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to follow a person.[36] The statute does not define "to follow," and thus there is no indication as to how far, or how often, or in what context such a following is prohibited. Thus private detectives, newspaper reporters, policemen, or suspicious neighbors who follow a particular person more than once in order to observe that person might be prosecuted under this law; even so trivial an act as one football player chasing another with "malicious intent" might arguably be covered under this statute.[37] Consequently, a court might find that the statutory language at issue was unconstitutional on its face.

### 2. Intent to a Place a Person in Fear of Physical Injury

An important narrowing feature of a number of the anti-stalking statutes is the requirement that the acts in question were intended to place another person in fear of physical injury.[38] This "intent" requirement is to be distinguished from the simple requirement that a person accused of stalking be "willfully" or intentionally following a person; the former intent requirement, unlike the latter, narrows the various statutes so that the nature and context of the action in question would be considered by the court or the jury.[39] Thus, under this narrowing language, mere following would not be the basis for a conviction without some evidence that the following was done as part of an intentional scheme to harm the victim.[40]

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36 FL LEGIS 92-208 (Westlaw 1992) *to be codified at* Fla. Stat. §784.048;

37 According to Blacks Law Dictionary, "malice" is present when an act is done with evil intent, or with intent to cause harm. The requirement that the following be "malicious" does little to narrow the statute, as there is no indication as to what type of "malicious" harm must be intended.

38 *See, e.g.* NY LEGIS 345 (Westlaw 1992) *to be codified at* New York Penal Law §120.13-.15 & §240.25-.30.

39 This intent requirement can also be used to distinguish stalking laws from those harassment laws which are directed primarily towards protecting individuals from non-physical threats; for instance, law which prohibit actions which threaten of physical injury might provide for more severe punishments than simple harassment. *See, e.g.*, NY LEGIS 345 (Westlaw 1992) *to be codified at* New York Penal Law §120.13-.15 & §240.25-.30.

40 A concern might be raised that some mentally disturbed stalkers do not actually intend to instill fear, but are actually attracted to their victims, and thus might evade the prohibitions of the law. Under most criminal statutes, however, an intent requirement is met if a reasonable person would be aware that his actions would have a prohibited effect. Thus, if a person's actions were likely to place a person in fear of physical violence, a jury would generally be allowed to assume that these actions were intended to convey that intent. However, a legislature might desire to make it clear that the intent requirement was to include those cases where an individual knew or should have known that his behavior would be perceived as threatening; for this reason, such clarification might be set out either in the legislative history or in the text of the statute.

### 3. Exclusion of Lawful, Legitimate or Constitutionally Protected Behavior

A number of statutes provide exclusions for "constitutionally protected activities" or condition restrictions on harassment or following to those acts which have no "lawful" purpose. These exclusions are to a degree redundant; for instance, if an act is constitutionally protected, then the statute prohibiting that act would be unenforceable. Or, if a person has a "lawful" reason to be harassing a person, then they are by definition not in violation of any statute, including the one being interpreted; thus the phrase "lawful" has a circular meaning. Although these provisions might have the effect of discouraging a law enforcement officer from enforcing the law in marginal cases or cases involving free speech, a sufficiently definitive statute would not need the addition of these narrowing provisions.

Some statutes also use the exclusionary phrase "for no legitimate purpose;" this language, however, might be the partial basis for a court to strike down a statute for unconstitutional vagueness.[41] In one state, where a harassment statute prohibited an act "that alarms or annoys another person and that serves no legitimate purpose," a court found that the phrase "serves no legitimate purpose" was vague and injected uncertainty into the statute.[42] The court appears to have determined that the phrase "no legitimate purpose" had no defined meaning under the statute and no objective meaning outside of the statute; thus the statute's language invited subjective evaluations of what behavior was prohibited by the law.

### 4. Anti-Stalking Legislative Phrasing

Although narrow anti-stalking language such as California's may be on the firmest ground constitutionally, a legislature may decide that for policy reasons, a broader statute is desired in order to punish the widest possible range of stalking behavior. Thus, a legislature might need to determine whether broad anti-stalking language can be drawn while still defining the offense with constitutionally definitive language. Following is an example of language which would appear likely to pass constitutional muster.

> Any person who repeatedly follows or harasses another person with the intent to place that person in reasonable fear of sexual battery, bodily injury or death; and whose actions would cause a reasonable person to suffer substantial emotional distress; and whose acts induce emotional distress to that person; is guilty of the crime of stalking.

The various terms used in such language would also need to be defined. Thus, for purposes of the above section:

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41 *See People v. Norman*, 703 P.2d 1261 (Colo. 1985).

42 703 P.2d 1266-67.

"Harasses" means a course of conduct directed at a specific person which would cause a reasonable person to fear sexual battery, bodily injury, or death, including by not limited to verbal threats, written threats, vandalism, or unconsented to physical contact.

"Follows" means maintaining a visual or physical proximity over a period of time to a specific person in such a manner as would cause a reasonable person to have a fear of sexual battery, bodily injury, or death.

"Repeatedly" means on two or more separate occasions.

Kenneth R. Thomas
Legislative Attorney
American Law Division

SB

19

# ALASKA STATE LEGISLATURE

Senator Rick Halford

*President of the Senate*

*While in Session:*
State Capitol
Juneau, AK 99801-1182
907-465-4958

*While in Interim:*
P.O. Box 670190
Chugiak, AK 99567
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MEMORANDUM

TO: Senator Robin Taylor, Chairman
Senate Judiciary Committee

FROM: Senator Rick Halford

DATE: February 15, 1993

SUBJECT: Sponsor Statement -- SB 19, "An Act relating to the crime of conspiracy."

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Organized crime is a serious problem in Alaska and one that is becoming increasingly worse. These professional criminal organizations are difficult to to prosecute or eliminate because of the separation their leadership maintains from the crimes that subordinate members of the organization routinely commit. In order to circumvent this organizational defense mechanism, the federal government defined the crime of conspiracy some time ago and now Alaska is the only state that has not passed a similar law.

It is important that Alaska enact a conspiracy statute and I have introduced SB 19 to provide our state and local law enforcement agencies with this valuable tool for prosecuting criminal organizations, especially drug rings.

Senate Bill 19 defines the crime of conspiracy to mean agreeing with one or more people either to commit a crime or to promote, facilitate, or cause a crime to happen if one or more of the people involved in the agreement commits an overt act to further the conspiracy. This will allow law enforcement officials to arrest and prosecute individuals before they personally attempt a crime and also without their direct participation in a crime that has already occurred. The conspiracy to commit a crime is classified one level below the class of the crime which the offender conspired to commit.

sponsor statement

Senate Bill 19 will significantly increase the efficiency and effectiveness of the criminal justice system. Its passage will improve our position in the war against drugs by enabling the prosecution of entire drug networks, rather than merely street-level pushers. Thank you for your consideration of this legislation.

# Alaska Statutes

## Title 11. Criminal Law.

Chapter

41. Offenses Against the Person (§§ 11.41.110, 11.41.300, 11.41.410 — 11.41.425, 11.41.434 — 11.41.440, 11.41.455, 11.41.470, 11.41.500)
46. Offenses Against Property (§ 11.46.482)
56. Offenses Against Public Administration (§§ 11.56.300, 11.56.330, 11.56.375, 11.56.740)
61. Offenses Against Public Order (§§ 11.61.120, 11.61.125, 11.61.200 — 11.61.220)
71. Controlled Substances (§§ 11.71.030, 11.71.040, 11.71.060, 11.71.070, 11.71.140 — 11.71.180, 11.71.900)
73. Imitation Controlled Substances (§ 11.73.099)
76. Miscellaneous Offenses (§§ 11.76.100, 11.76.105)
81. General Provisions (§§ 11.81.335, 11.81.900)

## Chapter 16. Parties to Crime.

**Sec. 11.16.110. Legal accountability based upon the conduct of another: Complicity.**

NOTES TO DECISIONS

**Distinction between principals and accessories abrogated.**

Alaskan law does not distinguish the criminal liability of principals and accomplices. Machado v. State, 797 P.2d 677 (Alaska Ct. App. 1990).

**Prosecution for conduct of 20-year-old mentally retarded daughter.** — Where defendant was prosecuted for theft on the theory that he was legally accountable for the conduct of his 20-year-old mentally retarded daughter, the trial court committed reversible error in taking judicial notice of the "fact" that defendant's daughter was not mentally culpable for the crime of theft and then advising the jury that they must accept this fact as conclusively proven. Smallwood v. State, 781 P.2d 1000 (Alaska Ct. App. 1989).

**Ambiguous indictment.** — Language of an indictment which appeared to charge defendant as a principal, but which cited subparagraph (2)(B), was sufficient to charge him as an accomplice in a car bombing. Machado v. State, 797 P.2d 677 (Alaska Ct. App. 1990).

**Restitution.** — Superior court could properly require minor to pay restitution for jewelry which was taken during a burglary which he admitted and for which the court adjudicated him a delinquent, where he did not contest the fact that his participation in the burglary made him legally accountable as an accomplice of the theft of the jewelry. J.M. v. State, 786 P.2d 943 (Alaska Ct. App. 1990).

Quoted in Wagers v. State, Ct. App. Op. No. 1127 (File No. A-3238), P.2d (1991).

**Sec. 11.16.120. Exemptions to legal accountability for conduct of another.**

NOTES TO DECISIONS

Quoted in Wagers v. State, Ct. App. Op. No. 1127 (File No. A-3238), P.2d (1991).

## Chapter 31. Attempt and Solicitation.

**Sec. 11.31.100. Attempt.**

NOTES TO DECISIONS

**Double jeopardy.** — The statutes which proscribe attempted murder, possession of explosives, and arson differ markedly in the conduct which they prohibit and in the specific societal interests which they seek to preserve, and multiple sentences for the three offenses do not violate double jeopardy. Machado v. State, 797 P.2d 677 (Alaska Ct. App. 1990).

**Attempted kidnapping and other attempted crimes.** — Every attempted sexual assault, attempted physical assault, or attempted armed robbery does not necessarily involve an attempted kidnapping. In order to make these distinctions clear, it is important that the jury be properly instructed that conviction of attempted kidnapping under AS 11.41.300(a)(1)(C) and this section requires a dual intent (1) to physically or sexually assault the victim and (2) to restrain the victim beyond what was necessary to effectuate the assault. Alam v. State, 793 P.2d 1081 (Alaska Ct. App. 1990).

Cited in Charles v. State, 780 P.2d 377 (Alaska Ct. App. 1989); Gantner v. State, 789 P.2d 381 (Alaska Ct. App. 1990).

**Sec. 11.31.110. Solicitation.**

NOTES TO DECISIONS

**Sentence upheld.** — Composite sentence of 40 years of imprisonment for solicitation of murder in the first degree, attempted murder in the first degree, and assault in the first degree was not clearly mistaken. Marzak v. State, 796 P.2d 1374 (Alaska Ct. App. 1990).

Quoted in Gargan v. State, 805 P.2d 998 (Alaska Ct. App. 1991).

## Chapter 41. Offenses Against the Person.

Article
1. Homicide (§ 11.41.110)
3. Kidnapping and Custodial Interference (§ 11.41.300)
4. Sexual Offenses (§§ 11.41.410 — 11.41.425, 11.41.434 — 11.41.440, 11.41.455, 11.41.470)
5. Robbery, Extortion, and Coercion (§ 11.41.500)





### Article 1. Homicide.

Section
110. Murder in the second degree

**Sec. 11.41.100. Murder in the first degree.**

NOTES TO DECISIONS

**Intent to kill required.**

Paragraph (a)(1) plainly requires proof of knowing (but not intentional) conduct rather than mere recklessness. Odom v. State, 798 P.2d 363 (Alaska Ct. App. 1990).

**Joinder of charges.** — Cocaine charges and murder, kidnapping, and robbery charges were properly joined, where the state's theory of the murder, kidnapping, and robbery offenses was that defendants committed the murder and carried out the kidnapping and robbery in defense of their cocaine distribution business. Mathis v. State, 778 P.2d 1161 (Alaska Ct. App. 1989).

**Admissibility of evidence.** — Where evidence of cocaine possession and sale would have been admissible on murder, kidnapping, and robbery charges, but the murder, robbery, and kidnapping evidence would not have been admissible on the cocaine charges, the appropriate action upon appeal from conviction on all counts was to vacate the cocaine convictions but affirm the other convictions. Mathis v. State, 778 P.2d 1161 (Alaska Ct. App. 1989).

**Sentence upheld.**

Sentence of three consecutive 99 year terms for three counts of murder and another consecutive seven-year term for attempted murder (for a total sentence of 304 years) was not excessive, where defendant had gone on a killing spree, essentially hunting his victims down, and there was no way to rule out the possibility that he might commit another series of homicides. Kanulie v. State, 796 P.2d 844 (Alaska Ct. App. 1990).

Cited in Zeciri v. State, 779 P.2d 795 (Alaska Ct. App. 1989); Charles v. State, 780 P.2d 377 (Alaska Ct. App. 1989); Odom v. State, 798 P.2d 363 (Alaska Ct. App. 1990); Bengel v. State, Ct. App. Op. No. 1142 (File No. A-3457), P.2d (1991).

**Sec. 11.41.110. Murder in the second degree.** (a) A person commits the crime of murder in the second degree if

(1) with intent to cause serious physical injury to another person or knowing that the conduct is substantially certain to cause death or serious physical injury to another person, the person causes the death of any person;

(2) the person knowingly engages in conduct that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life; or

(3) acting either alone or with one or more persons, the person commits or attempts to commit arson in the first degree, kidnapping, sexual assault in the first degree, sexual assault in the second degree, burglary in the first degree, escape in the first or second degree, or robbery in any degree and, in the course of or in furtherance of that crime, or in immediate flight from that crime, any person causes the death of a person other than one of the participants.

(b) Murder in the second degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 3 ch 166 SLA 1978; am § 1 ch 66 SLA 1988; am § 5 ch 4 SLA 1990)

## Chapter 05. Punishment.

*Secs. 11.05.010 — 11.05.060. Punishments and sentences. [Repealed, § 21 ch 166 SLA 1978. For current law on attempt, see AS 1.31; for current sentencing provisions, see AS 12.55.]*

*Secs. 11.05.070 — 11.05.090. [Renumbered as AS 33.30.310, 33.30.320, and 33.30.300.]*

*Sec. 11.05.100. Computation and execution of jail sentences. [Repealed, § 21 ch 166 SLA 1978. For current sentencing provisions, see AS 12.55.]*

*Secs. 11.05.110 — 11.05.120. Employment of imprisoned persons. Repealed, § 6 ch 53 SLA 1982.]*

*Sec. 11.05.130. [Renumbered as AS 33.30.290.]*

*Secs. 11.05.140 — 11.05.150. Imposition of punishment; punishment for felonies. [Repealed, § 21 ch 166 SLA 1978. For current sentencing provisions, see AS 12.55.]*

## Chapter 10. Parties to Crime.

*[Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.16 and 11.31.110.]*

## Chapter 15. Offenses Against the Person.

*Secs. 11.15.010 — 11.15.050. Murder and manslaughter. [Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.41.100 — 11.41.140.]*

*Sec. 11.15.060. [Renumbered as AS 18.16.010.]*

*Secs. 11.15.070 — 11.15.340. Homicide, sexual offenses, assaults, robbery, larceny, kidnapping, black mail, libel and slander. [Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.41.]*





## Chapter 16. Parties to Crime.



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**Collateral references.** — 21 Am. Jur. 2d, Criminal Law, §§ 37-61, 163-174.

22 C.J.S., Criminal Law, §§ 79-99.

Criminal responsibility of one cooperating in offense which he is incapable of committing personally, 5 ALR 782; 74 ALR 1110; 131 ALR 1322.

What amounts to participation in homicide on part of one not the actual perpetrator, who was present without preconcert or conspiracy, 12 ALR 276.

Intent to aid and abet perpetrator, or entering into his design, as necessary to make one, present at homicide without preconcert or conspiracy, criminally responsible, 12 ALR 277.

Responsibility of persons participating in jail delivery for homicide committed by one of their number, 16 ALR 456.

Principal in second degree, or aider and abettor in case of felonious assault, 16 ALR 1043.

Criminal responsibility of one who furnishes instrumentality of a kind ordinarily used for legitimate purposes, with knowledge that it is to be used by another for criminal purposes, 103 ALR 331.

Coercion, compulsion or duress as defense to criminal prosecution, 40 ALR2d 903.

Accessory before fact in manslaughter, 95 ALR2d 176.

Woman upon whom abortion is committed or attempted as accomplice for purposes of rule requiring corroboration of accomplice testimony, 34 ALR3d 868.

Acquittal of principal or his conviction of lesser degree of offense as affecting prosecution of accessory and aider and abettor, 9 ALR4th 972.

Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators, 19 ALR4th 192.

Disciplinary action against attorney for aiding or assisting another person in unauthorized practice of law, 41 ALR4th 361.

Withdrawal of life supports from comatose patient, 47 ALR4th 18.

Criminal responsibility under 18 USCS 2(b) of one who lacks capacity to commit an offense but causes another to do so, 52 ALR Fed. 769.

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**Sec. 11.16.100. Legal accountability based upon conduct.** A person is guilty of an offense if it is committed by the person's own conduct or by the conduct of another for which the person is legally accountable under AS 11.16.110, or by both. (§ 1 ch 166 SLA 1978)

### NOTES TO DECISIONS

**Former law construed.** — See Turnef v. State, 512 P.2d 923 (Alaska 1973). (Decided under former AS 11.10.010.)

**Legal accountability statutes apply to fish and wildlife offenses.** Knutson v. State, 736 P.2d 776 (Alaska Ct. App. 1987).

Applied in Kinegak v. State, 747 P.2d 541 (Alaska Ct. App. 1987).

Cited in Dailey v. State, 676 P.2d 657 (Alaska Ct. App. 1984).

**Sec. 11.16.110. Legal accountability based upon the conduct of another; Complicity.** A person is legally accountable for the conduct of another constituting an offense if

(1) the person is made legally accountable by a provision of law defining the offense;

(2) with intent to promote or facilitate the commission of the offense, the person

(A) solicits the other to commit the offense; or

(B) aids or abets the other in planning or committing the offense; or

(3) acting with the culpable mental state that is sufficient for the commission of the offense, the person causes an innocent person or a person who lacks criminal responsibility to engage in the prescribed conduct. (§ 1 ch 166 SLA 1978)

Cross references. — For solicitation, see AS 11.31.110.

NOTES TO DECISIONS

Editor's notes. — Some of the cases cited in the notes below were decided under former AS 12.15.010.

**Distinction between principals and accessories abrogated.** — Former AS 12.15.010 abrogated the distinction between principals and accessories. Tarnef v. State, 492 P.2d 109 (Alaska 1971).

By former AS 12.15.010, Alaska abolished the common-law distinction between accessories and principals to a crime. Rice v. State, 589 P.2d 419 (Alaska 1979).

**Legal accountability statutes apply to fish and wildlife offenses.** Knutson v. State, 736 P.2d 775 (Alaska Ct. App. 1987); Vaden v. State, 742 P.2d 784 (Alaska Ct. App. 1987).

**Knowledge of fact of criminality irrelevant.** — In order for a defendant to be found liable as an accomplice, the state need only prove that defendant intentionally aided codefendant, knowing of codefendant's criminal purpose. It is not necessary that he know of the criminality of the conduct. Mudge v. State, 760 P.2d 1046 (Alaska Ct. App. 1988).

**Abrogation did not apply only to punishment.** — The abrogation of the distinction between accessories and principals mandated by former AS 12.15.010 did not apply only to punishment. Scharver v. State, 561 P.2d 309 (Alaska 1977).

To "prosecute" one as a principal includes charging him as a principal. Scharver v. State, 561 P.2d 309 (Alaska 1977).

**Aiders and abettors as principals.** — Former AS 12.15.010 provided that anyone aiding or abetting the commission of a crime should be prosecuted, tried, and punished as a principal. Tarnef v. State, 492 P.2d 109 (Alaska 1971).

An accused who is indicted as a principal is subject to conviction upon evidence which shows that he only aided and abetted. Scharver v. State, 561 P.2d 309 (Alaska 1977).

One indicted as a principal may be convicted of the crime on evidence which shows that he merely aided and abetted. Ransom v. State, 460 P.2d 170 (Alaska 1969).

"Aid and abet" means to help, assist, or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage, counsel, or incite as to its commission. Thomas v. State, 391 P.2d 18 (Alaska 1964); Carman v. State, 602 P.2d 1255 (Alaska 1979). Hensel v. State, 604 P.2d 222 (Alaska 1979).

It can be inferred that the words "aid and abet" are used synonymously with various combinations of the words assist, advise, counsel, procure, encourage, incite and instigate. Tarnef v. State, 512 P.2d 923 (Alaska 1973); Carman v. State, 602 P.2d 1255 (Alaska 1979).

**A defendant need not commit every element of an offense to be guilty as a principal** under the law, so long as the state proves commission of the whole offense by someone and the aiding or abetting of the offense by the defendant. Anthony v. State, 521 P.2d 480 (Alaska 1974).

**When person is guilty as accomplice.** — See Gordon v. State, 533 P.2d 25 (Alaska 1975).

**Not just any act of the defendant will suffice.** The act must aid, abet, assist, or facilitate the commission of the particular substantive crime for which the state seeks to hold the defendant liable as an accomplice. Hensel v. State, 604 P.2d 222 (Alaska 1979).

**Focus in determining accomplice's liability.** — In determining an accomplice's liability for the crime committed by another, the focus is not only upon the substantive offense committed by the perpetrator; it is also upon the accomplice's acts and mental state vis-a-vis the criminal enterprise in general. Hensel v. State, 604 P.2d 222 (Alaska 1979).

