

ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 8672

10077 SENATE JUDICIARY

**SB**

**163**

# SENATE COMMITTEE REPORT

## First Committee of Referral

DATE: 4/22/99

FURTHER:

Date of 5-Day Notice: \_\_\_\_\_  
(in accordance with Uniform Rule 23)

DATE TURNED  
IN TO OFFICE: \_\_\_\_\_

Judiciary Committee considered

SENATE BILL NO. 163

"An Act relating to a trustee's duties to inform and account to beneficiaries; relating to the revocation, modification, termination, reformation, construction, and trustees of trusts; and relating to transfer restrictions in trusts."

and recommends:

- be replaced with S CS SB 163 LS0486W (JUD)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to the \_\_\_\_\_ Committee

- Senate Bill:
- same title
  - new title
- House Bill:
- same title
  - technical title
  - new: SCR# \_\_\_\_\_

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
<i>[Signature]</i>	✓	<i>[Signature]</i>			
		<i>[Signature]</i>			
		<i>[Signature]</i>			
CHAIR: <i>[Signature]</i>	✓	CHAIR:			

**NEW FISCAL NOTE(S):**

Department	Date	Zero	Fiscal

**PREVIOUS FISCAL NOTE(S):\***

Department	Date	Zero	Fiscal

APPROPRIATION -- no fiscal note

\*include fiscal notes accompanying Governor's bill

# Alaska State Legislature

*Chairman,*  
Judiciary Committee

State Capitol  
Juneau, Alaska 99801-1182  
(907) 465-3873  
Fax: (907) 465-3922



50 Front Street  
Suite 203  
Ketchikan, Alaska 99901  
(907) 225-8088  
Fax: (907) 225-0713

*Senator Robin L. Taylor*

## SPONSOR STATEMENT

SB 163

An Act relating to a trustee's duties to inform and account to beneficiaries; relating to the revocation, modification, termination, reformation, construction, and trustees of trusts; and providing for an effective date.

This legislation defines a current beneficiary as a person who receives a mandatory distribution of income or principal from a trust. Current law does not define "current beneficiary". Some trusts name as many as dozens of discretionary beneficiaries who may not be entitled to receive any income or principal for years. Under current law the trustees of such trusts do not know whether they have to notify these discretionary beneficiaries. The new legislation would clarify that the trustee only has to notify a beneficiary who is entitled to a mandatory distribution of income or principal from the trust.

District A:

Hyder • Ketchikan • Kupreanof • Meyers Chuck • Petersburg • Saxman • Sitka • Wrangell

# FISCAL NOTE

**STATE OF ALASKA**  
**1999 LEGISLATIVE SESSION**

**BILL NO. SB 163**

Revision Date/Time (Note if correction)	Dept. Affected	Law
Title " ... relating to a trustee's duties to inform and account to beneficiaries; ... revocation, modification ... of trusts ..."	BRU	Civil Division
Sponsor Senate Judiciary Committee by Request	Component	Commercial
Requestor Senate Judiciary Committee	Component Serial No.	2211

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
<b>CHANGE IN REVENUES ( )</b>						

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY99) cost: \_\_\_\_\_

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

SB 163 requires a trustee to give current beneficiaries notice of the registration of a trust and to keep the beneficiaries informed about its administration. Under this bill, trusts are presumed revocable unless expressly made irrevocable. It further defines how trusts can be revoked, whether they are revocable or not, modified and reformed to correct mistakes not intended by the person creating the trust.

This bill will have no fiscal impact on the Department of Law.

Prepared by Joan M. Kasson  
 Division Attorney General's Office  
 Approved by Commissioner Bruce M. Botelho, Attorney General  
 Agency Department of Law

Phone 465-5370  
 Date/Time 4/27/99, 9:08 AM  
 Date 4/27/99

**PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE**

For further distribution information, call the Governor's Legislative Office

## Explanation of Changes to Senate Bill 163

Proposed changes to the current statutory requirement that trustees must notify all beneficiaries...

The reason for the original proposal to modify the trustee's duty to notify current beneficiaries and contingent beneficiaries was due to two factors:

1. There was no definition of current beneficiaries in the statute.
2. We wanted to give the settlor (the creator of a trust) flexibility and privacy to limit the notification to some beneficiaries if they felt it was appropriate.

Based upon issues raised and certain concerns, it is felt that the original draft of the statute may have gone too far and may have caused a broad range of beneficiaries not to receive proper notification. Therefore, we have limited the scope of the proposed change.

The revised language in SB 163 allows a settlor in writing to exempt a trustee of the notification requirement only to a beneficiary who was not entitled to a mandatory distribution of income or principal from the trust on an annual or more frequent basis. If a beneficiary is (1) entitled to a distribution or (2) does receive a distribution, then the trustee would still be required to provide notice and accountings. The exemption period may not exceed the shorter of the settlor's lifetime or a judicial determination of the settlor's incapacity.

This change will allow settlors the flexibility and privacy of not being required to inform their young children that they are a beneficiary of trust. Many settlors have expressed concern that they may not want the beneficiaries to know they have a future interest in a trust. For example, the settlor is afraid that knowledge of the trust by the beneficiary might prevent them from conducting a productive lifestyle. In addition this allows Alaska to provide the same flexibility as other states that are competing with Alaska for trust business.

Again it should be noted that this restriction only applies to beneficiaries who are not entitled to a mandatory distribution and can only last for the settlor's lifetime or when the settlor has become judicially incompetent. If the creator of the trust (settlor) sets forth the waiver of notification in writing, the trustee will not notify the beneficiary until the time set forth above. This amendment is a default statute so if the settlor does not provide the written waiver, the current standard of notice to all current beneficiaries still applies.

## Summary

---

IN ESTATE OF GERMAN 85-1 USTC ¶ 13,610 (CCH) (CT. Cl. 1985), MRS. GERMAN WAS DOMICILED IN FLORIDA WHEN SHE CREATED THE TRUST. MARYLAND LAW GOVERNED THE TRUST - ONE OF THE TRUSTEES RESIDED THERE. MRS. GERMAN WAS NOT DOMICILED IN MARYLAND WHEN SHE DIED. YET, CLEARLY, THE COURT HELD CREDITORS' RIGHTS UNDER MARYLAND LAW CONTROLLED THE ESTATE TAX INCLUSION ISSUE.

## Summary

ESTATE OF ESTELLE E. GERMAN, 7 CL. CT. 641

---

"Internal Revenue Code § 2036 includes in the gross estate the value of any interest in property of which a decedent has at any time made a transfer under which he has retained for his life the possession or enjoyment of, or the right to income from, the property, or the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."

\* \* \*

"The question presented is whether the decedent divested herself of her interest in property in 1969 when she transferred such property to a trust with a proviso that the trustee might, in their absolute discretion, pay any or all of the income or principal to decedent at any time during her lifetime, if they received the written consent of the person who was entitled to receive the principal and accumulated income of the trust after her death, or whether she continued to enjoy the right to the income or principal of the trust up to the date of her death, because under Maryland law if she chose to incur any debts her creditors could still attach or levy upon the trust assets to collect them."

\* \* \*

"During the grantor's life the trustees had the power at anytime in their absolute and uncontrolled discretion to pay to or apply for the benefit of the grantor all or part of the net income and principal as the trustees should determine, in their absolute and uncontrolled discretion, for any reason whatsoever, including the termination of the trust, subject only to the condition

277-1700

that the trustees receive the written consent thereto of the respective beneficiary of the particular trust, Frederick or Arthur, individually."

\* \* \*

"Thus, the narrow issue to be decided herein is as to the extent of decedent's creditors' rights with respect to the trust income and assets under Maryland law."

\* \* \*

"Defendant [IRS] has not established that under Maryland law creditors of the settlor could have reached the trust income or principal of her discretionary trust up to the time of her death."

---

Estate of Estelle E. German, Plaintiff v. The United States, Defendant.  
U.S. Claims Court, No. '34-81T, 3/26/85.

This is a suit for refund of estate taxes. Internal Revenue Code § 2036 includes in the gross estate the value of any interest in property of which a decedent has at any time made a transfer under which he has retained for his life the possession or enjoyment of, or the right to income from, the property, or the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom. Section 2038 includes in the gross estate the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power by the decedent alone or by the decedent in conjunction with any other person, to alter, amend, revoke, or terminate. The question presented is whether the decedent divested herself of her interest in property in 1969 when she transferred such property to a trust with a proviso that the trustees might, in their absolute discretion, pay any or all of the income or principal to decedent at any time during her lifetime, if they received the written consent of the person who was entitled to receive the principal and accumulated income of the trust after her death, or, whether she continued to enjoy the right to the income or principal of the trust up to the date of her death, because under Maryland law if she chose to incur any debts her creditors could still attach or levy upon the trust assets to collect them.

*Statement*

On July 31, 1969, Estelle E. German (decedent) made six separate transfers of property to Frederick A. German and Arthur W. German, her sons, as trustees jointly. Each trust agreement provided that the trustees shall accumulate the net income of the trust, and that at the end of each year should add the accumulated net income to the principal of the trust. Three of the trusts were for the benefit of Frederick German and three for the benefit of Arthur German. Each trust provided that after decedent's death the trustees, in their sole and absolute discretion, were to accumulate for, pay to or apply for the benefit of the respective beneficiary all or part of the net income and principal of the trust, and, upon the death of the beneficiary, to such members of Frederick's or Arthur's family as each should appoint. Notwithstanding the foregoing, during the grantor's life the trustees had the power at anytime in their absolute and uncontrolled discretion to pay to or apply for the benefit of the grantor all or part of the net income and principal as the trustees should determine, in their absolute and uncontrolled discretion, for any reason whatsoever, including the termination of the trust, subject only to the condition that the trustees receive the written consent thereto of the respective beneficiary of the particular trust, Frederick or Arthur, individually. (FNI)

The decedent filed a gift tax return for 1969 which reflected that she had made no taxable gift during that year. She died on November 21, 1970. Her estate tax return, filed August 11, 1972, likewise failed to include in the estate the value of the assets transferred in 1969 to the six trusts.

Subsequently, there was assessed against the estate a \$355,959 deficiency in federal estate tax, plus interest thereon, which amounts were paid on various dates in 1973 and 1974.

A timely claim for refund was filed on December 17, 1975, which was denied on December 28, 1979, and this suit was timely filed on December 28, 1981.

---

---

*Decision*

1. *On liability for estate tax.*

[1] The government's theory is based upon the rationale of *Outwin v. Commissioner*, 76 T.C. 153 (1981) (acq., 1981-2 C.B. 2), a gift tax case. There the taxpayer had created four irrevocable trusts, which were to accumulate the income during his lifetime. After his death, if his wife survived him she was entitled to mandatory distributions of the trust income annually, and to distribution of the corpus to her only in the absolute and uncontrolled discretion of the trustee. In addition, she was given a special testamentary power of appointment over the corpus. Notwithstanding the foregoing, the trustees were given the power at any time during the life of the grantor, to pay to, or apply for the benefit of, the grantor, such part or parts of the income and principal as the trustees should determine in their absolute and uncontrolled discretion, for any reason whatsoever, notwithstanding that such payments might result in the termination of the trust; but such distributions by the trustees required the prior written consent of the grantor's spouse.

The Commissioner determined that in transferring property to such trusts Mr. Outwin had made a completed taxable gift, while the taxpayer contended to the contrary. The Tax Court overruled the Commissioner on the ground that the gift was not completed because the donor retained dominion and control over the property transferred. The court stated that "[w]here the trust agreement specifies \* \* \* that distributions to the settlor are to be made in the absolute discretion of the trustees, with no enforceable standard provided, the transfer is generally held to be complete for tax purposes." *Id.* at 162. However, "[a] different result obtains \* \* \* where state law permits creditors of the settlor-beneficiary to pierce the trusts for satisfaction of claims." *Id.* This result follows, the court said, from the fact that if under state law the creditors of a settlor-beneficiary of a discretionary trust may reach for satisfaction of claims the maximum amount which the trustee may pay to the settlor or apply for her benefit, the taxpayer may at any time "obtain the economic benefit of the trust income simply by borrowing and then forcing [his] creditors to look to [his] interest in the trust income for a source of repayment." *Id.* Because it found that the settlor-beneficiary's creditors did have such a right under Massachusetts law, which was applicable to the *Outwin* trust, the court held that the gift was incomplete to the extent of the value of the settlor-beneficiary's life estate. *Accord Commissioner v. Vander Weele*, 254 F.2d 895 (6th Cir.1958) (applying Michigan law); *Paolozzi v. Commissioner*, 23 T.C. 182 (1954) (also applying Massachusetts law); and *Rev.Rul. 76-103*, 1976-1 C.B. 293. *But see Herzog v. Commissioner*, 116 F.2d 591 (2d Cir.1941), and *In Re Uhl's Estate*, 241 F.2d 867 (7th Cir.1957), reaching contrary results under New York and Indiana law, respectively.

