately court-approved participant, and communication was made to achieve objects of litigation. West's Ann.Cal.Civ.Code § 47, subd. 2.

Overland, Berke, Wesley, Glts, Randolph & Levanas and Michael I. Levanas, Los Angeles, for plaintiff and appellant.

Proskauer, Rose, Goetz & Mendelsohn and Steven G. Drapkin, Los Angeles, for defendant and respondent.

Gibson, Dunn & Crutcher, Richard Chernick, Eileen Hale, Los Angeles, for amicus curiae on behalf of defendant and respondent.

CROSKEY, Associate Justice.

Plaintiff Vickie Howard ("plaintiff") appeals from a dismissal entered after a demurrer to her second amended complaint was sustained without leave to amend. The instant case evolved from a family law matter in which child custody and visitation were in dispute (the "underlying action"). Defendant Robin Drapkin ("defendant"), a psychologist, performed an evaluation of plaintiff and her family and plaintiff now claims that defendant acted improperly in carrying out that task.

In this appeal we are asked to determine whether the alleged wrongful actions of which plaintiff complains were performed in such a context that defendant can claim

(1) common law immunity as a quasi-judicial officer participating in the judicial process or (2) statutory privilege under Civil Code section 47, subdivision (2) ("section 47(2)")¹ for a publication in a judicial proceeding. We conclude that defendant, acting in the capacity of a neutral third person engaged in efforts to effect a resolution of a family law dispute, is entitled to the protection of quasi-judicial immunity for the conduct of such dispute resolution services. We also find that the litigation privilege provided for in section 47(2) applies to the facts of this case. We therefore affirm the dismissal of plaintiff's complaint.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises in the context of a family law dispute over custody and visitation rights with respect to the minor son of the plaintiff and her former husband, Robert. The dispute was one of a series and involved charges of physical and sexual abuse. Plaintiff initiated family law proceedings in which she sought to have Robert's custody and visitation rights terminated. Prior to any court hearing, plaintiff and Robert entered into a stipulation which provided that the defendant, as an independent psychologist, would evaluate the facts and circumstances and render non-binding findings and recommendations. This stipulation was ultimately signed by the court and converted into an order.

Plaintiff's claims against defendant apparently arise from (1) a single six-hour session between plaintiff and defendant, conducted pursuant to the aforesaid stipulation, in which plaintiff alleges that defendant was abusive, (2) defendant's report which plaintiff claims was negligently prepared, included false statements and omitted crucial information and (3) defendant's alleged failure to disclose certain conflicts of interest and lack of expertise in child abuse matters. The pleading before us is plaintiff's second amended complaint in which she had pled causes of action for

1. Civil Code section 47, subdivision 2 provides in relevant part that with certain exceptions for dissolution of marriage proceedings, "A privi-

leged publication or broadcast is one made—
... [¶] 2. In any ... (2) judicial proceeding...."

professional negligence, intentional infliction of emotional distress, negligent infliction of emotional distress and fraud.

In reviewing the sufficiency of the complaint we, of course, accept as true all of the properly pleaded allegations. (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 803, 167 Cal.Rptr. 407, 598 P.2d 60; *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 828, 122 Cal.Rptr. 745, 537 P.2d 866. By her demurrer, defendant admits "all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.]" (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591, 96 Cal.Rptr. 601, 487 P.2d 1241.) Plaintiff's complaint presents the following relevant allegations.

Defendant is a psychologist licensed by the State of California who was hired in that capacity in early February 1987 by plaintiff and Robert. She was hired to perform a family evaluation of plaintiff, Robert and their nine-year-old child. Such evaluation was necessary because the child had accused Robert of physical, emotional and sexual abuse. Defendant was to evaluate what contact Robert would have with the child, if any.

Because of the decision to retain defendant, plaintiff and Robert agreed to continue an order to show cause hearing which had been scheduled for February 26, 1987. It was further continued from time to time while the evaluation was progressing. The agreement to hire defendant was put into the form of a stipulation and was signed by plaintiff and Robert and by their respective attorneys in the underlying action. (It was entitled "STIPULATION AND ORDER FOR CHILD CUSTODY EVALUATION.") The family law judge had not required the stipulation, did not participate in drafting it and did not supervise defendant's work. Eventually, however, the "order" portion of the stipulation was signed by the court on August 12, 1987, approximately six months after the parties had signed it. Defendant's written report, made after her evaluation was finished, states that her evaluation began March 18, 1987 and ended September 3, 1987.

By the terms of the stipulation, defendant was authorized to provide written reports, but only to plaintiff and to Robert, not to the court. Plaintiff or Robert could call defendant to testify in the custody hearings but the court could not. Defendant was obligated to complete her evaluation, to prepare a written report and to participate in the proceedings or in a deposition only if her fees for such activity were paid in advance.

Plaintiff alleges that her final evaluation meeting with defendant was scheduled for the evening before the order to show cause hearing. Defendant represented to plaintiff that this meeting would only last an hour and a half. It lasted over six hours—from 5:30 p.m. to 11:50 p.m. For five of those six hours, defendant personally attacked plaintiff, screamed at her, ridiculed her, accused her of lying and fabricating evidence, threatened she would lose custody of her son if she persisted in believing his allegations about his father, and misrepresented that the child's doctors and other experts involved in the case did not believe the child had been abused. Plaintiff claims that defendant did this to induce plaintiff to abandon her belief that Robert had abused their child.

With respect to defendant's alleged non-disclosures, plaintiff asserts that defendant (1) failed to divulge her lack of expertise in the area of child and sexual abuse, (2) failed to disclose that she and Robert had a prior professional relationship in that they had spoken and participated together in professional seminars and (3) failed to disclose that she was a close personal friend of the wife of one of the partners in the law firm which represented Robert in the underlying action.

Plaintiff alleges that in defendant's written report, she neglected to state that a September 1979 hospital examination of the child resulted in the examining doctor (1) finding evidence of "irritation of [the child's] scrotum glans [sic], penis and shaft of penis" and (2) stating that "It seemed like somebody had been chomping on his penis." Besides omitting this and other material information in the written report, plaintiff claims that defendant failed to investigate certain other relevant matters.

as a quasi-judicial judicial proceeding under Civil Code section 47(2) ("action by a judicial professional defendant, actual third person entitled to the immunity for resolution ser- litigation privi- 47(2) applies to therefore affirm complaint.

CEDURAL ID

next of a family and visitation minor son of the husband, Robert. a series and in- as! and sexual family law pro- right to have Rob- rights terminat- hearing, plaintiff stipulation which as an independ- evaluate the facts order non-binding ions. This stipu- ed by the court er.

defendant ap- single six-hour and defendant, : aforesaid stipu- alleges that defen- defendant's report negligently pre- omissions and omit- d (3) defendant's certain conflicts expertise in child ing before us is ed complaint in es of action for east is one med- ical proceeding...."

Finally, plaintiff asserts that defendant acted with the intent to circumvent the judicial process and to cause plaintiff severe humiliation, mental anguish, and emotional and physical distress. Plaintiff claims that defendant's acts were willful, wanton, malicious and oppressive and she seeks both compensatory and punitive damages.

Defendant filed a general demurrer to the second amended complaint, contending that she has quasi-judicial, quasi-arbitral and/or arbitral immunity as well as immunity as an expert witness. She also claimed entitlement to the "judicial proceeding" or litigation privilege set out in section 47(2). In opposing the demurrer, plaintiff argued that defendant was not a quasi-judicial officer or an arbitrator, having been hired as a private evaluator, and that case law imposes an "interest of justice" limitation upon the section 47(2) privilege which would work in this case to defeat defendant's reliance on such defense. The trial court rejected plaintiff's arguments and sustained the demurrer without leave to amend. An order of dismissal was entered February 26, 1989.

ISSUE PRESENTED

This appeal raises the issue of the availability of (1) quasi-judicial immunity by rea-

2. We review this case in the context of both quasi-judicial immunity and statutory privilege out of a recognition that they are not coextensive. While on the facts here presented we will find that they both apply, the statutory privilege extends to bar liability for "communicative acts" but not conduct or "noncommunicative acts." (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 211, 271 Cal.Rptr. 191, 793 P.2d 524); *Pacific Gas & Electric Co. v. Bear Stearns & Company* (1990) 50 Cal.3d 1118, 1132, fn. 12, 270 Cal.Rptr. 1, 791 P.2d 587.) No such limitation exists for common law quasi-judicial immunity. Here, however, any conduct in which defendant engaged was secondary to and intertwined with the alleged offensive and dishonest communicative acts. Nonetheless, due to the importance of this issue and the likelihood that future cases involving neutral third persons engaged in mediation, conciliation, evaluation or other similar dispute resolution efforts may not be so clear, we believe it necessary to base our decision on both grounds.

son of defendant's involvement as a neutral dispute-resolving participant in the judicial process and (2) the absolute privilege under the provisions of section 47(2), as a complete bar to plaintiff's actions.

DISCUSSION

Defendant asserts both of these grounds and we have concluded that both arguments are meritorious.² For the historical and policy reasons discussed below, we believe that absolute quasi-judicial immunity is properly extended to neutral third persons who are engaged in mediation, conciliation, evaluation or similar dispute resolution efforts. As to defendant's second argument, the issue of section 47(2) privilege has, since the filing of the briefs herein, been resolved in defendant's favor by the Supreme Court's decision in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 266 Cal.Rptr. 686, 786 P.2d 865.

1. Common Law Immunity

a. Overview of Judicial Immunity

[1] The concept of judicial immunity is longstanding and absolute, with its roots in English common law. It bars civil actions against judges for acts performed in the exercise of their judicial functions³ and it

3. "Immunity exists for 'judicial' actions; those relating to a function normally performed by a judge and where the parties understood they were dealing with the judge in his official capacity. [Citations.] (*Olney v. Sacramento County Bar Assn.* (1989) 212 Cal.App.3d 807, 811, 260 Cal.Rptr. 242.) Thus, the line is drawn "between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other contexts, immunity is justified and defined by the function: it protects and serves, not by the person to whom it attaches." (*Forrester v. White* (1986) 484 U.S. 219, 227, 108 S.Ct. 538, 544, 98 L.Ed.2d 555, 565.) Acts and decisions which are not judicial or adjudicative, i.e., acts and decisions performed and made by a judge which are administrative or legislative, "even though they may be essential to the very functioning of the courts, have not ... been regarded as judicial acts." (*Id.* at p. 228, 108 S.Ct. at p. 544.)

This does not mean that judges who make legislative or administrative types of decisions

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applies to all judicial determinations, includ-
ing those rendered in excess of the judge's
jurisdiction, no matter how erroneous or
even malicious or corrupt they may be.
(*Turpen v. Booth* (1880) 58 Cal. 65, 68;
Greene v. Zank (1984) 158 Cal.App.3d 497,
507, 204 Cal.Rptr. 770.) The judge is im-
mune unless "he has acted in the clear
absence of all jurisdiction. [Citations.]"
(*Greene, supra*, at p. 507, 204 Cal.Rptr.
770.) Beyond doubt, the doctrine of "civil
immunity of the judiciary in the perform-
ance of judicial functions is deeply rooted
in California law." (*Oppenheimer v. Ash-
burn* (1959) 173 Cal.App.2d 824, 830, 848
P.2d 931; see also, *Frost v. Goernaert*
(1988) 200 Cal.App.3d 1104, 1107, 246 Cal.
Rptr. 440; *Tagliavia v. County of Los
Angeles* (1980) 112 Cal.App.3d 759, 761, 169
Cal.Rptr. 487.)

The rationale behind the doctrine is two-
fold. First, it "protect[s] the finality of
judgments [and] discourag[es] inappropri-
ate collateral attacks." (*Forrester v.*
White, supra, 484 U.S. 219, 225, 106 S.Ct.
538, 543.) Second, it "protect[s] judicial
independence by insulating judges from
vexatious actions prosecuted by disgrun-
tled litigants. [Citation.]" (*Ibid.*) With
respect to the latter reason, the immunity
is necessary in order to have an independ-
ent and impartial judiciary. The public is
best served when its judicial officers are
free from fear of personal consequences
for acts performed in their judicial capaci-
ty. (*Greene v. Zank, supra*, 158 Cal.
App.3d at p. 508, 204 Cal.Rptr. 770.) "If
judges are personally liable for erroneous
decisions, the resulting avalanche of suits,
most of them frivolous but vexatious,
would provide powerful incentives for
judges to avoid rendering decisions likely
to provoke such suits. [Citation.] The re-
sulting timidity would be hard to detect or
control, and it would manifestly detract
from independent and impartial adjudica-
tion." (*Forrester v. White, supra*, 484
U.S. 219, 226-227, 108 S.Ct. 538, 544.) "It

are not able to claim legislative immunity (*Sup-
reme Court of Va. v. Consumers Union* (1980)
446 U.S. 719, 721 et seq., 100 S.Ct. 1967, 1974 et
seq., 64 L.Ed.2d 641, 653 et seq.; *Forrester v.*
White, supra, 484 U.S. 219, 228, 108 S.Ct. 538,
544) or an immunity like that enjoyed by execu-

is a judge's duty to decide all cases within
his jurisdiction that are brought before
him, including controversial cases that
arouse the most intense feelings in the
litigants. His errors may be corrected on
appeal, but he should not have to fear that
unsatisfied litigants may hound him with
litigation charging malice or corruption.
Imposing such a burden on judges would
contribute not to principled and fearless
decision-making but to intimidation."
(*Pierson v. Ray* (1967) 386 U.S. 547, 554, 87
S.Ct. 1218, 1218, 18 L.Ed.2d 288, 294-295.)
"The justification for [judicial immunity]
is that it is impossible to know whether [a
person's claim against an official] is well
founded until the case has been tried, and
that to submit all officials, the innocent as
well as the guilty, to the burden of a trial
and to the inevitable danger of its outcome,
would dampen the ardor of all but the most
resolute, or the most irresponsible, in the
unflinching discharge of their duties."
(*Hardy v. Vial, supra*, 48 Cal.2d at pp.
582-583, 811 P.2d 494, quoting from *Gro-
goire v. Biddle* (2d Cir.1949) 177 F.2d 579,
581.) Thus, the protection must be abso-
lute, even to the malicious or corrupt judge.
The effect of judicial immunity is that the
action against the judicial officer must be
dismissed. (*Hardy, supra*, 48 Cal.2d at p.
584, 811 P.2d 494.)

b. Quasi-Judicial Immunity

Under the concept of "quasi-judicial im-
munity," California courts have extended
absolute judicial immunity to persons other
than judges if these persons act in a judi-
cial or quasi-judicial capacity. Thus, court
commissioners "acting either as a tempo-
rary judge or performing subordinate judi-
cial duties ordered by the appointing court"
have been granted quasi-judicial immunity.
(*Tagliavia v. County of Los Angeles, su-
pra*, 112 Cal.App.3d at p. 769, 169 Cal.Rptr.
467.) So also, quasi-judicial immunity from
civil suits for acts performed in the exer-

sive branch officials "when performing within
the scope of their power acts which require the
exercise of discretion or judgment. [Citations.]"
(*Hardy v. Vial* (1957) 48 Cal.2d 577, 582, 311
P.2d 494; accord *Forrester v. White, supra*, 484
U.S. 219, 230, 108 S.Ct. 538, 545).

class of their duties has been given to grand jurors (*Turpon v. Booth, supra*, 56 Cal. at p. 69); administrative law hearing officers (*Taylor v. Mitzel* (1978) 82 Cal.App.3d 865, 870-871, 147 Cal.Rptr. 323); arbitrators (*Baar v. Tigerman* (1983) 140 Cal.App.3d 979, 985, 211 Cal.Rptr. 426; *Coopers & Lybrand v. Superior Court* (1989) 212 Cal.App.3d 524, 534, 260 Cal.Rptr. 713)⁴; organizations sponsoring an arbitrator (*Olney v. Sacramento County Bar Assn., supra*, 212 Cal.App.3d at pp. 814-815, 260 Cal.Rptr. 842); and prosecutors (*Pearson v. Reed* (1935) 6 Cal.App.2d 277, 286-288, 44 P.2d 592). Additionally, the State Bar and the Committee of Bar Examiners, as arms of the Supreme Court, and their officials, as officers of the Supreme Court, have been afforded quasi-judicial immunity from civil suits for acts performed in the exercise of their duties. (*Greene v. Zank, supra*, 158 Cal.App.3d at p. 513, 204 Cal.Rptr. 770.) As with the reason for granting judicial immunity, quasi-judicial immunity is given to promote uninhibited and independent decisionmaking. (*Baar v. Tigerman, supra*, 140 Cal.App.3d at p. 982, 211 Cal.Rptr. 426.)

As noted above, courts look at the nature of the challenged act which a judge has performed to determine if it is truly judicial and therefore deserving of judicial immunity. So also, in determining whether a person is acting in a quasi-judicial fashion, the courts look at "the nature of the duty performed [to determine] whether it is a judicial act—not the name or classification of the officer who performs it, and many who are properly classified as executive officers are invested with limited judicial powers." (*Pearson v. Reed, supra*, 6 Cal.App.2d at pp. 286-287, 44 P.2d 592.) In *Pearson*, the court found that a prosecutor, in examining evidence submitted to him and in determining whether to prosecute a case against a defendant, is performing an

act that is judicial in nature, thus making him both a quasi-judicial officer and an executive branch officer. (*Ibid.*)

c. The Right to Quasi-Judicial Immunity Depends Upon a Connection to the Judicial Process

[2] Plaintiff seeks to establish that California's version of common law judicial and quasi-judicial immunity is applied only to public officials (judges, grand jurors, prosecutors, commissioners, etc.). If that were so, then arbitrators would not be protected by common law quasi-judicial immunity.⁵ We believe that in California, it is not so much one's status as a public official which has generally been the litmus test for judicial immunity but rather the above-referenced analysis of "functions normally performed by judges." (See fn. 2, *ante.*) It just so happens, that with the exception of arbitrators, and sometimes referees (*Park Plaza Ltd. v. Pietz* (1987) 193 Cal.App.3d 1414, 1418-1419, 289 Cal.Rptr. 51), such functions have usually been performed by public officials.

The case upon which plaintiff relies for her "public official" analysis is *White v. Towers* (1951) 37 Cal.2d 727, 235 P.2d 209, an action for malicious prosecution against an investigator for the State Fish and Game Commission who had the duty of enforcing laws regarding the protection of fish and game. That case does speak of "the immunity from civil liability with which the law surrounds officials directly connected with the judicial processes" (*Id.* at p. 730, 235 P.2d 209, emphasis added.) However, a reading of the court's opinion shows that the court was more interested in the "connected with the judicial process" portion of the abovequoted excerpt than with the fact that the defendant could be classified as an "official."

4. The Legislature made judicial immunity for arbitrators a statutory requirement by adding section 1280.1 to the Code of Civil Procedure. (Stats.1985, ch. 709, § 1, p. 2341.) However, by its own terms, section 1280.1 remains in effect only until January 1, 1991 unless a subsequent statute is enacted to delete or extend that date. § 1280.1.)

