ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672
9722 SENATE RULES

HB

193

UNIVERSITY OF ALASKA

UNIVERSITY OF WASHINGTON - WWAMI MEDICAL PROGRAM

The State of Alaska and the University of Alaska have a contract with the University of Washington to provide medical school services and opportunities through a regional program extended to Western states that do not have their own medical schools (Washington, Wyoming, Alaska, Montana and Idaho). The WWAMI consortium provides reserved seats in the UW medical school for students from the WWAMI states as well as medical services, programs, and access to health care that would not otherwise be available without an in-state medical school. WWAMI students attend the first year of the program at in-state universities and subsequent years at the University of Washington.

For the seventh year, the UW medical school is ranked as the #1 medical school for primary care, rural medicine and family medicine by the U.S. News and World Report ranking of medical schools. These are the specialties that that Alaska needs and they are the specialties selected by the vast majority of WWAMI students.

STATE COST FOR PARTICIPATION:

Costs for participation in the WWAMI program are derived by dividing the actual cost of the program among the participating states. The FY99 costs for Alaska are as follows:

2nd year students (10)	$421,987
3rd year students (10)	416,234
4th year students (10)	265,248
WWAMI program admin	163,950
Community clinical units	87,581
TOTAL	$1,355,000

UNIVERSITY OF ALASKA COST FOR FIRST YEAR MEDICAL PROGRAM:

Expenditures:	$751.163	Revenue:	$655,185	GF
			95,978	Tuition/fees
			$751.163	TOTAL

WHAT DOES ALASKA GET FOR ITS MONEY?

1. Ten seats/year reserved for Alaskans: As in-state pressure increases on medical schools, it has become extremely difficult for out-of-state students to gain admittance, regardless of qualifications.

2. Clerkships/Preceptorships in Alaskan communities: Dozens of WWAMI students each year are working with doctors and in clinics and hospitals around Alaska. These opportunities are part of the student's training, but also contribute significantly to the quality of Alaska's health care. ($500,000/yr)

3. Specialty Clinics: In 1998 sixty days of specialty clinics were held in Alaska. The clinics bring UW doctors together with Alaskan doctors and patients to review particularly complicated cases. ($75,000/yr)

4. WWAMI Rural Telemedicine Network: Using videoconferencing technology, rural providers and patients can talk directly with consultants while electronically exchanging information and images. ($200,000/yr)

5. Physicians Assistance Program: UW Medex program is working with UAA's WWAMI program to develop a physician's assistance program that is expected to be operational at UAA in 1999. ($50,000)

6. Alaska Family Practice Residency: Alaska's affiliation with WWAMI has allowed Providence Hospital to establish a family practice residency program that will generate millions of dollars a year to the Anchorage area, and provide training in Alaska's highest health care field.

7. Professional Development/Consultations: The WWAMI affiliation provides the opportunity forAlaska doctors to have access to the UW medical school staff for regular consultations, seminars, and other professional development activities. ($111,000/yr)

8. Rural Research Center: WWAMI's Rural Research Center provides consultation on community health systems, including infrastructure requirements and workforce issues. ($75,000/yr)

9. Research on Alaska specific health issues: Through WWAMI, several significant research projects dealing with Alaska health issues including diabetes, alcohol, and TB are currently underway. ($500,000/yr)

In addition to the training of Alaskan doctors, the return to Alaska from WWAMI participation is worth at least $1,511,000 per year in medical services and programs.

STUDENT EXPENSES/SUBSIDIES:

Alaskan students pay the Washington in-state tuition rate of approximately $8,500/yr.
The State of Alaska pays the differential between in-state and out-of-state tuition, approximately $13,000/yr.

HOW THE OTHER WWAMI STATES OPERATE:

IDAHO:	State pays out of state tuition differential with no further student obligation.
WYOMING:	Tuition differential for years 2, 3, & 4 are converted to loan if students do not return to state for 3 years.
MONTANA:	Students pay a surcharge of 8% of the state's per student WWAMI costs (approximately $3,000/year) that goes into a Rural Physician Incentive Program administered by the Board of Regents. Doctors (WWAMI graduates or any others) who serve in designated medically underserved areas of the state may apply to the Incentive Program for funds to repay their medical education debt.
ALASKA:	HB 193 would covert state-paid out-of-state tuition differential for years 1, 2, 3 & 4 to a loan if students do not return to Alaska to practice for 4 years. The total repayment would amount to approximately $60,506 ($121,951 including interest). Additional medical education debt averages $60,000.

RETURN RATE OF WWAMI PARTICIPANTS (as of 1997)*

	ALASKA	IDAHO	MONTANA
State Graduates in Practice	145	283	269
State WWAMI Return to State	72	102	114
State Return Rate	49.6%	36%	42.4%
Avg. for 10 Western states w/ med schools	40.9%		
Other WWAMI's Practicing in State	30	57	30
Total WWAMI Return to State	102	159	144
State WWAMI Return Rate	70.3%	56.2%	53.5%

* Wyoming program began in 1997 so no comparable data is available yet.

HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

P.O. BOX V, JUNEAU 99811
(907) 465-3759

SPONSOR STATEMENT

SCS CS HB 193 (FIN)

"An Act relating to financial assistance for students attending certain graduate education programs; and providing for an effective date."

SCS CS HB 193 (FIN) would convert the WWAMI Medical Education Program into a loan program. WWAMI has been a program of financial assistance named for the participating states of Washington, Wyoming, Alaska, Montana and Idaho. In FY 98, over $1,750,000 in general fund dollars were authorized for this program. Alaska is investing an average of $43,750 per student per year and yet historically fewer than 50% of these students are returning to Alaska to practice medicine.

Currently the WWAMI program has no real incentive for students to return to the state upon completion of their education. The purpose of this bill is to provide an incentive for these students to return to Alaska bringing the benefit of their medical training.

If graduate medical professionals who have benefited by this program choose to return to Alaska to work, SCS CS HB 193 (FIN) has a forgiveness provision of 20% per year for up to five years of work in their field of medicine. Conversely, if the recipients decide not to return to the state after terminating studies under the graduate education program, repayment will be required to begin not later than six months after the students complete their studies and are no longer in a medical residency, medical fellowship program, or performing a service obligation imposed by the National Health Service Corps, Indian Health Service or the Uniformed Service Scholarship Program. Those who fail to return and practice in Alaska will pay the tuition differential represented by nonresident tuition costs, which are only a portion of the fees that support the WWAMI program.

If participants choose to return to the state later than six months, forgiveness would only apply to the financial aid that has not yet been repaid to the state. Converting this program to a loan program and including a provision for loan forgiveness may be the incentive needed for Alaskans to bring their new skills back home.

CS FOR SENATE BILL NO. 170(HES)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE SENATE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

Offered: 4/30/97
Referred: Finance

Sponsor(s): SENATOR TAYLOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to financial assistance for students attending certain graduate education programs; and providing for an effective date."

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

*** Section 1.** AS 14.42.030(d) is amended to read:

(d) The commission may enter into agreements with government or postsecondary education officials of this state or other states to provide postsecondary educational services and programs to Alaska residents pursuing a medical education. An agreement with another state must be limited to services and programs that are unavailable in Alaska. **The commission shall require a person participating in a medical education program offered under this subsection to agree to the repayment condition imposed under AS 14.44.040.**

*** Sec. 2.** AS 14.44 is amended by adding a new section to article 1 to read:

Sec. 14.44.040. Repayment condition for medical education program participants. (a) Except as provided under (b) and (c) of this section, as a condition

of eligibility for receiving financial aid under AS 14.44.010 - 14.44.040, a program participant shall agree to receive a portion of the financial aid as a loan, to be repaid to the state. The portion of the financial aid received as a loan to be repaid to the state is equal to the difference between resident and nonresident tuition at the contracting postsecondary institution plus interest. The rate of interest is equal to the 12th Federal Reserve District discount rate in effect on March 1 of the year in which the financial aid is received plus two percentage points. Interest imposed under this subsection begins to accrue when the person terminates studies under the graduate education program. Accrued interest shall be added to the principal balance of the loan at the time the borrower is obligated to commence repayment and at the end of a deferment period.

(b) If a person required to repay a loan under (a) of this section has graduated from the graduate education program for which the loan was received and is employed within the state in the field for which the person received the loan, including employment within the state in a medical residency program, the loan shall be forgiven and considered a grant in an amount equal to the following percentages plus accrued interest:

(1) one year employment, 20 percent;

(2) two years employment, an additional 20 percent;

(3) three years employment, an additional 20 percent;

(4) four years employment, an additional 20 percent;

(5) five years employment, an additional 20 percent.

(c) Repayment under (a) of this section is required to begin not later than six months after the person terminates studies under the graduate education program, except that a person who qualifies for forgiveness under (b) of this section is not required to begin repayment to the state as long as the person remains qualified for forgiveness under (b) of this section. A person employed in a medical residency program is not required to begin repayment to the state as long as the person remains in the medical residency program. Forgiveness under (b) of this section only applies to that portion of the loan that has not been repaid to the state.

(d) If a person meets the qualifying conditions under this section for

forgiveness after beginning repayment, the repayment requirement is deferred in the month following qualification for forgiveness. Repayment shall be deferred as long as the person remains qualified or until the balance of the loan has been fully forgiven. If the person is delinquent or in default on the person's regular repayment schedule, repayment shall continue until the person is current in payments. A period of time during which the person is making past due payments may not be considered as a qualifying period for the purpose of calculating forgiveness benefits.

(e) For purposes of qualifying for forgiveness under this section, a person must be a full-time employee for a period of at least six months in order to qualify for a prorated forgiveness benefit. In this subsection, "full-time employee" does not include seasonal or temporary employment.

(f) A person's obligation to repay the loan under this section ends if the person dies and is deferred during any period in which a physician certifies that the person is totally disabled.

(g) This section does not apply to loans received by a person under AS 14.43.

(h) The commission may adopt regulations to implement this section. Except as provided in this section, regulations adopted under this subsection may not exempt or defer a repayment required under this section.

* **Sec. 3.** APPLICABILITY. This Act applies to a person who begins a graduate education program and who receives financial aid from the state under AS 14.44.010 - 14.44.040, or for a medical education program under AS 14.42.030(d), on or after July 1, 1997.

* **Sec. 4.** This Act takes effect July 1, 1997.

HB 198

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Copies of minutes listed below were originally included in this file. The minutes are available on the legislative computer database. In order to save space copies of minutes have not been left in the files.

Mary Pagenkopf

Senate Rules Committee 5/8/97 1:10 pm

Alaska State Legislature

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Economic Development
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Representative William K. Williams

SPONSOR STATEMENT

HOUSE BILL 198

"An Act relating to regional dive fishery development associations and to dive fishery management assessments; and providing for an effective date."

Southeast Alaska dive fishermen have been attempting for the past decade to establish orderly, consistent and stable fisheries capable of providing dependable economic opportunity for themselves, their families and the communities of southeast. The urgency to create an economically viable fishery is highlighted by the recent closure of the regions largest employer and other related negative economic effects on the economy of southeast Alaska.

Substantial untapped dive fishery resources have been identified through diver and ADF&G underwater activities for over a decade. Many of the southeast communities have placed the development of the dive fishery as a priority item in economic development documents and locally developed legislative budget priorities. The dive fishery resources appear to be abundant and diverse throughout the region. The small sea cucumber and geoduck fisheries in southeast have a combined annual ex-vessel value of $2.0-2.5 million dollars. In California, the urchin fishery has ranged in ex-vessel value from $16 to $39 million dollars from 1990-1996. Geoducks range in price from $6/lb. live to $3.50/lb. processed. Alaskan waters contain abundant amounts of these fishery resources plus many others not currently harvested. This legislation will encourage the identification and development of these resources. The potential for future jobs for harvesters, processors and support industries is considerable.

The commitment to work together is evidenced in the red sea urchin fishery. In 1996, the Alaska Department of Fish & Game (ADF&G), after a test fishery, was unable to open the red sea urchin fishery because of lack of funding. Based on positive results in the test fishery and a vision to diversify and develop their local economy, the Ketchikan Gateway Borough provided funding to ADF&G to conduct bioassessment surveys needed to open the fishery. The Borough continued in its involvement by facilitating and participating in a local task force comprised of Borough personnel, divers, processors and ADF&G. The resulting plan was for processors to "forward fund" the management costs of the fishery with agreements to recoup their funding through a $.05/lb. assessment on divers. Thus, in January 1997, a red urchin fishery opened in districts 1 through 4 in the Ketchikan and Craig areas.

This temporary fishery opening is based on a one time source of funding that will expire June 30, 1997. In order to continue this fishery, and to develop the other dive fishery resources, a stable source of funding is necessary.

The August 1996 red urchin management plan states: "Developing a long-term program to fund the costs of stock assessment, research and management remains an outstanding issue. If sufficient funds are not provided to the department each year, the fishery will not open." This is the dilemma divers face and House Bill 198 provides a creative and progressive vehicle to move towards a solution.

House Bill 198 does not mandate but allows the creation of regional dive fishery development associations for the purpose of developing dive fisheries and creates a working relationship between the divers and ADF&G to develop annual operating plans. The legislation is permissive and once a regional association is formed, divers can hold a ballot election of all interim-use permit holders to answer two questions: 1) shall we assess ourselves, and 2) at what rate shall we assess ourselves.

If approved by election, divers would be assessed, the state would collect, and the legislature may appropriate the assessment back to ADF&G. The appropriation will be based on the mutually developed annual operating budget and plan. ADF&G would then fund the specific purposes outlined in the legislation for the regional dive fishery development association and ADF&G.

All the appropriate checks and balances are in place and all parties are held accountable. In addition, all other fisheries business taxes are collected and deposited into the general fund.

House Bill 198 is a positive step forward by the private sector to support economic development and diversification without seeking a general fund appropriation. Time is of the essence. I would appreciate your support of this legislation for passage this session to keep the economic development for southeast moving forward.