Defendant claims that under Maryland law, which is applicable to the trusts herein, decedent's creditors could have reached the principal and interest of such trusts until the time of her death, and, accordingly, she had not disposed of her right to possession and enjoyment of the property and the transfer took effect upon her death. On the other hand, plaintiff maintains that Maryland law did not give decedent's creditors such right, and, accordingly, her gifts were completed at the time she transferred the assets in trust and they were no longer subject to estate tax. Thus, the narrow issue to be decided herein is as to the extent of decedent's creditors' rights with respect to the trust income and assets under Maryland law.

The authority upon which defendant relies primarily for Maryland law is the decision in *Warner v. Rice*, 66 Md. 436, 8 A. 84 (1887). That case presented the question as to whether or not the income of a debtor, from certain property embraced in a deed of

---

---

trust made by himself and his wife prior to incurring the debts, was liable to attachment or execution in a suit for his debts. The deed was made "[i]n trust for the use and benefit of said George Warner and his immediate family, free from liability for any of his debts, contracts, or engagement; and when, if so by said trustees found requisite, by him being proper, to apply the uses, rents, income, and profits to the support and maintenance of said George and his said family during his, said George's, life, and, after his decease, the same to go as he by last will may have directed, or, in case of his decease intestate, the same to go according to law under the existing statutory provisions of the law of Maryland." *Id.* 8 A. at 85. The court held that Mr. Warner's creditors could reach the income of this trust because "a beneficial legal estate, in fee or for life, cannot be conveyed or devised to a person with a provision that it shall not be alienated, or that it shall not be subject to the debts of the legal owner" (*id.*); that "equitable estates cannot be effectually created with a proviso against alienation, or that they shall not be liable to the debts of the *cestui que trust* \* \* \* and, generally, whenever property is subject to alienation by the owner it is subject to his debts" (*id.* at 85-86); and because, in this case--

The object of the deed of trust was not to destroy or divest himself of his right of property, but simply to place a legal estate therein in a trustee, as, perhaps, a guard against improvident management. But the equitable estate remains in George Warner during his life, with full power of disposition by will, and, in default of will, the property devolves on his heirs and representatives at his death, when the trust will terminate. It is only during his life that the rents, profits, and income from the property are directed to be applied to the support of himself and his family, when and as the trustee may deem proper. Full and complete control is retained in the *cestuis que trust* over the investments, and change of investments; and they declare, moreover, that they are entitled and reserve the right to collect, receive, and have, each for her or himself, the rents, issues, and profits of his or her share, conformably with the trust declared. As we have seen, there is no limitation over or cesser of George Warner's equitable life-estate, or his interest in the rents and profits of the property, upon seizure of the same by his creditors. (*Id.* at 86.)

In response to the argument by Warner that the trustee had discretion as to whether or not he would pay over the rents and profits to Warner, the court noted that if the trustee did not pay them over, he had no authority to accumulate them for any other purpose; they would still belong to the estate of George Warner and the trustee would have to account to his executor or administrator for such arrearage. *Id.* Accordingly, "[t]he discretion given the trustee, if the terms of the direction can be construed into a power to exercise a discretion at all, can only apply to the manner of the application, and not to any power to withhold or divert the rents and profits, and apply them to any other purpose." *Id.*

The instant case is distinguishable from *Warner* in several respects: First, if the trustee here, in the exercise of his discretion, did not distribute the income or principal to Mrs. German, it would go to the specified remaindermen; whereas in *Warner* the undistributed trust income would be accumulated for the settlor's benefit and the corpus distributed pursuant to his will. Second, unlike *Warner*, before the settlor here could receive any distribution from the trustees, the consent of a beneficiary having an adverse interest had to be obtained. Third, the trusts here, but not in *Warner*, made dispositions of the property upon the death of the settlor and were not intended solely to shield her assets from her creditors.

*In Mercantile Trust Co. v. Bergdorf Goodman & Co.* 167 Md. 158, 173 A. 31 (1934).

---

---

the Maryland Court of Appeals confirmed that where there is no proof of fraud the rights of attaching creditors to property in a trust created by a debtor depend upon whether the property which is not distributed to the settlor-beneficiary or according to his direction goes back to the settlor or to a third-party at his death. There the settlor had created an inter vivos trust, retaining a life estate in the trust assets and a power of appointment by will, which, if not exercised, would result in the property going to her then living issue or next of kin. The Maryland court held that although the creditors could attach the settlor's income from the life estate, in the absence of a fraudulent conveyance they could not reach the corpus of the trust, because, "there was an immediate vesting of the remainder in the next of kin of the settlor", and "[w]ith the ownership of the corpus in the remaindermen, even though the possession may be delayed or defeated by the will of the donor, \* \* \* the corpus cannot be attached to satisfy the creditors of the settlor." (*Id.* at 165-66, 173 A. at 34-35.) *Accord, United States v. Baldwin*, 283 Md. 586, 391 A.2d 844 (1978). If the unexercised right of the settlor in *Mercantile Trust Co.* and *Baldwin* to dispose of the corpus by will was not sufficient to render the trust property subject to execution by creditors because of the interests of the remaindermen in such property in default of appointment, for the same reason it would appear that the unexercised discretion of the trustees of Mrs. German's trust with respect to both principal and income would not render either vulnerable to Mrs. German's creditors under Maryland law.

Apart from *Warner v. Rice*, defendant has not cited any Maryland decision in which creditors were able to reach income or corpus which could be distributed to the settlor of a trust, not as a matter of right, but in the uncontrolled discretion of the trustee.

Equally important, defendant has cited no decision, either in the Maryland courts or elsewhere, where the creditor was held entitled to attach trust property where the trustee's discretion could only be exercised with the prior consent of those who would receive the property in default of such exercise. In *Outwin*, the Tax Court likewise confessed that it had been unable to find any authorities in any state which addressed the precise issue. *Outwin*, 76 T.C. at 165. However, it resolved that problem by reasoning that in view of the strong public policy of the Massachusetts courts against persons placing property in trust for their own benefit while at the same time insulating such property from the claims of creditors the veto power of a spouse would not be a barrier to such creditors under Massachusetts law, because it assumed (1) that (in the absence of divorce) the possibility that the spouse would veto a disbursement by the trustee to her husband was remote, and (2) the fact that the husband might reciprocate by veto of disbursements to the wife under her similar trust would tend to further discourage her veto. *Id.* at 166-67. This court finds no such strong public policy in the Maryland courts where there is a remainder interest. It finds no assumption by the Maryland courts that the wife may be deemed merely the husband's alter ego for purposes of insulating property from a settlor's creditors in a non-fraudulent conveyance transaction. Indeed, *Watterson v. Edgerly*, 40 Md.App. 230, 388 A.2d 934 (1978), appears to be to the contrary. And the instant case does not involve reciprocal husband and wife trusts.

Thus, defendant has not established that under Maryland law creditors of the settlor could have reached the trust income or principal of her discretionary trusts up to the time of her death.

The most satisfactory resolution of this question of state law would have been by certification to the Maryland Court of Appeals. See *United States v. Baldwin*, 283 Md. 586, 391 A.2d 844 (1978). Unfortunately, while the Uniform Certification of Questions of Law Act, Md. [Courts and Judicial Proceedings] Code Ann. §§ 12-601--12-609 (1984), grants jurisdiction to the Maryland Court of Appeals to answer questions of law

---

---

certified to it by a United States District Court or United States Court of Appeals, it does not allow certification from this court. Accordingly, it is the duty of this court to approximate the law of the state from decisions of its highest court as best it can. See *Commissioner v. Estate of Bosch*, 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967).

2. *On Equitable Estoppel.*

As noted previously, Estelle E. German made the transfers in trust on July 31, 1969, but in a gift tax return for that year asserted that they were not taxable because they did not constitute completed gifts. On November 21, 1970, decedent died. However, the estate tax return filed by her estate likewise failed to include any amount for the 1969 transfers to the trusts, stating merely that decedent had made six irrevocable transfers in 1969 which had been excluded from the gross estate.

Defendant now asserts, on the basis of an affidavit from an estate and gift tax examiner that the examiner, upon audit of both returns, had discussions with plaintiff's representative; that the latter acknowledged that the value of the 1969 transfers was includable in either the gift or the estate tax return; and that he then offered to include the trust property in the gross estate for estate tax purposes if the examiner would treat the transfers as incomplete for gift tax purposes. According to the examiner, he accepted the offer, and in reliance thereon the Commissioner of Internal Revenue assessed plaintiff \$355,959 in estate tax but nothing in gift tax. Nevertheless, less than 6 months after the period of limitations on assessing the gift tax expired, plaintiff filed a claim for refund of the estate tax paid pursuant to the assessment, and upon its denial filed this suit.

The affidavit of plaintiff's representative denies the examiner's allegations.

Plaintiff now concedes that the gift tax was properly due and that defendant is entitled to offset the estate tax overpayment by the gift tax deficiency. However, such concession does not satisfy defendant. It asserts that the applicable estate tax is \$66,000 more than the gift tax on the same transfers, and that, even if this court finds that only the gift tax was due, plaintiff is equitably estopped by the conduct of its representative from recovering any of the estate tax.

It is unnecessary to decide the disputed allegations, because, even if defendant's affiant's statements are true, defendant's claim for additional tax cannot be supported on the theory of equitable estoppel.

[2] Equitable estoppel is ordinarily invoked when because of representations by the taxpayer, relied on by the government, the latter allows the period of limitations on assessment of a tax properly due to pass without a statutory notice of deficiency. But it is an equitable doctrine and requires misrepresentations of fact, reliance thereon, and detriment to the government which cannot otherwise be corrected. *Glazer Steel Corp. v. United States*, 181 Ct.Cl. 1063, 1077, 388 F.2d 990, 998 (1967); *Crosley Corp. v. United States*, 229 F.2d 376, 381 (6th Cir.1956); *Commissioner v. Mellon*, 184 F.2d 157, 160 (3d Cir.1950); *Ross v. Commissioner*, 169 F.2d 483, 496 (1st Cir.1948); and see also *Hess v. United States*, 210 Ct.Cl. 483, 495, 537 F.2d 457, 463 (1976), cert. denied, 430 U.S. 931, 97 S.Ct. 1551, 51 L.Ed.2d 775 (1977); *Oak Woods Cemetery Association v. United States*, 345 F.2d 361, 363 (7th Cir.1965); *Ford v. United States*, 149 Ct.Cl. 558, 566, 276 F.2d 17, 21 (1960).

[3] None of these prerequisites may be found here. There is no allegation of misrepresentation as to the pertinent facts, as the only substantive dispute between the parties is as to the state law. There is no valid reason why defendant should have relied upon plaintiff's allegations as to the state law, as it is equally accessible to both parties.

---

---

Defendant has incurred no substantial detriment, as plaintiff concedes that defendant is entitled to an offset for gift tax which was properly due.

[4] As the phrase implies, equitable estoppel may be applied only to correct an inequity. *Ross*, 169 F.2d at 494. It has [\*647] already been determined herein that the estate tax is not applicable, and accordingly the applicable tax is the lesser gift tax. There is no equity in defendant's claim that equitable estoppel militates in favor of collecting more than was originally due absent the bar of the statute of limitations. As noted by the Supreme Court in *Dickerson v. Colgrove*, 100 U.S. 578, 580-81, 25 L.Ed. 618 (1879), equitable estoppel "is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit."

*Conclusion*

Defendant's motion for summary judgment is denied. Service of defendant's pretrial submission is now due on April 25, 1985.

---

FN1. The trustees were also required to obtain the written consent of a trust committee, comprised of individuals who were not beneficiaries of the trusts, before any distribution of trust assets or income could be made.

---

Summary  
Private Letter Ruling 9332006 (not precedent)

---

"The Settlers recently created an irrevocable trust (the "Trust") under the laws of Country X and contributed nominal consideration to fund it. Relevant trust provisions include the following. Trust beneficiaries include the Settlers, Beneficiary A (a living parent of the Settlers and a United States citizen), and the Settlers' living and future heirs. Either (1) the Trustee (an independent Country X corporation) with the consent of the Protector (see below), or (2) Beneficiary A, may direct trust income or principal to be appointed to or for the benefit of any beneficiary, provided, however, that only the Protector may make any such appointment for the benefit of a Beneficiary A or of either Settlor."