5. "Arbitration is the submission for determination of a disputed matter to private unofficial persons selected in the manner provided by law or by agreement of the parties." (*Stockwell v. Equitable F. & M. Ins. Co.* (1933) 134 Cal.App. 534, 540, 25 P.2d 873, emphasis added.)

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emphasis added.)

In looking at the doctrine of immunity the *White* court said at pages 730-732, 236 P.2d 209: "The doctrine of immunity from liability for allegedly malicious acts has long been established with respect to numerous public officers. In the early case of *Bradley v. Fisher*, 13 Wall. (U.S.) 886 (20 L.Ed. 646), the doctrine was applied to judges of courts of record. . . . Since that time it has been recognized that the orderly administration of the affairs of government necessitates the inclusion of many officials within the cloak of immunity. Executive heads of administrative departments have been included [citations] as well as their deputies, who act in their stead [citations].

"The last cited cases, however indicative of the trend of judicial decision, do not furnish the persuasive reason for holding that the doctrine extends to peace officers. Rather, it is the line of cases which directly concerns the application of the doctrine to those connected with the judicial processes which is determinative herein. Thus, it has been held almost universally that public prosecutors are entitled to immunity. [Citations.] Similarly, grand jurors were early held to be protected against civil actions for alleged malicious prosecution. [Citation.] A review of the cases which have concerned the application of the doctrine to law enforcement officers shows that the great majority of the courts have ruled in favor of the officers." (Emphasis added.) The court then went on to cite California and federal cases involving law enforcement officers such as a building inspector charged with investigating an alleged violation of a building ordinance, a deputy fire marshal charged with investigating fires, and an assistant city engineer.

Thus, the *White* court focused on the importance to the judicial system of persons charged with the duty to investigate crimes and institute criminal proceedings. The court was impressed by their connection to the judicial processes rather than the fact that they could be classified as

public officials. In our judgment, that is the proper way to view the matter. We therefore reject plaintiff's efforts to place the emphasis on the status of defendant rather than upon the connection between the defendant's activity and the judicial process.

d. Policy Considerations Support the Approach of the Federal Cases to Quasi-Judicial Immunity

For their part, defendant and amicus ask this court to go beyond California's apparently heretofore limited application of the "persons connected with the judicial processes" analysis and apply common law quasi-judicial immunity like the federal courts have applied it—to people connected with the judicial process who are not "public officials," arbitrators or referees, such as (1) mediators, guardians ad litem, therapists, receivers, bankruptcy trustees and other persons appointed by the courts for their expertise and (2) persons whose work product comes into the judicial process to be used by the court even though they were not court-appointed, such as social workers and probation department employees. Defendant and amicus also argue that immunity should be extended even further to a third category of people—those persons involved in alternative methods of dispute resolution, such as mediators and "neutral fact-finders," who function apart from the courts, as did the defendant in the instant case.⁶

Such an extension of quasi-judicial immunity would find persuasive support in a number of federal cases. The federal courts have held that immunity applies to such court-appointed persons as a trust officer employed by the Oregon Department of Veterans Affairs which was acting (by court appointment) as the conservator of plaintiff's estranged husband (*Mosher v. Saalfeld* (9th Cir.1978) 589 F.2d 438, 442, cert. den. 442 U.S. 941, 99 S.Ct. 2888, 61 L.Ed.2d 811); a receiver appointed by a

6. We recognize that ultimately defendant's status in the underlying action was governed by a court order. However, in our view, that is not the crucial fact. For several months prior to when the court signed the "order" portion of the

"Stipulation and Order for Child Custody Evaluation," the defendant worked pursuant to the private agreement of plaintiff and Robert, albeit in the shadow of pending litigation, in order to effect a resolution of their dispute.

court to manage property of a marital estate during a dissolution of the marriage (*New Alaska Development Corp. v. Guetschow* (9th Cir.1989) 869 F.2d 1298, 1802-1808); a child protective services worker acting pursuant to a court order to take a child into custody (*Coverdell v. Dept. of Social & Health Services* (9th Cir.1987) 884 F.2d 758, 764-765); and guardians ad litem, psychologists and attorneys for children in child abuse actions (*Myers v. Morris* (8th Cir.1987) 810 F.2d 1437, 1465-1468, cert. den. 484 U.S. 828, 108 S.Ct. 97, 98 L.Ed.2d 58).

With respect to nonappointed persons whose work product comes into the judicial process, the courts have held that immunity was properly given to probation officers who prepare presentencing reports for the use by the courts (*Demoran v. Witt* (9th Cir.1986) 781 F.2d 165) and workers at the Michigan Department of Social Services and psychiatrists who were involved in terminating plaintiffs' parental rights (*Kurzawa v. Mueller* (6th Cir.1984) 732 F.2d 1456). The *Kurzawa* court stated that in order to protect the well-being of children, the defendants must be able to perform their jobs "without the worry of intimidation and harassment from dissatisfied parents." (*Id.* at p. 1458; see also, *In re Alicia T.* (1990) 221 Cal.App.3d —, 271 Cal.Rptr. 513, and *Jenkins v. County of Orange* (1989) 212 Cal.App.3d 278, 260 Cal.Rptr. 645 [following federal cases which recognize an absolute immunity for § 1983 claims against social workers who were acting within the scope of their employment in investigating allegations of child abuse and initiating dependency proceedings].)

These courts emphasized that the defendants served functions integral to the judicial process (*Demoran v. Witt, supra*, 781 F.2d at p. 157; *New Alaska Development*

Corp. v. Guetschow, supra, 869 F.2d at p. 1303; *Myers v. Morris, supra*, 810 F.2d at p. 1467; *Kurzawa v. Mueller, supra*, 732 F.2d at p. 1458) and acted as arms of the court (*New Alaska, supra*, at p. 1303, fn. 6; *Demoran, supra*, at p. 157).

For example, in *Myers v. Morris, supra*, 810 F.2d at p. 1467, the court said: "[T]he ... therapists, guardians and attorney were appointed to fulfill quasi-judicial responsibilities under court direction. The family court was required to determine whether the children in its custody were neglected and to secure appropriate placements. To perform these functions, the court exercised its statutory authority to seek the assistance of experts. [Citation.] The absolute immunity which is accorded persons acting as an integral part of the judicial process protects them from having to litigate the manner in which they performed their delegated functions." (Emphasis added.)

In *Hardy v. Vial, supra*, 48 Cal.2d 577, 311 P.2d 494, our Supreme Court recognized that California courts line up with federal decisions in other types of situations, such as immunity for executive public officers when they are performing non-ministerial acts, i.e., when they use their judgment or discretion in performing their jobs. (*Id.* at p. 582, 311 P.2d 494.) Also, as defendant points out, many California decisions which address the issue of immunity cite with frequency to federal decisions. (See e.g., *Haraff v. Vial, supra*, 48 Cal.2d 577, 311 P.2d 494; *White v. Towers, supra*, 87 Cal.2d 727, 235 P.2d 209; *Olney v. Sacramento County Bar Assn., supra*, 212 Cal.App.3d 807, 260 Cal.Rptr. 842; *Tagliavia v. County of Los Angeles, supra*, 112 Cal.App.3d 759, 169 Cal.Rptr. 467; *Taylor v. Mizel, supra*, 82 Cal.App.3d 665, 147 Cal.Rptr. 323.)⁷

7. Relying on *Greene v. Zank, supra*, 158 Cal. App.3d 497, 204 Cal.Rptr. 770, a civil rights action brought under 42 U.S.C. § 1983, against the State Bar of California, the Committee of Bar Examiners and their officials, plaintiff argues that there is a distinct difference between state and federal law in the area of judicial immunity, and that determination of which of the two bodies of law applies depends upon

whether the action is a state or a federal one." We disagree with this analysis of *Greene*.

The *Greene* court did hold at page 503 of its opinion that it would necessarily have to apply federal law in that case (i.e., federal law regarding both the elements of a prima facie § 1983 cause of action and the elements of judicial immunity), since the plaintiff's cause of action was based on federal civil rights legislation.

2, 869 F.2d at p. 870, 810 F.2d at p. 811, *supra*, 732 F.2d at p. 733, 1303, fn. 6; 57).

Myers v. Morris, *supra*, 810 F.2d at p. 1466-1467. The court said: "[T]he quasi-judicial functions and attorney direction. The need to determine custody were appropriate place functions, the authority to perform. [Citation.] which is accorded integral part of the them from having which they perform functions." (Em-

48 Cal.2d 577, the Court recognizes line up with types of situation or executive public performing non- in they use their performing their 2d 494.) Also, as California decision of immunity federal decisions. *supra*, 48 Cal.2d *v. Towers*, *supra*, 39; *Oiney v. Sacramento*, *supra*, 212 Rptr. 842; *Tagliavia v. County of Los Angeles*, *supra*, 112 Rptr. 467; *Taylor*, Cal.App.3d 665, 147

or a federal one." analysis of *Greene*. and at page 503 of its clearly have to apply federal law regarding prima facie § 1983 elements of judicial plaintiff's cause of action and rights legislation.

[3] We are persuaded that the approach of the federal courts is consistent with the relevant policy considerations of attracting to an overburdened judicial system the independent and impartial services and expertise upon which that system necessarily depends. Thus, we believe it appropriate that these "nonjudicial persons who fulfill quasi-judicial functions intimately related to the judicial process" (*Myers v. Morris*, *supra*, 810 F.2d at p. 1466-1467) should be given absolute quasi-judicial immunity for damage claims arising from their performance of duties in connection with the judicial process. Without such immunity, such persons will be reluctant to accept court appointments or provide work product for the courts' use. Additionally, the threat of civil liability may affect the manner in which they perform their jobs. (*Moses v. Parwatikar* (8th Cir.1987) 813 F.2d 891, 892, cert. den. 484 U.S. 832, 108 S.Ct. 108, 98 L.Ed.2d 57.)

e. Extension of Immunity to Persons Engaged in Neutral Dispute Resolution Is Appropriate

In arguing for extensions of immunity to the category of persons who function apart from the courts in an attempt to resolve disputes, defendant and amicus emphasize that in this day of excessively crowded courts and long delays in bringing civil cases to trial, more reliance is being placed by both parties and the courts on alternative methods of dispute resolution. Along

However, both federal and California courts look to the act performed by the defendant to determine if it qualifies for judicial (or quasi-judicial) immunity. They examine the act to see if it is "a function normally performed by a judge, and to the expectations of the parties, i.e., [so that] they dealt with the judge in his judicial capacity." If so, it receives judicial immunity. (*Greene v. Zank*, *supra*, 158 Cal.App.3d at p. 507, 204 Cal.Rptr. 770, quoting from *Stump v. Sparkman* (1976) 435 U.S. 349, 362, 98 S.Ct. 1099, 1107, 55 L.Ed.2d 331, 342; accord *Pearson v. Reed*, *supra*, 6 Cal.App.2d at p. 286-287, 44 P.2d 592 and *Oiney v. Sacramento County Bar Assn.*, *supra*, 212 Cal.App.3d at p. 811, 260 Cal.Rptr. 842 (neither of which were federal civil rights cases).) In addition, the United States Supreme Court in *Briscoe v. LaHue* (1983) 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 determined that the common law provided absolute immunity from damages liability for persons "who were

traditional lines, the provisions of article VI, section 22 of the Constitution, which allow the Legislature to provide for the appointment by trial courts of officers such as commissioners, referees and masters (*Tagliavia v. County of Los Angeles*, *supra*, 112 Cal.App.3d at p. 763, 169 Cal.Rptr. 467), are becoming ever more important. We have court commissioners (Code Civ. Proc., § 259) and voluntary and mandatory referees (Code Civ. Proc., § 638 et seq.). In addition, contracts for binding arbitration (Code Civ. Proc., § 1280 et seq.) and provisions for non-binding arbitration (Code Civ. Proc., § 1141.10 et seq.) help relieve court congestion. So also does Civil Code section 4607's provision for mandatory mediation of child custody and visitation disputes.

More recently, other aspects of alternative dispute resolution efforts are being used with greater frequency. There are voluntary settlement conferences which are conducted by volunteers working with the court through, for example, local bar associations. In addition, if it is necessary, the parties can choose a mediator or neutral fact-finder with the expertise to facilitate a resolution of their particular dispute. As amicus notes, mediation is traditionally a non-binding dispute resolution alternative. While most mediation is voluntary, some is compulsory, like that provided for in Civil Code section 4607.⁸

Besides relieving court congestion and speeding up the conclusion of cases, these

integral parts of the judicial process" (language similar to that used by our Supreme Court in *White v. Towers*, *supra*, 37 Cal.2d at p. 731, 235 P.2d 209) and that section 1983's civil rights provisions did not affect that immunity. (*Id.* at pp. 335, 329 et seq., 103 S.Ct. at pp. 1115, 1112 et seq.)

8. In the instant case, plaintiff states in her opening brief that defendant was hired by herself and the child's father to provide psychological services in an attempt to resolve the family's problems outside of court, (as well as to prepare a report and potentially act as an expert witness if called by either parent). Thus, in addition to the mandatory mediation which plaintiff and her husband would receive under Civil Code section 4607, they were receiving private mediation-type services from defendant.

less-traditional alternative dispute resolution procedures are often less expensive and less stressful than seeing a case through its normal trial path. Like the more formal dispute resolution procedures, they are critical to the proper functioning of our increasingly congested trial courts.

We agree with defendant and amicus that the justification for giving judicial and quasi-judicial immunity to judges, commissioners, referees, court-appointed persons (such as psychologists, guardians ad litem and receivers), and nonappointed persons (such as those who prepare probation reports and handle child abuse cases) applies with equal force to these neutral persons who attempt to resolve disputes. Although they are not "law connected," as are judges, commissioners and court-appointed experts, neither are non-judicial arbitrators. (*Stockwell v. Equitable F. & M. Ins. Co.*, *supra*, 134 Cal.App. at p. 540, 25 P.2d 873.) Similarly, referees, although appointed by the courts, may or may not be employees or officers of the court and they may be paid by the parties. (*Park Plaza, Ltd. v. Pletz*, *supra*, 193 Cal.App.3d at p. 1419, 239 Cal.Rptr. 51.)⁹

Plaintiff notes that attorneys can be held liable to their clients for professional negligence because they have a specific duty to their clients. Using a "duty to the public" vs. "duty to a client" approach, plaintiff seeks to distinguish the federal "court appointment" cases from the instant case. She argues that "It is, among other things, the absence of a public responsibility, and the presence of a duty to private clients, which distinguishes the instant case from the various authorities defendant cited . . . for the proposition that court-appointed mental health professionals are immune from civil liability. . . . In each of the cases relied upon by the defendant, the psychologist or psychiatrist was either acting as an agent of the court pursuant to a court

appointment in order to provide an opinion to the court itself [citations] or was a government official who owed a direct duty to the public at large [citations] or was appointed by the court and had the responsibility of reporting to a governmental agency [citation]."

However, in reviewing the issue of immunity, we think that the focus is more correctly placed on a non-advocate vs. advocate analysis. Thus, while the criminal defense attorney who is paid with public funds has a duty to the public not to waste those funds, it is his or her job as an *advocate* for the defendant which makes him or her responsible and liable to the defendant and susceptible to a later civil action.

In contrast, the psychologist who is mediating a child custody dispute, whether by court appointment or not, is not an advocate for either parent, even if paid by them. (Cf. *Park Plaza, Ltd. v. Pletz*, *supra*, 193 Cal.App.8d at p. 1419, 239 Cal.Rptr. 51, where the court said that referees who are paid for by the parties in a law suit are not employees or independent contractors of those parties or of their attorneys.) The job of third parties such as mediators, conciliators and evaluators involves impartiality and neutrality, as does that of a judge, commissioner or referee; hence, there should be entitlement to the same immunity given others who function as neutrals in an attempt to resolve disputes. In a sense, those persons are similar to a judge who is handling a voluntary or mandatory settlement conference, no matter whether they are (1) making binding decisions (such as referees acting pursuant to Code Civ. Proc., § 638, subd. (1), and arbitrators), (2) making recommendations to the court (such as referees acting under Code Civ. Proc., § 639 or mediators acting under Civ. Code, § 4607), or (3) privately attempting

present policy of actively encouraging alternative dispute resolution in order to relieve the burden on the judicial system." (*Id.* at p. 535, 260 Cal.Rptr. 713.) In the instant opinion, we recognize the necessity for immunity for other but similar alternative dispute resolution activities.

9. In *Coopers & Lybrand v. Superior Court*, *supra*, 212 Cal.App.3d 524, 260 Cal.Rptr. 713 this court discussed the 1985 legislation which had expanded immunity for arbitrators. We recognized that "The law . . . has come a long way from disfavoring arbitration so as not to encroach on the jurisdiction of the courts to the

to settle disputes, such as the defendant here.

[4.5] We therefore hold that absolute quasi-judicial immunity is properly extended to these neutral third-parties for their conduct in performing dispute resolution services which are connected to the judicial process and involve either (1) the making of binding decisions, (2) the making of findings or recommendations to the court or (3) the arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes. As the defendant was clearly engaged in this latter activity, she is entitled to the protection of such quasi-judicial immunity.

2. Statutory Privilege

The second ground for demurrer raised by defendant is based on the provisions of section 47(2). A recent decision of the Supreme Court (*Silberg v. Anderson, supra*, 50 Cal.3d 205, 266 Cal.Rptr. 638, 786 P.2d 866) mandates that in spite of the nature of the behavior which plaintiff's allegations attribute to defendant, the defendant is protected from the tort liability claimed by plaintiff.

a. Background of the Silberg Case

As in the instant case, the complaint in *Silberg* stemmed from an underlying dissolution of marriage action and its attendant custody and visitation issues. In that underlying action, the husband (who was later to be the plaintiff in the *Silberg* case) asked his attorney to obtain an agreement from his wife that all family members would submit to an evaluation and counseling by an independent psychologist for the purpose of determining appropriate custody and visitation orders for their children. Wife's attorney (the defendant in the *Silberg* case) recommended a psychologist (Robert Adler) who was ultimately selected by plaintiff and his wife.

After an "apparently adverse" result for the plaintiff, plaintiff sued his wife's attorney, contending that contrary to defendant's representations, the psychologist was not independent and neutral because he had had a preexisting and undisclosed

relationship with defendant. Plaintiff claimed that defendant used her influence with Dr. Adler to his wife's advantage in the evaluation of the family members and that due to defendant's influence, Adler produced a biased and inaccurate report. Husband sued the defendant-attorney for breach of contract, negligence and "intentional tort," which the Supreme Court said was apparently intentional infliction of emotional distress but might also be fraud.

The defendant-attorney generally demurred to the complaint, contending that section 47(2) made her statements during the family law matter privileged. The trial court sustained the demurrer without leave to amend and dismissed the action. The Court of Appeal reversed as to the cause of action for "intentional tort" and remanded the case, directing the trial court to allow the husband to amend that cause of action. The court concluded that section 47(2) did not apply if defendant's representations were made to obtain personal objectives or to gain an advantage for her client through deceit. The court held that in such a case, the statements could not have been made to promote the "interest of justice" and further hold that such a determination was one for the trier of fact.