Alaska State Legislature

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Economic Development
Rules

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Representative William K. Williams

SECTIONAL ANALYSIS

CS for House Bill 198(FIN)

"An Act relating to regional dive fishery development associations and to dive fishery management assessments; and providing for an effective date."

Section 1

Sec.16.40.240. Regional dive fishery development associations.

- Allows the creation of regional dive fishery development associations for the purpose of developing dive fisheries.
- Association becomes qualified if the commissioner of Fish & Game makes the following determinations:

    1. it is incorporated as a nonprofit corporation;
    2. represents commercial divers in the region; and
    3. the board has representation from each of the significant commercial dive areas in the region; a processor of dive fishery resources; and, a representative of the municipalities in the administrative area.

Section 2

Sec.43.76.150. Dive fishery management assessment.

- Allows the divers to first form an association. The association then holds an election to determine their rate of assessment from rates (1%, 3%, 5%, 7% of value) set forth in the bill.
- If the association forms, determines to assess themselves at a certain rate, then this portion of the bill provides for the collection of this assessment by the Department of Revenue.

Sec. 43.76.160. Election to approve, amend, or terminate dive fishery management assessment.

- This section mirrors other language currently in statute. It outlines the time line, what must appear on the ballot. The commissioner of Fish & Game certifies the results of the election.
- This section also provides the same procedure for amending or terminating an assessment by the regional dive association.

Sec. 43.76.170. Amendment of dive fishery management assessment.

- Allows the Department of Revenue to amend a dive fishery management assessment if:

    1. 25% of the number of persons who voted in the original election present a petition to the commissioner of Fish & Game;
    2. an election is held asking the question to amend;
    3. a majority votes to amend; and
    4. the regional association provides proper notice.

Sec. 43.76.180. Termination of dive fishery management assessment.

- Allows the Department of Revenue to terminate a dive fishery management assessment if:

    1. 25% of the number of persons who voted in the original election present a petition to the commissioner of Fish & Game;
    2. an election is held asking the question to terminate;
    3. a majority votes to terminate; and
    4. the regional association provides proper notice.

Sec. 43.76.190. Collection of assessment. (Follows current method in statute.)

- Requires assessment to be collected at point of sale.
- Requires quarterly remittal to Department of Revenue.
- Requires the maintenance of buyer records.
- Requires the "owner" of the fishery resources to remit the assessment and maintain records if they remove the fishery resource from the state.
- Assessment deposited into general fund.

Sec. 43.76.200. Funding for qualified regional dive fishery development associations.

- Provides for appropriation of revenue to ADF&G for funding of qualified regional dive fishery development associations.
- The assessment collected in a particular administrative area will be returned to that administrative area.
- Funds may be expended by regional association for costs of management, research, and planning for dive fisheries and for the administration of the association.

- Requires associations receiving funding to:

    1. to develop an annual operating plan with the cooperation of ADF&G;
    2. plan must describe activities for which funds will be spent including:
        a. identification of species and areas for bioassessment surveys;
        b. description of management and research activities to be performed by both the regional association and ADF&G.

- Funds appropriated to ADF&G for the regional association cannot be spent by either the association or ADF&G (except for administration costs of the association) unless both parties have approved the annual operating plan.
- Requires an annual financial report to be submitted by the association to ADF&G.

Sec. 43.76.210. Definitions.

Provides definitions for the legislation.

Section 3

The bill will become effective upon passage.

HB 199

Alaska State Legislature

House of Representatives

COMMITTEE ASSIGNMENTS:

LABOR & COMMERCE
MILITARY & VETERANS AFFAIRS
COMMUNITY & REGIONAL AFFAIRS
OIL & GAS

Representative Joe Ryan

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House Bill 199
Sponsor Statement

Income tax advantage of community property

A person who owns assets with his or her spouse as community property in one of the nine community property states (Louisiana, Texas, New Mexico, Arizona, California, Nevada, Washington, Idaho, and Wisconsin) has a major income tax advantage over a married person who owns assets with his or her spouse but that are not community property. This advantage results from the incongruous operation of the step-up in basis rule. This rule is one of the few, if only, income tax advantages that a person's estate receives upon his or her death.

The best way to explain the step-up in basis rule is to start with an example of a single person in Alaska on her death bed who twenty years ago paid $10,000 for a homestead that is presently worth $110,000. If the person sold the homestead before she died, she would realize a long-term capital gain of $100,000. The gain would be subject to a maximum capital gains tax of 28%, or $28,000. On the other hand, if the person decided not to sell the homestead and died the next day, the $100,000 profit would be forgiven. This means that her heirs could sell the homestead for $110,000 and pay no income taxes! This is because the original cost basis of $10,000 is "stepped-up" to $110,000, the fair market value of the homestead at death. If the homestead is sold for $110,000 with its new basis of $110,000, there is no gain and no income taxes will be owed.

The step-up in basis rule gets more complicated when a married couple is involved. If we assume that a married couple in Alaska bought the homestead twenty years ago for $10,000 and held title as husband and wife, then each would own one-half of the homestead. If the husband was on his deathbed and the couple sold the homestead before the husband died for its current fair market value of $110,000, the couple would realize a $100,000 long-term capital gain just like the single person did. However, if the husband died and the wife inherited his half of the homestead and then sold it, she would only realize only a $50,000 long-term capital gain. This is because the profit in the husband's half of the homestead would be forgiven by the step-up in basis rule. The husband's half

of the homestead would get a "step-up" in basis to $55,000. When the husband's half was sold for $55,000 there would be no gain. However, the wife would have a gain on the sale of her half of the homestead. Her half of the homestead would have a basis of $5,000 (one-half of the original cost basis of $10,000). When this half was sold for $55,000, the wife would realize a $50,000 long-term capital gain and would pay a maximum of $14,000 of income taxes (28% of $50,000).

If, on the other hand, the couple lived in a community property state like Washington, the income tax savings would be even greater. If the homestead was community property under Washington law, for example, the wife would get a step-up in basis in both halves of the homestead to $110,000. After her husband's death when she sold the homestead for $110,000 she would pay no income taxes! In contrast, in the prior example of the married couple in Alaska who owned the homestead that was not community property, the wife who sold the homestead after her husband died would pay $14,000 of income taxes. In this way the income tax laws favor spouses in community property states who own assets as community property over spouses in non-community property states like Alaska who as a general rule cannot own assets as community property.

Overview of HB 199

This bill will allow married Alaskans to execute a written agreement to recharacterize their assets as community property. Unlike other states, which have a community property form of ownership for married persons, Alaskans would have their assets treated as community property only to the extent they execute a written agreement and elect into a community property system under Alaska law. In contrast, community property states mandate the married couple's assets to be community property unless the spouses elect out.

The bill not only allows Alaskan couples to enter into an agreement to have some or all of their assets treated as community property, but it also permits married persons who do not reside in Alaska to have their assets treated as community property under Alaska law by executing an Alaskan Community Property Trust. Such a trust must have an Alaskan trustee. It is anticipated that many married persons who reside outside of Alaska will wish to label a portion, or all, of their assets as community property because they believe that it is a more appropriate method of owning their assets and they wish to obtain the income tax advantages which are available to community property upon the death of the first spouse.

Some believe that community property represents a more fair and rational system of sharing the ownership of property during marriage because it essentially treats the marriage like a partnership; as assets are earned during the marriage, they are treated as owned 50/50 by the two partners (the husband and wife). Others believe community property is not a fair or rational system. Regardless of one's beliefs, it seems appropriate to allow Alaskans, and residents of other states, the freedom to choose the arrangement that is most appropriate for them.

It should be emphasized that no asset would be labeled as community property under the bill. Rather, the bill merely authorizes married persons to execute a written agreement or trust in which they expressly elect to treat some or all of their assets as community property under Alaska law.

FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. CSHB 199 (JUD)

Revision Date:
Title: Community Property

Sponsor: Rep. Ryan and Therriault
Requestor: House Rules

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

COMPONENT SERIAL NO.

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY02	FY 03	FY 04
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 General Fund						
1005 GF/Program Receipts						
1006 GF/Mental Health						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 98) cost: $ 0.0

POSITIONS

FULL-TIME	
PART-TIME	
TEMPORARY	

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Willis F. Kirkpatrick, Director Willis F Kirkpatrick Phone: 465-2521
Division: Banking, Securities and Corporations Date: 1-25-98

Approved by Commissioner: Deborah B. Sedwick Date:
Agency: Commerce and Economic Development

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MEMORANDUM March 25, 1997

SUBJECT: Sectional Summary of HB 199, the "community property" bill (Work Order No. 20-LS0522\E)

TO: Representative Joe Ryan
Attn: David Pree

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. The descriptions of the sections necessarily contain some generalizations and simplifications. As a result, please keep in mind that the bill itself is the best statement of its contents.

Section 1. States that community property under the new chapter (AS 34.75) is not included in the augmented estate. "Augmented estate" is a term used in the state's Uniform Probate Code to refer to the pot of property from which a surviving spouse can elect to take a one-third share; the property in the estate is "augmented" by adding to it certain other property transferred to others by the decedent.

Section 2. Makes an amendment to AS 25.15.010 to show that its provisions are subject to the new community property chapter (AS 34.75).

Section 3. Makes an amendment to AS 25.15.020 to show that the section is subject to the new community property chapter (AS 34.75).

Section 4. Makes an amendment to AS 25.15.050 to show that the provisions of the section are subject to the new community property chapter (AS 34.75).

Section 5. Makes an amendment to AS 25.15.060 to show that the provisions of the section are subject to the new community property chapter (AS 34.75).

Section 6. Adds a subsection to AS 25.24.160 (dealing with court judgments in divorce actions). The new subsection directs the court to distribute the parties' property under AS 34.75 according to their community property agreement or community property trust

under AS 34.75, if they have one. Directs the court to award one-half of the value of the community property to each party, unless the parties have agreed otherwise in the community property agreement or trust.

Section 7. Amends AS 25.24.200(a) (relating to dissolution of marriages) to include community property under AS 34.75.

Section 8. Amends AS 25.24.310(b) (relating to the payment of attorney fees, costs, and other disbursements in a child custody, support, and visitation matters) to include community property in the property that can be used to pay for a minor's legal representation or for other services.

Section 9. Amends AS 34.15.110 to make its provisions subject to the section in the new community property chapter, AS 34.75, that addresses how spouses can hold property. (The citation should be corrected to read "AS 34.75.110" in both places.)

Section 10. makes an amendment to AS 34.15.130. States that the conclusion that persons are tenants in common if they have an undivided interest in real property is subject to the provisions of the section in the new chapter, AS 34.75, that addresses how spouses can hold property. (The citation should be corrected to read "AS 34.75.110.")

Section 11. Adds a new chapter related to the property of spouses.

AS 34.75.010. Requires spouses to act in good faith towards each other if the matter involves community property. Prohibits changing this obligation in a community property agreement or trust.

AS 34.75.020. Allows a community property agreement or trust to change this chapter's effect, except for certain listed provisions.

AS 34.75.030. Limits the classification of property as community property to what the spouses say in a community property agreement or trust, except where this chapter classifies property otherwise.

Establishes a presumption that the spouses' property acquired during marriage and after the determination date (see AS 34.75.900 for definition) is community property, if the spouses' community property agreement says that all their property acquired during marriage is community property.

Gives a spouse a one-half interest in community property.

States that if the community property agreement states that all property acquired during marriage is community property, the income on the property is community property.

States that even if community property is transferred to a trust, it still remains community property.

States that property is not community property if it is owned by a spouse at the time of the marriage but before the determination date (see AS 34.75.900 for definition). This occurs even if the spouses' community property agreement provides that all property acquired during marriage is community property. However, the community property agreement may expressly provide differently.

States that certain listed property is individual property if it is owned by a spouse at the time of the marriage but before the determination date (see AS 34.75.900 for definition). This occurs even if the spouses' community property agreement provides that all property acquired during marriage is community property. However, the community property agreement may expressly provide differently.

States that appreciation and income of property transferred to a community property trust are community property if the trust says they are.

States that community property held in a trust remains community property when distributed to the spouses.

States that this chapter doesn't change property classification and ownership rights for property acquired before or during marriage, except as otherwise provided in this chapter.

AS 34.75.040. Identifies what property one spouse may manage and control alone.

Requires spouses to act together when managing and controlling community property that is held in both of their names (unless held in the alternative--"or").

States that the trust terms determine the management and control rights of community property transferred to a trust.

States that management and control rights for community property don't determine the classification of the property and don't rebut the presumption in AS 34.75.030(b).

States that management and control rights to community property do not permit gifts, except as provided in AS 34.75.050.

States that management and control rights are not affected by this chapter if the property is acquired before the determination date (see AS 34.75.900 for definition). Makes an exception to the extent provided otherwise in a community property agreement or trust.

Allows a court to appoint a conservator or guardian to handle the management and control rights of a disabled spouse.

AS 34.75.050. Prohibits one spouse acting alone from giving to a third party community property that the spouse manages and that is over $1,000 (in one calendar year), or is a larger amount unless the amount is reasonable considering the economic conditions of the spouses.

Subjects a gift not allowed under (a) of this section to a court action allowed under (d) unless both spouses act jointly or the gift is ratified by the other spouse.

Considers that the spouses have acted together when one spouse makes a gift, if either of certain U.S. gift tax activities occur.

Allows one spouse to bring a court action against a spouse making a gift that doesn't satisfy (a), or against the recipient of the gift, or both. Requires the action to be begun within a certain time. Characterizes a recovery during marriage as community property. Limits a recovery after dissolution or death of one spouse to one-half of the value of the gift and makes this recovery individual property.

AS 34.75.060. Allows spouses living in this state to classify all or part of their property as community property by using a community property agreement.

Allows spouses, even if not living in this state, to classify all or part of their property as community property by transferring the property to a community property trust that states that the property is community property.

AS 34.75.070. Establishes a presumption that an obligation incurred by a spouse during marriage is incurred in the interest of the marriage or family.