\* \* \*

"It has been represented that under the laws of Country X, neither a beneficiary nor any creditor of any beneficiary, including the Settlers, may compel the trustee to distribute the Trust's assets to or for their benefit at any time during the trust term; that transfers by the Settlers of interest in the Partnership to the Trust are not in any way liable to be set aside under any applicable fraudulent conveyance or other law, domestic or foreign."

\* \* \*

"Will any of the interests in the Partnership transferred to the Trust by the Settlers be includible in their gross estate under sections 2033, 2036, 2037, or 2038? Section 2036(a) provides that a decedent's gross estate includes the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) by trust or otherwise, under which he has retained, for his life or for any period not ascertainable without reference to his death or any period that does not in fact end before his death, (1) the possession or enjoyment of or the right to income from the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."

\* \* \*

"Furthermore, based on the taxpayer representations regarding Country X law, the property transferred to the Trust will not be included in the gross estate of either Settlor under section 2033, since the gift to the Trust will be complete and neither Settlor will have the right to compel a distribution from the trust. Similarly, interests in the Partnership transferred to the Trust by either Settlor will not be included in that Settlor's gross estate under sections 2036, 2037, or 2038, since under the facts presented, the Trustee's

discretion to make distributions to a Settlor is not a retained interest or power for purposes of those sections. See Rev. Rul. 76-103, cited above."

---

PLR 9332006, IRC Sec. 2031

PLR 9332006, IRC Sec. 2031

**Section 2031**

**Headnote**

**TRANSFERRED PARTNERSHIP INTEREST NOT INCLUDABLE IN GROSS ESTATE.**

Two siblings created an irrevocable trust in a foreign country. The trust beneficiaries included the siblings, a living parent, and their future heirs. The laws of the country allow for a protector of the trust. The protector was a U.S. citizen, and the trust provided that neither the protector nor his estate could be a beneficiary. The trust further provided that the protector was neither a person nor entity related to or under the control of the settlors; that the beneficiaries could not compel distributions from the trust, and that the trust was a foreign trust for purposes of section 7701(a)(31). The settlors funded the trust with fractions of directly held partnership interests.

The Service has ruled that the partnership interests transferred to the trust were completed gifts and, thus, subject to gift tax, finding that the settlors parted with dominion and control of the property on the transfer. The Service further ruled that the partnership interests would not be includable in the settlors' estates, finding that the trustee's discretion to make distributions to the settlors was not a retained interest or power.

The Service also ruled that the trust was a grantor trust and, thus, the settlor's were required to take into account the appropriate portion of the trust's income, deductions, and credits when computing their tax liability. Finally, the Service ruled that any portion of the trust that was treated as owned by a settlor would cease to be treated so on that settlor's death.

**Electronic Citation:** 93 TNT 170-42

**Geographic Identifier:** United States

**Index Term:** estate tax, gross estate

**Full Text**

UIL Number(s) 0679 00-00, 2031.00-00, 2033.00-00, 2036.00-00, 2037.00-00,  
2038 00-00, 2511.00-00

**Date:** August 20, 1992

**Refer Reply to:** CC:INTL:Br4-0239-92

This is in response to a letter dated February 12, 1992 in which certain rulings were sought in connection with the income, excise, gift, and estate tax consequences of the establishment and funding of a trust organized under the laws of Country X. Additional information and representations were submitted in letters dated March 24, 1992, March 31, 1992, and April 20, 1992.

The rulings contained in this letter are predicated on facts and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. This office has not verified any of the material submitted in support of the request for the rulings. Verification of the factual information, representations, and other data may be required as part of the audit process.

The information submitted is substantially as follows. Settlor A and Settlor B (collectively, the "Settlers"; individually, a "Settlor") are siblings. Both are United States citizens. Each Settlor owns a Percentage A interest in Corporation A, a domestic corporation. Corporation A owns all of the voting common stock of Corporation B, also a domestic corporation. That voting common stock represents Percentage B of the value of Corporation B. The balance of Corporation B's stock, represented by non-voting common shares, is owned by the Partnership, a domestic limited partnership. The Partnership conducts no active business. Each Settlor now owns directly Percentage C of the interests in the Partnership; together, those interests comprise all of the Partnership's limited partnership interests. Corporation A, which owns a Percentage B general partnership interest in the Partnership, is its sole general partner.

The Settlers recently created an irrevocable trust (the "Trust") under the laws of Country X and contributed nominal consideration to fund it. (The Trust was subsequently amended; the terms of the trust described herein are as amended.) Relevant trust provisions include the following. Trust beneficiaries include the Settlers, Beneficiary A (a living parent of the Settlers and a United States citizen), and the Settlers' living and future heirs. Either (1) the Trustee (an independent Country X corporation) with the consent of the Protector (see below), or (2) Beneficiary A, may direct trust income or principal to be appointed to or for the benefit of any beneficiary, provided, however, that only the Protector may make any such appointment for the benefit of Beneficiary A or of either Settlor. The term of the trust is 100 years, unless it is terminated earlier in the sole discretion of the Trustee. Upon termination, the Trustee may, in its discretion, appoint the trust's assets to any or all of the then beneficiaries, or, if there are no then living beneficiaries, for charitable purposes. Each Settlor is precluded from becoming a successor trustee.

Under the laws of Country X, a trust may include provisions pertaining to the rights and obligations of a Protector. The Trust names a United States citizen as Protector and makes provision for the appointment of successor Protectors. The Trust further provides that the Protector may appoint new or additional trustees (but not, as noted above, a Settlor), and that neither a Protector nor his estate is a permissible trust beneficiary.

It has been represented that the Protector is not and shall not be a person or entity related

to or under the control of either Settlor; that under the laws of Country X, neither a beneficiary or any creditor of any beneficiary, including the Settlers, may compel the trustee to distribute the Trust's assets to or for their benefit at any time during the trust term; that transfers by the Settlers of interests in the Partnership to the Trust are not in any way liable to be set aside under any applicable fraudulent conveyance or other law, domestic or foreign; that neither the Trustee nor the Settlers have any plans to hold Trust assets anywhere other than Country X; and that the Trust is a "foreign trust" within the meaning of section 7701(a) (31) of the Internal Revenue Code of 1986, as amended (the "Code"). (Hereafter, all references to sections are to sections of the Code.)

The Settlers propose to transfer equal fractions (but not less than half) of their directly-held interests in the Partnership to the Trust. Rulings are requested regarding the following issues: (1) That the transfers of interests in the Partnership to the Trust by the Settlers are completed gifts for purposes of section 2511 at the time of the transfers to the trust; (2) that no portion of the Trust will be includible in the estates of either Settlers A or B under sections 2033, 2036, 2037, or 2038; (3) that the Trust is a grantor trust within the meaning of section 679, and (4) that each portion of the Trust treated as owned by a Settlor under section 679 will, upon that Settlor's death, cease to be so treated even if then trust beneficiaries include United States persons.

These issues are considered below.

**ISSUE (1). WILL INTERESTS IN THE PARTNERSHIP TRANSFERRED TO THE TRUST BY THE SETTLERS WILL BE COMPLETED GIFTS UNDER Code SECTION 2511 SUBJECT TO FEDERAL GIFT TAX?** Section 2501 imposes a tax on the transfer of property by gift by an individual. Section 2511 provides that this tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Treas. Reg. section 25.2511-2(b) provides that a gift is complete when an owner of property, or an interest therein, has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another. If upon a transfer of property, whether in trust or otherwise, the owner reserves any power over its disposition, the gift may be wholly incomplete or partially complete and partially incomplete, depending on all of the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserve power, the terms of the power must be examined and its scope determined. The regulation cites as an example a situation where a donor transfers property to another in trust to pay the income to the donor or accumulate it in the discretion of the trustee, and the donor retains a testamentary power to appoint the remainder among his descendants. No portion of the transfer is a completed gift. On the other hand, if the donor had not retained the testamentary power of appointment, but had instead provided that the remainder should go to X or his heirs, the entire transfer would be a completed gift. However, if the exercise of the trustee's powers in favor of the grantor is limited by a fixed or ascertainable standard, enforceable by or on behalf of the grantor, then the gift is incomplete to the extent of the ascertainable value of any rights thus retained by the grantor.

Rev. Rul. 77-378, 1977-2 C.B. 347, provides that even though a trustee may have an unrestricted power to return all of the trust's assets to the grantor, if the grantor's interest in the trust is not enforceable either by the grantor or on the grantor's behalf, then the grantor has parted with dominion and control over the property transferred into trust. Furthermore, if the grantor retains such a mere expectancy that the trustee will distribute trust assets to the grantor rather than an enforceable interest in the trust, the expectancy does not prevent the completion or reduce the value of the gift.

The Sixth Circuit Court and Tax Court have held that a grantor of an irrevocable inter vivos trust has not completely parted with dominion and control over trust assets where the grantor could in actuality retain the economic benefit and enjoyment of the entire trust income and corpus by borrowing money or by selling, assigning, or transferring the grantor's interest in the trust fund and relegating the grantor's creditors to the trust fund for payment. *Commissioner v. Vander Weele*, 254 F.2d 895 (6th Cir. 1958); *Outwin v. Commissioner*, 76 T.C. 153 (1981); *Estate of Paxton v. Commissioner*, 86 T.C. 785 (1986). In view of the settlors' retained rights in these cases, there was no assurance that anything of value had passed to the remaindermen and the gifts were held to be entirely incomplete. See also Rev. Rul. 76-103, 1976-1 C.B. 374 (concluding that such an incomplete gift would be includible in the gross estate for estate tax purposes under section 2038).

In the instant case, the Settlers will part with dominion and control over the property being transferred into the trust. Although the Trustee has an unrestricted power to pay over trust assets to the Settlers, the Settlers cannot individually or together require that any of the trust's assets be distributed to themselves. Further, assuming taxpayers' representation regarding the law of Country X is correct, neither of the Settlers can utilize assets transferred to the Trust by incurring debt and relegating the Settlor's creditors to the trust.

Accordingly, based on the taxpayers' representations regarding Country X law, the transfers of interests in the Partnership to the Trust are completed gifts and the entire value of the interests in the Partnership transferred to the Trust by the Settlers is subject to the federal gift tax.

**ISSUE (2). WILL ANY OF THE INTERESTS IN THE PARTNERSHIP TRANSFERRED TO THE TRUST BY THE SETTLORS BE INCLUDIBLE IN THEIR GROSS ESTATES UNDER SECTIONS 2033, 2036, 2037, OR 2038?** Section 2036(a) provides that a decedent's gross estate includes the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) by trust or otherwise, under which he has retained, for his life or for any period not ascertainable without reference to his death or any period that does not in fact end before his death, (1) the possession or enjoyment of or the right to income from the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Section 2036(b)(1) provides that the retention of the right to vote, either directly or indirectly, shares of stock of a controlled corporation shall be considered a retention of the enjoyment of the transferred property.

In *United States v. Byrum*, 408 U.S. 125 (1972), 1972-1 C.B. 518, the decedent was a controlling shareholder and a member of the board of directors of a closely-held corporation. The Supreme Court held that stock in the corporation transferred by the decedent to an irrevocable trust, even though the decedent expressly retained the right to vote the transferred stock and to veto the sale or disposition of the stock by the trustee, was not included in his gross estate under section 2036. The Court held that the decedent, as a controlling shareholder and a member of the board of directors, had a fiduciary duty to promote the interests of the corporation and not to exercise his voting power to promote his personal interests at the expense of the minority shareholders. Accordingly, the decedent's retained power to vote the stock did not constitute the retained enjoyment of the transferred stock or the right to designate the income from the transferred stock for purposes of section 2036.

In the instant case, the Settlers are the sole shareholders of Corporation A, which is the general partner in the Partnership. Accordingly, the grantors have management authority over the Partnership, which would include the authority to control partnership distributions. However, like the decedent in *Byrum*, each Settlor in the instant case occupies a fiduciary position with respect to the limited partners of the Partnership, and cannot distribute or withhold distributions or otherwise manage that partnership for purposes unrelated to the conduct of the partnership business.

Section 2038 provides that the value of the gross estate shall include the value of all property of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) in trust or otherwise, where the enjoyment thereof was subject to a power in the decedent to alter, amend, revoke, or terminate such interest or where any such power was relinquished during the 3-year period ending on the date of the decedent's death. Based upon the foregoing analysis, each partner would have a similar fiduciary duty with respect to their management of the partnership.