The Supreme Court granted review to consider the question of whether the privilege set out in section 47(2) is subject to the "interest of justice" exception which some previous Court of Appeal decisions had recognized.

b. The Supreme Court's Silberg Analysis

(1) The Nature of the Section 47(2) Privilege

In discussing the privilege given by section 47(2), the *Silberg* court noted that (1) the privilege has been given application "to any communication, whether or not it amounts to a publication"; (2) it applies to all torts except malicious prosecution; (3) "it applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is

provide an opinion [citations] or was a owed a direct duty [citations] or was and had the respon- a governmental

g the issue of in- the focus is more advocate vs. advoc- the criminal de- paid with public public not to waste or her job as an dant which makes and liable to the ole to a later civil

logist who is medi- epute, whether by ot, is not an advoc- en if paid by them.

Pitz, supra, 198 239 Cal.Rptr. 51, t referees who are a law suit are not nt contractors of r attorneys.) The as mediators, con- volves impartiali- is that of a judge, e; hence, there the same immuni- tion as neutrals in putes. In a sense, to a judge who is mandatory settle- ter whether they decisions (such as nt to Code Civ. nd arbitrators), (2) ns to the court; under Code Civ. acting under Civ. vately attempting

encouraging alterna- order to relieve the tem." (Id. at p. 535, e instant opinion, we immunity for other e resolution activi-

made outside the courtroom and no function of the court or its officers is involved"; and (4) it applies "to all publications, irrespective of their maliciousness." (*Silberg v. Anderson, supra*, 50 Cal.3d at pp. 212, 216, 266 Cal.Rptr. 638, 786 P.2d 365.)

In setting out the "test" for application of the section 47(2) privilege, the *Silberg* court stated: "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have [sic] some connection or logical relation to the action. [Citations.]" (*Silberg v. Anderson, supra*, 50 Cal.3d at p. 212, 266 Cal.Rptr. 638, 786 P.2d 365.)

With respect to the third element, the court stated: "The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action. A good example of an application of the principle is found in the cases holding that a statement made in a judicial proceeding is not privileged unless it has some reasonable relevancy to the subject matter of the action. [Citations.] The 'furtherance' requirement was never intended as a test of a participant's motives, morals, ethics or intent. [Citations.]" (*Silberg v. Anderson, supra*, 50 Cal.3d at pp. 219-220, 266 Cal.Rptr. 638, 786 P.2d 365.)

10. One of the cases cited by the *Silberg* court was *Carden v. Getzoff* (1987) 190 Cal.App.3d 907, 235 Cal.Rptr. 692, a case from this division. In that case (which also stemmed from a dissolution of marriage matter), the plaintiff sued his former wife's accountant-witness, alleging that the accountant falsified a report which he had prepared and then used that report to give perjured testimony at trial.

The accountant had prepared, on behalf of the wife, a medical practice valuation of the husband's anesthesiology practice, in order to determine the value of its good will. The accountant stated he compared husband's practice to the goodwill of three similar practices he had also examined. In his complaint against the accountant, the husband alleged that the accountant (1) had made no valuation of his practice,

(2) *The "Interest of Justice" Factor*

The court addressed the above-mentioned line of Court of Appeal cases which had carved out an exception to the section 47(2) privilege. The exception was applied to communications which had not been made for the purpose of promoting the interest of justice. The court stated that the decision in which this test originated (*Bradley v. Hartford Acc. & Indem. Co.* (1978) 30 Cal.App.3d 818, 826, 106 Cal.Rptr. 718) took the third element of the test for application of section 47(2) (i.e., that the communication have been made to achieve the objects of the litigation) and read into it the additional requirement that the communication must have also been made for the purpose of promoting the "interest of justice." (*Silberg v. Anderson, supra*, 50 Cal.3d at p. 217, 266 Cal.Rptr. 638, 786 P.2d 365.)

The *Silberg* court rejected the "interest of justice" requirement, saying that endorsement of such a requirement "would be tantamount to the exclusion of all tortious publications from the privilege, because tortious conduct is invariably inimical to the interest of justice." (*Silberg v. Anderson, supra*, 50 Cal.3d at p. 218, 266 Cal.Rptr. 638, 786 P.2d 365.) The court stated that even though well-intentioned, the interest of justice requirement "is wholly inconsistent with the numerous cases in which fraudulent communications or perjured testimony have nevertheless been held privileged. [Citations.]" (*Ibid.*)¹⁰

(2) had made no such comparison because the three alleged anesthesiologists did not even exist in the State of California and (3) should have concluded that husband's practice had no good-will value because he worked on staff as part of a rotation group at a hospital and had no patients of his own.

The husband sued the accountant for abuse of process, intentional infliction of emotional distress and negligent infliction of emotional distress. This court held that section 47(2) immunized the accountant from liability. We stated that the defendant's "publications" in both his written report and his testimony at trial were privileged. *Carden* was cited several times by the *Silberg* court. (*Silberg v. Anderson, supra*, 50 Cal.3d at pp. 215, 216, 218, 246 Cal.Rptr. 638, 786 P.2d 365.)

of Justice" Factor

d the above-mentioned legal cases which had on to the section 47(2) option was applied to h had not been made promoting the interest : stated that the deci- st originated (*Bradley Indem. Co.* (1973) 80 i, 108 Cal.Rptr. 718) it of the test for appli-) (i.e., that the commu- made to achieve the on) and read into it the t that the communica- o been made for the g the "interest of jus- *Anderson, supra*, 50 Cal.Rptr. 638, 786 P.2d

rejected the "interest ment, saying that en- a requirement "would e exclusion of all tor- om the privilege, be- t is invariably inimical ustice." (*Silberg v. Cal.3d* at p. 213, 266 P.2d 365.) The court ough well-intentioned, : requirement "is whol- the numerous cases in munciations or per- ve nevertheless been ations.)" (*Ibid.*)¹⁰

a comparison because the ologists did not even exist rna and (3) should have d's practice had no good- worked on staff as part of . hospital and had no pa- ne accountant for abuse of fliction of emotional dis- fliction of emotional dis- that section 47(2) immu- from liability. We stated "publications" in both his is testimony at trial were as cited several times by *Silberg v. Anderson, supra*, :16, 218, 266 Cal.Rptr. 638,

c. Application of Silberg's Four-Part Test

[6] In her opening brief, plaintiff summarizes defendant's conduct as "failing to disclose her previous connections with one of the parties (i.e., an implied representation by defendant that she was acting in a professional manner by being independent), screaming at and otherwise psychologically abusing [plaintiff], negligently or deliberately misstating the facts she had learned about the case, negligently or deliberately failing to include in her report crucial facts which corroborated [the child's] complaints, and directly threatening [plaintiff] with the loss of custody of her son if [plaintiff] told anyone about defendant's acts of misconduct." All of the causes of action in plaintiff's second amended complaint allege tortious conduct. Thus, the four-part test for section 47(2) immunity which is set out in *Silberg* is applicable to each. (*Silberg v. Anderson, supra*, 50 Cal.3d at p. 212, 266 Cal.Rptr. 638, 786 P.2d 365.)

Plaintiff apparently concedes, as she must, the existence here of the second and the fourth elements of the section 47(2) test, i.e., that the communications were made by a participant in the litigation and that the publications have some connection or logical relation to the case. Defendant was an invited, and ultimately court-approved, participant in the dissolution matter and her communications were obviously related to a portion of the issues in the dissolution action—custody and visitation.

Although it seems that plaintiff should also concede the existence of the first element (that the defendant's alleged wrongful communications were made in a judicial or quasi-judicial proceeding), plaintiff argues in her reply brief that defendant's communications were "collateral" because they were not made during the course of and as a part of the judicial proceeding. That contention has no merit. The court in *Silberg* stated that the section 47(2) privilege applies "even though the publication is made outside the courtroom and no function of the court or its officers is involved." (*Silberg v. Anderson, supra*, 50 Cal.3d at p. 212, 266 Cal.Rptr. 638, 786 P.2d 365.)

As for the third element, i.e. that the communication be made to achieve the objects of the litigation, we find that this element is clearly met. Defendant's alleged wrongful communications (whether express or implied and whether screamed or simply stated) were "not ... extraneous to the action" but rather had a "logical relation" to it. (*Silberg v. Anderson, supra*, 50 Cal.3d at pp. 219-220, 266 Cal.Rptr. 638, 786 P.2d 365.) Defendant's acts were part of a process undertaken by the husband and wife to aid the court in its decision on an important matter in the dissolution. Defendant's "motives, morals, ethics or intent" are not in issue when asking whether her acts were in furtherance of the objects of the dissolution proceedings. (*Id.* at pp. 219-220, 266 Cal.Rptr. 638, 786 P.2d 365.) Thus, we conclude that section 47(2)'s privilege serves to protect defendant from her alleged wrongful conduct.

CONCLUSION

On the facts of this case, the defendant was entitled to common law immunity and statutory privilege. Thus, the trial court was correct in sustaining defendant's demurrer without leave to amend.

The absolute immunity and privilege to which defendant is entitled must protect her from suit. Such doctrines are not mere defenses to liability. (*Mitchell v. Forsyth* (1965) 472 U.S. 511, 525-526, 105 S.Ct. 2305, 2315, 55 L.Ed.2d 411, 424-425; *Hardy v. Vial, supra*, 48 Cal.2d at p. 584, 311 P.2d 494; *Silberg v. Anderson, supra*, 50 Cal.3d at p. 220, 266 Cal.Rptr. 638, 786 P.2d 365.) If such protection is to be meaningful it must be effective to prevent suits such as this one from going beyond demurrer. Avoiding the expense and burden of having to defend an action such as this one is precisely the goal which the principles of absolute immunity and privilege were intended to achieve. In order to best protect the ability of neutral third parties to aggressively mediate or resolve disputes, a dismissal at the very earliest stage of the proceedings is critical to the proper functioning and continued availability of these services.

DISPOSITION

The order of dismissal is affirmed. Costs on appeal to defendant.

KLEIN, P.J., concurs.

DANIELSON, Associate Justice, concurring and dissenting.

I concur in the result reached in the foregoing decision, but emphatically dissent and disassociate myself from the reasoning and the holding of the majority opinion which would create, by judicial legislation, a "quasi-judicial immunity" in persons whom it vaguely designates as "neutral third party participants in the judicial process."

In the first place, the majority simply designates those upon whom it would confer this newly-created quasi-judicial immunity as "neutral," and thereafter assumes that they are, in fact, neutral. Whether or not they are truly neutral presents a very substantial question of fact, one which would not have to be decided if this appeal were decided under existing law. The litigation privilege of Civil Code section 47, subdivision (2) (hereafter section 47(2)) provides a broad privilege which will protect participants in litigation from the consequences of their communications. Thus, the immunity which the majority would create serves no recognizable useful purpose.

The Majority's Holding is Judicial Legislation

The majority frankly and honestly acknowledges that defendant has asked this court to "go beyond" California's heretofore limited application of immunity and apply it to others (1) appointed by courts for their expertise, and (2) persons whose work product comes into the judicial process to be used by the court, even though they were not court appointed, such as social workers. The majority has granted that request. The majority holds "that absolute quasi-judicial immunity is properly extended to neutral third party participants in the judicial process." But who is doing the extending? The answer is: This court. However, the majority does not identify,

nor can they, their constitutional authority for "going beyond" the constitution and the laws of the State of California, and "extending" immunity to such third parties. By that act of "extending" they have created a new immunity, a new exemption from accountability, which has not existed in the laws of this state. To borrow the words of our Supreme Court in *Mutual Life Ins. Co. v. City of Los Angeles* (1990) 50 Cal.8d 402, 416, 267 Cal.Rptr. 589, 787 P.2d 896, this is "nothing more than judicial legislation."

The People of California, in establishing our Constitution, wisely followed the example of the United States and separated governmental powers into three branches. It is well that we remember and honor that fact. The legislative power remains "vested in the California Legislature" (art. IV, § 1); the executive power remains "vested in the Governor"; (art. V, § 1); and the judicial power is "vested in the [Courts]." (Art. VI, § 1.) Our courts do not have jurisdiction to legislate and have no right either to create new causes of action nor to abolish those which are already established. Those are legislative functions. (*Modern Barber Col. v. Cal. Emp. Stab. Com.* (1948) 31 Cal.2d 720, 726-727, 192 P.2d 916.)

The Majority's Holding is Gratuitous

The majority's creation of a new quasi-judicial immunity is wholly gratuitous. In deciding the central issue presented by this appeal the court could have, and should have, decided it on the basis of existing law. The litigation privilege of section 47(2) disposes of that issue fully, completely, and quickly; and that disposition is based upon law when was enacted by the people through their Legislature more than 100 years ago and which has been refined and interpreted many times by our courts. The majority did, in fact, utilize section 47(2) as an alternate basis for its decision, after first utilizing 18 pages of its opinion in its effort to justify and to create its new quasi-judicial immunity. The disposition under section 47(2) is correct and, standing alone, fully supports the result reached.

stitutional authority of California, and to such third party "pending" they have a new exemption which has not existed before. To borrow the Court in *Mutual Los Angeles* (1990) Cal.Rptr. 589, 787 giving more than judi-

cia, in establishing followed the exam- and separated gov- three branches. It er and honor that ver remains "vest- ialature" (art. IV; r remains "vested V, § 1); and the in the [Courts]." orts do not have and have no right es of action nor to e already estab- lative functions. Cal. Emp. Stab. '20, 726-727, 192

is *Gratuitous* of a new quasi-ju- : gratuitous. In presented by this ave, and should basis of existing tiege of section e fully, complete- at disposition is s enacted by the iature more than has been refined es by our courts. s, utilize section s for its decision. res of its opinion to create its new The disposition ect and, standing result reached.

This new judicial legislation is redundant and unnecessary.

Judicial Immunity Is Very limited In Scope

The majority opinion presents an extensive overview of judicial immunity. In studying that overview it must be noted and then remembered that judicial immunity, even for judges, is limited to those judicial acts which are adjudicatory in nature, i.e. decision making, dispositive, and the immunity does not otherwise extend to acts which simply happen to be done by judges. It is the *function* of adjudication of an issue, the decision making function, which requires and is the basis for judicial immunity. The decision of the United States Supreme Court in *Forrester v. White* (1982) 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555, is controlling on that point; and it provides no basis for extending such immunity to the non-adjudicatory actions of judges, nor of their adjuncts. A fortiori, judicial immunity should not extend to persons who are neither judges nor their adjuncts, but only third-party participants in litigation, i.e., witnesses.

It is important that this limitation be kept in mind, since the effect of the majority opinion is to extend judicial immunity, termed "quasi-judicial immunity," to persons who do not adjudicate but who are, at best, "neutral third-party participants in the judicial process."

The majority's scholarly review of judicial immunity contains no valid argument to justify extending such immunity to non-judicial persons who do not perform an adjudicatory function.

The Majority's Reasoning Does Not Support Its Holding

The majority discourse at length on their perceived need for creating their new quasi-judicial immunity. The examples they cite as demonstrating a need for such immunity do not support their conclusion. Where immunity is granted to the categories of persons which they mention, that immunity is based upon the function such person is performing at the particular time,

not on his or her calling or profession. As pointed out, above, judicial immunity extends to the person exercising a judicial function which is adjudicatory, decision-making, in nature. Even the act of a judge, in the performance of his duties as a judge, which is not adjudicatory in nature, is not clothed with judicial immunity. (*Forrester v. White, supra*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555.) The various categories of professionals referred to by the majority are granted immunity for their acts as adjuncts to a judge in aid of the judge's performing an adjudicatory act; they are the extension, so to speak, of the judge in those circumstances.

The Creation Of Immunity Is A Legislative Function

When it is necessary, or desirable, as a matter of public policy to extend judicial immunity to persons who would otherwise probably not enjoy it the Legislature has the power and the right to do so. Thus the Legislature has extended such immunity to arbitrators when acting in the capacity of arbitrators. The Legislature also has the constitutional power to provide for the appointment of persons other than judges to perform some judicial duties.

"The Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform subordinate judicial duties." (Cal. Const., art. VI, § 22.)

In 1985 the Legislature granted judicial immunity to arbitrators by enacting Code of Civil Procedure section 1280.1, which provides, in part: "An arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract." If there had been any need to extend judicial immunity to those encompassed in the new immunity created by the majority opinion the Legislature could have met that need by similar legislation at that time, or if such need now exists the Legislature is the correct branch of government, and has the power and the right to do so now.

Profound changes in our laws, such as the majority seek to make, should be

forged in the proven and legitimate crucible of the legislative process. There witnesses can be heard, pro and con the issue, and they are subject to questioning and probing, under the scrutiny of the press, which tests the interests of the witnesses as well as the merit and need for the proposed legislation. Debate and vote in two houses of the Legislature, and the requirement of approval by the Governor, also assure careful evaluation of the proposals. That is the procedure called for by our Constitution, and it is far better than legislation created in the relative secrecy of a judicial chamber.

The majority's discussion in support of its holding that judicial immunity should be extended to some broad, undefined, class is actually a series of arguments which might be used to support proposed legislation to create such an immunity. The reasoning might make a good law review article, but it has no place in a judicial decision. Laws should be created by legislation, not by litigation.

The Litigation Privilege Of Section 47(2) Does Not Create An Immunity

We must remember that Civil Code section 47, subdivision 2 creates a privilege for certain publications and broadcasts, commonly referred to as communications. The privilege is known as the "litigation privilege" and is absolute in tort actions, except for malicious prosecution suits. (*Silberg v. Anderson* (1990) 50 Cal3d 205, 214-217, 266 Cal.Rptr. 888, 788 P.2d 365.) However, section 47(2) does not confer immunity on any person or class of persons, it is limited to reaching and conferring a privilege on certain communications.

As pertinent to this discussion, section 47(2) provides, in part:

"A privileged publication ... is one made—

" ...

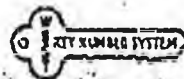
"2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law...."

* Before BEST, Acting P.J., and STONE (Wm.A.)

CONCLUSION

The process of litigation is a search for truth and justice. To the extent we limit the power of the courts to reach out in search of evidence, in search of the truth, and to the extent we deny citizens the right to seek redress for their grievances, we limit and impair the judicial process. Courts, and legislatures, should be most careful before they absolve persons of accountability for their conduct.

The litigation privilege of section 47(2) is quite enough to provide all persons connected with litigation with protection from tort liability for their communications. There is no need, and there is no showing that it would be wise, to clothe them with an immunity greater than that afforded to judges.



Andy RODRIGUEZ, a Minor, etc. et al., Petitioners,

v.

The SUPERIOR COURT of Kern County, Respondent;

GLENBROOK LABORATORIES etc. Real Party in Interest.

No. F013111.

Court of Appeal, Fifth District.