Restricts the satisfaction of a duty of support owed to the other spouse or child of the marriage to community property and the spouses's non-community property.

Restricts the satisfaction of an obligation incurred by a spouse in the interest of the marriage or family to community property and the non-community property of the spouse.

Restricts the satisfaction of certain obligations attributable to obligations, acts, or omissions before marriage to the non-community property of the spouse and certain community property.

Restricts the satisfaction of certain other obligation incurred by a spouse during marriage to the spouse's non-community property and the spouse's interest in community property.

States that this chapter doesn't change the spouses' relationship with their creditors with regard to property or obligations existing before the determination date (see AS 34.75.900 for definition).

Makes binding on a creditor a writing signed by the creditor that reduces the creditor's rights under this section.

States that creditor rights are not affected by a community property agreement or trust, unless the creditor knows about the effect when the obligation to the creditor is incurred. Prohibits changing the effect of this subsection by a community property agreement or trust.

States that this chapter doesn't affect a property exemption available under another law.

Sec. 34.75.080. Protects persons who are bona fide purchasers (in general, good faith purchasers for value without notice of a problem or adverse condition) in their transactions with spouses. States that notice of a community property agreement or trust, a marriage, or a marriage termination doesn't change the purchaser's status as a bona fide purchaser. Provides that certain community property purchased from one spouse by a bona fide purchaser is purchased free of any claim of the other spouse; prohibits changing this provision in a community property agreement or trust.

Sec. 34.75.090. Establishes certain requirements for and features of community property agreements. An agreement must be in writing, be signed, and make some property community property. Consideration (each spouse receiving something, usually money) is not needed for the agreement to be effective.

States that the agreement may not adversely affect a child's right to support.

Identifies various items that the spouses may agree on in the agreement.

Provides for the amendment or revocation of the agreement.

Allows persons who are not yet married to enter into an agreement, but prevents the agreement from becoming effective until they are married.

Establishes when community property agreements are unenforceable.

Provides that a court is the entity that determines whether an agreement is unconscionable (grossly unfair to one spouse).

Sec. 34.75.100. Establishes certain requirements for and features of community property trusts. To be a trust, it must be signed and state that some of the property transferred to the trust is community property, and one trustee must meet the qualifications given under the

section. Consideration (each spouse receiving something, usually money) is not needed for the trust to be effective.

States that the trust may not adversely affect a child's right to support.

Lists various items that the spouses may agree on in the trust.

Provides for the amendment or revocation of the agreement.

Establishes when community property trusts are unenforceable.

Provides that a court is the entity that determines whether a trust is unconscionable (grossly unfair to one spouse).

Requires the trustee to maintain certain records.

Sec. 34.75.110. Establishes how spouses may hold their property. Includes some new methods, e.g. holding separately or together as community property or holding as "survivorship community property" (where surviving spouse receives the other spouse's community property interest automatically). Provides for holding property as individual property.

Sec. 34.75.120. Prevents the issuer of an insurance policy from being liable because it makes payments or takes other actions on the policy, unless the issuer actually knew that the payments or actions were inconsistent with a community property agreement or trust or certain adverse claims.

Establishes some rules for how to classify the ownership of life insurance policies and proceeds.

States that this section does not affect a creditor's interest in a policy (or its proceeds) that is transferred or made payable to the creditor as security for an obligation.

States that this section does not affect the ownership interest or proceeds of a policy unless a spouse is listed as an owner and community property is used to pay a premium on the policy.

Sec. 34.75.130. Provides that other property becomes community property if it is mixed with community property and if it can't be traced (or except as provided in AS 34.75.110).

Provides that under certain conditions the individual property of one spouse is changed to community property if the other spouse contributes effort, skill, activity, etc. to the separate property.

Sec. 34.75.140. Gives a spouse a claim against the other spouse for failing to act in good faith, if the failure damages the claimant's community property interest.

Allows a court to order an accounting of the spouses' property and obligations. Allows a court to make certain listed determinations about the spouses' property.

Allows a court to order the addition of a spouse's name to the title of community property held in the name of only one spouse, except for certain listed property.

Requires a spouse to bring a court action against the other spouse under (a) within three years.

Sec. 34.75.150. After the death of a spouse living in this state and under certain circumstances, treats as community property the property that can be traced to certain recoveries of the decedent for a loss of earning capacity.

Sec. 34.75.160. Directs that this chapter is to be applied and construed uniformly with the laws on this same subject in other states and to be applied and construed to achieve its general purpose.

Sec. 34.75.900. Defines the terms in the chapter.

Sec. 34.75.995. Gives the chapter the title "Alaska Community Property Act."

Section 12. Describes how a section in the new chapter changes an Alaska Rule of Evidence.

Section 13. States that the provision in this bill that amends court rules only takes effect if the section describing how it amends the rule receives the necessary super-majority vote.

Section 14. Gives the bill an immediate effective date.

If I may be of further assistance, please advise.

TLB:jdr
97-218.jdr

MEMORANDUM

TO: Representatives and Senators

FROM: Representative Joe Ryan

SUBJECT: "Community Property Bill"

DATE:

This memorandum provides an Executive Summary and a more detailed Overview of the Community Property bill. The bill is designed, among other things, to allow married Alaskans to obtain an income tax advantage available to residents of nine other states and to produce business in Alaska.

Executive Summary

Nine states of the United States provide for married persons to hold assets acquired during the marriage as community property. These states are Louisiana, Texas, New Mexico, Arizona, California, Nevada, Washington (state), Idaho and Wisconsin. Under community property rules, most assets acquired during marriage by the husband or by the wife are owned one-half by the husband and one-half by the wife. This rule applies automatically, subject to certain exceptions. However, the husband and wife may execute a written agreement to elect not to have their assets treated as community property. If they elect for their assets not to be treated as community property, each asset will belong to the spouse who acquires it and no part of it will be owned by the other spouse, as a general rule.

When a property owner dies, the inherent profit (e.g., capital gains) in his or her assets is forgiven for income tax purposes. This is referred to as the "income tax-free set-up in basis". This forgiveness of income tax liability applies only to the assets which the decedent owned at death. For example, if a husband and wife own property together, only one-half is treated as own by the spouse who dies first and the inherent profit (e.g., capital gains) is forgiven only with respect to that one-half. The capital gain is not forgiven in the half which was already own by the surviving spouse.

Even though community property is also treated as owned by one-half by the husband and one-half by the wife, the inherent profit (e.g., capital gains) in 100% of the community property asset is forgiven when the first spouse dies. This rule has been contained in the Internal Revenue Code for decades and is unlikely to be changed. It means that a person who owns assets with his or her spouse as community property has a major advantage upon the death of the first spouse to die over a married person who owns assets with his or her spouse but which are not community property.

One of the purposes of the bill is to allow married Alaskans to execute a written agreement to recharacterize their assets as community property. Unlike other states which have a community property form of ownership for married persons, Alaskans would have their assets treated as community property only to the extent they execute a written agreement and elect into a community property system under Alaska law. In the current community property states, the law mandates the married couple's assets to be community property unless the spouses elect out. Because the change of ownership to community

property can have extremely far reaching effects, it is appropriate to allow Alaskans to elect into the system if they wish to arrive the benefits of ownership of community property as well as to obtain the income tax advantage for community property when the first of them dies, but not to mandate the use of a community property system.

The bill not only allows Alaskan couples to enter into an agreement to have some or all of their assets treated as community property, but it also permits married persons who do not reside in Alaska to have their assets treated as community property under Alaska law by executing an Alaskan Community Property Trust. Such a trust must have an Alaskan trustee. It is anticipated that many married persons who reside outside of Alaska will wish to label a portion, or all, of their assets as community property because they believe that is a more appropriate method of owning their assets and they wish to obtain the income tax advantages which are available to community property upon the death of first spouse to die.

It should be emphasized that no asset would be label as community property under the bill. Rather, the bill merely authorizes married persons to execute a written agreement or trust in which they expressly elect to treat some or all of their assets as community property under Alaska law.

Detailed Overview

Some Background on Ownership of Property Between Married Persons. All jurisdictions provide special rules for the treatment of assets acquired or owned by individuals while they are married. Many countries throughout the World provide

"community property" treatment of assets acquired during marriage. Under a typical community property system, all assets acquired by a husband or wife during the marriage are treated as community property. (Assets brought to the marriage, as well as gifts and inheritance received during the marriage, are generally excluded from being treated as community property.)

Essentially, community property is treated as own one-half by the husband and one-half by the wife. Therefore, if the couple divorces, each receives one-half of the community assets. Under community property rules, the first spouse to die is permitted to dispose of his or her one-half interest in the property and, usually, the surviving spouse is not given any rights to the one-half which is dispose of upon the death of the first spouse to die. Rather, the survivor already owns one-half interest in the community assets.

Nine states in the United States used the community property system. These states were, as a general rule, ones originally colonized by the Spanish or the French. Spain and France had a community property system. Wisconsin, in 1984, adopted community property by enacting the Uniform Martial Property Act, a uniform law providing for community property treatment.

The other states of the United States use, in large measure, a system derived under English law. That law provided for no division of property upon divorce, although virtually all states, including Alaska, now allow the courts to reallocate assets between the spouses in the event of a divorce. Under English law, a type of temporary property interest (known as dower widows and courtesy for husbands) was granted to a surviving spouse.

Almost all states which used the English system, including Alaska, have modified that rule to provide for a minimum or elective share to be taken by a surviving spouse.

Spouses May Vary Rights By Contract. Not infrequently, individuals, prior to or after marriage will agree on a division or sharing of their assets different from the rules which would otherwise apply under local law. One of the reasons for that is that the couple may move. For example, a couple may reside in the state of Washington (a community property jurisdiction) at the beginning of their marriage but then move to another state (such as Alaska) which does not provide for community property. A couple may well decide that they want community property to apply whether or not they moved to a non-community property state, for example.

Essentially, a couple which does not live in a community property state can enter into a written contract to have their property owned as though it were community property in all respects. That would give them the sharing benefits of community property but it would **not** provide them with certain income tax advantages of community property which will be discussed later.

Taxes and Community Property. Community property has been very well favored under the Internal Revenue Code. Based upon a decision of the Supreme Court of the United States in the 1930's, the tax law must respect the fact that community property is own one-half by the husband and one-half for the wife. Prior to 1948, that meant that a married couple in a community property state would pay less income tax than a couple in a non-community property state because the couple in the community property state were able

to treat their income as being equally divided between them. Because income tax rates increase as income increases, the community property couple usually could have their income taxed at the lowest range of income tax rates. Also, before the allowance of the estate tax marital deduction, only one-half of the couple's community property was subject to estate tax when the first spouse died. However, individuals who resided in non-community property states had to pay tax on their entire assets because under local law those assets were treated as own entirely, and not just one-half, by the spouse dying first.

These advantages were regarded as so significant that after World War II several states adopted or had legislation pending to adopt a community property system for married couples in those states. In 1948, the Congress amended the Internal Revenue Code to provide, essentially, the same income tax treatment for income of a married couple in a non-community property state as that provided for a couple in a community property state. In addition, the Congress allowed a marital deduction equal to one-half of the estate of a spouse to die for non-community property assets. That, in effect, put a married decedent in a non-community property state on the same footing, for estate tax purposes as a married person who died with community property. (Today the marital deduction is not limited to one-half of the estate.)

Major Remaining Income Tax Advantage for Community Property. While there continues to be some modest other advantages under the tax law for community property, one major difference remains. That difference relates to the income tax basis of inherited property.

Under Section 1014(a) of the Internal Revenue Code, the income tax basis of an inherited asset is equal to its estate tax value, as a general rule. Because property tends to appreciate over time, the effect of this section is to forgive the inherent profit (such as capital gains) in the asset when the owner of the property dies. For example, an individual buys Microsoft stock when it is worth $20 per share. She dies when it is worth $100 per share. If she had sold during her lifetime, she would have had to pay capital gains tax on the $80 profit on each share sold. However, if she dies when the stock is worth $100, her heirs will measure their gain from $100. The $80 profit is entirely forgiven for income tax purposes.

This automatic change in income tax basis upon death only applies to assets includable in the estate of an individual. Hence, when a married person dies, only the assets includable in the his or her estate are entitled to the change in income tax basis treatment. The Internal Revenue Code provides that only one-half of an asset jointly owned by husband and wife is includable in the estate of the first of them to die. However, if the asset were community property the income tax basis in the **entire** asset changes to estate tax value when the first of them dies.

Advantages and Disadvantages of Community Property. Some believe that community property represents a more fair and rational system of sharing the ownership or property during marriage because it essentially treats the marriage like a partnership: as assets are earned during the marriage, they are treated as owned 50/50 by the two partners (the husband and wife). Others, believe community property is not a fair or rational system. In any case, whether the couple resides in a community property state or non-community

property state, they may, by executing a written contract, choose to treat their property as though it is not community property or to provide for a treatment which is identical to community property. However, the favorable change in income tax basis under the Internal Revenue Code is permitted only for assets which are treated as community property only if the property "represents ... community property ... under the community property laws of any State...." Internal Revenue Code Section 1014(b)(6). Hence, merely providing by a written contract for assets to be treated in a way similar to community property will not cause them to be treated as community property under the Internal Revenue Code because they are not community property under state law . By allowing Alaskan couples to treat their assets as community property under Alaska law, the assets should be treated as community property for purposes of the Internal Revenue Code. This, in essence, will allow married Alaskans to obtain the same benefits which are available to couples in the current nine community property states. However, no couples' assets would be reclassified as community property under Alaska law except to the extent the couple enters into a written agreement providing for such treatment under Alaska law.

What the Bill Would and Would Not Do. Community property laws of the states which have them apply automatically to the assets of a married couple unless and except to the extent that the couple elects out of community property treatment. Whether one believes that community property represents a better or worst form of ownership, a change to a community property system would be farreaching. Therefore, under the bill, the nature of assets owned by an Alaskan couple would not be changed unless and except to the

extent they enter into a written agreement (or trust) in which they label certain, or all, of their assets as community property. Therefore, a couple must elect into community property in order for the law to have any impact on their assets. Therefore, the bill will have no impact on a couple unless they voluntarily enter into a written agreement in which they expressly label some or all of their assets as community property.