With respect to the mental element, liability for the crime of another will attach only upon a showing that an individual had knowledge of the criminal enterprise and specifically intended, by his conduct, to aid, abet, assist, or participate in the criminal enterprise. Hensel v. State, 604 P.2d 222 (Alaska 1979).

**Evidence of the defendant's diminished capacity** is admissible to negate the elements of knowledge and specific criminal intent required for accomplice liability. Hensel v. State, 604 P.2d 222 (Alaska 1979).

**Photographs are relevant to establish aiding and abetting** the commission of the crime and may be admitted into evidence. In re P.H., 504 P.2d 837 (Alaska 1972).

A witness' testimony that he bought two ski masks at defendant's request which he knew at the time would be used for a "hold-up," and that he paid his own money for them would have been sufficient to allow the jury to conclude that the witness was an accomplice to the robbery. Carman v. State, 602 P.2d 1255 (Alaska 1979).

In order to establish liability as accomplice in sale of cocaine, it was incumbent on the state to prove, first, that defendant was aware of another individual's plan to resell the cocaine, and, second, that in supplying the individual with cocaine, defendant acted with the intent to promote the other individual's plan. The state was not required to show defendant's awareness of and intent to promote the specific sale that actually occurred. Shindle v. State, 731 P.2d 592 (Alaska Ct. App. 1987).

**Aiding and abetting undercover agents.** — Defendants who aided and abetted undercover agents in committing illegal hunting acts were properly convicted as accomplices despite agents' lack of criminal liability. Vaden v. State, 760 P.2d 1102 (Alaska 1988).

**Absence of accomplice-as-matter-of-law instruction not erroneous.** — See Moseberg v. State, 624 P.2d 796 (Alaska 1981).

Applied in Bowell v. State, 728 P.2d 1220 (Alaska Ct. App. 1986); Kinegak v. State, 747 P.2d 541 (Alaska Ct. App. 1987); Thiel v. State, 762 P.2d 478 (Alaska Ct. App. 1988).

Quoted in Cole v. State, 764 P.2d 752 (Alaska Ct. App. 1988).

Cited in Dailey v. State, 675 P.2d 657 (Alaska Ct. App. 1984); Hale v. State, 761 P.2d 313 (Alaska Ct. App. 1988).





**Sec. 11.16.120. Exemptions to legal accountability for conduct of another.** (a) In a prosecution for an offense in which legal accountability is based on the conduct of another person,

(1) it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of criminal intent,

(A) terminated the defendant's complicity before the commission of the offense;

(B) wholly deprived the defendant's complicity of its effectiveness in the commission of the offense; and

(C) gave timely warning to law enforcement authorities or, if timely warning could not be given to law enforcement authorities by

ensonable efforts, otherwise made a reasonable effort to prevent the ommission of the offense;

(2) it is not a defense that

(A) the other person has not been prosecuted for or convicted of an ffense based upon the conduct in question or has been convicted of a lifferent offense or degree of offense;

(B) the offense, as defined, can be committed only by a particular lass of persons to which the defendant does not belong, and the defendant is for that reason legally incapable of committing the offense in n individual capacity; or

(C) the other person is not guilty of the offense.

(b) Except as otherwise provided by a provision of law defining an offense, a person is not legally accountable for the conduct of another constituting an offense if

(1) the person is the victim of the offense; or

(2) the offense is so defined that the person's conduct is inevitably incidental to its commission. (§ 1 ch 166 SLA 1978)

NOTES TO DECISIONS

**Conviction of accessory when principal is undercover agent.** — A professional hunting guide could properly be convicted as an accessory to hunting violations when the principal was an undercover agent for the government, since the defense of entrapment under AS 11.81.460 provides an adequate remedy for an government overreaching. Vaden v. State, 742 P.2d 784 (Alaska Ct. App. 1987).

A justification defense is personal to an undercover agent, and not transferable to a defendant charged as his accomplice. Vaden v. State, 768 P.2d 1102 (Alaska 1989).

Because the accomplice's state of mind is the focus in determining accomplice liability, defenses of entrapment, duress and heat of passion are not imputed to the accomplice. Vaden v. State, 768 P.2d 1102 (Alaska 1989).

"Renunciation" is an affirmative defense, and the burden is on the defendant to prove it by a preponderance of the evidence. Hale v. State, 764 P.2d 313 (Alaska Ct. App. 1988).

Quoted in Kott v. State, 678 P.2d 386 (Alaska 1984).

**Sec. 11.16.130. Legal accountability of organizations.** (a) Except as otherwise expressly provided, an organization is legally accountable for conduct constituting an offense if the conduct

(1) is the conduct of its agent and

(A) within the scope of the agent's employment and in behalf of the organization; or

(B) is solicited, subsequently ratified, or subsequently adopted by the organization; or

(2) consists of an omission to discharge a specific duty of affirmative performance imposed on organizations by law.

(b) In this section "agent" means a director, officer, or employee of an organization or any other person who is authorized to act in behalf of the organization. (§ 1 ch 166 SLA 1978)





**Cross references.** — For schedule of fines that can be levied against an organization convicted of an offense, see AS 12.55.035(c).

## Chapter 20. Offenses Against Property.

*Secs. 11.20.010 — 11.20.070. Arson and Related Crimes. [Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.46.400 — 11.46.460.]*

*Secs. 11.20.080 — 11.20.135. Burglary. [Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.46.300 — 11.46.310.]*

*Secs. 11.20.140 — 11.20.277. Larceny. [Repealed, § 21 ch 166 SLA 1978. For current provisions on theft, see AS 11.46.100 — 11.46.295.]*

*Secs. 11.20.280 — 11.20.340. Embezzlement. [Repealed, § 21 ch 166 SLA 1978. For theft by failure to make required disposition of funds received or held, see AS 11.46.210.]*

*Sec. 11.20.345. Extortion. [Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.41.520.]*

*Sec. 11.20.350. Receiving Stolen Goods. [Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.46.190 and 11.46.210.]*

*Secs. 11.20.360 — 11.20.510. False Pretenses and Frauds. [Repealed, § 21 ch 166 SLA 1978. For theft by deception, see AS 11.46.180; for business and commercial offenses, see AS 11.46.600 — 11.46.740.]*

*Secs. 11.20.515 — 11.20.650. Malicious Mischief and Trespass. [Repealed, § 21 ch 166 SLA 1978. For criminal trespass, see AS 11.46.320 — 11.46.350; for criminal mischief, see AS 11.46.480 — 11.46.486.]*

*Sec. 11.20.660. [Renumbered as AS 11.76.120.]*

*Secs. 11.20.670 — 11.20.690. Misuse, Damage, or Destruction. [Repealed, § 21 ch 166 SLA 1978. For criminal mischief, see AS 11.46.480 — 11.46.486.]*

## Chapter 22. Alaska Credit Card Crimes Act.

*[Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.46.285 — 11.46.290.]*

## Chapter 25. Forgery and Counterfeiting.

*[Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.46.500 — 11.46.580.]*

## Chapter 30. Offenses Against Public Justice.

*[Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.66.]*

## Chapter 31. Attempt and Solicitation.



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Collateral references. — 21 Am. Jur. 2d, Criminal Law, §§ 158-162.

22 C.J.S., Criminal Law, §§ 73-78.

What amounts to attempt to manufacture intoxicating liquor within criminal law, 22 ALR 225.

Solicitation to crime as substantive common-law offense, 35 ALR 961.

What constitutes attempt to commit robbery, 55 ALR 714.

Criminal offense of obtaining money under false pretenses, or attempting to do so, predicated upon receipt or claim of benefits under insurance policy, 135 ALR 1167.

Attempt to commit crime as to driving, being in control of, or operating a motor vehicle while intoxicated, 47 ALR2d 590.

Entrapment to commit or attempt abortion, 53 ALR2d 1166.

What justifies escape or attempt to escape, or assistance in that regard, 70 ALR2d 1430.

Attempt to commit assault as criminal offense, 79 ALR2d 697.

Fact that gun was unloaded as affecting criminal responsibility for attempt to commit murder, 79 ALR2d 1432.

Attempts to receive stolen property, 85 ALR2d 259.

Attempt to escape or commit prison breach as affected by means employed, 96 ALR2d 520.

Attempts to commit offenses of larceny by trick, confidence game, false pretenses, and the like, 6 ALR3d 241.

Impotency as defense to charge of rape, attempt to rape, or assault with intent to commit rape, 23 ALR3d 1351.

Woman upon whom abortion is committed or attempted as accomplice for purposes of rule requiring corroboration of accomplice testimony, 34 ALR3d 858.

Comment note on impossibility of consummation of substantive crime as defense in criminal prosecution for conspiracy or attempt to commit crime, 37 ALR3d 375.

What constitutes attempted murder, 54 ALR3d 612.

Temporary unauthorized absence of prisoner as escape or attempted escape, 70 ALR3d 695.

What conduct amounts to an overt act or acts done toward commission of larceny so as to sustain charge of attempt to commit larceny, 76 ALR3d 842.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim, 88 ALR3d 1309.

Use of force or intimidation in retaining property or in attempting to escape, rather than in taking property, as element of robbery, 93 ALR3d 643.

Criminal liability of third persons for death of another as result of accused's attempt to kill self or assist another's suicide, 40 ALR4th 702.

Impossibility of consummation as defense to prosecution for attempt, 41 ALR4th 688.

What constitutes attempted bank robbery under 18 USCS §§ 2113(a), making it offense to take or attempt to take, by force, violence, or intimidation, any property, money, or other thing of value from bank, 37 ALR Fed. 255.

Criminal responsibility under 18 USCS § 2(b) of one who lacks capacity to commit an offense but who causes another to do so, 62 ALR Fed. 769.

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**Sec. 11.31.100. Attempt.** (a) A person is guilty of an attempt to commit a crime if, with intent to commit a crime, the person engages in conduct which constitutes a substantial step toward the commission of that crime.

(b) In a prosecution under this section, it is not a defense that it was factually or legally impossible to commit the crime which was the object of the attempt if the conduct engaged in by the defendant would be a crime had the circumstances been as the defendant believed them to be.

(c) In a prosecution under this section, it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, prevented the commission of the attempted crime.

(d) An attempt is

(1) an unclassified felony if the crime attempted is murder in the first degree;

(2) a class A felony if the crime attempted is an unclassified felony other than murder in the first degree;

(3) a class B felony if the crime attempted is a class A felony;

(4) a class C felony if the crime attempted is a class B felony;

(5) a class A misdemeanor if the crime attempted is a class C felony;

(6) a class B misdemeanor if the crime attempted is a class A or class B misdemeanor.

(e) If the crime attempted is an unclassified crime described in a statute outside this title which is not part of this title and no provision for punishment of an attempt to commit the crime is specified, the punishment for the attempt is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the amount of the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime attempted is punishable by an indeterminate or life term, the attempt is a class A felony. (§ 2 ch 166 SLA 1978; am § 1 ch 102 SLA 1980; am § 10 ch 45 SLA 1982; am § 1 ch 59 SLA 1988)

**Cross references.** — For legislative purpose of ch. 45, SLA 1982, see § 1, ch. 45, SLA 1982 in the Temporary and Special Acts.

**Effect of amendments.** — The 1988 amendment, in subsection (d), inserted present paragraph (1), redesignated former paragraphs (1)-(6) as present paragraphs (2)-(6), and added "other than murder in the first degree" at the end of paragraph (2).

**Legislative history reports.** — For a report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, May 28, 1980.

## NOTES TO DECISIONS

**Editor's notes.** — Many of the cases cited in the notes below were decided under former AS 11.05.020.

The word "attempt" generally means the trial or physical effort to do a particular thing. Wooldridge v. United States, 237 F. 776 (9th Cir. 1916).

**When attempt complete under former law.** — See Lemke v. United States, 14 Alaska 687, 211 F.2d 73 (9th Cir. 1954); Wooldridge v. United States, 237 F. 776 (9th Cir. 1916).

In the area of attempt, criminal culpability was present under former AS 11.05.020 where there was the formation of criminal attempt, a preparation to commit the crime, and a direct unequivocal act toward its perpetration. Braham v. State, 571 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978).

**Mere preparation to commit a crime,** not followed by an overt act done toward its commission, did not constitute an attempt under former AS 11.05.020. There were borderline cases where it was sometimes difficult to determine whether preparation to commit a crime has come near enough to the accomplishment of the act so that an attempt had been committed. Gargan v. State, 436 P.2d 968 (Alaska 1968).

Mere preparation to commit a crime, not followed by an overt act done toward its commission, did not constitute an attempt. Lemke v. United States, 14 Alaska 687, 211 F.2d 73 (9th Cir. 1954).

When one's acts were of such a preliminary nature so as to constitute mere preparation for the contemplated crime, there was no crime of attempt. Braham v. State, 571 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978).

**Question of degree.** — Whether acts taken or done in contemplation of the commission of a crime were merely preparatory and did not constitute attempt, or whether they were sufficiently close to the consummation of the crime to amount to attempt, was a question of degree and depended upon the facts and circumstances of a particular case. Braham v. State, 571 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978).

**Inadequacy of former statute.** — Former AS 11.05.020 was apparently inadequate to codify effectively as a crime the situation involving the single act of contracting for another to perform a criminal act. Braham v. State, 571 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978).

**Applicability of this section.** — Since under Alaska law, delivery of cocaine is expressly defined to include an attempted delivery, the more specific statute controls and this section, the general attempt statute, is therefore not applicable to delivery of cocaine. Stuart v. State, 698 P.2d 1218 (Alaska Ct. App. 1985).

**Where defendant contracted with someone to kill another,** when he instructed the killer to visit the victim, his intention being that there would be fostered a relationship of trust and confidence between the killer and the victim, thus placing the killer in a position where he would be closer to the victim and could more readily kill him, the killer's visit with the victim, at defendant's direction, was the doing of a direct, unequivocal act toward the commission of the crime of murder, which followed the formation of a criminal intent and a preparation to commit this crime. Braham v. State, 571 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978).

**Factual impossibility not apparent to actor.** — A factual impossibility which was not apparent to the actor at the time should not, as a matter of policy, insulate him from conviction for attempting the commission of the offense. Gargan v. State, 436 P.2d 968 (Alaska 1968).

**"Empty pocket doctrine".** — See





Gargan v. State, 436 P.2d 968 (Alaska 1968).

**Attempt statute applied to attempted violation of narcotic drug statute.** — Persons attempting to commit the crime defined by AS 17.10.010 of the Alaska Uniform Narcotic Drug Act (now repealed) were not exempted or excepted from the provisions of the attempt statute. Simpson v. United States, 13 Alaska 635, 195 F.2d 721 (9th Cir. 1952).

**An attempt was necessarily included in an indictment for statutory rape.** Seklnoff v. United States, 283 F. 38 (9th Cir. 1922).

**Failure to include "substantial step" language in indictment for attempted murder** was a defect only as to form, where the indictment included a concise description of defendant's actions that constituted the offense, including the proper language regarding his state of mind. Clervo v. State, 755 P.2d 907 (Alaska Ct. App. 1988).

**Indictment need not specify intent to be proved for attempted rape.** — There is authority for the proposition that a specific intent must be proved for the crime of attempted rape. But there is no authority supporting the proposition that the indictment must specify that intent. State v. Thomas, 525 P.2d 1092 (Alaska 1974).

Even though there is no question that the crime of attempt requires a specific intent, it seems equally beyond dispute that a charge of attempt to commit a specific crime clearly advises the defendant of the offense with which he is charged. State v. Thomas, 525 P.2d 1092 (Alaska 1974).

**Indictment charging attempted rape and citing only the rape statute held sufficient.** — See State v. Thomas, 525 P.2d 1092 (Alaska 1974).

**Attempted kidnapping was class A felony under this section before 1982 amendment.** — Under the law as it existed before the 1982 amendment to this section became effective, attempted kidnapping was unquestionably a class A felony. Galbraith v. State, 693 P.2d 880 (Alaska Ct. App. 1985).

**Attempted first-degree sexual assault.** — At the very least, a defendant must have formed a specific intent to engage in sexual penetration in order to be convicted of attempted first-degree sexual assault. Baden v. State, 667 P.2d 1275 (Alaska Ct. App. 1983).

**Five-year presumptive sentence for attempted sexual assault.** — It was not manifestly unjust to impose a five-year presumptive term upon defendant's conviction of attempted sexual assault of a minor, and he was not automatically entitled as a matter of law to have his case referred to a three-judge panel for sentencing. Aveoganna v. State, 757 P.2d 75 (Alaska Ct. App. 1988).

**Offense of attempted second-degree murder was an impossibility.** Hulit v. State, 678 P.2d 415 (Alaska Ct. App. 1984).

**Applicability of partial affirmative defenses.** — A person charged with attempted kidnapping is not entitled to assert a partial defense when the intended victim of the crime is voluntarily released unharmed; under the plain language of AS 11.41.300(d), the partial affirmative defense applies only in a prosecution for kidnapping. Larsby v. State, 710 P.2d 427 (Alaska Ct. App. 1985).

**Defendant may be found guilty though attempt not expressly charged.** — Jury could find defendant guilty of the attempt to commit the crime of possessing narcotic drugs despite the fact that the attempt was not expressly charged. Simpson v. United States, 13 Alaska 635, 195 F.2d 721 (9th Cir. 1952).

**Substantial evidence of attempt.** — In a prosecution for possession of narcotic drugs, although there was no substantial evidence that defendant committed the crime charged in the information, there was substantial evidence that she attempted to commit the crime charged. Simpson v. United States, 13 Alaska 635, 195 F.2d 721 (9th Cir. 1952).

**Evidence sufficient to support conviction.** — See McCurlo v. State, 677 P.2d 1268 (Alaska Ct. App. 1984).

**Conviction reversed because of insufficient evidence.** — See Brower v. State, 728 P.2d 646 (Alaska Ct. App. 1986).

**Defendant's conviction of attempted sexual abuse of a minor in the second degree was reversed,** where evidence showing that he wrote notes to an eight-year-old girl asking her to be his girlfriend and to kiss him established only that he engaged in preparatory conduct and not that he took a substantial step toward sexual contact with the girl. Sullivan v. State, 766 P.2d 61 (Alaska Ct. App. 1988).

**Same offense for sentencing purposes.** — Assault with intent to rob and attempted robbery constituted the "same offense" for sentencing purposes. Brookins

v. State, 600 P.2d 12 (Alaska Ct. App. 1979).

**Conviction and sentence upheld.** — See Andrejko v. State, 695 P.2d 246 (Alaska Ct. App. 1985).

**Convictions reversed because of erroneous jury instruction.** — Convictions for attempted sexual assault in the first degree and kidnapping were reversed because of an erroneous jury instruction on sexual assault in the first degree concerning consent. The correct standard is whether the defendant recklessly disregarded the victim's lack of consent. Lassiter v. State, 684 P.2d 139 (Alaska Ct. App. 1984).

**Sentence upheld.** — See Bowie v. State, 494 P.2d 800 (Alaska 1972); Spearman v. State, 543 P.2d 202 (Alaska 1975); Braham v. State, 571 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978); Johnson v. State, 580 P.2d 700 (Alaska 1978); Ferguson v. State, 590 P.2d 43 (Alaska 1979); Morris v. State, 592 P.2d 1244 (Alaska 1979); Ramil v. State, 619 P.2d 722 (Alaska 1980); Travelstead v. State, 689 P.2d 494 (Alaska 1984); Schnecker v. State, 739 P.2d 1310 (Alaska Ct. App. 1987).

**Sentence for attempted first degree murder upheld.** — See Stancl v. State, 718 P.2d 918 (Alaska 1986).

**Conviction of attempted first-degree sexual assault affirmed.** — Conviction of attempted sexual assault on the first degree under AS 11.41.410 as it read before the 1983 amendment and this section was affirmed. Sexual charges based on non-consensual genital intercourse do not require proof of a specific sexual intent; and plain error was not established though the prosecutor's expressions which might have been construed as a personal opinion of the guilt of the defendant or an argument relating to a defendant's need for treatment were improper and uninvited. Fotta v. State, 712 P.2d 386 (Alaska Ct. App. 1986).

**Sentence under former AS 11.41.410(b) and this section held excessive.** — See Holhouse v. State, 687 P.2d 1168 (Alaska Ct. App. 1984).

**Sentence held excessive.** — See Hansen v. State, 657 P.2d 862 (Alaska Ct. App. 1983).

**Applied in** Nicholson v. State, 666 P.2d 1209 (Alaska Ct. App. 1982); Patterson v. State, 732 P.2d 1102 (Alaska Ct. App. 1987); Allen v. State, 769 P.2d 467 (Alaska Ct. App. 1989).

**Stated in** State v. Silas, 595 P.2d 661 (Alaska 1979); Ramil v. State, 619 P.2d 722 (Alaska 1980); Coleman v. State, 621 P.2d 869 (Alaska 1980); Clark v. State, 646 P.2d 1236 (Alaska Ct. App. 1982); Tazruk v. State, 655 P.2d 788 (Alaska Ct. App. 1982); Velez v. State, 762 P.2d 1297 (Alaska Ct. App. 1988).