PLR 9332006, IRC Sec. 2031

1. Does not address 2036(a)(1)
2. Like 76-103 for 2036  
it is with authority

Furthermore, based on the taxpayer representations regarding Country X law, the property transferred to the Trust will not be included in the gross estate of either Settlor under section 2033, since the gift to the Trust will be complete and neither Settlor will have the right to compel a distribution from the trust. Similarly, interests in the Partnership transferred to the Trust by either Settlor will not be included in that Settlor's gross estate under sections 2036, 2037, or 2038, since under the facts presented, the Trustee's discretion to make distributions to a Settlor is not a retained interest or power for

purposes of those sections See Rev. Rul. 76-103, cited above.

Accordingly, the value of the interests in the Partnership transferred by a Settlor to the Trust will not be includible in the gross estate of that Settlor under sections 2033, 2036, 2037, or 2038.

**ISSUE (3). IS THE TRUST A TRUST DESCRIBED IN SECTION 679?** Section 679 provides (with exceptions not here relevant) that a United States person who directly or indirectly transfers property to a foreign trust shall be treated as the owner for his taxable year of the portion of such trust attributable to such property if for such year there is a United States beneficiary of any portion of such trust. Section 7701(a)(30)(A) provides in part that the term "United States person" includes a citizen of the United States. Under section 679, the term "United States beneficiary" includes a trust beneficiary who is a United States person.

Each Settlor, a United States person, is considered to have transferred property to the Trust. Further, each Settlor and Beneficiary A is a "United States beneficiary" within the meaning of section 679. Accordingly, whether the Trust will be treated as a grantor trust under section 679 depends upon whether it is a foreign trust.

Section 7701(a)(31) defines a "foreign estate" and a "foreign trust" as an estate or trust, as the case may be, the income of which, from sources without the United States which is not effectively connected with the conduct of a trade or business within the United States, is not includible in gross income under subtitle A of the Code.

It has been represented that the Trust is a foreign trust. If that is so, the Trust will be treated as a grantor trust under section 679, and each Settlor will, for the taxable year in which the Trust is funded and in each succeeding taxable year during his or her life in which the Trust continues to have a United States beneficiary, be treated as the owner of a portion of the Trust income and corpus. That portion shall be determined in accordance with the principles of Treas. Reg. section 1.671-3, and each Settlor shall be required to take into account, in computing his or her federal income tax liability that Settlor's appropriate portion of the Trust's items of income, deductions, and credits.

**ISSUE (4). UPON A SETTLOR'S DEATH, WILL THE PORTION OF THE TRUST TREATED AS OWNED BY THAT SETTLOR CEASE TO BE SO TREATED EVEN IF THEN TRUST BENEFICIARIES INCLUDE UNITED STATES PERSONS?** Section 679(a)(2) (A) provides that the rules of section 679(a)(1) do not apply to "a transfer by reason of death of the transferor." While section 679(a)(2)(A) does not expressly address the tax consequences of the termination of foreign grantor trust status by reason of the grantor's death, the legislative history of the enactment of section 679 (H.R. Rep. No. 658, 94th Cong., 1st Sess. at 209 (1975), S. Rep. No. 938, 94th Cong., 2d Sess. at 218 (1976)) provides that "an inter vivos trust which is treated as owned by a U.S. person under [section 679] is not treated as owned by the estate of that person upon his death." Accordingly, any portion of the Trust that is treated as owned by a Settlor under the rules of section 679 shall cease to be so treated upon that Settlor's death.

No opinion is expressed about the tax treatment of the proposed transaction under other

provisions of the Code and regulations or about the tax treatment of any conditions existing at the time of, or effects resulting from, the proposed transaction that are not specifically covered by the above rulings. In particular, no opinion is expressed with respect to the imposition, under section 1491 of the Code, of the excise tax on the transfer of appreciated property by a United States citizen or resident to a foreign trust.

This letter is directed only to the taxpayers who requested it. Section 6110(j)(3) provides that it may not be used or cited as precedent.

A copy of this letter should be attached to the federal income tax and, if required to be filed, gift and/or estate tax returns of the taxpayers involved for the taxable year of the proposed transaction.

Pursuant to a power of attorney on file, a copy of this letter is being sent to the taxpayers.

Charles P. Besecky

Chief, Branch 4

Office of the Associate Chief

Counsel (International)

ccs:

CS FOR SENATE BILL NO. 163(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:  
Referred:

Sponsor(s): SENATE JUDICIARY COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to trusts, to a trustee's duties to notify and inform beneficiaries,  
2 and to the revocation, modification, termination, reformation, construction, and  
3 trustees of trusts."

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

5 \* Section 1. AS 13.36.080 is amended by adding a new subsection to read:

6 (b) The trust agreement or instrument may exempt a trustee from the duty  
7 under this section to provide notification or information regarding the trust to a  
8 beneficiary who is not entitled to a mandatory distribution of income or principal from  
9 the trust on an annual or more frequent basis. The exemption may not exceed in  
10 duration the shorter of the settlor's lifetime or a judicial determination of the settlor's  
11 incapacity. If the trust instrument or agreement provides for an exemption and a  
12 beneficiary with a future interest who is not a beneficiary entitled to a mandatory  
13 distribution of income or principal from the trust on an annual or more frequent basis  
14 receives a distribution, the trustee shall provide notification or information limited to

1 the accounting period during which the distribution was made. If a beneficiary with  
2 future interest becomes a beneficiary entitled to a mandatory distribution of income  
3 or principal from the trust on an annual or more frequent basis, the trustee shall  
4 provide notification and information as required under AS 13.16 and this chapter.

5 \* Sec. 2. AS 13.36.192 is amended by adding a new subsection to read:

6 (c) In addition to the powers provided under (a) of this section, the settlor of  
7 a trust affected by AS 13.36.105 - 13.36.220 may, by provision in the instrument  
8 creating the trust if the trust is created by a writing, by oral statement to the trustee at  
9 the time of the creation of the trust if the trust is created orally, by an amendment of  
10 the trust if the settlor reserved the power to amend the trust, or by a written document  
11 after the trust is created, relieve the trustee from the duty to provide notification or  
12 information to a beneficiary <sup>subject to</sup> ~~in accordance with~~ AS 13.36.080(b).

13 \* Sec. 3. AS 13.36 is amended by adding new sections to read:

14 **Sec. 13.36.335. Presumption of revocability.** (a) Unless a trust is expressly  
15 made irrevocable, a trust executed on or after the effective date of this Act is revocable  
16 by the settlor.

17 (b) Notwithstanding AS 13.36.035 - 13.36.050, this section applies only if the

18 (1) settlor is domiciled in this state when the trust is created;

19 (2) trust instrument is executed in this state; or

20 (3) trust provides that the law of this state governs the trust.

21 **Sec. 13.36.340. Modification and revocation of revocable trusts.** (a) A  
22 trust that is revocable by the settlor may be modified or revoked in whole or in part  
23 by

24 (1) substantial compliance with a method of modification or revocation  
25 provided in the trust instrument; or

26 (2) a writing, other than a will, signed by the settlor and delivered to  
27 the trustee during the lifetime of the settlor, except that, if the trust instrument  
28 expressly makes the method of revocation provided in the trust instrument the  
29 exclusive method of revocation, the trust may not be revoked under this paragraph.

30 (b) Unless otherwise provided in the trust instrument, if a trust that is  
31 revocable by the settlor is created by or funded by more than one settlor,

1 (1) the trust may be modified or revoked as provided in AS 34.77.100  
2 to the extent the trust consists of community property under AS 34.77 (Alaska  
3 Community Property Act);

4 (2) each settlor may modify or revoke the trust as to the portion of the  
5 trust property contributed by that settlor that is not community property under  
6 AS 34.77.

7 (c) A revocable trust may not be modified or revoked by an attorney-in-fact  
8 under a power of attorney unless the modification or revocation is expressly permitted  
9 by the trust instrument.

10 **Sec. 13.36.345. Modification or termination of irrevocable trusts because**  
11 **of unanticipated circumstances.** (a) On petition by a trustee, settlor, or beneficiary,  
12 a court may modify the administrative or dispositive terms of an irrevocable trust or  
13 terminate an irrevocable trust if, because of circumstances not anticipated by the  
14 settlor, modification or termination would substantially further the settlor's purposes  
15 in creating the trust.

16 (b) Upon termination of a trust under this section, the trust property shall be  
17 distributed in accordance with the settlor's probable intention.

18 **Sec. 13.36.350. Reformation to correct mistakes in irrevocable trusts.** (a)  
19 On petition by a trustee, settlor, or beneficiary, a court may reform the terms of an  
20 irrevocable trust, even if the trust instrument is not ambiguous, to conform to the  
21 settlor's intention if the failure to conform was due to a mistake of fact or law,  
22 whether in expression in the trust or inducement to create the trust, and if the settlor's  
23 intent can be established by clear and convincing evidence.

24 (b) A court may consider evidence, including direct evidence contradicting the  
25 plain meaning of the text, when determining the settlor's intent or for any other  
26 purpose under this section.

27 **Sec. 13.36.355. Construction of trust to achieve settlor's tax objectives.** (a)  
28 The terms of a trust shall be construed to achieve the settlor's tax objectives.

29 (b) On petition by a trustee, settlor, or beneficiary, a court may modify the  
30 terms of an irrevocable trust to achieve the settlor's tax objectives in a manner that  
31 does not violate the settlor's probable intent. The court may order that the

1 modification operate retroactively.

2 **Sec. 13.36.360. Modification or termination of irrevocable trust by consent.**

3 (a) Except as otherwise provided by this section, on petition by a trustee, settlor, or  
4 beneficiary, a court may modify or terminate an irrevocable trust if all of the  
5 beneficiaries consent and if continuation of the trust on the existing terms of the trust  
6 is not necessary to further a material purpose of the trust. However, the court, in its  
7 discretion, may determine that the reason for modifying or terminating the trust under  
8 the circumstances outweighs the interest in accomplishing the material purposes of the  
9 trust. The inclusion of a restriction on the voluntary or involuntary transfer of trust  
10 interests under AS 34.40.110 may constitute a material purpose of the trust under this  
11 subsection, but is not presumed to constitute a material purpose of the trust under this  
12 subsection.

13 (b) Unless otherwise provided in the trust instrument, an irrevocable trust may  
14 not be modified or terminated under this section while a settlor is also a discretionary  
15 beneficiary of the trust.

16 (c) If a beneficiary other than a qualified beneficiary does not consent to a  
17 modification or termination of an irrevocable trust that is proposed by the trustee,  
18 settlor, or other beneficiaries, a court may approve the proposed modification or  
19 termination if the court determines

20 (1) if all the beneficiaries had consented, the trust could have been  
21 modified or terminated under this section; and

22 (2) the rights of a beneficiary who does not consent will be adequately  
23 protected or not significantly impaired.

24 (d) In (c) of this section, "qualified beneficiary" means a beneficiary who

25 (1) on the date the beneficiary's qualification is determined, is entitled  
26 or eligible to receive a distribution of trust income or principal; or

27 (2) would be entitled to receive a distribution of trust income or  
28 principal if the event causing the trust's termination occurs.

29 **Sec. 13.36.365. Uneconomical irrevocable trust.** (a) Notwithstanding the  
30 other provisions of AS 13.36.335 - 13.36.365, if the value of the property of an  
31 irrevocable trust is less than \$50,000, the trustee may terminate the trust unless the

1 trust instrument provides otherwise.

2 (b) Notwithstanding the other provisions of AS 13.36.335 - 13.36.365 and the  
3 terms of the trust, on petition to the superior court by a trustee, settlor, or beneficiary,  
4 the court may modify or terminate an irrevocable noncharitable trust, or remove the  
5 trustee and appoint a different trustee, if the court determines that the value of the trust  
6 property is insufficient to justify the cost of administration.

7 (c) Upon termination of a trust under this section, the trustee shall distribute  
8 the trust property in accordance with the settlor's probable intent.

**SB**

**165**

# FISCAL NOTE

**STATE OF ALASKA  
1999 LEGISLATIVE SESSION**

**BILL NO. SB 165**

Revision Date/Time (Note if correction)	Dept. Affected	Law
Title	BRU	Civil Division
"An Act relating to the remedies available to judgment creditors against limited liability company members ..."	Component	Commercial
Sponsor	Senate Judiciary Committee by Request	
Requester	Senate Judiciary Committee	Component Serial No. 2211

**Expenditures/Revenues (Thousands of Dollars)**

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE (Thousands of Dollars)**

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY99) cost: \_\_\_\_\_

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

SB 165 limits a judgment creditor's rights to execute against parties and property with respect to limited liability company members or limited partnership general and limited partners.

This bill will have no fiscal impact on the Department of Law.