A married couple may enter into a community property agreement if they are both Alaskans. If neither spouse, or only one of the spouses is an Alaskan, the couple may choose to classify certain of their assets as community property by transferring them to an Alaska Community Property Trust.

More Information. The Bill is derived from the Uniform Community Property Act. Wisconsin adopted that act in 1984. However, under the Uniform Community Property Act, all assets of the couple are automatically relabelled as community property (subject to certain exceptions) merely by reason of the enactment of the law. Therefore, couples who do not wish for their assets treated as community property have to elect out by written agreement. Therefore, if one spouse does not wish to change the nature of their property from community property to another form, he or she can prevent the reclassification from occurring. Under the bill, the opposite would occur. The enactment of the bill would have no impact on the treatment of property owned by a husband and/or wife. Only if the husband and wife enter into an agreement (or trust) after the enactment of the bill to treat part of their assets as community property would a change in the nature of their assets occur.

In accordance with the Uniform Community Property Bill, its provision require that the spouses act in good faith toward each other with respect their community asset. The bill also prevents the use of the community property agreement or the community property trust to interfere or to hinder the rights of the creditor or to reduce the obligation of child support of a parent. The bill provides certain rules for the treatment of community property. For example, it provides that one spouse alone cannot make a gift to a third party of community property unless the value of the community property given does not exceed more than $1000 in a year or larger amount if, when made, the gift is reasonable in the amount considering the economic position of the spouses. (This provision is derived from the Uniform Community Property Act.) Also, community property would automatically be divided 50/50 upon divorce. Courts could not reallocate the assets in another way. However, all of these rules, subject to the safeguards for creditors, child support payments and acting in good faith, may be modified by the couple. Because the couple will be able to label their assets as community property only by a written agreement, they will have an opportunity to vary the rules, which otherwise are provided under the bill, to the extent they desire, in their community property agreement or community property trust. Therefore, even the rules which would be provided under the bill will not apply unless the couple executes the community property agreement or community property trust and they do not provide in their agreement or trust for alternative or different treatment than that provided under the bill.

C. Trustee Provisions. The following trustee and trustee power provisions should be included, at minimum:

> This Trust shall at all times have as Trustee or at least one Co-Trustee a person, bank or trust company which is a "qualified person" under Alaska Statutes. The duties of such Trustee or Co-Trustee shall at all times include, at minimum, maintaining records for the Trust on an exclusive or nonexclusive basis, preparing or arranging for the preparation of, on an exclusive or nonexclusive basis, the Trust's annual income tax return, and part or all of the administration (including physically maintaining trust records) occurs in Alaska.
>
> The Trustee shall at all times have some or all of the Trust assets, within the meaning of Alaska Statutes Section 13.36.055(c)(1), deposited in Alaska.

C. Spendthrift Provision. The usual spendthrift provision should be modified to make reference to the interest of the grantor and to Alaska law, as follows:

> No interest in the income or principal of any portion of the Trust property shall be subject to any form of voluntary or involuntary transfer, alienation or hypothecation by any beneficiary, nor shall any such interest or property otherwise be or become subject to the claims or liens of any person until such time as the property has actually been distributed in accordance with the terms of this instrument. This prohibition is intended to prevent all voluntary and involuntary dispositions by any beneficiary, specifically including the Grantor, of any part of any interest with respect to a portion or all of the trust property in any manner, as provided for under Alaska Statutes § 34.40.110.

D. Controlling Law. Finally, the following should be included:

> This Trust shall be controlled in all respects by the laws of the State of Alaska.

If a primary purpose of the trust is asset protection, the wise drafter should also include a typical flee clause, directing transfer of the trust situs and controlling law to an offshore jurisdiction if attachment by creditors looms.

VI. Alaska Family Limited Partnerships and LLC's

Alaska has also modified its statutes in 1997 relating to limited partnerships and limited liability companies to make the state a more desirable location for forming family limited partnerships and LLC's. Internal Revenue Code Section 2704(b) can restrict valuation discounts that are based upon provisions in governing documents that are more restrictive than applicable under state law, so choosing a state with favorable law is vital for maximizing valuation discounts. Alaska's changes and other existing features include:

a. No Limited Partner "Put" Right. In the past few years, many states, including Florida, Georgia, Delaware, Nevada and Colorado, have eliminated the six-month limited partner "put" right found in the Revised Uniform Limited Partnership Act ("RULPA"). Alaska has followed suit, and current AS

32.11.250 provides that a Limited Partner has no withdrawal right unless the partnership agreement provides for one.

b. Unlimited Life. Limited partnerships and LLC's are perpetual as long as there is at least one partner/member.

c. Court Ordered Liquidation. Under the laws of most states, a court can order the liquidation of a partnership or LLC for "any equitable reason." AS 32.11.380 provides that a court can only order the liquidation of a limited partnership or LLC only if it is impossible for the entity to continue to operate.

d. Amendment of Partnership Agreement. A limited partnership or LLC agreement may be amended only with unanimous consent of all partners or members.

Alaska does not impose any income or intangibles tax on limited partnerships or limited liability companies. Filing fees are $150.00 for a limited partnership or for a limited liability company, and there are no annual report fees. Corporate Information Services (phone: 360-754-9333, fax: 360-754-5781) charges $90.00 to form the entity, and a $165.00 annual Registered Agent fee.

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The Alaska Asset Protection Trust

Summary

On April 2, 1997, Alaska began competing for business with such offshore jurisdictions as Barbados, Belize, the Cayman Islands, the Channel Islands, the Cook Islands, and Nevis. The state legislature enacted a law authorizing the Alaska Asset Protection Trust.[1]

Advantages. The intended advantage of this trust is shelter from certain creditor claims. Shelter would be most likely to occur against future creditor claims, due to Alaska's retention of the fraudulent conveyance doctrine.[2] A settlor can transfer property into this type of trust, protect the property from these types of claims, and retain a degree of benefit and control over trust property.

Limitations. There are two basic limitations of this trust: (1) at least four years must pass after funding the trust before the statute of limitations extinguishes fraudulent conveyance claims, and (2) the settlor must surrender a significant degree of control over trust assets.

Surrender of control occurs in several ways: (1) the settlor must not retain a power to terminate or revoke the trust, (2) the settlor cannot dictate distributions from the trust, (3) the settlor cannot serve as trustee, (4) the settlor cannot be the only beneficiary, and (5) the settlor's beneficial interest can be only that of a discretionary beneficiary. It is up to the trustee—someone other than the settlor—to decide whether the settlor should receive any distribution from the trust.

Indirect Retention of Control. The settlor might retain some measure of indirect control over trust assets. Two optional features can be authorized in the trust instrument: (1) the settlor's power to veto distributions and (2) the settlor's special testamentary power of appointment over trust assets.

Dynastic Estate Planning. The Alaska Asset Protection Trust could also facilitate estate plans intended to cover multiple generations of beneficiaries.

Powers That Might Be Retained by the Settlor

Veto Power. The first optional feature is the settlor's power to forbid discretionary distributions. This is not a power to prescribe distributions but rather to prevent them if they do not meet with the settlor's approval. AS 34.40.110(b)(2).

Testamentary Special Power of Appointment. Second, the trust instrument can reserve for the settlor a testamentary power to appoint trust assets to persons other than the settlor's creditors or estate. *Id.* Power that the settlor surrendered during life—the affirmative power to dictate distributions—would return to the settlor upon death.

In This Issue

Distributions by Consent. These two optional features might lead to distributions that were indirectly prompted by the settlor. The trustee—probably a financial institution—would receive some sort of consent from the beneficiaries to distribution of trust assets to whichever beneficiaries were specified. The settlor might be the only beneficiary specified to receive a distribution.

Friendly Trustee. As a legal matter, the trustee would have power to disregard such promptings. In fact, it would be prudent for the trust instrument not even to mention such procedures. As a practical matter, however, the trustee would have good reason to act as a so-called "friendly trustee" and cooperate with any reasonable suggestion from the beneficiaries. As further assurance of harmony between trustee and beneficiaries, there could be a "trust protector" provision for removing and replacing an uncooperative trustee.

Cooperative Beneficiaries. Also as a legal matter, some beneficiaries could oppose a request for distribution that was initiated by the settlor for the settlor's benefit. In practice, however, beneficiaries would be persons whom the settlor had selected and whom would have a strong incentive to cooperate with the settlor. The incentive would stem from the settlor's retained powers to veto distributions and to appoint ultimate distributions by means of a will.

This arrangement may work to protect the settlor's assets from creditors. It may also help the settlor to retain some indirect benefit and control over those assets. The separate issue of estate tax consequences is discussed later in this article.

How This Differs from the Law of Most States

The Predominant Rule. The predominant rule of law throughout the United States is that a transfer into trust is void or voidable against the settlor's creditors, if the settlor is entitled to distributions from the trust or is even eligible for discretionary distributions. This is the rule of the Restatement (Second) of Trusts § 156(2) (1959). It appears to be the law of Oregon.

Until this year, the only recent departures from this rule were a couple of tax decisions of uncertain application from Maryland and Indiana. *In re Uhl's Estate*, 241 F2d 867 (7th Cir 1957); *Estate of German v. United States*, 85-1 USTC (CCH) ¶ 13,610 (Cl Ct 1985). Americans preferred to entrust billions of dollars to locations outside of the United States, in jurisdictions offering clear statutory protection.

The Alaska Rule. Now Alaska offers statutory protection. A settlor can make a lifetime transfer into an Alaska Asset Protection Trust, cause trust assets to be protected from creditor claims, and remain eligible for discretionary distributions from the trust.

In any state, a distinction might be drawn between laws of substantive liability and laws of exemption. The new Alaska statute tends toward the latter concept. For example, the statute does not alter liability for the tort of professional negligence. On the other hand, the statute does affect which assets might be seized to satisfy a judgment for malpractice. In this sense, the Alaska law resembles a debtor exemption statute, such as a homestead law.

Will It Work?

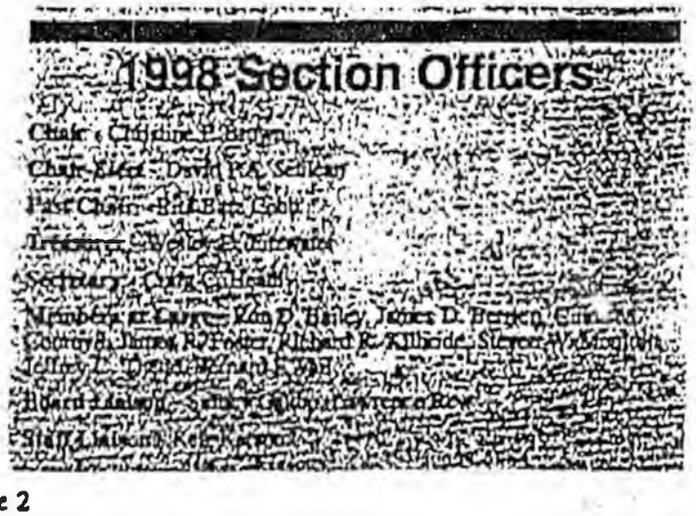
The burning issue is whether an Alaska Asset Protection Trust could be subjected to the debtor/creditor laws of a state that followed the predominant rule described above. If that happened, asset protection would end. This conflicts-of-law issue could be litigated in a federal forum such as a U.S. Bankruptcy Court. It could also arise from an effort to enforce a judgment from outside of Alaska in the Alaska court system, under the full faith and credit clause of the U.S. Constitution. It might even occur in litigation originating in Alaska, although this seems less likely.

The new Alaska statute is untested. Court challenges could result in rulings that cut both ways. Opposite outcomes are suggested by two conflicting lines of authority.

The Situs Rule. Supporting Alaska Asset Protection Trusts would be a line of authority led by the Restatement (Second) Conflicts of Laws § 273 (1971). According to this view, the situs of a trust as decreed in its governing instrument determines the jurisdiction whose debtor/creditor laws apply to it.[3] *In re Remington*, 14 BR 496 (Bankr D NJ 1981), for example, involved a trust created under Pennsylvania law, a New Jersey beneficiary, a New Jersey creditor, and a liability arising in New Jersey. The court applied Pennsylvania law because the trust instrument provided that the trust was situated and governed by the laws of that state. In sum, the "situs rule" would allow an Alaska Asset Protection Trust to be covered by Alaska's debtor/creditor laws.

One reason that a court might balk at applying the situs rule is that a creditor will never be privy to a trust agreement's provision regarding governing law. It might seem unfair for a creditor's rights to be restricted by an agreement to which the creditor was not a party. On the other hand, the "rights" being restricted would not involve substantive liability, but only exemption. Furthermore, the situs rule would still leave the creditor with the remedies of Alaska's fraudulent conveyance statute, which is comparable to laws of other states. Where a debtor acted to defraud a creditor, the creditor would continue to have four years to make a claim against trust assets.

The Significant Relationship Rule. An opposite line of authority would be much less receptive to Alaska Asset Protection Trusts. These cases hold that the jurisdiction with the most "significant relationship" to a trust is the one whose debtor/creditor laws govern that trust. *In re Portnoy*, 201 BR 685 (SDNY 1996); *In re Brown*, 4 Ak Br Rpt 279 (Bankr D Ala 1995). Under this rule, a trust provision claiming coverage by Alaska law would not necessarily be enforced. If the trust bore a significant relationship to some state other than Alaska, then Alaska's asset protection laws might not shield the trust's assets from creditors.



The significant relationship rule seems intended, however, for unusual situations. Decisions adopting this rule began with fact patterns of gross bad faith, liability arising outside of the state where the trust was situated, and a potentially inequitable result. The court's apparent response was to look for a significant relationship between the trust and a jurisdiction whose laws might afford the creditor a decent remedy.