Aug. 1, 1990.

Prior Report: Cal.App., 271 Cal.Rptr. 114.

ORDER DENYING PETITION FOR REHEARING

THE COURT: *

We recognize the problems of practical application for the trial courts created by a cause of action for strict liability based upon a failure to warn of a reasonably

and VARTABEDIAN, JJ.

HB

142

**SEVENTEENTH LEGISLATURE
SENATE JUDICIARY COMMITTEE BILL FILE**

BILL NUMBER: AB 142
ABBREVIATED TITLE:

ESCAPE

SPONSER: HSE JUD

ORIGINAL RECEIVED: April 11, 1991

WRITTEN REQUEST TO SCHEDULE REC'D: 4-11-91 FROM: Danelly

SPONSER'S STATEMENT REC'D: with file FROM: _____

SECTIONAL ANALYSIS RQST'D: _____ FROM: _____

SECTIONAL ANALYSIS RECEIVED: _____

FISCAL NOTE (ORIGINAL)

RQST'D OF: _____

REC'D FROM: Law O DATE: with file

RQST'D OF: _____

REC'D FROM: Pub Saf O DATE: with file

RQST'D OF: _____

REC'D FROM: _____ DATE: _____

FISCAL NOTE (C.S.)

RQST'D OF: _____

REC'D FROM: _____ DATE: _____

RQST'D OF: _____

REC'D FROM: _____ DATE: _____

RQST'D OF: _____

REC'D FROM: _____ DATE: _____

FIVE DAY NOTICE GIVEN: By Hearing NOTICE OF HEARINGS GIVEN: _____

COMMITTEES OF REFERRAL: FIRST: STA SECOND: Jud THIRD: _____

COMMITTEE ACTION Legislative Draftsman

DATE:

5-7-91

Hear - Pass Ind Rec -

5-7-91

Del to Sen Sec. 93

PERSONS TO BE NOTIFIED OF HEARING

- | | |
|----------------------------|-----------|
| 1. SPONSOR <u>HSE Jud.</u> | 6. _____ |
| 2. AGENCY _____ | 7. _____ |
| 3. _____ | 8. _____ |
| 4. _____ | 9. _____ |
| 5. _____ | 10. _____ |

Alaska State Legislature



House of Representatives House Judiciary Committee Chairman Dave Donley

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990

M E M O R A N D U M

TO: Senator Rick Halford, Chair
Senate Judiciary Committee

FROM: Representative Dave Donley, Chair DD
House Judiciary Committee

RE: HB 142 - Crime of Escape

DATE: April 18, 1991

I would greatly appreciate if HB 142 could be scheduled for a judiciary committee hearing. The bill reverses the effects of two recent Alaska court of appeals' decisions relating to the crime of escape by closing two loopholes in existing law.

In the first case, Jacobson v. State, 786 P.2d 388 (Alaska App. 1990), the defendant escaped the scene of a crime after having been handcuffed by a police officer, but before being arrested on a specific charge. The court of appeals reversed the defendant's conviction, and held that the statute only allows escape charges to be brought after a defendant has been formally arrested on a specific charge. Section 2 of the bill closes this loophole by making it a crime to, having been placed under actual restraint by a peace officer before arrest, remove oneself from the restraint.

In the second case, Hubbard v. State, 800 P.2d 952 (Alaska App. 1990), the defendant was in court on a bail hearing, having been previously released on a theft charge. The judge ordered the defendant into custody but, before an officer could physically restrain the defendant, he fled the courtroom. The court of appeals held that the defendant could not be charged with a crime under these circumstances because there was no indication of any legislative intent to prohibit the conduct. Section 3 of the bill closes this loophole by including constructive restraint under an order of the court within the definition of official detention.

Thank you in advance for your help in scheduling this bill. Backup materials for the legislation are attached to this memorandum.

DD:lc

BILL NO: HB 142

DATE: 3/13/91

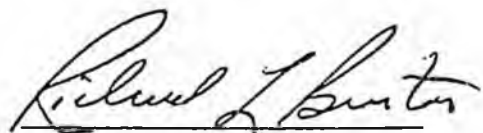
TITLE: An Act relating to the
crime of escape. . .

CONTACT: Gayle A. Horetski
Deputy Commissioner
465-4322

DEPARTMENT OF
PUBLIC SAFETY
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HB 142 amends Alaska's escape laws to clarify that an offender violates the law if he flees after having been placed under "restraint" by a peace officer or a court. This change in the language would return the meaning and scope of the law to what it was believed to be before two recent Alaska Court of Appeals' cases, Jacobson v. State and Hubbard v. State. These cases very narrowly construed the present law to exclude situations which police and prosecutors had believed to be covered.

The Department of Public Safety strongly supports HB 142.


Richard L. Burton
Commissioner



Superior Court
State of Alaska

FIRST JUDICIAL DISTRICT

DIMOND COURTHOUSE, BOX U
JUNEAU, ALASKA
99811-4100

Chambers of
Walter L. Carponeti, Judge

(907) 463-4741

January 25, 1991

Honorable Fran Ulmer
Alaska State Representative
P.O. Box V
Juneau, AK 99811

Re: Draft legislation concerning
escape

Dear Representative ^{Fran} Ulmer:

Thank you for your letter of January 23, 1991, received here yesterday, concerning draft legislation addressing the opinions of the court of appeals in the Jacobson and Hubbard cases. You asked for my opinion or comments.

First, I believe that the proposed legislation clearly defines as criminal the conduct in question, and in that regard addresses the concerns raised by those two cases.

Second, note that the proposed changes would make the defendant's actions in Jacobson prosecutable as a misdemeanor, but not a felony. (I make this observation because the defendant's conduct in Jacobson arguably was felonious, although, of course, the court of appeals ruled that there was no violation of the statute.) It is a legislative decision as to whether the conduct should be a misdemeanor or a felony, but I wanted to make sure that you were aware that the draft provided that removing oneself from restraint placed by a peace officer prior to arrest would be only a misdemeanor, even if the person had been placed under restraint for a felony.

RE
HB142

January 25, 1991

On January 17th I received from you a note regarding House Bill No. 21 and your requests for comments. I would make the following general observations:

1. The proposed legislation does not address at all the problem raised in the Jacobson and Hubbard cases. That is, it does not change or clarify the definition of "official detention".

2. The proposed legislation basically has the effect of creating a felony when one escapes from official detention for a misdemeanor (or from official detention in connection with a valid warrant), and during the escape takes a police vehicle or an emergency medical vehicle. That seems to me to be a policy decision for the legislature, and I do not believe that I can offer too much which would be helpful to that policy determination.

I hope these comments are helpful to you. Thank you for offering me the chance to comment. Please do not hesitate to contact me if you have any other questions.

Sincerely,

Walter L. Carpeneti

Walter L. Carpeneti

Re:
Rep.
Barnes
bill on
staling
police
cars



Superior Court
State of Alaska

FIRST JUDICIAL DISTRICT
DIMOND COURTHOUSE, BOX U
JUNEAU, ALASKA
99811-4100

Chambers of
Walter L. Carpaneti, Judge

(907) 463-4741

December 6, 1990
(dictated 12/5/90)

Honorable Fran Ulmer
Alaska House of
Representatives
P.O. Box V
Juneau, AK 99811

Dear Fran:

Enclosed please find copies of the two cases which I mentioned to you during your visit yesterday.

Simply put, I cannot believe that the legislature would not have intended that the conduct of the defendants in these cases be prosecutable as escape. Mr. Jacobson was apprehended by a police officer under extremely suspicious circumstances in a darkened building after the officer had received a report of a burglary in progress. He ran from the officer when he realized, on a darkened stairway, that he was speaking to an officer of the law and not to a confederate. He was caught by the officer some hundred yards or so from the building. He feigned illness in an attempt to break away, which was momentarily successful, until tackled by the officer again. Brought back to the building by the officer, he was placed in handcuffs, which handcuffs were run around a post so as to secure Mr. Jacobson to the post. The officer left him under the guard of an armed officer. By tricking the officer and by pulling one hand through the handcuff, Mr. Jacobson was able to escape from the police. He was again caught, this time about 20 minutes later.

The narrow question in Jacobson was whether the defendant was "under official detention for a felony" when he fled. The legislature defined official detention to include "custody,

arrest, surrender in lieu of arrest, or confinement under an order of a court." I think it is clear that Mr. Jacobson was in custody. The court of appeals held that he was not. Its reasons are set out on page 393. They are wholly unpersuasive to me. (Briefly, it makes no sense to categorize these definitional terms according to whether they describe continuing circumstances or those which are fixed in time, and it does violence to legislative intent to effectively interpret away a term.) More importantly, I simply cannot believe that the legislature intended the kinds of distinctions found at page 393 when it passed this statute.

The Hubbard case is even more baffling. There, the defendant, in a courtroom, was ordered by a judge to remain in the courtroom while a bail hearing was set on. The defendant had previously been arrested, was out on release, had allegedly violated the conditions of release, and was released again. While the defendant was subsequently in court, the judge said "Mr. Hubbard will be remanded", which I take to mean that he would be remanded to custody while a bail hearing was scheduled. The judge requested the defendant to take a seat in the jury box, and he instead left the courtroom, ignoring a further call by the judge to remain.

Without sounding like a broken record, I simply cannot believe that the legislature, when it defined "official detention" as including "custody" (as well as "arrest, surrender in lieu of arrest, or confinement under an order of a court") did not intend that a person in Mr. Hubbard's situation be considered as being in custody.

In defense of the court of appeals, I believe that it is concerned about the policy implications of contrary decisions in these cases. The Jacobson court says as much at the top of the right-hand column on page 393. With due respect to the court, however, I believe it is for the legislature to weigh and then make those policy decisions, and for the courts to effectuate those decisions (short of a constitutional violation, which no one has argued here).

Honorable Fran Ulmer

Page Three

December 6, 1990
(dictated 12/5/90)

I hope this information is helpful to you. I would be happy to discuss it further with you.

Sincerely,

Bud Carpeneti

Walter L. Carpeneti

Enclosures

David W. JACOBSON, Appellant,

7.

STATE of Alaska, Appellee.

Nos. A-2217, A-2218.

Court of Appeals of Alaska.

Jan. 26, 1990.

Defendant was convicted in the Superior Court, First Judicial District, Juneau, Walter L. Carpeneti and Rodger W. Pegues, JJ., of theft in the second degree, burglary in the second degree, escape in the second degree, and misconduct involving a weapon in the first degree. Defendant appealed. The Court of Appeals, Bryner, C.J., held that: (1) an inventory of defendant's items did not impermissibly encroach on his privacy rights; (2) the police properly continued to inventory defendant's items even after they decided to seek a warrant; and (3) the term "official detention," as used in the escape statute, does not apply to investigative stops.

Affirmed in part, and vacated and remanded in part.

1. Searches and Seizures ⇐58

Police were authorized to open various closed containers for purposes of conducting inventory of defendant's property; only containers police opened were those that they themselves had packed and closed while seizing defendant's belongings from motel room, and those containers contained items that were in plain view when they were seized. U.S.C.A. Const.Amend. 4.

2. Searches and Seizures ⇐58

Police properly continued to inspect defendant's belongings after deciding to apply for warrant; police continued to have legitimate interest in performing inventory even after they decided to seek warrant. U.S.C.A. Const.Amend. 4.

3. Weapons ⇐4

Butterfly knife is not "switchblade or gravity knife" and therefore does not quali-

fy as prohibited weapon. AS 11.61.200(a)(3), (e)(1)(D).

4. Escape ⇐1

"Official detention," for purposes of escape in second-degree statute, does not apply to investigative stops. AS 11.56.310, 11.81.900(b)(34).

See publication Words and Phrases for other judicial constructions and definitions.

5. Escape ⇐1

"Custody," for purposes of escape in second-degree statute, begins upon arrest or surrender in lieu of arrest. AS 11.56.310, 11.81.900(b)(34).

See publication Words and Phrases for other judicial constructions and definitions.

Margaret W. Berck, Asst. Public Defender, Juneau, and John B. Salemi, Acting Public Defender, Anchorage, for appellant.

W.H. Hawley, Asst. Atty. Gen., Office of Sp. Prosecutions and Appeals, Anchorage, and Douglas B. Baily, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

BRYNER, Chief Judge.

David W. Jacobson was convicted of theft in the second degree, burglary in the second degree, escape in the second degree, and misconduct involving a weapon in the first degree. Superior Court Judge Rodger W. Pegues sentenced Jacobson to an aggregate term of seven years. Jacobson appeals, contending that the superior court erred in failing to suppress evidence that resulted from an unlawful search and seizure, in failing to dismiss the charges of escape and misconduct involving weapons, in denying his motion for a mistrial, and in admitting evidence of prior misconduct. Jacobson also challenges his sentence as excessive. We affirm the convictions for theft and burglary, reverse the conviction for misconduct involving a weapon, and

remand for additional fine and escape charge.

FACTS

On November 1, 1986, the police were called to investigate a burglary at an office building in Anchorage. The building, a police office, was owned by David W. Jacobson. Jacobson ran a business out of the building. He apprehended a short distance from the building. An officer led him back, Jacobson fled. He was subdued, and taken to a carport post outside the building. *Miranda* warnings. Jacobson was charged with and convicted of burglary. The police were "considering" a

A short time later, Jacobson attempted to extricate one of his hands from the handcuffs. He avoided capture by swimming in a nearby creek. Pursuing officers searched a nearby motel room. The room and placed him under arrest.

The police seized Jacobson's belongings from the motel room. They arrested him. After taking him to the police station, they searched his items that had been in the motel room but did not find a knapsack and bank bag. The police closed. When the inventory of items of jewelry that appeared to be the police obtained a warrant for a search of all of Jacobson's belongings. Various stolen items were found in the course of the search. The police seized a butterfly knife that had been in Jacobson's possession in the motel room.

Jacobson was charged with theft, and escape. For the possession of the butterfly knife, he was charged with misconduct involving a weapon. He received separate jury trials for the theft and burglary charges. The superior court Judge Rodger W. Pegues and weapons misconduct charges were joined for trial without a separate trial. Superior Court Judge Walter W. Pegues being convicted on all charges. The cases were consolidated. Judge Pegues imposed five sentences totaling seven years.

remand for additional findings on the escape charge.

onment and specified that Jacobson would not be eligible for early release on parole.

FACTS

On November 1, 1986, the Juneau police were called to investigate a possible burglary at an office building. Upon entering the building, a police officer encountered Jacobson. Jacobson ran but was apprehended a short distance away. As the officer led him back, Jacobson attempted to flee. He was subdued, handcuffed to a carport post outside the building, and given *Miranda* warnings. Jacobson asked what he was charged with and was told that the police were "considering burglary."

A short time later, Jacobson managed to extricate one of his hands. He fled and avoided capture by swimming across a creek. Pursuing officers located Jacobson in a nearby motel room. They entered the room and placed him under arrest.

The police seized Jacobson's personal belongings from the motel room when they arrested him. After taking the property to the police station, they inventoried the items that had been in open view at the motel room but did not open or search a knapsack and bank bag that had been closed. When the inventory disclosed items of jewelry that appeared to be stolen, the police obtained a warrant authorizing a search of all of Jacobson's personal belongings. Various stolen items were seized in the course of the search. In addition, the police seized a butterfly knife that had been in Jacobson's possession at the motel room.

Jacobson was charged with burglary, theft, and escape. For his possession of the butterfly knife, he was charged with misconduct involving a weapon. Jacobson received separate jury trials before Superior Court Judge Rodger W. Pegues on the theft and burglary charges. The escape and weapons misconduct charges were joined for trial without a jury before Superior Court Judge Walter Carpeneti. After being convicted on all counts, Jacobson's cases were consolidated for sentencing. Judge Pegues imposed partially consecutive sentences totaling seven years' impris-

SEARCH AND SEIZURE

On appeal, Jacobson contends that the superior court erred in denying his motion to suppress evidence, which challenged the warrantless police inventory of his personal property. After conducting an evidentiary hearing, Judge Carpeneti upheld the inventory, finding that it was performed for legitimate purposes and did not exceed the permissible limits set out in *Reeves v. State*, 599 P.2d 727, 736-38 (Alaska 1979).

[1] The court's decision must be upheld unless clearly erroneous. *State v. Bianchi*, 761 P.2d 127, 129-30 (Alaska App. 1988). Jacobson argues that the police were not authorized to open various closed containers for purposes of conducting the inventory. However, the only containers the police opened were those that they themselves had packed and closed while seizing Jacobson's belongings from the motel room. Those containers, such as Jacobson's shaving kit and grocery bags of clothing, contained items that were in plain view when they were seized. The police had a legitimate interest in protecting themselves against potential claims for loss by inventorying these items. The inventory did not impermissibly encroach on Jacobson's privacy rights. See, e.g., *Griffith v. State*, 578 P.2d 578, 580 (Alaska 1978).

[2] Jacobson also complains that the police continued to inventory his property even after they recognized items that were apparently stolen. In Jacobson's view, the fact that the police persisted in inspecting his belongings after deciding to apply for a warrant casts doubt on whether their actual purpose was to conduct an inventory. As correctly recognized by the superior court, however, even after the police decided to seek a warrant, they continued to have a legitimate interest in performing an inventory. Their continuation of the inventory does not establish an improper motive.

The superior court did not err in denying Jacobson's motion to suppress.¹

MISCONDUCT INVOLVING WEAPONS

[3] Jacobson next challenges his conviction for misconduct involving a weapon in the first degree. Jacobson was convicted of the offense under AS 11.61.200(a)(3), which prohibits, *inter alia*, possession of a "prohibited weapon." The term "prohibited weapon" is defined in AS 11.61.200(e)(1)(D) to include a "switchblade or gravity knife." The state's theory in charging Jacobson was that the butterfly knife found in his motel room was a gravity knife. On appeal, Jacobson argues that the statutory prohibition against possessing "prohibited weapons" is impermissibly vague. We need not decide this issue. In *State v. Strange*, 785 P.2d 563, (Alaska App.1990), we held that a butterfly knife is not a "switchblade or gravity knife" and therefore does not qualify as a prohibited weapon. Our *Strange* holding requires that Jacobson's conviction for misconduct involving a weapon must be vacated.

ESCAPE

[4, 5] Jacobson was convicted of escape in the second degree in violation of AS 11.56.310. The statute provides, in relevant part, that "[o]ne commits the crime of escape in the second degree if, without lawful authority, one removes oneself from ... official detention for a felony...." As defined in AS 11.81.900(b)(34), "official detention" means "custody, arrest, surrender in lieu of arrest, or confinement under an order of a court...."

At trial, Jacobson maintained that he had not yet been formally arrested when he removed his handcuffs and eluded the police. Jacobson argued that he was therefore not under "official detention for a felony." In finding Jacobson guilty of escape, Judge Carpeneti did not find it necessary to determine whether Jacobson had been arrested. Instead, the judge found

that a person who has been subjected to an investigative stop is in "custody" and therefore under "official detention" for purposes of the escape statute, even if the stop did not rise to the level of a full arrest. Finding that, at the very least, Jacobson had been subjected to an investigative stop for a possible burglary, Judge Carpeneti concluded that he was "under official detention for a felony" when he eluded the police.