Prepared by Joan M. Kasson *Joan M. Kasson*  
 Division Attorney General's Office  
 Approved by Commissioner Bruce M. Botelho *Bruce M. Botelho*  
 Agency Department of Law

Phone 465-5370  
 Date/Time 5/6/99, 9:36 AM  
 Date 5/6/99

**PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE**

For further distribution information, call the Governor's Legislative Office

# FISCAL NOTE

STATE OF ALASKA  
2000 LEGISLATIVE SESSION

BILL NO. SB 165

Revision Date/Time (Note if correction)		Dept. Affected	Law
Title	"An Act relating to the remedies available to judgment creditors against limited liability company members..."	BRU	Civil Division
Sponsor	Senate Judiciary Committee	Component	Commercial
Requester	Senate Finance Committee	Component No.	2211

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	0.0	0.0	0.0	0.0	0.0	0.0

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

FUND SOURCE	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
<b>TOTAL</b>	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2000) cost: \_\_\_\_\_

**POSITIONS**

POSITIONS	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Full-time						
Part-time						
Temporary						

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

SB 165 limits a judgment creditor's rights to execute against parties and property with respect to limited liability company members or limited partnership general and limited partners.

This bill will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson *Joan M. Kasson*  
 Division: Attorney General's Office  
 Approved by Commissioner: *[Signature]* Bruce M. Botelho, Attorney General  
 Agency: Department of Law

Phone 465-5370  
 Date/Time 2/1/00, 2:12 PM  
 Date 2/1/00

**PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE**

For further distribution information, call the Governor's Legislative Office

# SENATE COMMITTEE REPORT

## First Committee of Referral

DATE: 4/28/99

FURTHER: Finance

Date of 5-Day Notice: 24-hour rule in effect  
(in accordance with Uniform Rule 23)

DATE TURNED  
IN TO OFFICE: 5/12/99

Judiciary Committee considered

SENATE BILL NO. 165

"An Act relating to the remedies available to judgment creditors against limited liability company members and their assignees and against limited partnership general and limited partners and their assignees; and providing for an effective date."

and recommends:

- be replaced with \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to the \_\_\_\_\_ Committee

- Senate Bill:
- same title
  - new title
- House Bill:
- same title
  - technical title
  - new: SCR# \_\_\_\_\_

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS -	NR	DNP	AM
		<i>[Handwritten signature]</i>			
		<i>[Handwritten signature]</i>			
CHAIR: <i>[Handwritten signature]</i>	<input checked="" type="checkbox"/>	CHAIR:			

**NEW FISCAL NOTE(S):**

Department	Date	Zero	Fiscal
<i>Law</i>	<i>5/6</i>	<input checked="" type="checkbox"/>	

**PREVIOUS FISCAL NOTE(S):\***

Department	Date	Zero	Fiscal

APPROPRIATION -- no fiscal note

\*include fiscal notes accompanying Governor's bill

# Alaska State Legislature

Chairman,  
Judiciary Committee  
Administrative Regulations  
Revenue Committee

Vice Chairman,  
Resources Committee



*Senator Robin L. Taylor*

State Capitol  
Juneau, Alaska 99801-1182  
(907) 465-3873  
Fax: (907) 465-3922

50 Front Street  
Suite 203  
Ketchikan, Alaska 99901  
(907) 225-8088  
Fax: (907) 225-0713

## REQUESTOR STATEMENT

### SB 165

**"An Act relating to the remedies available to judgment creditors against limited liability company members and their assignees and against limited partnership general and limited partners and their assignees; and providing for an effective date."**

SB 165 amends the Alaska Limited Partnership Act and the Alaska Limited Liability Act. The proposed amendments make it clear that a judgement creditor of an Alaska limited partnership or limited liability company has only the remedy of a charging order. Thus, the creditor will receive all distributions made to the debtor partner or member. However, the right to receive such distribution is the judgement creditor's only remedy. No other remedies are available to the judgement creditor or to a court implementing a creditor's collection request.

Limited partnerships and limited liability companies are often used for closely held businesses or investment activities. Families frequently use them. One of the key advantages of these business entities is that the partners or members can choose who will be their business associates, and can be secure that the venture will continue until an agreed time or event.

If a creditor obtains a judgement against a partner or member, the statutes provide that the creditor can obtain a "charging order" against the debtor's partnership or limited liability company interest. This allows the creditor to receive the distributions to which the partner or member would be entitled.

District A:

Hyder • Ketchikan • Kupreanof • Meyers Chuck • Petersburg • Saxman • Sitka • Wrangell

Requestor Statement

Pg. 2

On its face, these statutes do not expressly allow for any other creditor remedies. This is consistent with the concept that the other partners of a partnership or members of a limited liability company should not have their business or investment actively disrupted, nor should they be forced to take in a substitute partner or member (e.g., the judgement creditor). This was the generally understood position taken by the Uniform Limited Partnership Act and many limited liability acts.

However, recently a Connecticut court held that a judgement creditor of a limited partnership could foreclose on the partnership interest. This holding was in conflict with a prior Florida court decision which held that foreclosure was not an available remedy for a judgement creditor of a limited partner. Such foreclosure would allow the judgement creditor to become a partner of the limited partnership, or a member of the limited liability company. Depending on the provisions of the partnership agreement or operating agreement, this could result in a forced dissolution of the entity and sale of its assets. Such a result could be very harmful to the other partners or members.

# 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

September 27, 1999

**SUBJECT:** Sectional Summary of SB 165(Work order 21-LS0919A)

**TO:** Senator Robin Taylor  
Attn: Sue

**FROM:** *TB*  
Theresa Bannister  
Legislative Counsel

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

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

**Section 1.** Adds provisions relating to the rights of judgment creditors of a member (or a member's assignee) of a limited liability company.

Sec. 10.50.380(c) states that AS 10.50.380 provides the exclusive remedy that the judgment creditor may use to satisfy a judgment out of the judgment debtor's interest in the limited liability company. Identifies some of the remedies that are not available to the judgment creditor.

Sec. 10.50.380(d) states that AS 10.50.380 does not deprive a member of a limited liability company of the benefit of an exemption that applies to the member's membership interest in the limited liability company.

**Section 2.** Provides that the rights of a creditor with regard to the interest of a general partner in a limited partnership are subject to the new provision proposed by sec. 3 of the bill.

**Section 3.** Adds a provision relating to the rights of judgment creditors of a general or limited partner (or of the partner's assignee) of a limited partnership. States that AS 32.11.340 provides the exclusive remedy that the judgment creditor may use to satisfy a judgment out of the judgment debtor's interest in the partnership. Identifies some of the remedies that are not available to the judgment creditor.

**Section 4.** States that the Act does not apply to a judgment creditor's remedies for collecting a judgment entered by a court before the Act takes effect.

Senator Robin Taylor  
September 27, 1999  
Page 2

**Section 5.** Gives the Act an immediate effective date.

If I may be of further assistance, please advise.

TLB:pl  
99-152.plm

**SB**

**166**

# FISCAL NOTE

STATE OF ALASKA  
1999 LEGISLATIVE SESSION

BILL NO. SB 166

Revision Date/Time (Note if correction) _____	Dept. Affected _____	Law _____
Title <u>"An Act relating to the amendment and revocation</u>	BRU _____	Civil Division _____
of spouse: <u>community property agreements and ..."</u>	Component _____	Commercial _____
Sponsor <u>Senate Judiciary Committee by Request</u>	_____	
Requester <u>Senate Judiciary Committee</u>	Component Serial No. _____	<u>2211</u>

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

FUND SOURCE	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY99) cost: \_\_\_\_\_

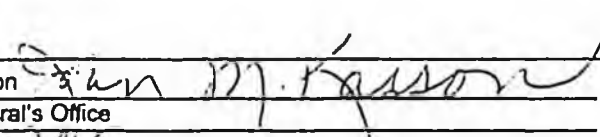
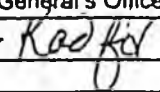
**POSITIONS**

Full-time						
Part-time						
Temporary						

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

SB 166 makes technical corrections to the Community Property Act passed in 1998. The bill relates to amending the community property agreement with regard to disposition of the surviving spouse's property after the death of the first spouse.

This bill will have no fiscal impact on the Department of Law.

Prepared by Joan M. Kasson   
 Division Attorney General's Office  
 Approved by Commissioner Rodolfo  Bruce M. Botelho, Attorney General  
 Agency Department of Law

Phone 465-5370  
 Date/Time 5/6/99, 9:16 AM  
 Date 5/6/99

**PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE**

For further distribution information, call the Governor's Legislative Office

# SENATE COMMITTEE REPORT

## First Committee of Referral

DATE: 4/28/99

FURTHER:

Date of 5-Day Notice: 24-hour rule in effect  
(in accordance with Uniform Rule 23)

DATE TURNED  
IN TO OFFICE: 5/12/99

Judiciary Committee considered

SENATE BILL NO. 166

"An Act relating to the amendment and revocation of spouses' community property agreements and community property trusts; and providing for an effective date."

and recommends:

- be replaced with \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to the \_\_\_\_\_ Committee

- Senate Bill:**
- same title
  - new title
- House Bill:**
- same title
  - technical title
  - new: SCR# \_\_\_\_\_

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
		<i>[Handwritten Signature]</i>			
		<i>[Handwritten Signature]</i>	✓		
CHAIR: <i>[Handwritten Signature]</i>		CHAIR:			

**NEW FISCAL NOTE(S):**

Department	Date	Zero	Fiscal
<i>LAW</i>	<i>5/6</i>	✓	

**PREVIOUS FISCAL NOTE(S):\***

Department	Date	Zero	Fiscal

APPROPRIATION -- no fiscal note

\*include fiscal notes accompanying Governor's bill

# Alaska State Legislature

Chairman,  
Judiciary Committee  
Administrative Regulations  
Revenue Committee

Vice Chairman,  
Resources Committee



State Capitol  
Juneau, Alaska 99801-1182  
(907) 465-3873  
Fax. (907) 465-3922

50 Front Street  
Suite 203  
Ketchikan, Alaska 99901  
(907) 225-8044  
Fax. (907) 225-0713

*Senator Robin L. Taylor*

## REQUESTOR STATEMENT

SB 166

**"An Act relating to the amendment and revocation of spouses' community property agreements and community property trusts; and providing for an effective date."**

The Alaska Community Property Act is based upon the Uniform Marital Property Act. One new feature added by UMPA is the ability of a couple to make a non-testamentary disposition under a community property agreement. Alaska enacted the same provision which is applicable to both community property agreements and community property trusts. Further, the Alaska Act provides that such instruments may not be amended or revoked unless the agreement or trust itself provides for revocation "on a particular date or on the occurrence of a particular event," or unless the agreement or trust is amended or revoked by a later community property agreement or trust.

The above-described provisions may create an argument that the surviving spouse makes a completed taxable gift at the first spouse's death. The following history explains this issue. The Uniform Marital Property Act was previously enacted in Wisconsin. Subsequently, the decision in *Pyle v. United States*, 766 F.2d 1141 (7<sup>th</sup> Cir. 1985) was decided. This case involved an Illinois joint will. The court held that after the death of the first spouse, the surviving spouse could not change the will. Therefore, at that time, the surviving spouse made a taxable gift to the residuary beneficiaries who would inherit after the surviving spouse's death. As a result, transfer tax was payable at the death of the first spouse, which otherwise would have been deferred until the death of the surviving spouse.

Wisconsin practitioners became concerned, and the Wisconsin legislature amended its community property statute to create a default rule that a surviving spouse may unilaterally amend a community property agreement with respect to property to be disposed of at the death of the surviving spouse. Such a provision would prevent application of the decision of *Pyle v. United States* because the amendment would prevent the gift from being completed until the death of the surviving spouse.

District A:

Hyder • Ketchikan • Kupreanof • Meyers Chuck • Petersburg • Saxman • Sitka • Wrangell

The proposed amendments to A.S. 34.75.090 and .100 are similar to the amendments enacted by the Wisconsin Legislature. They state that if a community property agreement or trust provides for the non-testamentary disposition of property, without probate, at the death of the second spouse, at any time after the death of the first spouse the surviving spouse may amend the community property agreement or trust with respect to trust provides otherwise. The purpose of this language is to prevent a community property agreement or trust from inadvertently creating a completed gift at the death of the first spouse which would require the payment of federal transfer tax, which otherwise would be deferred until the death of the surviving spouse.

**AS 34.75.090. Community property agreement. \*\*\***

- (c) A community property agreement may not be amended or revoked unless the agreement itself provides for revocation on a particular date or on the occurrence of a particular event, or unless the agreement is amended or revoked by a later community property agreement. To amend or revoke the agreement, the later community property agreement is not required to declare any property of the spouses as community property. The amended agreement or the revocation is enforceable without consideration. However, if a community property agreement provides for the non-testamentary disposition of property, without probate, at the death of the first spouse the second spouse, at any time after the death of the first spouse the surviving spouse may amend the community property agreement with regard to property to be disposed of at his or her death unless the community property agreement expressly provides otherwise.