This author believes that both of the foregoing rules will be applied in future cases. Risk factors that could imperil an Alaska Asset Protection Trust would include (1) gross bad faith by the settlor, (2) liability arising outside of Alaska, (3) trust administration occurring outside of Alaska, and (4) trust assets, particularly real estate, located outside of Alaska. On the other hand, a trust that was not heavily burdened by these characteristics would stand a good chance of surviving a court challenge.

Tax Issues

Overlaying the Alaska Asset Protection Trust are various gift, estate, and generation-skipping transfer tax issues that are common to all estate planning. A few of those issues are discussed below.

Estate Tax Exemption. To make use of the lifetime exemption (and associated unified credit) against the federal estate tax, Alaska attorneys have developed two general versions of the Alaska Asset Protection Trust.

The "incomplete gift" version might be attractive to clients who care more about influencing distributions than removing post-transfer appreciation from their estates. In this version, powers retained by the settlor are maximized, including both of the optional powers discussed earlier in this article. The results are (1) inclusion of trust assets in the settlor's gross estate and (2) preservation of the estate tax exemption to shelter some or all of those assets.

The "completed gift" version, on the other hand, might be attractive to clients who care more about estate tax minimization than retained ability to influence distributions. In this version, powers retained by the settlor are minimized. The optional retained powers discussed above are entirely omitted. The intended results are (1) removal of trust assets (and their subsequent appreciation) from the settlor's gross estate and (2) depletion of the settlor's estate tax exemption.

There is controversy over whether it would always be possible to make a completed gift into this type of trust. The Internal Revenue Service has stated that a completed gift does occur, if a settlor transfers assets into a trust, surrenders all dominion, control, and beneficial interest except that of a discretionary beneficiary, and the assets become unavailable for satisfaction of creditor claims against the settlor. Rev Rul 76-103, 1976-1 CB 293. But an Alaska Asset Protection Trust might not protect against all creditor claims, for reasons previously discussed. So, there might not be assurance, at time of funding, that a transfer into trust succeeded in removing assets from the settlor's gross estate.

One response to this uncertainty would be to use only the incomplete gift version and abandon any hope of removing post-transfer growth from the settlor's gross estate. A different response might be to use both versions and create two trusts. One trust would attempt to remove assets from the gross estate with an inter vivos completed gift. It would be funded to the extent of the settlor's unexhausted exemption. The other trust could maximize the settlor's retained powers with an incomplete gift. Both trusts could obtain asset protection.

Assuming that a completed gift was accomplished, it might be dangerous for that transfer to be followed by a regular stream of distributions to the settlor. This could cause inference of a de facto agreement to that effect, under IRC § 2036(a)(1), with resultant inclusion of trust assets in the settlor's gross estate. On the other hand, sporadic distributions to the settlor would not tend to trigger such an inference. *See, e.g., Skinner's Estate v. United States*, 197 F Supp 726, (ED Pa 1961), *aff'd* 316 F2d 517 (3d Cir 1963).

Annual Gift Tax Exclusion. A second issue is whether transfers into an asset protection trust can be sheltered by the annual $10,000 gift tax exclusion.

This would be unnecessary if the incomplete gift approach were followed. Such a transfer would not deplete the lifetime estate tax exemption.

On the other hand, the annual gift tax exclusion would be useful as a setoff against a completed gift transfer. There would be a potential obstacle — the "present interest rule." Subject to a few exceptions, transfers into trust constitute gifts of future interests, which do not qualify for the annual gift tax exclusion. This problem can probably be averted or minimized through the use of "Crummey" powers of withdrawal. If beneficiaries other than the transferor were furnished with Crummey withdrawal powers for an appropriate period of time after transfers into trust, then those transfers would probably be sheltered by the $10,000 annual gift tax exclusion.

Nonresidents of Alaska

Settlors and Beneficiaries. Oregon estate planners might wonder whether nonresidents of Alaska can enjoy the benefits of an Alaska Asset Protection Trust. The answer is yes. The statute does not impose any residency (or nationality) requirement on settlors or beneficiaries of such trusts. Only trustees need to be Alaskan.

Trustees. Oregon trust companies might wonder whether they could participate in the administration of such trusts. The answer is yes, with some qualifications.

To qualify under Alaska's asset protection statute, a trust must satisfy the following four requirements: (1) the trustee must be either an individual who is a resident of Alaska or a trust company or bank with trust powers with principal place of business in Alaska, (2) some or all trust assets must be deposited in Alaska, (3) the Alaska trustee must be empowered to maintain trust records in Alaska and to file tax returns for the trust, and (4) "part or all of the administration" must occur in Alaska. AS 13.36.035(c).

The phrase "part or all" suggests that some fractional involvement by non-Alaska fiduciaries would be permissible. In response to this language, Alaska trust companies have already begun developing procedures for sharing administration with non-Alaska fiduciaries. Their brochures and forms suggest a subcontractor relationship. Investments, distributions, and customer service interaction might be handled by a subcontractor located outside of Alaska, wherever the settlor or other beneficiaries resided. Meanwhile, activities occurring within Alaska would include trust accounting, tax compliance, and maintenance of at least one fund, which might be used to cover expenses of trust administration.

A note of caution should be raised. Use of a non-Alaska

fiduciary is one of the risk factors identified earlier in this article. The more non-Alaskan the trust, the more vulnerable the trust becomes to the debtor/creditor laws of states other than Alaska.

Shifting to Other Jurisdictions

There could be several reasons for wanting to shift an Alaska Asset Protection Trust to a different location. For example, other states might enact asset protection legislation. Delaware already appears to have done so. Del Code Ann 12 § 3501, *et seq*. Under such circumstances, it would be helpful if a trust originating in Alaska could be moved elsewhere in the United States.

An opposite set of facts might also provide impetus for removing a trust from Alaska. If courts broadly embraced conflict of laws doctrines such as the significant relationship rule discussed above, then it might be desirable to move a trust to an offshore location such as the Cook Islands.

One of the trust companies in Alaska suggests that trust instruments include a "trust protector provision" to remove the trust from Alaska. It would be prudent for someone other than the settlor to hold the removal power, since removal would in some ways resemble a termination and reconstitution of the trust. Termination is one of the powers a settlor is not allowed to retain.

Client Profile

Wealthy Clients with Future Liabilities. Alaska Asset Protection Trusts could be attractive to clients with large estates and the potential for large future claims.

A stereotypical client might be a wealthy professional who wanted to retire in a few years with the knowledge that a large pool of assets, beyond funds in IRAs and qualified retirement plans, was protected from malpractice claims. This client could establish the trust, fund it, remain individually solvent and continue to work for at least four more years. At the end of that time, the client could look forward to retiring with access to funds that were exempt from creditor claims.

This type of trust would be less useful to clients who were already being pursued by creditors. The Alaska statute provides that creditors can bring an action for fraudulent conveyance for four years after the settlor funds the trust. Furthermore, this type of trust is unavailable to settlors who are 30 days or more in default of a child support obligation. AS 34.40.110(b)(4).

Dynasty Trusts. A related profile would be clients interested in establishing so-called "dynasty trusts." These multigenerational trusts are limited in most states by the Rule Against Perpetuities. The new Alaska law repeals this doctrine's applicability to discretionary trusts situated in Alaska. AS 34.27.050(a)(3). An Alaska Dynasty Trust can therefore operate in perpetuity.

Alaska is not the only state to have embraced dynasty trusts. Delaware, Idaho, Illinois, South Dakota, and Wisconsin have passed similar laws repealing the Rule Against Perpetuities. Alaska, however, offers the combined advantages of perpetual trusts, asset protection, and no state income tax. These advantages could magnify the initial size and subsequent growth of an Alaska Dynasty Trust.

First of all, the trust could compound from a base that included both the initial transfer and any appreciation or income that occurred between the time of transfer and the settlor's death. This would result from the settlor funding the trust with an inter vivos completed gift equal to the settlor's estate tax exemption or GST exemption. (The earlier discussion of Rev Rul 76-103 explains how asset protection might make a completed gift and resultant leverage of one or both exemptions possible.) Second, corpus would be enhanced to the extent that the trust avoided losing assets to creditor claims. Finally, the trust could grow faster by not losing revenue to a state income tax. Over several generations, an Alaska Dynasty Trust might compound to a size significantly larger than if it had operated under traditional trust, debtor/creditor, and tax laws.

Conclusion

The Alaska Asset Protection Trust offers clients an opportunity to shield wealth from future claims while retaining some degree of benefit and control. It might also enhance the funding and growth of a related estate planning vehicle, the Alaska Dynasty Trust.

Bob Casey

End Notes

1. SCS CSHB 101(JUD) of the Alaska Legislature became effective on April 2, 1997. Its provisions are distributed throughout the Alaska Statutes 13.12, 13.36, 34.27, and 34.40. The statutes do not use upper- and lowercase spellings to refer to qualifying trusts; this article does so for purposes of readability.

2. Exceptions cutting both ways could occasionally occur. For example, an Alaska Asset Protection Trust might also protect against current creditors (those whose claims arose before the trust was funded), if they (1) failed to commence legal action within four years of the date of funding or (2) were unable to prove that the settlor's insolvency was caused by the transfer into trust. On the other hand, an Alaska Asset Protection Trust would not protect against any creditor who commenced legal action within four years of funding and was able to prove the settlor's actual intent to hinder, delay, or defraud. AS 34.40.010, *et seq*.

3. If the trust property consists of real estate, however, the law of the situs of the real estate will govern. Restatement (Second) Conflicts of Laws § 280.

Questions, Comments, or Suggestions About This Newsletter?

Contact: Susan N. Gary
1221 University of Oregon School of Law
Eugene, OR 97403-1221
(541) 346-3855
E-mail: sgary@law.uoregon.edu

HB 206

Alaska State Legislature

Official Business

House Majority Leader

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

Sponsors Statement

for

HB 206 PERS For Village Public Safety Officers

Throughout the State the **Village Public Safety Officer Program** has provided a very important means of maintaining peace and harmony in the villages. Most of these individuals were not covered by a retirement program. Now some of these former officers are working for other organizations that are covered by the State PERS program. The work experience these individuals obtained by participating in this program has proven to be an invaluable asset in their present endeavors.

This bill would allow them to obtain retirement credit for the service rendered under the VPSO program. The eligible participant could receive credit for up to 5 years of service in the VPSO. Once their service had been verified, an indebtedness would be determined, and the vested employee would have to arrange to buy this time back into the State PERS system. The provisions of this bill will help in the recruiting and the retention of participants of the VPSO program in the villages. Turnover and a lack of qualified applicants has been a historic problem for the VPSO program.

LEGAL SERVICES

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

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

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

MEMORANDUM March 21, 1997

SUBJECT: Sectional Summary of HB 206. (Credit in PERS for village public safety officers)

TO: Representative Brian Porter
Attn: Joel Lounsbury

FROM: Teresa B. Cramer TBC
Legislative Counsel

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

Section 1 permits an employee who is a vested member of the Public Employees' Retirement System (PERS) to receive up to five years' credit for employment as a village public safety officer (VPSO). (Under AS 39.35.680(40), a vested member is defined as one who meets the five-year requirement to qualify for a retirement benefit.) Under subsection (b), the member is required to contribute the full actuarial cost of providing benefits based on VPSO employment. Under subsection (c), the credited service granted for VPSO employment may not be used to satisfy the credited service requirements for normal retirement. (Under AS 39.35.370(a)(2), a member of PERS with at least 20 years of credited service as a fire fighter or peace officer is eligible for a normal retirement. Under paragraph (3) of that subsection, an employee with at least 30 years of credited service can take a normal retirement.)

TC:jdr
97-207.jdr

FISCAL NOTE

STATE OF ALASKA **BILL NO. HB 206**

1998 LEGISLATIVE SESSION

Revision Date:

Title: "An Act relating to credited service in the public employees retirement system."

Sponsor: Representative Porter

Requestor: (H) FIN

Department Affected: Administration

BRU: Centralized Administrative Services

Component: Retirement and Benefits

COMPONENT SERIAL NO. 2271

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1037 GF/Mental Health	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

Estimate of any current year (FY98) : $ 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 is estimated to have an unmeasurable impact in the PERS funding ratio. There is an increase to the unfunded liability of the PERS of approximately $450,000. This would result in an employer contribution increase of approximately $40,000 per year, unmeasurable as a percent of payroll.

(continued on next page)

Prepared by: Guy Bell Phone: 465-4460

Division: Retirement and Benefits Date:

Approved by Commissioner: Mark Boyer Date: 2/11/98

Agency: Department of Administration

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FISCAL NOTE
STATE OF ALASKA

1998 LEGISLATIVE SESSION **BILL NO. HB 206**

ANALYSIS: (continued)

This bill would also, for the first time, allow employees to claim credited service for non government employment. This would set a precedent and open the door for other non government forms of service.

Another point is that many VPSO's receive retirement as part of their employment. If past enacted legislation is an indicator, then the legislature does not support "double dipping" on retirement benefits.

If enacted this bill would have no effect on the PERS average employer contribution rate or the funding ratio.

PUBLIC SAFETY EMPLOYEES ASSOCIATION
4300 Boniface Parkway, #116
Anchorage, AK 99504-4387
(907)337-1979 FAX:(907)337-1753

Honorable Representative Brian Porter
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

February 13, 1998

Dear Representative Porter:

House Bill 206, PERS credit for VPSO's, was recently heard in the House Finance Committee. Before passage of the bill there were several amendments attached to the bill. Amendment number three may deny VPSO's credited service for their time served as VPSO's if they receive any retirement benefits from those years service as a VPSO.

VPSO's work for the regional non-profit native corporations. Most of these non-profit corporations participate in a limited profit sharing pension plan. This Plan is not a defined benefit, but rather a plan like a 401(k) where upon termination the employee can take a lump sum or roll the benefit into an IRA. The retirement benefits for most of these employees is accrued at the rate of only about five to seven percent of their annual earnings with no employee contribution. If the average VPSO made around $25,000 a year then in five years he/she would have accrued about $6250 in principal. This principal amount plus accrued interest would be their total benefit. Furthermore, there is a vesting period of at least 3 years for most non-profits.