The issue presented on appeal is thus whether "custody" as used in the statutory definition of "official detention" occurs when an individual is subjected to an investigative stop that falls short of a full arrest. Jacobson argues, as he did below, that he could not have been in "custody" for purposes of the escape statute without first being placed under arrest. Jacobson's argument finds support in *Beckman v. State*, 689 P.2d 500 (Alaska App. 1984). In *Beckman*, we adopted a narrow reading of the word "custody" as used in connection with Alaska's escape statute:

"Custody" is not expressly defined in the provisions of Alaska law dealing with escape. However, definitions of "custody" contained in escape statutes from other jurisdictions suggest that, in context, the word is intended to have a narrow meaning, essentially synonymous to "arrest."

Id. at 502 n. 3 (citations omitted).

In considering the applicability of *Beckman* to the present case Judge Carpeneti noted that *Beckman* appeared to be incorrect in pinpointing the source of Alaska's escape statute. In our discussion of the term "custody" in *Beckman*, we mistakenly indicated that Alaska's definition of "official detention" was derived from Missouri Revised Statute § 556.061(3) (1979). This error stemmed from the fact that the derivation table of the Alaska Department of Law's Criminal Law Manual (Manual) listed the Missouri statute in connection with

circumstances to justify consideration of the issue as a matter of plain error. See *Moreau v. State*, 588 P.2d 275, 279-81 (Alaska 1978).

Alaska's definition of "of Judge Carpeneti corrected the Manual's derivation meant to reflect the ac statutes included in Alaska Code. Rather, the t after the adoption of the was intended only as a p provisions in other juris similar to those in Alaska: actual derivation of provi the revised code, the deriv its readers to the Tenta Revised Criminal Code t by the Criminal Law Revision (Subcommission).² I his conclusion that *Beckm* as to the source of Alaska: Judge Carpeneti declined row interpretation of "c adopted in that case.

Beckman's mistake is origin of Alaska's escap sori law has no bearing validity of the narrow rea to the word "custody" in ing in the actual history c statute points to the app broader reading of the w contrary conclusion seem

Alaska's escape statute most verbatim from the proposed by the Subcomn tative Draft. See Alask Revision, Part IV, 46-49 (The Subcommission, in tu the Tentative Draft pro largely on then existing

When the Subcommissio tative Draft, Alaska's es vided, in relevant part, th: mits an escape if without he ... wilfully removes b cial detention...." See : 090 (ch. 171, § 1, SLA : "official detention" was c

2. See Alaska Department of Manual, derivation table at

3. *Id.* at 6-1-2 (emphasis i. It should be noted that t was compiled by the crim Department of Law afte

1. Jacobson further challenges as impermissible the warrantless seizure of property from his motel room. He did not raise this argument below, however, and we find no exceptional

as been subjected to an is in "custody" and official detention" for ape statute, even if the he level of a full arrest. e very least, Jacobson to an investigative stop glary, Judge Carpeneti was "under official de- y" when he eluded the

nted on appeal is thus as used in the statutory icial detention" occurs is subjected to an inves- falls short of a full ar- gues, as he did below, have been in "custody" e escape statute without nder arrest. Jacobson's upport in *Beckman v.*) (Alaska App. 1984). In oted a narrow reading of " as used in connection ipe statute:

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justify consideration of the of plain error. See *Moreau v.* 75, 279-81 (Alaska 1978).

Alaska's definition of "official detention."² Judge Carpeneti correctly recognized that the Manual's derivatio table was not meant to reflect the actual derivation of statutes included in Alaska's Revised Criminal Code. Rather, the table was compiled after the adoption of the revised code and was intended only as a guide to statutory provisions in other jurisdictions that are similar to those in Alaska's code. For the actual derivation of provisions contained in the revised code, the derivation table refers its readers to the Tentative Draft of the Revised Criminal Code that was prepared by the Criminal Law Revision Subcommission (Subcommission).³ Relying in part on his conclusion that *Beckman* was mistaken as to the source of Alaska's escape statute, Judge Carpeneti declined to follow the narrow interpretation of "custody" that we adopted in that case.

Beckman's mistake in attributing the origin of Alaska's escape statute to Missouri law has no bearing, however, on the validity of the narrow reading that we gave to the word "custody" in that case. Nothing in the actual history of Alaska's escape statute points to the appropriateness of a broader reading of the word. In fact, the contrary conclusion seems indicated.

Alaska's escape statute was adopted almost verbatim from the escape provision proposed by the Subcommission in its Tentative Draft. See Alaska Criminal Code Revision, Part IV, 46-49 (Tent. Draft 1977). The Subcommission, in turn, indicated that the Tentative Draft provision was based largely on then existing Alaska law. *Id.*

When the Subcommission issued the Tentative Draft, Alaska's escape statute provided, in relevant part, that "a person commits an escape if without lawful authority he ... wilfully removes himself from official detention...." See former AS 11.30.090 (ch. 171, § 1, SLA 1976). The term "official detention" was defined in former

2. See Alaska Department of Law, Criminal Code Manual, derivation table at 6-41 (1985).

3. *Id.* at 6-1-2 (emphasis in original);

It should be noted that the derivation listing was compiled by the criminal division of the Department of Law after enactment of the

AS 11.30.100(2) (ch. 171, § 3, SLA 1976) as follows:

"Official detention" means arrest, custody following surrender in lieu of arrest, detention in any facility for custody of persons under charge or conviction of crime or alleged or to be delinquent, detention for extradition or deportation or any other detention for law enforcement purposes; but "official detention" does not include supervision on probation or parole, or constraint incidental to release on bail.

Under this statutory definition, it seems clear that "official detention" did not include the type of restraint inherent in a pre-arrest investigative stop.

Although the definition of "official detention" contained in the Tentative Draft differed somewhat from that set out in former AS 11.30.090, nothing in the Tentative Draft's commentary indicated that the changes in wording were intended to alter the substance of the existing definition in any way material to this case. In its commentary, the Subcommission described three significant ways in which the Tentative Draft's proposed escape provisions differed from then existing law. The description contains no mention of broadening the concept of "official detention" to include pre-arrest investigative stops. At least in the Subcommission's view, the definition of "official detention" embodied in the Tentative Draft (which was ultimately adopted as AS 11.81.900(b)(34)) was in substance identical to that contained in former AS 11.30.100(2).

Subsequent legislative commentary is also relevant. As enacted by the legislature in 1978, the Revised Criminal Code's second-degree escape statute made it unlawful to remove oneself from "official detention on a charge of a felony...." Former AS 11.56.310(a)(1)(B) (ch. 166, § 6, SLA 1978) (emphasis added). This language

revised code. Statutes from other jurisdictions that were actually considered by the criminal law revision subcommission are set out in a table appearing as an appendix to each volume of the six part tentative draft of the code published by the subcommission.

drew verbatim from the Tentative Draft, as well as from former AS 11.30.090(b)(1)—the statute in effect when the revised Alaska Criminal Code was adopted. In 1980, however, the legislature amended the second-degree escape statute to its current form, making it unlawful to remove oneself from "official detention for a felony." AS 11.56.310(a)(1)(B) (emphasis added).

The legislature explained its substitution of "for a felony" for "on a charge of a felony" as follows:

This amendment is required to make clear that escape and permitting an escape can occur when a person has been arrested for a crime, though not necessarily formally charged with a crime by way of complaint, indictment or information.

Commentary on the Alaska Revised Criminal Code, Senate Journal Supp. No. 44 at 13, 1980 Senate Journal 1436. This commentary is telling. In stating that the amended statute would permit the prosecution of persons "arrested for a crime, though not necessarily formally charged . . .," the legislature clearly indicated its view that, even under the amended version of the statute, an arrest was still necessary before escape could properly be charged.

In the present case, the state has cited no escape statutes or cases from other jurisdictions defining "custody" or "official detention" to include an investigative stop falling short of an actual arrest. Nor are we aware of any such authority. Our own brief survey of escape statutes indicates that other jurisdictions uniformly construe custody to begin with arrest or surrender in lieu of arrest.⁴ While some jurisdictions have specific statutory provisions expressly defining custody as beginning at the point of formal arrest, others appear to reach the same conclusion without any express statu-

tory definition. For example, in *State v. Blaine*, 133 Vt. 345, 341 A.2d 16, 17-20 (1975), the Supreme Court of Vermont considered a case prosecuted under former 13 V.S.A. § 1601, which prohibited "escape from lawful custody of a police officer." *Id.* 341 A.2d at 18. Although Vermont's escape statute apparently did not expressly define custody, the court in *Blaine* rejected the prosecution's contention that "custody" could be found in situations involving detention or restraint falling short of actual arrest. The court concluded that "lawful custody does not exist until the arrest is made." *Id.* 341 A.2d at 20.

In short, there appears to be no support in the history of Alaska's escape statute or in the law of other jurisdictions for the conclusion that *Beckman* was incorrect in concluding that "custody" is "essentially synonymous to 'arrest.'" *Beckman*, 689 P.2d at 502 n. 3.

In rejecting the conclusion we reached in *Beckman*, Judge Carpeneti also reasoned that the statutory definition of "official detention" would not have separately included "custody" and "arrest" if both words meant precisely the same thing. The court's concern seems well-founded, since every word used in a statutory provision is presumed to have been intended to have some useful purpose. *See, e.g., Alaska Transportation Commission v. Airpac, Inc.*, 685 P.2d 1248, 1253 (Alaska 1984). However, the narrow interpretation of "custody" we adopted in *Beckman* does not render the word superfluous as used in the statutory definition of "official detention."

Alaska Statute 11.81.900(b)(34) uses four separate terms to define "official detention": "custody, arrest, surrender in lieu of arrest, or confinement under an order of a

peace officer pursuant to an arrest or court order . . ."; Tex. Penal Code Ann. § 38.07 (Vernon 1974), applying escape statute to "[a] person arrested for, charged with, or convicted of . . ."; Utah Code Ann. § 76-8-309 (1978), defines "official custody" to mean "arrest, custody in a penal institution . . ."; Wash. Rev. Code § 9A.76.120 (1988), applying second-degree escape statute to persons "charged with a felony."

court . . ." Of the "arrest" and "surrender" involve discrete event duration. The remaining "custody" and "confinement in a court," describe circumstances continuing in nature over time.

Once the police have a person or once a person is in lieu of being arrested, the person remains in post-arrest custody until the filing and disposition of the case, including release on bail. In some cases, when an arrest is made without an outstanding warrant, the person will be in "confinement in a court" from the time of arrest. In other situations, if the police make a warrantless arrest at the scene of a crime, a person is in "detention and confinement" from the time of arrest, which no charge and no court order will confine the arrested person. In such situations, the arrested person will still be in "custody" and will continue to be in "official detention" subject to the penalties of the escape statute.

Thus, although "custody" and "arrest" are essentially synonymous, they refer to the inception of custody for purposes of the escape statute. "Custody" is the broader of the two and encompasses post-arrest custody. The legislature's use of the term "official detention" in the definition of "official detention" is inconsistent with the interpretation we adopted in *Beckman*.

In deciding to adhere to the interpretation of "custody" in *Beckman*, we are pa-

4. The Model Penal Code § 242.6 at 216 states that "[o]fficial detention means arrest, detention in any facility for custody of persons under charge or conviction of crime or alleged or found to be delinquent . . ." *See also* N.Y. Penal Law § 205.00 (McKinney 1988), defining custody as "restraint by a public servant pursuant to an authorized arrest or an order of a court"; Or. Rev. Stat. § 162.135 (1987) defining custody as "the imposition of actual or construc-

5. Another concern voiced was that *Beckman*'s interpretation of "custody" might encroach on the investigatory concern, however, see *State v. Blaine*, 133 Vt. 345, 341 A.2d 16, 17-20 (1975), who resist or fail to cooperate before being arrested or charged with a crime other than prosecution of a crime. AS 11.56.700 (resisting arrest) applies to persons refusing to assist a police officer, not whether such conduct

If, after considering the evidence presented at trial, the judge finds beyond a reasonable doubt that Jacobson was under arrest and acted with the requisite culpable mental state, the judgment of conviction for escape may be left intact. If, on the other hand, the judge finds a reasonable doubt as to whether Jacobson was actually under arrest or acted with the applicable culpable mental state, a judgment of acquittal must be entered. We will retain jurisdiction over the appeal pending the resolution of this issue on remand.⁷

7. Because an acquittal on the escape charge would significantly affect Jacobson's composite sentence, we find it preferable not to address Jacobson's sentencing arguments until completion of proceedings on remand. In addition to his sentencing arguments, Jacobson has raised two issues that require only brief consideration.

First, Jacobson argues that the trial court erred in denying a motion for mistrial that he made because members of his jury saw him in the custody of an officer and in close proximity to uniformed guards during the trial. We have consistently held, however, that neither the presence of guards nor a brief, inadvertent view of the defendant in custody is necessarily so prejudicial as to require a mistrial. See, e.g., *Hines v. State*, 703 P.2d 1175, 1178 (Alaska App. 1985); *Dunn v. State*, 653 P.2d 1071, 1086 (Alaska App. 1982). The decision whether to grant a motion for a mistrial is consigned to the sound discretion of the trial court. *Roth v. State*, 626 P.2d 583, 585 (Alaska App. 1981). Our review of the record in this case convinces us that the court did not abuse its discretion in denying Jacobson's motion for a mistrial in this case.

The convictions for burglary and theft are AFFIRMED. The conviction for misconduct involving a weapon is VACATED. This case is REMANDED for further findings on the escape charge.



Second, Jacobson contends that the trial court erred in admitting evidence of other crimes during his burglary trial. Jacobson was charged with burglarizing one of several offices in an office building. The trial court allowed the state to admit evidence that property stolen from another office in the same building was found in Jacobson's possession. Jacobson contends that the challenged evidence was inadmissible under Alaska Rule of Evidence 404(b). We disagree. The challenged evidence was integrally related in time and circumstance to the crime with which Jacobson was charged and was highly relevant to discredit Jacobson's claim of mistake. Under the circumstances, the challenged evidence had legitimate relevance on an issue other than Jacobson's propensity to commit crime, and the trial court could readily find that its probative value substantially outweighed its potential for prejudice. See *Kugzruk v. State*, 436 P.2d 962, 966-68 (Alaska 1968). We find no abuse of discretion.

Notice: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE COURT OF APPEALS OF THE STATE OF ALASKA

CHRISTOPHER HUBBARD,)	
)	Court of Appeals No. A-3025
Appellant,)	Trial Court No. 3ANS-88-5537CR
)	
v.)	<u>O P I N I O N</u>
)	
STATE OF ALASKA,)	
)	[No. 1092 - November 16, 1990]
Appellee.)	
<hr/>		

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Joan M. Katz, Judge.

Appearances: Jacqueline Bressers, Assistant Public Defender, John B. Salemi, Public Defender, Anchorage, for Appellant. Nancy R. Simel, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, Douglas B. Baily, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats, Judge, and Cutler, Superior Court Judge.*

COATS, Judge.

Christopher Hubbard was convicted by a jury of escape in the second degree, a class B felony. AS 11.56.310(a)(1)(B). Hubbard appeals his conviction, arguing that the trial court erred by refusing to dismiss the indictment against him because the evidence which the state presented did not establish that he was

*Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

"in custody" at the time of the alleged escape. We agree with Hubbard and reverse his conviction.

In September 1988, Christopher Hubbard was charged with theft in the second degree and was released on bail. On September 20, 1988, Hubbard appeared for a preindictment hearing before District Court Judge Elaine Andrews. Hubbard sat in the back of the courtroom; and his attorney sat at defense counsel's table.

At the hearing, the prosecutor alleged that Hubbard had violated the conditions of bail by not remaining within the custody of his third-party custodian. He explained that within hours of being released on bail, Hubbard was rearrested on city charges: driving without a valid operator's license, giving false information to a police officer, resisting arrest, and carrying a concealed weapon. At the time of the second arrest, Hubbard was not in the presence of a third-party custodian. Apparently he was re-released on bail after the second arrest. Hubbard's attorney claimed that Hubbard had not violated the conditions of his original bail -- he told the court that when Hubbard was rearrested, he was on his way to get married, and one of the third-party custodians had been driving the car behind him.

The court responded as follows:

Well, I think at this stage Mr. Hubbard will be remanded and we can set on a bail hearing . . . Mr. Hubbard can take a seat in the jury box because he's gonna be in custody while we decide what happens here.

Judge Andrews then set bail at \$10,000, and asked, "Mr. Hubbard, do you want to come forward and take a seat in the jury box?" Hubbard did not take a seat in the jury box; he instead left the

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courtroom while the parties were scheduling his bail review hearing. Judge Andrews called out to Hubbard as he left, but he did not respond. Judge Andrews then issued an arrest warrant and set bail at \$20,000.

Hubbard was indicted for escape in the second degree in violation of AS 11.56.310(a)(1)(B). The indictment charged that Hubbard

knowingly and without lawful authority remove[d] himself from the State of Alaska Court Building while under official detention for a felony offense.

Hubbard moved to dismiss the indictment, arguing that he was not under "official detention" when he left the courtroom. The motion was denied. The case proceeded to trial before Judge Katz on the escape charge. The underlying charge for theft in the second degree, for which Hubbard had been released on bail, was dismissed.

At trial, after the state rested its case, Hubbard moved for judgment of acquittal on the ground that the state had not established that he was in "official detention" when he left the courtroom. This motion was also denied.

Hubbard challenges the indictment which charged him with escape in the second degree under AS 11.56.310(a)(1)(B). The statute states:

(a) One commits the crime of escape in the second degree if, without lawful authority, one

(1) removes oneself from

(B) official detention for a felony. . .

Official detention is defined in AS 11.81.900(b)(34) as:

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custody, arrest, surrender in lieu of arrest, or confinement under an order of a court in a criminal or juvenile proceedings, other than an order of conditional bail release.

The question which this case presents is whether Judge Andrews' statement, "Mr. Hubbard, do you want to come forward and take a seat in the jury box" was sufficient to create an "official detention" pursuant to AS 11.81.900(b)(34). Hubbard argues that the escape statute does not apply to him because he was never under any physical restraint before he left the courtroom. The state contends that Hubbard's construction of the statute is too narrow. The state concedes that some kind of physical contact is necessary to effectuate an arrest, but it argues that a mere order from the court can trigger "custody" and "confinement under an order of a court." The statutes do not define the terms, "custody" and "confinement under an order of the court."¹

In previous decisions, we have held that before a person was in "official detention" for purposes of the escape statute, the state must establish that the defendant was clearly under some form of official restraint. Normally, before a defendant could be convicted of escape, we have required the state to show that the defendant was under arrest. In Maynard v. State, 652 P.2d 489, 492 n. 6 (Alaska App. 1982), we quoted with approval what appears to be the majority rule from R. Perkins, Criminal Law:

¹. Hubbard argues that he was released on bail at the time of his alleged escape and therefore his actions were not covered by the escape statute. We assume, for purposes of this opinion, that Judge Andrews had revoked Hubbard's bail before he left the courtroom. We therefore assume that Hubbard did not fall within the "conditional bail release" exclusion of AS 11.81.900(b)(34).

