ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672
7872 HOUSE JUDICIARY
137

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

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January 28, 1994

JAN 31 1994

The Honorable Al Vezey
Alaska House of Representatives
State Capital, Room 102
Juneau, AK 99811

Re: HB 277, defense and indemnification of public employees

Dear Representative Vezey:

The letter from your aide, Joe Ryan, to Deborah Behr for a legal opinion on certain provisions of HB 277 has been referred to me for response. Your questions are restated and answered in turn below:

1. How does this bill affect employee liability in general?

HB 277 does not affect the liability of public employees at all, in terms of when a public employee may be liable to a plaintiff. The bill merely codifies the circumstances in which the public employee may look to a public employer for indemnification of the employee's liability.

2. Will this bill alleviate the concerns of financial institutions of persons named in lawsuits?

This is not a legal question that is within our purview. Generally speaking, the bill does not differ from the state's existing practice of defending and indemnifying state employees in certain circumstances. In the past, the state's position on defense and indemnification has been relayed to financial institutions at the request of state employees involved in job-related litigation. Whether the bill will provide those institutions with greater comfort than a letter from the state on this issue is uncertain. Insofar as this bill may affect the current practice of municipalities with respect to their employees, it is possible that it could also affect the attitude of financial institutions toward municipal employees named in lawsuits.

3. How will this bill impact the employee's liability concerning punitive damages?

The bill does not alter the circumstances in which a plaintiff might be entitled to an award of punitive damages from a public employee defendant. In the event a public employee is found liable for punitive damages, the bill provides that the employer is not obligated to indemnify the employee for those damages. Proposed AS 39.90.160(h)(1). However, the bill does allow a public employer to agree to pay punitive damages awards against an employee. Proposed AS 39.90.160(i).

We hope this responds to your concerns. If you have other questions or wish to discuss this bill, please feel free to contact me.

Very truly yours,
BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Susan D. Cox
Susan D. Cox
Assistant Attorney General

SDC:pch

cc: Raga Elim, Legislative Liaison
Deborah Behr, Legislation/Regulations Attorney

STATE OF ALASKA

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Received
JAN 14 1994
REP BRIAN PORTER

January 14, 1994

The Honorable Brian Porter
House of Representatives, Room 118
State Capitol
Juneau, AK 99801-1182

Re: Defense and indemnification of state employees

Dear Representative Porter:

Your aide, Eric Musser, has asked me to provide a statement of the state's policy regarding defense and indemnification of state employees when they are sued for civil damages. As I explained to Mr. Musser, there is no generally applicable defense and indemnification provision in state law and no written policy document on the subject. However, many of the state's collective bargaining agreements do include defense and indemnification clauses that apply to employees who are union members. For those not covered by a collective bargaining provision, the state has a longstanding practice of providing defense and indemnifying under certain circumstances, explained below.

As a general matter, the state provides defense to executive branch employees who are sued for damages, where the act or omission at issue is within the course and scope of state employment. In addition, the state indemnifies employees and pays settlements or adverse judgments against them so long as there is no finding that the act or omission was outside the course and scope of state employment or amounted to gross negligence or intentional misconduct. The state is statutorily immune from liability for punitive damages (see AS 09.50.280) and therefore does not generally indemnify employees for punitive damages awards made against them.

The effect of this practice is that the state usually provides legal defense for state employees when they are sued about a matter that relates to their jobs. The state routinely reserves rights with respect to indemnification where it is possible that the trier of fact may determine they acted outside the scope of their employment, were grossly negligent or engaged in intentional misconduct, or are liable for punitive damages. This means that,

in some cases, the extent of the state's indemnification is not determined until the case is over.

The special litigation section in the Department of Law is the entity that handles personal injury and property damage claims against the state and state employees, as well as some civil rights litigation against state employees. Our section, along with our client agency, the division of risk management, contributed to the bill drafting that resulted in HB 395 in 1992. We understand the last committee version of that bill was the model for the bill you filed in this legislature: HB 277. For the most part, we were and are satisfied with the bill's attempt to create a workable, codified defense and indemnification provision for public employers. However, Mr. Musser invited us to share our comments or suggestions on the bill as drafted, so we offer the following ideas for your consideration.

The first paragraph of the proposed AS 39.90.160 sets out the general obligation of public employers to defend and indemnify their employees, unless a collective bargaining agreement includes a provision on that subject. Proposed AS 39.90.160(a). To make it perfectly clear that this bill is not intended to affect union members whose collective bargaining agreements cover this subject, we believe it would be preferable to delete the introductory clause in (a) on page 1, line 7 and half of line 8, and add a separate statement to AS 39.90.160(b), which lists the circumstances in which the statutory defense and indemnification obligations do not apply. Such a change would be consistent with the legislative intent, as we understand it.

Proposed AS 39.90.160(b)(1) makes it incumbent on the public employee to timely notify the employer when served with a claim or lawsuit, in order to qualify for employer provided defense and indemnification. Specifically, the bill requires the employee to notify the employer in writing within 10 days, unless the employee has good cause for failing to provide timely or proper notice and the employer is not materially prejudiced. Although the 10-day period for notice to the employer is longer than currently allowed in some state collective bargaining agreements, it is acceptable. However, we believe the "good cause" exception to the notice requirement should be deleted (page two, lines 3 and 4). The exception guts the rule, and makes every late notice arguable.

Paragraphs (e) and (f) of proposed AS 39.90.160 cover the situation where an employer denies indemnification to an employee. They distinguish between situations in which the public employer is a co-defendant with the employee and situations in which the employer is not named as a co-defendant, or has been dismissed from the case. In the former situation, an employee who has been denied indemnification must file a cross-claim against the employer in the underlying action. Proposed AS 39.90.160(e). Where the employer is not a party to the suit, the employee must wait until the underlying case has ended, then file an action against the employer for indemnification within one year. Proposed AS 39.90.160(f).

These sections need to clarify what is meant by "denying" indemnification: do they only apply where the employer refuses to indemnify at all, or do they also cover the "reservation of rights" situation where an employer may conditionally agree to indemnify, pending the outcome of the case? If they apply only to outright denial of indemnification, we have no objection to the substance of (e) and (f) as written. However, if they cover the reservation of rights situation as well, we do not agree that employees should cross-claim against their employers during the underlying litigation. All would be best served by awaiting the outcome of the litigation to determine to what extent the employee is entitled to indemnification; if there is some dispute at that point, the employee should be able to file suit as provided in proposed AS 39.90.160(f).* In summary, we recommend that (e) and (f) be clarified so as not to apply to a "reservation of rights" or partial denial of indemnification; alternatively, we suggest that (e) be deleted and (f) be revised to apply to all situations where indemnification is denied by an employer, regardless of whether the employer is a party to the underlying litigation or not.

There is one other suggestion, that is more of a housekeeping nature. In proposed AS 39.90.160(i), on page 3 at line 20, the bill talks about an employee "on whose behalf a public employer has undertaken representation." To be consistent throughout the bill, that phrase should be replaced with "for whom a public employer has provided legal defense."

Thank you for your consideration of these proposals. Please do not hesitate to contact me or Brad Thompson, director of risk management, if you would like to discuss this subject.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Susan D. Cox
Susan D. Cox
Assistant Attorney General

SDC:pch

cc: Deborah Behr
Raga Elim

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* Outright denial of indemnification by the state is very rare. However, there are many times in which reservation of rights is warranted.

L /ISION OF LEGAL SERVIC_S
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM January 20, 1994

SUBJECT: Sectional Summary of Draft CSHB 277(STA). (Public employer obligation to defend and indemnify public employees)

TO: Representative Brian Porter, Chair
House Judiciary Committee

FROM: Teresa B. Cramer TBC
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill is not considered an authoritative interpretation of the bill. The bill itself is the best statement of its contents.

Section 1 adds Sec. 39.90.160 to the title that applies to public officers and employees. Subsection (a) provides that a public employer shall provide legal defense and pay settlements and judgements for a public employee when the acts or omissions that form the basis for the claim or judgement occurred during the course of and within the scope of the public employee's employment.

Subsection (b) states that the requirements of the section apply unless a collective bargaining agreement that covers the public employee includes a provision for defense and indemnification.

Subsection (c) limits when a public employer's obligation to defend and indemnify arises and requires the public employee to provide notice and make a good faith effort to cooperate in the defense. The public employer is not required to defend and indemnify if the act or omission was the result of the employee's gross negligence or intentional or wilful misconduct.

Subsection (d) prohibits a public employer from withholding legal defense or indemnification based solely on someone else's allegations of gross negligence or intentional or wilful misconduct.

SECTIONAL ANALYSIS

Subsections (e) - (g) address how the employer may refuse to provide legal defense and indemnification and the employee's remedies for the refusal.

Subsection (h) sets out circumstances in which the public employer does not have an obligation to provide legal defense and indemnification and subsection (i) permits the employer to commit itself to provide them under circumstances in which the employer would not have an obligation to do so.

Subsection (j) addresses what happens if a public employee settles a claim or action before requesting the public employer to defend and indemnify or after the employer has declined to do so.

Subsection (k) permits the public employer to provide a legal defense while contesting the employer's obligation to indemnify the employee.

Section (l) defines "employee," "employer," and "settlement" for the section.

TBC:gc
94-047.glc

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Juneau, Alaska 99801-2105

MEMORANDUM April 13, 1993

SUBJECT: Sectional Summary of HB 277. (Defense and indemnification of public employees)

TO: Representative Brian Porter

FROM: Teresa B. Cramer TBC
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill is not considered an authoritative interpretation of the bill. The bill itself is the best statement of its contents.

Section 1 adds a new section to the title that applies to public officers and employees. Subsection (a) provides that a public employer shall provide legal defense and pay settlements and judgements for a public employee when the acts or omissions that form the basis for the claim or judgement occurred during the course of and within the scope of the public employee's employment. This requirement applies unless a collective bargaining agreement that covers the public employee includes a provision for defense and indemnification.

Subsection (b) limits when a public employer's obligation to defend and indemnify arises and requires the public employee to provide notice and make a good faith effort to cooperate in the defense. The public employer is not required to defend and indemnify if the act or omission was the result of the employee's gross negligence or intentional or wilful misconduct.

Subsections (d) - (f) address how the employer may refuse to provide legal defense and indemnification and the employee's remedies for the refusal.

Subsection (g) sets out circumstances in which the public employer does not have an obligation to provide legal defense and indemnification and subsection (h) permits the employer to commit itself to provide them under circumstances in which the employer would not have an obligation to do so.

Subsection (i) addresses what happens if a public employee settles a claim or action before requesting the public employer to defend and indemnify or after the employer has declined to do so.

Subsection (j) permits the public employer to provide a legal defense while contesting the employer's obligation to indemnify the employee.

Section (k) defines "employee" and "employer" for the section.

TC:pl
93-293.plm

CSHB 277 - INDEMNIFICATION

Mr. Chairman, thank you for the opportunity to again be here this morning to testify on House Bill 277, Defense and Indemnification of Public Employees.

As was previously stated, this bill seeks to codify what is widely believed to be existing policy.

You have before you a Committee Substitute, which address concerns raised during the previous hearing. Briefly, I'll review the changes.

1. Section 1(a) - changed so that it states a public employer shall provide for the legal defense of employees.

   (b) is changed to state that a collective bargaining agreement which includes a defense and indemnification provision takes precedent over any other provision of the legislation.

   (c) through (l) are re-alphabetized.

   (f) On page 2, line 25, language was added to stipulate that if limitations on indemnification are placed on an employee, the employee's exclusive remedy is to bring action for indemnification under (g).

   (g) On page 3, line 1, language was added to stipulate that if limitations on indemnification are placed on an employee, the employee's exclusive remedy is to bring action for indemnification against the employer.

   (j) On page 3, line 29, language was changed from "on whose behalf a public employer has undertaken representation" to "for whom a public employer has provided legal defense".

   (l) On page 4, line 22, the definition of "settlement" as it applies to this legislation was added.

These changes incorporate concerns addressed by Susan Cox, the risk management attorney from the Department of Law.

Association. This section shall not apply to appointed employees or to employees designated in subsections 2.24.021A 1-4.