**AS 34.75.100. Community property trust. \*\*\***

- (c) A community property trust may not be amended or revoked unless the agreement itself provides for revocation on a particular date or on the occurrence of a particular event or unless the agreement is amended or revoked by a later community property trust. To amend or revoke the trust, the later community property trust is not required to declare any property held by the trustee as community property. The amended trust or revocation is amended without consideration. However, if a community property trust provides for the non-testamentary disposition of property, without probate, at the death of the second spouse, at any time after death of the first spouse the surviving spouse may amend the community property trust with regard to property to be disposed of at his or her death unless the community property trust expressly provides otherwise.

**SB**

**2017**

# FISCAL NOTE

STATE OF ALASKA  
2000 LEGISLATIVE SESSION

BILL NO. SB 207

Revision Date/Time (Note if correction)		Dept. Affected	Revenue
Title	<u>Medical Support Orders for Children</u>	BRU	<u>Child Support Enforcement</u>
Sponsor	<u>Rules</u>	Component	<u>Child Support Enforcement</u>
Requester	<u>Senate Health, Education and Social Services</u>	Component No.	<u>111</u>

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2000) cost: \_\_\_\_\_

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

The main feature of this legislation would allow the Child Support Enforcement Division to issue a medical support order without it having to be in conjunction with an order for financial support. Under existing statutes, an order for medical support can only be established in conjunction with a financial support order. This bill changes the law so that a medical support order may be established on its own.

Prepared by: <u>Barbara Miklos, Director</u>	Phone: _____
Division: <u>Child Support Enforcement Division</u>	Date/Time: <u>2/7/00 9:06 AM</u>
Approved by: <u>Wilson Condon, Commissioner</u>	Date: _____
Agency: <u>Department of Revenue</u>	

**PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE**

For further distribution information, call the Governor's Legislative Office

LOMY KNOWLES

SB 207

STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

January 19, 2000

The Honorable Drue Pearce  
President of the Senate  
Alaska State Legislature  
State Capitol  
Juneau, AK 99801-1182

Dear President Pearce:

Thanks to the inception of Denali Kid Care in March 1999, 12,000 more Alaska children and pregnant women have basic medical care. The success of this program will have far-reaching and long-term effects on the health and well-being of Alaskans.

The vast success of Denali Kid Care has brought more into focus, however, an ongoing problem with Medicaid benefits and its effect on Alaska's child support system. This bill corrects the problem by clarifying that a child support order need not be automatically established when a custodial parent receives medical benefits through Medicaid.

The Child Support Enforcement Division (CSED) must, under federal law, issue a medical support order whenever a custodial parent receives medical benefits through Medicaid. The support order requires either parent to provide health care coverage for the child if it is available at a reasonable cost. Currently, the CSED cannot establish a medical support order only; it must be in conjunction with a child support order that seeks monthly support payments. The custodial parent, however, may not want to pursue child support for various reasons. The current requirement to do so, then, becomes a disincentive to seek valuable medical benefits through Denali Kid Care. To allow more flexibility in such cases, this bill gives parents the option of requesting a medical support order only, without an accompanying child support order.

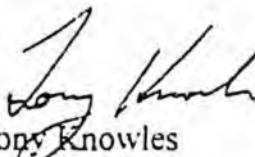
This bill also amends the medical support statutes to provide that either parent, not simply the obligor parent, may be required to provide health care coverage if coverage is available to the parent at a reasonable cost. By making this change, the bill assures that

The Honorable Drue Pearce  
January 19, 2000  
Page 2

the statutory requirements for medical support orders are consistent with the requirements of Alaska Civil Rules and related federal law. This bill also makes it clear that a medical support order can be issued regardless of whether health care coverage is currently available to either parent. This makes medical support a continuing obligation on the part of either parent to provide health care coverage for the child whenever it is available at a reasonable cost.

In the interest of the health of Alaska's children, I urge your prompt and favorable action on this bill.

Sincerely,



Tony Knowles  
Governor

*Jud. Com.*

*Seal*

**Sectional Analysis Senate Bill 207**

**“An Act relating to the establishment and enforcement of medical support orders for children and providing for an effective date.”**

This bill makes three changes to child support statutes. First, under existing statutes, an order for medical support can only be established in conjunction with a financial support order. This bill changes the law so that a medical support order may be established on its own. Second, this bill amends the medical support statutes to provide that either parent, not simply the obligor parent, may be required to provide health care coverage. Third, this bill amends the law to require that a medical support order be issued regardless of whether health care coverage is currently available to either parent.

Since so many statutes address child support, changes must be made to many different sections.

Section 1 removes the requirement in AS 25.27.020(a) (9) that a medical support order be issued only as part of a child support order. It also amends the statutes to provide that either parent, not simply the obligor parent, may be required to provide health care coverage.

Section 2 accomplishes the same as Section 1. However, this section amends AS 25.27.060(c), which addresses court orders.

Section 3 amends AS 25.27.063(a) so that either parent may be ordered to provide medical support, not just the obligor. It also adds language clarifying that the parent must provide health insurance only if the health insurance is available at a reasonable cost. This makes this section consistent with other statutes.

Section 4 amends AS 25.27.063(b) so that either parent may be ordered to provide medical support, not just the obligor.

Section 5 amends AS 25.27.140(a) to allow CSED to establish a medical support order as part of a duty of support.

Section 6 amends AS 25.27.140(c) so that it is clear that CSED will not send out an income withholding order with a medical support order only.

Section 7 amends AS 25.27.160 to include the establishment of medical support orders in the same procedures used to establish child support orders. The section

clarifies that CSED must serve the obligor with a notice and finding of financial responsibility to establish a medical support order only. However, it exempts medical support orders from certain requirements, including the requirement that the notice set a periodic payment amount and that the notice inform the obligor of the possibility that the obligor's property and assets will be subject to execution.

Section 8 adds a new section to AS 25.27.160 that delineates the requirements for a notice and finding of financial responsibility for a medical support order.

Sections 9 and 10 amend AS 25.27.170(d) and 25.27.170(f) so that hearing officers of the Department of Revenue have clear direction when holding hearings for medical support orders only. In Section 9, when the hearing relates to medical support only, the hearing officer is not required to determine the amount of periodic payments. In Section 10, when the hearing relates to medical support only, the obligor's property and income is not subject to immediate execution if the obligor fails to appear at the hearing.

Section 11 describes what must happen in a hearing for a medical support order only. The hearing officer shall determine whether either parent is required to provide health care coverage, taking into consideration whether coverage is available to either parent at a reasonable cost and whether adequate health care is available through Indian Health Service or other insurance coverage.

Section 12 adds the requirement that a decision issued by a hearing officer include a medical support order. It removes the requirement that the hearing officer determine the amount of periodic payments if a medical support order only is being established.

Section 13 adds the duty to provide health care coverage to the definition of duty to support.

Section 14 specifies that the legislation takes effect immediately.

**S B**

**2 3 3**

1-GS2058VD  
Lauterbach  
3/28/00

*adopted  
3/29/00*

**CS FOR SENATE BILL NO. 233(JUD)**

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**TWENTY-FIRST LEGISLATURE - SECOND SESSION**

**BY THE SENATE JUDICIARY COMMITTEE**

**Offered:  
Referred:**

**Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR**

**A BILL**

**FOR AN ACT ENTITLED**

1 "An Act relating to priorities, claims, and liens for payment for certain medical  
2 services provided to medical assistance recipients; and providing for an effective  
3 date."

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

5 \* Section 1. AS 34.35.460 is amended by adding a new subsection to read:

6 (b) A hospital or the owner or operator of a hospital, or a physician or licensed  
7 special nurse who files a notice of lien under (a) of this section for hospitalization or  
8 services provided to a recipient of medical assistance under AS 47 shall mail a copy  
9 of the notice of lien to the unit of the Department of Health and Social Services that  
10 administers medical assistance for needy persons under AS 47. The copy must be sent  
11 by certified mail no later than 30 days after the filing of the notice of lien under (a)  
12 of this section.

13 \* Sec. 2. AS 34.35 is amended by adding a new section to read:

14 **Sec. 34.35.481. Priority of liens.** A lien perfected by the Department of

1 Health and Social Services under AS 47.05.075 has priority over a lien perfected by  
2 a hospital, nurse, or physician under AS 34.35.450 - 34.35.480.

3 \* Sec. 3. AS 44.77.015(a) is amended to read:

4 (a) For the purposes of filing claims for medical services provided under  
5 AS 47.07 or AS 47.25.120 - 47.25.300, "promptly," in AS 44.77.010(a), means [(1)  
6 WITHIN SIX MONTHS AFTER THE DATE OF SERVICE, OR AS PROVIDED IN  
7 (b) OF THIS SECTION, IF THERE IS NO THIRD-PARTY CLAIM, OR (2)] within  
8 12 months after the date of service or as provided in (b) of this section [IF THERE  
9 IS A THIRD-PARTY CLAIM]. Except as provided in (c) of this section, a claim may  
10 not be paid if it is not filed promptly; an inference to the contrary may not be drawn  
11 from AS 09.10.053, AS 09.50.250 - 09.50.300, or AS 37.25.010.

12 \* Sec. 4. AS 44.77.015(b) is amended to read:

13 (b) In accordance with (a) of this section, a claim may be considered to be  
14 filed promptly if (1) the claim was filed more than 12 [SIX] months after the date of  
15 service because the medical provider had reason to believe that the beneficiary was  
16 ineligible for service under AS 47.07 or AS 47.25.120 - 47.25.300; (2) a court of  
17 competent jurisdiction or an administrative hearing officer finds that the beneficiary  
18 was eligible for service under AS 47.07 or AS 47.25.120 - 47.25.300 on the date of  
19 service; and (3) the claim is filed within 12 [SIX] months after the date that the court  
20 or administrative finding is rendered. The beneficiary is responsible for notifying the  
21 medical provider of the judicial or administrative finding. The department shall make  
22 a good faith effort to notify the medical provider of the judicial or administrative  
23 finding if the department has reason to believe that services have been provided to the  
24 beneficiary.

25 \* Sec. 5. AS 44.77.015(c) is amended to read:

26 (c) The commissioner of health and social services may authorize payment to  
27 a medical provider of a claim not promptly filed, upon good cause shown.  
28 [PAYMENTS UNDER THIS SUBSECTION MAY NOT EXCEED 50 PERCENT OF  
29 THE ALLOWABLE CHARGES PRESENTED IN THE CLAIM.]

30 \* Sec. 6. AS 47.05.070 (b) is amended to read:

31 (b) If the department provides or pays for medical assistance for injury or

1 illness under this title, the department is subrogated to the rights of the recipient of that  
2 medical assistance for any claim arising from the injury or illness and to the proceeds  
3 of an insurance policy covering the injury or illness to the extent of the value of the  
4 medical assistance provided. A recipient of medical assistance or the recipient's  
5 attorney must notify the department in writing of any action or claim against a  
6 third-party payor if medical assistance was provided by the department to treat  
7 an injury or illness for which the third party may be liable. Notwithstanding the  
8 assertion of any action or claim by the recipient of medical assistance, the  
9 department may bring an action in the superior court against an alleged third-  
10 party payor to recover an amount subrogated to the department for medical  
11 assistance provided on behalf of a recipient.

12 \* Sec. 7. AS 47.05.070(c) is amended to read:

13 (c) If a recipient of medical assistance under this title settles a claim or obtains  
14 an award or judgment arising from the injury or illness for which the medical  
15 assistance was received, the amount of the claim to which the department is  
16 entitled under (b) of this section shall be reduced by a pro rata share of the  
17 [DEPARTMENT SHALL REIMBURSE THE RECIPIENT FOR] attorney fees and  
18 litigation costs [COMMENSURATE WITH THE AMOUNT OF THE SETTLEMENT,  
19 AWARD, OR JUDGMENT TO WHICH THE DEPARTMENT IS ENTITLED  
20 UNDER (b) OF THIS SECTION]. Regardless of the manner in which the amount of  
21 the attorney fees is derived in the particular case, the pro rata reduction of the  
22 subrogated claim for [,] reimbursement of attorney fees shall be calculated in  
23 accordance with the applicable rules of court governing the award of attorney fees in  
24 civil matters.

25 \* Sec. 8. AS 47.05.070 is amended by adding new subsections to read:

26 (e) Notwithstanding (b) of this section, the department may waive the  
27 subrogation rights to all or part of the amount of medical assistance paid on behalf of  
28 a recipient of medical assistance in cases of undue hardship.