Escape and the kindred offenses are clearly in the nature of obstructions of justice but they have been dealt with so commonly as distinct crimes that it seems wise to treat them as such. And before any effort to explore this field is attempted a clarification of terms is needed. The word 'escape' is used in two different senses in regard to the factual occurrence indicated, and in two (or more) different senses in its use as the name of a crime. In the technical sense an 'escape' is an unauthorized departure from legal custody; in a loose sense the word is used to indicate either such an unlawful departure or an avoidance of capture. And while the word is regularly used by the layman in the broader sense it usually is limited to the narrower meaning when used in the law, -- although this is not always so. It is employed in this subsection exclusively in the technical sense. Thus if an officer approaches an offender for the purpose of making an arrest, which he is unable to do because the other eludes him by running away, there has been no 'escape' as the term is used here. It is necessary, however, to bear in mind that 'arrest' is also a technical term. If an officer having authority to make an arrest actually touches his arrestee, for the manifested purpose of apprehending him, the arrest is complete 'although he does not succeed in stopping or holding him even for an instant.' In such a case there is legal custody of the arrestee for an instant although the imprisonment is constructive rather than effective. Hence there would be an escape, if such an arrestee ran away after being touched by the officer with appropriate words of arrest and lawful authority for this purpose.

R. Perkins, Criminal Law at 500 (2d ed. 969) (citations omitted). In Maynard, we concluded that "[t]he offense of escape is complete when a person once in lawful custody, voluntarily removes himself from that custody without lawful authority." Maynard, 652 P.2d at 492.

In Beckman v. State, 689 P.2d 500, 502 n. 3 (Alaska App. 1984), this court focused on the meaning of "custody" as it is used in the definition of "official detention" in the escape statute:

"Custody" is not expressly defined in the provision of Alaska law dealing with escape. However, definitions of "custody" contained in escape statutes from other jurisdictions suggest that, in context, the word is intended to have a narrow meaning, essentially synonymous to "arrest."

In Jacobson v. State, 786 P.2d 388, 390-94 (Alaska App. 1990), we followed Beckman in interpreting the escape statute. In Jacobson, the defendant was stopped by the police and handcuffed at the scene of a possible burglary. The defendant managed to free himself from one of the handcuffs and fled from the scene. He was convicted of escape in the second degree. On appeal, we concluded that the court could find that the defendant was "under official detention for a felony" for purposes of the escape statute only if he was under arrest for a felony when he eluded the police. Id. at 393. We remanded to the trial court to determine whether the defendant was under arrest for a felony at the time that he fled.

The state asks us to conclude that Hubbard was in "confinement under an order of a court in a criminal . . . [proceeding]." The state points out that some jurisdictions have held that a defendant may be in "constructive custody" by order of the court. The state cites United States v. Peterson, 592 F.2d 1035 (9th Cir. 1979). See also Harrell v. State, 743 S.W.2d 229, 231 (Tex. Cr. App. 1987). In Peterson, the defendant appeared with his counsel for sentencing. The court imposed sentence and ordered that sentence to begin immediately. The court ordered Peterson's

counsel to take him to the marshal's office so that Peterson could begin his sentence. When Peterson's counsel stopped to talk to someone in the hall, Peterson slipped away. Peterson was convicted of escape under 18 U.S.C. § 751(a) which provides:

Whoever escapes or attempts to escape . . . from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate. . . shall . . . be fined not more than \$5,000 or imprisoned not more than five years or both.

On appeal, the Ninth Circuit held that Peterson's actions violated the escape statute when the government proved that he had willfully failed to comply with the court's order placing him in custody. Although the Peterson case provides authority in support of the state's proposition, it is distinguishable because the federal statute is different from the Alaska statute. The federal statute appears to be more broad than the Alaska statute.

We believe that Alaska cases such as Jacobson point in the direction of strictly defining the phrase "official detention for a felony." We have consistently followed the maxim of statutory interpretation that ambiguities in penal statutes must be narrowly read and strictly construed against the government. Kinnish v. State, 777 P.2d 1179, 1181 (Alaska App. 1989); 3 C. Sands, Sutherland Statutory Construction § 59.04 at 13 (4th ed. 1974). We see no indication of any legislative intent to adopt a doctrine of "constructive restraint." See State v. Sanchez, 701 P.2d 571 (Ariz. 1985). Furthermore, we believe that there are sound reasons for requiring the state to prove that a person has been physically placed under arrest before allowing that person to

be convicted of a felony. If the state were allowed to prove that a defendant was in custody without establishing that an arrest had been made, ambiguous situations might occur in which reasonable people could differ concerning the defendant's status. Such ambiguities could well result in a lack of notice. Adopting a bright-line rule for determining when a person is in custody will ensure objective, clear, and unambiguous notice to all concerned. See Model Penal Code and Commentaries, § 242.2 at 214 (1980) and Sanchez, 701 P.2d at 573.

We accordingly conclude that since Hubbard was never placed under arrest before he left the courtroom, he was never in custody or in confinement under an order of a court. Thus he was never under "official detention for a felony" as is required for violation of AS 11.56.310(a)(1)(B). We therefore conclude that the trial court erred in failing to dismiss the indictment against Hubbard. We accordingly reverse Hubbard's conviction and order the trial court to dismiss the indictment.

REVERSED.

David W. JACOBSON, Appellant,

v.

STATE of Alaska, Appellee.

Nos. A-2217, A-2218.

Court of Appeals of Alaska.

Jan. 26, 1990.

Defendant was convicted in the Superior Court, First Judicial District, Juneau, Walter L. Carpeneti and Rodger W. Pegues, JJ., of theft in the second degree, burglary in the second degree, escape in the second degree, and misconduct involving a weapon in the first degree. Defendant appealed. The Court of Appeals, Bryner, C.J., held that: (1) an inventory of defendant's items did not impermissibly encroach on his privacy rights; (2) the police properly continued to inventory defendant's items even after they decided to seek a warrant; and (3) the term "official detention," as used in the escape statute, does not apply to investigative stops.

Affirmed in part, and vacated and remanded in part.

1. Searches and Seizures ⇐58

Police were authorized to open various closed containers for purposes of conducting inventory of defendant's property; only containers police opened were those that they themselves had packed and closed while seizing defendant's belongings from motel room, and those containers contained items that were in plain view when they were seized. U.S.C.A. Const.Amend. 4.

2. Searches and Seizures ⇐58

Police properly continued to inspect defendant's belongings after deciding to apply for warrant; police continued to have legitimate interest in performing inventory even after they decided to seek warrant. U.S.C.A. Const.Amend. 4.

3. Weapons ⇐4

Butterfly knife is not "switchblade or gravity knife" and therefore does not quali-

fy as prohibited weapon. AS 11.61.200(a)(3), (e)(1)(D).

4. Escape ⇐1

"Official detention," for purposes of escape in second-degree statute, does not apply to investigative stops. AS 11.56.310, 11.81.900(b)(34).

See publication Words and Phrases for other judicial constructions and definitions.

5. Escape ⇐1

"Custody," for purposes of escape in second-degree statute, begins upon arrest or surrender in lieu of arrest. AS 11.56.310, 11.81.900(b)(34).

See publication Words and Phrases for other judicial constructions and definitions.

Margaret W. Berck, Asst. Public Defender, Juneau, and John B. Salemi, Acting Public Defender, Anchorage, for appellant.

W.H. Hawley, Asst. Atty. Gen., Office of Sp. Prosecutions and Appeals, Anchorage, and Douglas B. Baily, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

BRYNER, Chief Judge.

David W. Jacobson was convicted of theft in the second degree, burglary in the second degree, escape in the second degree, and misconduct involving a weapon in the first degree. Superior Court Judge Rodger W. Pegues sentenced Jacobson to an aggregate term of seven years. Jacobson appeals, contending that the superior court erred in failing to suppress evidence that resulted from an unlawful search and seizure, in failing to dismiss the charges of escape and misconduct involving weapons, in denying his motion for a mistrial, and in admitting evidence of prior misconduct. Jacobson also challenges his sentence as excessive. We affirm the convictions for theft and burglary, reverse the conviction for misconduct involving a weapon, and

remand for additional fine and escape charge.

FACTS

On November 1, 1986, the police were called to investigate a burglary at an office building. While searching the building, a police officer apprehended a short distance from the building, a police officer led him back, Jacobson fled. He was subdued, and a police officer led him back to the carport post outside the building. After *Miranda* warnings, Jacobson was charged with and the police were "considering

A short time later, Jacobson was extricated one of his hands and avoided capture by swimming in a nearby creek. Pursuing officers entered a nearby motel room and placed him under

The police seized Jacobson's belongings from the motel room and arrested him. After taking the items to the police station, they found items that had been in the motel room but did not find a knapsack and bank bag closed. When the inventory of items of jewelry that appeared to be the police obtained a warrant for search of all of Jacobson's belongings. Various stolen items were found in the course of the search. The police seized a butterfly knife that had been in Jacobson's possession in the motel room.

Jacobson was charged with theft, and escape. For the possession of the butterfly knife, he was charged with misconduct involving a weapon. He received separate jury trials for the theft and burglary charges and weapons misconduct charges. The cases were joined for trial without a mistrial. Superior Court Judge Walter Pegues being convicted on all cases were consolidated. Judge Pegues imposed five sentences totaling se-

remand for additional findings on the escape charge.

ment and specified that Jacobson would not be eligible for early release on parole.

FACTS

On November 1, 1986, the Juneau police were called to investigate a possible burglary at an office building. Upon entering the building, a police officer encountered Jacobson. Jacobson ran but was apprehended a short distance away. As the officer led him back, Jacobson attempted to flee. He was subdued, handcuffed to a carport post outside the building, and given *Miranda* warnings. Jacobson asked what he was charged with and was told that the police were "considering burglary."

A short time later, Jacobson managed to extricate one of his hands. He fled and avoided capture by swimming across a creek. Pursuing officers located Jacobson in a nearby motel room. They entered the room and placed him under arrest.

The police seized Jacobson's personal belongings from the motel room when they arrested him. After taking the property to the police station, they inventoried the items that had been in open view at the motel room but did not open or search a knapsack and bank bag that had been closed. When the inventory disclosed items of jewelry that appeared to be stolen, the police obtained a warrant authorizing a search of all of Jacobson's personal belongings. Various stolen items were seized in the course of the search. In addition, the police seized a butterfly knife that had been in Jacobson's possession at the motel room.

Jacobson was charged with burglary, theft, and escape. For his possession of the butterfly knife, he was charged with misconduct involving a weapon. Jacobson received separate jury trials before Superior Court Judge Rodger W. Pegues on the theft and burglary charges. The escape and weapons misconduct charges were joined for trial without a jury before Superior Court Judge Walter Carpeneti. After being convicted on all counts, Jacobson's cases were consolidated for sentencing. Judge Pegues imposed partially consecutive sentences totaling seven years' imprisonment

SEARCH AND SEIZURE

On appeal, Jacobson contends that the superior court erred in denying his motion to suppress evidence, which challenged the warrantless police inventory of his personal property. After conducting an evidentiary hearing, Judge Carpeneti upheld the inventory, finding that it was performed for legitimate purposes and did not exceed the permissible limits set out in *Reeves v. State*, 599 P.2d 727, 736-38 (Alaska 1979).

[1] The court's decision must be upheld unless clearly erroneous. *State v. Bianchi*, 761 P.2d 127, 129-30 (Alaska App. 1988). Jacobson argues that the police were not authorized to open various closed containers for purposes of conducting the inventory. However, the only containers the police opened were those that they themselves had packed and closed while seizing Jacobson's belongings from the motel room. Those containers, such as Jacobson's shaving kit and grocery bags of clothing, contained items that were in plain view when they were seized. The police had a legitimate interest in protecting themselves against potential claims for loss by inventorying these items. The inventory did not impermissibly encroach on Jacobson's privacy rights. See, e.g., *Griffith v. State*, 578 P.2d 578, 580 (Alaska 1978).

[2] Jacobson also complains that the police continued to inventory his property even after they recognized items that were apparently stolen. In Jacobson's view, the fact that the police persisted in inspecting his belongings after deciding to apply for a warrant casts doubt on whether their actual purpose was to conduct an inventory. As correctly recognized by the superior court, however, even after the police decided to seek a warrant, they continued to have a legitimate interest in performing an inventory. Their continuation of the inventory does not establish an improper motive.

weapon. AS 11.61.

tion," for purposes of statute, does not stop. AS 11.56.310,

Words and Phrases al constructions and

purposes of escape in ute, begins upon arrest u of arrest. AS 11.56. i).

Words and Phrases al constructions and

ck, Asst. Public Defend- ohn B. Salemi, Acting nchorage, for appellant.

st. Atty. Gen., Office of nd Appeals, Anchorage, ily, Atty. Gen., Juneau,

, C.J., and COATS JJ.

OPINION

Judge.

son was convicted of l degree, burglary in the ape in the second degree, volving a weapon in the rior Court Judge Rodger ed Jacobson to an aggre- an years. Jacobson ap- that the superior court suppress evidence that unlawful search and sei- dismiss the charges of duct involving weapons, ion for a mistrial, and in e of prior misconduct. llenges his sentence as firm the convictions for y, reverse the conviction volving a weapon, and

The superior court did not err in denying Jacobson's motion to suppress.¹

MISCONDUCT INVOLVING WEAPONS

[3] Jacobson next challenges his conviction for misconduct involving a weapon in the first degree. Jacobson was convicted of the offense under AS 11.61.200(a)(3), which prohibits, *inter alia*, possession of a "prohibited weapon." The term "prohibited weapon" is defined in AS 11.61.200(e)(1)(D) to include a "switchblade or gravity knife." The state's theory in charging Jacobson was that the butterfly knife found in his motel room was a gravity knife. On appeal, Jacobson argues that the statutory prohibition against possessing "prohibited weapons" is impermissibly vague. We need not decide this issue. In *State v. Strange*, 785 P.2d 563, (Alaska App.1990), we held that a butterfly knife is not a "switchblade or gravity knife" and therefore does not qualify as a prohibited weapon. Our *Strange* holding requires that Jacobson's conviction for misconduct involving a weapon must be vacated.

ESCAPE

[4, 5] Jacobson was convicted of escape in the second degree in violation of AS 11.56.310. The statute provides, in relevant part, that "[o]ne commits the crime of escape in the second degree if, without lawful authority, one removes oneself from ... official detention for a felony...." As defined in AS 11.81.900(b)(34), "official detention" means "custody, arrest, surrender in lieu of arrest, or confinement under an order of a court...."

At trial, Jacobson maintained that he had not yet been formally arrested when he removed his handcuffs and eluded the police. Jacobson argued that he was therefore not under "official detention for a felony." In finding Jacobson guilty of escape, Judge Carpeneti did not find it necessary to determine whether Jacobson had been arrested. Instead, the judge found

that a person who has been subjected to an investigative stop is in "custody" and therefore under "official detention" for purposes of the escape statute, even if the stop did not rise to the level of a full arrest. Finding that, at the very least, Jacobson had been subjected to an investigative stop for a possible burglary, Judge Carpeneti concluded that he was "under official detention for a felony" when he eluded the police.

The issue presented on appeal is thus whether "custody" as used in the statutory definition of "official detention" occurs when an individual is subjected to an investigative stop that falls short of a full arrest. Jacobson argues, as he did below, that he could not have been in "custody" for purposes of the escape statute without first being placed under arrest. Jacobson's argument finds support in *Beckman v. State*, 689 P.2d 500 (Alaska App. 1984). In *Beckman*, we adopted a narrow reading of the word "custody" as used in connection with Alaska's escape statute:

"Custody" is not expressly defined in the provisions of Alaska law dealing with escape. However, definitions of "custody" contained in escape statutes from other jurisdictions suggest that, in context, the word is intended to have a narrow meaning, essentially synonymous to "arrest."

Id. at 502 n. 3 (citations omitted).

In considering the applicability of *Beckman* to the present case Judge Carpeneti noted that *Beckman* appeared to be incorrect in pinpointing the source of Alaska's escape statute. In our discussion of the term "custody" in *Beckman*, we mistakenly indicated that Alaska's definition of "official detention" was derived from Missouri Revised Statute § 556.061(3) (1979). This error stemmed from the fact that the derivation table of the Alaska Department of Law's Criminal Law Manual (Manual) listed the Missouri statute in connection with

circumstances to justify consideration of the issue as a matter of plain error. See *Moreau v. State*, 588 P.2d 275, 279-81 (Alaska 1978).

Alaska's definition of "of Judge Carpeneti correctly the Manual's derivation meant to reflect the act statutes included in Alaska Code. Rather, the t after the adoption of the was intended only as a provisions in other juris similar to those in Alaska actual derivation of provi the revised code, the deriv its readers to the Tentative Revised Criminal Code t by the Criminal Law Revision (Subcommission).² I his conclusion that *Beckman* as to the source of Alaska Judge Carpeneti declined row interpretation of "c adopted in that case.

Beckman's mistake in origin of Alaska's escape law has no bearing validity of the narrow rea to the word "custody" in ing in the actual history c statute points to the app broader reading of the w contrary conclusion seem

Alaska's escape statute most verbatim from the proposed by the Subcommi tative Draft. See Alaska Revisor, Part IV, 46-49 (The Subcommission, in tu the Tentative Draft pro largely on then existing

When the Subcommis sive Draft, Alaska's es vided, in relevant part, th: mits an escape if without he ... wilfully removes h cial detention...." See f 090 (ch. 171, § 1, SLA : "official detention" was c

2. See Alaska Department of Law's Criminal Law Manual, derivation table at

3. *Id.* at 6-1-2 (emphasis i It should be noted that i was compiled by the crim Department of Law afte

1. Jacobson further challenges as impermissible the warrantless seizure of property from his motel room. He did not raise this argument below, however, and we find no exceptional

as been subjected to an arrest in "custody" and "official detention" for escape statute, even if the level of a full arrest. At the very least, Jacobson was "under official detention" when he eluded the

argument on appeal is thus that as used in the statutory definition of "official detention" occurs when a person is subjected to an investigation that falls short of a full arrest, as he did below, and has not yet been in "custody" under the escape statute without being under arrest. Jacobson's argument is supported in *Beckman v. State* (Alaska App. 1984). In that case, the court adopted a narrow reading of "official detention" as used in connection with the escape statute:

"Official detention" is expressly defined in the Alaska law dealing with escape. Under the definitions of "custody" and "official detention" in escape statutes from other jurisdictions, it is intended to have a narrow, essentially synonymous to

(citations omitted).