B. Managerial/professional employees against whom disciplinary action other than dismissal is taken or proposed shall have the right to request a hearing before the borough disciplinary review board. The employees shall serve written demand for said hearing on the mayor or his or her designee not later than ten days following the employee's receipt of written notice of the disciplinary action. Failure to serve demand for a hearing within said time limit, or to appear at a hearing scheduled in response to such a demand, shall constitute a waiver by the affected employee of the right to said hearing. The mayor or his or her designee may, but is not required to, suspend imposition of the disciplinary action pending review by the board.

C. All managerial/professional and classified employees against whom dismissal action is proposed shall be suspended from a pay status on the date on which the affected employee receives written notice of the proposed dismissal action. Said employees shall have the right to request a hearing before the borough disciplinary review board. The affected employee shall serve written demand for said hearing on the mayor or his or her designee not later than ten days following the employee's receipt of written notice of the proposed dismissal action. Failure to serve demand for a hearing within said time limit, or to appear at a hearing scheduled in response to such a demand, shall constitute a waiver by the affected employee of the right to said hearing. If the employee demands a hearing as specified above he shall continue in a non-pay status until the board's decision is issued or the case is otherwise concluded. Dismissal shall become effective:

1. If the employee fails to timely demand a hearing, upon the expiration of the ten day time limit set forth above; or

2. If the employee timely demands a hearing, upon the date the employee waives the hearing by failing to attend or upon the date on which the board issues a decision affirming the dismissal action, which ever shall first occur.

D. The disciplinary review board shall consist of a managerial/professional employee of the borough appointed by the mayor, who works in a division of the borough administration different from the division in which the affected employee works; a private citizen appointed by the mayor, who is neither employed by nor under contract to the borough; and a member of the borough assembly appointed by the presiding officer. The board shall conduct a hearing on the matter as soon as reasonably practicable after service of demand for said hearing upon the mayor or his or her designee. The board shall provide the affected employee with at least ten days' notice of the date and place of hearing and shall provide both the affected employee and a representative of borough management with an opportunity to exercise the following rights at the hearing:

1. To testify;
2. To present witnesses and other evidence;
3. To cross-examine witnesses;
4. To be represented by a person of his choice.

The board shall conduct the hearing as specified above and, after considering the evidence presented at said hearing, shall determine whether the disciplinary action imposed or proposed, or the severity thereof, is arbitrary, capricious or contrary to law. The board may affirm the disciplinary action, impose a lesser disciplinary action, or prohibit the imposition of discipline against the employee for incidents examined at the hearing. The affirmative vote of two members shall constitute the decision of the board which shall be in writing and shall be issued as soon as reasonably practicable following termination of the hearing. If an employee has been suspended from a pay status pending the hearing, said suspension shall continue until the board's decision is issued. If the board determines that dismissal would be arbitrary, capricious, or contrary to law, the employee shall be returned to a pay status and shall receive all pay to which he would have been entitled during the period of the suspension, unless the board directs otherwise.

E. The disciplinary review board shall deliver or mail its decision to the affected employee, and the decision of the board is final unless the affected employee appeals said decision to the Superior Court not later than thirty days after the date on which the decision was delivered or mailed to the employee. The Court shall review the matter on the record and shall determine whether the board abused its discretion. The case shall not be tried de novo. The Rules of Appellate Procedure of the State of Alaska shall apply to the case. (Ord. 85-137 § 5, 1985)

2.24.331 Safety.

A. It is the responsibility of all levels of borough management to ensure that prudent safety rules and precautions are developed, implemented and observed.

B. Failure of borough employees to comply with safety requirements and regulations shall be just cause for disciplinary action to include dismissal. (Ord. 84-102 § 2 (part), 1985)

2.24.341 Indemnification.

A. Indemnity. The borough shall indemnify any employee of the borough against any claim, demand, suit or judgment arising out of his employment by the borough if the borough employee, at the time of occurrence, was acting in good faith and within the scope of his duties.

B. Defense. The borough shall provide an employee with independent legal counsel:

1. When the employee requests and the assembly concurs;

2. When the borough mayor or borough attorney determines that there may be a conflict of interest between the borough and the employee.

The borough shall provide the employee with independent legal counsel when the liability of the employee involves claims or defenses not reasonably related to the claims or defenses of the borough. (Ord. 88-026 § 3, 1988)

2.24.351 Employee separations.

A. Resignation. To resign in good standing, an employee shall give the appointing authority or his designee not less than ten working days' notice prior to the action date of severance, unless the borough mayor or his designee agrees to permit a shorter period for extenuating circumstances. The employee notice of resignation shall be in writing and shall contain the reason for resignation. Failure to comply with this provision shall be entered in the employee's personnel file, and will be just cause for denying future reemployment.

B. No managerial/professional or classified employee shall be dismissed unless the provisions of Section 2.24.321 have been followed. Appointed employees and employees designated in Section 2.24.021A4 shall be dismissed in the manner described in Section 2.24.021 for each such employee. (Ord. 85-137 § 6, 1985; Ord. 84-102 § 2 (part), 1985)

2.24.361 Position descriptions.

The borough shall maintain a position classification (job description) for the various occupations authorized by the organization's staffing structure. This document will reflect the job title, representative functions of the position, minimum job requirements, and be coordinated with the borough's classification plan (Section 2.24.091).

A. Reclassification. Positions may be reclassified with authority of the borough mayor whenever the duties of the position have substantially and materially changed.

B. New Positions. The appointing authority (borough mayor) may create new positions, change the classification designations and salaries, provided such actions can be accomplished within the limitations of the current borough budget. (Ord. 84-102 § 2 (part), 1985)

2.24.371 Salary plan.

A. The borough shall publish a salary schedule each year in conjunction with the publication of the borough annual budget. Delays caused by extraordinary circumstances such as collective bargaining are excepted.

B. Normally, newly hired employees will be employed at the beginning rate of the appropriate salary range. However, in cases where unusual difficulty has been experienced in filling a vacancy, or when the applicant is exceptionally qualified, the borough mayor may direct the starting salary above the minimum. (Ord. 84-102 § 2 (part), 1985)

2.24.381 Payday.

Normally, borough employees shall be paid every other Friday of each month for the preceding two-week pay period. If these days fall on a holiday, the employees shall be paid on the last working day preceding the holiday. (Ord. 84-102 § 2 (part), 1985)

2.24.391 Overtime.

A. The borough's normal scheduled workweek encompasses forty hours' work within one week (Monday through Sunday). Employees, permanent or term-permanent, who are directed to work hours in excess of forty in one week shall be paid overtime calculated at a rate of one and one-half times the employee's base hourly rate for overtime worked during the period Monday through Saturday. Overtime worked on Sundays or holidays shall be compensated at a rate of double time (two times the employee's base hourly rate).

B. Temporary employees shall be compensated at a rate of one and one-half times their base hourly rate for all hours worked in excess of forty in one week.

C. No employee shall work overtime unless directed to do so by a supervisor empowered to give such direction.

D. For some positions, overtime work is considered a normal part of the job and does not justify overtime pay. Overtime compensation shall not be granted to:

1. Appointed employees;

2. Managerial/professional employees;

3. Persons occupying positions which qualify as supervisors under the criteria of the Fair Labor Standards Act, as interpreted by U.S. Department of Labor and the Alaska Department of Labor. (Ord. 86-017 § 15, 1986; Ord. 84-102 § 2 (part), 1985)

2.24.401 Holidays.

A. All borough employees, excluding temporaries, shall be entitled to the holidays listed below with pay. Full-time employees shall receive regular straight-time compensation; part-time employees shall be paid straight-time compensation in proportion to the number of hours regularly scheduled to work:

1. New Year's Day (January 1st);
2. Washington's Birthday (third Monday in February);
3. Memorial Day (last Monday in May);
4. Independence Day (July 4th);

ALASKA MUNICIPAL LEAGUE

217 Second Street, Suite 200 • Juneau, Alaska 99801 • Tel (907) 586-1325, Fax (907) 463-5480

January 24, 1994

TO: Representative Al Vezey, Chair
and
Members, House Committee on State Affairs

FROM: Kent E. Swisher, Executive Director

RE: **HB 277 - Indemnification of public employees**

It has been brought to my attention that your committee is considering **HB 277- Indemnification of public employees**, which would amend AS 39.90 to require public employers, including municipalities, to provide defense and indemnification of employees for actions or omissions that occurred during the course and within the scope of the employee's employment, except in cases of gross negligence or intentional or wilful misconduct. The bill allows for collective bargaining agreements to supersede state law with regard to defense and indemnification.

It is the understanding of the Alaska Municipal League that it is already common practice for municipalities to indemnify employees for actions/omissions taken during the course and scope of their employment and that such indemnification is included within most, if not all, collective bargaining agreements.

The League has no objection to the current draft of HB 277, or to the proposed Committee Substitute dated 1/20/94. It appears to codify existing common practice, to provide reasonable protection for employers by requiring the employee to keep the employer informed and to cooperate in the defense, and to provide equal treatment of all types of employees.

cc: Representative Brian Porter

Member of the National League of Cities and the National Association of Counties

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Anchorage Telephone Utility

Executive Offices

JAN 2 0 1994

January 20, 1994

Representative Brian Porter
Room 122
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Porter:

I want to express my appreciation to you for introducing H.B. 377. This legislation would allow public entities to indemnify employees from personnel liability resulting from honest and efficient accomplishment of their job responsibilities. ATU fully supports this bill and urges its speedy approval.

Our society is seeing increasing numbers of former employees arguing wrongful discharge cases in front of juries. Without regard to the merits of such cases, our system of justice places public employees in a precarious position. Plaintiffs in such actions can not gain punitive damages from a public entity; punitive damages may only be applied to a private entity. Given this, plaintiffs' attorneys will often name an individual as defendant in order to establish a party with punitive liability or, as may be the case, simply to provide leverage.

While individuals so named, more often than not, eventually are relieved of liability, their lives in the meantime can be dramatically impacted. An individual so named will have all credit suspended pending outcome of the case. Simply put, the individual is unable to buy a house, a car or even a large appliance through normal credit channels until the case is settled. In many instances, such cases take years to resolve.

600 Telephone Avenue ☎ Anchorage, Alaska 99503-6091 ☎ Telephone: (907) 561-7000 ☎ Fax: (907) 562-2688

Our concern in rectifying this unfair situation stems from our desire to have effective employees carrying out their responsibilities in a competent and efficient manner. Clearly, an employee who must consider his/her personal fortunes and those of his family each time he makes a decision will find his thinking swayed by this potential threat. We ask for this legislation to be passed so that our employees may work in an atmosphere free from the threat of personal reprisal.

Again, thank you for your efforts. If you need anything further from ATU regarding this legislation, please let me know.

Sincerely,

ANCHORAGE TELEPHONE UTILITY

James G. Morrison
General Manager

ALASKA PEACE OFFICERS ASSOCIATION

State APOA Office • P.O. Box 240106 • Anchorage, Alaska 99524-0106 • (907) 277-0515

JAN 2 6 1994

January 18, 1994

Representative Brian Porter
State Capitol
Juneau, AK 99801

Dear Representative Porter,

The Alaska Peace Officers Association supports House Bill 277. We believe that government must be held responsible for its actions. When someone is wrongly harmed through the actions of government, injured parties should be able to make claims as appropriate. However, we believe very strongly that government employees should be defended and protected when their actions are made in good faith and without malice.

Generally when a lawsuit is filed, employees are listed as parties to the action. In the past, employees have not been held personally liable for actions taken at the behest of their employer, unless they were clearly working outside the scope of their authority. This seems to be changing. Recent court rulings imposing personal punitive damages are placing the livelihoods of our public employees in jeopardy.

The trend where public employees are being held personally liable places employees in a position where their own personal assets are at risk. All government employees are in danger, from the highest level policy maker to the lowest level of workers where those policies are carried out. The social worker, the road maintenance supervisor, the police officer, the medic, the fire fighter, and elected officials are all vulnerable.

We in law enforcement believe this is an undue burden upon the state's public employees, It carries great potential for the workings of government to become bogged down because employees fear that decisions they make in good faith may result in the loss of their assets. I encourage you and your colleagues to support House Bill 277.