**Cited in** Handley v. State, 616 P.2d 627 (Alaska 1980); Walker v. State, 662 P.2d 948 (Alaska Ct. App. 1983); Bell v. State, 668 P.2d 829 (Alaska Ct. App. 1983); Brower v. State, 683 P.2d 290 (Alaska Ct. App. 1984); Hart v. State, 702 P.2d 651 (Alaska Ct. App. 1985); Chief v. State, 718 P.2d 475 (Alaska Ct. App. 1986); Hastings v. State, 736 P.2d 1157 (Alaska Ct. App. 1987); James v. State, 739 P.2d 1314 (Alaska Ct. App. 1987); Stevens v. State, 748 P.2d 771 (Alaska Ct. App. 1988); James v. State, 764 P.2d 1336 (Alaska Ct. App. 1988); Ervin v. State, 761 P.2d 124 (Alaska Ct. App. 1988); Robison v. State, 763 P.2d 1357 (Alaska Ct. App. 1988); Konrad v. State, 763 P.2d 1369 (Alaska Ct. App. 1988); Lawrence v. State, 764 P.2d 318 (Alaska Ct. App. 1988).

**Sec. 11.31.110. Solicitation.** (a) A person commits the crime of solicitation if, with intent to cause another to engage in conduct constituting a crime, the person solicits the other to engage in that conduct.

(b) In a prosecution under this section,

(1) it is not a defense

(A) that the defendant belongs to a class of persons who by definition are legally incapable in an individual capacity of committing the crime that is the object of the solicitation; or

(B) that a person whom the defendant solicits could not be guilty of the crime that is the object of the solicitation;





(2) it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, after soliciting another person to engage in conduct constituting a crime, prevented the commission of the crime.

(c) Solicitation is a

(1) class A felony if the crime solicited is an unclassified felony;

(2) class B felony if the crime solicited is a class A felony;

(3) class C felony if the crime solicited is a class B felony;

(4) class A misdemeanor if the crime solicited is a class C felony;

(5) class B misdemeanor if the crime solicited is a class A or class B misdemeanor.

(d) If the crime solicited is an unclassified crime described in a state law which is not part of this title and no provision for punishment of a solicitation to commit the crime is specified, the punishment for the solicitation is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime solicited is punishable by an indeterminate or life term, the solicitation is a class A felony. (§ 2 ch 166 SLA 1978; am § 2 ch 102 SLA 1980; am § 11 ch 46 SLA 1982)

**Cross references.** — For legislative purpose of ch. 46, SLA 1982, see § 1, ch. 46, SLA 1982, in the Temporary and Special Acts; for legal accountability based on the conduct of another and complicity, see AS 11.16.110.

**Legislative history reports.** — For a report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, May 26, 1980.

NOTES TO DECISIONS

**Former law construed.** — See McConkey v. State, 504 P.2d 823 (Alaska 1972); Cassell v. State, 645 P.2d 219 (Alaska Ct. App. 1982). (Decided under former AS 11.10.070.)

**One contracting with another to kill a third person was guilty of attempted first-degree murder, not solicitation.** — See Braham v. State, 571 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978).

**Quoted in** Sullivan v. State, 766 P.2d 61 (Alaska Ct. App. 1988).

**Cited in** Hoover v. State, 641 P.2d 1263 (Alaska Ct. App. 1982); P.S. v. State, 655 P.2d 1319 (Alaska Ct. App. 1982); Monroe v. State, 752 P.2d 1017 (Alaska Ct. App. 1988).

**Sec. 11.31.140. Multiple convictions barred.** (a) It is not a defense to a prosecution under AS 11.31.100 or AS 11.31.110 that the crime that is the object of the attempt or solicitation was actually committed pursuant to the attempt or solicitation.

(b) A person may not be convicted of more than one crime defined by AS 11.31.100 or AS 11.31.110 for conduct designed to commit or culminate in commission of the same crime.

(c) A person may not be convicted on the basis of the same course of conduct of both (1) a crime defined by AS 11.31.100 or 11.31.110; and (2) the crime that is the object of the attempt or solicitation.

(d) This section does not bar inclusion of multiple counts in a single indictment or information charging commission of a crime defined by AS 11.31.100 or 11.31.110 and commission of the crime that is the object of the attempt or solicitation. (§ 2 ch 166 SLA 1978)

NOTES TO DECISIONS

**Conspiracy is separate offense.** — The crime of conspiracy is generally regarded as a separate offense from the substantive crime that is the object of the conspiracy. Unlike the other preliminary offenses of attempt and solicitation, conspiracy does not merge into a conviction for the substantive crime. Lythgoe v. State, 626 P.2d 1082 (Alaska 1980).

The no-merger rule means that a defendant can be convicted of both conspiracy and the object of the conspiracy. One reason advanced for this special treatment of conspiracy as a separately punishable offense is that conspiracy has been regarded as a serious crime in itself. Lythgoe v. State, 626 P.2d 1082 (Alaska 1980).

**Sec. 11.31.160. Substantive crimes involving attempt or solicitation.** Notwithstanding AS 11.31.140(d),

(1) a person may not be charged under AS 11.31.100 if the crime allegedly attempted by the defendant is defined in such a way that an attempt to engage in the proscribed conduct constitutes commission of the crime itself;

(2) a person may not be charged under AS 11.31.110 if the solicitation in question is defined as a specific crime under other provisions of law. (§ 2 ch 166 SLA 1978)

NOTES TO DECISIONS

Cited in Stuart v. State, 698 P.2d 1218 (Alaska Ct. App. 1985).

## Chapter 35. Abandonment and Nonsupport.

*[Repealed, § 1 ch 39 SLA 1970 and § 21 ch 166 SLA 1978. For current law on desertion and nonsupport of a minor, see AS 11.51.100 — 11.51.120.]*





## Chapter 36. Failure to Permit Visitation with Minor Child.

*[Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.51.126.]*

## Chapter 40. Crimes Against Morality and Decency.

*[Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.51.130, 11.51.140, AS 11.61.110, 11.61.130, 11.61.140 and AS 11.66.100 — 11.66.150.]*

## Chapter 41. Offenses Against the Person.

Article
1. Homicide (§§ 11.41.100 — 11.41.140)
2. Assault and Reckless Endangerment (§§ 11.41.200 — 11.41.250)
3. Kidnapping and Custodial Interference (§§ 11.41.300 — 11.41.370)
4. Sexual Offenses (§§ 11.41.410 — 11.41.470)
5. Robbery, Extortion, and Coercion (§§ 11.41.500 — 11.41.530)

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**Cross references.** — For provisions authorizing arrest without warrant in certain cases where the police officer has reasonable cause to believe that the person has committed a crime under this chapter, see AS 12.25.030(b).

NOTES TO DECISIONS

Cited in Leuch v. State, 633 P.2d 1006 (Alaska 1981).

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### Article 1. Homicide.

Section
100. Murder in the first degree
110. Murder in the second degree
116. Defenses to murder
120. Manslaughter
130. Criminally negligent homicide
135. Multiple deaths
140. Definition

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**Collateral references.** — 41 Am. Jur. 2d, Homicide, § 1 et seq.

40 C.J.S., Homicide, § 1 et seq.

Homicide by wanton or reckless use of firearm without express intent to inflict injury, 5 ALR 603; 23 ALR 1654.

Homicide or assault in attempting to prevent elopement, 8 ALR 660.

What amounts to participation in homicide on part of one not the actual perpetrator, who was present without preconcert or conspiracy, 12 ALR 276.

Intoxication as reducing homicide from murder to manslaughter, 12 ALR 888; 79 ALR 897.

Responsibility of persons participating

the assessment of the civil penalty shall be determined de novo, and shall include the right of a trial by jury, the right to counsel, and the right to confront witnesses. The facts of the violation shall be proved beyond a reasonable doubt.

**Civil action**

(h) If an individual does not request a hearing pursuant to subsection (e) of this section and the Attorney General issues an order pursuant to such subsection, or if an individual does not under subsection (g) of this section seek judicial review of such an order, the Attorney General may commence a civil action in any appropriate district court of the United States for the purpose of recovering the amount assessed and an amount representing interest at a rate computed in accordance with section 1961 of Title 28. Such interest shall accrue from the expiration of the 30-day period described in subsection (g) of this section. In such an action, the decision of the Attorney General to issue the order, and the amount of the penalty assessed by the Attorney General, shall not be subject to review.

**Limitation**

(i) The Attorney General may not under this subsection commence proceeding against an individual after the expiration of the 5-year period beginning on the date on which the individual allegedly violated subsection (a) of this section.

**Expungement procedures**

(j) The Attorney General shall dismiss the proceedings under this section against an individual upon application of such individual at any time after the expiration of 3 years if—

(1) the individual has not previously been assessed a civil penalty under this section;

(2) the individual has paid the assessment;

(3) the individual has complied with any conditions imposed by the Attorney General;

(4) the individual has not been convicted of a Federal or State offense relating to a controlled substance; and

(5) the individual agrees to submit to a drug test, and such test shows the individual to be drug free.

A nonpublic record of a disposition under this subsection shall be retained by the Department of Justice solely for the purpose of determining in any subsequent proceeding whether the person qualified for a civil penalty or expungement under this section. If a record is expunged under this subsection, an individual concerning whom such an expungement has been made shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge a proceeding under this section or the results thereof in response to an inquiry made of him for any purpose.

(Pub.L. 91–513, Title II, § 405, formerly Pub.L. 100–690, Title VI, § 6486, Nov. 18, 1988, 102 Stat. 4384, renumbered and amended Pub.L. 101–647, Title X, § 1002(g)(1), (2), Nov. 29, 1990, 104 Stat. 4828.)

**EDITORIAL NOTES**

**Prior Provisions.** A prior section 405 of Pub.L. 91–513, Title II, Oct. 27, 1970, 84 Stat. 1265, was redesignated section 418 by Pub.L. 101–647, § 1002(a)(1). See Section 859 of this title.

## § 845. Transferred to § 859

## § 845a. Transferred to § 860

## § 845b. Transferred to § 861

## § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub.L. 91–513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265, amended Pub.L. 100–690, Title VI, § 6470(a), Nov. 18, 1988, 102 Stat. 4377.)

## § 847. Additional penalties

Any penalty imposed for violation of this subchapter shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(Pub.L. 91–513, Title II, § 407, Oct. 27, 1970, 84 Stat. 1265.)

## § 848. Continuing criminal enterprise

**Penalties; forfeitures**

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to

1984, 98 Stat. 2031, as amended, set out as a note under section 3551 of this title.

## § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

### Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 88, 294 (Mar. 4, 1909, ch. 321, § 37, 35 Stat. 1096; Mar. 4, 1909, ch. 321, § 178a, as added Sept. 27, 1944, ch. 425, 58 Stat. 752).

This section consolidates said sections 88 and 294 of title 18, U.S.C., 1940 ed.

To reflect the construction placed upon said section 88 by the courts the words "or any agency thereof" were inserted. (See *Haas* v. *Henkel*, 1909, 30 S.Ct. 249, 216 U.S. 462, 54 L.Ed. 569, 17 Ann.Cas. 1112, where court said: "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful functions of any department of government." Also, see *United States v. Walter*, 1923, 44 S.Ct. 10, 263 U.S. 15, 68 L.Ed. 137, and definitions of department and agency in section 6 of this title.)

The punishment provision is completely rewritten to increase the penalty from 2 years to 5 years except where the object of the conspiracy is a misdemeanor. If the object is a misdemeanor, the maximum imprisonment for a conspiracy to commit that offense, under the revised section, cannot exceed 1 year.

The injustice of permitting a felony punishment on conviction for conspiracy to commit a misdemeanor is described by the late Hon. Grover M. Moscowitz, United States district judge for the eastern district of New York, in an address delivered March 14, 1944, before the section on Federal Practice of the New York Bar Association, reported in 3 Federal Rules Decisions, pages 380–392.

Hon. John Paul, United States district judge for the western district of Virginia, in a letter addressed to Congressman Eugene J. Keogh dated January 27, 1944, stresses the inadequacy of the 2-year sentence prescribed by existing law in cases where the object of the conspiracy is the commission of a very serious offense.

The punishment provision of said section 294 of title 18 was considered for inclusion in this revised section. It provided the same penalties for conspiracy to violate the provisions of certain counterfeiting laws, as are applicable in the case of conviction for the specific violations. Such a punishment would seem desirable for all conspiracies as for such offenses as counterfeiting and transporting stolen property in interstate commerce.

A multiplicity of unnecessary enactments inevitably leads to confusion and disregard of law. (See reviser's note under section 493 of this title.)

Since consolidation was highly desirable and because of the strong objections of prosecutors to the general application of the punishment provision of said section 294, the revised section represents the best compromise that could be devised between sharply conflicting views.

A number of special conspiracy provisions, relating to specific offenses, which were contained in various sections incorporated in this title, were omitted because adequately covered by this section. A few exceptions were made, (1) where the conspiracy would constitute the only offense, or (2) where the punishment provided in this section would not be commensurate with the gravity of the offense. Special conspiracy provisions were retained in sections 241, 286, 372, 757, 794, 956, 1201, 2271, 2384 and 2388 of this title. Special conspiracy provisions were added to sections 2153 and 2154 of this title.

## § 372. Conspiracy to impede or injure officer

If two or more persons in any State, Territory, Possession, or District conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce by like means any officer of the United States to leave the place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be fined not more than $5,000 or imprisoned not more than six years, or both.

### Revision Notes

Based on title 18, U.S.C., 1940 ed., § 54 (Mar. 4, 1909, ch. 321, § 21, 35 Stat. 1092).

Scope of section was enlarged to cover all possessions of the United States. When the section was first enacted in 1861 there were no possessions, and hence the use of the words "State of Territory" was sufficient to describe the area then subject to the jurisdiction of the United States. The word "District" was inserted by the codifiers of the 1909 Criminal Code.

## § 373. Solicitation to commit a crime of violence

(a) Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands,

## 8.05A CONSPIRACY—ELEMENTS

The defendant is charged in [Count _____ of] the indictment with conspiring to _____ in violation of Section _____ of Title _____ of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [beginning on or about _____ and ending on or about _____] [starting sometime before _____] there was an agreement between two or more persons to commit at least one crime as charged in the indictment;

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and

Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed.

I shall discuss with you briefly the law relating to each of these elements.

A conspiracy is a kind of criminal partnership—an agreement of two or more persons to commit one or more crimes. The crime is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the con-

spiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is charged with the same responsibility as if that person had been one of the originators of it. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a member merely by associating with one or more persons who are conspirators, nor merely by knowing of the existence of a conspiracy.

An overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The government is not required to prove that the defendant personally did one of the overt acts. Once you have decided that the defendant was a member of a conspiracy, the defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not the defendant knew what they said or did.

### Comment

Proof of an overt act is not expressly required by every conspiracy statute. *See, e.g.,* 18 U.S.C. § 1951(a) (Conspiracy to Interfere with Commerce by Threats or Violence), § 1962(d) (Conspiracy to Engage in Racketeer Influenced and Corrupt Organizations), § 2384 (Seditious Conspiracy); 21 U.S.C. § 846 (Conspiracy to Possess a Controlled Substance with Intent to Distribute), § 963 (Conspiracy to Import or Export a Controlled Substance). "The overwhelming weight of authority now holds that proof of an overt act is not necessary to charge and convict on conspiracy [where the statute does not require it]." *United States v. Savaiano,* 843 F.2d 1280, 1294 (10th Cir.), *cert. denied,* 109 S.Ct. 99 (1988). However, Ninth Circuit law is to the contrary. *See United States v. Melchor-Lopez,* 627 F.2d 886, 890 (9th Cir.1980).

A court, in making a preliminary factual determination under Rule 801(d)(2)(E), may admit hearsay statements offered on the existence of the conspiracy and the membership of the speaker

and any persons discussed in the statement. *Bourjaily v. United States* 483 U.S. 171 (1987).

Venue lies in the district in which the conspiracy was entered or in any district in which there was an overt act. *Hyde & Schneider v. United States*, 225 U.S. 347 (1912); *Grigg v. Bolton*, 53 F.2d 158 (9th Cir.1931), *cert. denied*, 285 U.S. 538 (1932).

## 8.05B MULTIPLE CONSPIRACIES

You must decide whether the conspiracy charged in the indictment existed, and, if it did, who at least some of its members were. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you may find that some other conspiracy existed. Similarly, if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy.

### Comment

Absent variance between the allegations of the indictment and the evidence presented, there is no need to instruct the jury on the issue of multiple conspiracies. *United States v. Zemek*, 634 F.2d 1159 (9th Cir.1980), *cert. denied*, 450 U.S. 916 (1981); *United States v. Mayo*, 646 F.2d 369, 370 (9th Cir.), *cert. denied*, 454 U.S. 1127 (1981). But where there is variance, *e.g.*, where the indictment charges a single conspiracy and the evidence indicates two or more possible conspiracies, a multiple conspiracy instruction is proper. *United States v. Perry*, 550 F.2d 524, 533 (9th Cir.), *cert denied*, 431 U.S. 918, 434 U.S. 827 (1977) (citing *United States v. Varelli*, 407 F.2d 735, 746 (7th Cir.1969). Failure to give a multiple conspiracy instruction if none is requested does not amount to plain error *United States v. Krasn*, 614 F.2d 1229, 1235–36 (9th Cir.1980).

In cases where the conspiracy charged involves only two persons, it is useful to instruct the jury that should it find either conspirator not guilty of conspiracy it must acquit both. *United States v. Coven*, 662 F.2d 162, 173 (2d Cir.1981), *cert. denied*, 456 U.S. 916 (1982); *see also United States v. Glickman*, 604 F.2d 625, 631–33 (9th Cir.1979), *cert. denied*, 444 U.S. 1080 (1980).

## 8.05C CONSPIRACY—KNOWING OF AND ASSOCIATION WITH OTHER CONSPIRATORS

A conspiracy may continue for a long period of time and may include the performance of many transactions. It is not necessary that all members of the conspiracy join it at the same time, and one may become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names, identities, or locations of all of the other members.

Even though a defendant did not directly conspire with [the other defendant] [or] [other conspirators] in the overall scheme, the defendant would, in effect, have agreed to participate in the conspiracy if it is proved beyond a reasonable doubt that (1) the defendant directly conspired with one or more conspirators to carry out at least one of the objects of the conspiracy, (2) the defendant knew or had reason to know that other conspirators were involved with those with whom the defendant directly conspired, and (3) the defendant had reason to believe that whatever benefits the defendant might get from the conspiracy were probably dependent upon the success of the entire venture.

It is no defense that a person's participation in a conspiracy was minor or for a short period of time.

### Comment

A person may be a member of a conspiracy even though the person does not know all of the purpose of the conspiracy. *United States v. Escalante*, 637 F.2d 1197, 1200 (9th Cir.), *cert. denied*, 449 U.S. 856 (1980); *United States v. Kearney*, 560 F.2d 1358, 1362 (9th Cir.), *cert. denied*, 434 U.S. 971 (1977).

A single conspiracy can be established even though it took place during a long period of time during which new members joined and old members dropped out. *United States v. Green*, 523 F.2d 229, 233 (2d Cir.1975), *cert. denied*, 423 U.S. 1074 (1976). *See also United States v. Thomas*, 586 F.2d 123, 132 (9th Cir.1978); *United States v. Perry*, 550 F.2d 524 (9th Cir.), *cert. denied*, 431 U.S. 918, 434 U.S. 827 (1977).

## 8.05D WITHDRAWAL FROM CONSPIRACY

Once a person becomes a member of a conspiracy, that person remains a member until that person withdraws from it. One may withdraw by doing acts which are inconsistent with the purpose of the conspiracy and by making reasonable efforts to tell the co-conspirators about those acts. You may consider any definite, positive step that shows that the conspirator is no longer a member of the conspiracy to be evidence of withdrawal.

The government has the burden of proving that the defendant did not withdraw from the conspiracy before the overt act—on which you all agreed—was committed by some member of the conspiracy.

### Comment

It is proper to instruct that continued participation in a conspiracy is presumed unless there is evidence of withdrawal. *United States v. Krasn*, 614 F.2d 1229, 1236 (9th Cir.1980). *See also United States v. Basey*, 613 F.2d 198, 202 (9th Cir.1979), *cert. denied*, 446 U.S. 919 (1980).

If requested, an instruction on the government's burden of disproving withdrawal should be given. *United States v. Read*, 658 F.2d 1225 (7th Cir.1981). *See generally* Instructions 1.03, 3.02, *supra*, and Comments.

In the absence of a statute of limitations defense, do not use this instruction if the conspiracy charged in the indictment requires no proof of an overt act charged, since the crime is complete upon entering into the conspiracy. If the statute of limitations is a defense, this instruction should be modified to require the government to disprove withdrawal before the limiting date.

## 8.05E CONSPIRACY—PINKERTON CHARGE

Each member of a conspiracy is responsible for the actions of other members performed during the course and in furtherance of the conspiracy. If one member of a conspiracy commits a crime in furtherance of a conspiracy, the other members have also, under the law, committed the crime. Therefore, you may find the defendant guilty of [e.g., distributing cocaine] as charged in Count _____ of the indictment if the government has proved each of the following elements beyond a reasonable doubt:

First, a person named in Count _____ of the indictment [e.g., knowingly distributed cocaine];

Second, the person was a member of the conspiracy charged in Count _____ of the indictment;

Third, the person [e.g., distributed cocaine] in furtherance of the conspiracy; and

Fourth, the defendant was a member of the same conspiracy.

### Comment

The Pinkerton Charge derives its name from *Pinkerton v. United States*, 328 U.S. 640 (1946). "[A conspirator] is liable for the acts of his co-conspirators though he was not aware of the performance of those acts, nor even of the existence of the actors." *Hernandez v. United States*, 300 F.2d 114, 122 (9th Cir.1962). If warranted by the evidence, additional language may be added to the instruction to inform the jury that a conspirator may not be convicted of a substantive offense committed by a co-conspirator if commission of the offense could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. *See United States v. Roselli*, 432 F.2d 879, 894 n. 25 (9th Cir.1970), *cert. denied*, 401 U.S. 924 (1971).

# FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO: SB 19

Revision Date: _____ Dept. Affected: Public Safety

Title: An act relating to the crime of conspiracy. BRU: Alaska State Troopers

Component: Criminal Investigation Bureau

Sponsor: Senator Halford

Requestor: Senator Halford COMPONENT SERIAL NO. 830

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

| 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 | -0- | -0- | -0- | -0- | -0- | -0- |
| REVENUE FUND SOURCE: | -0- | -0- | -0- | -0- | -0- | -0- |

**FUNDING: (Thousands of Dollars)**

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1006 GF/MHTIA | | | | | | |
| Other | | | | | | |
| TOTAL | -0- | -0- | -0- | -0- | -0- | -0- |

**POSITIONS:**

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

Estimate of current year (FY 93) impact: $ _____

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact upon the Alaska State Troopers is anticipated.

Prepared By: Francis C. Allan Phone: 269-5691

Division: Alaska State Troopers Date: 1/11/93

Approved by Commissioner: [signature] Date: 1/13/93

Agency: Richard I. Burton, Dept. of Public Safety

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Fiscal Notes

Rev 11/92

# FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. S.B. 19

Revision Date: February 11, 1992
Dept. Affected: Corrections
Title: "An Act relating to the crime of conspiracy."
BRU: Statewide Programs
Component:
Sponsor: Senator Halford
Requestor:
COMPONENT SERIAL NO. 700

Expenditures/Revenues: (Thousands of Dollars)

| OPERATING | FY94 | FY95 | FY96 | FY97 | FY98 | FY99 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | 365.0 | 365.0 | 365.0 | 365.0 | 365.0 | 365.0 |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | 365.0 | 365.0 | 365.0 | 365.0 | 365.0 | 365.0 |
| CAPITAL | | | | | | |
| REVENUE FUND SOURCE: | | | | | | |

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | 365.0 | 365.0 | 365.0 | 365.0 | 365.0 | 365.0 |
| 1005 GF/Program Receipts | | | | | | |
| 1006 GF/MHTIA | | | | | | |
| Other | | | | | | |
| TOTAL | 365.0 | 365.0 | 365.0 | 365.0 | 365.0 | 365.0 |

POSITIONS:

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | | | | | | |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

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

ANALYSIS: (Attach a separate page if necessary)

See Attached Analysis.

Prepared by: Dana LaTour, Special Assistant
Phone: 465-3376
Division: Office of the Commissioner
Date: 02-11-93
Approved by Commissioner: Lloyd G. Rupp, Commissioner
Date: 02-11-93
Agency: Department of Corrections

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Data on the number of cases and average sentences for conspiracy convictions is not available to the Department of Corrections since this has not been a crime in Alaska in the past. However, based on information obtained last session from the Department of Law, Criminal Division, it appears likely that the conspiracy statute would enable more effective prosecution of drug crimes in particular. Since conspiracies to commit murder, or kidnapping rarely occur, the impact on the Department is unpredictable.

The Department of Law predicts that the conspiracy law will facilitate more effective prosecution of cases involving multiple defendants and may encourage defendants to cooperate with the State to get reduced charges. The result will be more offenders sentenced for drug charges, rather than increasing sentence length.

According to 1992 booking statistics, there were 203 offenders incarcerated whose most serious charges were unclassified (10), class A (10) and class B (183) Misconduct Involving a Controlled Substance (MICS) offenses.

If this bill results in a ten percent increase in convictions for drug offenses about 20 additional cases will be added each year. Since 90% of the relevant MICS offense are class B felonies, the mean sentence length for a MICS B felony is used to calculate additional bed days. Mean sentence length is 20.1 months. Subtracting one-third of the sentence for statutory good time results in time served of slightly over one year. Twenty additional offenders serving one additional year would result in 7300 additional bed-days per year.

Because populations within correctional facilities are already exceeding emergency caps, it is assumed that these offenders will either be placed in Community Residential Center (CRC) beds, or that other offenders in the correctional centers will be displaced and moved to CRC beds. The daily cost of placement is $50.

The calculation used in computing the cost is:

7300 beds days per year x $50 per CRC bed = $365,000.

The estimated costs are based on CRC beds since it is not possible to predict when the increases in incarceration would actually require adding more prison beds to the system. Cost of placement in a correctional center is approximately $100 per day.

The current prison beds are full. The Department's master plan indicates a need to build between 500- 700 additional beds by 1996 if other measures to reduce inmate population are not addressed.

If this bill results in any substantial increase in convictions and prison sentences for offenses other that the 10% increase in drug offenses described above, or if sufficient prisoners cannot be diverted to community residential centers contract beds, then the effect of this bill may be to add increasing pressure on the already overcrowded correctional facilities.

# FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

Bill No. SB 19

Revision Date:
Title: An Act relating to the crime of conspiracy
Sponsor: Halford
Requestor: Halford

Department Affected: Alaska Court System
BRU: Trial Courts
Components:
COMPONENT SERIAL NO. 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING | FY 94 | FY 95 | FY 96 | FY 97 | FY 98 | FY 99 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | 121.1 | 121.1 | 121.1 | 121.1 | 121.1 | 121.1 |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS & CLAIMS | | | | | | |
| TOTAL OPERATING | 121.1 | 121.1 | 121.1 | 121.1 | 121.1 | 121.1 |
| CAPITAL | | | | | | |
| REVENUE FUND SOURCE: | | | | | | |

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 FEDERAL RECEIPTS | 121.1 | 121.1 | 121.1 | 121.1 | 121.1 | 121.1 |
| 1003 GF MATCH | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/PROGRAM RECEIPTS | | | | | | |
| 1006 GF/MHTIA | | | | | | |
| OTHER | | | | | | |
| TOTAL | 121.1 | 121.1 | 121.1 | 121.1 | 121.1 | 121.1 |

POSITIONS:

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| FULL-TIME | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 |
| PART-TIME | 3.0 | 3.0 | 3.0 | 3.0 | 3.0 | 3.0 | 3.0 |
| TEMPORARY | | | | | | | |

Estimate of current year (FY 93) impact: None

ANALYSIS: (Attach a separate page if necessary)
See attached

Prepared by: C. S. Christensen III, Staff Counsel
Division: Alaska Court System
Phone: 264-8228
Date: 02/04/93

for Susan G. Fisher, Fiscal Officer

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
Date: 02/04/93

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

Alaska Court System

Fiscal Analysis
SB 19

This bill creates a new crime of conspiracy to promote or facilitate a heinous offense. Its purpose is to create a crime under which persons not presently prosecutable can be prosecuted.

The Department of Law has not estimated the number of prosecutions which will result from this legislation. When similar legislation was considered in 1987, the department projected a need for two additional attorneys, a paralegal, and a secretary, indicating a potentially large caseload. OPA has estimated that it will defend 25 co-defendants charged as a result of this legislation, in addition to those co-defendants represented by the Public Defender. Most of these co-defendants will be entitled to separate trials. Experience in other states and at the federal level demonstrates that conspiracy cases generally require extensive pre-trial motion work, and are more likely to go to trial than other felony cases.

Alaska Court System

Fiscal Analysis
SB 19

Personal Services

| | Salary | Benefits | Total |
|---|---|---|---|
| Pro Tem Superior Court Judge Anchorage, 12 months | $24,150 | $16,841 | $40,991 |
| Pro Tem Superior Court Judge Fairbanks, 6 months | 12,251 | 8,439 | 20,690 |
| Pro Tem Superior Court Judge Juneau, 6 months | 12,075 | 8,420 | 20,495 |
| In-Court Clerk, Anchorage | 27,108 | 11,816 | 38,924 |
| | | | $121,100 |

# FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. SB 19

Revision Date: February 5, 1993
Title: "An Act relating to the crime of Conspiracy."

Sponsor: Senator Halford
Requestor: Senator Halford

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

COMPONENT SERIAL NO. 0085 through 0090

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.

Prepared by: Richard I. Peques, Director
Division: Administrative Services Division
Phone: 465-3672
Date: February 5, 1993

Approved by Commissioner: Charles E. Cole, Attorney General
Richard I. Peques / FOR
Agency: Department of Law
Date: February 5, 1993

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ANALYSIS (Continued):

This bill creates a crime of conspiracy when two or more people agree to commit a criminal offense and one of them does some act in furtherance of the agreement. The bill extends the application of the conspiracy law to offenses against a person under AS 11.41, punishable as unclassified or class A felonies, and to offenses involving controlled substance, under AS 11.71, punishable as unclassified, class A, or class B felonies.

The Department of Law believes there will not be a significant increase in the number of cases due to the conspiracy law. Current law permits prosecution of those who directly commit crimes, as well as those who are accomplices (AS 11.16). Because our present accomplice law allows us to prosecute people who aid and abet a criminal, it is unlikely that the conspiracy law (which requires proof of an agreement to commit the crime) will result in significantly more cases being prosecuted. Instead, the crime of conspiracy will be added as another count in a case that would have been prosecuted anyway.

In those cases that cannot be charged under current law, the crime of conspiracy will permit some additional cases to be prosecuted and some fiscal impact could result, although there may be offsetting cost savings.

The major effect of the conspiracy law is to permit the introduction of additional evidence in a trial. Thus the jury is permitted to hear, for example, more evidence about the overall drug operation, rather than being limited to evidence about specific drug sales on specific dates. The jury does not therefore view those sales in isolation, but is allowed to see the "big picture", and the state's case is made stronger. We believe that defendants charged under the conspiracy law will cooperate with the state to try to get a reduced charge, and therefore fewer trials will occur. Another potential cost-savings is that multiple defendants charged with conspiracy will be able to be tried in a joint trial, rather than separate trials as is usually the practice now. Naturally the effects of any new law cannot be predicted with precise certainty. However, conspiracy laws and stiff drug penalties are nothing new in the rest of the country.

# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY
## STATE OF ALASKA

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

**MEMORANDUM** February 5, 1993

**SUBJECT:** Sectional Summary of SB 19 (Work Order No. 8-LS0246\A)

**TO:** Senator Rick Halford
Attn: John

**FROM:** Jerry Luckhaupt JCL
Legislative Counsel

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

redo sectional

**Section 1 of the bill** creates AS 11.31.120, the crime of conspiracy. That section would make it a crime for a person

(1) with the intent to promote or facilitate a serious felony offense;

(2) to agree with one or more other persons to engage in or cause that serious felony offense; and

(3) an overt act in furtherance of the conspiracy is performed by one of the persons involved in the conspiracy.

This section clarifies criminal liability for certain situations, provides affirmative defenses that may be raised by the defendant, and defines "serious felony offense." Conspiracy is punishable as an unclassified, class A, class B or class C felony depending on the classification of the crime that was the object of the conspiracy.

**Section 2 of the bill** amends AS 11.31.140(a) to provide that it is not a defense to prosecution for conspiracy that the crime the defendant conspired to commit was actually committed.

**Section 3 of the bill** amends AS 11.31.140(b) to provide only one conviction for conspiracy, attempt, or solicitation is permitted for conduct that was designed to commit the same crime.

**Section 4 of the bill** amends AS 11.31.140(d) permits a prosecutor to charge both conspiracy to commit an offense and commission of the underlying offense.

Legal Services · Sectional

**Section 5 of the bill** amends AS 12.25.125(b) to provide that a person convicted of conspiracy to commit murder in the first degree shall be sentenced to a definite term of imprisonment of not less than five years and not more than 99 years.

GPL:pl
93-065.plm

FRANK H. MURKOWSKI
ALASKA

COMMITTEES:
SELECT COMMITTEE ON INTELLIGENCE (VICE CHAIRMAN)
ENERGY AND NATURAL RESOURCES
FOREIGN RELATIONS
VETERANS' AFFAIRS
SELECT COMMITTEE ON INDIAN AFFAIRS

# United States Senate

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February 28, 1991

The Honorable Rick Halford
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Senator Halford: Rick

When I had the opportunity to speak before the State Legislature earlier this month, I expressed my deep concern about the escalation of drug activity in Alaska. We must recognize that the weakness of our state's drug laws sends an unfortunate message to those who would traffic in illegal drugs. I applaud your efforts to address this problem by introducing legislation calling for a state conspiracy law. The passage of such a law should dispel any notion drug organizations may have that Alaska is a safe haven for their illicit operations.

It is time to give law enforcement in Alaska the tools necessary to break the criminal organizations that prey on our youth. Your legislation is an important step toward achieving that goal. The enactment of a state conspiracy law would allow us to bring down entire drug organizations rather than just prosecuting the pushers who are easily replaced.

We cannot simply rely upon the federal criminal justice system to deal with the rise of criminal organizations in Alaska. While federal conspiracy laws play a significant role in combatting criminal organizations, we must give the state's law enforcement community the ability to use effectively their valuable resources to stem the tide of drugs washing up on Alaska's shores. We must make every effort to ensure that state and local law enforcement can take the steps necessary to adequately protect our youth and our communities.

I am hopeful that the Legislature will act quickly to provide for this protection by enacting a criminal conspiracy statute.

Sincerely,

Frank H. Murkowski
United States Senator

supporting documents

**U. S. Department of Justice**

United States Attorney

*District of Alaska at Anchorage*

*Federal Building & U.S. Courthouse*
*222 West 7th Avenue, #9, Room 253*
*Anchorage, Alaska 99513-7567*

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February 18, 1992

The Honorable Rick Halford
State Senate
Alaska State Legislature

Re: State Conspiracy Laws
Violent Crime, Drugs, Guns and Fraud
Law Enforcement Coordinating Committee

Dear Mr. Halford:

It is important that the Legislature enact conspiracy laws to address violent crime, drugs, guns and fraud. This is an area of criminal law that has been neglected by the State for too long. Organized crime in Alaska must be adequately addressed.

Enclosed for your review is my article that was published in "The Anchorage Times" this past Saturday. The article sets forth my position on the need for State conspiracy laws.

It is vitally important for the welfare of the citizens of this State and local law enforcement that conspiracy laws are enacted this session. The laws should adequately address Alaska'a growing organized complex criminal element.

Please do not hesitate to contact me if I may be of assistance. I will be happy to meet with you. Your assistance and support is greatly appreciated by law enforcement and all concerned Alaska citizens.

Best Wishes.

Yours Very Truly,

WEVLEY WILLIAM SHEA
United States Attorney

WWS:kjm
Enclosure
cc: Chuck Farmer, Coordinator
Law Enforcement Coordinating Committee

RICK — YOU KNOW AS WELL AS I THE IMPORTANCE OF THIS LEGISLATION!!
THANKS, WEV

# FBI National Academy Associates

## Alaska Chapter

February 16, 1993

Senator Rick Halford
Alaska State Legislature
Box V
Juneau, AK 99811

Dear Senator Halford:

The Alaska Chapter of the FBI National Academy Associates is once again supporting Senate Bill 19 (An Act relating to the Crime of Conspiracy).

Alaska's criminal justice system will be enhanced with passage of this bill. Law enforcement in Alaska requires legislation which offers the ability through the judicial system to prosecute those individuals or groups involved with the crime of conspiracy.

I have spoken with Chief O'Leary from the Anchorage Police Department and he "absolutely" supports and concurs with this legislation.

We strongly support your efforts toward passage of SB 19.

Sincerely,

Timothy W. Foster
President

TWF/ljc

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|---|---|
| To John Sheppard | From Tim Foster |
| Co. | Co. |
| Dept. | Phone # |
| Fax # | Fax # |

# Alaska Association Chiefs of Police

February 4, 1993

Senator Rick Halford
Alaska State Capitol
Room 111
Juneau, AK 99801-1182

Dear Senator Halford:

On behalf of the Alaska Association of Chiefs of Police I would like to express our support for Senate Bill 19. For several years Alaskan law enforcement has been united in its request to the legislature for a Statute dealing with the Crime of Conspiracy.

There have been many serious felony crimes committed over the years that may well not have occurred if law enforcement had been able to pursue the offenders utilizing a Conspiracy Statute. Limiting conspiracy to serious felony offenses only is a sensible approach that should alleviate some past concerns.

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 VOICE OF THE TIMES

## Without a headline, a major cocaine ring is cracked

By WILLIAM J. TOBIN

Early on a frigid Saturday morning 2 1/2 weeks ago, federal agents — with state law enforcement agencies participating — staged one of the biggest drug busts in Anchorage history.

You didn't read anything about it in the paper.

Not a word was published about the raids on three hangouts where 10 accused crack cocaine dealers were arrested.

There was nothing printed about a federal grand jury indictment that charged 11 men and five women — the 10 who were arrested that Saturday morning and six others — with a whole series of federal crimes ranging from conspiracy, drug trafficking, the use of firearms as part of drug dealing activities, operating crack cocaine houses, the preparation of false birth certificates and raft of other illegal activities.

U.S. Attorney Wevley W. Shea promptly made available to the news media details of the Jan. 23 raids and copies of the 32-page indictment. The arrests and charges, for reasons unknown, simply were ignored — regarded as a non-event.

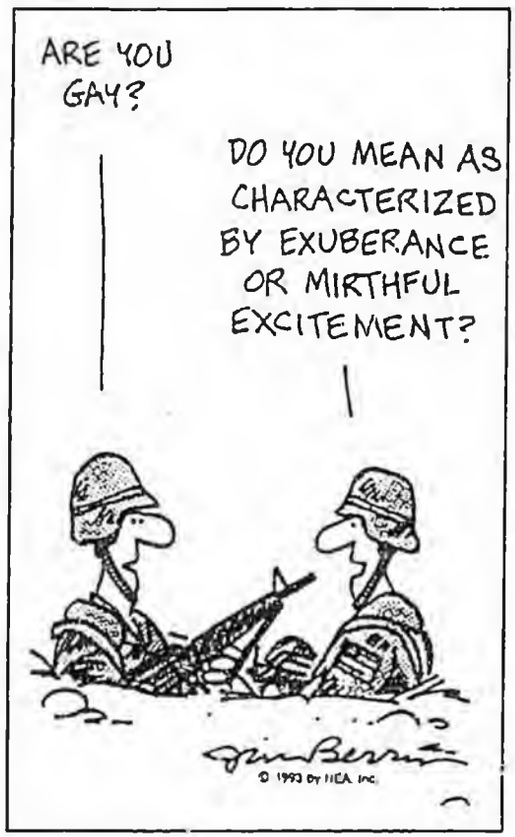
Also ignored was the U.S. attorney's report of the arrests and charges that was hand-carried to the office of Gov. Walter J. Hickel, with copies to Alaska Atty. Gen. Charlie Cole and to state Public Safety Commissioner Richard L. Burton. The report, pointing out the success of the federal law enforcement action, renewed Shea's long-standing recommendation for enactment of state conspiracy laws, which he views as an essential tool against organized crime in Alaska.

Tobin

For being such an apparent non-event, the Jan 23 raids were part of a massive crime crackdown.

Consider:

- The operation was led by the Federal Bureau of Alcohol, Tobacco & Firearms, including more than a dozen agents brought to Anchorage aboard a Washington State Air National Guard transport.
- Agents of the Federal Bureau of Investigation, the Drug Enforcement Administration, the U.S. Marshal Service, the U.S. Customs Service and the Internal Revenue Service were involved.
- State agencies represented in the raids were the Alaska State Troopers, the Drug Interdiction Unit of the Alaska National Guard, the Alaska Department of Public Safety and the Alaska State Crime Lab.
- And, of course, officers of the Anchorage Police Department were very much a part of the crackdown.




In days since the raids, two others of the accused drug dealers have been arrested — raising to 12 the number of those taken into custody. Of those, nine are still in jail and three have been released on bail. The remaining four are fugitives — subjects of an on-going search that presumably extends well beyond Alaska.

Meanwhile, the indictment gives a clue as to how widespread this particular crack cocaine operation was in Anchorage. According to the federal charges, this gang operated from or ran so-called crack houses — fortified with a small arsenal of semi-automatic weapons — at 11 locations:

- 9360 Campbell Terrace
- 1315 Hyder St.
- 7601 Little Bend Circle
- 4203 Dimond Blvd., No. B
- 227 E. 12th Ave., No. 1
- 227 E. 12th Ave., No. 2
- 1027 Nelchina, No. 5
- 937 E. 10th, No. 3
- 45340 E. 36th, No. 73
- 9332 Sea Parrot
- 601 E. 16th, No. A3

In addition, for six weeks last November and December, the indictment charges, the gang rented a room at a hotel in the railroad area and used it as yet another place to make crack cocaine or to cut pure cocaine into diluted packages to increase the volume available for street sales.

In setting up the crack houses, the indictment charges, the "premises would be fortified, including the keeping of firearms, and a means of conducting crack cocaine sales established, such as creating a pass-through slot in a door so that customers would exchange money for drugs without gaining entry."

They were sophisticated operations, federal agents said, and included the use of a communications system that involved electronic pagers and at least one cellular telephone.

During one three-month period, July to September last year, one of these pagers received more than 2,000 calls, federal agents said.

John Bobb, resident agent in charge of the Bureau of Alcohol, Tobacco and Firearms in Anchorage, said the January raids and arrests were the culmination of an investigation that began in 1991.

Both he and Shea hailed the success of what they called a "coordinated takedown" of a major drug ring that had been supplying crack cocaine throughout the Anchorage area.

The arrests, Shea said, "dealt a major blow to the trafficking of crack cocaine in Alaska."

At the same time, however, he warned that Anchorage and Alaska are not immune to crack cocaine — which some think is just a problem facing the inner cities of America's big metropolitan centers.

"It is available in Anchorage," he said, and "it is cheap, it is addictive." And, as this January crackdown makes clear, it is part of a real and ugly underworld in Anchorage.

It is an underworld under attack by a host of men and women in law enforcement agencies in Anchorage — including the FBI, the BATF, the DEA, Customs, IRS, the U.S. Marshal's office, the Troopers, the Anchorage police. They're out there on the front line, in a grimy and dangerous environment.

