

ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672

8628 HOUSE JUDICIARY

**HB**

**450**

# Alaska State Legislature

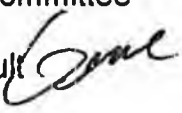
REPRESENTATIVE  
GENE THERRIAULT  
P.O. Box 55326  
North Pole, Alaska 99705  
(907) 488-0862

White in Juneau  
State Capitol  
Juneau, Alaska  
99801-1182  
(907) 465-4797

House District 33

## House Of Representatives

To: Representative Brian Porter  
Chairman, House Judiciary Committee

From: Representative Gene Therriault 

Date: February 20, 1996

Re: Hearing request for House Bill 450

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I would like to request a hearing for House Bill 450, "An act relating to trademarks; amending Alaska Rule of Appellate Procedure 609; and providing for an effective date."

This legislation is intended to update the State Trademark Act, which has not been changed since the mid-60s. The bill is modeled closely to the Model State Trademark Bill, written by the International Trademark Association. It would allow the registration of marks that currently cannot be registered under state law, such as service marks, certification marks and collective marks. The legislation was introduced at the request of the Division of Banking, Securities and Corporations.

Attached to this memorandum are:

1. Sponsor statement
2. Sectional analysis
3. Current fiscal notes
4. Position statement
5. Background materials
6. Two proposed amendments

We are not requesting a teleconference at this time.

I am also submitting two amendments for the committee's consideration. Amendment 1 would allow the agencies affected by the Act to proceed with regulations necessary to implement the changes enacted by the new law prior to the effective date of the bill. This is necessary so that regulations are in place when the bill goes into effect. Amendment 2 is a technical change to correct an error made in drafting.

HB 450 Hearing Request  
Page 2

Passage of the legislation is needed to strengthen the intellectual property rights for Alaska's business community. I would appreciate consideration of this bill at the Committee's earliest convenience. Thank you.

# Alaska State Legislature

REPRESENTATIVE  
GENE THERRIALT  
P.O. Box 55326  
North Pole, Alaska 99705  
(907) 488-0862

House District 33

While in Juneau  
State Capitol  
Juneau, Alaska  
99801-1182  
(907) 465-4797

## House Of Representatives

HB 450 "An act relating to trademarks; amending Alaska Rule of Appellate Procedure 609; and providing for an effective date."

Sponsor: Representative Gene Therriault

---

### Sponsor Statement:

This legislation is intended to update the State Trademark Act. Alaska's current law is modeled upon the 1964 Lanham Act. The proposed revision is to bring Alaska's trademark law current with the changes to the Lanham Act over the past 30 years, and is modeled closely to the Model State Trademark Bill written by the International Trademark Association. This revision will allow the registration of marks that currently cannot be registered under state law, such as service marks, certification marks and collective marks. The legislation was introduced at the request of the Division of Banking, Securities and Corporations. Passage of the legislation is needed to strengthen the intellectual property rights for Alaska's business community.

2/5/96

## Sectional Analysis

**House Bill 450**, "An act relating to trademarks; amending Alaska Rule of Appellate Procedure 609; and providing for an effective date."

The revisions to this bill are based on the Model State Trademark Bill, promulgated by the International Trademark Association.

- Section 1** INTENT. The legislation is intended to make Alaska's system of state trademark registration consistent with the federal system.
- Section 2** Replaces the term "trademark" with the term "marks" as they relate to the income the state derives from rentals or royalties for using the marks. A trademark refers only to a word, name or symbol placed on a product to identify who made it. "Mark" includes a "certification mark," "collective mark," "service mark," and "trademark." A certification mark is used by someone other than the registrant to certify characteristics of the product or that the product was made by a union; a collective mark is used by members of a cooperative or association to indicate membership in a union; a service mark is used to identify the services of a person. This change is made throughout the bill.
- Section 3** AS 45.50.010 (1) - (5) Contains clarification and grammatical changes, including addition of the words "when used on or in connection with" to describe how a mark must be used. This change is made throughout the bill.  
AS 45.50.010 (6) States that a mark cannot resemble another mark registered with the United States Patent and Trademark Office. The current law states the mark cannot resemble another mark registered in the state.
- Section 4** Adds definitions for "descriptive" and "misdescriptive" by stating that when words describing goods or services become accepted as identifying the goods or services, the words are no longer merely descriptive. Defines "misdescriptive" as words that falsely describe goods or services.
- Section 5** Changes the entity with whom a mark must be registered from the department to the commissioner, and makes technical changes.  
(1) (B) Adds the following to the information that must be included when registering a trademark:

- the partnership, the state in which the partnership is organized and the names of the general partners.

- a statement that to the best of the applicant's knowledge, no other person has previously registered a confusingly similar mark.

- a statement as to whether an application to register a mark has been filed with the United States Patent and Trademark Office by the applicant or a predecessor and, if registration was refused, why. The change is in response to comments from state trademark administrators who want to benefit from any prior federal examinations.

- Section 6** Adds a new section regarding the application procedure. This section clarifies the commissioner's authority to accept or reject an application, based on the registrability of the proposed mark. Current law gives the commissioner no direction on the procedure for examining applications.
- Section 7** Adds partnership to the list of groups that can apply to register a mark and requires three examples showing use of the mark on or in connection with the goods.
- Section 8** Takes the filing fee out of statute and allows it to be set by the department. This is to allow greater flexibility.
- Section 9** Adds the following to the information to be shown on the certificate:
- if a corporation, the state of incorporation
  - if a partnership, the state in which the partnership is organized and the names of the general partners.
- Makes various other technical revisions, such as adding "services" to the definition of products that can be registered. This change is made throughout the bill.
- Section 10** Changes "department" to "commissioner" as the party that issues certificates. Similar changes are made throughout the bill.
- Section 11** Changes the duration of regular registration from 10 years to five years to reduce the number of "deadwood" registrations. "Deadwood" refers to marks that have not been used in commerce for an extended period of time.
- Section 12** Adds a subsection stating that renewal applications must include a verified statement that the mark has been and still is in use.

- Section 13** Takes the renewal fee out of statute and allows it to be set by the department.
- Section 14** Reduces the renewal time from 10 successive years to five successive years.
- Section 15** Changes the time the commissioner must notify registrants of the need to renew from one year to six months before the mark expires.
- Section 16** Makes technical changes consistent with the rest of the bill.
- Section 17** Adds a new section regarding name changes and other filings. Under previous versions of the Model Bill, assignments of trademark registrations and applications are recordable. This section was revised to allow the recording of name changes as well.  
**45.50.125(b)** Allows the recording of other instruments that relate to state trademark registrations such as licenses, security interests or mortgages.
- Section 18** Technical amendments to reflect other changes.
- Section 19** Provides that the commissioner can cancel registrations that expire and are not renewed under AS 45.50.070 - 45.50.090. Currently, the commissioner can cancel a mark that was registered under previous law, is more than five years old and has not been renewed.  
**45.50.140 (f)** Provides that a registration may be canceled if the mark has become generic.
- Section 20** Adds a new section stating that a mark is abandoned when use of the mark has been discontinued and the registrant has no intent to resume its use, or when the mark loses its significance as a mark due to action or failure to act. No use of a mark for two years is sufficient to prove that registration has been abandoned.
- Section 21** This section affects classification of goods and services. Some states have adopted the old U.S. classification system while others have converted to the International classification system. The bill removes direct delineation and states that to the extent practical, the classification of goods and services should conform to the classification adopted by the United States Patent and Trademark Office.
- Section 22** Makes technical amendments.

**Section 23** Makes technical amendments.

**Section 24** Makes technical amendments.

**Section 25** Provides remedies for cases involving infringement, in the form of a judgment for punitive damages not to exceed three times the profits, damages, and reasonable attorney fees of the prevailing party.

**Section 26** Adds new sections regarding dilution of a mark. Dilution is the lessening of the capacity of a mark to identify and distinguish goods or services. Often the distinctiveness of a famous mark is diluted when it is used without the owner's consent on dissimilar products over a period of time, gradually chipping away the famous mark's foundation. 45.50.180 (d) gives a registrant the right to file an injunction against another's dilution of a famous mark, and to collect damages if the dilution was intentional. It lists factors to be considered when determining if a mark is famous.

**Section 27** Provides definitions.

45.50.200 (10) Adds a new definition for "use" or "used." The word "use" has been revised according to the standards of the Trademark Law Revision Act and to cover only "use in the state." The requirement of intrastate use eliminates possible ambiguities created by alternate references to "use" or "used."

45.50.200 (11) Adds a new definition for "verified."

**Section 28** Makes technical amendments

**Section 29** Makes technical amendments

**Section 30** Makes technical amendments

**Section 31** Provides a transition period, stating that the amendments do not apply to an application or proceeding pending on the effective date of the act, and that a registration or renewal of a registration that is in effect on the effective date of the Act remains in effect despite the Act.

# FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. HB 450

Revision Date: \_\_\_\_\_  
Title: An Act Relating to Trademarks  
Sponsor: Representative Therriault  
Requestor: \_\_\_\_\_

Department: Commerce and Economic Development  
BRU: Banking, Securities and Corporations  
Component: Banking, Securities and Corporations

COMPONENT SERIAL NO. 1233

**Expenditures/Revenues**

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	0.0	0.0	0.0	0.0	0.0	0.0

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES</b>	4.0	11.3	12.4	13.6	14.9	16.4
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**FUND SOURCE**

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 General Fund	4.0	11.3	12.4	13.6	14.9	16.4
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	4.0	11.3	12.4	13.6	14.9	16.4

Estimate of any current year (FY 96) cost: \$ 0.0

**POSITIONS**

FULL-TIME						
PART-TIME						
TEMPORARY						

**ANALYSIS:** (Attach a separate page if necessary)

HB 450 will remove fees from the statute and give the Commissioner authority to promulgate fees by regulation. The current fee for new registration and renewals is \$10.00 per application. The current fee for assignment is \$2.00. The current fees have not increased in 30 years. The increase in revenue is based on an anticipated fee for new registrations and renewals of \$50.00 and an assignment fee of \$50.00.

Prepared by: Willis F. Kirkpatrick, Director  
Division: Banking, Securities and Corporations  
Approved by Commissioner: William L. Hensley  
Agency: Commerce and Economic Development

Phone: 465-2521  
Date: 1-29-96  
Date: 1-29-96

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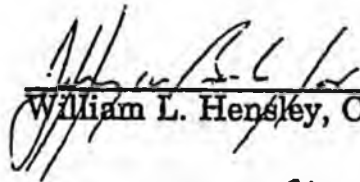
**HB 450**

The department supports the passage of HB 450. Passage of this bill will make the Alaska Trademark Act substantially consistent with the federal system of trademark registration, and will strengthen "intellectual property" (various types of trademark forms) rights for Alaskan businesses.

The major improvements to the Alaska Trademark Act, proposed by HB 450, include broadening trademark protection to service providers, adding additional remedies to trademark owners for infringement, and providing anti-dilution provisions for "intellectual property" owners whose trademark has become famous in this state.

The department endorses the intent of this bill to update the Alaska Trademark Act, and strengthen "intellectual property" rights for Alaskan businesses.

The department expects no additional cost will be incurred by this legislation.

  
\_\_\_\_\_  
William L. Hensley, Commissioner

Date: 1-31-96



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
**BILL ANALYSIS**

DEPARTMENT Commerce & Economic Dev.	DIVISION Banking, Securities & Corp.	BILL NUMBER HB 450	SPONSOR Representative Gene Therriault
SHORT TITLE OF BILL Alaska Trademark Act			
DEPARTMENT POSITION The department supports passage of HB 450			
PREPARED BY Willis F. Kirkpatrick, Director	DATE 1/30/96	COMMISSIONER'S SIGNATURE <i>[Signature]</i>	DATE 1-31-96

**SUMMARY**

OTHER AGENCIES AFFECTED BY BILL None	CONSTITUENT GROUP(S) AFFECTED BY BILL Any type of business owners in Alaska who use words or logos to identify their goods and services. Legal practitioners in intellectual property.
ORGANIZATIONAL SUPPORT FOR BILL The International Trademark Association, Intellectual Property Attorneys	ORGANIZATIONAL OPPOSITION TO BILL None

FISCAL IMPACT:  NONE  FISCAL NOTE ATTACHED

BACKGROUND/LEGISLATIVE INTENT  
HB 450 was patterned to be substantially consistent with the federal system of trademark registration under the Lanham Act of 1946, as amended.

ANALYSIS OF BILL/PROGRAM EFFECTS  
The current Act is modeled after a pre 1964 version of the Model State Trademark Bill, and has not kept pace with changes to the Lanham Act which have occurred over the past 30 years. The proposed legislation is based upon a revision to the MSTB which was adopted by the International Trademark Association, the International Association of Corporation Administrators, and the National Association of Secretaries of State. HB 450 will make the State Trademark Act more consistent with the Lanham Act, and will strengthen intellectual property rights for Alaskan businesses.

AMENDMENTS PROPOSED  
Sec. 32. **TRANSITION: REGULATIONS.** Notwithstanding Sec. 33 of this Act, the state agencies affected by this Act may proceed to adopt regulations necessary to implement changes in law enacted by this Act. The regulations take effect under AS 44.62 (Administrative Procedure Act), but not before the respective effective date of the change in law in this Act.  
  
Sec. 33. This Act takes effect January 1, 1997.

PLEASE ATTACH A SEPARATE SHEET FOR ADDITIONAL COMMENTS OR ANALYSIS



# FAX

To: Representative Theriault  
Alaska State Legislature  
Room 421, State Capitol  
Juneau, Alaska 99801-1182

From: Don and Rose Harris  
Cookhouse, Inc.  
dba: Red Dog Saloon  
Juneau, Alaska  
FAX: 541-347-4061  
pages 1 of 2

Re: Revision of the Alaska Trademark Act

Dear Representative Theriault:

With much enthusiasm, we want you to "forge ahead" to update Alaska's State Trademark Act. Over the past several years, our well known Alaska landmark, the Red Dog Saloon, has been infringed upon, diluted and identified with as major in-state/out-of-state business concerns attempt to do business in Alaska. Each time our corporation has "rallied to the cause" to defend our registered trademark. And, each time this procedure has cost many dollars and expended undue time and energies away from our business activities.