29 (f) The department may adopt regulations to interpret and implement this  
30 section.

31 \* Sec. 9. AS 47.05 is amended by adding a new section to read:

1           **Sec. 47.05.075. Medical assistance lien.** (a) The department has a lien upon  
2 any sum that may be due to the recipient of medical assistance from a third-party  
3 payor. The lien is in the amount of the medical assistance paid for medical services  
4 under this title, together with reasonable attorney fees and litigation costs incurred in  
5 the enforcement of the lien.

6           (b) A lien against a sum due from a third-party payor for medical services  
7 provided to a recipient of medical assistance under this title attaches and is effective  
8 upon filing with a recorder's office in any recording district in the state. However, a  
9 lien filed under this subsection is not perfected and has no effect unless notice of filing  
10 of the lien is served by the department upon the third-party payor, personally or by  
11 registered, certified, or insured mail, return receipt requested.

12           (c) If a recipient of medical assistance under this title settles a claim or obtains  
13 an award or judgment arising from the injury or illness for which the medical  
14 assistance was received, the amount of the lien to which the department is entitled  
15 under (a) of this section shall be reduced by a pro rata share of the attorney fees and  
16 litigation costs. Regardless of the manner in which the amount of the attorney fees is  
17 derived in the particular case, the pro rata reduction of the lien shall be calculated in  
18 accordance with the applicable rules of court governing the award of attorney fees in  
19 civil matters.

20           (d) A perfected lien under this section has priority over a lien perfected by a  
21 hospital, nurse, or physician under AS 34.35.450 - 34.35.480.

22       \* **Sec. 10.** The uncodified law of the State of Alaska is amended by adding a new section  
23 to read:

24           **APPLICABILITY.** (a) Sections 3 - 5 of this Act apply to all claims for medical  
25 services provided under AS 47 to a recipient of medical assistance that are submitted to the  
26 Department of Health and Social Services on or after the effective date of this Act.

27           (b) Except as provided in (a) of this section, this Act applies to all claims for medical  
28 services that are provided under AS 47 to a recipient of medical assistance on or after the  
29 effective date of this Act.

30       \* **Sec. 11.** This Act takes effect immediately under AS 01.10.070(c).

# SENATE COMMITTEE REPORT

DATE: 2/17/00

FURTHER: Finance

DATE TURNED  
IN TO OFFICE: \_\_\_\_\_

Judiciary Committee considered

SENATE BILL NO. 233

"An Act relating to priorities, claims, and liens for payment for certain medical services provided to medical assistance recipients; and providing for an effective date."

and recommends:

- be replaced with \_\_\_\_\_ CS SB 233 \_\_\_\_\_ (\_\_\_\_\_)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to the \_\_\_\_\_ Committee

- Senate Bill:
- same title
  - new title
- House Bill:
- same title
  - technical title
  - new: SCR# \_\_\_\_\_

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
		<i>Rich Hayward</i>	✓		
		<i>J. ...</i>	✓		
CHAIR: <i>Christ ...</i>	✓	CHAIR: _____			

**NEW FISCAL NOTE(S):**

Department                      Date              Zero              Fiscal


**PREVIOUS FISCAL NOTE(S):\***

Department                      Date              Zero              Fiscal


APPROPRIATION -- no fiscal note

\*include fiscal notes accompanying Governor's bill

# STATE OF ALASKA

## DEPT. OF HEALTH AND SOCIAL SERVICES

OFFICE OF THE COMMISSIONER

TONY KNOWLES, GOVERNOR

P.O. BOX 110601  
JUNEAU, ALASKA 99811-0601  
PHONE: (907) 465-3030  
FAX: (907) 465-3068

February 16, 2000

Honorable Robin Taylor, Chairman  
Senate Judiciary Committee  
Room 119 Capitol Building  
Juneau, AK 99811

Dear Senator Taylor,

The Department of Health and Social Services respectfully requests a hearing in the Senate Judiciary Committee on Senate Bill 233 "An Act relating to priorities, claims, and liens for payment to certain medical services provided to medical assistance recipients; and providing for an effective date."

The bill contains two distinct provisions: 1) providing the Department of Health and Social Services with unambiguous authority to recover medical costs incurred by the Division of Medical Assistance when a legal settlement making a monetary award to cover injuries has been made; and 2) allowing providers to bill the Division for services up to twelve months from the date of service.

A fiscal note has previously been submitted. The bill was heard by the Senate Health, Education and Social Services Committee and moved without amendment. Your favorable consideration of this request would be appreciated.

Sincerely,



Elmer A. Lindstrom  
Special Assistant to the Commissioner

Cc: Pat Pourchot  
Legislative Director  
Office of the Governor

Bob Labbe  
Director  
Division of Medical Assistance

JOHN KNOWLES

STATE OF ALASKA  
Office of the Governor  
JUNEAU

January 31, 2000

The Honorable Drue Pearce  
President of the Senate  
Alaska State Legislature  
State Capitol  
Juneau, AK 99801-1182

Dear President Pearce:

In the interest of recovering medical assistance payments due to the state, I am transmitting this bill that grants the Department of Health and Social Services an express right to a lien against any money recovered from a third party for assistance payments. The bill also strengthens the department's existing right of third party subrogation and extends the time period from six months to one year for medical providers to file claims with the department for medical services provided.

Under the bill, when a state medical assistance recipient recovers money from a third party who is found liable for the recipient's medical expenses, the department would have a lien against that recovery. The department's lien would be reduced by a pro rata share of the recipient's attorney fees and litigation costs incurred in the recovery. If the department incurs attorney fees and costs to enforce the lien, the amount of the lien would be increased to cover those fees and costs. The department's lien would take priority over a lien filed by a hospital, nurse, or physician.

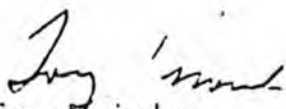
Under existing law, when a state medical assistance recipient has a claim against a third party for the recipient's medical expenses, the department has a right of subrogation. This law allows the department to stand in the place of the recipient to enforce the recipient's claim for medical assistance payments against an insurer or other third party. This bill adds a requirement that the recipient give the department notice if the recipient has an action or claim against a third party so that the department may enforce its subrogation rights. The bill also expressly grants the department the right to bring an

The Honorable Drue Pearce  
January 31, 2000  
Page 2

action to recover on a subrogated medical assistance claim regardless of whether the recipient acts or fails to act to enforce the claim.

I urge your support of this important legislation.

Sincerely,



Tony Knowles  
Governor

# FISCAL NOTE

STATE OF ALASKA  
2000 LEGISLATIVE SESSION

BILL NO. SB 233

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Health and Social Services  
 Title: Medicaid lien recovery and filing period BRU: Medical Assistance  
 Component: Medicaid Services  
 Sponsor: Rules COMPONENT SERIAL NO. 2077  
 Requestor: Governor See also (SN#): \_\_\_\_\_

**Expenditures/Revenues:** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS	(2.7)	(10.7)	(10.7)	(10.7)	(10.7)	(10.7)
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>(2.7)</b>	<b>(10.7)</b>	<b>(10.7)</b>	<b>(10.7)</b>	<b>(10.7)</b>	<b>(10.7)</b>

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGES IN REVENUES ( )						
-------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts	(1.6)	(6.4)	(6.4)	(6.4)	(6.4)	(6.4)
1003 GF Match	(1.1)	(4.3)	(4.3)	(4.3)	(4.3)	(4.3)
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (please specify)						
<b>TOTAL</b>	<b>(2.7)</b>	<b>(10.7)</b>	<b>(10.7)</b>	<b>(10.7)</b>	<b>(10.7)</b>	<b>(10.7)</b>

Estimate of any current year (FY2000) cost: \$0.0

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

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

This legislation would make two changes to the Medicaid program; the net effect of those changes is shown above. First, the legislation would strengthen the Department of Health and Social Services' ability to recover money from third party payors when they are liable for the medical expenses that have been paid by the department for someone receiving medical assistance under Medicaid or the Chronic and Acute Medical Assistance (CAMA) program. This would result in the Department recovering more of these expenditures.

The legislation also extends the timely filing period for providers to submit claims to Medicaid and CAMA from six months to one year. This will increase expenditures as currently some claims are not paid solely because they are not filed within the six month time period. The following page shows the separate impacts. (Note: impacts to CAMA are not included as they are not considered material.)

Prepared by: Jon Sherwood *RSR* Phone: 465-3355  
 Division: Medical Assistance Date/Time: 1/20/00 3:03 PM  
 Approved by Commissioner: Karen Perdue, Commissioner Date: 1/24/00  
 Agency: Department of Health & Social Services

**PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE**  
 For further distribution information, call the Governor's Legislative Office

**ANALYSIS (cont.):**

**Medicaid Lien and Recovery**

Giving the Department lien authority and improving its subrogation rights will result in increased third-party settlement recoveries (those recoveries in which liens and subrogation are at issue) for the Medicaid program. Because regulations are necessary to implement some provisions and third party recoveries usually take place well after the Medicaid program has paid for the medical services, recoveries are not expected to increase immediately. The table below shows the projected increase in recoveries.

Year	Increased Recovery (thousands)
FY2001	\$52.7
FY2002	\$210.7
FY2003	\$210.7
FY2004	\$210.7
FY2005	\$210.7
FY2006	\$210.7

Assumption: Third party settlement recoveries will increase by one-third, beginning in the 4th quarter of FY2001.

**Timely Filing Period Extension**

Currently, some Medicaid providers fail to bill within the six month timely filing period. In some cases, these claims are not reimbursed. In other cases, where providers show good cause for late filing, they may get paid for 50 percent of the normal reimbursement for the claims.

Extending the timely filing period to 12 months and allowing full reimbursement for late claims with good cause will result in more valid claims being paid in full. The amount of late claims can vary widely from year to year, and in some years, more late claims are meet the good cause criteria for partial reimbursement. The table below represents an average estimated amount of increased claims payments as a result of the proposed change, assuming that implementing regulations become effective in the fourth quarter of FY2001.

Year	Increased Payments (thousands)
FY2001	\$50.0
FY2002	\$200.0
FY2003	\$200.0
FY2004	\$200.0
FY2005	\$200.0
FY2006	\$200.0

Assumption: New timely filing limits go into effect beginning the 4th quarter of FY2001.

Net Impact	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006
Liens and Recovery (decrease)	(52.7)	(210.7)	(210.7)	(210.7)	(210.7)	(210.7)
Timely Filing (increase)	50.0	200.0	200.0	200.0	200.0	200.0
TOTAL	(2.7)	(10.7)	(10.7)	(10.7)	(10.7)	(10.7)

**SB**

**259**

## Overview and Explanation of Changes SB 259 (Jud)

Expansion of the previous bill. It uses some federal language.

We have looked into the concerns that Senator Halford expressed about victim's rights (credit reporting) in this bill. Unfortunately this language is criminal and according to legal, victim rights a civil matter and recommended it should not be placed in this bill (single Subject)

Makes it a crime to use someone else's identity for criminal activity and crime in and of itself.

Addresses use of new technology such as disk recording devices and distribution systems such as computers.

It also includes computer hacking as a crime.

The bill spells out the severity of the offense based on monetary gain.

**Section 1. & 2** are at request. It adds electronic recording to the existing child exploitation laws essentially to match current and hopefully future technology. (Computers, C D's, video and audio disks)

The remainder of the bill defines criminal impersonation and associated crimes.

**Section 3.** Deals with illegal credit card use or the numbers involved in obtaining credit and establishes its degree of offense.

**Section 4.** Expands the fraud definition in current statute and establishes the level of the offense based on monetary gain.

**Section 5.** Adds the offense of obtaining an access device or I.D. either through illegal means or by giving false information.

**Section 6.** Establishes First degree criminal impersonation (Class B felony)

**Section 7.** Establishes Second Degree criminal impersonation (Class A Misdemeanor)

**Section 8.** Adds recording to the definition of business record.

**Section 9.** Establishes crime level for deceptive business practices done without assistance from a computer. (Class A Misdemeanor)

**Section 10.** Makes using a computer in the commission of deceptive business practices a Class C felony and defines criminal usage of a computer. (Includes hacking)

**Section 11.** Hacking- Defines when it is a crime

**Section 12-13** Definitions of terms used in the bill.

**Section 14** Makes giving false information to a police officer an offense.

**Section 15-17** Definitions

**Section 18** Applicability and effective date.

1-LS1284K  
Luckhaupt  
3/20/00

*adopted  
3/20/00*

CS FOR SENATE BILL NO. 259(JUD)  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:  
Referred:

Sponsor(s): SENATOR TAYLOR

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to crimes and offenses relating to aural representations,  
2 recordings, access devices, identification documents, impersonation, false reports, and  
3 computers; and providing for an effective date."