And their work, in this case, at least, doesn't merit a headline, even on an inside page.

*William J. Tobin is an editor of The Anchorage Times.*

OPINION

TAKING A STAND

# Without conspiracy laws Alaska easy target for organized crime

Wevley William Shea

State prosecutors cannot prosecute criminal organizations without conspiracy laws. Alaska's problem is complex due to the previous state 'legalization' of marijuana. Alaska is looked upon as a haven for drug traffickers.

Alaska is unique. Approximately 50 percent of our population resides in the Anchorage area. Much of Alaska's remaining population is isolated. This isolation and lack of a transportation infrastructure places a substantial burden on state and local law enforcement.

Crime in Alaska is complex and organized in the areas of illicit drugs, fraud, corruption and violent crime. Federal law enforcement agencies work closely with state and local agencies in combating crime. This is a federal, state and local "team approach" with communication, coordination and cooperation to attack state-wide crime.

Federal conspiracy laws assist federal law enforcement in effectively addressing criminal organizations. A conspiracy is an agreement between two or more persons to commit a crime or accomplish a legal purpose through illegal action. Alaska does not have state conspiracy laws. Virtually all other states do.

Local law enforcement is the first line of defense for crime involving drugs, guns and violence. The Alaska State Troopers and Anchorage Police Department, as well as state prosecutors, are severely restricted without state conspiracy laws. As the complexity of criminal organizations has increased, the burden placed upon state law enforcement has increased.

State prosecutors should have the basic "tools" to attack crime. It is a tremendous handicap not to have state conspiracy laws to address criminal organizations. The public should demand and have adequate protection.

Anchorage over the past few years has become a base or transshipment point for complex criminal organizations. In the last eight months, the United States Attorney for Alaska has initiated prosecution of the following criminal organizations:

*•MEXICAN MARIJUANA/COCAINE CONSPIRACY*

The Anchorage area was the site of numerous, very high quality marijuana "indoor grows." The marijuana was exported to the Lower 48 in exchange for cocaine and cash. The U.S. Attorney's Organized Crime and Drug Enforcement Task Force led by the Drug Enforcement Administration and composed of federal, state and local law enforcement investigated and prosecuted the case. The conspiracy investigation involved the U.S. Attorney for the Eastern District of Washington.

*•NIGERIAN HEROIN CONSPIRACY*

Nigerian heroin traffickers established a smuggling conspiracy utilizing Anchorage International Airport as a transshipment point to the Lower 48. United States Customs has intercepted over 60 pounds of pure China-white heroin with a street value of $1 million per pound. The heroin conspiracy operated primarily in New York, Florida and Texas. The heroin originated in Thailand and was shipped t Anchorage via Japan and the Philippines. The conspiracy investigation involved the U.S. Attorney Offices in Texas, Hawaii, Washington, New York and Florida.

*•MUSLIM CRIPS CRACK-COCAINE CONSPIRACY*

The Muslim Crips gang of Los Angeles has attempted to make inroads in the crack cocaine distribution in Anchorage. Recently Crips were arrested in Anchorage on drug and gun charges. The investigation involved the U.S. Attorney for the Central District of California.

State prosecutors cannot prosecute criminal organizations without conspiracy laws. Alaska's problem is complex due to the previous state "legalization" of marijuana. Alaska is looked upon as a haven for drug traffickers. In addition, individuals who conspire to manufacture, transport and distribute drugs look upon Alaska as a "permissive" environment since Alaska has no conspiracy laws. Virtually all other states have conspiracy laws.

Over the past 16 years, state and local law enforcement, as well as concerned citizen organizations, such as the Anchorage Chamber of Commerce, have stressed the importance of the Alaska state Legislature enacting conspiracy laws to address criminal organizations. However, the Legislature has failed to act or the governor has not supported the conspiracy legislation.

The U.S. Attorney's Law Enforcement Coordinating Committee comprised of federal, state and local law enforcement agencies recognizes that Alaska laws are not adequate to address the criminal organizations in Alaska. This is especially true in the area of drugs, guns and violence. More cases are prosecuted federally due to inadequate state laws.

The Federal Court System in Alaska is not adequate to handle the drastically increasing criminal element in Alaska that thrives on drugs, guns, fraud and corruption. Alaska Attorney General Charles Cole, as well as local district attorneys, support enacting adequate state conspiracy laws to address the criminal environment in Alaska.

The Anchorage Chamber of Commerce anticipates that Gov. Walter Hickel and concerned legislators will again be addressing Alaska's need for conspiracy laws. The Anchorage Chamber of Commerce urges all Alaska citizens to support the enactment of conspiracy laws necessary to address an increasing criminal element in Alaska.

*Wevley William Shea is U.S. Attorney for the District of Alaska. Opinions expressed in Taking A Stand do not necessarily reflect the editorial position of The Anchorage Times.*

# SB 21

SENATOR DAVE DONLEY
ALASKA STATE LEGISLATURE

**SB 21**
**GRANDPARENTS VISITATION RIGHTS**
**SPONSOR STATEMENT**
**(April 13, 1994)**

SB 21, referred to as the Grandparents Visitation Rights bill, is currently in the Senate Judiciary Committee.

This is a very straight-forward and necessary bill. SB 21 would allow grandparents to petition Superior Court for an order establishing reasonable visitation rights with their grandchildren. Of course, visitation rights would only be granted if the Court deemed it was in the best interest of the child.

While we are in the throes of budget discussions and health care reform, I still think this bill deserves attention this session. It is a simple bill with no partisan undertones and I see no reason why it should not pass the Legislature this year. I have received many phone calls and letters of support from seniors and senior groups all over the state.

If you need additional information on SB 21 contact Alexis Miller in my office at 465-3892.

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June-December: 716 W. 4TH AVE. • S
2 • FAX: (907) 465-6595
58-8181 • FAX: (907) 258-5571
*CO-CHAIR:* Anchorage Caucus •
ıate Resources Committee

ALASKA WOMEN'S LOBBY
P.O. BOX 22156, JUNEAU, ALASKA 99802

To: Senator Dave Donley
From: The Alaska Women's Lobby
Date: March 10,1994

The Alaska Women's Lobby requests your consideration of an amendment to SB 21, regarding visitation rights of grandparents and other persons.

SB 21 requires that when custody is disputed in a divorce the court shall provide for visitation by a grandparent or other person with whom the court determines visitation is in the best interests of the child. The bill also allows a child's grandparents to petition the Superior Court for visitation after a divorce.

Sections 3 & 4 of the bill deal with dissolutions or divorces in which the parents are not in dispute but in agreement. The Alaska Women's Lobby supported changes in the dissolution statute several years ago which clarified that the agreements between spouses be in writing, that the written agreements constitute the entire agreement between the parties and that the court may amend the written agreements between the parties *only* if both petitioners concur in the amendment in writing or on the record. (A.S. 25.24.220 (g))

We continue to support this concept and so object to section 4 of SB 21 which specifically sets aside A.S. 25.24.220 (g) to allow the court to amend the dissolution agreement by inserting visitation rights for a grandparent or other person without the express consent of the parties to the agreement.

Section 3 of the bill requires the court when considering if the parents agreement on visitation is in the child's best interests to also consider whether the agreement should include visitation by a grandparent or other person. If the parents agree on all other aspects of the dissolution but cannot agree in writing to the insertion of an other person's right to visitation with their child the court has the option of not granting the dissolution.

A.S. 25.24.230 (a) (4) currently requires that in dissolutions " each spouse entered into the agreement voluntarily and free from coercion of another person".

We request that Section 4 be stricken from the bill. Thank you for your consideration of our concern.

SB 21



**Sec. 25.24.150. Judgments for custody.** (a) In an action for divorce or for legal separation or for placement of a child when one or both parents have died, the court may, if it has jurisdiction under AS 25.30.020, and is an appropriate forum under AS 25.30.050 and 25.30.060, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of a child of the marriage, make, modify, or vacate an order for the custody of or visitation with the minor child that may seem necessary or proper, including an order that provides for visitation by a grandparent or other person if that is in the best interests of the child.

(b) If a guardian ad litem for a child is appointed, the appointment shall be made under the terms of AS 25.24.310(c).

(c) The court shall determine custody in accordance with the best interests of the child under AS 25.20.060 — 25.20.130. In determining the best interests of the child the court shall consider

(1) the physical, emotional, mental, religious, and social needs of the child;

(2) the capability and desire of each parent to meet these needs;

(3) the child's preference if the child is of sufficient age and capacity to form a preference;

(4) the love and affection existing between the child and each parent;

(5) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

(6) the desire and ability of each parent to allow an open and loving frequent relationship between the child and the other parent.

(d) In awarding custody the court may consider only those facts that directly affect the well-being of the child.

(e) Notwithstanding the provisions of (d) of this section, in awarding custody the court shall comply with the provisions of 25 U.S.C. 1901 — 1963 (P.L. 95-608, the Indian Child Welfare Act of 1978). (§ 1 ch 160 SLA 1968; am § 1 ch 167 SLA 1975; am § 2 ch 61 SLA 1977; am § 1 ch 63 SLA 1977; am § 1 ch 15 SLA 1982; am §§ 2, 3 ch 88 SLA 1982)

**Revisor's notes.** — Formerly AS 09.55.205. Renumbered in 1983.

**Cross references.** — For intent of 1982 amendments, see § 1, ch. 88, SLA 1982, in the Temporary and Special Acts; for enforcement of visitation rights, see AS 25.24.300.

**Effect of amendments.** — The first 1982 amendment designated the former first sentence as subsection (a), the second sentence as subsection (b), and the rest of the section as subsection (c), inserted "or for placement of a child when one or both parents have died" and "modify, or vacate" in subsection (a), substituted "a child of the marriage" for "any child of the marriage," and the language beginning "that may seem necessary or proper" for "which may seem necessary or proper and may at any time modify or vacate the order" in subsection (a), and substituted "If" for "Any appointment of" and "AS 09.65.130(c)" for "AS 09.65.130" and inserted "is appointed, the appointment" in subsection (b).

The second 1982 amendment, in subsection (c), substituted "under AS 25.20.060 — 25.20.180" for "neither parent is entitled to preference as a matter of right in awarding custody of the child" at the end of the first sentence, deleted "all relevant factors including" from the end of the introductory language in the second sentence, added "if the child is of sufficient age and capacity to form a preference" to the end of paragraph (3), and substituted "the other parent" for "his other parent" at the end of paragraph (6). The amendment also added subsections (d) and (e).





## NOTES TO DECISIONS



### I. GENERAL CONSIDERATION.

**Editor's notes.** — A number of cases cited in the note below were decided under the former custody provisions of AS 09.55.210.

**Applied** in Hinchey v. Hinchey, Sup. Ct. Op. No. 2312 (File No. 1528), 625 P.2d 297 (1981); Matson v. Matson, Sup. Ct. Op. No. 2461 (File No. 5302), 639 P.2d 298 (1982); Morel v. Morel, Sup. Ct. Op. No. 2528 (File No. 5706), 647 P.2d 605 (1982).

**Quoted** in Honger v. Honger, Sup. Ct. Op. No. 520 (File No. 954), 449 P.2d 766 (1969); Delgado v. Fawcett, Sup. Ct. Op. No. 953 (File No. 1594), 515 P.2d 710 (1973); Dalchen v. Dalchen, Sup. Ct. Op. No. 1469 (File No. 3179), 566 P.2d 1324 (1977); Chavre v. Chavre, Sup. Ct. Op. No. 1891 (File No. 3349), 598 P.2d 81 (1979); Malekos v. Chloe Ann Yin, Sup. Ct. Op. No. 2580 (File Nos. 5767, 5817), P.2d (1982).

**Stated** in I. A. M. v. State, Sup. Ct. Op. No. 1249 (File No. 2221), 547 P.2d 827 (1976); K. C. M. v. State, Sup. Ct. Op. No. 2326 (File No. 4764), 627 P.2d 607 (1981).

**Cited** in In re S.D., Sup. Ct. Op. No. 1255 (File No. 2530), 549 P.2d 1190 (1976); Granato v. Occhipinti, Sup. Ct. Op. No. 1962 (File No. 3766), 602 P.2d 442 (1979); Layne v. Niles, Sup. Ct. Op. No. 2396 (File No. 5887), 632 P.2d 234 (1981); Szmyd v. Szmyd, Sup. Ct. Op. No. 2472 (File No. 6854), 641 P.2d 14 (1982); Stone v. Stone, Sup. Ct. Op. No. 2522 (File No. 6674), P.2d (1982).

### II. DETERMINATION OF CUSTODY.

#### A. In General.

**Welfare of children is given paramount consideration.** — In determining the custody of children the trial court should be guided by the rule of quite general application that the welfare and best interests of the children should be given paramount consideration. Rhodes v. Rhodes, Sup. Ct. Op. No. 83 (File No. 107), 370 P.2d 902 (1962); Rannier v. Rannier, Sup. Ct. Op. No. 348 (File No. 606), 414 P.2d 956 (1966); Glasgow v. Glasgow, Sup. Ct. Op. No. 405 (File No. 749), 426 P.2d 617 (1967); Bass v. Bass, Sup. Ct. Op. No. 455 (File No. 832), 437 P.2d 324 (1968); Sheridan v. Sheridan, Sup. Ct. Op. No. 603 (File No. 1120), 466 P.2d 821 (1970).

The paramount criterion of the welfare and best interests of the child overrides consideration of any factor of technical fault. Bass v. Bass, Sup. Ct. Op. No. 455 (File No. 832), 437 P.2d 324 (1968).

There has been a steady course of legal development, whereby the best interests of the child are to be the paramount consideration in custody cases, to the exclusion of other criteria, such as the doctrine that children of tender years will generally be awarded to the mother when other factors are fairly evenly balanced. King v. King, Sup. Ct. Op. No. 650 (File No. 1235), 477 P.2d 356 (1970).

The paramount consideration in any custody determination is what appears to be for the best interests of the child. Carle v. Carle, Sup. Ct. Op. No. 847 (File No. 1496), 503 P.2d 1050 (1972); Nichols v. Nichols, Sup. Ct. Op. No. 971 (File No. 1833), 516 P.2d 732 (1973); Wetzler v. Wetzler, Sup. Ct. Op. No. 1518 (File No. 2892), 570 P.2d 741 (1977); Faro v. Faro, Sup. Ct. Op. No. 1650 (File No. 3465), 579 P.2d 1377 (1978); Bonjour v. Bonjour, Sup. Ct. Op. No. 1814 (File No. 3965), 592 P.2d 1233 (1979); Starkweather v. Curritt, Sup. Ct. Op. No. 2446 (File No. 5484), 636 P.2d 1181 (1981).

Between parents, custody is to be awarded according to the best interests of the child. Veazey v. Veazey, Sup. Ct. Op. No. 1381 (File No. 2631), 560 P.2d 382 (1977).

In sifting and weighing the often emotionally charged and diametrically opposed testimony of the parties, Alaska decisions, and Alaska's positive law, require that the trial court's resolution of custody issues be determined by the paramount criterion of the best interests of the child. Horutz v. Horutz, Sup. Ct. Op. No. 1390 (File No. 2615), 560 P.2d 397 (1977).

The primary goal of the court in awarding custody is to further the best interests of the child, which includes respecting the beliefs of a mature child, whether they be religious or nonreligious. Bonjour v. Bonjour, Sup. Ct. Op. No. 1814 (File No. 3965), 592 P.2d 1233 (1979).

**Even over claims of parents.** — Where neither parent exhibited any characteristics of a proper person to have the care and control of two little boys, the welfare of the children was made paramount to the claims of either parent. Leak v. Leak, 3 Alaska 164 (1906), appeal dismissed, 166 F. 473, 474 (9th Cir. 1907).

**The best interests of the parent, or detriment to the parent, are not the test.** Veazey v. Veazey, Sup. Ct. Op. No. 1381 (File No. 2631), 560 P.2d 382 (1977), Horutz v. Horutz, Sup. Ct. Op. No. 1390 (File No. 2616), 560 P.2d 397 (1977).

**Stepchild as "child of the marriage".** — Where stepparent has assumed status of in loco parentis, a stepchild is a "child of the marriage" within this section. Carter v. Brodrick, Sup. Ct. Op. No. 2600 (File No. 6511), 644 P.2d 860 (1982).

**Broad discretion.** — The trial court's duty to provide for the care and custody of minor children in divorce proceedings places a grave responsibility upon the court and at the same time gives it a broad discretion. Bass v. Bass, Sup. Ct. Op. No. 455 (File No. 832), 437 P.2d 324 (1968).

**The law now vests a very wide discretion in the trial court to determine where custody shall be placed.** King v. King, Sup. Ct. Op. No. 650 (File No. 1235), 477 P.2d 356 (1970); Carle v. Carle, Sup. Ct. Op. No. 847 (File No. 1496), 503 P.2d 1050 (1972); Horutz v. Horutz, Sup. Ct. Op. No. 1390 (File No. 2616), 560 P.2d 397 (1977).

**The trial court is given broad discretion in fashioning suitable visitation rights and support obligations.** Curgus v. Curgus, Sup. Ct. Op. No. 943 (File No. 1837), 514 P.2d 647 (1973).

**But that discretion is not unlimited.** — Trial courts have wide discretion in determining custody issues, but that discretion is not unlimited. Johnson v. Johnson, Sup. Ct. Op. No. 1429 (File Nos. 2709, 2724), 564 P.2d 71 (1977), cert. denied, 434 U.S. 1048, 98 S. Ct. 896, 54 L. Ed. 2d 800 (1978).

**Standard for custody in section parallels supreme court standard.** — The legislative standard for custody expressed in this section parallels the standard articulated by the supreme court. Carle v. Carle, Sup. Ct. Op. No. 847 (File No. 1496), 503 P.2d 1050 (1972); Bonjour v. Bonjour, Sup. Ct. Op. No. 1456 (File No. 3000), 566 P.2d 667 (1977).

**Children should be kept together if possible.** — In determining custody of children consideration should be given to the desirability of keeping the children of the family together so that they may enjoy the normal condition of childhood of growing up together as brothers and sisters. Rhodes v. Rhodes, Sup. Ct. Op. No. 83 (File No. 107), 370 P.2d 902 (1962); Glasgow v. Glasgow, Sup. Ct. Op. No. 405 (File No. 749), 426 P.2d 617 (1967).

**Consideration should be given to the desirability of not separating the children unless their welfare clearly requires such a course.** Nichols v. Nichols, Sup. Ct. Op. No. 971 (File No. 1833), 516 P.2d 732 (1973).

**The question of whether or not it is necessary to separate children must depend upon the facts and circumstances of each particular case.** Nichols v. Nichols, Sup. Ct. Op. No. 971 (File No. 1833), 516 P.2d 732 (1973).

**The doctrine of tender years is not an appropriate criterion for determination of the best interests of the child under this section.** Johnson v. Johnson, Sup. Ct. Op. No. 1429 (File Nos. 2709, 2724), 564 P.2d 71 (1977), cert. denied, 434 U.S. 1048, 98 S. Ct. 896, 54 L. Ed. 2d 800 (1978); Wetzler v. Wetzler, Sup. Ct. Op. No. 1518 (File No. 2892), 570 P.2d 741 (1977).

**The "tender years" doctrine was specifically rejected in Johnson v. Johnson,** Sup. Ct. Op. No. 1429 (File Nos. 2709, 2724), 564 P.2d 71 (1977), cert. denied, 434 U.S. 1048, 98 S. Ct. 896, 54 L. Ed. 2d 800 (1978), and the opinion in Wetzler v. Wetzler, Sup. Ct. Op. No. 1518 (File No. 2892), 570 P.2d 741 (1977), in no way revived the doctrine. Faro v. Faro, Sup. Ct. Op. No. 1650 (File No. 3465), 579 P.2d 1377 (1978).

**For cases prior to 1977 which construed the tender years doctrine,** see Harding v. Harding, Sup. Ct. Op. No. 120 (File No. 218), 377 P.2d 378 (1962); Glasgow v. Glasgow, Sup. Ct. Op. No. 405 (File No. 749), 426 P.2d 617 (1967); Bass v. Bass, Sup. Ct. Op. No. 455 (File No. 832), 437 P.2d 324 (1968); Sheridan v. Sheridan, Sup. Ct. Op. No. 603 (File No. 1120), 466 P.2d 821 (1970).

**Age of children is only one factor to be considered.** — Although the age of the children in a custody dispute is one factor which may be considered by the trial court in its determination of the best interests of the child, it is only one factor, to be weighed with many others. Johnson v. Johnson, Sup. Ct. Op. No. 1429 (File Nos. 2709, 2724), 564 P.2d 71 (1977), cert. denied, 434 U.S. 1048, 98 S. Ct. 896, 54 L. Ed. 2d 800 (1978).





**Constitutionality of section in specifying "religious needs" as consideration.** — This section in specifying that the "religious needs" of the child may be considered in awarding custody, is not unconstitutional on its face. Bonjour v. Bonjour, Sup. Ct. Op. No. 1814 (File No. 3965), 592 P.2d 1233 (1979).

**This section is limited to cases where particular religious practices or beliefs pose a substantial threat of or would result in actual physical, emotional or mental injury to the child or will otherwise have a harmful effect on the child in violation of valid state statutes.** Bonjour v. Bonjour, Sup. Ct. Op. No. 1814 (File No. 3965), 592 P.2d 1233 (1979).

**In addition, the court may consider the actual religious needs of a mature child.** Bonjour v. Bonjour, Sup. Ct. Op. No. 1814 (File No. 3965), 592 P.2d 1233 (1979).