Sincerely,

Michael A. Grimes, Statewide President
Alaska Peace Officers Association

EXECUTIVE DIRECTOR
Edward T. Harler
Anchorage

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ANCHORAGE POLICE DEPARTMENT

4501 SOUTH BRAGAW STREET ♦ ANCHORAGE, ALASKA 99507-1599
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Tom Fink, Mayor

Service since 1921

Received
JAN 19 1994
REP BRIAN PORTER

January 18, 1994

Representative Brian Porter
House of Representatives
Alaska State Legislature
Juneau, Alaska 99801-1182

Dear Representative Porter,

I am writing this letter in support of House Bill 277, which would require public employers to indemnify public employees with respect to law suits and legal claims made against employees who are working within the scope and authority of their position. I can safely represent that the subject of indemnification is very important to all public employees.

Law enforcement over the years has identified indemnification as a top legislative priority. Our premise is simple. We believe that when a public employee is working at the behest of their employer, and they operate in good faith and within their proper authority, employees should be indemnified.

This is not an argument for protection of bad employees. It is a request that, as a matter of law, employers protect employees who are doing the work of the government. Threatened or actual legal action has a very chilling effect on any employee. If personal assets or wealth are unfairly at risk, employees are discouraged from making decisions or taking action.

We are happy to work with you and the Legislature in the passage of this bill. If you have any questions, please contact me at 786-8552.

Sincerely,

Duane S. Udland

Duane S. Udland, Deputy Chief
Anchorage Police Department
4501 South Bragaw
Anchorage, Alaska 99507

Alaska Association Chiefs of Police

January 17, 1994

Received
JAN 19 1994
REP BRIAN PORTER

Representative Brian Porter
House of Representatives
State Capital
Juneau, Alaska, 99811

Dear Representative Porter:

Two years ago the Alaska Association of Chiefs of Police, the Alaska Peace Officers Association, and the FBI National Academy Associates identified the indemnification of public employees as their number one legislative riority. This issue is even more timely and critical now. The following is the combined statement and position of the three professional law enforcement associations concerning indemnification.

"We believe that government must be held responsible for its actions. When someone is wrongly harmed through the actions of government, injured parties should be able to make claims as appropriate. However, we believe very strongly that government employees should be defended and protected when their actions are made in good faith.

Generally when a lawsuit is filed, individual employees are listed as parties to the action also. In the past, employees have not been held personally liable for actions taken at the behest of their employer unless they were clearly working outside the scope of their authority. This seems to be changing. Recent court rulings imposing personal punitive damages are placing the livelihoods of public employees in jeopardy.

The trend to hold public employees personally liable places employees in a position where their own personal assets are at risk. This means that all government employees are in danger, from the highest level policy maker to the level of worker where the policy is implemented. Even elected officials are vulnerable today.

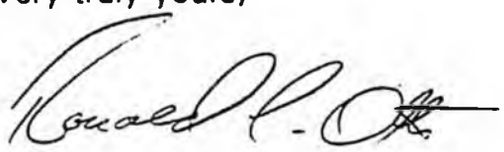
We in law enforcement believe this is an undue burden upon the public employees of this State. It carries the potential for the workings of government to become bogged down because employees fear that decisions they make in good faith may result in the loss of their assets.

When employees are doing the work of the government, within the scope of their authority, and without malice, they should not be held personally liable when they are named as parties to law suits.

Legislation should be passed that indemnifies public employees and frees them from the burden of working under the constant threat that their good faith judgments can result in the loss of their homes, their cars, or their savings."

If we can be of any assistance in the passage of your bill please let me know.

Very truly yours,



Ronald L. Otte
President

RLO/lp

The New ATU
Behind Every Call You Make

Anchorage Telephone Utility

Executive Offices

January 17, 1994

Representative Brian Porter
Room 122
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Porter:

As one of many employees who would be effected by the passage of House Bill 277, I appreciate the opportunity of conveying to you how important I believe this legislation to be, and how strongly I support its passage.

As the Director of Human Resources for Anchorage Telephone Utility, I typically must make the final decision regarding employee terminations. Increasingly, that decision is based not only on "is this the appropriate action for the employee", but also "how likely are we to convince a jury that this is fair".

The number of these cases which go to jury trial is increasing, as is the frequency with which specific individuals are being named as defendants. Consequently, those who must make these critical employment decisions are becoming more and more cautious about their involvement, often to the detriment of the organizations for which they work.

This concern is not hypothetical. A recent experience at ATU was neither particularly unique nor particularly onerous, but it does serve as a good example of why this legislation is so timely and so important.

A number of months ago, a significant amount of money became unaccounted for in our Customer Service area. Following extensive investigation, it became apparent that specific procedures had not been followed, and the Supervisor of the Cash function was identified as responsible for the missing money. While careful not to suggest that this individual had taken the money, we felt that it was while under her responsibility and due to her failure to follow procedures that the cash disappeared. After the investigation and significant deliberations, I determined that termination was the appropriate action.

600 Telephone Avenue ☎ Anchorage, Alaska 99503 6091 ☎ Telephone: (907) 561-3000 ☎ Fax: (907) 563-2688

A few months later, this former employee filed a wrongful termination suit against the Utility, and I was named as a co-defendant. There were no particular reasons given for me being included, other than an allegation that I may have defamed her by telling others that the employee had stolen the money. My own opinion as to the reason I was named is that a former employee cannot be awarded punitive damages when suing a public employer. However, punitive damages can be awarded against an individual. By naming me as co-defendant, this former employee was keeping the option of punitive damages available to the future jury.

The consequences of being named as defendant or even co-defendant in this type of suit are significant. Any financial or real estate transaction I might have attempted would have been thwarted by an honest answer to the standard question on an application: "Are you currently involved in any type of civil litigation?" Since wrongful termination cases can drag on for several years, that limitation could have been a significant and enduring problem.

Of greater concern would be the legal fees, which as defendant or even co-defendant, might have been my personal responsibility. With current estimates of approximately $200,000 in defense costs in a typical wrongful termination, the implication is obvious.

And of greatest concern is the potential finding and award of the jury. With back pay, future pay, emotional and physical distress claims, and conceivably punitive damages, the personal consequence to one who must make a termination decision without some kind of indemnification can be devastating.

In the ATU example I used, the outcome has been positive. Although the case has not been resolved, following early depositions and some legal work by defense counsel, I was dropped as a defendant. However, every employment decision is clouded by the thought that next time I may not be as fortunate.

Ultimately, without the type of protection provided by House Bill 277, those who make employment decisions may determine that doing the "right" thing is not worth the risk, and workplace situations which should be addressed will instead be ignored. At that point, everyone loses.

Public employers need individuals in decision making positions who will make careful and frequently difficult decisions. Those individuals need an employer who will stand by them and support them when those decisions are challenged. House Bill 277 provides just that type of support. I very much appreciate and endorse your support of this bill.

Sincerely,

ANCHORAGE TELEPHONE UTILITY

Steven B Terry
Director, Human Resources

HB

280

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 280

Revision Date: December 9, 1993
Title: "An Act adopting the Uniform Custodial Trust Act"
Sponsor: House Rules Committee
Requestor: Governor's Office

Department Affected: Department of Law
BRU: Legal Services
Component: Operations

COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						
FUNDING:						
1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
POSITIONS:						
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
Please see the attached analysis. -

Richard L. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services Division
Date: December 9, 1993

Richard L. Pegues /FOR/

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law
Date: December 9, 1993

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Rev 11/93

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 280

ANALYSIS CONTINUATION:

The Custodial Trust Act is designed to provide a statutory standby inter vivos trust for individuals who typically are not very affluent or sophisticated, and possibly represented by attorneys engaged in general rther than specialized estate practice. The most frequent use of this trust would be in response to the commonly occurring need of elderly individuals to provide for the future management of assets in the event of incapacity.

Although the most frequent use probably will be by elderly persons, it is also available for a parent to establish a custodial trust for an adult child who may be incapacitated; for adult persons in the military, or those leaving the country temporarily, to place their property with another for management without relinquishing beneficial ownership of their property; or for young people who have received property under the Uniform Transfers to Minors Act to continue a custodial trust as adults in order to obtain the benefit and convenience of management services performed by the custodial trustee.

The objective of the statute is to provide a simple trust that is uncomplicated in its creation, administration, and termination. Consequently, the statute should also serve to avoid unnecessary administrative and legal costs and to conserve the corpus of individual trusts. These are transactions involving private persons, and the bill will therefore not have an impact on the Department of Law or state government.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 280

Revision Date: April 12, 1993
Title: "An Act adopting the Uniform Custodial Trust Act."
Sponsor: House Rules Committee
Requestor: House Rules Committee

Department Affected: Department of Law
BRU: Legal Services
Component: Operations

COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE FUND SOURCE:						
FUNDING:						
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services Division
Date: April 12, 1993

Richard I. Pegues /FOR/

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law
Date: April 12, 1993

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HB 280
Contacts

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Terry Bannister
Bill Drafter, Legal Services (wk) 2450

Deborah Behr
Uniform Law Commissioner
Attorney General's office (wk) 465-3600

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM April 18, 1993

SUBJECT: Sectional Summary of HB 280

TO: Representative Carl Moses
Chair
House Rules Committee

FROM: Theresa L. Bannister TB
Legislative Counsel

You have requested a sectional summary of the above described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1. Contains the entire bill. Adds a new chapter, the "Alaska Uniform Custodial Trust Act."

Sec. 13.60.010 authorizes a person to create a custodial trust of property by a written transfer of the property to another person or by a written declaration. Places title to the custodial trust property in the custodial trustee and the beneficial interest in the beneficiary. Prohibits termination of a custodial trust by the transferor except as provided in the section. Terminates the trust on the beneficiary's death. Authorizes a person to augment existing custodial trust property. Authorizes the transferor to designate, or authorize the designation of, a successor custodial trustee in the trust instrument. States that the chapter does not displace or restrict other means of creating trusts.

Sec. 13.60.020. Authorizes a person to create a custodial trust upon the occurrence of a future event. Authorizes the designation of a substitute or successor custodial trustee. Identifies the documents that can be used to make a designation; otherwise, requires the designation to be registered with or delivered to a specified person.

Sec. 13.60 030. States that the obligations of a custodial trustee arise when the trustee accepts the custodial trust property. States how the acceptance may be

evidenced. States that upon acceptance the trustee is subject to the personal jurisdiction of the court with respect to a matter relating to the trust.

Sec. 13.60.040. Unless otherwise directed by an instrument designating a custodial trustee under sec. 13.60.020, authorizes a person holding the property of, or owing a debt to, certain incapacitated individuals to make a transfer to certain persons as custodial trustee for the incapacitated individuals. Transfers over $20.000 must be authorized by the court. States that a written acknowledgement of delivery signed by the custodial trustee constitutes a sufficient receipt and discharge for the transferred property.

Sec. 13.60.050. States that beneficial interests in a custodial trust created for multiple beneficiaries are separate trusts of equal undivided interests for each beneficiary. Indicates when a right of survivorship exists. Authorizes administration as a single custodial trust for custodial trust property held by the same trustee for the same beneficiary. Requires separate accounting to each beneficiary with regard to custodial trust property held for more than one beneficiary.

Sec. 13.60.060. Establishes the general duties of, and the standard of care to be exercised by, the custodial trustee. States that the exercise of a durable power of attorney for an incapacitated beneficiary is not effective to terminate or direct the administration or distribution of a custodial trust.

Sec. 13.60.070. Establishes the general powers of a custodial trustee. Indicates that the section does not relieve a custodial trustee from liability for a violation of sec. 13.60.060.

Sec. 13.60.080. Establishes how the custodial trustee may use custodial trust property.

Sec. 13.60.090. Determines when the custodial trustee may administer a custodial trust as for an incapacitated beneficiary. Establishes what a custodial trustee may rely on to determine that the beneficiary is incapacitated. Indicates when a custodial trustee for an incapacitated beneficiary can administer the trust as for a beneficiary whose incapacity has ended or changed. On petition of certain persons directs the court to determine whether the beneficiary is incapacitated. Directs a custodial trustee to administer the custodial trust as for an incapacitated beneficiary under other given circumstances if there isn't a determination of incapacity under (b) or (d) of this section. States that the incapacity of a beneficiary doesn't terminate the trust, a successor trustee designation, the trustee's rights or powers, or the immunities of certain third persons.

Sec. 13.60.100. Exempts a third person who deals with a custodial trustee in good faith and without a court order from being held liable for dealing with the custodial trustee in certain circumstances.