We learned that the existing system of state trademark registration and protection is vague at best and almost impossible to defend. One of the major obstacles is Alaska's inconsistency with the federal system of trademark registration.

You have our support for your efforts to sponsor legislation to update Alaska's State Trademark Act. We can swap "horror stories", show you examples of large companies attempting to use our trademark, or simply talk with you as you make progress. If we can be of assistance, contact us.

Don and Rose Harris  
Cookhouse, Inc.  
200 Admiral Way  
Gunnear, Alaska  
FAX: 541 347 4061

*Amendment 1*

Sec. 32      TRANSITION: REGULATIONS. Notwithstanding Sec. 33 of this Act, the state agencies affected by this Act may proceed to adopt regulations necessary to implement changes in law enacted by this Act. The regulations take effect under AS 44.62 (Administrative Procedure Act), but not before the respective effective date of the change in law in this Act.

Sec. 33      This Act takes effect January 1, 1997.

**Amendment 2**

**Section 30**

**Page 16, Line 14.** Change "AS 45.50.025(d), added by sec. 5 of this act, amends Alaska Rule of Appellate" to "AS 45.50.025(d), added by sec. 6 of this act, amends Alaska Rule of Appellate"

(7)

HOUSE COMMITTEE REPORT

Date Referred to Committee: January 26, 1996

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 2-19-96

The LABOR AND COMMERCE Committee considered:

HB 450

HOUSE BILL NO. 450

ALASKA TRADEMARK ACT

"An Act relating to trademarks; amending Alaska Rule of Appellate Procedure 609; and providing for an effective date."

recommends it be replaced with the following committee substitute CS HB 450 (L&C)  the same title  a new title

additional referral to \_\_\_\_\_ Committee

attached amendment(s)

ADOPTS: \_\_\_\_\_ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): \_\_\_\_\_ (Dept)

APPROVES PREVIOUS: \_\_\_\_\_ (Dept/Date)

fiscal note(s) CFD (BSC)

fiscal note(s) \_\_\_\_\_

zero fiscal note(s) \_\_\_\_\_

zero fiscal note(s) \_\_\_\_\_

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<i>[Signature]</i>	✓			
<i>[Signature]</i>			✓	
<i>[Signature]</i>			✓	
<i>Gene Kasper</i>			✓	
<i>Thomas D. Fortee</i>	✓			
<i>Elizabeth Mack</i>			✓	
<i>Jerry Sanders</i>			✓	

CHAIR'S SIGNATURE *[Signature]*

LANE  
POWELL  
SPEARS  
LUBERSKY

February 16, 1996

Mark Rindner

Law Offices

550 W. 7th Ave.  
Suite 1650  
Anchorage, AK  
99501-3568

(907) 277-9511

Facsimile:

(907) 276-2631

A Partnership  
Including  
Professional  
Corporations

The Honorable Gene Therriault  
Representative  
Alaska House of Representatives  
Room 421 State Capitol  
Juneau, AK 99801-1182

Re: House Bill No. 450, and Act Relating to Trademarks

Dear Representative Therriault:

I am writing to express my support for House Bill 450, entitled "An Act Relating to Trademarks; Amending Alaska Rule of Appellate Procedure 609; and Providing for An Effective Date." This legislation is based on the revised Model State Trademark Bill, a document drafted in 1992 by the International Trademark Association (INTA), the world's leading organization of trademark owners and practitioners. My firm, Lane Powell Spears Lubersky, is a member of INTA. As an attorney, I encourage the Alaska Legislature to adopt this measure.

House Bill 450 reflects, in part, recent amendments made to the Lanham Act, the federal trademark statute that has effectively protected the interests of consumers and the business community over a period of fifty years. It also promotes consistency with new changes to the trademark laws of other states.

The enactment of this legislation will improve the functioning of the state trademark system. It will allow me and my firm to better defend our clients' marks against infringement and improve the quality of trademark searches undertaken by the Department of Commerce and Economic Development. The promotion of trademarks and the recognition of the important role they play in commerce will also be greatly enhanced.

Please feel free to contact me should you have any questions concerning my support of House Bill 450.

Anchorage, AK  
Los Angeles, CA  
Mount Vernon, WA  
Olympia, WA  
Portland, OR  
Seattle, WA

London, England  
Tokyo, Japan

The Honorable Gene Therriault  
February 16, 1996  
Page 2

Thank you for your assistance.

Very truly yours,

LANE POWELL SPEARS LUBERSKY

A handwritten signature in cursive script that reads "Mark Rindner".

Mark Rindner

cc: Anne W. Glazer, Esq.

MR\therriau.ltr

# PERKINS COIE

A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS  
1029 WEST THIRD AVENUE, SUITE 300 · ANCHORAGE, ALASKA 99501-1970  
TELEPHONE: (907) 279-8561 · FACSIMILE: (907) 276-3108

February 12, 1996

The Honorable Pete Kott  
Chair, Committee on Labor and Commerce  
Alaska House of Representatives  
Room 432 State Capitol  
Juneau, AK 99801-1182

**Re: House Bill No. 450, an Act Relating to Trademarks**

Dear Representative Kott:

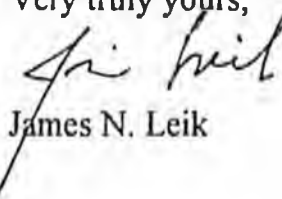
I am writing to express my support for House Bill 450, entitled "An Act Relating to Trademarks; Amending Alaska Rule of Appellate Procedure 609; and Providing for An Effective Date." This legislation is based on the revised Model State Trademark Bill, a document drafted in 1992 by the International Trademark Association (INTA), the world's leading organization of trademark owners and practitioners. My firm, Perkins Coie, is a member of INTA.

House Bill 450 reflects, in part, recent amendments made to the Lanham Act, the federal trademark statute that has effectively protected the interests of consumers and the business community over a period of fifty years. It also promotes consistency with new changes to the trademark laws of other states.

The enactment of this legislation will improve the functioning of Alaska's trademark system. It will allow our firm to better defend our clients' marks against infringement and improve the quality of trademark searches undertaken by the Department of Commerce and Economic Development. The promotion of trademarks and the recognition of the important role they play in commerce will also be greatly enhanced.

Thank you for your assistance.

Very truly yours,



James N. Leik

JNL:dln

[/AA960430.009]

**HB**

**457**



# STATE OF ALASKA

THE ALASKA STATE LEGISLATURE

## House of Representatives

Representative Jeannette James

Chair of House State Affairs Committee

Capitol Building

Juneau, AK 99801-2197

(907) 465-3743 ph

(907) 465-2381 fax

## SPONSOR STATEMENT

HB 457 Fines: unlicensed practice of occupation

Rep. Jeannette James

February 6, 1995

This legislation was requested by LB&A as part of the sunset audits on various boards.

Current law allows enforcement of practicing certain occupations without a license only through the courts. This Bill allows the Department to impose a civil penalty if a person practices or offers to practice an occupation in this State that is regulated under Title Sec.08.01.

The civil penalty may not exceed \$5,000.00 for each offense. The Bill also provides for enforcement mechanisms.

# FISCAL NOTE

**STATE OF ALASKA**  
**1996 LEGISLATIVE SESSION**

**BILL NO. HB 457**

Revision Date: \_\_\_\_\_ Department: Commerce and Economic Development  
 Title: An Act relating to the unlicensed practice of BRU: Occupational Licensing  
certain occupations for which licenses are required. Component: Operations  
 Sponsor: Representative James  
 Requestor: House State Affairs COMPONENT SERIAL NO. 1844

Expenditures/Revenues	(Thousands of Dollars)					
OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES						
--------------------	--	--	--	--	--	--

FUND SOURCE	(Thousands of Dollars)					
1002 Federal Receipts						
1003 GF Match						
1004 General Fund						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other 1091 Designated PR						
<b>TOTAL</b>	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 96) cost: \$ 0.0

**POSITIONS**

FULL-TIME						
PART-TIME						
TEMPORARY						

**ANALYSIS:** (Attach a separate page if necessary)  
 HB 457 authorizes the department to establish a civil penalty for unlicensed practice of a regulated occupation in an amount not to exceed \$5,000.00. The bill expands the department's current enforcement powers for unlicensed activity by providing the civil fine option. New funds are not required to implement this bill.

Prepared by: Jennifer Strickler, Administrative Officer  
 Division: Occupational Licensing  
 Approved by Commissioner: William L. Hensley  
 Agency: Commerce and Economic Development

Phone: 485-2144  
 Date: February 5, 1996  
 Date: 2-5-96

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# STATE OF ALASKA

## DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

DIVISION OF OCCUPATIONAL LICENSING

TONY KNOWLES, GOVERNOR

P.O. BOX 110806  
JUNEAU, ALASKA 99811-0806  
PHONE: (907) 465-2534  
FAX: (907) 465-2974  
TDD: (907) 465-5437

DATE: January 24, 1996  
TO: Walt Wilcox, Aide  
Representative Jeannette James  
FROM: Catherine A. Reardon, Director *e 2R*  
Division of Occupational Licensing  
Department of Commerce and  
Economic Development  
SUBJECT: Sunset Extension Bills

*RECEIVED*  
JAN 24 1996  
Rep. Jeannette James

I spoke with Randy Welker, the Legislative Auditor, to clarify a few points in his January 17 memo and sunset audits. I hope this information assists your effort to incorporate all audit recommendations into the bills.

On page 1 of his memo, Mr. Welker recommends clarifying Alaska Statute (AS) 08.71.145 regarding licensure of opticians by credential. Mr. Welker explained to me that he suggests amending that statute to specifically mention all the requirements in Regulation 12 AAC 30.100. Page 8 of the optician audit discusses this suggested language.

On page 2 of his memo, Mr. Welker recommends amending AS 08.20.140 to codify the current practice of requiring all chiropractic applicants to take the state exam. Repeal of the AS 08.20.140 and AS 08.20.120(b) will achieve Mr. Welker's goal, because all applicants would then have to satisfy the requirements of AS 08.20.12(a).

On page 2 of his memo, Mr. Welker recommends that the Legislature amend the optician statute to clarify whether employees of optometrists who provide optician services must be licensed opticians. This is a subject of substantial controversy between optometrists and opticians. The Division of Occupational Licensing believes that the current law requires optometrists' employees to be licensed opticians; however, directly addressing the issue in statute would certainly resolve the ongoing dispute.

Finally, Mr. Welker's memo recommends amending the law to give the Division of Occupational Licensing authority to impose civil fines for unlicensed activity. Mr. Welker explained that he is recommending this authority be granted for all division licensing programs, not just the optician program. The creation of a new section in AS 08.01 modeled after AS 08.48.295 (architects, engineers and land surveyors) would achieve this goal. Licensing boards should impose the fines in programs which have boards. The division should impose fines in programs it directly administers.

CAR/cw1840.oi  
012496a

**ALASKA STATE LEGISLATURE**  
**LEGISLATIVE BUDGET AND AUDIT COMMITTEE**  
Division of Legislative Audit



P. O. Box 113300  
Juneau, AK 99811-3300  
(907) 465-3830  
FAX (907) 465-2347

**MEMORANDUM**

**TO:** The Honorable Mark Hanley  
The Honorable Richard Foster  
Co-Chairs, House Finance Committee

**FROM:** Randy S. Welker *Randy*  
Legislative Auditor

**DATE:** January 17, 1996

**RE:** Sunset Audits

---

The Legislative Budget and Audit Committee has released the enclosed sunset audit reports on the Board of Dispensing Opticians, the Board of Chiropractic Examiners, and the Board of Examiners in Optometry.

I would like to take this opportunity to provide the following comments on the legislation you have before your committee on each board.

**Board of Dispensing Opticians (HB 382)**

We have recommended that the termination date of the board be extended to June 30, 2000 as provided for in House Bill 382.

We are also recommending certain statutory changes regarding licensing by reciprocity and credentials. In Recommendation No. 1, we support the repeal of AS 08.71.150. This section is essentially irrelevant and serves to provide legal support for applicants who have been rejected and are predisposed to legally challenging the board's decision.

Also in Recommendation No. 1, we suggest that AS 08.71.145 should be clarified to provide that a person licensed in another state **with requirements and standards essentially equivalent to those of Alaska** shall be issued a license in Alaska without examination. Such language would reflect the current standard being utilized by the board and provide a stronger statutory basis for those standards.

Board of Chiropractic Examiners (HB 404)

Our audit conclusion recommended a four year extension of this board until the year 2000. This is one year sooner than the date contained in House Bill No. 404.

We are also recommending the legislature consider modifying AS 08.20.140. This statute provides a process by which applicants may be licensed as chiropractors without taking the state examination if they are licensed in another jurisdiction that has requirements equivalent to Alaska. The board has determined that no other jurisdiction has requirements essentially equivalent to those of Alaska. This has rendered the licensure by credentials statute meaningless.

Statutory amendment should codify current practice, thereby providing clear notice of the licensing requirements and standards.

Board of Examiners in Optometry (HB 405)

We are recommending that the board be extended to June 30, 2002. Additionally, we are recommending several changes to the optometry statutes.

First, we suggest the repeal of AS 08.72.150 which establishes an administrative deadline for submitting applications to the Division of Occupational Licensing. We believe this deadline should be set by the board and the division through regulation.

Next, we recommend the repeal of the license requirements relating to branch offices (AS 08.72.125). It appears that the conditions and concerns that originally gave rise to branch office licensing no longer exist.

We are also recommending the repeal of language relating to health and visual acuity requirements for licensure. AS 08.72.140 and AS 08.72.181 contain unreasonable and potentially discriminatory requirements.

Finally, we are recommending the Legislature clarify the statute that relates to the supervision and registration requirements of unlicensed individuals employed by opticians and optometrists.

We would respectfully request that the House Finance Committee consider amending the bills before you to address the issues summarized above regarding these specific boards.