In the applicability of *Beckman* to the present case Judge Carpeneti appeared to be incorporating the source of Alaska's definition of "official detention" in our discussion of the *Beckman* case, we mistakenly stated that Alaska's definition of "official detention" was derived from Missouri § 556.051(3) (1979). This is incorrect because the definition of "official detention" in the Alaska Department of Law Manual (Manual) listed in connection with

justify consideration of the issue of plain error. See *Morreau v. State*, 75, 279-81 (Alaska 1978).

Alaska's definition of "official detention."² Judge Carpeneti correctly recognized that the Manual's derivation table was not meant to reflect the actual derivation of statutes included in Alaska's Revised Criminal Code. Rather, the table was compiled after the adoption of the revised code and was intended only as a guide to statutory provisions in other jurisdictions that are similar to those in Alaska's code. For the actual derivation of provisions contained in the revised code, the derivation table refers its readers to the Tentative Draft of the Revised Criminal Code that was prepared by the Criminal Law Revision Subcommittee (Subcommission).³ Relying in part on his conclusion that *Beckman* was mistaken as to the source of Alaska's escape statute, Judge Carpeneti declined to follow the narrow interpretation of "custody" that we adopted in that case.

Beckman's mistake in attributing the origin of Alaska's escape statute to Missouri law has no bearing, however, on the validity of the narrow reading that we gave to the word "custody" in that case. Nothing in the actual history of Alaska's escape statute points to the appropriateness of a broader reading of the word. In fact, the contrary conclusion seems indicated.

Alaska's escape statute was adopted almost verbatim from the escape provision proposed by the Subcommittee in its Tentative Draft. See Alaska Criminal Code Revision, Part IV, 46-49 (Tent. Draft 1977). The Subcommittee, in turn, indicated that the Tentative Draft provision was based largely on then existing Alaska law. *Id.*

When the Subcommittee issued the Tentative Draft, Alaska's escape statute provided, in relevant part, that "a person commits an escape if without lawful authority he ... wilfully removes himself from official detention...." See former AS 11.30.090 (ch. 171, § 1, SLA 1976). The term "official detention" was defined in former

AS 11.30.100(2) (ch. 171, § 3, SLA 1976) as follows:

"Official detention" means arrest, custody following surrender in lieu of arrest, detention in any facility for custody of persons under charge or conviction of crime or alleged or to be delinquent, detention for extradition or deportation or any other detention for law enforcement purposes; but "official detention" does not include supervision on probation or parole, or constraint incidental to release on bail.

Under this statutory definition, it seems clear that "official detention" did not include the type of restraint inherent in a pre-arrest investigative stop.

Although the definition of "official detention" contained in the Tentative Draft differed somewhat from that set out in former AS 11.30.090, nothing in the Tentative Draft's commentary indicated that the changes in wording were intended to alter the substance of the existing definition in any way material to this case. In its commentary, the Subcommittee described three significant ways in which the Tentative Draft's proposed escape provisions differed from then existing law. The description contains no mention of broadening the concept of "official detention" to include pre-arrest investigative stops. At least in the Subcommittee's view, the definition of "official detention" embodied in the Tentative Draft (which was ultimately adopted as AS 11.81.900(b)(34)) was in substance identical to that contained in former AS 11.30.100(2).

Subsequent legislative commentary is also relevant. As enacted by the legislature in 1978, the Revised Criminal Code's second-degree escape statute made it unlawful to remove oneself from "official detention on a charge of a felony...." Former AS 11.56.310(a)(1)(B) (ch. 166, § 6, SLA 1978) (emphasis added). This language

revised code. Statutes from other jurisdictions that were actually considered by the criminal law revision subcommittee are set out in a table appearing as an appendix to each volume of the six part tentative draft of the code published by the subcommittee.

2. See Alaska Department of Law, Criminal Code Manual, derivation table at 6-41 (1985).

3. *Id.* at 6-1-2 (emphasis in original).
It should be noted that the derivation listing was compiled by the criminal division of the Department of Law after enactment of the

drew verbatim from the Tentative Draft, as well as from former AS 11.30.090(b)(1)—the statute in effect when the revised Alaska Criminal Code was adopted. In 1980, however, the legislature amended the second-degree escape statute to its current form, making it unlawful to remove oneself from "official detention for a felony." AS 11.56.310(a)(1)(B) (emphasis added).

The legislature explained its substitution of "for a felony" for "on a charge of a felony" as follows:

This amendment is required to make clear that escape and permitting an escape can occur when a person has been arrested for a crime, though not necessarily formally charged with a crime by way of complaint, indictment or information.

Commentary on the Alaska Revised Criminal Code, Senate Journal Supp. No. 44 at 13, 1980 Senate Journal 1436. This commentary is telling. In stating that the amended statute would permit the prosecution of persons "arrested for a crime, though not necessarily formally charged . . ." the legislature clearly indicated its view that, even under the amended version of the statute, an arrest was still necessary before escape could properly be charged.

In the present case, the state has cited no escape statutes or cases from other jurisdictions defining "custody" or "official detention" to include an investigative stop falling short of an actual arrest. Nor are we aware of any such authority. Our own brief survey of escape statutes indicates that other jurisdictions uniformly construe custody to begin with arrest or surrender in lieu of arrest.⁴ While some jurisdictions have specific statutory provisions expressly defining custody as beginning at the point of formal arrest, others appear to reach the same conclusion without any express statu-

4. The Model Penal Code § 242.6 at 216 states that "[o]fficial detention" means arrest, detention in any facility for custody of persons under charge or conviction of crime or alleged or found to be delinquent. . . ." See also N.Y. Penal Law § 205.00 (McKinney 1988), defining custody as "restraint by a public servant pursuant to an authorized arrest or an order of a court"; Or.Rev.Stat. § 162.135 (1987) defining custody as "the imposition of actual or construc-

tory definition. For example, in *State v. Blaine*, 133 Vt. 345, 341 A.2d 16, 17-20 (1975), the Supreme Court of Vermont considered a case prosecuted under former 13 V.S.A. § 1501, which prohibited "escape from lawful custody of a police officer." *Id.* 341 A.2d at 18. Although Vermont's escape statute apparently did not expressly define custody, the court in *Blaine* rejected the prosecution's contention that "custody" could be found in situations involving detention or restraint falling short of actual arrest. The court concluded that "lawful custody does not exist until the arrest is made." *Id.* 341 A.2d at 20.

In short, there appears to be no support in the history of Alaska's escape statute or in the law of other jurisdictions for the conclusion that *Beckman* was incorrect in concluding that "custody" is "essentially synonymous to 'arrest.'" *Beckman*, 689 P.2d at 502 n. 3.

In rejecting the conclusion we reached in *Beckman*, Judge Carpeneti also reasoned that the statutory definition of "official detention" would not have separately included "custody" and "arrest" if both words meant precisely the same thing. The court's concern seems well-founded, since every word used in a statutory provision is presumed to have been intended to have some useful purpose. See, e.g., *Alaska Transportation Commission v. Airpacc, Inc.*, 685 P.2d 1248, 1253 (Alaska 1984). However, the narrow interpretation of "custody" we adopted in *Beckman* does not render the word superfluous as used in the statutory definition of "official detention."

Alaska Statute 11.81.900(b)(34) uses four separate terms to define "official detention": "custody, arrest, surrender in lieu of arrest, or confinement under an order of a

tive restraint by a peace officer pursuant to an arrest or court order. . . ."; Tex.Penal Code Ann. § 38.07 (Vernon 1974), applying escape statute to "[a] person arrested for, charged with, or convicted of. . . ."; Utah Code Ann. § 76-8-309 (1978), defines "official custody" to mean "arrest, custody in a penal institution. . . ."; Wash. Rev.Code § 9A.76.120 (1988), applying second-degree escape statute to persons "charged with a felony."

court. . . ." Of the "arrest" and "surrender" involve discrete event duration. The remaining "custody" and "confinement by a court," describe circumstances continuing in nature time.

Once the police have a person or once a person is in lieu of being arrested, the person actually remains in post-arrest custody pending the filing and disposition of the case, including release on bail. In some cases, when an arrest is made without an outstanding warrant, the person will be in "confinement by a court" from the time of arrest. In other situations, if the police make a warrantless arrest at the scene of a crime, a person is in "detention and confinement" from the time of arrest, including which no charge is filed and no court order will be issued to confine the arrested person. In these situations, the arrested person will still be in "custody" and will continue to be in "official detention" subject to the penalties of the escape statute.

Thus, although "custody" and "arrest" are essentially synonymous, we refer to the inception of "custody" for purposes of the escape statute as the broader of the two. The definition of "official detention" encompasses post-arrest custody. The legislature's use of the term "official detention" is not inconsistent with the definition of "official detention" we adopted in *Beckman*.

In deciding to adhere to the narrower interpretation of "custody" in *Beckman*, we are pa-

5. Another concern voiced in the dissent was that *Beckman*'s narrow interpretation of "custody" might encourage persons to be subjected to investigatory stops. This concern, however, is not unique to persons who resist or fail to comply with police orders before being arrested. It is a concern shared by other than prosecution. AS 11.56.700 (resisting arrest) provides that a person refusing to assist a police officer is not whether such con-

example, in *State v. ...*, 341 A.2d 16, 17-20 Court of Vermont construed under former 13 which prohibited "escape of a police officer."

Although Vermont's court in *Blaine* rejected contention that "custody" situations involving defaulting short of actual concluded that "lawful arrest until the arrest is made at 20.

It appears to be no support Alaska's escape statute or other jurisdictions for the defendant was incorrect in "custody" is "essentially arrest." *Beckman*, 689

In conclusion we reached in *Carpeneti* also reasoned definition of "official detention" not have separately in "arrest" if both are the same thing. This seems well-founded, and is in a statutory provision have been intended to purpose. *See, e.g., Alaska Commission v. Aird*, 1248, 1253 (Alaska) a narrow interpretation adopted in *Beckman* does seem superfluous as used in definition of "official deten-

AS 11.81.900(b)(34) uses four terms to define "official detention, surrender in lieu of arrest, or confinement under an order of a

police officer pursuant to an arrest"; Tex.Penal Code Ann. § 4), applying escape statute defined for, charged with, or taken into custody Code Ann. § 76-8-309 "arrestal custody" to mean "arrestal institution...."; Wash. Code Ann. § 9A.04.010 (1988), applying second-degree to persons "charged with a

court...." Of the four statutory terms, "arrest" and "surrender in lieu of arrest" involve discrete events of relatively brief duration. The remaining two terms, "custody" and "confinement under an order of a court," describe circumstances that are continuing in nature rather than fixed in time.

Once the police have completed arresting a person or once a person has surrendered in lieu of being arrested, that person typically remains in post-arrest detention pending the filing and disposition of charges or release on bail. In some situations, such as when an arrest is made pursuant to an outstanding warrant, the arrested person will be in "confinement under an order of a court" from the time the arrest is completed. In other situations, however, as when the police make a warrantless arrest at the scene of a crime, a period of post-arrest detention and confinement will ensue during which no charge will have been filed and no court order will have been issued to confine the arrested person. In such situations, the arrested person will nonetheless still be in "custody" and will therefore continue to be in "official detention" and subject to the penalties prescribed in the escape statute.

Thus, although "custody" and "arrest" are essentially synonymous insofar as they refer to the inception of "official detention" for purposes of the escape statute, "custody" is the broader of the two terms and encompasses post-arrest restraint. The legislature's use of the word "custody" in the definition of "official detention" is not inconsistent with the narrow interpretation we adopted in *Beckman*.⁵

In deciding to adhere to the narrow interpretation of "custody" that we adopted in *Beckman*, we are particularly concerned

5. Another concern voiced by Judge Carpeneti was that *Beckman's* narrow construction of "custody" might encourage persons who are subjected to investigative stops to resist. This concern, however, seems unfounded. Those who resist or fail to cooperate with the police before being arrested are subject to sanctions other than prosecution for escape. *See, e.g., AS 11.56.700* (resisting arrest); *AS 11.56.720* (refusing to assist a police officer). The issue is not whether such conduct is encouraged, but

that serious practical problems might arise if our escape statute were extended to all persons who are subjected to investigative stops. All but the most casual encounters between citizens and police officers may be characterized as stops involving some degree of restraint or deprivation of liberty. *See, e.g., Waring v. State*, 670 P.2d 357, 363-66 (Alaska 1983); *Howard v. State*, 664 P.2d 603, 607-11 (Alaska App.1983). Under the view adopted by the trial court, most if not all such situations would involve "official detention" for purposes of the escape statute. In many cases, moreover, the stops would be based only on reasonable suspicion. The low quantum of evidence needed to effect an investigative stop would make it difficult to say with any degree of confidence whether the stop was "for a felony." Presumably, in all situations where the possibility of a felony had not yet been ruled out, the stop could be characterized as "official detention for a felony" and could serve as a basis for a second-degree escape charge.

We have found no authority to support such a sweeping interpretation of Alaska's escape statute. Accordingly, we conclude that the trial court erred in construing "official detention," as used in AS 11.56.310, to apply to investigative stops. In keeping with the position we adopted in *Beckman*, we hold that "custody," as used in AS 11.81.900(b)(34), begins upon arrest⁶ or surrender in lieu of arrest.

In the present case, Judge Carpeneti found it unnecessary to decide whether Jacobson had actually been arrested at the time he fled. Our conclusion that an arrest was a necessary predicate for an escape conviction requires us to remand this case to Judge Carpeneti for specific resolution of the issue.

rather the level of sanction that the legislature intended to apply.

6. By "arrest" we refer to the statutory definition of the term. Under AS 12.25.160, "[a]rrest is the taking of a person into custody in order that the person may be held to answer for the commission of a crime." *See also Nome v. Ailak*, 570 P.2d 162, 167-69 (Alaska 1977).

If, after considering the evidence presented at trial, the judge finds beyond a reasonable doubt that Jacobson was under arrest and acted with the requisite culpable mental state, the judgment of conviction for escape may be left intact. If, on the other hand, the judge finds a reasonable doubt as to whether Jacobson was actually under arrest or acted with the applicable culpable mental state, a judgment of acquittal must be entered. We will retain jurisdiction over the appeal pending the resolution of this issue on remand.⁷

7. Because an acquittal on the escape charge would significantly affect Jacobson's composite sentence, we find it preferable not to address Jacobson's sentencing arguments until completion of proceedings on remand. In addition to his sentencing arguments, Jacobson has raised two issues that require only brief consideration.

First, Jacobson argues that the trial court erred in denying a motion for mistrial that he made because members of his jury saw him in the custody of an officer and in close proximity to uniformed guards during the trial. We have consistently held, however, that neither the presence of guards nor a brief, inadvertent view of the defendant in custody is necessarily so prejudicial as to require a mistrial. See, e.g., *Hines v. State*, 703 P.2d 1175, 1178 (Alaska App. 1985); *Dunn v. State*, 653 P.2d 1071, 1086 (Alaska App. 1982). The decision whether to grant a motion for a mistrial is consigned to the sound discretion of the trial court. *Roth v. State*, 626 P.2d 583, 585 (Alaska App. 1981). Our review of the record in this case convinces us that the court did not abuse its discretion in denying Jacobson's motion for a mistrial in this case.

The convictions for burglary and theft are **AFFIRMED**. The conviction for misconduct involving a weapon is **VACATED**. This case is **REMANDED** for further findings on the escape charge.



Second, Jacobson contends that the trial court erred in admitting evidence of other crimes during his burglary trial. Jacobson was charged with burglarizing one of several offices in an office building. The trial court allowed the state to admit evidence that property stolen from another office in the same building was found in Jacobson's possession. Jacobson contends that the challenged evidence was inadmissible under Alaska Rule of Evidence 404(b). We disagree. The challenged evidence was integrally related in time and circumstance to the crime with which Jacobson was charged and was highly relevant to discredit Jacobson's claim of mistake. Under the circumstances, the challenged evidence had legitimate relevance on an issue other than Jacobson's propensity to commit crime, and the trial court could readily find that its probative value substantially outweighed its potential for prejudice. See *Kugzruk v. State*, 436 P.2d 962, 966-68 (Alaska 1968). We find no abuse of discretion.

HB

146

SEVENTEENTH LEGISLATURE
SENATE JUDICIARY COMMITTEE BILL FILE

Bill Number: HB 146
Abbreviated Title: Facilitated Divorce / Property / Child Settlement
Sponsor: Barnes Original Received: _____
Written Request to Schedule Rcv'd: _____ From: _____
Sponsor's Statement Rcv'd: _____ From: _____
Sectional Analysis Rqst'd: _____ From: _____
Sectional Analysis Received: _____
Fiscal Note (Original)
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Fiscal Note (C.S.)
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
Five Day Notice Given: _____ Notice of Hearings Given: May 18, 1991
Committees of Referral: First: _____ Second: _____ Third: _____
LAA Contact: _____ To Senate Secretary: _____

COMMITTEE ACTION

DATE: May 19, 1991 Passed - Moved on Ind Rec -

PERSONS TO BE NOTIFIED OF HEARING

1. Sponsor
2. Agency
3. Ramona / Mil - 3438
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____

Alaska State Legislature

House of Representatives

REPRESENTATIVE
RAMONA L. BARNES
DISTRICT 14

ANCHORAGE
2230 PARKSON
ANCHORAGE, ALASKA 99504
907/337-7737
907/561-2036
R02 V
ANCHORAGE, ALASKA 99811
907/465-3438

OFFICIAL BUSINESS

SPONSOR STATEMENT

CSHB 146 (Judiciary)

CSHB 146 would prohibit a court from allowing a divorce decree while reserving child custody issues or property division issues for a later time unless both parties agree or a party who moves for division of the issues shows good cause and the court finds that the interest of the opposing party will not be jeopardized. This is commonly known as a bifurcated divorce. Divorce now - property settlement and/or child custody hearing at a later date.

Additionally, the bill prohibits the court from granting what is known as a bifurcated divorce if certain conditions are found to exist. These conditions include 1) that granting a bifurcated divorce would put the opposing party's interests substantially at risk in the event of death of the other party before final disposition of the marital estate; 2) that the ability of the opposing party to protect the value of the assets not in that party's control would be diminished; (3) that the best interests of each minor child involved would not be served by granting a bifurcated divorce; (4) that adverse tax consequences would occur for the opposing party; or, (5) the opposing party's ability to maintain existing health insurance would be adversely impacted.

Although there may be some advantages to separating the issues, I believe that the disadvantages far outweigh the advantages. Some of these disadvantages include the following:

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

Delay prolongs and exacerbates litigation.

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

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

Gaps in medical insurance can occur.

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

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

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

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

25.24.150 New Section Added -

Sec 2 May not reserve custody or property issue

Unless

Parties & Guardian Agree

or a Party may move to delay an issue
by showing good cause &

Ct finds opposing party won't be injured -

Ct can't grant if

Risk of Death Before final ruling -

Diminish value of assets not in control -

Not in interests of minor child w/ delayed custody.

Would have adverse tax consequence.

Would affect health ins. coverage.

(Is the above a limitation of factors Ct can consider?)