Sec. 13.60.110. Authorizes a third person to bring certain claims against the custodial trust property by proceeding against the trustee in a fiduciary capacity. States that a custodial trustee is not personally liable to a third person on certain contracts and for certain obligations. States that a beneficiary is not personally liable to a third person for certain obligations or torts unless certain circumstances exist. States that (b) and (c) of the section do not preclude proceedings to establish the liability of the trustee or beneficiary to the extent the person sued is protected as the insured by liability insurance.

Sec. 13.60.120. Addresses the declination, resignation, incapacity, death, and removal of custodial trustees. Addresses the designation and succession of successor custodial trustees. Addresses the handling of trust property and records in these circumstances.

Sec. 13.60.130. States that, except as otherwise provided in the custodial trust instrument, in an agreement with the beneficiary, or by court order, the custodial trustee is entitled to reimbursement for reasonable expenses, may charge a reasonable compensation for services, and does not need to furnish security.

Sec. 13.60.140. Addresses the reporting and accounting requirement for the custodial trustee. Authorizes certain persons to petition the court for an accounting or approval of final accounts. Authorizes the court to require or permit the custodial trustee or the custodial trustee's legal representative to account. If a custodial trustee is removed, directs the court to require an accounting and to order delivery of the trust property and records to the successor custodial trustee and the execution of certain instruments. Authorizes the court under certain circumstances to issue instructions to the custodial trustee or to review the acts of the trustee or the compensation determined by the custodial trustee for the services of the custodial trustee or others.

Sec. 13.60.150. Indicates when actions against a custodial trustee are barred.

Sec. 13.60.160. Indicates how the custodial trustee is to distribute the custodial trust property when the custodial trust is terminated. Provides for continuation of the trust if the distributee is incapacitated and until certain circumstances occur. Prevents the death of the beneficiary from terminating the custodial trustee's power to discharge certain obligations.

Sec. 13.60.170. Establishes methods and forms for creating custodial trusts.

Sec. 13.60.180. Indicates what law applies to transfers or declarations creating custodial trusts.

Sec. 13.60.190. Directs how the chapter is to be applied and construed.

Sec. 13.60.900. Defines the terms used in the chapter.

Sec. 13.60.990. Gives the chapter a short title.

If I may be of further assistance, please advise.

TLB:lmb
93-127.lmb

THE UNIFORM CUSTODIAL TRUST ACT

CONTENTS

A Few Facts About

THE UNIFORM CUSTODIAL TRUST ACT

PURPOSE: To make the benefits of trusts available to people without extensive financial assets.

ORIGIN: Completed by the Uniform Law Commissioners in 1987.

ENDORSED BY: American Bar Association

STATE ADOPTIONS:

- Arkansas
- Hawaii
- Idaho
- Minnesota
- New Mexico
- Rhode Island
- Virginia
- Wisconsin

1993 INTRODUCTIONS:

- Massachusetts

For any further information regarding the Uniform Custodial Trust Act, please contact John McCabe or Katie Robinson at 312-915-0195.

(1/15/93)

WHY STATES SHOULD ADOPT THE

UNIFORM CUSTODIAL TRUST ACT

The Uniform Custodial Trust Act (UCTA), promulgated by the National Conference of Commissioners on Uniform State Laws in 1987, offers everyone a chance to establish a kind of trust that guarantees control of property at a time when a person becomes incapacitated, and that may also be used to pass on property at death without probate. The act is designed to offer a new, very simplified custodial trust, making the benefits of trusts available to people without extensive financial assets.

The UCTA was inspired by the Uniform Transfers to Minors Act, and the highly useful concept of a custodian for property of a minor under the terms of that act. But why should minors be the only beneficiaries of a good idea?

There are many reasons why every state should consider and adopt the Uniform Custodial Trust Act.

INEXPENSIVE

A custodial trust is inexpensive to create. Fees for consultation and drafting will be minimum - and non-existent in many cases. In addition, the UCTA provides an alternative to a costly court-supervised conservator or guardian. It can be used to avoid the costs and delays of probate proceedings at death. Economies can accrue broadly with the use of custodial trusts.

SIMPLE

A custodial trust can be set up by simple language referencing the statute. No elaborate trust document is necessary. Rights and obligation are derived directly from the statute.

CONTROL

Any person who creates a custodial trust retains complete control over it until incapacity or death. The named trustee manages the property in the case of incapacity, but until then, control remains with the beneficiary - the creator of the trust. The beneficiary directs the management of the property, receives income and principal, and can cancel the trust at any time.

COMPREHENSIVE

Any kind of property, real or personal, tangible or intangible, can be put in a custodial trust. Anybody can be made a beneficiary. Any legally competent person or entity can be appointed as trustee.

The Uniform Custodial Trust Act is simple, inexpensive, comprehensive, and complete. The most frequent users of this trust will most likely be senior citizens who want to provide for the management of assets in the event of future incapacity. It is also available for a parent to establish a custodial trust for an adult child who may be incapacitated. Those leaving the country temporarily can also place their property with another for management without relinquishing permanent control of their property.

The Uniform Custodial Trust Act should be adopted in every state. Although it meshes with the Uniform Probate Code (UPC), it is appropriate in states which have not adopted the UPC.

UNIFORM CUSTODIAL TRUST ACT

We are perfectly free to be irresponsible with the property that we accumulate. We can dissipate it, abandon it, or ignore it. Most of us choose to be more responsible, however. We tend to accumulate property for the economic security it provides ourselves and our families. It comes as a great shock, therefore, when we find that controlling and protecting it at key moments in our lives is much harder than we imagined. What happens if we become incapacitated? Guardianships and conservatorships are expensive last resorts that mean total loss of control. What happens when we die? Wills and the probate process offer some solace, but probate becomes more onerous and expensive than helpful. Extensive estate planning with its panoply of generation-skipping devices, such as trusts, is expensive and beyond the resources of most people. The search for a better way continues.

The Uniform Law Commissioners' Uniform Custodial Trust Act, promulgated in 1987, offers some needed help. Inter vivos and testamentary, discretionary trusts are too complicated to meet certain needs. But the trust form of ownership, simplified and carefully prescribed in a statute, can meet them - thus the Uniform Custodial Trust Act (UCTA).

A trust is, simply, a legal structure for organizing the ownership and management of property for its preservation on behalf of specified individuals. A trust involves three fundamental participants: a donor who puts property in a trust; a trustee who owns and manages the trust; and beneficiaries who receive the financial benefit of the trust and for whom the property is preserved. A trust arises in a trust agreement or instrument (a document) in which the donor names the trustee and beneficiaries. The donor also establishes the trustee's powers over the property and the beneficiaries' rights to principal and income in the trust instrument. The donor then transfers property to the trustee, who owns it for the benefit of the beneficiaries. The trustee is also a fiduciary, meaning that he or she is subject to special rules and standards of care when managing the trust's assets. All trusts have these characteristics, and a custodial trust is but one of a number of kinds of trusts.

The UCTA allows any person to create a custodial trust by executing a simple statement (it may be a separate document or merely a notation on an existing title document) that the property is being placed in trust under the Act. The trustee's obligations arise upon acceptance of the property. That is all that is necessary to create the trust.

The UCTA permits a kind of springing trust too - a trust that arises upon the happening of a future event. Any person can create such a trust with respect to specific property by executing a simple statement, indicating that the trust will be established upon the happening of the event.

The UCTA also allows anybody obligated to an incapacitated person, without a conservator (a conservator is a court-appointed manager of an incapacitated person's property), to establish a custodial trust into which property satisfying the obligation is placed for the incapacitated person as beneficiary. If the value of the property so placed exceeds $20,000, however, a transfer into such a trust must be approved by a court.

What distinguishes a custodial trust from other kinds of trusts? To begin with, the UCTA governs all aspects of the trust relationship, including a trustee's powers and obligations. Therefore, elaborate trust documents are not needed. Second, a custodial trust exists at the will of its beneficiaries. Any beneficiary can terminate his or her share of the trust. Third, trust beneficiaries can direct the trustee's payment of income to themselves. Fourth, the beneficiaries can direct the trustee's investment and management of the trust property. Fifth, at a beneficiary's incapacity, the trust continues as a discretionary trust, with the trustee as a full fiduciary. Therefore, no conservator needs to be appointed for the purposes of managing the trust property. Sixth, a beneficiary may direct the trustee by a simple writing to distribute the trust property in any fashion the beneficiary desires at the beneficiary's death. The writing is not a will unless the beneficiary makes it one, and the distribution is a non-probate transfer of the property.

These powers of beneficiaries distinguish a custodial trust from all other trusts. Trustees under the common law are not subject to the direction of beneficiaries. The powers of the beneficiaries in the UCTA suggest why such a trust is called "custodial" and suggest the values of a custodial trust, as well as its limitations.

A trust is custodial because the trustee's powers are limited by the beneficiaries - the trustee is a custodian for the beneficiaries' interests. The trustee is a custodian until such time as a beneficiary becomes incapacitated. The custodial trust is an ideal form of ownership for anyone who wants to make sure property is properly managed before incapacity and protected afterwards. A person with property merely conveys the property to a trustee, naming himself or herself as beneficiary. While there are no questions of capacity, the beneficiary retains significant powers over the property. At incapacity, his or her appointed trustee continues to manage the property and use it for the beneficiary. If incapacity is temporary, the beneficiary reasserts his or her powers when capacity returns. If at any time a beneficiary with capacity desires to terminate the custodial trust, he or she simply terminates it.

Who will use the trust? Older people who want to make sure they control who manages their property when they are incapacitated, are the most likely users of the UCTA. People who go on long trips and who want to assure proper management while they are gone or who want protection if they become incapacitated while traveling can use a custodial trust rather than a power of attorney if it suits their needs. These are examples of people and situations for which the UCTA was created.

At the same time, people who need discretionary trusts for estate planning and tax purposes will continue to turn to traditional trust law. The control provided to beneficiaries in the UCTA and the ability to terminate a custodial trust do not make it suitable for these purposes.

The UCTA fills very particular needs of ordinary people. It should be considered strongly by any state or jurisdiction conscious of the difficulties an ordinary person has in preparing for personal incapacity and death.

A 100–YEAR TRADITION OF EXCELLENCE

The National Conference Of Commissioners On Uniform State Laws

In the latter part of the 19th century, about the time a prominent law professor was characterizing state legal systems as "a whimsical diversity of laws," a movement began taking hold for the development of uniform laws among the states.

The Alabama Bar Association took the first formal action to encourage the development of "uniform" laws in 1881. But it was not until August 1889, during the 12th annual meeting of the American Bar Association, that the legal community made a formal resolution to work for "uniformity in the laws" of the then 44 states.

New York was the first state to act. In 1890 it authorized the governor to appoint three commissioners to "examine the subjects of marriage and divorce, insolvency, the form of notarial certificates and other subjects; to ascertain the best means to effect an assimilation and uniformity of the laws of the states; and especially to consider whether it would be wise and practicable for the state of New York to invite other states of the Union to send representatives to a convention to draft uniform laws to be submitted for the approval and adoption of the several states...." A few months later the ABA endorsed the New York action and urged the states, the District of Columbia and territorial legislatures to follow New York's lead.

In the Beginning -- Seven States

Six other states heeded the call and joined New York at the first meeting of the "Conference of State Boards of Commissioners on Promoting Uniformity of Law in the U.S." in Saratoga Springs, New York on August 24, 1892. They were Delaware, Georgia, Massachusetts, Michigan, New Jersey and Pennsylvania.

The new Commissioners wasted no time. They immediately completed and urged states and territories to adopt three acts – Relating to Acknowledgments on Written Instruments, Validating Wills Lawfully Executed Without the State, and Recognizing as Valid Wills Probated in Another State.

They also recommended that states enact laws governing payment of notes, validating contracts and divorce and marriage. With great variance in the marriage consent age, they proposed raising the marrying age to 18 for males and 16 for females.

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

After this burst of activity, the Conference produced no other proposals until 1896, when the Negotiable Instruments Law was completed. The NIL was the first act adopted by every state and the District of Columbia; it later became the basis for Article 3 of the Uniform Commercial Code.

Then There were 33

By 1900, 31 states and two territories had appointed commissioners on uniform laws. During the first decade of the new century the Uniform Law Commissioners (ULC) concentrated on legislation to facilitate interstate commerce, drafting laws concerning sales, warehousing and transportation. A majority of states adopted all of these pioneering acts before they, as well as the Negotiable Instruments Law, were superseded by the Uniform Commercial Code some 40 years later.