Additionally, on a broader basis, we believe that the Division of Occupational Licensing would benefit from statutory authority to impose civil fines for unlicensed activity. This would apply to all professions under its jurisdiction. We provide a brief discussion of the

The Honorable Mark H. ...  
The Honorable Richard Foster  
Co-Chairs, House Finance Committee

- 3 -

January 17, 1996

issue in Recommendation No. 2 of the audit on the Board of Dispensing Opticians. If an appropriate vehicle is available to accommodate this measure, we believe the division will improve in the efficiency and cost effectiveness of enforcement activities.

We are available to assist you in analyzing the boards currently under sunset review. Please feel free to contact me at any time.

HOUSE STATE AFFAIRS STANDING COMMITTEE  
January 16, 1996  
8:00 a.m.

MEMBERS PRESENT

Representative Jeannette James, Chair  
Representative Scott Ogan, Vice Chair  
Representative Joe Green  
Representative Ivan Ivan  
Representative Brian Porter  
Representative Caren Robinson  
Representative Ed Willis

MEMBERS ABSENT

All members present.

COMMITTEE CALENDAR

\* HOUSE BILL NO. 382

"An Act extending the termination date of the Board of Dispensing Opticians; and providing for an effective date."

- PASSED OUT OF COMMITTEE

\* HOUSE BILL NO. 404

"An Act extending the termination date of the Board of Chiropractic Examiners; and providing for an effective date."

- PASSED OUT OF COMMITTEE

\* HOUSE BILL NO. 405

"An Act extending the termination date of the Board of Examiners in Optometry; and providing for an effective date."

- PASSED OUT OF COMMITTEE

\* HOUSE BILL NO. 71

"An Act relating to the location of the convening of the legislature in regular session; and providing for an effective date."

- PASSED OUT OF COMMITTEE

(\* First public hearing)

PREVIOUS ACTION

BILL: HB 382

SHORT TITLE: EXTEND BOARD OF DISPENSING OPTICIANS  
SPONSOR(S): REPRESENTATIVE(S) JAMES

JRN-DATE	JRN-PG		ACTION
12/29/95	2366	(H)	PREFILE RELEASED
01/08/96	2366	(H)	READ THE FIRST TIME - REFERRAL(S)
01/08/96	2366	(H)	STATE AFFAIRS
01/16/96		(H)	STA AT 08:00 AM CAPITOL 102

BILL: HB 404

SHORT TITLE: EXTENDING BOARD OF CHIROPRACTORS  
SPONSOR(S): LABOR & COMMERCE

JRN-DATE	JRN-PG		ACTION
01/09/96	2392	(H)	READ THE FIRST TIME - REFERRAL(S)
01/09/96	2392	(H)	STATE AFFAIRS
01/16/96		(H)	STA AT 08:00 AM CAPITOL 102

BILL: HB 405

SHORT TITLE: EXTEND BOARD OF OPTOMETRISTS  
SPONSOR(S): LABOR & COMMERCE

JRN-DATE	JRN-PG		ACTION
01/09/96	2392	(H)	READ THE FIRST TIME - REFERRAL(S)
01/09/96	2392	(H)	STATE AFFAIRS
01/16/96		(H)	STA AT 08:00 AM CAPITOL 102

BILL: HB 71

SHORT TITLE: LEGISLATIVE SESSIONS TO BE IN ANCHORAGE  
SPONSOR(S): REPRESENTATIVE(S) GREEN, Porter, Bunde, Kohring

JRN-DATE	JRN-PG		ACTION
01/06/95	39	(H)	PREFILE RELEASED
01/16/95	39	(H)	READ THE FIRST TIME - REFERRAL(S)
01/16/95	39	(H)	STATE AFFAIRS, JUDICIARY, FINANCE
01/19/95	91	(H)	COSPONSOR(S): BUNDE
01/12/96	2440	(H)	COSPONSOR(S): KOHRING
01/16/96		(H)	STA AT 08:00 AM CAPITOL 102

WITNESS REGISTER

WALTER WILCOX, Committee Aide  
House State Affairs Committee  
State Capitol, Room 102  
Juneau, Alaska 99801-1182  
Telephone: (907) 465-3743

POSITION STATEMENT: Provided information on HB 382, HB 404 and  
HB 405.

CATHERINE REARDON, Director  
Division of Occupational Licenses

Department of Commerce and Economic Development  
P.O. Box 110806  
Juneau, Alaska 99811-0806  
Telephone: (907) 465-2974  
POSITION STATEMENT: Testified in favor of HB 382, HB 404 and HB 405.

LARRY HARPER, Licensed Dispensing Optician  
534 West 2nd Avenue  
Anchorage, Alaska 99501  
Telephone: (907) 276-1021  
POSITION STATEMENT: Provided comments on HB 382.

DENNIS EGAN, Mayor  
City and Borough of Juneau  
155 South Seward Street  
Juneau, Alaska 99801  
Telephone: (907) 586-5257  
POSITION STATEMENT: Testified against HB 71.

JAMIE PARSONS, Chair  
Alaska Committee  
9218 Emily Way  
Juneau, Alaska 99801  
Telephone: (907) 789-3060  
POSITION STATEMENT: Testified against HB 71.

CHUCK ACHBERGER, Executive Director  
Juneau Chamber of Commerce  
124 West 5th Avenue  
Juneau, Alaska 99801  
Telephone: (907) 586-6420  
POSITION STATEMENT: Testified against HB 71.

SENATOR RANDY PHILLIPS  
Alaska State Legislature  
State Capitol, Room 103  
Juneau, Alaska 99801-1182  
Telephone: (907) 465-4949  
POSITION STATEMENT: Provided comments on HB 71.

ACTION NARRATIVE

TAPE 96-01, SIDE A  
Number 0000

The House State Affairs Committee was called to order by Chair Jeannette James at 8:00 a.m. Members present at the call to order were Representatives James, Ogan, Ivan, Porter, Robinson, and Willis. Members absent were Green.

CHAIR JEANNETTE JAMES welcomed the committee members back and the

audience to the first 1996 House State Affairs Committee meeting. She proceeded with housekeeping issues. Meeting times would be from 8:00 a.m. to 10:00 a.m. on Tuesdays and Thursdays, and 10:00 a.m. to 12:00 p.m. on Saturdays, if necessary. Chair James declared the meetings would start and end on time. However, on Thursday, January 25, 1996, the Speaker of the House and the President of the Senate would be speaking at the Alaska Business Round Table at 7:00 a.m., therefore, the meeting would start at 8:15 a.m. She remarked a meeting may be extended in the event of a heavy schedule. She informed the committee teleconference testifiers would have a time limit and suggested a representative speak on behalf of a large group of testifiers, when possible. She further remarked the witness registers were located at the front door and all those who wished to testify must register. She stated each committee member would receive a committee packet. She informed the committee on Tuesday, January 23, 1996, there would be a joint state affairs committee meeting. Chair James further outlined the rules by which the committee would operate.

Number 0510

CHAIR JAMES recognized the presence of Representative Joe Green.

HB 382 - EXTEND BOARD OF DISPENSING OPTICIANS

HB 404 - EXTENDING BOARD OF CHIROPRACTORS

HB 405 - EXTEND BOARD OF OPTOMETRISTS

Number 0529

The first order of business to come before the House State Affairs Committee was HB 382, HB 404 and HB 405.

CHAIR JAMES said she prepared HB 382 and her Committee Aide, Walter Wilcox, was here to make the presentation.

Number 0544

WALTER WILCOX, Committee Aide, House State Affairs Committee, read the sponsor statement for HB 382, HB 404 and HB 405. House Bill 382 extended the board for four years, HB 404 extended the board for five years, and HB 405 extended the board for five years. Mr. Wilcox stated the boards were responsible for overseeing the licensing of doctors that were covered by the appropriate board. The board must be extended, he stated, if the doctors were to be licensed. He further stated the fiscal notes identified the cost of the programs which were included in the 1997 fiscal year operating budget, therefore new funds were not required. Mr. Wilcox informed the committee, concerns were raised in the Legislative Budget and Audit Committee regarding some of the boards of which legislation was forthcoming. Catherine Reardon, Director, Division of Occupational Licensing

was here to answer any questions from the committee.

Number 0597

REPRESENTATIVE SCOTT OGAN asked Mr. Wilcox to share with the committee the concerns expressed in the Legislative Budget and Audit Committee.

MR. WILCOX said he would defer to Ms. Reardon to answer that question.

Number 0611

CHAIR JAMES asked Ms. Reardon to come forth and join them at the table for further discussion. She informed the committee members HB 382, HB 404 and HB 405 were grouped together because of their similarities, but they would vote on them separately.

Number 0645

CATHERINE REARDON, Director, Division of Occupational Licensing, Department of Commerce and Economic Development, thanked Representatives James and Kott for introducing the three bills before them. She stated the boards were up for their scheduled "sunset period." The Legislative Budget and Audit Committee recommended extending all three boards, she stated. The fiscal notes were not new money the division would need, she asserted, but reflected the ongoing cost needed to run the programs. Ms. Reardon said, the issues brought forth in the "sunset" audits were relatively minor statute concerns. For example, the Board of Optometrists audit suggested the application deadline be regulated by department rather than by statute. The statute mandated that the application must be received 15 days before the examination causing administrative trouble in the department. It also suggested removing statute licensing requirements for branch offices, and finally, it recommended deleting some statute requirements due to the Americans with Disabilities Act (ADA). The Board of Chiropractor Examiners audit suggested eliminating licensing reciprocity with other states. The Board of Dispensing Opticians audit suggested eliminating one of two statutes that addressed Alaska licensing requirements for those licensed in other states. The audit also suggested instituting a civil fine for practicing the field of opticianry without a license. In summary, she stated, the legislative audits were favorable towards the boards.

Number 0975

CHAIR JAMES thanked Ms. Reardon and opened the floor up for discussion and questions.

Number 0980

REPRESENTATIVE CAREN ROBINSON asked Ms. Reardon if the Administration would be making suggestions for changes or was it the responsibility of the legislature.

Number 1000

MS. REARDON said the Administration agreed with all of the suggested changes as a result of the audits. However, the Governor did not intend to introduce legislation this year. The concentration was solely on extending the boards at this time.

Number 1040

CHAIR JAMES asked if there were further questions or comments.

Number 1045

REPRESENTATIVE SCOT OGAN asked if the boards had any judicial powers.

Number 1062

MS. REARDON cited the Board of Registration for Architects, Engineers, Land Surveyors had the ability to fine up to \$5,000 for unlicensed activity. However, the great majority of the boards did not have judicial power, she said. It was left to the court system burdened with perceived more serious cases. Ms. Reardon mentioned again the dispensing opticians audit recommended instituting a civil fine authority for that board.

Number 1098

CHAIR JAMES asked if there were further questions or comments and thanked Ms. Reardon for her time. She called on the first teleconference participant in Anchorage, Larry Harper.

Number 1114

LARRY HARPER via Anchorage, Licensed Dispensing Optician, testified and recommended to the committee the Board of Dispensing Opticians and the Board of Optometrists have the same "sunset" expiration date.

Number 1175

CHAIR JAMES asked Mr. Wilcox to respond.

MR. WILCOX said it was his understanding the intention was to stagger the expiration dates for the audit department's work load. He called on Ms. Reardon to respond further.

Number 1198

MS. REARDON said it was her understanding it worked that way in prior years. She said the chiropractic extension could be adjusted, however.

Number 1200

MR. WILCOX said there was no objection to making them all the same.

Number 1211

CHAIR JAMES said, that would be up to the committee, and asked if there were further questions or comments.

Number 1217

REPRESENTATIVE OGAN asked Ms. Reardon to explain the makeup of the boards.

Number 1242

MS. REARDON said there were five members on each board. The Board of Optometrists consisted of four licensed optometrists and one public member. The Board of Chiropractic Examiners consisted of four licensed chiropractors and one public member. The Board of Dispensing Opticians consisted of four opticians to include some licensed in contacts and some in spectacles, and one public member. The Board of Dispensing Opticians met one time per year to help keep expenses down, while the other two boards met twice a year. Teleconference meetings were arranged, when needed.

Number 1350

CHAIR JAMES asked if there were further questions or comments.

Number 1355

REPRESENTATIVE BRIAN PORTER moved that HB 382 move from committee. Hearing no objection, HB 382 was moved out of the House State Affairs Committee with the attached fiscal note and individual recommendations.

Number 1375

REPRESENTATIVE JOE GREEN said there was discussion about changing "2000" to "2001" for the Board of Dispensing Opticians. He asked if the decision was to leave it at "2000."

Number 1380

CHAIR JAMES said it would remain as is because there was a motion made and no one objected.

Number 1390

REPRESENTATIVE PORTER moved that HB 404 move from committee. Hearing no objection, HB 404 was moved out of the House State Affairs Committee with the attached fiscal note and individual recommendations.

Number 1405

REPRESENTATIVE PORTER moved that HB 405 move from the committee. Hearing no objection, HB 405 was moved out of the House State Affairs Committee with the attached fiscal note and individual recommendations.

HB 71 - LEGISLATIVE SESSIONS TO BE IN ANCHORAGE

Number 1470

CHAIR JAMES announced the next item on the agenda was HB 71. She called on Representative Joe Green to present his sponsor statement.

Number 1480

REPRESENTATIVE JOE GREEN read the following sponsor statement.

"HB 71 directs the legislature to meet in the Municipality of Anchorage beginning in January 1998. HB 71 does not, and I repeat, does not, propose to move the capitol.

"A recent statewide survey, and the results of the 1994 ballot initiative, both indicated that there is considerable statewide support, and majority support in southcentral Alaskan area, for the legislature to meet in Anchorage. HB 71 directs the legislative council to arrange for an appropriate meeting place. Since the dimensions of the House chambers, the largest meeting body that we have in the legislature, are 60 feet by 52 feet, it is not anticipated that arranging for an appropriate meeting place would present much of a problem.

"While credit should be given to the Alaska Committee for their efforts to make Juneau a better host to legislators and staff, their efforts can not overcome Juneau's remote geographical location. Navigational improvements at the airport, telecommunications infrastructure, and more available housing units will all make Juneau a better capitol city. However, none of these improvements will get the majority of legislators together in a majority with the voters."