Sec 3 New Subsection -

May not reserve property division w/o compliance
with above.

Sec 5 Civ. R 54B -

May split only upon an express determination that there is
no just reason for delay.

Mel (Barns Staff) is on her way

**CS FOR HOUSE BILL NO. 146 (JUDICIARY)
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - FIRST SESSION**

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 5/14/91

Referred: Rules

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

A BILL

FOR AN ACT ENTITLED

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

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

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

7 (f) If the issue of child custody is before the court at the time it issues a judgment under
8 AS 25.24.160, the court shall concurrently issue a judgment for custody under this section unless,
9 subject to AS 25.24.155, the court delays the custody decision for a later time.

10 * **Sec. 2.** AS 25.24 is amended by adding a new section to read:

11 **Sec. 25.24.155. RESERVATION OF ISSUES.** (a) The court may not delay or reserve
12 a custody decision under AS 25.24.150(f) or an issue of property division under AS 25.24.160(c)
13 unless

14 (1) each party, and the guardian ad litem if one has been appointed under

1 AS 25.24.310, expressly agrees on the record to the delay or reservation; or

2 (2) a party who moves for an order of delay or reservation shows good cause and
3 the court finds that the interests of a party opposing the motion will not be jeopardized by the
4 delay or reservation.

5 (b) The court may not grant a motion under (a)(2) of this section if the court finds that
6 granting the motion would

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

9 (2) diminish the ability of the party opposing the motion to protect the value of
10 assets not in the party's control;

11 (3) not be in the best interests of each minor child whose custody would remain
12 unresolved if the motion were granted;

13 (4) have adverse tax consequences for the opposing party; or

14 (5) have adverse consequences on the opposing party's ability to maintain ^{the} existing ^{level of}
15 health insurance coverage.

16 * Sec. 3. AS 25.24.160 is amended by adding a new subsection to read:

17 (c) Notwithstanding (a) of this section, if one of the parties to an action for divorce or
18 action declaring a marriage void expressly submits to the court the issue of property division and
19 has not withdrawn that issue from the court before judgment, the court shall provide in the
20 judgment for the division of property and may not reserve the issue of property division for a
21 later time unless the conditions of AS 25.24.155 have been met.

22 * Sec. 4. AS 25.24.150(f), 25.24.155, and 25.24.160(c), added by secs. 1 - 3 of this Act, apply to
23 actions for divorce and actions declaring a marriage void for which no judgment on any claim in the
24 action has been entered before the effective date of this Act.

25 * Sec. 5. AS 25.24.150(f), 25.24.155, and 25.24.160(c), added by secs. 1 - 3 of this Act, amend
26 Rule 54(b), Alaska Rules of Civil Procedure, by prohibiting separation of claims in certain actions
27 without compliance with AS 25.24.155, as added by sec. 2 of this Act.

28 * Sec. 6. This Act takes effect immediately under AS 01.10.070(c) but only if sec. 5 of this Act
29 receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State
30 of Alaska.



STATE OF ALASKA

OFFICE OF THE GOVERNOR

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

April 25, 1991

TO: Representative Ramona Barnes
FROM: Glenne Ralls
Alaska Womens Commission
Re: House Bill 146

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

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

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

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

Alaska State Legislature

Legislative Research Agency



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

February 25, 1991

MEMORANDUM

TO: Representative Ramona Barnes

FROM: Patricia Young *PM*
Legislative Analyst

RE: Bifurcated Divorce Proceedings
Research Request 91.171

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

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

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

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

- The granting of a final decree of divorce separate from resolution of custody and/or financial matters may reduce the incentive to finalize those issues expeditiously, particularly for the party with more money. The party who stands to lose assets in an economic distribution may delay settlement in the hope that the dependent party will eventually agree to accept less in order to have the issue finally resolved.
- In cases without the possibility of a mutually agreeable settlement, bifurcation prolongs and exacerbates litigation.
- Unresolved and unreconciled old business hinders the parties' efforts to restructure their lives. Remarriage, although it may satisfy the emotional needs of one or both parties, further complicates matters and almost inevitably further reduces the wealthier party's incentive to resolve financial and/or custody issues.
- Bifurcated divorces, especially when followed by remarriages, may prove very disruptive for children, particularly if they come to believe that their parents consider their own needs and wishes as more important than those of their children.
- Eligibility for medical insurance coverage provided through one party's employment and extending to the spouse and children is no longer available for the ex-spouse. Although alternate insurance may be available, gaps in coverage can occur at a time when individuals are particularly vulnerable due to increased stress.
- The real property ownership status of tenancy by the entirety--which carries a right of survivorship--is available only to married couples. Once a dissolution is final, ownership status converts, by operation of law, to tenancy in common. More like a partnership, tenancy in common does not afford the same protections--such as right of survivorship--as does tenancy by the entirety.
- In a bifurcated divorce proceeding, the party with fewer assets has lost the protection afforded by statute to a spouse and yet has not gained the protection of a valid property settlement agreement. Property owned at the time of divorce may have diminished, increased, or disappeared by the time of economic distribution.

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

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

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

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

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

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

Representative Barnes
February 25, 1991
Page 4

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

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

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

Attachments

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

Reversed and remanded.

1. Trial \Leftrightarrow 3(5)

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

2. Trial \Leftrightarrow 3(5)

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

3. Divorce \Leftrightarrow 184(5)

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

4. Trial \Leftrightarrow 3(5)

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

Jacob WOLK

v.

Thelma Dym WOLK, Appellant.

Jacob WOLK

v.

Thelma Dym WOLK, Appellant.

Superior Court of Pennsylvania.

Argued May 25, 1983.

Filed Aug. 26, 1983.

Appeal was taken from decree of the Court of Common Pleas of Allegheny Coun-

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

John J. Dean, Pittsburgh, for appellant.

Frederick N. Frank, Pittsburgh, for appellee.

Before CAVANAUGH, ROWLEY and CIRILLO, JJ.

CIRILLO, Judge:

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

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

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

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

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

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

(c) The court need not determine all claims at one time but may enter a decree adjudicating a specific claim or claims. Pa.R.C.P. 1920.52(c). Adopted June 27, 1980, effective July 1, 1980.

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

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

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

1. The Act of April 2, 1980, P.L. 63, No. 26.

§ 201, 23 P.S. § 201(d).

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

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

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

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

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

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

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

Bifurcation separates the termination of the marriage from the distribution of property so that the marriage and each party's personal life are not held hostage to economic demands. At the same time, the

dependent spouse is not economically disadvantaged by the fact of the divorce being issued because support and/or alimony pendente lite are required to continue at their pre-divorce levels pending resolution of the economic matters. *Klein v. Klein*, 16 D & C 3d 651 (1980).²

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

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

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

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

Alimony pendente lite, if literally construed, means alimony while the litigation is pending. (citation omitted). Under prior law, the duty to pay alimony pendente lite ended with the divorce because this was the only subject of the litigation. In *Ponthus v. Ponthus*, 70 Pa.Superior Ct. 39 (1918), the court held that alimony pendente lite continued while an appeal from the issuance of a divorce decree is pending. According to this court, the pur-

pose of alimony pendente lite is to permit a dependent spouse to meet the expenses of carrying on or defending an action (including reasonable living expenses), so payments should continue as long as the action is pending. Also see: *Commonwealth ex rel. Entler v. Entler*, 33 Lehigh 23 (1968). Thus so long as any claims raised in the divorce litigation are still pending, the principles enunciated in *Ponthus* bar automatic termination of alimony pendente lite.

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

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

Still another issue which could arise relates to the effect that a bifurcated divorce has on a divorced spouse's right to receive the proceeds of a life insurance policy in which that spouse was named a beneficiary. In *Simpkins v. Dodolak*, 1 Pa.Fiduc.2d 120 (1980), a Clearfield County case, the court held that since the husband had retained the right to change his beneficiary at any time, then under the Act of April 18, 1978, P.L. 42, No. 23, Sec. 3, 20 Pa.C.S.A. § 6111-

1, the rights of the wife were revoked regarding the proceeds of the policy in question. Undoubtedly, to this list of detriments associated with bifurcation, numerous other possibilities can be added.

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

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

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

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

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

5. Act of July 9, 1976, P.L. 556, No. 142, § 2, as amended by the Act of April 28, 1978, P.L. 202, No. 53 § 10(75), 12 Pa.C.S.A. § 5930.

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

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

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

Garrett's Estate, 335 Pa. 287, 292-93, 6 A.2d 358, 360 (1939); See also: *Mackarus Estate*,

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

431 Pa. 585, 246 A.2d 661 (1968); *Campbell v. Heilman Homes, Inc.*, 233 Pa.Super 366, 371, 335 A.2d 371, 373 (1975) (HOFFMAN, J., dissenting).

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

Reverse and Remand.



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

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

¹³⁷⁰The other issues raised by plaintiffs on this appeal do not pertain to the trial court's post-judgment order under review. Rather, they all appear to address our prior decision in *Gautam v. De Luca*, *supra*, and, therefore, are not properly raised on this appeal and we do not address them.

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



239 N.J. Super. 370

¹³⁷⁰Richard B. LEVENTHAL, Plaintiff

v.

Rosalyn LEVENTHAL, Defendant.

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

Decided Oct. 11, 1989.

Party to divorce moved for bifurcation of action. The Superior Court, Chancery

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

Motion denied.

1. Trial ⇨ 3(1)

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

2. Divorce ⇨ 146

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

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

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

KRAFTE, J.S.C.

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

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

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

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

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

[1,2] Generally, the rationale behind the use of the procedural device of bifurcation is *judicial* economy. The decision to bifurcate should be made only after balancing the advantages and disadvantages and determining that there would be a greater benefit to the court with bifurcation than without. 27A C.J.S., *Divorce*, § 209(b). The purpose is not to ensure the absolute necessity of a second proceeding, as would be the case here, but rather reduce the probability of multiple litigation.

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

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

the procedure and the delays inherent in its use. The committee's recommendations encouraged a court rule or directive on bifurcation, but in its absence stated that bifurcation be granted "only in unusual and extenuating circumstances," and then only with the approval of the assignment judge. *Id.* at 24. The actual decision as to the merits of bifurcation of 137 this case has been deferred to this trial court by the assignment judge.

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

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

In *Glazer v. Glazer*, 394 So.2d 140 (Fla. Ct.App.1981) a Florida court held that a split procedure may be used only if it is clearly necessary in the best interests of the parties and the children, following the

prior state court ruling in *Cloughton v. Cloughton*, 393 So.2d 1061 (Fla.Sup.Ct. 1980). The *Glazer* court emphasized that only in exceptional circumstances should a trial court exercise its discretion to grant bifurcation. Specifically, Florida holds that the "convenience of one of the parties for 137A early remarriage" does not justify the issue of bifurcation. *Cloughton*, supra at 1062. The major reason noted by plaintiff to justify the bifurcation of the present action is that he desires to marry the woman with whom he is living. However, deciding the divorce without addressing the extensive financial matters would yield a benefit to absolutely no one but plaintiff.

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

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

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

545 A.2d 362 (Super.Ct.1988); *Leese v. Leese*, 369 Pa.Super. 104, 534 A.2d 1101 (Super.Ct.1987); *Mosier v. Mosier*, 359 Pa.Super. 187, 518 A.2d 843 (Super.Ct.1986); *Wolk v. Wolk*, 318 Pa.Super. 311, 464 A.2d 1359 (1983). Overall, in spite of ¹³⁷the explicit authority gleaned from the legislature, the courts in Pennsylvania are cautioned not to grant the use of this procedural device without a finding that the consequences of bifurcation would be highly beneficial. The exclusive benefits of a bifurcation in this case would clearly inure to plaintiff while the court would still have the burden of the second trial and defendant, the uncertainty of her economic future. Neither the court nor defendant would receive any actual or perceived gain.

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

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

marital assets are fairly valued and the interests of defendant are protected as to equitable distribution.

¹³⁷There remains the real danger that once divorce is granted, there will be much less incentive for plaintiff to finalize any other issues. This court cannot find any factor other than plaintiff's personal desire to remarry which, with due respect for plaintiff's sincerity in wishing to move forward with his life, does not reach the standards necessary to employ any special or preferential procedures on his behalf. Every argument propounded by plaintiff to buttress his claim for bifurcation applies with equal force to hundreds of cases pending before this court. If plaintiff is entitled to bifurcation, so are the others. To permit this would be to wreak havoc upon the efficient administration of the divorce calendar. Everyone would be divorced without any basic financial issues finalized, leaving all with hopelessly confused life factors.

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

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

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

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



239 N.J.Super. 378

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

v.

RUTHERFORD RENT BOARD, Eleanor Bocker, Agnes Morris, Anna Hunter, Martha Kellerman, Frances Kasperski, Samuel Bloomfield, Elizabeth Cronin, Catherine Rogers, Albert Van der Veen, Mrs. John Kilroy, Regina Cunningham, Eleanor Noonan, Thomas Griffen, Julia Buhtanic, Angelo De Marco, Emily Hanson, Pearl Fecanin, Alfred Barbera, Edward Noff, Olive MacIntyre, Robert MacFadden, Catherine Brown, Grenville Lloyd, Loretta Dommeleers, Grace Broder, Laura Ferucci, David Minor, Lillian Heinrich, Joan Sink, Lillian Bruder, Mrs. John Soltis, Mrs. Matthew Albonese, a/k/a Jane Albonese, Patricia Murphy, William Barrett, Christine Sudol, Margaret Xigues, William Bidwell, Eleanor Cinquegrama, Laura

Day, Dorothy Raabe, Lottie Miller, Betty Balogh, Gertrude Kohn, Minerva Blom, Ruth Clancy, Mrs. David Greenstein, Marla Shine, Mr. and Mrs. Patrick J. O'Byrne, Dorothy Hahn, Kap Yi Pak, Martha Doyle, Ludmilla Szayna, Mr. and Mrs. Arthur Hauck, Defendants.

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

Decided May 31, 1989.

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

Decision of rent board reversed.

1. Landlord and Tenant ⇄200.68

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

2. Landlord and Tenant ⇄356

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

3. Landlord and Tenant ⇄356

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

4. Landlord and Tenant ⇄200.52

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

BIFURCATE DIVORCE? WELL, . . .

Critics say 2-step process often leads to delay

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

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

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

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

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

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

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

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

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

"It opens in some cases a veritable



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

Pandora's Box of problems that weren't contemplated," said Groner.

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

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

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

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

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

Before the advent of no-fault divorce, property issues were decided

more quickly because they were part of the bargaining process. One party would agree to the grounds for a divorce in exchange for property.

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

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

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

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

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

—Debra Cassens Moss



▲ Beverly Anne Groner

156

HB

STATE OF ALASKA
1992 LEGISLATIVE SESSION

No. 2
Bill Version: CSSS HB 156 (JUD)
(H) Publish Date: 3-4-92

Revision Date: _____
Title: Confidentiality/Domestic Violence Counselors
Sponsor: Brown
Requestor: House Judiciary

Department Affected: Administration
BRU: Public Defender
Component: Public Defender

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	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.)

Changes in CSSS HB 156 (JES) have no fiscal impact. This fiscal note is appropriate.

31 Mac 92 date MAF Comte Aide (initial)

Prepared by: Kevin Brooks
Division: Administrative Services

Phone: 465-4411
Date: February 21, 1992

Approved by Commissioner: Nancy Bear Usua
Agency: Administration

Date: _____

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

COMMITTEE COPY

STATE OF ALASKA
1992 LEGISLATIVE SESSION

No. 4
Bill Version: CSSSHB 156 (JUD)
(H) Publish Date: 3-4-92

Revision Date: _____ Department Affected: Public Safety
Title: An Act providing that communications BRU: Domestic Violence & Sexual Assault
are privileged. Component: Domestic Violence & Sexual Assault
Sponsor: Brown, et al
Requestor: House Judiciary Committee COMPONENT SERIAL NO.

5	2	1
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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	-0-	-0-	-0-	-0-	-0-	-0-
FUND SOURCE:						

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: None

<p>ANALYSIS: (Attach a separate page if necessary.) No fiscal impact is anticipated.</p>	<p>Changes in <u>CSSSHB 156 (JUD)</u> have no fiscal impact. This fiscal note is appropriate. <u>3/16/92</u> <u>McFou</u> date Comte Aide (initial)</p>
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Prepared By: Marcia Lynn McKenzie Phone: 465-4356
1/16/92 Division: Council on Domestic Violence & Sexual Assault Date: 1-15-92
Approved by Commissioner: Richard L. Burton
Agency: Department of Public Safety Date: 1-15-92

Distribution (by preparer): Leg. F & Impacted Agency(ies).
Rev 10/7/91

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Revision Date: _____
Title: "...communications between victim and...
counselor are privileged..."
Sponsor: Representative Brown
Requestor: House Judiciary Committee

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	-0-	-0-	-0-	-0-	-0-	-0-

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

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

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Changes in CSSS HB 156(J) have no fiscal impact. This fiscal note is appropriate.

3/14/92 date LD Four Comce Aide (initial):

Prepared by: Richard I. Peques Director
Division: Administrative Services

Phone: 465-3672
Date: February 21, 1992

Approved by Commissioner: Charles E. Cole Attorney General
Agency: Department of Law

Date: February 21, 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. SSHB 156

This bill amends AS 18.66 to add a section which provides that communications between a domestic violence or sexual assault victim and a domestic violence or sexual assault counselor are privileged. In addition to making these communications privileged, the bill prohibits the disclosure of the location of certain types of facilities used by the victims of these crimes, and prohibits the disclosure of the identities of domestic violence or sexual abuse counselors. The bill also provides several exceptions to these privileged communications, primarily dealing with information regarding child abuse or neglect, and when failure to disclose a privileged communication is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. Similarly, these communications would no longer be privileged if they caused the failure of a person to testify as a witness and resulted in an inference unfavorable to the state's cause or the cause of a domestic violence or sexual assault victim. We do not believe that the bill will have a fiscal impact on the Department of Law.

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. SCSCSSSHB 156 (HESS)

Revision Date: _____

Department Affected: Administration

Title: Confidentiality/Domestic Violence Counselors

ERU: Office of Public Advocacy

Sponsor: Brown

Component: Office of Public Advocacy

Requestor: _____

COMPONENT SERIAL NO.

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Expenditures/Revenue.s: (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: Brant McGee

Phone: 274-1684

Division: Office of Public Advocacy

Date: April 6, 1992

Approved by Commissioner: Nancy Bear Usura

Agency: Administration

Date: 4/14/92

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. SCSCSSHB 156 (HESS)

Revision Date: _____

Department Affected: Administration

Title: Confidentiality/Domestic Violence Counselors

BRU: Public Defender

Sponsor: Brown

Component: Public Defender

Requestor: _____

COMPONENT SERIAL NO.

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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: John Salemi

Phone: 279-7541

Division: Public Defender

Date: April 6, 1992

Approved by Commissioner: Nancy Bear Usara

Agency: Administration

Date: 4/14/92

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