Under amendment number three the House Finance committee has just penalized VPSO's for accruing a very paltry retirement. This, in effect, kills the intent of the bill.

This is unacceptable and needs to be fixed before the bill reaches the Senate. One way to fix the amendment is to replace the wording "retirement benefits" with the words "defined retirement benefits". This amendment needs to be legally researched. If you have any questions please do not hesitate to call me at 456-4167 or 474-2555(Work)

Sincerely,

Craig Persson

Craig Persson
PSEA Legislative Liaison

END

John Terrel
P.O. Box 245
Naknek, Alaska 99633
(907) 246-4222

February 6, 1998

Representative Brian Porter
State Capitol, Room 214
Juneau, Alaska 99801

Dear Representative Porter:

This is to let you know that I support your efforts with House Bill 206. It is my understanding that this bill allows time spent as a Village Public Safety Officer (VPSO) to be entered into the PERS retirement system if the VPSO leaves the program but continues as a law enforcement officer. I was a VPSO for over two years and was in the First VPSO/Municipal Police Transition Academy. I became one of the first VPSO Sergeants in the program. When I became a municipal police officer and found out that time spent as a VPSO was not counted in PERS I was angry and very disappointed. I have now been a Police Officer for the Bristol Bay Borough Police Department for over eight years.

I owe the VPSO program a lot for allowing me to become a Municipal Police Officer, but VPSO's are treated as step children as it is. Not allowing this time on PERS is adding insult to injury. This Bill would be a good incentive to keep people in the VPSO program, instead of quitting to find a job with real benefits.

Thank you very much for this thoughtful and much needed bill.

Sincerely,

John Terrel

John Terrel

Representative Brian Porter
Alaska Legislature
FAX #465-3834

February 6, 1998

RE: HB206

Representative Porter,

It is my understanding that HB206 is going before the legislature next week. I wanted to take a moment to express my support for this bill.

This bill provides an incentive for Village Public Safety Officers to remain serving their villages and also encourages them to later to seek employment with departments that are under the PERS system. This is a WIN WIN, for both the VPSO, the village, and future employers because it allows the VPSO's to serve with out feeling like they are "spinning their wheels" when it comes to retirement.

I, myself started as a VPSO. This bill will benefit me personally very little since I was looking toward my future when I was making employment decisions, and stayed as a VPSO a short time before moving onto another agency that offered a good retirement plan (the Troopers). I feel if this bill would have been in place back then, I could have stayed much longer.

Thank you for hearing me, and I hope that this bill passes.

Sincerely,

Joseph A. Masters

PUBLIC SAFETY EMPLOYEES ASSOCIATION
"REPRESENTING ALASKA'S FINEST"
4300 Boniface Parkway, #116
Anchorage, AK 99504-4387
(907)337-1979 FAX:(907)337-1753

Representative Bryan Porter
State Capitol
Juneau, AK 99801-1182

April 15, 1997

Dear Representative Porter:

On behalf of the Public Safety Employees Association I would like to personally thank you for sponsoring House Bill 206.

PSEA fully supports HB206. This bill allows Village Public Safety Officers(VPSO's) to buy up to five years of credited PERS retirement time for that time served as a VPSO.

As you already know VPSO's are not paid a lot and receive very minimal retirement benefits through the Native Regional Corporations. HB206 provides a greater incentive for VPSO's to stay at the job and then, if opportunities exist, to become a state or city law enforcement officer.

We also believe that VPSO's can make excellent future state or municipal law enforcement officers. Some of the best training for any Alaska State Trooper is time spent in villages as a VPSO.

Again, I would like to thank you for taking your time to put this piece of legislation together. If you have any further questions please do not hesitate to call me.

Sincerely,

Keith Perrin

Keith Perrin
PSEA President

TANANA CHIEFS CONFERENCE, INC.

122 First Avenue, Suite 600
Fairbanks, Alaska 99701-4897
Tele: 907/452-8251x3236 & Fax: 907/459-3851

April 21, 1997

Brian Porter
Rm: 216, State Capital
Juneau, Alaska 99801
Tele: 907/465-4930
Fax: 907/465-3834

Dear Representative Porter:

This letter is in regards to House Bill 206. I am very troubled by the House Finance Committee's drastic cuts to services in Rural Alaska. The areas of concern that Tanana Chiefs Conference would like to see considered by the Senate Finance Committee during their deliberations over the operating budget.

(VPSO) Village Public Safety Officer.
The Village Public Safety Officer has provided law enforcement service in rural Alaska for nearly (20) years, and within those twenty years there has been a drastic change in Rural Alaska, towards declining incidents; drowing, fire, alcohol related incidents. The VPSO provide a broad range of public safety services in rural Alaska, including but not limited to health and safety situations. With the existing retirement plan, and to implement our VPSO's into the State Pers, it would enable our program to recruit qualified, dedicated Police Officers. Although we do receive good qualified VPSO's, but they don't stay long, because of the low pay and not much of a retirement system, along with a heavy work load. With that, I encourage you and your staff to fully support House Bill 206. This will ensure that they will continue to play a crucial role in protecting the life, health and safety needs of our rural residents.

Sincerely,

TANANA CHIEFS CONFERENCE, INC.

Jim D. Titus
VPSO Coordinator

HB 208

REPRESENTATIVE ALAN AUSTERMAN Alaska State Legislature

P.O. Box 2368, Kodiak, Alaska 99615 (907) 486-3730 • Session: State Capitol, Juneau, Alaska 99801 465-2487

SPONSOR STATEMENT - HB 208

Updated: April 23, 1997

The Alaska Aerospace Development Corporation is a young organization that has vigorously pursued its responsibility to forge a new industry and new opportunities in Alaska. Its first task was to bring talented people with significant experience in the aerospace industry to Alaska as employees and consultants. Through their efforts the AADC has won federal contracts, generated significant industrial interest, and brought Alaska, international recognition as a potential center for this major growth industry. The probability for success is extremely high and the prospects for Alaska's economy are exceptional.

AADC's focus has been on two projects. The development of a rocket launch complex on Kodiak Island and the location of satellite ground stations in the Fairbanks area. AADC has also pursued educational opportunities throughout the state, as well as global warehousing and manufacturing possibilities in Anchorage.

The present board of directors of the AADC has served the State of Alaska extremely well, in directing the purposes of the corporation. The professional, technical and scientific expertise provided by the University of Alaska members of the board, have guided the start-up phase of this undertaking.

As we move into the construction, marketing and operational phase of this endeavor, it is imperative that the board be restructured to include specific members of the Alaska business community. These individuals should have experience in finance, marketing analysis and an understanding of economic development, based on their existing or previous participation in private enterprise.

In addition, this bill calls for the chair and vice-chair to be selected from among the board of directors of the corporation who reside in Alaska.

REPRESENTATIVE ALAN AUSTERMAN Alaska State Legislature

P.O. Box 2368, Kodiak, Alaska 99615 (907) 486-5930 • Session: State Capitol, Juneau, Alaska 99801 465-2487

PROPOSED CHANGES UNDER HB 208 TO:
AS 14.40.826(a)(b) - AADC BOARD OF DIRECTORS

Updated: April 23, 1997

Existing Voting Member	Proposed Change
[U of A Board of Regents]	Business Sector-state resident
U of A President or designee	U of A President or designee
U of A Geophysical Institute	U of A Geo. Institute or designee
[ASTF Executive Director]	Business Sector-state resident
DCED Commissioner or designee	DCED Commissioner or designee
Aerospace or Commercial Space	Aerospace or Commercial Space
Aerospace or Commercial Space	Aerospace or Commercial Space
[U of A Faculty Member]	Business Sector-state resident
Public Member	Pub.School Educator or Pub.Member

[Deleted Text Bracketed] New Text Underlined

Sec. 14.40.821. Creation and termination of corporation. (a) The Alaska Aerospace Development Corporation is created as a public corporation of the state. The corporation is a body corporate and politic located for administrative purposes within the Department of Commerce and Economic Development and affiliated with the University of Alaska but with a separate and independent legal existence.

(b) The corporation may not be terminated as long as it has bonds, notes, or other obligations outstanding. If the corporation is terminated, it shall be terminated in a manner that permits the University of Alaska and Poker Flat Research Range to continue their research and educational missions uninterrupted. (§ 2 ch 88 SLA 1991)

Sec. 14.40.825. [Renumbered as AS 14.43.305.]

Sec. 14.40.826. Board of directors. (a) The board of directors of the corporation consists of nine members appointed by the governor as follows:

(1) one member of the Board of Regents of the University of Alaska;

(2) the president or the designee of the president of the University of Alaska;

(3) the director of the Geophysical Institute of the University of Alaska;

(4) the executive director of the Alaska Science and Technology Foundation;

(5) the commissioner of commerce and economic development or the commissioner's designee;

(6) two members who have experience and understanding of the aerospace or commercial space industry, one of whom shall have a special emphasis in federal regulatory procedures and policy involving space;

(7) one faculty member of the University of Alaska with research interests involving rockets or satellites;

(8) a public member.

(b) The members of the board of directors of the corporation described in (a)(6) of this section may be nonresidents of the state. The term of the members described in (a)(1), (6), (7), and (8) of this section is four years and those terms shall be staggered.

(c) Members of the board of directors of the corporation described in (a)(6) and (8) of this section receive $100 compensation for each day spent on official business of the corporation.

(d) In addition to the members of the board of directors described in (a) of this section, two members of the legislature shall serve as ex officio nonvoting members of the board of directors. The two ex officio nonvoting members shall include one member of the senate appointed by the president of the senate and one member of the house appointed by the speaker of the house.

(e) The voting and nonvoting members of the board of directors of the corporation are entitled to per diem and travel expenses authorized under AS 39.20.180. (§ 2 ch 88 SLA 1991)

Legislative history reports. — For legislative letter of intent related to the appointment of an industry advisory board by the corporation, see 1991 Senate Journal, page 1270.

Sec. 14.40.830. [Renumbered as AS 14.43.310.]

Sec. 14.40.831. Chair and vice-chair. The president of the University of Alaska or the designee of the president shall be the chair of the board of directors of the corporation. The commissioner of commerce and economic development or the designee of the commissioner shall be vice-chair of the board of directors of the corporation. The vice-chair presides over all meetings in the absence of the chair and has other duties the board of directors of the corporation may direct. (§ 2 ch 88 SLA 1991)

Sec. 14.40.835. [Renumbered as AS 14.43.315.]

STATE OF ALASKA
Boards and Commissions

Membership Roster
AEROSPACE DEVELOPMENT CORPORATION (165)

Member	Appointed	Reappointed	Term Exp.
Syun-ichi Akasofu Dir./UA Geophysical Institute... UAF Geophysical Institute 910 Koyukuk Drive Fairbanks, AK 99775-0800	08/16/91		
Alan Austerman Legislature/Representative/Nonvoting Alaska State Representative State Capitol, M/S 3100 Juneau, AK 99801-1182	03/03/95		
Eugene Cernan Industry 900 Town and Country Lane Houston, TX 77024	08/16/91	07 01/93	07/01/97
Kenneth M. Damm Public P.O. Box 1666 Kodiak, AK 99615	10/07/94		07/01/97
~~Steve Frank~~ Drue Pearce Legislature/Senator Nonvoting Jerry Ward (Alternate) Alaska State Senator State Capitol, M/S 3100 Juneau, AK 99801-1182	2/25/97 ~~03/11/93~~		
Sharon Gagnon UA Bd of Regents 7001 Tree Top Circle Anchorage, AK 99516	08/16/91	07/01/92	07/01/96
Joe Hawkins UA Faculty University of Alaska Fairbanks Department of Electrical Engineers 203 Duckering Fairbanks, AK 99775-1760	08/16/91		07/01/95
James Kenworthy Exec Dir ASTF Executive Director Alaska Science & Technology Found. 4500 Diplomacy Drive Anchorage, AK 99508-5918			

STATE OF ALASKA
Boards and Commissions

Membership Roster
AEROSPACE DEVELOPMENT CORPORATION (165)

Member	Appointed	Reappointed	Term Exp.
Jerome Komisar U of A Pres/Pres designee 202 Butrovich Building Fairbanks, AK 99775	08/16/91		
Bill Paulick Commissioner/Commerce and Economic Development/or designee Development Specialist Division of Economic Development Dept. Commerce & Economic Develop. P.O. Box 110800 Juneau, AK 99811-0800	06/14/93		
Courtney A. Stadd Industry President Capitol Solutions 5618 Old Chester Road Bethesda, MD 20814	09/01/93	07/01/94	07/01/98
Gene Therriault Legislature/Representative/Nonvoting Alaska State Representative State Capitol, M/S 3100 Juneau, AK 99801-1182	03/03/95		

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

NO. CSHB 208(L&C)
BILL VERSION:
PUBLISH DATE: April 9, 1997

Revision Date: April 7, 1997
Title: An Act relating to the board of Directors of the AK Aerospace Develop. Corp
Sponsor: Representative Austerman
Requestor: House Labor & Commerce

Department Affected: Commerce & Economic Develop
BRU: AK Aerospace Development Corp.
Component: AK Aerospace Development Corp.
1424

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary)

The House Labor & Commerce Committee voted to zero out the fiscal note. The committee feels that travel should be covered within the Department's budgeted travel accounts.

Prepared by: House Labor and Commerce Committee Phone: 465-4954
Division: Shirley L. Armstrong, Staff House Labor & Commerce Date: 4/9/97
Approved by: Representative Norman Rokeberg, Chair
Agency: House Labor and Commerce Committee Date: 4/9/97

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

HB

214

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Copies of minutes listed below were originally included in this file. The minutes are available on the legislative computer database. In order to save space copies of minutes have not been left in the files.