REPRESENTATIVE GREEN asserted the setting today was biased. He suggested a meeting was in order in the Anchorage Bowl. In comparison to the capital move, he said, the legislative move did

**HB**

**459**

9-LS1335M :  
Bannister  
2/9/96

CS FOR HOUSE BILL NO. 459( )  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:  
Referred:

Sponsor(s): REPRESENTATIVE VEZEY

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the jurisdiction governing a trust, to challenges to trusts or  
2 property transfers in trust, to the validity of trust interests, and to transfers of  
3 certain trust interests."

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

5 \* Section 1. AS 13.36.035(a) is amended to read:

6 (a) The court has exclusive jurisdiction of proceedings initiated by interested  
7 parties concerning the internal affairs of trusts, including trusts covered by (c) of this  
8 section. Except as provided in (c) - (d) of this section, proceedings that [  
9 PROCEEDINGS WHICH] may be maintained under this section are those concerning  
10 the administration and distribution of trusts, the declaration of rights and the  
11 determination of other matters involving trustees and beneficiaries of trusts. These  
12 include [, BUT ARE NOT LIMITED TO,] proceedings to

- 13 (1) appoint or remove a trustee;
- 14 (2) review trustees' fees and to review and settle interim or final

1 accounts;

2 (3) ascertain beneficiaries, determine any question arising in the  
3 administration or distribution of any trust including questions of construction of trust  
4 instruments, instruct trustees, and determine the existence or nonexistence of any  
5 immunity, power, privilege, duty or right; and

6 (4) release registration of a trust.

7 \* Sec. 2. AS 13.36.035 is amended by adding new subsections to read:

8 (c) A provision that the laws of this state govern the validity, construction, and  
9 administration of the trust and that the trust is subject to the jurisdiction of this state  
10 is valid, effective, and conclusive for the trust if

11 (1) some or all of the trust assets are deposited in this state or are being  
12 managed by a qualified person;

13 (2) the trustee is a qualified person; and

14 (3) the principal place of administration is located in this state.

15 (d) The validity, construction, and administration of a trust with a state  
16 jurisdiction provision are determined by the laws of this state, including the

17 (1) capacity of the settlor;

18 (2) powers, obligations, liabilities, and rights of the trustees and the  
19 appointment and removal of the trustee; and

20 (3) existence and extent of powers, conferred or retained, including a  
21 trustee's discretionary powers, the powers retained by a beneficiary of the trust, and  
22 the validity of the exercise of a power.

23 \* Sec. 3. AS 13.36.045(a) is amended to read:

24 (a) The court will not, over the objection of a party, entertain proceedings  
25 under AS 13.36.035 involving a trust registered or having its principal place of  
26 administration in another state, unless

27 (1) all appropriate parties could not be bound by litigation in the courts  
28 of the state where the trust is registered or has its principal place of administration;

29 [OR]

30 (2) the interests of justice otherwise would seriously be impaired; or

31 (3) the trust contains a state jurisdiction provision; and

- 1                                    (A) some or all of the trust assets are deposited in this state  
2                                    or are being managed by a qualified person; or  
3                                    (B) the trustee is a qualified person.

4 \* Sec. 4. AS 13.36 is amended by adding new sections to read:

5                    Sec. 13.36.310. CHALLENGES TO TRUST. Except as provided in  
6 AS 34.40.110, a trust that is covered by AS 13.36.035(c) or that is otherwise governed  
7 by the laws of this state, or a property transfer in trust that is covered by  
8 AS 13.36.035(c) or that is otherwise governed by the laws of this state, is not void,  
9 voidable, liable to be set aside, defective in any fashion, or questionable as to the  
10 settlor's capacity, on the grounds that the trust or transfer avoids or defeats a right,  
11 claim, or interest, or contravenes a law or a judicial or administrative order or action  
12 that recognizes, protects, enforces, or gives effect to the right, claim, or interest. In  
13 this subsection, "right, claim, or interest" means a right, claim, or interest conferred by  
14 law on a person by reason of a personal or business relationship with the settlor or by  
15 way of a marital or similar right.

16                    Sec. 13.36.390. DEFINITIONS. In AS 13.36,

17                    (1) "qualified person" means

18                    (A) an individual who, except for brief intervals, military  
19 service, attendance at an educational or training institution, or for absences for  
20 good cause shown, resides in this state, whose true and permanent home is in  
21 this state, who does not have a present intention of moving from this state, and  
22 who has the intention of returning to this state when away;

23                    (B) a trust company that is organized under AS 06.25 and that  
24 has its principal place of business in this state; or

25                    (C) a bank that is organized under AS 06.05, or a national  
26 banking association that is organized under 12 U.S.C. 21 - 216d, if the bank  
27 or national banking association possesses and exercises trust powers and has  
28 its principal place of business in this state;

29                    (2) "settlor" means a person who transfers property in trust; "settlor"  
30 includes a person who furnishes the property transferred to a trust even if the trust is  
31 created by another person;

1 (3) "state jurisdiction provision" means a provision that the laws of this  
2 state govern the validity, construction, and administration of a trust and that the trust  
3 is subject to the jurisdiction of this state.

4 \* Sec. 5. AS 34.27.050(a) is amended to read:

5 (a) A nonvested property interest is invalid unless

6 (1) when the interest is created, it is certain to vest or terminate no later  
7 than 21 years after the death of an individual then alive; [OR]

8 (2) the interest either vests or terminates within 90 years after its  
9 creation; or

10 (3) the interest is in a trust and all or part of the income or  
11 principal of the trust may be distributed, in the discretion of the trustee, to a  
12 person who is living when the trust is created.

13 \* Sec. 6. AS 34.27.060 is amended to read:

14 Sec. 34.27.060. REFORMATION. Upon the petition of an interested person,  
15 a court shall reform a disposition in the manner that most closely approximates the  
16 transferor's manifested plan of distribution and is within the 90 years allowed by  
17 AS 34.27.050(a)(2), (b)(2), or (c)(2) if

18 (1) a nonvested property interest or a power of appointment becomes  
19 invalid under AS 34.27.050;

20 (2) a class gift is not but might become invalid under AS 34.27.050 and  
21 the time has arrived when the share of any class member is to take effect in possession  
22 or enjoyment; or

23 (3) a nonvested property interest that is not validated by  
24 AS 34.27.050(a)(1) or (3) can vest but not within 90 years after its creation.

25 \* Sec. 7. AS 34.40.010 is amended to read:

26 Sec. 34.40.010. INVALIDITY GENERALLY. Except as provided in  
27 AS 34.40.110, a [A] conveyance or assignment, in writing or otherwise, of an estate  
28 or interest in land, or in goods, or things in action, or of rents or profits issuing from  
29 them or a charge upon land, goods, or things in action, or upon the rents or profits  
30 from them, made with the intent to hinder, delay, or defraud creditors or other persons  
31 of their lawful suits, damages, forfeitures, debts, or demands, or a bond or other

1 evidence of debt given, action commenced, decree or judgment suffered, with the like  
2 intent, as against the persons so hindered, delayed, or defrauded is void.

3 \* Sec. 8. AS 34.40.110 is repealed and reenacted to read:

4 Sec. 34.40.110. RESTRICTING TRANSFERS OF TRUST INTERESTS. (a)

5 A person who in writing transfers property in trust may provide that the interest of a  
6 beneficiary of the trust may not be either voluntarily or involuntarily transferred before  
7 payment or delivery of the interest to the beneficiary by the trustee. In this subsection,

8 (1) "property" includes real property, personal property, and interests  
9 in real or personal property;

10 (2) "transfer" means any form of transfer, including deed, conveyance,  
11 or assignment.

12 (b) If a trust contains a transfer restriction allowed under (a) of this section,  
13 the transfer restriction prevents a creditor existing when the trust is created, a person  
14 who subsequently becomes a creditor, or another person from satisfying a claim out  
15 of the beneficiary's interest in the trust, unless the

16 (1) transfer was intended in whole or in part to hinder, delay, or  
17 defraud creditors or other persons under AS 34.40.010;

18 (2) trust provides that the settlor may revoke or terminate all or part  
19 of the trust without the consent of a person who has a substantial beneficial interest  
20 in the trust and the interest would be adversely affected by the exercise of the power  
21 held by the settlor to revoke or terminate all or part of the trust; in this paragraph,  
22 "revoke or terminate" does not include a power to veto a distribution from the trust or  
23 a similar power; or

24 (3) trust requires that all or a part of the trust's income or principal, or  
25 both, must be distributed to the settlor.

26 (c) The satisfaction of a claim under (b)(1) - (3) of this section is limited to  
27 that part of the trust to which (b)(1) - (3) of this section applies.

28 (d) In this section, "settlor" means a person who transfers real property,  
29 personal property, or an interest in real or personal property, in trust.

30 \* Sec. 9. This Act does not apply to a trust unless the trust is created on or after the  
31 effective date of this Act.

9-LS1335M  
Bannister  
2/9/96

CS FOR HOUSE BILL NO. 459( )  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:  
Referred:

Sponsor(s): REPRESENTATIVE VEZEY

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7 parties concerning the internal affairs of trusts, including trusts covered by (c) of this  
8 section. Except as provided in (c) - (d) of this section, proceedings that [.  
9 PROCEEDINGS WHICH] may be maintained under this section are those concerning  
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11 determination of other matters involving trustees and beneficiaries of trusts. These  
12 include [, BUT ARE NOT LIMITED TO,] proceedings to

- 13 (1) appoint or remove a trustee;
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1 accounts;

2 (3) ascertain beneficiaries, determine any question arising in the  
3 administration or distribution of any trust including questions of construction of trust  
4 instruments, instruct trustees, and determine the existence or nonexistence of any  
5 immunity, power, privilege, duty or right; and

6 (4) release registration of a trust.

7 \* Sec. 2. AS 13.36.035 is amended by adding new subsections to read:

8 (c) A provision that the laws of this state govern the validity, construction, and  
9 administration of the trust and that the trust is subject to the jurisdiction of this state  
10 is valid, effective, and conclusive for the trust if

11 (1) some or all of the trust assets are deposited in this state or are being  
12 managed by a qualified person;

13 (2) the trustee is a qualified person; and

14 (3) the principal place of administration is located in this state.

15 (d) The validity, construction, and administration of a trust with a state  
16 jurisdiction provision are determined by the laws of this state, including the

17 (1) capacity of the settlor;

18 (2) powers, obligations, liabilities, and rights of the trustees and the  
19 appointment and removal of the trustee; and

20 (3) existence and extent of powers, conferred or retained, including a  
21 trustee's discretionary powers, the powers retained by a beneficiary of the trust, and  
22 the validity of the exercise of a power.

23 \* Sec. 3. AS 13.36.045(a) is amended to read:

24 (a) The court will not, over the objection of a party, entertain proceedings  
25 under AS 13.36.035 involving a trust registered or having its principal place of  
26 administration in another state, unless

27 (1) all appropriate parties could not be bound by litigation in the courts  
28 of the state where the trust is registered or has its principal place of administration;

29 [OR]

30 (2) the interests of justice otherwise would seriously be impaired; or

31 (3) the trust contains a state jurisdiction provision; and



1 (3) "state jurisdiction provision" means a provision that the laws of this  
2 state govern the validity, construction, and administration of a trust and that the trust  
3 is subject to the jurisdiction of this state.

4 \* Sec. 5. AS 34.27.050(a) is amended to read:

5 (a) A nonvested property interest is invalid unless

6 (1) when the interest is created, it is certain to vest or terminate no later  
7 than 21 years after the death of an individual then alive; [OR]

8 (2) the interest either vests or terminates within 90 years after its  
9 creation; or

10 (3) the interest is in a trust and all or part of the income or  
11 principal of the trust may be distributed, in the discretion of the trustee, to a  
12 person who is living when the trust is created.

13 \* Sec. 6. AS 34.27.060 is amended to read:

14 Sec. 34.27.060. REFORMATION. Upon the petition of an interested person,  
15 a court shall reform a disposition in the manner that most closely approximates the  
16 transferor's manifested plan of distribution and is within the 90 years allowed by  
17 AS 34.27.050(a)(2), (b)(2), or (c)(2) if

18 (1) a nonvested property interest or a power of appointment becomes  
19 invalid under AS 34.27.050;

20 (2) a class gift is not but might become invalid under AS 34.27.050 and  
21 the time has arrived when the share of any class member is to take effect in possession  
22 or enjoyment; or

23 (3) a nonvested property interest that is not validated by  
24 AS 34.27.050(a)(1) or (3) can vest but not within 90 years after its creation.

25 \* Sec. 7. AS 34.40.010 is amended to read:

26 Sec. 34.40.010. INVALIDITY GENERALLY. Except as provided in  
27 AS 34.40.110, a [A] conveyance or assignment, in writing or otherwise, of an estate  
28 or interest in land, or in goods, or things in action, or of rents or profits issuing from  
29 them or a charge upon land, goods, or things in action, or upon the rents or profits  
30 from them, made with the intent to hinder, delay, or defraud creditors or other persons  
31 of their lawful suits, damages, forfeitures, debts, or demands, or a bond or other

1 evidence of debt given, action commenced, decree or judgment suffered, with the like  
2 intent, as against the persons so hindered, delayed, or defrauded is void.

3 \* Sec. 8. AS 34.40.110 is repealed and reenacted to read:

4 Sec. 34.40.110. RESTRICTING TRANSFERS OF TRUST INTERESTS. (a)

5 A person who in writing transfers property in trust may provide that the interest of a  
6 beneficiary of the trust may not be either voluntarily or involuntarily transferred before  
7 payment or delivery of the interest to the beneficiary by the trustee. In this subsection,

8 (1) "property" includes real property, personal property, and interests  
9 in real or personal property;

10 (2) "transfer" means any form of transfer, including deed, conveyance,  
11 or assignment.