**This section, insofar as it permits a court to consider the "religious needs" of a minor as an aspect of the child's "best interest," does not infringe upon constitutionally protected rights. However, the court must make a finding that the child has actual, not presumed, religious needs, and that one parent will be more able to satisfy those needs than the other parent.** Bonjour v. Bonjour, Sup. Ct. Op. No. 1814 (File No. 3965), 592 P.2d 1233 (1979).

**"Actual religious needs".** — By actual religious needs, the supreme court refers to the expressed preference of a child mature enough to make a choice between a form of religion or the lack of it. Bonjour v. Bonjour, Sup. Ct. Op. No. 1814 (File No. 3965), 592 P.2d 1233 (1979).

**Section not limited to consideration of formal religious needs.** — In order to avoid running afoul of the establishment clause, this section cannot be limited to consideration of the formal religious needs of the child. Bonjour v. Bonjour, Sup. Ct. Op. No. 1814 (File No. 3965), 592 P.2d 1233 (1979).

**Court must retain strict neutrality.** So long as a court makes findings as to a child's actual needs respecting religion, the court may consider such needs, as one factor, in awarding custody. In such consideration, the court, however, may not substitute its own preferences, either for or against a particular type of religious observance, but must retain a strict neutrality. Bonjour v. Bonjour, Sup. Ct. Op. No. 1814 (File No. 3965), 592 P.2d 1233 (1979).

**Reliance on parties' religious affiliations held improper.** The trial court's reliance on the religious affiliations of the parties, in the absence of a showing of actual religious needs of the child, constitutes the use of an improper criterion. Bonjour v. Bonjour, Sup. Ct. Op. No. 1814 (File No. 3965), 592 P.2d 1233 (1979).

**The trial court's reliance in determining custody on findings that the father and his second wife were "devout Protestants" and members of an "organized religious community," while the mother's interest in religion was "passive," was impermissible under the establishment clause of the first amendment, since there was no secular purpose in the trial court's action, the primary effect of such action was to advance religion, and the action fostered excessive government entanglement with religion.** Bonjour v. Bonjour, Sup. Ct. Op. No. 1814 (File No. 3965), 592 P.2d 1233 (1979).

**Bicultural situations.** — Where the differing life-styles flowing from two cultures have significance in determining which parent could provide the best possible parent-child relationship, it is inappropriate to decide the custody issue on the basis of cultural assumptions which are not borne out by the record. Carle v. Carle, Sup. Ct. Op. No. 847 (File No. 1496), 503 P.2d 1050 (1972).

**It is not permissible, in a bicultural context, to decide a child's custody on the hypothesis that it is necessary to facilitate the child's adjustment to what is believed to be the dominant culture. Such judgments are not relevant to the determination of custody issues. Rather, the focus should be on the fitness of the parent and the parent's ability to accord the child the most meaningful parent-child relationship.** Carle v. Carle, Sup. Ct. Op. No. 847 (File No. 1496), 503 P.2d 1050 (1972).

**Unique facts of each case to be weighed.** — The legislative intent is that the trial court decide custody matters by weighing the unique facts in each case in order to determine the best interests of the child. Johnson v. Johnson, Sup. Ct. Op. No. 1429 (File Nos. 2709, 2724), 564 P.2d 71 (1977), cert. denied, 434 U.S. 1048, 98 S. Ct. 896, 54 L. Ed. 2d 800 (1978).

**Determination of the child's best interests must turn on a balancing of the unique facts of each case rather than on outmoded presumptions.** Wetzler v. Wetzler, Sup. Ct. Op. No. 1518 (File No. 2892), 570 P.2d 741 (1977).

**The weight to be accorded a child's preference in custody disputes depends**

to some extent on the basis and reasons for that preference. Lacy v. Lacy, Sup. Ct. Op. No. 1308 (File No. 2770), 553 P.2d 928 (1976).

Custody decrees are not subject to modification merely because a child has developed a preference for one parent over the other. But where it would appear that the preferences of the children are of long standing duration, it was incumbent upon the superior court to hear the children's testimony regarding the circumstances of their preferences. Once the court has heard such testimony, it is then to determine whether the children's preferences, when considered with all other relevant factors, are sufficient to warrant the determination that it is in the best interests of the minor children to modify the decree's custody provisions. Lacy v. Lacy, Sup. Ct. Op. No. 1308 (File No. 2770), 553 P.2d 928 (1976).

**Parental custody is preferable** and only to be refused where clearly detrimental to the child. Turner v. Pannick, Sup. Ct. Op. No. 1189 (File No. 2293), 540 P.2d 1051 (1975); Britt v. Britt, Sup. Ct. Op. No. 1473 (File No. 2957), 567 P.2d 308 (1977).

Unless the superior court determines that a parent is unfit, has abandoned the child, or that the welfare of the child requires that a nonparent receive custody, the parent must be awarded custody. Turner v. Pannick, Sup. Ct. Op. No. 1189 (File No. 2293), 540 P.2d 1051 (1975).

Between a parent and a nonparent, the parent is to be preferred unless placing custody with him or her would be detrimental to the child. Veazey v. Veazey, Sup. Ct. Op. No. 1301 (File No. 2631), 560 P.2d 382 (1977).

In custody litigation between a parent and a nonparent, the nonparent must overcome by a preponderance of the evidence the preference for parental custody. Britt v. Britt, Sup. Ct. Op. No. 1473 (File No. 2957), 567 P.2d 308 (1977).

**The parent is entitled to a preference over the grandparents,** unless it is clearly shown that the parent is unfit for the trust, or that the welfare of the child requires it to be in the custody of the grandparents. Bass v. Bass, Sup. Ct. Op. No. 455 (File No. 832), 437 P.2d 324 (1968).

**Review of Alaska cases with respect to test applicable to suits by biological parent to regain custody of child from third party.** — See Turner v. Pannick, Sup. Ct. Op. No. 1189 (File No. 2293), 540 P.2d 1051 (1975).

**No presumption in favor of person with whom child has most recently and continuously resided.** — While there might be some preference for leaving the child in the custody of the person with whom he has most recently and continuously resided, the supreme court will not establish such a presumption lest it lend to pre-hearing maneuvering for possession of the child. Carle v. Carle, Sup. Ct. Op. No. 847 (File No. 1496), 503 P.2d 1050 (1972).

**Time spent with parent during appeal of custody order.** — Where one parent obtained custody pursuant to a court order but on appeal the order was vacated and remanded, on remand the trial court could consider the quality and duration of the time which the child spent with each parent during the pendency of the appeal in deciding anew the child custody issue. Craig v. McBride, Sup. Ct. Op. No. 2462 (File No. 5358), 639 P.2d 303 (1982).

**Fact of mother's adulterous relationship** is of importance in a child custody case only as it may affect the best interests of the child. Bonjour v. Bonjour, Sup. Ct. Op. No. 1456 (File No. 3000), 566 P.2d 667 (1977).

**Mother's bearing of children out of wedlock** or her instability in terms of relationships should be determinative in a child custody dispute only where such conduct adversely affects the child or the mother's parenting abilities. Craig v. McBride, Sup. Ct. Op. No. 2462 (File No. 5358), 639 P.2d 303 (1982).

**Evidence of lifestyle, habits, or character of custody claimant is relevant** only to the extent that it may be shown to affect the person's relationship to the child. Britt v. Britt, Sup. Ct. Op. No. 1473 (File No. 2957), 567 P.2d 308 (1977).

**Sexual abuse of children.** — Given that the trial court accepted as fact the father's sexual abuse of his older children, it was an abuse of discretion to find that it was in the child's best interests to be placed in the custody of the father without ample evidence of his rehabilitation. Horton v. Horton, Sup. Ct. Op. No. 1020 (File No. 1825), 519 P.2d 1131 (1974).

**Power to appoint guardian ad litem.** — In contested custody cases the trial court, in its discretion, is empowered to appoint a guardian ad litem to represent the interests of the minor child. Carle v. Carle, Sup. Ct. Op. No. 847 (File No. 1496), 503 P.2d 1050 (1972).

**Custody award irrespective of fault.** — The trial judge may make a custody award irrespective of the fault of either party only if it would be manifestly improper to do otherwise. Harding v. Harding, Sup. Ct. Op. No. 120 (File No. 218), 377 P.2d 378 (1962).

**Admissibility of child welfare report.** — See Bass v. Bass, Sup. Ct. Op. No. 455 (File No. 832), 437 P.2d 324 (1968).

**Parents have standing to challenge determination of child's best interest.** — Whether or not a constitutional due process right of the child is involved, parents have standing to challenge on appeal a determination of what is in the best interest of the child. Carle v. Carle, Sup. Ct. Op. No. 847 (File No. 1496), 503 P.2d 1050 (1972).

**Change in nature of proceeding.** — Where superior court transformed proceeding which initially was contemplated to be one that would determine the question of child's interim custody for the impending school year into one that decided the question of permanent custody, proceeding did not afford basic fairness to parent of child. Cushing v. Painter, Sup. Ct. Op. No. 2699 (File No. 6491), ___ P.2d ___ (1983).

### B. Review.

**The scope of review in child custody cases is relatively narrow.** DeHart v. Layman, Sup. Ct. Op. No. 1165 (File No. 2067), 636 P.2d 789 (1975), aff'd on other grounds, Sup. Ct. Op. No. 1393, 560 P.2d 1206 (1977).

**Standard on review.** — In custody questions findings of fact shall not be set aside unless clearly erroneous. Bass v. Bass, Sup. Ct. Op. No. 455 (File No. 832), 437 P.2d 324 (1968).

The supreme court will reverse the determinations of the trial court only where it is convinced that the findings of the trial court are clearly erroneous and the record indicates that an abuse of discretion has occurred. King v. King, Sup. Ct. Op. No. 650 (File No. 1245), 477 P.2d 356 (1970); Carle v. Carle, Sup. Ct. Op. No. 847 (File No. 1496), 503 P.2d 1050 (1972); Horutz v. Horutz, Sup. Ct. Op. No. 1390 (File No. 2615), 560 P.2d 397 (1977); Faro v. Faro, Sup. Ct. Op. No. 1650 (File No. 3465), 579 P.2d 1377 (1978); Bonjour v. Bonjour, Sup. Ct. Op. No. 1814 (File No. 3965), 592 P.2d 1233 (1979).

**On appeal the task of the supreme court** is to ascertain whether or not the trial court misapplied the broad discretion vested in it in regard to determination of custody questions, and whether the court's findings in respect to custodial issues are clearly erroneous. DeHart v. Layman, Sup. Ct. Op. No. 1165 (File No. 2067), 636 P.2d 789 (1975).

When called upon to decide whether the trial court abused its discretion in applying the best interests test, the supreme court must at times determine whether the trial court assigned "too great a weight to some factors while ignoring others, perhaps by elevating the interests of one of the parties to the dispute above that of the child, perhaps by making a clearly erroneous finding with respect to some material issue." Horutz v. Horutz, Sup. Ct. Op. No. 1390 (File No. 2615), 560 P.2d 397 (1977).

The supreme court's standard of review in custody cases is that of "abuse of discretion." Findings of fact are reviewed against a "clearly erroneous" criterion. Layman v. DeHart, Sup. Ct. Op. No. 1393 (File No. 2806), 560 P.2d 1206 (1977).

The supreme court must determine on review "whether that discretion has been abused, perhaps by assigning too great a weight to some factors while ignoring others." Johnson v. Johnson, Sup. Ct. Op. No. 1429 (File Nos. 2709, 2724), 564 P.2d 71 (1977).

The award of custody is committed to the discretion of the trial court and is reversible only for an abuse of that discretion. Wetzler v. Wetzler, Sup. Ct. Op. No. 1518 (File No. 2892), 570 P.2d 741 (1977).

Review of visitation privileges is based upon the same standard applied in other custody matters, that is, the supreme court needs only to determine whether the trial court abused its discretion in fashioning suitable visitation rights. Faro v. Faro, Sup. Ct. Op. No. 1650 (File No. 3465), 579 P.2d 1377 (1978).

**Custody award on conflicting evidence.** — The fact that an award of custody is based upon extremely conflicting evidence does not of itself show an abuse of discretion. Harding v. Harding, Sup. Ct. Op. No. 120 (File No. 218), 377 P.2d 378 (1962); Bass v. Bass, Sup. Ct. Op. No. 455 (File No. 832), 437 P.2d 324 (1968).

**When case must be remanded.** — Where the supreme court is unable to conclude with any degree of certainty that custody was decided without taking into consideration impermissible factors, the case must be remanded for further proceedings. Carle v. Carle, Sup. Ct. Op. No. 847 (File No. 1496), 503 P.2d 1050 (1972).

If the supreme court finds that the trial court has used an impermissible criterion in its determination, it will remand the case for a decision in which proper factors are considered. Johnson v. Johnson, Sup. Ct. Op. No. 1429 (File Nos. 2709, 2724), 564 P.2d 71 (1977), cert. denied, 434 U.S. 1048, 98 S. Ct. 896, 54 L. Ed. 2d 800 (1978); Bonjour v. Bonjour, Sup. Ct. Op. No. 1814 (File No. 3965), 592 P.2d 1233 (1979).

## III. CUSTODY MODIFICATION.

### A. In General.

**All custody awards are subject to motions for modification.** Britt v. Britt, Sup. Ct. Op. No. 1473 (File No. 2957), 567 P.2d 308 (1977).

**A motion to modify custody may be made at any time during the minority of the child involved, and the superior court has an obligation to consider such a request.** Cooper v. State, Sup. Ct. Op. No. 2453 (File Nos. 4906, 4970), 638 P.2d 174 (1981).

**Motion made immediately after decision in divorce case.** — A motion for custody modification, which was made immediately after the court's decision in a contested divorce case, was tantamount to a motion for a new trial on the custody issue. King v. King, Sup. Ct. Op. No. 650 (File No. 1235), 477 P.2d 356 (1970).

**Application of Uniform Child Custody Jurisdiction Act.** — The jurisdictional prerequisites of AS 25.30.020 apply when a superior court is asked to modify custody. Szmyd v. Szmyd, Sup. Ct. Op. No. 2472 (File No. 6856), 641 P.2d 14 (1982).

**A change in custody should not be ordered lightly.** Nichols v. Nichols, Sup. Ct. Op. No. 971 (File No. 1833), 516 P.2d 732 (1973); DeHart v. Layman, Sup. Ct. Op. No. 1165 (File No. 2067), 536 P.2d 789 (1975).

**Best interests of child is test.** — A court should not alter a previous custody determination without a reasonable basis for concluding that the best interests of the child dictate such a change. King v. King, Sup. Ct. Op. No. 650 (File No. 1235), 477 P.2d 356 (1970); Nichols v. Nichols, Sup. Ct. Op. No. 971 (File No. 1833), 516 P.2d 732 (1973).

**A court modifying a previous custody determination must be guided by what appears to be for the best interests of the child.** Horton v. Horton, Sup. Ct. Op. No. 1020 (File No. 1825), 519 P.2d 1131 (1974).

**Removal of the children from the state should not automatically shift custody without a hearing.** Sherry v. Sherry, Sup. Ct. Op. No. 2271 (File No. 4939), 622 P.2d 960 (1981).

**Modification of child custody or visitation must generally rest upon some substantial change in circumstances.** Cooper v. State, Sup. Ct. Op. No. 2453 (File Nos. 4906, 4970), 638 P.2d 174 (1981).

**The "change of circumstance" doctrine is not an ironclad rule.** King v. King, Sup. Ct. Op. No. 60 (File No. 1235), 477 P.2d 356 (1970).

**This section does not refer to a requirement of "change of circumstance" in order to modify a decree.** Nichols v. Nichols, Sup. Ct. Op. No. 971 (File No. 1833), 516 P.2d 732 (1973).

**It is perhaps possible to conceive of a case in which, despite the fact that there was apparently no change of circumstances, nevertheless the welfare of the child might require that the previous order of custody be changed, but without some change in circumstance there is no logical basis for a court to alter a determination which has once seriously and finally been made.** King v. King, Sup. Ct. Op. No. 650 (File No. 1235), 477 P.2d 356 (1970); Nichols v. Nichols, Sup. Ct. Op. No. 971 (File No. 1833), 516 P.2d 732 (1973).

**The concept of "substantial change" of circumstances is not a limitation on the discretion of the trial court to determine custody according to the best interest of the child. Rather, it may be considered simply a rule of judicial economy designed to discourage discontented parents from continually renewing custody proceedings.** King v. King, Sup. Ct. Op. No. 650 (File No. 1235), 477 P.2d 356 (1970); Nichols v. Nichols, Sup. Ct. Op. No. 971 (File No. 1833), 516 P.2d 732 (1973).

**The "substantial change" of circumstances is not an initial obstacle which must be overcome by either party in order to have the court redetermine custody. It is simply one of the factors to be weighed in the balance by the court when a motion for modification of a divorce decree in respect to custody is made.** King v. King, Sup. Ct. Op. No. 650 (File No. 1235), 477 P.2d 356 (1970); Nichols v. Nichols, Sup. Ct. Op. No. 971 (File No. 1833), 516 P.2d 732 (1973).

**There was satisfaction of the "substantial change" doctrine where each party had remarried and the home environment for the child which would be afforded by either party had changed.** King v. King, Sup. Ct. Op. No. 650 (File No. 1235), 477 P.2d 356 (1970).





**When hearing not required.** — While a trial court must consider all motions for a change in custody, it is not required to grant a hearing on the motion if it is plain that the facts alleged in the moving papers, even if established, would not warrant a change. Deivert v. Oseira, Sup. Ct. Op. No. 2357 (File No. 4910), 628 P.2d 575 (1981).

**This section precludes a superior court from denying a motion for a change in custody with prejudice.** Cooper v. State, Sup. Ct. Op. No. 2453 (File Nos. 4906, 4970), 638 P.2d 174 (1981).

**Future requests for changes.** — A superior court may deny any particular request for modification of child custody or visitation so long as it does not abuse its discretion in doing so; but, it cannot preclude future requests for a change in custody. Cooper v. State, Sup. Ct. Op. No. 2453 (File Nos. 4906, 4970), 638 P.2d 174 (1981).

**Weight must be given to findings made at the original hearing.** DeHart v. Layman, Sup. Ct. Op. No. 1165 (File No. 2067), 536 P.2d 789 (1975).

**A court must give great weight to a finding of unfitness by a trial judge who has heard exhaustive testimony and examined exhibits, including medical and psychiatric reports.** Nichols v. Nichols, Sup. Ct. Op. No. 971 (File No. 1833), 516 P.2d 732 (1973).

**Consideration of original decree in modification cases.** — Where the court, in a hearing on a petition for change of custody, made only passing reference to the prior proceedings, the hearing became a reweighing of the evidence at the original custody hearing without imposing the heavy burden of persuasion required of the party seeking the modification, and was an abuse of discretion. Gentrix v. Gentrix, Sup. Ct. Op. No. 2573 (File No. 5980), 652 P.2d 76 (1982).

**Review.** — The Alaska supreme court will only reverse a trial court's decision to deny a change in custody if it abuses the substantial discretion it possesses in such matters, or if it makes clearly erroneous findings. Deivert v. Oseira, Sup. Ct. Op. No. 2357 (File No. 4910), 628 P.2d 575 (1981).

**Establishment of abuse of discretion.** — Abuse of discretion by a trial court in denying a change in custody can be established by showing that the court considered improper factors in making its determination, that it failed to consider statutorily-mandated factors, or that too much weight was assigned to some factors. Deivert v. Oseira, Sup. Ct. Op. No. 2357 (File No. 4910), 628 P.2d 575 (1981); Starkweather v. Curritt, Sup. Ct. Op. No. 2440 (File No. 5484), 636 P.2d 1181 (1981).

### B. Decrees of Other States.

**Award of custody of child in another state is not binding on courts of latter state.** — A decree awarding the custody of a child to one of the parties, rendered when the child is in another state, does not preclude the courts of the latter state from determining the question of custody of the child, although the court rendering such decree retains jurisdiction for the purpose of making further orders. Weber v. Weber, 10 Alaska 214 (1942).

**A foreign custody decree can be modified in the absence of a showing of changed circumstances.** Layman v. DeHart, Sup. Ct. Op. No. 1393 (File No. 2806), 560 P.2d 1206 (1977).

**Relationship of the full faith and credit clause to child custody cases.** — See Wilsonoff v. Wilsonoff, Sup. Ct. Op. No. 951 (File No. 1770), 514 P.2d 1264 (1973).

**A child's welfare has such a great claim upon a state that this responsibility was not to be foreclosed by a prior adjudication made by another state.** Wilsonoff v. Wilsonoff, Sup. Ct. Op. No. 951 (File No. 1770), 514 P.2d 1264 (1973); Layman v. DeHart, Sup. Ct. Op. No. 1393 (File No. 2806), 560 P.2d 1206 (1977).

**Although a sister state's decree should not be ignored in custody matters, strict application of the full faith and credit clause would result in a default of the court's responsibility to ensure the welfare of minor children domiciled in Alaska.** Layman v. DeHart, Sup. Ct. Op. No. 1393 (File No. 2806), 560 P.2d 1206 (1977).

**Foreign decrees should not be wholly ignored in custody disputes.** DeHart v. Layman, Sup. Ct. Op. No. 1165 (File No. 2067), 536 P.2d 789 (1975).

**And are to be considered significant factor.** — Alaska law requires that the custody decree of a sister state be considered a significant factor by the courts of Alaska in determining whether or not the foreign custody decree should be modified. Layman v. DeHart, Sup. Ct. Op. No. 1393 (File No. 2806), 560 P.2d 1206 (1977).