By 1910, only Nevada and the Territory of Alaska had not appointed commissioners. They came aboard by 1912.

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

The ULC responded to problems of the 1920s with proposals in such areas as aviation and public utilities. In the 1930s, Commissioners wrestled with machine gun laws as well as torts and trusts.

Fifty–Year Assessment

As the Conference approached its golden anniversary year, its leadership began a reassessment to determine how the ULC could better serve the federal system. Though the past had been productive, Commissioners decided they could play a more useful role in the future if they attacked major problems with comprehensive legal solutions rather than trying to address them piecemeal.

That decision led to the launching of the mammoth project that produced the Uniform Commercial Code (UCC). The ULC officially took on the task of drafting a comprehensive code to provide guidelines for all commercial transactions in 1940. Work on some of its components had already begun. In 1947 the ULC and the American Law Institute joined in a partnership that put all the components together in a Uniform Commercial Code that was offered to the states for their consideration in 1951. More than a decade of difficult battles for adoption in every state followed. But by 1967, all the states had enacted the Code except for Louisiana, which remains the lone holdout on several code provisions.

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

The UCC is not set in stone. In 1987 the first new article since 1951 was approved, establishing law for the billion dollar leasing industry. As the Conference embarks on its second century, it is dealing with major changes in state payment system law, including electronic funds transfers, to bring the Code into the 21st century of finance.

The UCC's success as a comprehensive solution inspired Commissioners to produce and work for enactment of a wide variety of legislative solutions to other basic state problems. These have included: the Uniform Probate Code, Uniform Consumer Credit Code, Uniform Marriage and Divorce Act, Uniform Alcoholism and Intoxication Treatment Act and a package of proposals designed to do for land transactions what the UCC did for transactions in the commercial realm — provide modern law to deal with modern problems.

While forging these major broad projects — primarily from the 1960s to the early 1980s — the ULC also completed legislation needed by the states to deal with more specific problems. Among these proposals were the Child Custody Jurisdiction Act, Anatomical Gift Act, a major revision of the Limited Partnership Act and the Determination of Death Act.

Agendas are made by a Scope and Program Committee. Most recently, commercial and family law have been focal areas for drafting efforts. Among the "products" of the 1980s are two new Articles to the Uniform Commercial Code, a Trade Secrets Act, the Transfers to Minors Act, Premarital Agreement and Marital Property Acts, and acts addressing such topical issues as surrogate mother contracts and rights of the terminally ill.

Uniform and Model Acts

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

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

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

Why the Conference Works

Commissioners dedicated to the work of the Conference make it work. They include about 300 law professors, judges and lawyers in the public and private sector. It is their contribution of time and expertise – Commissioners receive no salaries or fees for their work with the Conference – that has earned NCCUSL the media label of "prestigious." In this century, President Woodrow Wilson and U.S Supreme Court Justices Louis D. Brandeis and William F. Rehnquist served as Commissioners. So did such law school legends as Roscoe Pound of Harvard.

Commissioners are appointed by the 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. The number of Commissioners (most states have at least three) and the method of appointment vary from state to state. While the governor is responsible for appointments in most states, Commissioners are usually considered non–partisan. As a result, many are appointed by the governor of one party and reappointed by the governor of another. Some Commissioners serve the ULC for decades.

A Two–Part Job

Being a Commissioner involves two areas of service. They not only draft proposals but then work within their state for enactment of uniform laws designed to solve problems common to all states.

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

For example, there were a number of real estate law experts appointed to the committee responsible for preparing preliminary drafts of the land transactions package, which includes the Uniform Land Transactions Act (ULTA), Uniform Simplification of Land Transfers Act (USOLTA), Uniform Condominium Act (UCA), Uniform Planned Community Act (UPCA),

Model Real Estate Cooperative Act (MRECA), and finally the Uniform Common Interest Ownership Act (UCIOA). These drafters included Commissioners who were law school professors as well as practicing lawyers specializing in real estate law. Outside lawyer and non–lawyer experts were invited to provide specialized knowledge to the drafting committee. These advisers represented associations of lenders, builders, sellers, lawyers and consumers. But all decisions were made by Commissioners who represent only the people of their state.

The Drafting Ordeal

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

During the annual meeting Commissioners assemble for a week, spending every day and some nights considering each "tentative draft" prepared by the drafting committees. The drafts are read "line by line" and then discussed, debated and changed. With hundreds of trained eyes probing every concept and word, it's a rare draft that leaves an annual meeting in the same form it comes in. Because the ULC is a confederation of state commissions on uniform laws, close issues are decided by polling state delegations. Regardless of the number of representatives from each state, each state has only one vote.

Shortly after the annual meeting, committees with uncompleted drafts begin incorporating changes made during the meeting and dealing with new problems raised by Commissioners as well as others.

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

The Conference Proposes – The State Disposes

With the drafting done, a Commissioner's job has only begun. Each is then obligated to return home and work for adoption of the completed proposal in his or her state legislature. Normal resistance to anything new makes this the most difficult part of a Commissioner's responsibility. Remember, it took 14 years before the Uniform Commercial Code was adopted by 49 states.

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

Published by the National Conference of Commissioners on Uniform State Laws
676 N. St. Clair, Chicago, Illinois 60611 (312) 915-0195

UNIFORM STATE LAWS

What are they?

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

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

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

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

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

Back in 1892

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

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

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

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

National Conference
of Commissioners
on Uniform State Laws
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Uniform Law Commissioners

UNIFORM STATE LAWS

Cost and Value

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

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

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

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

The Hard Job

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

GENESIS of a Law

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

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

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

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

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

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

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

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

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

Commissioners

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

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

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

Updating Acts

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

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

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

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

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

SPONSOR STATEMENT
UNIFORM CUSTODIAL TRUST ACT

If enacted, HB 280 would adopt the Uniform Custodial Trust Act into Alaska Statute.

The Uniform Custodial Trust Act (UCTA) makes the benefits of trusts available to people without extensive financial assets. It offers everyone a chance to establish a kind of trust that guarantees control of property at a time when a person becomes incapacitated, and that may also be used to pass on property at death without probate. The act is designed to offer a new, very simplified custodial trust.

The UCTA was inspired by the Uniform Transfers to Minors Act, and the highly useful concept of a custodian for property of a minor under the terms of that act.

The UCTA is also endorsed by the American Bar Association

The state of Alaska should consider adoption of the UCTA. Custodial Trusts are inexpensive to create, they can be set up by a simple language reference in statute, the person who creates the trust retains control over it until incapacity or death and the trusts are comprehensive - that is they can contain real or personal property, tangible or intangible.

The most frequent users of this trust will most likely be senior citizens who want to provide for the management of assets in the event of future incapacity. Persons leaving the country temporarily can also place their property with another for management without relinquishing permanent control of their property.

HB 280 is a non-controversial bill and I would appreciate consideration and affirmative action by the committee.

Alaska State Legislature

Representative Carl E. Moses

CHAIRMAN
HOUSE RULES COMMITTEE

CHAIRMAN
HOUSE SPECIAL FISHERIES COMMITTEE

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MEMORANDUM

DATE: April 20, 1993

TO: Representative Brian Porter
Chairman, House Judiciary Committee

FROM: Representative Carl E. Moses
Chairman, House Rules Committee

RE: Request for Hearing

I would like to request a committee hearing for HB280 at your earliest convenience. HB 280 would adopt the Uniform Custodial Trust Act.

The Uniform Custodial Trust Act (UCTA) offers everyone a chance to establish a kind of trust that guarantees control of property at a time when a person becomes incapacitated, and that may also be used to pass on property at death without probate. The act is designed to offer a new, very simplified custodial trust, making the benefits of trusts available to people without extensive financial assets.

The state of Alaska should consider adoption of the UCTA. Custodial Trusts are inexpensive to create, they can be set up by a simple language reference in statute, the person who creates the trust retains control over it until incapacity or death and the trusts are comprehensive - that is they can contain real or personal property, tangible or intangible.

This legislation was introduced during the last session of the 17th legislature and CSHB 509(L&C) passed the house. Due to a lack of time, the bill was held up in the Senate.

HB280 is a non-controversial bill and I would appreciate prompt scheduling in the Judiciary committee before close of the first session. If you have questions, please contact Karen Brand of my staff at 3765.

CHANGING TIMES

EASY TRUSTS

Now there's an inexpensive and relatively painless way to put your property into a living trust, a legal device that lets you control your assets and appoint a trustee who can manage when you can't (see "Trusts You Can Change at Will," Nov.). The only catch is that your state must adopt the new Uniform Custodial Trust Act.

The UCTA was drafted by the Uniform Law Commissioners, a group of state-appointed lawyers, judges and law professors that drafts laws to solve problems common to all states. It lets you create a trust as easily as setting up a custodial account for a minor under the Uniform Transfers to Minors Act, the inspiration for the new act. You don't even need a written trust agreement. All you have to do is change the name on your bank accounts, for instance, to that of your chosen trustee.

A UCTA trust can cover any kind of property, real or personal, tangible or intangible. You cannot be your own trustee, but you can name a family member, friend or institution to become the owner of your stocks, bank accounts or other assets you designate. As the beneficiary, you have the right to direct the management of the assets, to receive income and principal, and to cancel the trust whenever you want to. If you become incapable of handling your own affairs, the trustee takes over and manages the trust according to the very broad powers built into the statute. You can also use the trust as a will because you can direct what happens to the assets after your death.

According to Lawrence Bugge, a Madison, Wis., lawyer who headed the drafting committee, both the UCTA trust and a durable power of attorney (which gives the person you name the power to act for you if you are incapacitated) get around the need for a costly, distressing court proceeding to appoint a court-supervised conservator or guardian. But the trust, he says, is better than a durable power because the safeguards against mishandling of your assets, such as periodic accounting and penalties for misappropriation of funds, and the details of the fiduciary relationship between you and the trustee are clearer and more elaborate than those surrounding durable powers.

Older people who want to maintain control over their assets will probably benefit most, but someone who is going abroad temporarily or is a parent of an incapacitated child can set one up, too.

It is too early to tell how much interest there will be in the act; to date, no states have adopted the UCTA. If you are interested in encouraging its adoption in your state, write to your state legislator.

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SUN. 200,777

DEC 27 1987

JANE BRYANT QUINN

Proposed 'custodial trust' is cheap, easy way to avoid probate

Everybody hates probate. A few years ago, Americans rushed to buy books of legal forms by author Norman Dacey, for their do-it-yourself trusts to avoid probate (which is the process of approving the legality of your will at death).

But there were a couple of problems with these trusts.

First, they didn't provide any other important protections — like naming a trustee to manage your money if you become senile.

Second, Dacey trusts simply weren't accepted by many stock-transfer agents, insurance companies and title companies. Sometimes the forms were filled in wrong. Sometimes title in the property hadn't been properly passed to the trustee. Sometimes, even when the paperwork was done right, it looked fishy. Reasonably or not, many agents simply decided it was safer not to transfer property ownership based on a hand-drawn trust.

So Dacey trusts faded. But the need for a similar — and better-recognized — document persisted. And finally, one is on the horizon.

A proposed new "custodial trust" has been created by the National Conference of Commissioners on Uniform State Laws. It still has to be approved by the American Bar Association and then presented to each state for adoption. But if accepted, it will be a cheap and easy way of avoiding probate — and more. Among the trust's virtues:

- You can set it up yourself, by signing a standard document established by law. There don't have to be any legal fees, although you may want a lawyer to answer questions about the trust.
- It names a trustee to manage your money in case you become mentally incompetent. But until that moment arrives (if it ever does), "you have total control over your assets," said Madison, Wis., attorney Lawrence Bugge, chairman of the committee that drew up the trust. A wife can be her husband's trustee and vice versa. You can cancel the trust any time you want.
- By naming a beneficiary for the trust's assets, you can keep them out of probate.
- You can arrange to have the money managed for the joint lifetimes of yourself and your spouse. The surviving spouse, too, can effectively manage the money or even take it out of trust (as long as he or she is mentally competent).
- The trust sets up tests to determine mental incompetence. Your family won't face the expense and embarrassment of having you declared bonkers in court. (However, if for some reason you think that your trust has mistaken your mental condition, you yourself can force the issue into court.)
- You can use a custodial trust to provide money management for an adult child who may be retarded or otherwise incapacitated.
- It's a good device for short-term money management. Says Eugene Scoles of the University of Illinois: "If I'm out of the country for eight months and want some of my property administered for my kids in college, I could use the custodial trust." A durable power of attorney could achieve the same thing. But the power of attorney stops if you die, whereas the custodial trust can continue

Also, some insurance companies resist the durable power-of-attorney, if it's used to change beneficiaries or cash in a policy, says Richard Wellman of the University of Georgia's law school.