Mary Pagenkopf

Senate Rules Committee 4/29/97 10:52 am

Alaska State Legislature
House of Representatives

Committees
Rules Committee, Chair
Legislative Council
International Trade & Tourism
Military & Veterans Affairs
World Trade & State/Federal Relations

Interim:
10928 Eagle River Rd. Suite 141
Eagle River, AK 99577

Session:
Alaska State Capitol
Juneau, AK 99801

TO: Senator Tim Kelly
Chair
Senate Rules Committee

FROM: Representative Pete Kott
Chair
House Rules Committee

DATE: April 24, 1997

RE: **HB 214: Request for Floor Action.**

I respectfully request that you calendar HB 214, dealing with workers' compensation matters, for floor action at your earliest convenience. This bill is merely housekeeping in nature, and there is no opposition. I would anticipate that it would require less than 5 minutes of floor time.

Attached hereto, please find a Sponsor Statement, a Sectional, and backup material.

Thank you in advance for your kind assistance in this matter.

Representative Pete Kott

Juneau Office (907) 465-3777 Toll Free 1-800-861-KOTT(5688) Fax (907) 465-2819
Eagle River Office (907) 694-8944 Fax (907) 694-8945 **E-Mail:** representative_pete_kott@legis.state.ak.us

Alaska State Legislature
House of Representatives

Committees
Rules Committee, Chair
Legislative Council
International Trade & Tourism
Military & Veterans Affairs
World Trade & State/Federal Relations

Interim:
10928 Eagle River Rd. Suite 141
Eagle River, AK 99577

Session:
Alaska State Capitol
Juneau, AK 99801

SPONSOR STATEMENT AND SECTIONAL ANALYSIS
HB 214

HB 214, which is supported by the Department of Labor, makes two important adjustments to Title 23 pertaining to workers' compensation. Sections 1 and 2 amend AS 23.30 to comport with federal law. Sections 3 and 4 amend Alaska workers' compensation law to reflect changes made to public assistance eligibility.

Section 1:

This section aligns AS 23.30.022 with 42 U.S.C. 12101-12213 (Americans with Disabilities Act). It amends AS 23.30.022 to provide that an employee who, following a conditional offer of employment, makes a false representation during a medical inquiry or examination regarding the employee's physical condition, may be barred from receiving workers' compensation for an injury causally connected to the false representation. Currently, AS 23.30.022 refers to false representations of physical condition in an "employment application or preemployment questionnaire".

The ADA prohibits many employers from making inquiries designed to obtain information regarding disabilities prior to a conditional offer of employment, including inquiries made in the employment application and preemployment questionnaire. An employer subject to the ADA could not comply with the ADA and benefit from AS 23.30.022, while an employer who did not comply with the ADA might benefit at the expense of an employee's rights under the ADA. Section 1 of HB 214 replaces the "employment application or preemployment questionnaire" language of the current statute with the ADA permitted examinations or inquiries after a conditional offer of employment. The employer who complies with the ADA will be able to benefit from AS 23.30.022, and employment candidates will not be asked to chose between exercising their rights under the ADA and potentially losing their workers' compensation benefits.

Section 2:

Under existing law, before an employer can benefit from the Second Injury Fund, the employee must either have been hired or retained in employment after the employer learns of a permanent physical impairment. This section deletes the option that an employer, to benefit from the Second Injury Fund, acquire knowledge of a qualifying impairment before hiring an

Representative Pete Kott

Juneau Office (907) 465-3777 Toll Free 1-800-861-KOTT(5688) Fax (907) 465-2819
Eagle River Office (907) 694-8944 Fax (907) 694-8945 E-Mail: representative_pete_kott@legis.state.ak.us

employee. As amended, in order to obtain Second Injury Fund reimbursement, it will be sufficient for an employer to have "retained" an employee in employment after acquiring knowledge of the employee's impairment.

Section 3:

The Alaska temporary assistance program, AS 47.27, was enacted in 1996 as part of welfare reform. One of its provisions, AS 47.27.035, requires that, unless exempt under that statute, participants in the Alaska Temporary Assistance Program participate in "work activities". "Work activities", as defined in AS 47.27.900, includes paid employment and paid on-the-job training, as well as unpaid activities such as community work service and job search and preparation activities. Section 3 of HB 214 would amend AS 23.30.230(a), which contains the current list of persons excluded from workers' compensation coverage, to add Alaska Temporary Assistance participants who are engaged in an unpaid work activity. This amendment ensures that workers' compensation coverage is provided only to those who are involved in a wage earning activity.

Section 4:

Defines "on-the-job training", as that phrase is used in Section 3 of this bill.

Section 5:

Because the amendments contained in sections 3 and 4 are linked to the new AS 47.27.035, Section 5 of this bill ties the effective date of Sections 3 and 4 to the effective date of AS 47.27.035.

Section 6:

Establishes an immediate effective date, except as provided in Section 5.

HB 214 will make Alaska law consistent with Federal ADA law and will clarify an area of legal uncertainty created with the passage of welfare reform. I urge your support.

Alaska State Legislature
House of Representatives

DOL-LAB JUNEAU MAY 08 199

COMMITTEE ASSIGNMENTS:

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MILITARY & VETERANS AFFAIRS, CHAIRMAN
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PHONE (907) 694-8944
FAX 694-8949

SESSION:
STATE CAPITOL
JUNEAU, AK 99801-1182
PHONE (907) 465-3777
FAX (907) 465-2819

May 5, 1995

Mr. Paul Grossi
Director
Division of Workers' Compensation
PO Box 25512
Juneau, Alaska 99811-5512

Re: Draft Workers Compensation Pamphlet

Dear Mr. Grossi:

Thank you for providing me a draft copy of the Workers' Compensation pamphlet. I have had an opportunity to review it and have a few comments for your consideration.

I urge you to request an opinion from the Attorney General concerning the current viability of AS 23.30.022. It has been alleged that this statute conflicts with the Americans With Disabilities Act. If so, I would suspect that it is preempted under the Supremacy Clause of the United States Constitution. Should that prove to be the case, I request that you delete references to it in the pamphlet.

I note that the draft contains language that does not reflect the Gilmore decision. I recommend that you await the final status of HB 237 and if it becomes law incorporate its changes into the pamphlet. Should it not become law, the pamphlet should reflect the Gilmore decision.

Should you have any questions, or if I may be of any assistance, please do not hesitate to contact me.

Sincerely,

Pete Kott
District 24

cc House Labor and Commerce Committee members
Representative Berye Davis

A

MEMORANDUM

STATE OF ALASKA
DEPARTMENT OF LABOR
Office of the Commissioner

TO: The Honorable Bruce Botelho
Attorney General
Department of Law

DATE: May 12, 1995

FILE: OM 1-3 B
X AG Opinion
Binder

THRU: David Ramseur
Acting Chief of Staff
Office of the Governor

PHONE: 465-2700

FROM: Tom Cashen
Tom Cashen
Commissioner

SUBJECT: Request for Attorney General Opinion Regarding AS 23.30.022 and AS 23.30.205(c) as Related to ADA

The Department of Labor's Workers' Compensation Division is requesting a formal Attorney General's opinion concerning AS 23.30.022 and AS 23.30.205 (c). It is alleged that AS 23.30.022 and AS 23.30.205 (c) are in direct conflict with the Americans with Disabilities Act (ADA). If that is the case, are these statutes preempted under the Supremacy Clause Act of the United States Constitution?

The Workers' Compensation Division provides every injured worker in Alaska an informative pamphlet regarding the workers' compensation system and process. AS 23.30.022 is referenced in the current pamphlet. An insert advising injured workers to contact the Equal Employment Opportunity Commission with any questions regarding their injury as related to ADA is included with the pamphlet. The insert is a temporary measure until language acknowledging the potential conflict is published in a new pamphlet. Is the language found in the insert sufficient?

Attached is a copy of a letter from Representative Kott requesting an Attorney General opinion, the current Workers' Compensation pamphlet, and a pamphlet insert.

Attachments (3)

cc: Representative Pete Kott
Dwight Perkins, Legislative Liaison, DOL
Paul Grossi, Director, WC
Jake Sanders, Admin Officer, WC

(A)

OM 1-37
X AG Opinion Binder

MEMORANDUM

State of Alaska

Department of Law

		WC
		LS&S
		LRA
		ESD
		ASD
		Ex. Sec'y
		Adm Asst
	✓	Sp Asst TEL
	✓	Deputy
	✓	Comm SUBJECT
ACT	INFO	Initials

TO: The Honorable Tom Cashen
Commissioner
Department of Labor

RECEIVED
Department of Labor
NOV 07 1996
Office of the Commissioner

DATE: September 17, 1996

FILE NO: AGO File No. 661-95-0748

TEL: (907) 269-5190

SUBJECT: Are AS 23.30.022 and AS 23.30.205(c) preempted by the Americans with Disabilities Act?

FROM: Kristin S. Knudsen
Assistant Attorney General
Department of Law

You have asked for advice concerning the relationship between the Americans with Disabilities Act of 1990, Pub. L. No. 101-336 (codified at 42 U.S.C. §§ 12101-12213), known as the ADA, and certain sections of the Alaska Workers' Compensation Act relating to the Second Injury Fund and the false statement exclusion. Specifically, you ask if AS 23.30.022 and AS 23.30.205(c) are preempted in whole or in part by the ADA. You also ask whether an insert titled "Notice" provided with the brochure distributed by the Division of Workers' Compensation to injured workers is sufficient to address any problems that may exist. The short answer to your question is that there is a conflict between the ADA and certain portions of AS 23.30.022 and AS 23.30.205(c)[1]; these provisions may be preempted by the ADA. The insert does not adequately inform employers or employees of the possible effect of preemption.

DISCUSSION

1. Second Injury Fund

Alaska is one of twenty states which provide a broad-based second injury fund in their workers' compensation system.[2]

---

[1] In AS 23.30.022, "employment application or preemployment questionnaire" and "in hiring" conflict with ADA provisions barring inquiries as to the existence of a disability in preemployment questionnaires and job applications, and barring discrimination in hiring on the basis of disability. In AS 23.30.205(c), the phrase "hired" [after the employer acquired that knowledge] of a qualifying condition presents similar conflicts.

[2] Alaska's Second Injury Fund is broad-based because it defines permanent physical impairment as one of 25 listed conditions, from ankylosis of joints to varicose veins, plus any condition supporting a rating of disability of 200 weeks or more, AS 23.30. 205(d). "Second Injury" is something of a misnomer, as many of the listed conditions, e.g., epilepsy, varicose veins,

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> protects the Fund against spurious or collusive claims.

Sea-Land Services, 737 P.2d at 795, citing U.S. Pipe & Foundry Co. v. Caraway, 546 S.W.2d 215, 219 (Tenn. 1977). The written record requirement also serves to reduce litigation on the question of whether the employer had knowledge of the pre-existing impairment. Sea-Land Services, supra; Ketchikan Gateway Borough v. Saling, 604 P.2d 590 (Alaska 1979); A. Larson, Workmen's Compensation Law, Sec. 59.33(f), Vol.2, p. 10-523 (1992).

2. False Statement Exclusion

As part of a general reconstruction of the workers' compensation laws in 1988, AS 23.30.022 was adopted. § 5 ch 79 SLA 1988. It provides:

> An employee who knowingly makes a false statement as to the employee's physical condition on an employment application or preemployment questionnaire may not receive benefits under this chapter if
>
> (1) the employer relied upon the false representation and this reliance was a substantial factor in the hiring; and
>
> (2) there was a causal connection between the false representation and the injury to the employee.

This provision protects the employer from compensation liability where the employee misrepresents his physical condition, the employer relies on the false representation to the extent that it was a substantial factor in hiring, and the employee incurs an injury which is causally connected to the false representation. Unlike AS 23.30.250, which imposes a criminal penalty for willful misrepresentation in the workers' compensation process, this provision addresses knowing misrepresentation prior to the injury and protects the employer as well as excludes the employee. It complements the Second Injury Fund mechanism. If the employee divulged the information, the employer had a "written record" and could file a claim for Fund protection if an injury resulted in significant disability. On the other hand, if the employee knowingly concealed the information, the employer would not have access to Fund reimbursement in the event of injury, but in certain cases[4] the employer would be able to avoid liability altogether.

---

[4]The misrepresentation exclusion applies only where the employee's misrepresentation is causally related to the injury; e.g., in those cases where the employer could have provided

The reasoning behind these restrictions was set forth at length in the House Education and Labor Committee:

> Historically, employment application forms and employment interviews requested information concerning an applicant's physical or mental condition. This information was often used to exclude applicants with disabilities -- particularly those with so-called hidden disabilities such as epilepsy, diabetes, emotional illness, heart disease and cancer -- before their ability to perform the job was even evaluated.
>
> In order to assure that misconceptions do not bias the employment selection process, the legislation sets forth a process which begins with a prohibition on pre-offer medical examinations or inquiries. . . . This prohibition against inquiries regarding disability is critical to assure that bias does not enter the selection process.

H.R. Rep. No. 485, 101 Cong., 2d Sess., pt. 2, at 72-73 (1990).

The ADA provides that state and local governments may not exclude a qualified person with a disability from participation in government services, benefits or programs, nor deny benefits of government services, benefits or programs by reason of such disability. 42 U.S.C. § 12132. Such programs include services of the workers' compensation division and eligibility for workers' compensation benefits.

While concern was expressed in Congress regarding ADA conflicts with OSHA workplace safety standards or other state health regulations, no explicit discussion of conflicts with second injury funds or workers' compensation laws is contained in committee reports.[5] Regarding potential conflict with workplace safety laws, the United States Attorney General was directed to "exercise coordinating authority to avoid and eliminate such conflicts." H.R. Rep. No. 485, 101st Cong. 2d Sess., pt.2, at 136 (1990).

4. Federal Preemption

Article VI of the Constitution of the United States

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[5]There was testimony relating "myths about job performance, safety, insurance costs" as a barrier to employment. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt 2 at 33 (1990).