12 (b) If a trust contains a transfer restriction allowed under (a) of this section,  
13 the transfer restriction prevents a creditor existing when the trust is created, a person  
14 who subsequently becomes a creditor, or another person from satisfying a claim out  
15 of the beneficiary's interest in the trust, unless the

16 (1) transfer was intended in whole or in part to hinder, delay, or  
17 defraud creditors or other persons under AS 34.40.010;

18 (2) trust provides that the settlor may revoke or terminate all or part  
19 of the trust without the consent of a person who has a substantial beneficial interest  
20 in the trust and the interest would be adversely affected by the exercise of the power  
21 held by the settlor to revoke or terminate all or part of the trust; in this paragraph,  
22 "revoke or terminate" does not include a power to veto a distribution from the trust or  
23 a similar power; or

24 (3) trust requires that all or a part of the trust's income or principal, or  
25 both, must be distributed to the settlor.

26 (c) The satisfaction of a claim under (b)(1) - (3) of this section is limited to  
27 that part of the trust to which (b)(1) - (3) of this section applies.

28 (d) In this section, "settlor" means a person who transfers real property,  
29 personal property, or an interest in real or personal property, in trust.

30 \* Sec. 9. This Act does not apply to a trust unless the trust is created on or after the  
31 effective date of this Act.

9-LS1335K ✓  
Bannister  
2/7/96

CS FOR HOUSE BILL NO. 459( )  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:  
Referred:

Sponsor(s): REPRESENTATIVE VEZEY

A BILL  
FOR AN ACT ENTITLED

1 "An Act relating to the jurisdiction governing a trust, to challenges to trusts or  
2 property transfers in trust, to the validity of trust interests, and to transfers of  
3 certain trust interests."

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

5 \* Section 1. AS 13.36.035(a) is amended to read:

- 6 (a) The court has exclusive jurisdiction of proceedings initiated by interested
- 7 parties concerning the internal affairs of trusts, including trusts covered by (c) of this
- 8 section. Except as provided in (c) - (d) of this section, proceedings that [
- 9 PROCEEDINGS WHICH] may be maintained under this section are those concerning
- 10 the administration and distribution of trusts, the declaration of rights and the
- 11 determination of other matters involving trustees and beneficiaries of trusts. These
- 12 include [, BUT ARE NOT LIMITED TO,] proceedings to
- 13 (1) appoint or remove a trustee;
- 14 (2) review trustees' fees and to review and settle interim or final

1 accounts;

2 (3) ascertain beneficiaries, determine any question arising in the  
3 administration or distribution of any trust including questions of construction of trust  
4 instruments, instruct trustees, and determine the existence or nonexistence of any  
5 immunity, power, privilege, duty or right; and

6 (4) release registration of a trust.

7 \* Sec. 2. AS 13.36.035 is amended by adding new subsections to read:

8 (c) A provision that the laws of this state govern the validity, construction, and  
9 administration of the trust and that the trust is subject to the jurisdiction of this state  
10 is valid, effective, and conclusive for the trust if

11 (1) some or all of the trust assets are deposited in this state or are being  
12 managed by a qualified person; or

13 (2) the trustee is a qualified person.

14 (d) The validity, construction, and administration of a trust with a state  
15 jurisdiction provision are determined by the laws of this state, including the

16 (1) capacity of the settlor;

17 (2) powers, obligations, liabilities, and rights of the trustees and the  
18 appointment and removal of the trustee; and

19 (3) existence and extent of powers, conferred or retained, including a  
20 trustee's discretionary powers, the powers retained by a beneficiary of the trust, and  
21 the validity of the exercise of a power.

22 \* Sec. 3. AS 13.36.045(a) is amended to read:

23 (a) The court will not, over the objection of a party, entertain proceedings  
24 under AS 13.36.035 involving a trust registered or having its principal place of  
25 administration in another state, unless

26 (1) all appropriate parties could not be bound by litigation in the courts  
27 of the state where the trust is registered or has its principal place of administration;

28 [OR]

29 (2) the interests of justice otherwise would seriously be impaired; or

30 (3) the trust contains a state jurisdiction provision; and

31 (A) some or all of the trust assets are deposited in this state

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or are being managed by a qualified person; or

(B) the trustee is a qualified person.

\* Sec. 4. AS 13.36 is amended by adding new sections to read:

Sec. 13.36.310. CHALLENGES TO TRUST. Except as provided in AS 34.40.110, a trust that is covered by AS 13.36.035(c) or that is otherwise governed by the laws of this state, or a property transfer in trust that is covered by AS 13.36.035(c) or that is otherwise governed by the laws of this state, is not void, voidable, liable to be set aside, defective in any fashion, or questionable as to the settlor's capacity, on the grounds that the trust or transfer avoids or defeats a right, claim, or interest, or contravenes a law or a judicial or administrative order or action that recognizes, protects, enforces, or gives effect to the right, claim, or interest. In this subsection, "right, claim, or interest" means a right, claim, or interest conferred by law on a person by reason of a personal or business relationship with the settlor or by way of a marital or similar right.

Sec. 13.36.390. DEFINITIONS. In AS 13.36,

(1) "qualified person" means

(A) an individual who, except for brief intervals, military service, attendance at an educational or training institution, or for absences for good cause shown, resides in this state, whose true and permanent home is in this state, who does not have a present intention of moving from this state, and who has the intention of returning to this state when away; or

(B) a trust company that is organized under AS 06.25 or a bank that is organized under AS 06.05, if the trust company or bank has its principal place of business in this state;

(2) "settlor" means a person who transfers property in trust; "settlor" includes a person who furnishes the property transferred to a trust even if the trust is created by another person;

(3) "state jurisdiction provision" means a provision that the laws of this state govern the validity, construction, and administration of a trust and that the trust is subject to the jurisdiction of this state.

\* Sec. 5. AS 34.27.050(a) is amended to read:

- 1 (a) A nonvested property interest is invalid unless  
 2 (1) when the interest is created, it is certain to vest or terminate no later  
 3 than 21 years after the death of an individual then alive; [OR]  
 4 (2) the interest either vests or terminates within 90 years after its  
 5 creation; or  
 6 (3) the interest is in a trust and all or part of the income or  
 7 principal of the trust may be distributed, in the discretion of the trustee, to a  
 8 person who is living when the trust is created.

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 11 a court shall reform a disposition in the manner that most closely approximates the  
 12 transferor's manifested plan of distribution and is within the 90 years allowed by  
 13 AS 34.27.050(a)(2), (b)(2), or (c)(2) if

- 14 (1) a nonvested property interest or a power of appointment becomes  
 15 invalid under AS 34.27.050;  
 16 (2) a class gift is not but might become invalid under AS 34.27.050 and  
 17 the time has arrived when the share of any class member is to take effect in possession  
 18 or enjoyment; or  
 19 (3) a nonvested property interest that is not validated by  
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 23 AS 34.40.110, a [A] conveyance or assignment, in writing or otherwise, of an estate  
 24 or interest in land, or in goods, or things in action, or of rents or profits issuing from  
 25 them or a charge upon land, goods, or things in action, or upon the rents or profits  
 26 from them, made with the intent to hinder, delay, or defraud creditors or other persons  
 27 of their lawful suits, damages, forfeitures, debts, or demands, or a bond or other  
 28 evidence of debt given, action commenced, decree or judgment suffered, with the like  
 29 intent, as against the persons so hindered, delayed, or defrauded is void.

30 \* Sec. 8. AS 34.40.110 is repealed and reenacted to read:

31 Sec. 34.40.110. RESTRICTING TRANSFERS OF TRUST INTERESTS. (a)

1 A person who in writing transfers property in trust may provide that the interest of a  
2 beneficiary of the trust may not be either voluntarily or involuntarily transferred before  
3 payment or delivery of the interest to the beneficiary by the trustee. In this subsection,

4 (1) "property" includes real property, personal property, and interests  
5 in real or personal property;

6 (2) "transfer" means any form of transfer, including deed, conveyance,  
7 or assignment.

8 (b) If a trust contains a transfer restriction allowed under (a) of this section,  
9 the transfer restriction prevents a creditor existing when the trust is created, a person  
10 who subsequently becomes a creditor, or another person from satisfying a claim out  
11 of the beneficiary's interest in the trust, unless the

12 (1) transfer was intended in whole or in part to hinder, delay, or  
13 defraud creditors or other persons under AS 34.40.010;

14 (2) trust provides that the settlor may revoke or terminate all or part  
15 of the trust without the consent of a person who has a substantial beneficial interest  
16 in the trust and the interest would be adversely affected by the exercise of the power  
17 held by the settlor to revoke or terminate all or part of the trust; in this paragraph,  
18 "revoke or terminate" does not include a power to veto a distribution from the trust or  
19 a similar power; or

20 (3) trust requires that all or a part of the trust's income or principal, or  
21 both, must be distributed to the settlor.

22 (c) The satisfaction of a claim under (b)(1) - (3) of this section is limited to  
23 that part of the trust to which (b)(1) - (3) of this section applies.

24 (d) In this section, "settlor" means a person who transfers real property,  
25 personal property, or an interest in real or personal property, in trust.

26 \* Sec. 9. This Act does not apply to a trust unless the trust is created on or after the  
27 effective date of this Act.

**LEGAL SERVICES****DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA**

(907) 465-3887 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101


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

**MEMORANDUM**

December 26, 1995

**SUBJECT:** Sectional Summary of bill draft relating to trusts (Work Order No. 9-LS1335\F)

**TO:** Representative Al Vezey  
Attn: Joe Ryan

**FROM:**   
Theresa Bannister  
Legislative Counsel

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

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

**Section 1.** Modifies the statute that gives the superior court exclusive jurisdiction of certain trust proceedings. Includes trusts described in sec. 2 of the bill and coordinates the provisions of the statute with sec. 2. Makes a technical change by deleting "but are not limited to."

**Section 2.** Subsection (c) states that a provision in a trust that this state's laws govern the trust and that the trust is subject to this state's jurisdiction is valid, effective, and conclusive if either of two listed conditions is met. These conditions relate to the location of trust assets and the relationship of the trust asset manager or trustee to this state.

Subsection (d) states that a trust's validity, construction, and administration are determined by this state's laws, if the trust has a state jurisdiction provision. Identifies some of the matters covered by this provision.

**Section 3.** States that this state's superior court will not, if a party objects, handle a trust's proceedings under AS 13.36.035 if the trust is registered or has its principal place of administration in another state, unless certain conditions are met. Among these conditions is if the trust has a state jurisdiction provision and either (1) trust assets are deposited in this state or managed by a qualified person, or (2) the trustee is a qualified person.

**Section 4.** AS 13.36.310 states that, except as provided in AS 34.40.110, a trust, or a property transfer in trust, that is governed by this state's laws isn't void, voidable, liable to

Representative Al Vezey  
December 26, 1995  
Page 2

be set aside, defective, or questionable as to the settlor's capacity, on the grounds described in the section.

AS 13.36.390 defines "qualified person," "settlor," and "state jurisdiction provision" for AS 13.36.

**Section 5.** States that a nonvested property interest is invalid unless, among the other listed reasons, the interest is in a trust and income or principal of the trust is subject to discretionary distribution by the trustee to a person living when the trust is created.

**Section 6.** Conforms this section to the amendment made in sec. 5 of the bill.

**Section 7.** Coordinates this section with the new provisions in sec. 8 of the bill.

**Section 8.** Subsection (a) allows a person who transfers property in trust and in writing to provide that a trust beneficiary's interest may not be transferred before payment or delivery of the interest to the beneficiary.

Subsection (b) states provides that the above transfer restriction prevents a creditor or other person from using the beneficiary's trust interest to satisfy a claim unless certain listed conditions are met.

Subsection (c) limits the part of a trust that may be used to satisfy a claim otherwise allowed under (b).

Subsection (d) defines "settlor" for the section.

**Section 9.** Indicates that the bill's provisions only apply to trusts created on or after the effective date of bill.

If I may be of further assistance, please advise.

TLB:glc  
95-474.glc

# Alaska State Legislature

## House of Representatives



Official Business

State Capitol  
Juneau, Alaska 99801-1182  
(907) 465-3718

House Majority Leader

### *SPONSOR STATEMENT*

Alaska is in the unique position of having neither a state income tax nor a state sales tax. This fact has made Alaska a very favorable venue for managers of large investment portfolios, administrators of trusts and other investors who want the security and protection of the United States Government and the American banking system for their investments.

To attract these investments, certain changes have been suggested to the statutes governing trusts in Alaska. These changes when enacted, will open the door to Alaska management of billions of dollars that are now fleeing to offshore jurisdictions. According to the latest figures reported by Congress' Joint Committee on Taxation, American families transferred over \$460 billion off-shore last year alone.

It is becoming increasingly obvious to policy-makers that this out-flow of U.S. capital comes at a steep cost. U.S. citizens who transfer assets in trust offshore do not gain any tax advantages – indeed unless structured carefully, there can be extortionate tax costs. Thus, there is no tax loss to U.S. jurisdictions. But the out-flow results in much more. It reduces the capital base available for other investment in the U.S., it increases the costs of capital and it reduces the increased banking and legal work in the U.S. associated with creating and administering Family Trusts. And there is no indication that Americans of good intention will stop seeking to use this very traditional method of preserving their family's wealth and protecting it from adversity. Currently, only one American state – Missouri – has enacted a statute to offset the tremendous capital out-flow, but it suffers from defects and ambiguities that make many practitioners uncomfortable recommending it as a viable option. Therefore, it could be a great asset to Alaska, and the U.S. generally, to enact legislation that would make it possible for Americans to create Family Trusts in the U.S.

Passage of HB-459 will be the key to opening this great opportunity for Alaska.



Official Business

# Alaska State Legislature

State Capitol  
Juneau, AK 99801-1182

## ***SPONSOR STATEMENT***

### **THE FAMILY TRUST ACT**

#### **Proposed Amendments to Titles 13 and 34 of the Alaska Statutes**

I. **Purpose of the Bill**

Among the many traditional reasons for establishing trusts, one is the preservation of assets for one's family. This very ancient and common form of "asset protection" is not usually undertaken by one who is or who is about to become insolvent. If so, traditional rules will protect creditors who are harmed by the creation of the trust. Quite the contrary, trusts such as these are more typically created by individuals who are seeking to shelter a "nest egg" from the attendant risks of modern economic life and provide a source of support for the future. Such a trust is usually irrevocable and gives the trustee full discretion to accumulate income or to "sprinkle" income and principal among a class of beneficiaries that can include the grantor (a "Family Trust"). The key element for Family Trusts is that no person, not even a family member, can invade the trust.