A custodial trust doesn't handle complicated jobs. It can't be used to pass money in trust from one generation to another, or restrict access to assets. It's not a discretionary trust that might work, in some cases, to provide extra money to a person living on Medicaid in a nursing home or mental hospital. For that, you need a lawyer.

I see only one problem with the proposed new trust. Despite all the labor that has gone into it, it truly cannot be made so simple that the average person can understand it. You face some of the same risks you did with a Dacey trust: mistakes in filling in the documents, not getting your property properly transferred to the trustee, and neglecting the trust's tax forms.

I'll be pleased to have a simple trust on the market. ■

UNIFORM CUSTODIAL TRUST ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-SIXTH YEAR
IN NEWPORT BEACH, CALIFORNIA
JULY 31 - AUGUST 7, 1987

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
Philadelphia, Pennsylvania, February 9, 1988

UNIFORM CUSTODIAL TRUST ACT

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Custodial Trust Act was as follows:

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Final, approved copies of this Act and copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
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UNIFORM CUSTODIAL TRUST ACT

PREFATORY NOTE

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

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

An adult beneficiary, who is not incapacitated, may: (1) terminate the custodial trust on demand (Section 2(e)); (2) receive so much of the income or custodial property as he or she may request from time to time (Section 9(a)); and (3) give the custodial trustee binding instructions for investment or management (Section 7(b)). In the absence of direction by the beneficiary, who is not incapacitated, the custodial trustee manages the property subject to the standard of care that would be observed by a prudent person dealing with the property of another and is not limited by other statutory restrictions on investments by fiduciaries (Section 7).

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

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

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

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

UNIFORM CUSTODIAL TRUST ACT

UNIFORM CUSTODIAL TRUST ACT

Section 1. Definitions.

As used in this [Act]:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMENT

(1) "Adult" is a person 18 years of age for the purpose of custodial trusts. The result of this is that a person 18 years of age will be eligible to be a custodial trustee under this Act, although he or she may not be eligible under UTMA since minor custodianships under UTMA may run to age 21 and the minor could in some cases be older than the custodian. As the Comments under Section 1 of UTMA explain, the age of 21 was retained under that Act because the Internal Revenue Code continues to permit a "minority trust" under Section 2503(c), to continue in effect until age 21 and because it was believed that most transferors creating trusts or custodianships for minors would prefer to retain the property under management for the benefit of the young person as long as possible. The difference has little or no practical consequence and serves the purpose of each Act.

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

(4) "Court" means _____ court. Here the likelihood is that most states would utilize the same court, e.g., the probate court, that deals with conservators and estates.

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

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

(8) A definition of incapacitated has been included, for the purpose of this Act, because incapacity of the beneficiary converts the trust from a revocable trust to a discretionary trust. The definition is taken from the Uniform Probate Code Section 5-401(c) relating to the person who is unable to manage property. Compare Uniform Probate Code Section 5-103(7). Note that Section 10(a)(ii) permits a transferor to direct that the trust shall be administered as one for an incapacitated person. Section 10 deals specifically with the determination of incapacity.

(10) The beneficiary's family is broadly defined to identify persons who may have standing to seek judicial intervention or accounting (Sections 13 and 15).

(11) The definition of a person is taken from the Uniform Probate Code Section 1-201(29).

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

Section 2. Custodial Trust; General.

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

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

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

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

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

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

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

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

COMMENT

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

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

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

These alternatives permit the major uses of the

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

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

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

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

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

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

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

Section 3. Custodial Trustee for Future Payment or Transfer.

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

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

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

COMMENT

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

serve before the transfer occurs or may resign under Section 13 after the transfer.

The source of this section is Section 3 of UTMA.

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

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

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

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

CUSTODIAL TRUSTEE'S RECEIPT AND ACCEPTANCE

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

Dated: _____

_____

(Signature of Custodial Trustee)

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

COMMENT

Although a custodial trust is created by a transfer that satisfies Section 2 of the Act, the responsibility and obligations upon the trustee do not arise until the trustee has accepted the transfer. This detailed section is included to call the attention of the parties to the effective receipt and acceptance by the custodial trustee. Once a custodial trustee accepts the transfer of the custodial trust property, the custodial trustee assumes the obligation of a custodial trustee under this Act. The acceptance can be expressed or implied, but it is recommended that the written acceptance provided for in Section 4(b) be utilized. By the acceptance the custodial trustee submits to the personal jurisdiction of the courts of the enacting state for the purpose of the custodial trust, despite subsequent relocation of the parties or of the custodial trust property. The principal sources of these provisions are Sections 8 and 9 of UTMA and the analogous provisions under the Uniform Probate Code, Sections 3-602, 5-208, 5-307, 7-103.

Section 5. Transfer to Custodial Trustee by Fiduciary or Obligor; Facility of Payment.

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

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

COMMENT

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

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

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

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

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

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

COMMENT

This Act, unlike UTMA, does not preclude a custodial trust for more than one beneficiary. Adult persons creating custodial trusts are likely to set up custodial trusts in various forms, e.g., parents may wish to set up a custodial trust for their children or for themselves, then for a spouse, etc. However, the interests of each beneficiary are separate and the custodial trustee is obligated under subsection (c) to account separately to each beneficiary for administration of the beneficiary's interest in the custodial trust.

Subsection (b) allows a custodial trustee who is administering multiple custodial trusts for the same beneficiary to administer the custodial trusts as a single custodial trust. For example, if multiple trusts are created for an incapacitated beneficiary, the custodial trustee can administer them as a single custodial trust.

Section 7. General Duties of Custodial Trustee.

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

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

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

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

(e) A custodial trustee shall keep records of all transactions with respect to custodial trust property, including information necessary for the preparation of tax returns, and shall make

the records and information available at reasonable times to the beneficiary or legal representative of the beneficiary.

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

COMMENT

Subsection (b) restates and confirms the control by the beneficiary who is not incapacitated. However, the trustee has a reasonable obligation to act when the beneficiary has not directed him. Under Sections 9 and 10, when a beneficiary becomes incapacitated, the custodial trust becomes a discretionary trust and the trustee is subject to the control of the statute and not the beneficiary's direction. The custodial trustee is subject to the usual trustee's standard as taken from Section 7-302 of the Uniform Probate Code. The statute also imposes a slightly higher standard on professional fiduciaries acting under the statute. Otherwise, much of this section is taken from Section 12 of UTMA. Whenever recordable assets, such as land, are in the custodial trust, the trustee would be expected to record title to the asset. The section is entitled "general duties" because there are additional specific duties identified in other sections such as Section 9.

Section 8. General Powers of Custodial Trustee.

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

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

COMMENT

This section is taken from Section 13 of UTMA. It grants the trustee very broad powers over the property, subject, however, to the Prudent Person Rule and to the obligations set out in the Act. An alternative approach to subsection (a) that might be taken by an enacting state is to refer to the existing statutes granting powers to a trustee, such as the Uniform Trustee's Powers Act. For example: [(a) A custodial trustee has the powers of a trustee under the Uniform Trustee's Powers Act.]

Section 9. Use of Custodial Trust Property.

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

(b) If the beneficiary is incapacitated, the custodial trustee shall expend so much or all of the custodial trust property as the custodial trustee considers advisable for the use and benefit of the beneficiary and individuals who were supported by the beneficiary when the beneficiary became incapacitated, or who are legally entitled to support by the beneficiary. Expenditures may be made in the manner, when, and to the extent that the custodial trustee determines suitable and proper, without court order and without regard to other support, income, or property of the beneficiary.

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

COMMENT

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

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

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

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

Section 10. Determination of Incapacity; Effect.

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

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

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

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

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

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

COMMENT

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

This section is not a proceeding for the appointment of a conservator, and it is not contemplated that such a declaration would lead to court appoint-

ment of a conservator or guardian unless other factors would warrant such appointment. The existence of a comprehensive and well-managed custodial trust would be one factor that would tend to avoid the necessity for the appointment of a conservator or guardian of the estate.

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

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

Section 11. Exemption of Third Person from Liability.

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

(1) the validity of the purported custodial trustee's designation;

(2) the propriety of, or the authority under this [Act] for, any action of the purported custodial trustee;

(3) the validity or propriety of an instrument executed or instruction given pursuant to this Act] either by the person purporting to make a transfer or declaration or by the purported custodial trustee; or

(4) the propriety of the application of property vested in the purported custodial trustee.

COMMENT

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

Section 12. Liability to Third Person.

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

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

(1) on a contract properly entered into in a fiduciary capacity unless the custodial trustee fails to reveal that capacity or to identify the custodial trust in the contract; or

(2) for an obligation arising from control of custodial trust property or for a tort committed in the course of the administration of the custodial trust unless the custodial trustee is personally at fault.

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

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

COMMENT

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

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

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

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

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

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

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

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

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

COMMENT

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

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

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

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

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

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

(1) is entitled to reimbursement from custodial trust property for reasonable expenses incurred in the performance of fiduciary services;

(2) has a noncumulative election, to be made no later than six months after the end of each calendar year, to charge a reasonable compensation for fiduciary services performed during that year; and

(3) need not furnish a bond or other security for the faithful performance of fiduciary duties.

COMMENT

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

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

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

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

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

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

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

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

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

COMMENT

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

Subsection (a) identifies the necessary reports and accountings for the parties, and subsection (b) identifies a broad group of persons who may petition the court for an accounting by the custodial trustee or the custodial trustee's legal representative. Much of the section is drawn from Section 19 of the UTMA modified to fit the custodial trust.

Subsection (f) recognizes the inherent power of the court to instruct trustees and review their actions. This paragraph is patterned after Uniform Probate Code Section 7-205.

Section 16. Limitations of Action Against Custodial Trustee.

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

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

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

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

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

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

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

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

COMMENT

In an effort to provide as comprehensive a statute as possible to inform the parties of substantially all of their obligations and rights, statutes of limitation are provided in this section. The limitations pro-

vided in this section are derived from the Uniform Probate Code, Sections ' 106 and 7-307, and from the Missouri Custodial Act.

The nature of the limitations imposed by the section are illustrated by the situation in which a custodial trustee is removed, resigns, or dies. If the former custodial trustee accounts as required under Section 13 on removal or resignation, or the deceased custodial trustee's personal representative accounts, the two-year limitation of subsection (a)(1) applies. Should the former custodial trustee or the personal representative fail to account, then, subsection (a)(2) would apply to limit the time in which a proceeding to assert the claim could be commenced. This time would begin to run on the date the trust terminated. Of course, if the claim is one for fraud or concealment, the longer time limitation of subsection (b) would apply. In any event, should the beneficiary become incapacitated or die before the applicable time limitation had expired, the tolling provision of subsection (c) could postpone the time bar until two years after removal of the disability or death.

Section 17. Distribution on Termination.

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

(1) to the beneficiary, if not incapacitated or deceased;

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

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

(i) as last directed in a writing signed by the deceased beneficiary while not incapacitated and received by the custodial trustee during the life of the deceased beneficiary;

(ii) to the survivor of multiple beneficiaries if survivorship is provided for pursuant to Section 6;

(iii) as designated in the instrument creating the custodial trust; or

(iv) to the estate of the deceased beneficiary.

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

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

COMMENT

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

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

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

Signed

_____
(signature)

Beneficiary

Date _____

Receipt Acknowledged

_____
(signature)

Custodial Trustee

Date _____

Section 18. Methods and Forms for Creating Custodial Trusts.