While courts are not to seek out conflicts between state and federal regulation where none clearly exist, Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 446 (1960), "under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." Gade v. National Solid Wastes Management Ass'n, 505 U.S. at 108, 112 S.Ct. 2388; quoting in part Felder v. Casey, 487 U.S. at 138; 108 S.Ct., at 2307.

Congress did not express a clear and manifest intent to preempt state workers' compensation laws in enacting the ADA. The ADA is designed to prevent discrimination on the basis of disability; not to compensate those who suffer disability as a result of work-related injury. Congress disclaimed any intent to occupy the field of disability law, stating that the ADA is not to be construed to "invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act." Sec. 501(b). Moreover, the EEOC's interpretive guidance to the federal regulations enforcing the ADA's restrictions on employer medical inquiries provide that state workers' compensation laws are not preempted by the ADA. 29 CFR 1630, App. 1630.14(b). However, the EEOC also states that "ADA requirements supersede any conflicting state workers' compensation laws." EEOC Technical Assistance Manual, Sec. 9.6(b), Part IX, p.6 (1992). In this instance, federal preemption by the ADA of the state's workers' compensation laws must rest on the existence of a conflict between the ADA and the state law.

5. Preemption of Second Injury Fund Written Record Requirement

AS 23.30.205(c) requires an employer to have written knowledge of a permanent physical impairment before the injury and that "the employee was hired or retained in employment after the employer acquired that knowledge". The ADA, on the other hand, strictly prohibits any pre-employment inquiries into the existence of a "disability or the nature or severity of a disability". 42 U.S.C. § 12112(c)(2)(A). The ADA definition of disability is sufficiently broad[6] to encompass many of the Second Injury Fund's

---

[6]The ADA defines "disability" as
(a) a physical or mental impairment that substantially limits one or more of the major life functions of such individual;
(b) a record of such impairment; or
(c) being regarded as having such an impairment.
42 U.S.C. 12102(2). Not all of the listed conditions would

1630.14(b), and inquiries to current employees are limited to those "job-related and consistent with business necessity." 42 U.S.C. § 12112(c)(4)(A).[8] With regard to entrance examinations, the EEOC cautions that, although inquiries that are not job-related are permitted:

> employers may, as a practical matter, find it desirable to avoid requiring such examination/inquiries. This is so because an employer's obtaining information unrelated to the job can be probative of an employer's knowledge of an individual's disability if discrimination is alleged at a later time.

EEOC Guidance on Pre-Employment Disability-Related Inquiries and Medical Examinations under the ADA (No. 915.002, May 19, 1994) at n.59. Thus, while an ADA covered employer has a window of opportunity to make broad inquiry into the existence of listed conditions, and the EEOC acknowledges the role of second injury funds in limiting the cost of injury to an employer, the EEOC cautions that the employer may find it more advantageous not to make such inquiries.

> It is the position of the EEOC that:
> the ADA does not prohibit employers from obtaining information about pre-existing injuries and providing needed information to second injury funds. . . . [A]n employer may make such medical inquires and require a medical examination after a conditional offer of employment and before a person starts work, so long as the examination or inquiry is made of all applicants in the same job category.

EEOC Technical Assistance Manual, Sec. 9.5, Part IX, p.6, (1992). The Manual makes no statement about information acquired after hire. After the employment entrance inquiries, inquiries must be "job related and consistent with business necessity". It could be argued that broad inquiries after the employment entrance window are "consistent with business necessity", but it is more difficult to tie such inquiries to the specific employee's job, even solely for Second Injury Fund purposes.

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[8]It could be argued that it is consistent with business necessity for an employer to make sufficient record to claim Fund protection in the event of a future serious work-related injury, particularly as the existence of the record is necessary for Fund reimbursement.

The federal agency charged with enforcement of the ADA has approved transmission of information properly obtained to second injury funds, 28 C.F.R. 1630, App. 1630.14(b). Since the employer must obtain the knowledge and record it to send to a second injury fund, the EEOC evidently does not view a requirement that an employer establish by written record that the employee was retained in employment after the employer had knowledge of the listed impairment as having direct and substantial effect on implementation of the ADA. Such a written record requirement may or may not induce some employers to evade the ADA. However, speculation that an employer may be tempted to violate the ADA to obtain a state benefit does not render the state statute invalid. An otherwise valid state statute will not be struck down "merely because the public reacts to it in a manner inconsistent with federal law." Kosikowski v. Bourne 659 F.2d 100, 105 (9th Cir. 1981) (dismissing argument that local ordinance was preempted because it induced unsafe practices and caused pilots to attempt to violate federal regulations). Compare, Tellis v. United States Fidelity and Guar. Co., 625 F. Supp. 92, 95 (N.D.Ill. 1985) (in claim against employer based on scheme to defraud worker of benefits by false statement that he would be returned to work, RICO does not preempt state workers' compensation exclusive remedy rule), aff'd, 805 F.2d 741 (7th Cir. 1986), cert. granted and vacated on other grounds, 483 U.S. 1015, 107 S.Ct. 3255 (1987), aff'd on other grounds, 826 F.2d 477 (7th Cir. 1986).

6. False Statement Exclusion

AS 23.30.022 provides that an employee who "knowingly makes a false statement as to the employee's physical condition on an employment application or preemployment questionnaire" may not receive workers' compensation benefits if the employer substantially relies on the false statement "in hiring" and the employee's injury is causally related to the false statement.

The ADA prohibits preemployment inquiries as to physical condition prior to a job offer. Therefore, an employer with more than 15 employees cannot comply with the ADA and obtain relief from liability under this statute. Since the statute does not exclude employees from coverage based on post-offer misrepresentations, as in an entrance examination or a legitimate job-related inquiry, the employer cannot obtain relief under this statute in other circumstances when the information is obtained in compliance with the ADA.[10] The statute also requires the employer to demonstrate

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[10]If the "pre-employment questionnaire" in A23.30.022 is defined as a "post-offer entrance questionnaire" which complies with the ADA, an employer could avoid conflict. However, a preemployment questionnaire is not generally meant as being completed after an offer of employment. Also, taken in

Christopher G. Bell, "Integrating the Americans with Disabilities Act into the Workers' Compensation System", Disability Law Reporter, Vol.2, No.6, p.3, 13 (June 1993). The EEOC takes the position that under the ADA an employer may withdraw an offer to, or fire, a person who knowingly provides a false answer to a lawful inquiry about their physical condition or workers' compensation history. EEOC Technical Assistance Manual, supra.

7. Effect of Federal Preemption.

A state statute that actually conflicts with federal law is void to the extent that the conflict exists. Edgar v. MITE Corp., 457 U.S. 624, 102 S.Ct. 2629 (1982). In those cases where Congress did not intend to occupy the whole field, the state statute is invalid or void only to the extent of the actual conflict; Planned Parenthood of Billings v. State of Montana, 648 F. Supp. 47 (D.C. Mont. 1986); Consolidated Rail Corp. v. City of Bayonne, 724 F. Supp. 320 (D.C. N.J. 1989); and inconsistent provisions only of state law may be preempted. Matter of Baby K., 16 F.3d 590 (4th Cir. 1994). The extent of the preemption depends on the extent of the conflict. Boyle v. United Tech Corp., 487 U.S. 500, 512, 108 S.Ct. 2510, 2518 (1988).

Federal preemption may invalidate otherwise valid state law "as it is applied", Hankin v. Finnel, 964 F.2d 853 (8th Cir. 1992) (invalidating application of state's incarceration reimbursement lien against judgment paid by state in inmate's 1983 action against state prison guard); Texas Employers' Ins. Ass'n v. U.S., 569 F.2d 874, 875 (5th Cir. 1978) (application of state workmen's compensation anti-assignment statute against V.A. hospital invalid); or specific provisions of state law, Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 101 S.Ct. 1895 (1981) (invalidating state law prohibiting pension benefit offsets of workmen's compensation benefits); or specific operation of state law. Employee Benefits Committee, Etc. v. Pascoe, 679 F.2d 1319, 1322-23, (9th Cir. 1982) (invalidating operation of Hawaii workers' compensation law barring any rule to relieve the employer from liability). Thus while specific operation or provision of state law may be invalid, the remaining applications or provisions are not preempted. District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 113 S.Ct. 580 121 L.Ed.2d 513 (1992).

A finding of federal preemption in this instance would invalidate only those specific offending parts of the state workers' compensation law, since neither the operation of second injury funds in general nor false statement exclusions are barred by the ADA. Specifically, in AS 23.30.205(c), the words "hired or" and, in AS 23.30.022, the words "on an employment application or preemployment questionnaire" and "this reliance was a substantial factor in the hiring" are the portions of the statutes that present

Since the ADA bars inquiry into physical conditions in employment applications or pre-employment questionnaires, an employer may not require an employee to divulge such conditions at the risk of losing future workers' compensation under AS 23.30.022.

Because it is impossible to comply with conflicting provisions of the ADA (federal law) and the specific offending provisions of AS 23.30.205(c) and AS 23.30.022, identified more specifically above, the federal law (the ADA) would preempt the state law provisions regarding the Second Injury Fund (reimbursement based on hire after acquiring written knowledge of impairment) and the false statement exclusion (concealment of conditions on employment applications or pre-employment questionaires). These provisions could be deemed void.[11] The insert provided does not give notice of the effect of preemption by the ADA.

We hope this memorandum answers your questions.

KSK:lea

Attachment

[11]There has been no published ruling from any court on this precise issue to date.

NOTICE

At page 3, the following is added to the section "WHAT IF YOU DON'T TELL THE TRUTH." Alaska Statute 23.30.022 states:

> An employee who knowingly makes a false statement as to the employee's physical condition on an employment application or preemployment questionnaire may not receive benefits under this chapter if
>
> (1) the employer relied upon the false representation and this reliance was a substantial factor in the hiring; and
>
> (2) there was a causal connection between the false representation and the injury.

A federal law, the Americans with Disabilities Act (ADA) , may limit your employer's right to ask you about your physical condition (health). You can get information about the ADA as it relates to employment by calling the federal Equal Employment Opportunity Commission at 1-800-669-4000, or writing the Commission at 907 First Avenue, Suite 400, Seattle, Washington 98104-1061.

(See Reverse for More Information)

April 23, 1997

HB 214 (Labor & Commerce)

Dear Senator,

I read HB 214 and I have some concerns that I would like you to consider.

*Section 1. AS 23.30.022 is amended to read:

> Sec.23.30.022. False statements by employee. An employee who knowingly makes a false statement as to the employee's physical condition **in response to a medical inquiry, or in a medical examination, after a conditional offer of employment** [on an employment application or preemployment questionnaire] may not receive benefits under this chapter if
>
> (1) the employer relied upon the false representation and this reliance was a substantial factor in the hiring; and
>
> (2) there was a causal connection between the false representation and the injury to the employee.

My objection is to the word "conditional." This allows employers to make a "conditional" offer of employment until the employee completes the medical inquiry or questionnaire. If the employee reveals ANY condition, the employer has the option of withdrawing the conditional offer of employment. While the revised statute may meet the requirements for the Americans with Disabilities Act (ADA), it still allows employers to discriminate against any employees who have ANY disability. Not all employees who have some type of disability are going to have work related injuries. Yet this amendment punishes the masses for a few who may have work injuries. The amended AS 23.30.022 without the word "conditional" offers all the protection an employer needs to prevent the employee who lied about his preexisting condition on his application from getting workers' compensation benefits. Is this change in the language helping small employers, or potentially costing them tens of thousands of dollars in defense litigation costs?

One of the biggest complaints to the Workers' Compensation Division is from employees who have been injured on the job, released to return to work and find that the employer will not take them back. Alaska has no statute that requires an employer to reemploy an injured worker, even if he/she is fully recovered. If the employer won't reemploy a fully recovered employee with a good employment record, what is the likelihood that they will offer an employee a job after the employee reveals a previous injury or preexisting condition?

I urge you to vote NO on this amendment to HB 214. It isn't good for employees (constituents) because it may deprive them of the ability to earn a fair living for themselves and their families.

Sincerely,

Betty Johnson

Betty Johnson
Juneau, Alaska
eMail: bettmark@alaska.Net

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION

April 23, 1997

HB 214 (Labor & Commerce)

Dear Senator,

I read HB 214 and I have some concerns that I would like you to consider.

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Sincerely,

Betty Johnson

Betty Johnson
Juneau, Alaska
eMail: bettmark@alaska.net

No. 4
Bill Version: HB 214
(H) Publish Date: 4/7/97

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

Revision Date:
Title: " . . . employer's knowledge of an employee's physical condition ... purposes of the Alaska Worker's Compensation . .
Sponsor: House Rules Committee
Requester: House Labor and Commerce Committee

Dept. Affected: Department of Law
BRU: Civil Division
Component: General Legal Services
COMPONENT SERIAL NO. 2087

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY97) cost: $ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

HB 214 amends AS 23.30.022, relating to false statements by an employee as to the employee's physical condition, and AS 23.30.205(c), relating to injury combined with preexisting impairment, to bring Alaska's workers' compensation laws into conformance with the federal Americans with Disabilities Act.

The Alaska temporary assistance program (the successor to the Aid to Families with Dependent Children program), AS 47.27, was enacted in 1996 as part of welfare reform. One of its provisions, AS 47.27.035, requires that, unless exempt under that statute, participants in the Alaska temporary assistance program must participate in "work activities" in order to receive assistance or services under the program. "Work activities" includes paid employment and paid on-the-job training, as well as unpaid activities such as community work service and job search and preparation activities. HB 214 would also amend AS 23.30.230(a), the list of persons excluded from workers' compensation coverage, to add to that list Alaska temporary assistance program participants who are engaged in unpaid work activity. The amendment would draw the distinction that ensures

Prepared by: Joan M. Kasson
Division: Administrative Services Division
Phone: 465-5370
Date: 4/1/97

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: 4/1/97

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FISCAL NOTE