However, under the laws of many states a Family Trust is not an effective shield against improvidence. This is so because of relatively modern innovations in trust law. For example, traditionally a Family Trust would be safe from the claims of the grantor's creditors. Under the laws of many states today,

however, it is possible for the creditors of the grantor (and in some cases, even creditors of the beneficiaries) to reach the assets of a Family Trust even though neither the grantor nor any beneficiary could do so. This result is often predicated on the public policy that a person should not be able to put assets beyond the reach of his creditors and yet retain their use. But in practice, the rule operates contrariwise. It actually makes it possible for the grantor to do indirectly what he otherwise cannot do directly. By racking up debts that he cannot repay, for example, the grantor is indirectly able to withdraw assets from the trust, to the detriment of the family. In the typical Family Trust, however, the grantor would not be able to withdraw the trust assets unilaterally.

It is clear that the rule in most jurisdictions makes sense when a trust is in fraud of creditors, a sham or created solely for the benefit of the grantor with the understanding that the grantor alone would continue to benefit from a trust. In those cases, the rule operates to enforce the public policy mentioned above. However, in respect to a traditional Family Trust, the rule operates a hardship on families and makes perfectly respectable--and many times important--family planning impossible.

In the face of this problem, and testament to their bona fides in creating Family Trusts, many American families have turned to off-shore jurisdictions such as the Cook Islands, Cayman Islands, Jersey, Bermuda and many others for their trust needs. These jurisdictions have enacted statutes that clarify the law and make it possible to create a Family Trust without the risk that the grantor's creditors will attach trust assets, unless the transfer in trust was in fraud of the transferor's creditors. According to the latest figures reported by Congress' Joint Committee on Taxation, American families transferred over \$460 billion off-shore last year alone.

It is becoming increasingly obvious to policy-makers that this out-flow of U.S. capital comes at a steep cost. U.S. citizens who transfer assets in trust off-shore do not gain any tax advantages -- indeed unless structured carefully, there can be extortionate tax costs. Thus, there is no tax loss to U.S. jurisdictions. But the out-flow results in much more. It reduces the capital base available for other investment in the U.S., it increases the costs of capital and it reduces the increased banking and legal work in the U.S. associated with creating and administering Family Trusts. And there is no indication that Americans of good intention will stop seeking to use this very traditional method of preserving their family's wealth and protecting it from adversity. Currently, only one American state -- Missouri -- has enacted a statute to offset the tremendous capital out-flow, but it suffers from defects and ambiguities that make many practitioners uncomfortable recommending it as a viable option. Therefore, it could be a great asset to Alaska, and the U.S. generally, to enact legislation that would make it possible for Americans to create Family Trusts in the U.S.. This could be accomplished with little substantive change in the substantive law of trusts in Alaska and without working to the detriment of creditors. The proposed Bill therefore clarifies current law in Alaska by saying that irrevocable transfers to a fully discretionary trust -- even when one of the potential beneficiaries is the transferor -- are not liable to the claims of creditors unless the transfer is otherwise in fraud of creditors under Alaska law.



Official Business

# Alaska State Legislature

## HISTORICAL BACKGROUND

State Capitol  
Juneau, AK 99801-1182

The practice of placing property in trust in order to preserve it for the use of one's family is as old as the concept of the trust itself. In the 15th century, the trust developed under the common law of England as a means, among other things, to protect the property of the landed gentry as they did battle in Europe, thus preserving their property for family members. The trust assured the gentleman that rival nobles, the Church or others, could not rob his family of their fortune while their protector was absent. Over the centuries, the use of trusts has varied. Sometimes a trust was used to protect a family from the claims of the Church, at others to protect a family from the claims of the Crown. In more modern times, trusts have been used to protect the assets of Jews from seizure by the Nazis. Over its long history, the trust has consistently been a means of securing a family's wealth to its "natural" objects with minimal risks from the claims of others. In its origin, a trust was very much a Family Trust.

As old as the Family Trust is, so too is the notion that an irrevocable fully discretionary trust created solely for the benefit of the Settlor is void. The rule is grounded in the very good reason that such a "self-settled" trust is particularly prone to abuse and, more important, it violates a common sense of fairness. An individual should not be able to put his assets beyond the reach of his rightful creditors when the assets nevertheless remain available for his use.

For example, statutes dating back to the 16th Century in England have rendered void a trust created by a person primarily for his benefit. American jurisdictions have continued this type of rule in effect. For example, in New York, the Estates, Powers and Trusts Law provides:

A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator.

And for well near 100 years, these statutes have been interpreted to mean that a "self-settled" trust, whether discretionary or not, is void only if the Settlor is the sole beneficiary. For example, cases in New York (until very recently) have consistently held that an irrevocable discretionary trust created for the benefit of a class that includes the grantor is not subject to the claims of the grantor's creditors.

In recent times, however, many American jurisdictions have expanded the basic "self-settled" trust rule and thus made it very difficult for a person to create a Family trust. In large part, this development has been the result of abusive (sometimes real, sometimes perceived) transactions. But in reacting to these abuses, state legislatures and courts have gone too far and effectively restricted the traditions and reasonable uses of Family Trusts.

In particular, state courts have begun to construe the "self-settled" trust rule to mean that an irrevocable trust which includes the Settlor as a permissible beneficiary, even if the Settlor has retained no powers over the trust or the trustee, will be void as against the Settlor's creditors. In a recent New York case, for example, the court found that such a trust (even though there was no evidence to suggest that the trustee exercised his discretion in favor of the Settlor alone) was void against the Settlor's creditors on public policy grounds because it put the Settlor's assets beyond the reach of her creditors while remaining available for her use. Vanderbilt.

Despite the intuitive appeal of this argument, the extension of the "self-settled" trust rule is unwarranted. Consider, for instance, that an irrevocable discretionary trust, by its nature, puts assets beyond the reach of a beneficiary's creditors. Indeed, that's the difference between an outright gift and a gift in trust.

Where a trust includes the Settlor as a permissible beneficiary and where there is nothing to suggest that the trust is primarily for the benefit of the Settlor or is a sham, there is no policy reason to alter the basic rule. Under these circumstances, the Settlor has no assurance that he will receive any of the assets of the trust. They are beyond his reach, unless the trustee determines to make a distribution. It does not offend notions of fairness, therefore, that the assets also be beyond the reach of the Settlor's creditors.

Indeed, fairness would require that the Settlor's creditors in such a case not be able to reach the assets of the trust. For example, if a family wishes to safeguard its wealth against disaster and therefore, the matriarch irrevocably creates a fully discretionary trust for the benefit of every member of the family, naming a bank as trustee, the family rightly would assume that no one of them (not even the Settlor) would be able to reach the assets of the trust. By allowing the Settlor's creditors to reach the assets in a case such as this, state courts make it possible for the Settlor to do indirectly what he is prohibited from doing directly. It makes it possible for the Settlor to amass debt that he cannot repay, knowing that the trust assets will be available to satisfy his creditors' claims. This is the equivalent of allowing the Settlor to make mandatory withdrawals from the trust.

Some jurisdictions have resisted the temptation of overreaching. In places such as Cayman, Bermuda and other off-shore jurisdictions, for example, statutes have been passed which adopt a rule that an irrevocable discretionary trust for the benefit of a class that includes the Settlor, is immune from the claims of the Settlor (or his creditors) unless the transfer was in fraud of his creditors, under local law. And in Missouri, the legislature recently enacted a similar statute. It provides:

A provision restraining the voluntary or involuntary transfer of beneficial interests in a trust will prevent the Settlor's creditors from satisfying claims from the trust assets except:

(1) Where the conveyance of assets to the trust was intended to hinder, delay or defraud creditors or purchasers, pursuant to section 428.020, RSMo; or

(2) To the extent of the Settlor's beneficial interest in the trust assets, if at the time the trust was established or amended:

(a) The Settlor was the sole beneficiary of either the income or principal of the trust or retained the power to revoke or amend the trust; or

(b) The Settlor was one of a class of beneficiaries or retained a right to receive a specific portion of the income or principal of the trust that was determinable solely from the provisions of the trust instrument.

Thus, as in the off-shore jurisdictions, it would appear that an irrevocable discretionary trust established in Missouri for the benefit of the Settlor and his family would appear not to be subject to the claims of the Settlor's creditors if the trust so provides. Unfortunately, Section (2)(b) of the Missouri statute is ambiguous and the conclusion is not as obvious as it could be. As a result, few practitioners have sought to establish Family Trusts in Missouri.

These jurisdictions are not "asset protection" jurisdictions where creditors can expect an unfriendly reception or whether unscrupulous Settlers can defraud their creditors. Instead, these jurisdictions have returned to the traditional notion that, except where the Settlor has retained dominion and control over the assets in a trust or where the Settlor is the sole beneficiary or

where the transfer was in fraud of the Settlor's creditors, an irrevocable discretionary trust truly puts the trust assets beyond the reach of the Settlor and therefore should also be protected from the reach of the Settlor's creditors.

This notion of the use of Family Trusts is not only consistent with the tradition of the law of trusts but still rings true with property owners. Evidence the fact that last year alone, over \$460 billion dollars was transferred to off-shore trusts such as the type described above. While it is possible, in some cases, that these trusts are abusive, it is likely that most of them are not. And for the likely majority that are not, American states with their over-reaching rules are forcing people to transfer their assets off-shore in order to obtain reasonable protection of their family's assets. This has the effect of transferring out of the US. the earning power, capital base and local banking and legal work that might otherwise be used here to promote local economies. And because foreign jurisdictions might in some cases have animosity toward foreign creditors, the result of the over-reaching rule is one that works to the collective detriment of creditors, property owners and the U.S. economy.

The conditions are therefore ripe for Alaska to fill the breach and provide a friendly jurisdiction to those who wish to establish Family Trusts. By the terms of the proposed legislation, only those trusts established with bona fides will successfully bar creditors' claims. So, for example, an irrevocable discretionary trust created for the benefit of the Settlor and his family, where the trustee is independent of the Settlor, makes distributions in response to the needs of the family and not the direction of the Settlor, and where their transfer does not leave the Settlor insolvent and is not motivated by a desire to avoid specific creditors, will be immune from the claims of the Settlor's creditors. Everything about such a trust suggests that the Settlor has parted with dominion and control over the trust assets. He could not compel the trustee to distribute

any of the assets nor could he exercise any other control over the assets. In such a case, it seems fair and reasonable to prohibit the Settlor from forcing a distribution to himself by racking up debt he cannot afford to repay.

If, however, a trust is created primarily for the benefit of the Settlor or if the Settlor retains powers over the trust or over the trustee (either explicit or implicit), the proposed bill would not protect the trust from the claims of the Settlor's creditors. For example, a trust over which the Settlor retains a power to revoke will remain liable to the claims of the Settlor's creditors. Or a trust which is created with the understanding that the trustee would make distributions to the Settlor any time he requested them, then that trust, too, would remain liable to the claims of the Settlor's creditors. In both circumstances, the Settlor has, either explicitly or implicitly, retained ownership of the trust assets and may force their distribution to him. Fairness therefore dictates that the Settlor's creditors have the same access to the trust assets as the Settlor.

The proposed Bill would provide generous flexibility for Family Trusts that fall in between those two extremes. For example, if the Settlor could not compel distribution but he could veto a proposed distribution by the trustee, the proposed Bill would nevertheless protect the trust assets from the claims of the Settlor's creditors. Likewise, if a Family Trust required that the Settlor receive the income of the trust quarterly, under the proposed Bill, only the income of the trust would be vulnerable to the claims of the Settlor's creditors. The integrity of the trust would nevertheless remain secure. In the first case, the power retained by the grantor enables him to preserve assets, not acquire them for his use. Thus, it is equitable that his creditors not be able to convert such a power into a power to distribute to the Settlor. In the second case, the creditors would not be able to undo the security of the family in the trust simply because

the Settlor retained a partial interest. Equity would require that the Settlor's creditors be able to recover exactly what the Settlor could demand, and no more.

By adopting the proposed Bill, Alaska will be returning to a more conservative position on trusts. It will be doing no more than making it possible for traditional Family Trusts to exist free from the over-reaching claims of creditors, where those claims against the trust would fail if made by the Settlor. It would not be expanding the ability of Settlers to evade creditors nor would it be restricting creditors fair access to a debtor's assets. Instead, Alaska would return itself to the more balanced and substantive view of Family Trusts that existed before the recent over-reaching.

And, collaterally, Alaska could bring to its economy a business boom unprecedented in the State since the oil boom. Even if only one-tenth of the trust business that goes off-shore were to come to Alaska, it would see \$4 billion of assets move into the state. That, in turn, will increase the capital base in Alaska, and stimulate capital growth. This would give rise to banking and legal business, and serve as a catalyst to the economic "mushrooming" that has occurred in the off-shore jurisdictions that adopted such legislation.

It is notable that these off-shore jurisdictions, like Alaska, do not have an income tax. It is true that a tax-friendly regime creates an added incentive for property owners who wish to create Family Trusts. But it is often not the motivating reason. For example, Settlers will typically have to pay federal income tax on all income of the trust because it will be a grantor trust for federal income tax purposes. There is a temptation for states to reap a short-run gain by levying income tax on Family Trusts located in its jurisdiction. But Alaska would be well advised to avoid that temptation. For most families, an income tax would make Alaska a less desirable jurisdiction than Cayman or the Cook Islands. And in those jurisdictions that do not have an income tax, the

exponential effects of the trust business more than compensate for the loss of potential income tax revenue.