**Application of "clean hands" doctrine.** — The "clean hands" doctrine is generally considered a device for resolving problems of custody jurisdiction among the states and is most commonly invoked when a court is asked to either enforce or modify a custody decree of a sister state.

King v. King, Sup. Ct. Op. No. 650 (File No. 1235), 477 P.2d 356 (1970).

The "clean hands" doctrine serves no purpose in a setting where the court is asked to modify its own custody award as specifically allowed by the statute. King v. King, Sup. Ct. Op. No. 650 (File No. 1235), 477 P.2d 356 (1970).

Courts will recognize and enforce custody decrees of a sister state without reexamination of their merits, regardless of change of conditions, when there is misconduct or malfeasance on the part of the parent seeking such reexamination, by invoking the doctrine of "clean hands." This misconduct generally consists of defiantly leaving a sister state, usually the marital domicile, with the minor to avoid its jurisdiction and for the purpose of seeking redetermination of the issue in a more favorable forum. King v. King, Sup. Ct. Op. No. 650 (File No. 1235), 477 P.2d 356 (1970).

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**Collateral references.** — Consent of natural parents as essential to adoption where parents are divorced, 47 ALR2d 824.

Court's power as to custody and visitation of children in marriage annulment proceedings, 63 ALR2d 1008.

Mental health of contesting parent as factor in award of child custody, 74 ALR2d 1073.

Power of court which denied divorce, legal separation or annulment, to award custody or make provisions for support of child, 7 ALR3d 1096.

Withholding or denying visitation rights for failure to make alimony or support payments, 51 ALR3d 520.

Right, in child custody proceedings, to cross-examine investigating officer whose report is used by court in its decision, 59 ALR3d 1337.

Effect in subsequent proceedings, of paternity findings or implications in divorce or annulment decree or in support or custody made incident thereto, 78 ALR3d 846.

Grandparents' visitation rights, 90 ALR3d 222.

Rights and remedies of parents inter se with respect to the names of their children, 92 ALR3d 1091.

Admissibility of social worker's expert testimony on custody issue, 1 ALR4th 837.

Visitation rights of persons other than natural parents or grandparents, 1 ALR4th 1270.

Parent's physical disability or handicap as factor in custody award or proceedings, 3 ALR4th 1044.

Initial award or denial of child custody to homosexual or lesbian parent, 6 ALR4th 1297.

Race as factor in custody award or proceedings, 10 ALR4th 796.

Desire of child as to geographical location of residence or domicile as factor in awarding custody or terminating parental rights, 10 ALR4th 827.

Right of incarcerated mother to retain custody of infant in penal institution, 14 ALR4th 748.

Propriety of awarding joint custody of children, 17 ALR4th 1013.

Propriety of awarding custody of child to parent residing or intending to reside in foreign country, 20 ALR4th 677.

**Sec. 25.24.160. Judgment.** In a judgment in an action for divorce or action declaring a marriage void or at any time after judgment, the court may provide

(1) *[Repealed, § 2 ch 160 SLA 1968.]*

(2) for the payment by either or both parties of an amount of money or goods, in gross or installments, as may be just and proper for the parties to contribute toward the nurture and education of their children, and the court may order the parties to arrange with their employers for an automatic payroll deduction each month or each pay period, if the period is other than monthly, of the amount of the installment; if the employer agrees, the installment shall be forwarded by the employer to the clerk of the superior court which entered the judgment





or to the court trustee, and the amount of the installment is exempt from execution;

(3) for the recovery by one party from the other of an amount of money for maintenance, in gross or in installments, as may be just and necessary without regard to which of the parties is in fault;

(4) for the delivery to either party of that party's personal property in the possession or control of the other party at the time of giving the judgment;

(5) *[Repealed, § 6 ch 251 SLA 1976.]*

(6) for the division between the parties of their property, whether joint or separate, acquired only during coverture, in the manner as may be just, and without regard to which of the parties is in fault; however, the court, in making the division, may invade the property of either spouse acquired before marriage when the balancing of the equities between the parties requires it; and to accomplish this end the judgment may require that one or both of the parties assign, deliver, or convey any of their real or personal property to the other party;

(7) to change the name of one of the parties. (§ 12.14 ch 101 SLA 1962; am § 1 ch 84 SLA 1966; am §§ 2 — 6 ch 160 SLA 1968; am §§ 72, 73 ch 127 SLA 1974; am § 6 ch 251 SLA 1976)

Revisor's notes. Formerly AS 09.55.210. Renumbered in 1983.

NOTES TO DECISIONS

I. General Consideration.
II. Child Support.
III. Alimony.
IV. Division of Property.
  A. In General.
  B. What Constitutes Property.

I. GENERAL CONSIDERATION.

**This section and AS 09.55.220 (now AS 25.24.170) are predicated upon the court's jurisdiction of the parties and the subject matter.** Weber v. Weber, 10 Alaska 214 (1942).

**And jurisdiction of defendant's person is necessary for money judgment for alimony.** — Where the plaintiff was a resident of Connecticut and the defendant a resident of Alaska, constructive service of summons being made on the defendant in Alaska, the court of the forum had jurisdiction of the marital status but did not have jurisdiction of the person of the defendant which is essential for the entry of a money judgment for alimony. Thornhill v. Huston, 13 Alaska 150 (1951).

**Quoted in** Balchen v. Balchen, Sup. Ct. Op. No. 1469 (File No. 3178), 566 P.2d 1324 (1977); Allen v. Allen, Sup. Ct. Op. No. 2514 (File No. 6006), 645 P.2d 774 (1982).

**Cited in** Otton v. Zaborac, Sup. Ct. Op. No. 1072 (File No. 2050), 525 P.2d 537 (1974); Gutterman v. First Nat'l Bank, Sup. Ct. Op. No. 1876 (File No. 3996), 597 P.2d 969 (1979).

II. CHILD SUPPORT.

**The trial court is given broad discretion in fashioning suitable visitation rights and support obligations.** Curgus v. Curgus, Sup. Ct. Op. No. 943 (File No. 1837), 514 P.2d 647 (1973).

**Continuation of educational support beyond age of majority.** — A reasonable construction of this section allows for the continuation of educational support of children beyond the age of majority. Hinchey v. Hinchey, Sup. Ct. Op. No. 2312 (File No. 3528), 625 P.2d 297 (1981).

days or until the court is notified that mediation efforts have failed. All court orders made under AS 25.24.140 remain in effect during the period of mediation. (§ 2 ch 188 SLA 1975; am § 1 ch 117 SLA 1992)

Effect of amendments. — The 1992 amendment, effective September 20, 1992, in subsection (c), substituted "unmarried children" for "minor children" and inserted "under the age of 19 whose interests may be affected."

**Sec. 25.24.140. Orders during action.** (a) During the pendency of the action, a spouse may, upon application and in appropriate circumstances, be awarded expenses, including

(1) attorney fees and costs that reasonably approximate the actual fees and costs required to prosecute or defend the action; in applying this paragraph, the court shall take appropriate steps to ensure that the award of attorney fees does not contribute to an unnecessary escalation in the litigation;

(2) reasonable spousal maintenance, including medical expenses; and

(3) reasonable support for minor children in the care of the spouse and reasonable support for unmarried 18-year-old children of the marriage who are actively pursuing a high school diploma or an equivalent level of technical or vocational training and living as dependents with the spouse or designee of the spouse, if there is a legal obligation of the other spouse to provide support.

(b) During the pendency of the action, upon application, a spouse is entitled to necessary protective orders, including orders

(1) providing for the freedom of each spouse from the control of the other spouse;

(2) restraining each spouse from subjecting the other spouse or another person living in the household to domestic violence, as defined in AS 25.35.200;

(3) directing one spouse to vacate the marital residence or the home of the other spouse;

(4) restraining a spouse from communicating directly or indirectly with the other spouse;

(5) restraining a spouse from entering a propelled vehicle in the possession of or occupied by the other spouse; and

(6) prohibiting a spouse from disposing of the property of either spouse or marital property without the permission of the other spouse or a court order.

(c) After a hearing, if both parties agree, the court may also order that the parties engage in personal or family counseling or mediation. In the order, the court shall provide for the payment of the costs of the counseling or mediation. (§ 12.13 ch 101 SLA 1962; am § 71 ch 127 SLA 1974; am § 5 ch 130 SLA 1990; am § 2 ch 117 SLA 1992)





Effect of amendments. — The 1992 amendment, effective September 20, 1992, rewrote paragraph (a)(3).

NOTES TO DECISIONS

I. General Consideration
II. Attorney Fees and Costs

I. GENERAL CONSIDERATION.

**Factors to consider in awarding interim spousal maintenance.** — An award of interim maintenance provides for reasonable and necessary living expenses while divorce litigation is pending and insures that neither spouse is disadvantaged in presenting their claims. The primary factors which should be considered in awarding interim spousal maintenance are the relative economic circumstances and needs of the parties and the ability to pay the maintenance. Johnson v. Johnson, 836 P.2d 930 (Alaska 1992).

**Specific findings required for interim spousal maintenance.** — Where record contained no findings in support of the interim spousal maintenance order entered by trial court judge, award was vacated and the issue remanded for specific findings. Johnson v. Johnson, 836 P.2d 930 (Alaska 1992).

II. ATTORNEY FEES AND COSTS.

**Evidence insufficient to award attorney's fees.** — Award of $7,000 in attorney's fees to the wife was reversed, where the husband's act of taking his son out of state without notifying the wife was insufficient evidence that he undertook a modification action willfully and without just excuse. Kessler v. Kessler, 827 P.2d 1119 (Alaska 1992).

**Sec. 25.24.150. Judgments for custody.**

NOTES TO DECISIONS

I. General Consideration.
II. Determination of Custody.
A. In General.
III. Custody Modification.
A. In General.

I. GENERAL CONSIDERATION.

Applied in Farrell v. Farrell, 819 P.2d 896 (Alaska 1991); Lowdermilk v. Lowdermilk, 825 P.2d 874 (Alaska 1992); Kessler v. Kessler, 827 P.2d 1119 (Alaska 1992); Harvick v. Harvick, 828 P.2d 769 (Alaska 1992).

II. DETERMINATION OF CUSTODY.

A. In General.

**Custody improperly awarded as sanction against parent.** — Where the court awarded custody of son to father as a sanction against mother without undertaking a best interests of the child analysis, the award had to be vacated and the matter remanded for the purpose of redetermining custody based upon a best interests of the child analysis, with appropriate findings of fact which addressed all relevant criteria of subsection (c). Hakes v. Bergenthal, 843 P.2d 642 (Alaska 1992).

III. CUSTODY MODIFICATION.

A. In General.

**Effect of hostility between parents.** — Ordinarily, hostility and dispute between the parents, in and of itself, will not be considered a substantial change of circumstances unless the adverse impact on the child is extreme. The effect of hostility between the parents, however, may combine with other significant changes in circumstance to amount, in the aggregate, to a substantial change sufficient to warrant change of custody. Long v. Long, 816 P.2d 146 (Alaska 1991).

**Arrangement jeopardizing father's relationship with children.** — Finding that the existing custody arrangement, in which the mother had custody, placed the relationship of the father and the children at risk, supported change of custody, granting custody of the children to the father. Pinneo v. Pinneo, 835 P.2d 1233 (Alaska 1992).

## Sec. 25.24.160. Judgment.

### NOTES TO DECISIONS

I. General Consideration.
II. Child Support.
III. Alimony.
IV. Division of Property.
A. In General.
B. What Constitutes Property.

### I. GENERAL CONSIDERATION.

Applied in Chotiner v. Chotiner, 829 P.2d 829 (Alaska 1992).

### II. CHILD SUPPORT.

**"Just and proper" contribution.** — Civil Rule 90.3, regarding child support awards, does not modify or amend this section, but the rule interprets the code section and establishes guidelines to enable courts to determine what is a "just and proper" contribution. Coghill v. Coghill, 836 P.2d 921 (Alaska 1992).

**Award excessive.**

Expenses beyond reasonable need were son's summer hockey camp, daughter's gymnastics class that daughter was not enrolled in, and yearly expense for three year old daughter's psychotherapy sessions when the treatment would have only taken about six months. Money v. Money, 852 P.2d 1168 (Alaska 1993).

**Trial court must disclose calculations.** — A trial court abused its discretion in failing to disclose the actual numbers it used to calculate a child support award. Terry v. Terry, 851 P.2d 837 (Alaska 1993).

### III. ALIMONY.

**But such factors are not substitutes for statutory standard.** [illegible]

**Failure to address any of the relevant statutory factors resulted in remand to consider subparagraph (a)(4)(A) through (I) with particular emphasis to the earning capacities and health of parties, and the income producing capacity of properties.** Money v. Money, 852 P.2d 1168 (Alaska 1993).

**Sizable award requires careful inquiry.** — When a spouse's disabilities and lack of work experience make the alimony award sizable, it is imperative that the trial court inquire into the specific needs of the recipient spouse before making the award. Jones v. Jones, 835 P.2d 1173 (Alaska 1992).

**Temporary forms of alimony preferred.** — Either rehabilitative alimony or reorientation alimony where appropriate is, in general, to be preferred to permanent alimony because it is generally undesirable to require one person to support another on a long-term basis in the absence of an existing legal relationship. Jones v. Jones, 835 P.2d 1173 (Alaska 1992).

**Rehabilitative designation.** — Designation of alimony award as rehabilitative did not limit the award to rehabilitation. By awarding wife alimony to aid her in preparing for the job market and to help her organize her portion of the marital estate assets, the superior court effectively awarded wife both rehabilitative and reorientation alimony. Money v. Money, 852 P.2d 1168 (Alaska 1993).

**Substantial evidence to support award.** — Substantial evidence in support of the trial court's finding that the spouse awarded alimony was not employable justified award of permanent alimony. Jones v. Jones, 835 P.2d 1173 (Alaska 1992).

**Retirement terminated agreement.** — A financial agreement entered into when parties petitioned to dissolve their marriage provided for permanent spousal support, terminable only on wife's death or remarriage, terminated on husband's voluntary retirement. Keffer v. Keffer, 852 P.2d 394 (Alaska 1993).

Husband's retirement was not voluntary because his job was abolished and he was eligible for retirement and took it. Keffer v. Keffer, 852 P.2d 394 (Alaska 1993).





### IV. DIVISION OF PROPERTY.

#### A. In General.

**Property division generally.**

Alaska law provides that the divorce court has the power to reorder the pre-dissolution interests of the parties as required for an equitable result, even if this requires the court to invade the pre-marital property of one spouse for the benefit of the other. Yerrington v. Yerrington, 141 Bankr. 96 (9th Cir. 1992).

**Presumption favoring equal division.** — In the absence of findings to warrant an unequal division, an equal division of the marital estate is presumptively the most equitable. Miles v. Miles, 816 P.2d 129 (Alaska 1991).

**Time of valuing property.**

The date on which the trial court values marital property generally should be as close as practicable to the date of trial. Doyle v. Doyle, 815 P.2d 366 (Alaska 1991).

In special situations, the trial court may value marital property as of the date of separation of the parties. However, in that event, there should be specific findings as to why the date of separation is the more appropriate choice for valuation. Doyle v. Doyle, 815 P.2d 366 (Alaska 1991).

Property should be valued for division purposes at the date of trial rather than the date of separation. However, the separation date may be used when special circumstances of the case demonstrate that a truly fair and appropriate property evaluation and division of assets cannot otherwise be achieved. Thomas v. Thomas, 816 P.2d 374 (Alaska 1991).

**Fair market value as valuation index.** — Fair market value, rather than purchase price values, was the appropriate index of valuation for the parties' personal property. Doyle v. Doyle, 815 P.2d 366 (Alaska 1991).

**Valuation by parties.** — A trial court is not bound by a buy-sell agreement valuation, but may consider such a valuation, especially when it is supported by other valuation methods. Money v. Money, 852 P.2d 1168 (Alaska 1993).

**Evidence of valuation.** — Where a party identifies a significant marital asset but presents no evidence as to its value, the best practice is for the trial court to direct the parties, or the delinquent party having the best access to the proof, to fill the evidentiary void. Root v. Root, 851 P.2d 67 (1993).

**The division of property, etc.**

When a marriage is of long duration or assets are commingled, the correct method of property division involves (1) identifying the specific property available for distribution, (2) determining the value of this property, and (3) determining the most equitable division of the property, beginning with the presumption that an equal division is most equitable. Lowdermilk v. Lowdermilk, 825 P.2d 874 (Alaska 1992).

In accord with paragraph in main pamphlet. See Jones v. Jones, 835 P.2d 1173 (Alaska 1992).

**"Source of funds" approach to classification.** — Under the "source of funds" approach, property is classified according to the classification of the funds used to purchase it. Property purchased on debt is classified according to the funds used to pay off the debt. The source of funds rule, although not adopted per se in this jurisdiction, is not inconsistent with this section. Zimin v. Zimin, 837 P.2d 118 (Alaska 1992).

**Determining status of premarital assets.** — The trial court retains discretion to decide whether a premarital asset remains separate property even where the asset has been treated as joint property. The trial court makes this determination in the context of an equitable division of marital assets and its balancing of the parties' situation. Miles v. Miles, 816 P.2d 129 (Alaska 1991).

**Premarital assets.** — It is an abuse of discretion for the trial court to shield the property from equitable distribution merely by affixing to the property the label of "premarital asset." Lowdermilk v. Lowdermilk, 825 P.2d 874 (Alaska 1992).

**When invasion of premarital asset unauthorized.** — A whole life insurance policy taken out on behalf of husband when he was four years old, although the $13.83 quarterly premiums were paid out of a joint checking account, was not invaded as marital property because the policy paid dividends which offset the annual premiums. Money v. Money, 852 P.2d 1168 (Alaska 1993).

**Contributions benefiting separate property of other spouse, etc.**

Wife's efforts in handling insurance and roofing contracts relating to her husband's premarital real property, and in

# PREFACE

A growing number of grandparents throughout the country have been denied access to their grandchildren by the children's parents or other custodians and have sought legal assistance in obtaining visitation. At least one hundred appellate court decisions involving grandparent visitation rights have been published to date. Yet grandparent visitation law remains a relatively new area of domestic relations law, and there is little literature on the handling of grandparent visitation cases for judges, domestic relations attorneys, mediators and other professionals working in the family law arena.

In the Fall of 1987, the Administration on Aging of the U.S. Department of Health and Human Services provided funds to the American Bar Association for a one-year project focusing on grandparent visitation rights. The project was jointly sponsored by three American Bar Association entities: the Commission on Legal Problems of the Elderly, the Family Law Section, and the National Legal Resource Center for Child Advocacy and Protection. One of the primary goals of the project was to publish this legal resource manual to provide up-to-date information on statutory and case law, existing legal literature, case representation, judicial practice, the role of experts and the use of mediation.

We have many acknowledgements to make. First, we thank the Administration on Aging for providing the grant which made this project possible. We appreciate the tremendous efforts of the authors who contributed to this book. The following authors took time off from their various fields of practice to draft and redraft chapters for the manual: Judge Ernest Rotenberg, Leonard L. Loeb, Marcia B. Gevers, Patricia Fernandez, Dr. Pamela Langelier, and Dr. John Haynes. We also appreciate the help of our Advisory Committee members, who volunteered their time and shared their knowledge: Edith Engel, Dr. Arthur Kornhaber, Dr. Doris Jonas Freed, Leonard Loeb, Bruce Kaufman, T.H. Guerin, Paula Monopoli, Professor Judith Areen, and Daniel Skoler. We thank Inga Van Eysden and Kimberly Shanks, law students who did extensive research and drafted portions of the manual. On the American Bar Association staff we have numerous individuals to thank. We appreciate the guidance and supervision of Nancy Coleman, Staff Director of the Commission on Legal Problems of the Elderly, and Howard Davidson and Bob Horowitz, Director and Associate Director of the National Legal Resource Center for Child Advocacy and Protection. We also would like to thank Beverly Y. Lyons for word processing and performing numerous other helpful tasks, and Norma Gregerman for publication production.

Ellen C. Segal
Naomi Karp

February, 1989

*. . . About the American Bar Association Commission on Legal Problems of the Elderly*

*In 1978, the American Bar Association established the Commission on Legal Problems of the Elderly to examine law-related concerns of older persons. The Commission has encouraged legal services for the elderly, particularly through involvement of the private bar; and has explored legal issues surrounding long term care, home care, guardianship, home equity conversion, surrogate decision-making, and Social Security due process.*

*. . . About the American Bar Association National Legal Resource Center for Child Advocacy and Protection*

*Since 1978 the Resource Center has worked to improve laws and professional practices in the child welfare arena. It routinely offers educational opportunities to lawyers and other professionals involved in child abuse, foster care, child support, and other substantive areas of law. One of its principal goals is to improve the way courts and public agencies handle their child welfare caseloads, particularly with an eye towards protecting the rights of children and families. Towards this end, the Center works with legislators, judges and agency administrators in the development and implementation of new laws and policies.*

*. . . About the American Bar Association Family Law Section*

*The Family Law Section was established in 1958 to promote the objectives of the ABA by improving the administration of justice in the field of family law, by study, conferences, and publication of reports and articles with respect to providing assistance and guidance to the practice of family law, and to provide assistance with the teaching, promulgation of, and improvement of the welfare and strength of the family unit and its members in all related matters.*

Chapter I

# INTRODUCTION

American grandparents are becoming increasingly vocal about being denied access to their grandchildren. It appears that more and more grandparents are being deprived of the opportunity to see their grandchildren. These visitation problems seem to reflect broad changes in American society: the divorce rate is growing, family members no longer live in close proximity to one another, and the traditional family unit is becoming diffused. The visibility of the grandparent visitation issue also seems to reflect demographic and political changes: as our population ages, older persons are becoming more verbal about issues affecting them, and legislators, policy makers and service providers are giving those issues more attention.