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

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

TRANSFER UNDER THE [ENACTING STATE]
UNIFORM CUSTODIAL TRUST ACT

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

Dated: _____

_____

(Signature); or

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

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

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

Dated: _____

_____

(Signature)

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMENT

This section largely follows Section 9 of UTMA. provides instructional detail for forms and thods of transferring assets that satisfy the reirements of the statute. Although many of the stomary methods of transferring assets are idenied, these methods are not intended to be exclue since any type of property that can be transrred by any legal means is intended to be within e scope of the statute, provided the requirements of Section 2 are met. The method of transfer or conveyance appropriate to the asset should be used, e.g., if land is involved, a deed or conveyance that satisfies the local requirements would be appropriate. In the effort to make the statute as self-contained and as fully explanatory as possible, these provisions for implementation are included in the statute rather than being appended or inserted in the Comments.

ction 19. Applicable Law.

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

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

COMMENT

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

Section 20. Uniformity of Application and Construction.

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

Section 21. Short Title.

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

Section 22. Severability.

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

Section 23. Effective Date.

This [Act] takes effect _____ ____.

Good Afternoon, Mr. Chairman, members of the committee. For the record, my name is Karen Brand, Staff for Representative Moses. I will be delivering the opening comments on HB280, as Representative Moses is currently in a meeting on the third floor. Then I will be available for questions. Mr. Art Peterson, a local Uniform Law Commissioner, is also here and will also be available for questions.

I would like to start with a definition. A trust is defined as the care and management of property or funds, by a person or a bank, for the benefit of another.

With that in mind, I'll detail the bill before you. If enacted, HB280 will not change existing law, but it would add a new section to adopt the Uniform Custodial Trust Act. The UCTA makes the benefits of trusts available to all Alaskans. There are four benefits of trusts that I'd like to note. **First,** the trust will be inexpensive to create. Currently, you can create a trust, but the time for an attorney to create it from scratch is more than most people ~~want to~~ can afford. **Secondly,** the trust will be simple to create. This bill includes a set of guidelines that can easily be filled out by the owner of the trust, or by an attorney with minimal time. **The Third** characteristic is control. Under the UCTA, control of your property remains with you until which time you become incapacitated, and the trust will take over the care and management of your property. **Lastly,** the trust is comprehensive. It covers physical property, financial assets, and intangibles.

Moving on,... the adoption of the UCTA will benefit all Alaskans, young and old, as well as anyone who anticipates incapacity at some time and wants to be assured that their belongings will be properly cared for. The most frequent users of this trust will most likely be senior citizens who want to provide for their assets in the event of

future incapacity. Persons leaving the country temporarily can also place their property with another for management without relinquishing permanent control of the property.

Let me finish up with a bit of history. This UCTA has been adopted in 7 other states, and was introduced in another during 1993. A duplicate of HB280 was introduced during the 17th Legislature. It had bi-partisan support, public testimony, and was voted out of the House Unanimously, 36 to Zero. Due to a lack of time, the bill did not get a vote in the Senate. HB280 is a non-controversial bill, and Representative Moses would appreciate consideration and affirmative action.

I'll entertain questions by committee members.

HB

292

ALASKA STATE MEDICAL ASSOCIATION

4107 Laurel Street • Anchorage, Alaska 99508-5334 • (907) 562-2662 • FAX (907) 561-2063

January 21, 1994

Representative Brian Porter
Alaska State Legislature
Room 122, State Capitol
Juneau, Alaska 99801

Dear Representative Porter:

On behalf of the Alaska State Medical Association, I urge you to support H.B. 292, Liability Reform. We believe strongly that any health system reform must include comprehensive liability reform. Our association was involved in the drafting of H.B. 292 and support all reform in the bill. Therefore, we ask you to move H.B. 292 from Labor & Commerce to House Judiciary.

Your support and sponsorship is sincerely appreciated.

Sincerely,

Ray Schalow
Executive Director

Received
JAN 24 19[illegible]
REP [illegible]

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 292

ANALYSIS CONTINUATION:

This bill amends Title 9, the Alaska Code of Civil Procedure, to provide various changes that are intended to bring about reforms in the manner in which the state's civil justice system handles personal injury claims. The bill seeks to reduce costs associated with the civil justice system, and the bill seeks to create a more equitable distribution of the cost of risk of injury. The bill does this by changing the existing balance between claimants and defendants, and their respective, competing economic interests, by limiting the time in which certain claims can be filed, and by setting and reducing claims limits. As a result, the existing balance is tilted away from claimants and toward defendants. Consequently, the state's claims exposure and the amount it ultimately pays would be reduced. However, because the total number of claims would probably not be reduced, the impact on the department's defense of personal injury claims will be negligible.

FORUM / LETTERS

Reformed tort system could deliver more doctors

By Fred Wurlitzer

COMPASS
POINTS OF VIEW FROM OUR COMMUNITY

PLANO, TEXAS — Your editorials of Aug. 9 on "Malpractice" and "Reform Options" are a refreshing attempt to address the malpractice insurance problems in Alaska. The tort system in Alaska is discouraging physicians from working there. I speak from personal experience.

I am a board-certified surgeon, Fellow of the American College of Surgeons, who came to Alaska this summer to work in a smaller community. Unfortunately, I felt my financial security was threatened.

Although in all my years of practice I was never sued, the only malpractice insurance available to me had a limit of $500,000. A representative with MEIC, one of the few carriers willing to be at risk in offering medical malpractice insurance in Alaska, informed me that the tort system of "severe and separate liability" discouraged them from offering more insurance. Long-term practitioners might get additional coverage, he said, but the rates increased sharply.

In Alaska, everyone named in a successful malpractice suit can be held liable for the full judgment amount, e.g., doctors, nurses, laboratory assistants, pharmacists, hospitals, orderlies, etc. In other states, such as California, tort reform meant that physicians could be held partially liable.

Why should physicians come to Alaska to practice under these circumstances? You may attract young doctors with few assets and limited experiences, but not likely middle-aged, more prosperous physicians whose broader experiences are desirable for the smaller communities in Alaska.

The problem is not, as some lawyers allege, one of "thousands of patients — injured or killed each year by incompetent or negligent doctors." (I doubt this inflammatory assertion is based on facts garnered in Alaska.) Nor will guaranteed health insurance give the promised coverage, which Dan Hensley of the Alaska Academy of Trial Lawyers hopes for, unless there are doctors to meet the needs.

In the smaller communities of Alaska where specialist coverage is lacking, the physician is called upon to read X-rays, analyze laboratory results, set fractures, read cardiograms, perform surgery with expert skill, and never make a mistake. The public expectation in these smaller communities is that the state-of-art medicine in university centers in the Lower 48 is the standard of care without the highly trained staff that these university centers provide.

I suggest that the problem is the public unreasonably expecting perfection in medical care, and a tort system that encourages attorneys to capitalize on those expectations. A 99 percent batting average is not satisfactory. The fact is every physician makes honest mistakes from time to time. In the public eye this constitutes malpractice, and law suits are born.

When insurance companies settle these suits, physicians find themselves compromised in obtaining licensing and privileges. Their insurance premiums rise! More defensive medicine is practiced, and the circle continues! The costs of defensive medicine are far more than people realize.

It is dismaying that the medical/legal environment in Alaska is considered so hostile that physicians otherwise willing to practice there all too often go elsewhere.

It is dismaying that the medical/legal environment in Alaska is considered so hostile that physicians otherwise willing to practice there all too often go elsewhere. What needs changing is the tort system in Alaska. Make a start there before you think of other ways to improve your health-care delivery.

☐ Fred Wurlitzer, M.D., F.A.C.S., lives in Plano, Texas.

WLC Annual Meeting

Politics: The Art of the Plausible

by Robert Erickson, Research Director
Nevada Legislative Counsel Bureau

Dr. Thomas Sowell

A highlight of the 1993 Annual Meeting for many delegates was the presentation by featured speaker, Dr. Thomas Sowell. A Senior Fellow at the Hoover Institution of Stanford University, Dr. Sowell is a prominent economist, author, columnist and educator. Dr. Sowell also is the writer of a nationally syndicated newspaper column, "Observations" in Forbes magazine, and a number of books on topics of concern to government policymakers.

Interesting article RE: TORT REFORM

According to Dr. Sowell, economics is the study of the alternative uses of scarce resources. Unfortunately, he said, politics is something quite different, perhaps more "the art of the plausible" than the "art of the possible." People who work in the political process require far more knowledge than do economists, and often require more information than is available. An inherent problem in government is that the numbers always run far behind reality, so that "by the time that you know what the facts are, the facts may have changed."

...In politics, we are always looking for villains

Dr. Sowell stated that the biggest difference between politics and economics is that politicians usually seek categorical solutions to problems, while economists evaluate incremental trade-offs. As an example, he cited that a political decision to connect two population centers by bridge may cost the lives of a number of workers. On the other hand, many other lives may be saved if the bridge affords shorter travel time to hospitals during emergency situations. The decision to build the bridge is a trade-off instead of a solution.

He also warned that certain laws designed to help a few members of society ultimately may endanger many others. He stated that vaccines used to prevent certain diseases may cost the lives of a few people because of adverse reactions. If laws are enacted which enable the surviving family of such a person to sue the pharmaceutical company which produced the drug, some companies may stop producing the vaccine, thus endangering the lives of many more. An even greater concern is that such laws may discourage the investment of resources into finding cures for other diseases.

Dr. Sowell also warned against seeking solutions that are perfect and totally without risk. The "law of diminishing returns" must be considered by policymakers. For example, it may be better to require that drinking water be 95 percent pure instead of 97 percent pure, because to gain the additional 2 percent could cost many times more. Besides, alternative uses of our scarce financial resources must be considered.

Throughout his presentation, Dr. Sowell interjected subtle humor to support his arguments. For example, he stated his belief that in politics we are "always looking for villains." He said that we may be nearing the philosophy that "every misfortune that happens is the fault of the nearest person with money."

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 292

Revision Date: February 2, 1994
Title: "...relating to civil actions; amending Alaska Rules of Civil Procedure 49 and 68..."
Sponsor: House Labor and Commerce
Requestor: House Labor and Commerce

Department Affected: Department of Law
BRU: Legal Services
Component: Operations

COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING:

1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

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

Estimate of current year (FY94) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
Please see the attached analysis.

Prepared by: Richard L. Pegues, Director
Phone: 465-3672
Division: Administrative Services Division
Date: February 2, 1994

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: February 2, 1994

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 292

ANALYSIS CONTINUATION:

This bill amends Title 9, the Alaska Code of Civil Procedure, to provide various changes that are intended to bring about reforms in the manner in which the state's civil justice system handles personal injury claims. The bill seeks to reduce costs associated with the civil justice system, and the bill seeks to create a more equitable distribution of the cost of risk of injury. The bill does this by changing the existing balance between claimants and defendants, and their respective, competing economic interests, by limiting the time in which certain claims can be filed, and by setting and reducing claims limits. As a result, the existing balance is tilted away from claimants and toward defendants. Consequently, the state's claims exposure and the amount it ultimately pays would be reduced. However, because the total number of claims would probably not be reduced, the impact on the department's defense of personal injury claims will be negligible.

Alaska State Legislature

Please enter into the record my testimony to the HOUSE FINANCE & JUDICIARY committee name committee on HB 292 bill/subject . dated FEBRUARY 17, 1994

SEE ATTACHED:

2 PAGE LETTER

Signed: Robert B Stephenson
Testifier

Representing (Optional)

1511 Gorden View Dr Fairbanks AK 99709
Address

455 6073
Phone No.

9/86 Legislative Information Office

Robert B. Stephenson
P.O. Box 81314
College, Alaska 99708

February 17, 1994

To: Members of the House Judiciary Committee
Members of the House Finance Committee

It is my understanding that HB 292 would severely limit Alaskans' right to recovery from accidents and negligence.

In 1988, I and two others suffered massive 3rd degree burns from a 500 gallon propane spill and explosion near Fairbanks. Untrained workers were directed to move a large propane tank (1,200 gal. cap., 3' x 18') containing about 500 gallons of liquid propane. That's illegal. They broke a bottom valve, and all 500 gallons leaked out and exploded within minutes. In addition, the resulting fire burned down a huge warehouse, a loss of several million dollars.

I spent a month in the hospital, including two weeks in the intensive care burn unit, and did not recover from my burns and skin grafts for about three years. In fact, my skin will never be the same as it was. My hospital and doctor bills for the first month alone were well over $100,000. None of us will ever be the same after these burns and emotional injuries.

This accident was a result of improper handling of a propane tank. The owner of the tank did not want to remove the propane from the tank BEFORE moving it, as is required.

My burns and skin grafts have healed now, but I will never be the same, as I am sure you can understand.