It should be stressed again that the proposed Bill is not a "device" for unscrupulous debtors and, therefore, should not create animosity among sister states. It does not make Alaska a "tax haven" or a jurisdiction unfriendly to creditors' claims. Indeed, the proposed Bill affords creditors broad protection when assets are transferred in fraud of their interests or when the Settlor retains powers over the trust assets. Quite the contrary of being anti-creditor, the proposed Bill is both creditor and family friendly. It rebalances the legal equities between individuals and creditors so that when an individual permanently and irrevocably parts with his property for the benefit of his family, he cannot squander the family's wealth through the inadvisable accumulation of debts.

#### V. Budgetary Implications

There are no costs associated with this legislation. Instead, it is projected that there will be a dramatic increase in state revenue as banks, lawyers and other businesses benefit from the increased economic activity in Alaska.

**HB**

**462**

TO: LIO

RE: Testimony on HB 462

fax: 283-3075

Position: Support

Please enter into the record my testimony to the House Judiciary Committee on HB 462.

Chairman Porter and members of the House Judiciary Committee, I urge you to support and pass HB 462. This bill is needed legislation. With budget cuts and reduced staff both law enforcement and District Attorney offices, are required to work to their limits especially when an emergency situation exists. Section 4 of HB 462 provides some assistance to these agencies in dealing with drunk drivers.

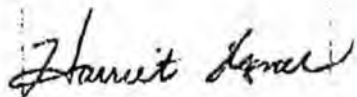
My daughter was involved in a head-on auto accident with a drunk driver. Some five hours after the accident, the drunk driver was still under the influence of alcohol and needed assistance to walk.

However, due to some technical problems relating to the testing of alcohol content the grand jury had limited information relating to the case. The drunk driver involved in this accident had a long and recent history of driving while intoxicated. The driver had an alcohol related accident the previous week.

If we establish a social intolerance and standard for driving while intoxicated, we then need to provide the regulatory reform and tools to enforce these standards.

I would also encourage you to examine House Bill 24. The two bills, HB 462 and 24, would help to save lives and prevent injuries.

Thank you for this opportunity to provide testimony



Harriet Wegner

PO Box 2101

Kenai AK 99611

283-6595 hm

262-4441 x 298 wk

# Alaska State Legislature

## Representative Brian S. Porter

CHAIRMAN  
HOUSE JUDICIARY COMMITTEE

MEMBER  
HOUSE LABOR & COMMERCE COMMITTEE  
HOUSE STATE AFFAIRS COMMITTEE  
INTERNATIONAL TRADE & TOURISM  
COMMITTEE

MEMBER  
FINANCE SUBCOMMITTEES  
DEPARTMENT OF LAW  
DEPARTMENT OF EDUCATION  
COURTS



**DISTRICT 20**

SESSION:  
STATE CAPITOL, ROOM 118  
JUNEAU, ALASKA 99801-1182  
PHONE: (907) 485-4930  
FAX: (907) 485-3834

INTERIM:  
718 W. 4TH AVE., SUITE 640  
ANCHORAGE, AK 99501-2133  
PHONE: (907) 258-8197  
FAX: (907) 258-5510

### *Sponsor Statement*

#### **HB 462, Drunk Driving: Evidence & Sentencing**

The bill would change a part of the sentencing scheme for persons convicted of felony driving while intoxicated or refusal to take a breath test. A sentencing court may order a defendant convicted of DWI or breath test refusal to receive inpatient treatment as a condition of the sentence.

Normally, if the defendant fails to complete treatment the court may impose some or all of the suspended jail time. However, in creating the felony driving while intoxicated and refusal offenses last session, the law was inadvertently changed to require the court to automatically impose all suspended time on felony offenders who fail to complete treatment ( ch. 80, SLA 1995). This automatic imposition of all suspended time for those offenders creates legal and practical problems.

Legally, mandating that all suspended time be imposed for only one class of criminal offenders may violate the constitutional guarantee of Equal Protection of the Law. Practically, the ultimate goal is to curtail the practice of people drinking and driving. Some offenders require more than one exposure to a treatment program before it becomes effective. This is often accomplished by imposing a portion of the suspended jail time followed by a forced return to treatment. This bill amends the law to give the sentencing court the discretion to decide how much of the suspended term the defendant should serve for failure to complete a treatment program.

SPONSOR STATEMENT

The bill additionally amends Rule 6(r)(1) of the Alaska Rules of Criminal Procedure to allow prior convictions of driving while intoxicated and breath test refusal to be presented at the grand jury proceedings by hearsay evidence. Because grand jury presentations must occur within 10 days after arrest, there is not sufficient time to obtain certified judgments of prior convictions, particularly if the convictions are from another jurisdiction. This court rule amendment is necessary in order to ensure that repeat offenders from out of state are not treated more leniently than Alaskans.

Finally, the bill amends Rule 32.1 of the Alaska Rules of Criminal Procedure to provide that a presentence investigation by the Department of Corrections is not required in most cases in which a person is convicted of felony driving while intoxicated or breath test refusal. Offenders convicted of driving while intoxicated and breath test refusal have been sentenced successfully for many years without the benefit of a presentence investigation. The bill would require that a presentence report be prepared for a repeat felony offender convicted of driving while intoxicated or breath test refusal.

(3) The presentment shall not mention the names of individuals. The presentment shall not be filed with the court, nor shall it be kept by the court beyond the time that the grand jury is discharged.

(4) When the presentment is made the court shall give such instructions on the law as it considers necessary.

(p) **Defense Witnesses.** Although the grand jury has no duty to hear evidence on the behalf of the defendant, it may do so.

(q) **Sufficiency of Evidence.** When the grand jury has reason to believe that other available evidence will explain away the charge, it shall order such evidence to be produced and for that purpose may require the prosecuting attorney to subpoena witnesses. An indictment shall not be found nor a presentment made upon the statement of a grand juror unless such grand juror is sworn and examined as a witness. The grand jury shall find an indictment when all the evidence taken together, if unexplained or uncontradicted, would warrant a conviction of the defendant.

(r) **Admissibility of Evidence.**

(1) Evidence which would be legally admissible at trial shall be admissible before the grand jury. In appropriate cases, however, witnesses may be presented to summarize admissible evidence if the admissible evidence will be available at trial. Except as stated in subparagraphs (2) and (3), hearsay evidence shall not be presented to the grand jury absent compelling justification for its introduction. If hearsay evidence is presented to the grand jury, the reasons for its use shall be stated on the record.

(2) In a prosecution for an offense under AS 11.41.410 — 11.41.440 or 11.41.455, hearsay evidence of a statement related to the offense, not otherwise admissible, made by a child who is the victim of the offense may be admitted into evidence before the grand jury if

(i) the circumstances of the statement indicate its reliability;

(ii) the child is under 10 years of age when the hearsay evidence is sought to be admitted;

(iii) additional evidence is introduced to corroborate the statement; and

(iv) the child testifies at the grand jury proceeding or the child will be available to testify at trial.

(3) Hearsay evidence related to the offense, not otherwise admissible, may be admitted into evidence before the grand jury if

(i) the individual presenting the hearsay evidence is a peace officer involved in the investigation; and

(ii) the hearsay evidence consists of the statement and observations made by another peace officer in the course of an investigation; and

(iii) additional evidence is introduced to corroborate the statement.

(4) If the testimony presented by a peace officer under paragraph (3) of this section is inaccurate because of intentional, grossly negligent, or negligent misstatements or omissions, then the court shall dismiss an indictment resulting from the testimony if the defendant shows that the inaccuracy prejudices substantial rights of the defendant.

(5) In this section "statement" means an oral or written assertion or nonverbal conduct if the nonverbal conduct is intended as an assertion.

(s) **Discharge and Excuse.** A grand jury shall serve until discharged by the presiding superior court judge of the judicial district but no grand jury may serve more than 4 months, unless for good cause such period is extended. At any time for cause shown the presiding judge may excuse a juror either temporarily or permanently and may impanel an alternate juror in place of the juror excused. In order to vote on the proposed bill, the alternate juror must be present during the presentation of all evidence related to that case.

(t) **Delegation of Duties.** Whenever a superior court is sitting other than where the presiding judge is sitting, or the presiding judge is unavailable, the presiding judge may delegate duties under this rule to another judicial officer. However, the presiding judge may delegate duties under Criminal Rule 6.1 only to another superior court judge.

(u) **Telephonic Testimony.**

(1) A witness may participate telephonically in grand jury proceedings if the witness is not a victim and the witness:

(A) would be required to travel more than 50 miles to the situs of the grand jury; or

(B) lives in a place from which people customarily travel by air to the situs of the grand jury.

(2) A witness who is not entitled to participate telephonically under subparagraph (1) may participate telephonically with approval of the presiding judge of the judicial district, or the presiding judge's designee. A motion to allow telephonic testimony under this subparagraph may be ex parte and shall be accompanied by an affidavit of the prosecuting attorney that states the reason telephonic testimony is requested.

(3) If a witness participates telephonically in grand jury proceedings, after the witness is sworn, the prosecuting attorney shall require the witness to:

(A) state the location from which the witness is testifying; and

of another is not improper in determining a sentence to be voted against the accused. *Burleson v. State*, Op. No. 1222, 543 P2d 1195 (Alaska 1975).

The supreme court's function, in a sentence appeal, is to determine whether the trial court was clearly mistaken in imposing the particular sanction. *Burleson v. State*, Op. No. 1222, 543 P2d 1195 (Alaska 1975).

Sentencing court must unequivocally bring home to defendant that he has right to make a statement in his own behalf and to present any information in mitigation of punishment. *Natras v. State*, Op. No. 1314, 554 P2d 399 (Alaska 1976).

Actual consideration of police contacts will not invalidate sentence if from the record or by witnesses' testimony the court is aware of the circumstances and outcome of the contacts. *Buchanan v. State*, Op. No. 2553, 561 P2d 1197 (Alaska 1977).

Sentencing court may rely on psychiatric report which defendant explained police contacts in reaching a diagnosis. *Buchanan v. State*, Op. No. 1316, 561 P2d 1197 (Alaska 1977).

Mere awareness by sentencing court of other police contacts will not serve to invalidate an otherwise valid sentence. *Buchanan v. State*, Op. No. 1316, 561 P2d 1197 (Alaska 1977).

Sentencing judge may consider instances of past anti-social behavior, substantiated by supporting information, even though defendant was not charged or convicted. *Nukapigak v. State*, Op. No. 1410, 562 P2d 697 (Alaska 1977).

Question, "Do you have anything you want to say before we impose sentence?" was minimal compliance with allocation requirement of this rule, where defendant was sentenced four months before Supreme Court imposed more stringent Natras standard. *Capwell v. State*, Op. No. 1482, 568 P2d 10 (Alaska 1977).

Trial court's failure to afford defendant the opportunity to make a statement on his own behalf at sentencing hearing was harmless error. *Mohr v. State*, Op. No. 1719, 584 P2d 40 (Alaska 1978).

Under Rule 32(a) the obligation is on the court to afford defendant the opportunity to speak and not on the defendant to request such an opportunity, hence defendant's failure to assert actively his right of allocution did not constitute error. *Mohr v. State*, Op. No. 1719, 584 P2d 40 (Alaska 1978).

Defendant's contention that consideration of his juvenile record by the court imposing sentence violated his right to a fair trial was rejected. *Pena v. State*, Op. No. 1774, 588 P2d 40 (Alaska 1978).

Despite the fact that defendant spoke at some length under cross-examination by his counsel at the sentencing hearing, the court's failure to inform him of his right of allocution constituted error. *Law v. State*, Op. No. 2301, 624 P2d 40 (Alaska 1981).

In order to establish a claim of racial bias in sentencing, defendant must show that the sentence was probably higher than that which would have been imposed upon a defendant of different race with a like criminal history who committed a similar offense. *Coleman v. State*, Op. No. 2190, 621 P2d 869 (Alaska 1980).

Trial court, in conducting a hearing pursuant to this rule to determine whether mitigating and aggravating factors have been established, may consider evidence previously introduced at the trial. *Wolf v. State*, Op. No. 99, 647 P2d 609 (Alaska App. 1982).

Where defendant was given a chance to exercise his right of allocution just prior to sentencing and did not exercise that right on the ground that he needed more time to prepare, failure of the trial judge to give the defendant more time was not error. *Hastings v. State*, Op. No. 706, 736 P2d 1157 (Alaska App. 1987).

Denial of allocution may be harmless where the defendant is subject to presumptive sentencing, no aggravating or mitigating factors are established, and the totality of the circumstances would not warrant referral to a three-judge panel for sentencing. *Johnson v. State*, Op. No. 858, 762 P2d 493 (Alaska App. 1988).

Trial judge's oversight in denying defendant allocution was harmless beyond a reasonable doubt where the judge had already rejected proposed mitigating factors and possible referral to a three-judge panel for sentencing. *Johnson v. State*, Op. No. 858, 762 P2d 493 (Alaska App. 1988).

### Rule 32.1. Presentence Procedure for Felony Sentencings.

(a) **Scheduling.** At the time guilt in a felony case is established by verdict or plea, the judge shall establish the date for a sentencing hearing and a presentencing hearing, if appropriate, and shall order a presentence investigation by the Department of Corrections. If the judge elects to schedule a single hearing, all of the procedures for the presentencing and sentencing hearings shall be applicable at the single hearing.

#### (b) Presentence Investigation and Report.

(1) The Department of Corrections shall prepare and deliver the report of the presentence investigation not less than 30 days before the presentencing hearing. The report shall contain any prior criminal conviction and any finding of delinquency of the defendant and such information about the defendant's characteristics, financial condition, and the circumstances affecting the defendant's behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the judge. The presentence report shall comply with the Victims' Rights Act, AS 12.61.100-.150.

The report shall be submitted to the judge, the state's attorney, and the attorney for the defendant; the defense attorney shall not be prohibited from providing a full copy to the defendant unless the judge enters on the record findings why providing specific portions of the report to the defendant would prove detrimental to the rehabilitation of the defendant or the safety of the public.

Unless otherwise ordered, or except as specifically allowed by other provisions of law, further disclosure of the report shall be limited to agents of the state's attorney or the defendant's attorney, any reviewing courts, and the agencies having charge of the defendant's rehabilitation.