In the last two decades, grandparents have gained ground in their efforts to obtain court-ordered visitation. Under the common law parental rights doctrine, courts generally refused to order visitation rights for grandparents over the objections of the child's parents. Since 1965, every state (excluding the District of Columbia) has enacted a statute enabling grandparents to petition for visitation rights with grandchildren.

These state statutes vary a great deal. They differ on who is authorized to petition for visitation, when a grandparent may petition, and what standard a court should apply in deciding whether to grant visitation privileges.
The volume of litigation in the grandparent visitation area is growing rapidly. As many as one hundred or more cases may have reached the state appellate court level since 1980; many more have been filed at the trial court level.

Although domestic relations is traditionally governed by state law, there has been considerable activity on the federal level concerning grandparent visitation. In 1982 and 1983, the House of Representatives' Select Committee on Aging Subcommittee on Human Services held hearings on the issue. House Concurrent Resolution 67 was adopted on April 24, 1985 expressing the sense of the Congress that a uniform State act should be developed and adopted which provides grandparents adequate rights to petition State courts for privileges to visit their grandchildren.

APPENDIX A

GRANDPARENT VISITATION STATUTES*

| | State | Citation to Statute | On Death[1] of Parent | On Divorce[2] of Parents | After Living with[3] Grandparent | General[4] Provision |
|---|---|---|---|---|---|---|
| 1. | Alabama | Ala. Code §30-3-3 (1983) | X | X | | |
| 2. | Alaska | Alaska Stat. §25.24.150 (1983) | X | X | | |
| 3. | Arizona | Ariz. Rev. Ann. §25-337.01 (Supp. 1987) | X | X | | |
| 4. | Arkansas | Ar. Stat. Ann. §9-13-103 (Supp. 1987) | X | X | | |
| 5. | California | Cal. Civ. Code §§197.5, 4601 (West 1984 & Supp. 1987) | X | | | X |
| 6. | Colorado | Colo. Rev. Stat. §19-1-116 (1986) | X | X | | |
| 7. | Connecticut | Conn. Gen. Stat. Ann. §§46b 59, -59a (West 1986 & Supp. 1988) | | | | X |
| 8. | Delaware | Del. Code Ann. tit. 10, §950(7) (Supp. 1986) | | X | | |
| 9. | Florida | Fla. Stat. §61.13(2) (b)2c (Supp. 1987) | | X | | |
| 10. | Georgia | Ga. Code Ann. §19-7-3 (Supp. 1988) | X | | | |
| 11. | Hawaii | Haw. Rev. Stat. §571.46(7) (1985) | | X | | |
| 12. | Idaho | Idaho Code §32-1008 (1983) | | | | X |
| 13. | Illinois | Ill. Ann. Stat. ch.40, para. 607(b) (c) (Smith-Hurd Supp. 1988) | X | X | | |
| 14. | Indiana | Ind. Code Ann. §§31-1-11.7-1 to .7-8 (Burns 1987 & Supp. 1988) | X | X | | |

*Reprinted, with minor editorial and substantive changes, from J. Atkinson 2 Modern Child Custody Practice §8.19 (1986 & Supp. 1987)

FOOTNOTES

1 Under this type of provision, visitation could be granted to a grandparent whose son or daughter (the parent of the child) died.

2 Several statutes also specifically provided for grandparent visitation while the parents are separated, where the marriage was annulled, or where there are or have been child custody proceedings.

3 The length of the time in which the child lived with the grandparent triggered the right of the grandparent to seek visitation: twelve months (Minnesota and Pennsylvania) and six months (Texas and New Mexico).

4 "General provision" refers to visitation statutes which did not specify or restrict the circumstances under which a grandparent could obtain visitation.

| | State | Citation to Statute | of Parent | of Parents | Grandparent | Provision |
|---|---|---|---|---|---|---|
| 15. | Iowa | Iowa Code Ann. §§598.35-.36 (West 1987 & Supp. 1988) | X | X | | |
| 16. | Kansas | Kan. Stat. Ann. §60-1616(b) (Supp. 1987) | | | | X |
| 17. | Kentucky | Ky. Rev. Stat. Ann. §405.021 (Baldwin 1984) | | | | X |
| 18. | Louisiana | La. Rev. Stat. Ann. §9:572 (West Supp. 1988) | X | X | | |
| 19. | Maine | Me. Rev. Stat. Ann. tit. 19, §752 (Supp. 1988) | | | | X |
| 20. | Maryland | Md. Fam. Law Code Ann. §9-102 (1984) | | X | | |
| 21. | Massachusetts | Mass. Gen. Laws Ann. ch.119, §39D (West Supp. 1988) | X | X | | |
| 22. | Michigan | Mich. Comp. Laws Ann. §§722.72(b), 722.72b (West Supp. 1988) | X | X | | |
| 23. | Minnesota | Minn. Stat. Ann. §257.022 (West 1982 & Supp. 1988) | X | X | X | |
| 24. | Mississippi | Miss. Code Ann. §§93-16-1. -3, -5, -7 (Supp. 1988) | X | X | | |
| 25. | Missouri | Mo. Ann. Stat. §§452.400, .402 (Vernon 1986) | X | X | | |
| 26. | Montana | Mont. Code Ann. §§40-9-101 to -102 (1987) | | | | X |
| 27. | Nebraska | Neb. Rev. Stat. §§43-1801 to -1803 (Supp. 1986) | X | X | | |
| 28. | Nevada | Nev. Rev. Stat. §§125A.330, .340 (1987) | X | X | | |
| 29. | New Hampshire | N.H. Rev. Stat. Ann. §458:17 VI (1983) | | X | | |
| 30. | New Jersey | N.J. Stat. Ann. §9:2-7.1 (West Supp. 1988) | X | X | | |
| 31. | New Mexico | N.M. Stat. Ann. §§40-9-1 to -4 (1986 & Supp. 1988) | X | X | X | |
| 32. | New York | N.Y. Dom. Re. Law §§72, 240(1) (McKinney 1986 & 1988) | X | X | | X |
| 33. | North Carolina | N.C. Gen. Stat. §§50-13.2(b1), .2A, .5(j) (1987) | | X | | |
| 34. | North Dakota | N.D. Cent. Code §14-09-05.1 (Supp. 1987) | | | | X |
| 35. | Ohio | Ohio Rev. Code Ann. §3109.05(B) (Anderson Supp. 1987) | | X | | |
| 36. | Oklahoma | Okla. Stat. Ann. tit. 10, §5 (West 1987) | X | X | X | |
| 37. | Oregon | Or. Rev. Stat. §§109.121, .123 (1987) | X | X | | |

| | State | Citation to Statute | On Death[1] of Parent | On Divorce[2] of Parents | After Living with[3] Grandparent | General[4] Provision |
|---|---|---|---|---|---|---|
| 38. | Pennsylvania | 23 Pa. Cons. Stat. Ann. §§5311-5314 (Purdon Supp. 1988) | X | | X | |
| 39. | Rhode Island | R.I. Gen. Laws §§15-5-24.1 to .2 (1981 & Supp. 1987) | X | X | | |
| 40. | South Carolina | S.C. Code Ann. §20-7-420(33) (Law. Co-op. 1976) | | | | X |
| 41. | South Dakota | S.D. Codified Laws Ann. §§25-4-52 to -54 (1984) | X | X | | |
| 42. | Tennessee | Tenn. Code Ann. §36-6-301 (Supp. 1988) | | | | X |
| 43. | Texas | Tex. Fam. Code Ann. §14.03(e)-(g) (Vernon Supp. 1988) | X | X | X | |
| 44. | Utah | Utah Code Ann. §30-3-5(4),(7) (Supp. 1988) | | | | X |
| 45. | Vermont | Vt. Stat. Ann. tit. 15, 1011-1016 (Supp. 1988) | X | X | | |
| 46. | Virginia | Va. Code Ann. §20-107.2 (Supp. 1988) | | X | | |
| 47. | Washington | Wash. Rev. Code Ann. §26.09.240. (Supp. 1988) | | | | X |
| 48. | West Virginia | W. Va. Code §§48-2-15(b)(1), 48-2B-1 (1986) | X | X | | |
| 49. | Wisconsin | Wis. Stat. Ann. §767.245 (West Supp. 1988) | | | | X |
| 50. | Wyoming | Wyo. Stat. §20-2-113(c) (Supp. 1988) | X | X | | |

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 21

Revision Date: March 9, 1994
Title: "...relating to child visitation rights of grandparents and other persons who are not parents of a child."
Sponsor: Senator Donley
Requestor: Senate State Affairs Committee

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 I. Pegues, Director
Division: Administrative Services Division
Phone: 465-3672
Date: March 9, 1994

Approved by Commissioner: Bruce M. Botelho, Attorney General
Richard I. Pegues/FOR
Agency: Department of Law
Date: March 9, 1994

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 21

ANALYSIS CONTINUATION:

This bill amends AS 25.20 to provide that in a child custody determination a court shall provide for visitation by a grandparent or other person if that is in the best interests of a child. This bill deals with the rights of private parties, and it therefore will not have a fiscal impact on the Department of Law.

# SB 24

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

☑ CRIMINAL DIVISION CENTRAL OFFICE
P. O. BOX 110300 · STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3428

☐ OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
1031 W. 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

# DEPARTMENT OF LAW

CRIMINAL DIVISION

January 19, 1993

The Honorable Dave Donley
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: SB 24 ("An Act Extending the Maximum Period of Probation After Conviction")

Dear Senator Donley:

By this letter, we wish to express our support for SB 24, "An Act Extending the Maximum Period of Probation After Conviction." Particularly for some offenses, such as sexual assaults and sexual abuse of minors, extended periods of supervision may reduce the number of new offenses committed by the defendant. Generally speaking, the costs associated with supervising a person on probation are less than the costs associated with new offenses. As a class, sex offenders in particular are difficult to treat and may reoffend years after release from incarceration.

Thank you for the opportunity to comment on this bill. If you have any further questions that we may be able to answer, please do not hesitate to call upon us.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: Dean J. Guaneli
Dean J. Guaneli
Assistant Attorney General

MOK/sf

POSITION PAPER - Department of Public Safety

BILL NO: SB 24

DATE: January 19, 1993

TITLE: An Act Extending the Maximum Period of Probation

CONTACT: C.E. Swackhammer
Deputy Commissioner

SB 24 extends, from five to ten years, the maximum period of probation to which a convicted criminal defendant can be sentenced. There may be situations in which the court wishes to continue probation supervision of an offender for longer than the five-year period now allowed by law. This bill would allow the courts the flexibility to fashion a sentence which best fits a particular offense or defendant.

The Department of Public Safety supports this bill.

Richard L. Burton
Commissioner

# Alaska Association Chiefs of Police

January 25, 1993

Senator Dave Donley
State Capitol
Juneau, Alaska 99801-1182

Dear Senator Donley:

I am writing to express the support of the Alaska Association of Chiefs of Police for Senate Bill 24. Existing law only allows for imposition of five years of probation. We support extending this to ten years as proposed in your bill.

Probation can be an excellent tool in protecting the public. We submit, however, that judges under current law are to limited and should be given the ability to require persons convicted of serious crimes to be monitored and supervised for longer periods of time when necessary.

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

ALASKA NETWORK
ON
DOMESTIC VIOLENCE
AND
SEXUAL ASSAULT

419 6th Street, No. 116 • Juneau, Alaska 99801 • (907) 586-3650



# SENATE BILL 24

The Alaska Network on Domestic Violence supports Senate Bill 24, which provides judges with the ability to order probation for up to ten years after an offense. The Network is a non-profit coalition of 22 organizations throughout Alaska which work with victims of domestic violence and sexual assault.

Alaska has a very high rate of violent crime, including one of the highest rates of assault and sexual assault in the nation. These crimes in Alaska are on the increase. Reported rapes in Alaska rose 91% from 1989 to 1991 (277 in 1989 to 530 in 1991). The number of assaults per one thousand persons has increased over 57% in the last five years.

National studies have shown that sex offenders have 80-90% rates of recidivism, and that the risk of reoffending does not diminish over time. Current probation limits are insufficient and counterproductive in keeping track of this group of offenders, who need to be monitored over a long period of time. Senate Bill 24 would give judges greater flexibility in tailoring appropriate sentences.

# THE GOVERNOR'S ANTI-CRIME PACKAGE

The following is taken from page 7 of Governor Hickel's Jan. 12, 1994 anti-crime package sectional analysis.

**Increase Probation from 5 to 10 Years** -- Among other benefits, this simple proposal would help protect Alaska's children and others from family violence. For example, right now many convicted child abusers or molesters finish serving their prison sentences while their own young children (who are most at risk from repeat violence) are still children. Because current law limits probation to only five years, the courts only have a maximum of five years of "control" over a released felon.

We can't lock all these offenders up forever. But by simply extending the allowable period of probation to up to 10 years for all felony offenses, we can give the courts the tool they need to "hang a hammer" over the head of released child abusers for a long, long time -- long enough for most of their kids to grow up and become safe, independent adults -- and do so without the more expensive costs of full-time incarceration. In property crimes cases, extending probation can also be revenue positive by increasing the State's ability to collect restitution.

Proposals like this have been pendi .. the legislature during the past several years. It is generally supported by both prosecutors and defense lawyers, and should be acted upon this Session.

# Alaska State Legislature

## SENATE

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811

**WHY WE NEED SB 24:**

It gives judges greater flexibility in sentencing criminal defendants by increasing the maximum allowable period of probation from five years to ten years.

**HOW SB 24 WILL IMPROVE THE CRIMINAL JUSTICE SYSTEM:**

(1) There are offenders who pose a high task of recidivism, such as sex offenders, where five years may not be a long enough period of probation. Judges should have the tool available to put someone on probation as long as is necessary to protect the public.

(2) Where an offender is asked to pay a large amount of restitution, five years may not be long enough for the full amount to be paid. Because probation may not exceed five years, there are offenders who are being returned to jail for failure to pay restitution. With a longer probation period the state could avoid the high cost of incarcerating these offenders and victims could be fully compensated for their injuries.

(3) In appropriate cases, providing for a a longer probationary period will allow judges to fashion sentences that provide a lower cost punishment than jail.

**WHO SUPPORTS SB 24:**

The legislation is supported by the Department of Law, the Department of Public Safety, the Alaska Association of Chiefs of Police, and the Network on Domestic Violence and Sexual Assault.

**QUESTION - WHY ARE ALL THE FISCAL NOTES ZERO?**

Fiscal notes are projections for the next five years. Since the bill only applies to offenses committed after the effective date of the Act, and judges can now put people on probation for five years, the fiscal impact for the next five years is clearly zero. After that, the experts tell us there is no way to calculate the cost. Although some people will be on probation for longer periods of time, others will be probation instead of going to jail which will result in a net cost savings.

# FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 24

Revision Date: December 15, 1993
Depa. Affected: Department of Law
Title: "An Act extending the maximum period of probation after conviction."
BRU: Prosecution
Component: Criminal Justice Litigation
Sponsor: Senator Donley
Requestor: Governor's Office
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.)

This bill amends AS 12.55.090(c) to extend the maximum period of probation after conviction to ten years from five years. This is a sentencing provision that may have some impact on Probation and Parole, but will not have an impact on the Department of Law.

Prepared by: Richard L. Pegues, Director
Phone: 465-3672
Division: Administrative Services Division
Date: December 15, 1993
Approved by Commissioner: Richard L. Pegues for/FAR/ Charles E. Cole, Attorney General
Agency: Department of Law
Date: December 15, 1993

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FISCAL NOTES

Continuation of fiscal note analysis

Senate Bill 24: "An Act extending the maximum period of probation after conviction."

The current maximum period of probation is five years. This bill does not apply to crimes committed before the Act's effective date, and therefore there is no fiscal impact on the Department for the fiscal years reflected on this fiscal note.

The Department will be able to minimize the future fiscal impact of this legislation because the probation officers' sentencing recommendations are generally followed by the Court. The Department would seldom recommend more than five years of probation.

Extension of probation may be used in lieu of incarceration, in cases of probation violation, particularly when the offender owes large amounts of restitution. In such instances, the bill might contribute to lessening overcrowding in prisons, thus reducing the need for costly prison construction and operation.

Probation caseloads are currently averaging about 85 offenders per officer. The probation population is growing at a rate of about 4% per year. Although the number of cases in which the courts may extend probation for up to an additional five years is difficult to quantify, the effect of the bill will be to accelerate the growth of probation caseloads, and thus the demand for additional probation officers.

# FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 24

Revision Date: 02/01/94
Dept. Affected: Alaska Court System
Title: An Act extending the maximum period of probation after conviction
BRU: Trial Courts
Components:
Sponsor: Sen. Donley
Requestor: Judiciary
COMPONENT SERIAL NO. 768

EXPENDITURES/REVENUES (Thousands of Dollars)

| OPERATING EXPENDITURES | FY 95 | FY 96 | FY 97 | FY 98 | FY 99 | FY 00 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS & CLAIMS | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CAPITAL EXPENDITURES | | | | | | |
| CHANGE IN REVENUES ( ) | | | | | | |

FUND SOURCE (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 1005 GF/Program Receipts | | | | | | |
| 1006 GF/MHTIA | | | | | | |
| Other | | | | | | |
| TOTAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

POSITIONS

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | | | | | | |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

Estimate of current year (FY 94) cost: $ None

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

Prepared by: C. S. Christensen III, Staff Counsel Phone: 264-8220
Agency: Alaska Court System Date: 02/01/94

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System Date: 02/01/94

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# FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 24

Revision Date: February 5, 1994
Title: An Act extending the maximum period of probation
Sponsor: Sen. Donley
Requestor: Senate Finance

Dept. Affected: Corrections
BRU: All
Component: All
COMPONENT SERIAL NO. 694-1884

Expenditures/Revenues (Thousands of Dollars)

| OPERATING EXPENDITURES | FY 95 | FY 96 | FY 97 | FY 98 | FY 99 | FY 00 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | * | | * | * | * | * |
| TOTAL OPERATING | * | * | * | * | * | * |
| CAPITAL EXPENDITURES | * | * | * | * | * | * |
| CHANGE IN REVENUES ( ) | 0 | 0 | 0 | 0 | 0 | 0 |

FUND SOURCE (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | * | * | * | * | * | * |
| 1005 GF/Program Receipts | | | | | | |
| 1006 GF/MHTIA | | | | | | |
| Other | | | | | | |
| TOTAL | * | * | * | * | * | * |

Estimate of any current year (FY94) cost: $ 0

POSITIONS

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | | | | | | |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

ANALYSIS: (Attach a separate page if necessary)

The bill will result in increased expenses for probation services and may impact incarcerated populations, but specific dollar impact cannot be predicted. Please see the attached fiscal analysis.

Prepared by: Diane Schenker, Special Assistant — Phone: 465-4643/786-2147
Division: Office of the Commissioner — Date: 2/5/94
Approved by Commissioner: J. Frank Prewitt, Jr. (for) — Date: 2/8/94
Agency: Department of Corrections

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The bill would extend the maximum period of probation from five years to ten years.

**Assumptions**

1. The bill will probably not effect probation caseloads until five years after it goes into effect. However, offenders now receiving less than the maximum five years might begin receiving longer periods of probation right away as a sort of "inflationary" effect. For example, an offender who would receive two and a half years of probation under current law is being given half of the maximum time; a court might give the same offender five years under the new law to reflect the seriousness of the offense.

2. Probation Officers are currently carrying caseloads averaging 75-80 offenders. Larger caseloads would dilute the effectiveness of supervision and defeat the purpose of extending the period of supervision. Additional probation-days cannot be absorbed without additional resources. The department's liability for inadequate supervision of probationers has been set forth in court decisions such as Neokok.

3. Salary, benefits, and insurance for a beginning Probation Officer II are estimated to be approximately $52,243 per year.

4. A longer period of probation supervision may increase the likelihood of the court imposing probation as an alternative to incarceration. However, the longer an offender is on probation, the greater the chances the offender may be caught violating his or her conditions and being returned to prison. Therefore, the bill may reduce or increase prison populations.

**Operating Expenses**

It is not possible to estimate a dollar figure. Increases in Community Corrections personnel costs are inevitable, probably beginning five years after the change goes into effect. There may be increases in operating costs for prisons, due to more violators being placed in prison. That increase may be offset by use of probation as an alternative to incarceration.

# FISCAL NOTE

**STATE OF ALASKA**
**1994 LEGISLATIVE SESSION**

**BILL NO:** SB 24

Revision Date: _____ Dept. Affected: Public Safety

Title: "An Act extending the maximum period of probation" BRU: Alaska State Troopers

Component: Detachments

Sponsor: Senator Donley

Requestor: S. JUD COMPONENT SERIAL NO. 799

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

| OPERATING | FY 95 | FY 96 | FY 97 | FY 98 | FY 99 | FY 00 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | -0- | -0- | -0- | -0- | -0- | -0- |
| CAPITAL EXPENDITURES | -0- | -0- | -0- | -0- | -0- | -0- |
| CHANGE IN REVENUES ( ) Revenue Code | -0- | -0- | -0- | -0- | -0- | -0- |

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1006 GF/MHTIA | | | | | | |
| Other | | | | | | |
| TOTAL | -0- | -0- | -0- | -0- | -0- | -0- |

Estimate of current year (FY 94) impact: $ _____

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary.)
No fiscal impact upon the Alaska State Troopers is anticipated.

Prepared By: Lee Ann Lucas Phone: 465-4322

Division: Commissioner's Office Date: 2/1/94

Approved by Commissioner: _____ Date: 2/1/94

Agency: Richard J. Burton, Dept. of Public Safety

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