It was more than a year after the explosion that symptoms of Post Traumatic Stress Disorder (PTSD) began to surface. Nightmares, sleeplessness, fear of the workplace, just to name a few, were common.

I still have flashbacks and nightmares of amputation and death squads.

43% of my body had little or no skin. I could only begin to describe the pain of being lowered into a whirlpool for debriding (dead skin scrubbed off). No amount of morphine can prevent the screaming and the horrible pain.

No amount of money can compensate for that pain, which took place once a day for thirty days. Would you go through that for $10,000 a day? How about $20,000? What's YOUR price? If this happened to your son or daughter or family member, would you want to cap their recovery for pain and suffering?

It would be my recommendation for industry to be regulated by stricter standards and be made to follow existing standards. In my opinion, this would limit the negligence and the injuries to Alaska's work force.

Let's stop the negligence, not prevent the fair recoveries for injured Alaskans.

I believe that HB 292 is completely unfair to innocent victims in Alaska. It would have serious consequences to the citizens of Alaska, your constituents. I strongly urge you to vote against such tort reform bills.

Your response would be greatly appreciated.

Sincerely,

Robert B. Stephenson

Robert B. Stephenson

HB-292

OMNI MEDICAL CENTER

Robert Jay Rowen, M.D.
Diplomate, American Boards of Family Practice, Emergency Medicine, Chelation Therapy

"Biologic Alternatives to Drugs and Surgery"

615 E. 82nd Street, Suite 300
Anchorage, Alaska 99518
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February 15, 1994

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 1

To Danielle	From Luck
Co. H. Jack	Co. O. L.
Dept.	Phone 465-2538
Fax # 465-3834	Fax # 465-2974

Karl Luck, Director
Division of Occupational Licensing
3601 C Street
Anchorage, AK 99503

Dear Mr. Luck,

I am writing this in response to proposed legislation entitled, Medical Practice Parameters. I have some significant concerns about this legislation. Notwithstanding the potential cost, I am more than concerned about what impact regulatory practice standards might have on the constantly changing practice of medicine. I am very concerned that regulating the practice of medicine will create more of a nightmare than the problem it is trying to solve. I am not in favor of this legislation.

Who shall pay for this committee representing medical specialties? And of course, what shall be the reimbursement? Since the parameters must be revised every 2 years, this will incur an ongoing significant expense indefinitely.

Some innovative individuals who are on the cutting edge, are accused of quackery, and then their practices are embraced within a few years. Others might be practicing current, accepted standards which may find themselves outmoded even though the practice is still being done. Are we to have cookbook medicine? One of the fears of the profession is that the Clinton administration wishes to set up how medicine should be practiced with a set form of treatment for each diagnosis. That is impossible. Each patient is a human being with different parameters and must be treated individually.

I feel there are other far more appropriate ways to deal with the practice of medicine. As a private physician, I would be happy to discuss this with any member of the legislature concerned about this issue.

The language in this legislation is quite broad and requests an all encompassing document. I cannot see any conceivable or reasonable mechanism by which that can happen by the Alaska State Medical Board or even Alaska physicians. This would ask us to undertake the writing of a major medical textbook for virtually every specialty requested.

Sincerely,

Robert Jay Rowen, M.D.
Alaska State Medical Board Member

John L. George & Associates
9515 Moraine Way
Juneau, Alaska 99801
Tel. 907 789-0172 Fax 907 789-6964

February 7, 1994

The Honorable Brian Porter
Chairman, House Judiciary Committee
State Capitol
Juneau, Alaska 99801-1182

Reference: House Bill 292

Dear Representative Porter,

During the last hearing on HB 292 in the House Labor and Commerce Committee, comments were made relative to my prior testimony on the bill. I had stated that problem causing the need for tort reform was not so much the million dollar awards as it was related to the volume of smaller claims that settle for greater amounts than they would normally justify due to the threat and potential for extremely high awards in court. To clarify and expand on those remarks I offer the following comment.

The threat of unlimited awards for subjective and unquantifiable damages drives the settlements for many claims higher than normal. The threat of court awards that deviate from the predictable norm for similar claims leaves out of court settlements up to emotional arguments and speculation. A similar situation in criminal law happens when an innocent party is charged with a murder he did not commit. Does he risk life in prison or plea bargain to a lesser charge for the certain five year sentence for the crime he did not commit. Principle would dictate a court fight but practicality might dictate the absolute avoidance of a life sentience by taking a known lesser sentence. This would be further exacerbated if the death penalty were a possibility. The higher the stakes the greater the incentive to offer higher than justified settlements. Would you opt for a chance at the gas chamber or the certainty of five years in prison for a crime you did not commit?

Caps on non economic damages are a recognition that significant but not unlimited compensation is proper for pain and suffering. Caps on non economic damages add predictability and upper quantifiable limits to an otherwise completely subjective loss. While a relatively small percentage of awards for non economic damages exceed the proposed caps, they non the less, have the effect of adding great unpredictability to claims settlements and are a meaningful and integral part of the tort reform package.

Sincerely,

John L. George

KODIAK OIL SALES IC
BOX 1487
KODIAK ALASKA 99615
486-3245
486-3205 FAX

Received
FEB 0 1 1994
REP BRIAN PORTER

JAN. 31, 1993

HOUSE LABOR AND COMMERCE COMMITTEE
ATTN.:

BILL HUDSON	JERRY MACKIE	JOE SITTON
ELDON MILLER	JOE GREEN	
BILL WILLIAMS	BRIAN PORTER	

HB 292

DEAR SIRS:

KODIAK OIL SALES IS A FAMILY OWNED BUSINESS WHICH HAS OPERATED IN ALASKA SINCE 1950. WE LIKE MOST ALASKAN BUSINESS ARE FACED WITH RISING INSURANCE PREMIUMS AND IF WE BECOME INVOLVED IN A LAWSUIT THE POSSIBILITY OF AN OUTRAGEOUSLY HIGH SETTLEMENT THAT MAY THREATEN OUR CONTINUED OPERATION.

ALASKA NEEDS TORT REFORM VERY BADLY, WE NEED TO STOP THE INSANITY IN OUR LEGAL INDUSTRY IN ALASKA. I SAY INDUSTRY INSTEAD OF LEGAL PROFESSION OR LEGAL SYSTEM SINCE THAT WHAT IT IS A MULTI MILLION DOLLAR INDUSTRY THAT PREYS ON THE PEOPLE OF THIS STATE.

HB 292 WILL BEGIN TO BRING SOME SANITY TO THIS OUT OF CONTROL SITUATION. I URGE YOU MOVE THIS BILL INTO THE HOUSE.

YOURS TRULY
JIM RAMAGLIA
VICE PRESIDENT

FAX TRANSMITTAL

FROM DAVID FRAZIER & ASSOC. INC.

PHONE 907-258-1169, FAX 907-258-3638,
ACCOUNTING PHONE & FAX 907-274-2869

Number of Pages 1

Date 2-3-94

To House Labor & Commerce Attention Brian Porter

I'm in support of HB 292 except that the non-Economic damage cap is to high. It should be reduced from $500,000 to $250,000. Let me know if more is out of committee. THX!!

David Frazier
7545 Shenandoah Dr.
Anchorage 99504

* a Speaker - Mike Leissmeier

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Reply to: JUNEAU

February 3, 1994

Representative Bill Hudson
Alaska House of Representatives
State Capital
Juneau, Alaska 99811

Received
FEB 03 1994
STATE CAPITOL

Re: CSHB 292

Dear Representative Hudson:

I am writing to you on behalf of State Farm Mutual Automobile Insurance Company and State Farm Fire & Casualty Company. State Farm presently has approximately 32 percent of the automobile insurance market in the state of Alaska. State Farm Fire & Casualty has 43 percent of the homeowners' insurance market. Collectively State Farm has had significant experience with Alaska's civil justice system which goes back for at least 20 years. It is from this perspective that we offer our comments regarding the CS for HB292, which is presently before you.

You probably already know that we had no involvement in the introduction or drafting of this legislation. Since our day-to-day activities will be affected significantly by this legislation, we feel compelled to comment on it. We feel compelled to comment for another reason, for regardless of whether we wish to be a part of this debate, we nonetheless are brought into it by those who believe the only reason for tort reform is insurance reform.

At the outset we wish to commend your committee for the efforts it has and is making toward finding balance in an area where there are strong feelings on all sides. Many people have

vastly different opinions about where as a matter of fairness to draw the line on issues such as statutes of repose and caps for non-economic damages. While we have no opinion on those particular issues, it is easy to make the observation that efforts to impose reasonable limitations will have a positive effect on the goals your committee seeks to further through the introduction of this legislation. There are other areas addressed by this legislation which we feel strongly about and the following will set forth those areas.

1. Section 11 (Reduction of future wage loss awards by income taxes). We have always questioned the logic behind not reducing awards for future earnings by the amount of federal and/or state income tax. Section 11 would alleviate what is currently a windfall and we are very much supportive of this change.

2. Sections 16 and 17 (several liability). These sections alleviate an obvious problem in the interpretation of the 1988 several liability initiative. We found it incredible that one of the opponents to this legislation has argued the changes proposed by Sections 16 and 17 to be significant when compared to the way things are currently done. Frankly the rulings we have received on this issue have been different in almost every case. We doubt if anyone else's experience has been different.

What we also find to be incredible is how the clear intent of the 1988 initiative has been so frustrated by those who are unwilling to enforce the intent of the voters. As you will recall the voters in 1988 were told that "the initiative would make each party liable for damages only equal to his or her share of fault and repeal the law concerning reimbursement from other parties." Unfortunately this has not proven to be the case. The changes that you propose in Sections 16 and 17 would simply ensure that indeed a party would be held responsible only for his or her percentage of fault, regardless of who the plaintiff chose to sue. We very much support this change as it will simply give effect to what the voters decided in 1988.

3. Section 19 (offers of judgment) is a change we also support. This provision represents an attempt to encourage parties to reasonably and fairly evaluate their cases. We think the effect of a provision such as this will indeed be significant.

4. Section 20 (pre-judgment interest) is a change which is long overdue. The proposal would key pre-judgment interest to what a party could realistically hope to earn on their money, which of course is the intent of pre-judgment interest. No longer would there be the risk that pre-judgment interest is arbitrarily either too high or too low.

5. Section 21 (pre-judgment interest on future damages) is

also a provision we are very much in support of. This again operates to remove the windfall of awarding pre-judgment interest on future damages or punitive damages, which again as a matter of logic and fairness seems most appropriate.

6. Finally, we are supportive of Section 26, which eliminates costs and attorney's fees that are presently awarded as a matter of course in almost every case. The current issue of who is the "prevailing party" in civil litigation is one that is litigated probably more frequently than any other issue. Indeed, every consumer who purchases an insurance policy from us in Alaska pays for Rule 82 coverage. Eliminating this would not only reduce litigation on this issue, but would remove an element of cost that is present in the current system.

Aside from the above comments which relate to specific sections of the proposed legislation before you, we have a general comment we would like to make. We are, of course, aware that any time legislation such as this is proposed, the opponents will respond by arguing it should not be passed unless there are guarantees the passage will reduce insurance rates by a specific percentage. We wish the issues were so simple. To see they are not, we need only look back at the 1988 initiative. Although we thought then and even now the issue of several liability to be a simple one, there has been a great deal of litigation about the issue of whether fault is to be allocated only amongst those parties the plaintiff has chosen to sue, or amongst all. We are now rapidly approaching the five-year anniversary of the effective date of this initiative and this seemingly simple issue has still not been answered.

We suspect that even if the legislation before you is passed, the meaning of many of these provisions will be disputed for years to come. The opponents of this legislation are talented and at least in some cases well-financed groups who have a great deal of personal stake in the enforcement of the provisions before you. It may be years before the true benefit of this legislation will be felt.

There is a second reason the benefit we fully expect to result from this legislation is not easily quantifiable. Many aspects of civil litigation remain subjective and not quantifiable, especially over the short term. One need only look at the natural disasters which have befallen literally every region of our country in the past five years to see that.

Although we fully expect this legislation to have a positive effect on insurance premiums, those that oppose legislation of this nature for the purported reason that there is no guarantee insurance rates will be affected need only to understand that there are a number of controls in the system that prevent an insurer from having an excessive level of profit. The first is