(2) In the event the parties request preparation of a presentence report to aid them in reaching a plea agreement, the judge may order such a report made prior to the time stated in this rule. If a report is prepared prior to entry of a verdict or plea of guilty or no contest, the report shall be submitted only to the parties and not to the judge.

(3) Notwithstanding subparagraph (b)(2), the judge may use the presentence report to determine whether to accept a plea agreement under Criminal Rule 11.

**(c) Notice of Aggravating and Mitigating Factors, Extraordinary Circumstances, Prior Convictions, and Other Information to be Relied on at Sentencing.** (1) Within ten days after receipt of the presentence report, each party shall file:

(A) notice of any aggravating or mitigating factors, pursuant to AS 12.55.155, or extraordinary circumstances, pursuant to AS 12.55.165, on which it intends to rely, supported by a written statement outlining, as an offer of proof, the evidence that counsel contends establishes each aggravating or mitigating factor or extraordinary circumstance; and

(B) a memorandum giving notice of any evidence which the party intends to rely on at sentencing which was not previously presented at a prior proceeding in the case, in the notice described in (c)(1)(A), or in the presentence report. If the party intends to present additional witnesses, the memorandum shall include a list of these witnesses and a brief summary of their anticipated testimony. The memorandum need not give notice of matters to be mentioned in a defendant's allocution or a victim's oral statement.

(2) Within ten days after receipt of the presentence report, the state shall file:

(A) notice of the prior convictions, if any, on which it intends to rely for presumptive sentencing purposes; and

(B) notice of the amount of restitution, if any, it intends to request, supported by a memorandum or exhibits that establish the basis for the restitution request.

**(d) Disputing Aggravating and Mitigating Factors, Extraordinary Circumstances, Prior Convictions, or Other Information.** (1) Within ten days after receipt of the notices required by paragraph (c), each party shall file:

(A) notice whether the party concedes or disputes each aggravating or mitigating factor or extraordi-

nary circumstance asserted by the opposing party; and

(B) notice of objection to any information in the presentence report or in any other material the judge or opposing party has identified as a source of information to be relied on at sentencing on the ground that such information is insufficiently verified or is inaccurate. For each item a party contests as inaccurate, that party shall submit an affidavit from the party or another witness with personal knowledge outlining the testimony the witness is prepared to provide to refute or to explain the allegation, or a notice that the party has served or attempted to serve a subpoena upon the person who provided the contested information and intends to examine the person at the presentencing hearing.

(2) Within ten days after receipt of the notices required by paragraph (c), the defense shall file:

(A) notice of any objection to any of the prior convictions relied on by the state and a statement of the grounds for the objection as provided in AS 12.55.145(c), which shall be supported by affidavit if the objection is based on facts outside the record; and

(B) notice of any objection to any restitution request and a statement of grounds for the objection.

**(e) Presentencing Hearing.** At the presentencing hearing, the judge shall review the notices filed pursuant to paragraphs (c) and (d). The judge shall enter findings as to undisputed facts. For each allegation a party contends is based on insufficiently verified information, the judge shall determine whether the allegation is sufficiently verified and shall order stricken from the presentence report any allegation the judge finds is not sufficiently verified. The judge shall provide an opportunity for argument and then shall enter conclusions on legal issues that may be resolved without an evidentiary hearing. The judge shall clarify the material disputed facts, so that the parties can be prepared to present witnesses at the sentencing hearing.

(Added by SCO 157 effective February 15, 1973; amended by SCO 218 effective January 15, 1976; by SCO 536 effective October 1, 1982; by SCO 643 effective September 15, 1985; repealed and reenacted by SCO 1136 effective July 15, 1993)

#### Annotations

#### Cases

Sentence of five years' imprisonment for burglary, two of which were suspended, was not clearly mistaken, even though the defendant was 19 years old and it was his first felony offense. *Zuribuh v. State*, Op. No. 2234, 620 P2d 690 (Alaska 1980).

Where defendant was convicted of assault with a dangerous weapon for striking another person in the face with a beer bottle, sentencing court was not clearly mistaken in imposing

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE BRICE

TO: HB 462

1 Page 1, after line 4:

2 Insert a new bill section to read:

3 **\*\* Section 1.** AS 28.35.030(h) is amended to read:

4 (h) The court shall order a person convicted under this section to satisfy the  
5 screening, evaluation, referral, and program requirements of an agency authorized by  
6 the court to make referrals for rehabilitative treatment or to provide rehabilitative  
7 treatment. An agency that refers a person for rehabilitative treatment shall  
8 maintain records of the person's compliance with the rehabilitative treatment  
9 program and shall comply with rehabilitative treatment recommendations of the  
10 division of alcoholism and drug abuse established under AS 47.37.020. If a person  
11 is convicted under (n) of this section, the court shall order the person to be evaluated  
12 as required by this subsection before the court imposes sentence for the offense."

13 Page 1, line 5:

14 Delete "Section 1."

15 Insert "Sec. 2."

16 Renumber the following bill sections accordingly.

17 Page 2, after line 1:

18 Insert a new bill section to read:

19 **\*\* Sec. 3.** AS 28.35.032(l) is amended to read:

20 (l) The court shall order a person convicted under this section to satisfy the  
21 screening, evaluation, referral, and program requirements of an agency authorized by  
22 the court to make referrals for rehabilitative treatment or to provide rehabilitative

1 treatment. An agency that refers a person for rehabilitative treatment shall  
2 maintain records of the person's compliance with the rehabilitative treatment  
3 program and shall comply with rehabilitative treatment recommendations of the  
4 division of alcoholism and drug abuse established under AS 47.37.020. If a person  
5 is convicted under (p) of this section, the court shall order the person to be evaluated  
6 as required by this subsection before the court imposes sentence for the offense."

7 Renumber the following bill sections accordingly.

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3067 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

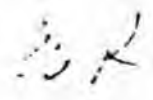
130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

## MEMORANDUM

February 26, 1996

**SUBJECT:** Sectional Summary of HB 462.

**TO:** Representative Brian Porter

**FROM:** Michael F. Ford  
Legislative Counsel 

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

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

**Section 1.** Allows a court to impose part or all of the remaining portion of a suspended sentence for driving while intoxicated, if the convicted person fails to meet required alcohol rehabilitation treatment conditions.

**Section 2.** Allows a court to impose part or all of the remaining portion of a suspended sentence for refusing to take a chemical breath test, if the convicted person fails to meet required alcohol rehabilitation treatment conditions.

**Section 3.** Technical amendment to allow certain hearsay evidence in a felony prosecution to be presented to the grand jury.

**Section 4.** Allows hearsay evidence of prior convictions to be presented to the grand jury, in a felony prosecution for driving while intoxicated under AS 28.35.030(n) or refusal to take a chemical breath test under AS 28.35.032(p).

**Section 5.** Technical amendment regarding pre-sentence investigations by the Department of Corrections.

**Section 6.** Provides that unless the defendant is subject to a presumptive term of imprisonment, a pre-sentence investigation by the Department of Corrections is not required for a person convicted of felony driving while intoxicated or felony refusal to take a chemical breath test.

Representative Brian Porter

February 26, 1996

Page 2

**Section 7.** Applicability clause.

**Section 8.** Effective date.

MFF:glc

96-126.glc

# STATE OF ALASKA

## DEPARTMENT OF LAW

CRIMINAL DIVISION  
February 27, 1996

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

CRIMINAL DIVISION CENTRAL  
OFFICE  
P.O. BOX 110300  
JUNEAU, ALASKA 99811-0300  
PHONE: (907) 465-3428  
FAX: (907) 465-4043

OFFICE OF SPECIAL PROSECUTION  
AND APPEALS  
310 K STREET, SUITE 308  
ANCHORAGE, ALASKA 99501-2000  
PHONE: (907) 269-6250  
FAX: (907) 269-6270

The Hon. Brian Porter, Chairman  
House Judiciary Committee  
House of Representatives  
State Capitol, Room 118  
Juneau, Alaska 99801

Re: House Bill 462

Dear Representative Porter:

This is in response to your request for a legal analysis of HB 462, an act addressing driving while intoxicated offenses, Rules of Criminal Procedure, and providing for an effective date.

HB 462 amends the provisions of AS 28.35.030 and AS 28.35.032 as they relate to the powers and duties of the court if a person fails to complete a program of alcohol rehabilitation authorized by the court, after having been convicted of felony driving while intoxicated or felony refusal to submit to a chemical test. Present law requires the court to impose the entire remaining suspended sentence in these circumstances. Under HB 462, the court would have the discretion to impose either a part or all of the remaining sentence. This discretion would be very useful to the court in encouraging a defendant to return to treatment by having additional time to impose if the defendant again fails to finish the treatment program.

The bill also amends the Alaska Rules of Criminal Procedure to allow hearsay evidence of prior convictions to be used before the grand jury in felony driving while intoxicated and refusal to submit to a chemical test cases. This is particularly important in cases where prior convictions have occurred in other states. Although grand juries must be conducted within 10 days of arrest, it is often very time consuming to obtain certified copies of judgments. The use of criminal records to establish prior offenses would enable the cases to be brought to the grand jury in a timely way.

Finally, HB 462 amends the Alaska Rules of Criminal Procedure to allow felony driving while intoxicated and refusal to submit to a chemical test cases to proceed to sentencing without a presentence report, unless a presumptive sentence applies to the case. Defendants in these cases have been fairly and efficiently sentenced without a presentence report for many years; the expense and time of preparing a presentence report is not justified unless presumptive sentencing applies.

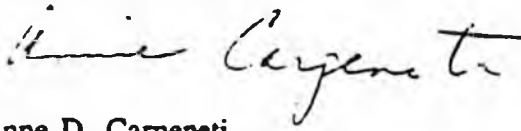
The Hon. Brian Porter, Chairman  
House Judiciary Committee

February 27, 1996  
Page 2

The Department of Law strongly supports the passage of HB 462. We will be pleased to assist in its progress through the legislature in any way.

Very truly yours,

BRUCE M. BOTELHO  
ATTORNEY GENERAL

By:   
Anne D. Carpeneti  
Assistant Attorney General

ADC:rew

# FISCAL NOTE

**STATE OF ALASKA**  
**1996 LEGISLATIVE SESSION**

**BILL NO: HB 462**

Revision Date: \_\_\_\_\_ Dept. Affected: Public Safety  
 Title: An Act relating to the offenses of driving while BRU: Motor Vehicles  
intoxicated and refusal to submit. Component: Driver Services  
 Sponsor: Rep Porter  
 Requestor: House Transportation COMPONENT SERIAL NO. 0500

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

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	0	0	0	0	0	0

<b>CAPITAL EXPENDITURES</b>	-0-	-0-	-0-	-0-	-0-	-0-
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<b>CHANGE IN REVENUES</b> (1006) ) Revenue Code	0	0	0	0	0	0
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**FUNDING: (Thousands of Dollars)**

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	0	0	0	0	0	0

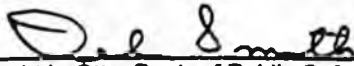
Estimate of current year (FY 96) impact: \$ 0

**POSITIONS:**

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

**ANALYSIS: (Attach a separate page if necessary.)**

This bill has no fiscal impact on Division of Motor Vehicles.

Prepared By: Charles R. Hosack Phone: 269-5559  
 Division: Motor Vehicles Date: 2/26/96  
 Approved by Commissioner:  Date: 2/27/96  
 Agency: Ronald L. Otte, Dept. of Public Safety

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# FISCAL NOTE

**STATE OF ALASKA**  
**1996 LEGISLATIVE SESSION**

**BILL NO:** HB 462

Revision Date: \_\_\_\_\_ Dept. Affected: Public Safety  
 Title: Drunk driving: Evidence and Sentencing BRU: Alaska State Troopers  
 Component: Detachments  
 Sponsor: Representative Porter  
 Requestor: H. Transportation COMPONENT SERIAL NO. 0799

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

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>CAPITAL</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>CHANGE IN REVENUES ( )</b> Revenue Code	-0-	-0-	-0-	-0-	-0-	-0-

**FUNDING: (Thousands of Dollars)**

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

Estimate of current year (FY 96) 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.)**

This bill will not have a fiscal impact on the Division of Alaska State Troopers.

Prepared By: Lt. Dan Lowden Phone: 465-5505  
 Division: Alaska State Troopers Date: February 28, 1996  
 Approved by Commissioner: *Del Smith* Date: 2/28/96  
 Agency: Ronald L. Otte, Department of Public Safety

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# FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. HB 462 | \_\_\_\_\_

Revision Date: 12/1/95 Dept. Affected: Corrections  
 Title: "An Act relating to the offenses of driving while BRU: Statewide Programs  
intoxicated and refusal to submit to a chemical test..." Component: Community Corrections  
 Sponsor: Representative Porter  
 Requester: House Transportation COMPONENT SERIAL NO. 1382

**Expenditures/Revenues**

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES	(104.0)					
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>(104.0)</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE**

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	(104.0)					
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TCTAL</b>	<b>(104.0)</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY96) cost: \$ 0.0

**POSITIONS**

FULL-TIME	-2					
PART-TIME						
TEMPORARY						

**ANALYSIS:** (Attach a separate page if necessary)

The impact of automatic imposition of a suspended sentence was not previously considered. The more permissive language will not result in reduced costs allocated to incarceration costs in the fiscal note submitted with HB 159 signed by the Governor in 1995.

Rule 32.1(a) as amended in Sec. 5 of this bill will require pre-sentence investigations in 69 cases annually. 261 cases will be subject to the discretion of the trial court judge. It is assumed the court will chose to order a pre-sentence investigation in 50 percent of these cases. This will result in a projected decrease of 130 Pre-sentence investigations annually. Staff will be reduced by two probation officers and personal services will be reduced by \$104.0.

2 PO II X 52.0 annual salary = \$104.0 (decrement)

This decrement assumes that the 5 positions and funding related to HB 159 are annualized and will be funded in FY 97 without this legislation

Prepared by: Jerry Shriner Phone: 485-4640  
 Division: Office of the Commissioner Date: 2/12/96  
 Approved by Commissioner: Margaret M. Pugh Margaret Pugh Date: 2/12/96  
 Agency: Department of Corrections

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