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

5 \* Section 1. AS 11.41.455(a) is amended to read:

6 (a) A person commits the crime of unlawful exploitation of a minor if, in the  
7 state and with the intent of producing a live performance, film, audio, video,  
8 electronic, or electromagnetic recording, photograph, negative, slide, book,  
9 newspaper, magazine, or other [PRINTED] material that visually or aurally depicts  
10 the conduct listed in (1) - (7) of this subsection, the person knowingly induces or  
11 employs a child under 18 years of age to engage in, or photographs, films, records, or  
12 televises a child under 18 years of age engaged in, the following actual or simulated  
13 conduct:

14 (1) sexual penetration;

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31

- (2) the lewd touching of another person's genitals, anus, or breast;
- (3) the lewd touching by another person of the child's genitals, anus, or breast;
- (4) masturbation;
- (5) bestiality;
- (6) the lewd exhibition of the child's genitals; or
- (7) sexual masochism or sadism.

\* Sec. 2. AS 11.41.455(b) is amended to read:

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is intended to be used in producing a live performance, film, audio, video, electronic, or electromagnetic recording, photograph, negative, slide, book, newspaper, magazine, or other [PRINTED] material that visually or aurally depicts the conduct.

\* Sec. 3. AS 11.46.140(a) is amended to read:

(a) A person commits the crime of theft in the third degree if the person commits theft as defined in AS 11.46.100 and

- (1) the value of the property or services is \$50 or more but less than \$500;
- (2) the property is an access device [A CREDIT CARD]; or
- (3) the value of the property is less than \$50 and, within the past five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of theft or concealment of merchandise, or an offense under another law or ordinance with similar elements.

\* Sec. 4. AS 11.46.285 is amended to read:

Sec. 11.46.285. Fraudulent use of an access device [A CREDIT CARD].

(a) A person commits the crime of fraudulent use of an access device [A CREDIT CARD] if, with intent to defraud, the person uses an access device [A CREDIT CARD] to obtain property or services with knowledge that

- (1) the access device [CARD] is stolen or forged;

1 (2) the access device [CARD] is expired or has been revoked or  
2 cancelled; or

3 (3) for any other reason, that person's use of the access device [CARD]  
4 is unauthorized by either the issuer or the person to whom the access device [CREDIT  
5 CARD] is issued.

6 (b) Fraudulent use of an access device [A CREDIT CARD] is

7 (1) a class B felony if the value of the property or services obtained  
8 is \$25,000 or more;

9 (2) a class C felony if the value of the property or services obtained is  
10 \$500 or more but less than \$25,000;

11 (3) [(2)] a class A misdemeanor if the value of the property or services  
12 obtained is \$50 or more but less than \$500;

13 (4) [(3)] a class B misdemeanor if the value of the property or services  
14 obtained is less than \$50.

15 \* Sec. 5. AS 11.46.290 is amended to read:

16 Sec. 11.46.290. Obtaining an access device or identification document [A  
17 CREDIT CARD] by fraudulent means. (a) A person commits the crime of  
18 obtaining an access device or identification document [A CREDIT CARD] by  
19 fraudulent means if

20 (1) the person buys an access device or identification document [A  
21 CREDIT CARD] from a person other than the issuer or, as other than the issuer, the  
22 person sells an access device or identification document [A CREDIT CARD];

23 (2) with intent to defraud, the person obtains an access device or  
24 identification document [CONTROL OF A CREDIT CARD AS A SECURITY FOR  
25 DEBT]; or

26 (3) with intent to defraud, the person makes a false statement in an  
27 application for an access device or identification document [A CREDIT CARD].

28 (b) [OBTAINING A CREDIT CARD BY FRAUDULENT MEANS UNDER  
29 (a)(1) OR (2) OF THIS SECTION IS A CLASS C FELONY.] Obtaining an access  
30 device or identification document [A CREDIT CARD] by fraudulent means [UNDER  
31 (a)(3) OF THIS SECTION] is a class A misdemeanor.

1 \* Sec. 6. AS 11.46 is amended by adding a new section to read:

2 Sec. 11.46.565. **Criminal impersonation in the first degree.** (a) A person  
3 commits the crime of criminal impersonation in the first degree if the person

4 (1) possesses an access device or identification document of another  
5 person;

6 (2) without authorization of the other person, uses the access device or  
7 identification document of another person to obtain a false identification document,  
8 open an account at a financial institution, obtain an access device, or obtain property  
9 or services; and

10 (3) with criminal negligence, damages the financial reputation of the  
11 other person.

12 (b) Criminal impersonation in the first degree is a class B felony.

13 \* Sec. 7. AS 11.46.570 is amended to read:

14 Sec. 11.46.570. **Criminal impersonation in the second degree.** (a) A person  
15 commits the crime of criminal impersonation in the second degree if the person

16 (1) assumes a false identity and does an act in the assumed character  
17 with intent to defraud, commit a crime, or obtain a benefit to which the person is  
18 not entitled; or

19 (2) pretends to be a representative of some person or organization and  
20 does an act in the pretended capacity with intent to defraud, commit a crime, or  
21 obtain a benefit to which the person is not entitled.

22 (b) Criminal impersonation in the second degree is a class A misdemeanor.

23 \* Sec. 8. AS 11.46.630(b)(1) is amended to read:

24 (1) "business record" means a writing, recording, or article kept or  
25 maintained by an enterprise for the purpose of evidencing or reflecting its condition  
26 or activity;

27 \* Sec. 9. AS 11.46.710(c) is amended to read:

28 (c) Except as provided in (d) of this section, deceptive [DECEPTIVE]  
29 business practices is a class A misdemeanor.

30 \* Sec. 10. AS 11.46.710 is amended by adding a new subsection to read:

31 (d) Deceptive business practices is a class C felony if the person uses the

1 internet or a computer network to commit the offense. In this subsection, "Internet"  
2 means the combination of computer systems or networks that make up the international  
3 network for interactive communications services, including remote logins, file transfer,  
4 electronic mail, and newsgroups.

5 \* Sec. 11. AS 11.46.740(a) is amended to read:

6 (a) A person commits the offense of criminal use of a computer if, having no  
7 right to do so or any reasonable ground to believe the person has such a right, the  
8 person knowingly accesses, [OR] causes to be accessed, or exceeds the person's  
9 authorized access to a computer, computer system, computer program, computer  
10 network, or any part of a computer system or network, and, as a result of or in the  
11 course of that access,

12 (1) obtains information concerning a person; [OR]

13 (2) introduces false information into a computer, computer system,  
14 computer program, or computer network with the intent to damage or enhance the  
15 data record or the financial reputation of a person;

16 (3) introduces false information into a computer, computer system,  
17 computer program, or computer network and, with criminal negligence, damages  
18 or enhances the data record or the financial reputation of a person;

19 (4) obtains proprietary information of another person;

20 (5) obtains information that is only available to the public for a fee;

21 (6) introduces instructions, a computer program, or other  
22 information that tampers with, disrupts, disables, or destroys a computer,  
23 computer system, computer program, computer network, or any part of a  
24 computer system or network; or

25 (7) encrypts or decrypts data.

26 \* Sec. 12. AS 11.46.740 is amended by adding a new subsection to read:

27 (c) In this section, "proprietary information" means scientific, technical, or  
28 commercial information, including a design, process, procedure, customer list, supplier  
29 list, or customer records that the holder of the information has not made available to  
30 the public.

31 \* Sec. 13. AS 11.46.990 is amended by adding a new paragraph to read:

1 (14) "financial reputation" means a person's

2 (A) ability to obtain a loan from a financial institution, open an  
3 account with a financial institution, obtain property or services on credit, or  
4 obtain an access device; or

5 (B) creditworthiness in a credit report.

6 \* Sec. 14. AS 11.56.800(a) is amended to read:

7 (a) A person commits the crime of making a false report if the person  
8 knowingly

9 (1) gives false information to a peace officer with the intent of  
10 implicating another in an offense [A CRIME];

11 (2) makes a false report to a peace officer that a crime has occurred or  
12 is about to occur;

13 (3) makes a false report or gives a false alarm that a fire or other  
14 incident dangerous to life or property calling for an emergency response has occurred  
15 or is about to occur; or

16 (4) makes a false report to the Department of Natural Resources under  
17 AS 46.17 concerning the condition of a dam or reservoir.

18 \* Sec. 15. AS 11.61.125(d) is amended to read:

19 (d) In this section, "distribution" includes delivering, selling, renting, leasing,  
20 lending, giving, circulating, exhibiting, presenting, providing, [AND] exchanging, and  
21 placing on a computer network or computer system, whether or not for monetary  
22 or other consideration.

23 \* Sec. 16. AS 11.81.900(b)(48) is amended to read:

24 (48) "property" means an article, substance, or thing of value, including  
25 money, tangible and intangible personal property including data or information stored  
26 in a computer program, system, or network, real property, an access device [A  
27 CREDIT CARD], a domestic pet or livestock regardless of value, choses-in-action, and  
28 evidence of debt or of contract; a commodity of a public utility such as gas, electricity,  
29 steam, or water constitutes property, but the supplying of such a commodity to  
30 premises from an outside source by means of wires, pipes, conduits, or other  
31 equipment is considered a rendition of a service rather than a sale or delivery of

1       property;

2       \* Sec. 17. AS 11.81.900(b) is amended by adding new paragraphs to read:

3               (61) "access device" means a card, credit card, plate, code, account  
4       number, algorithm, or identification number, including a social security number,  
5       electronic serial number, or password, that is capable of being used, alone or in  
6       conjunction with another access device or identification document, to obtain property  
7       or services, or that can be used to initiate a transfer of property;

8               (62) "identification document" means a paper, instrument, or other  
9       article used to establish the identity of a person; "identification document" includes a  
10      social security card, driver's license, non-driver's identification, birth certificate,  
11      passport, employee identification, or hunting or fishing license.

12      \* Sec. 18. The uncodified law of the State of Alaska is amended by adding a new section  
13      to read:

14              APPLICABILITY. This Act applies to acts and offenses committed or completed on  
15      or after the effective date of this Act.

16      \* Sec. 19. This Act takes effect immediately under AS 01.10.070(c).

# FISCAL NOTE

STATE OF ALASKA  
2000 LEGISLATIVE SESSION

BILL NO. CSSB 259 (JUD)

Revision Date/Time (Note if correction) 21-Mar-00 Dept. Affected Administration  
 Title "An Act relating to criminal impersonation" BRU Legal and Advocacy Services  
 Component Public Defender Agency  
 Sponsor Senator Taylor  
 Requester (S) JUD Component No. 1631

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services	46.5	46.5	46.5	46.5	46.5	46.5
Travel	3.5	3.5	3.5	3.5	3.5	3.5
Contractual	26.3	26.3	26.3	26.3	26.3	26.3
Supplies	1.9	1.9	1.9	1.9	1.9	1.9
Equipment	6.5	0.0	0.0	0.0	0.0	0.0
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>84.7</b>	<b>78.2</b>	<b>78.2</b>	<b>78.2</b>	<b>78.2</b>	<b>78.2</b>

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ( )						
------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	84.7	78.2	78.2	78.2	78.2	78.2
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
<b>TOTAL</b>	<b>84.7</b>	<b>78.2</b>	<b>78.2</b>	<b>78.2</b>	<b>78.2</b>	<b>78.2</b>

Estimate of any current year (FY2000) cost: \_\_\_\_\_

**POSITIONS**

Full-time	1	1	1	1	1	1
Part-time						
Temporary						

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

This bill amends current law and adds new statutes to enable prosecution of a wide variety of computer-related offenses.

Prosecution and defense of these offenses will require sophisticated technical expertise. The Public Defender Agency does not currently have staff who have the technical knowledge necessary to defend criminal cases that could be brought under this new legislation.

The Public Defender Agency will need to hire a Programmer Analyst I in order to consult with and train the attorneys appointed to defend these cases. The Programmer Analyst will be based in Anchorage. In addition to providing technical assistance on individual cases in Anchorage, the Programmer Analyst would also be responsible for training attorneys and investigators in all Public Defender Agency offices on technical issues in these cases. One-time equipment costs for computer equipment is also included in the first year.

Prepared by: Barbara Brink, Director Phone 264-4414  
 Division Public Defender Agency Date/Time \_\_\_\_\_  
 Approved by Commissioner -- Robert Poe, Jr. Date 3/21/00  
 Agency Department of Administration

**PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE**

For further distribution information, call the Governor's Legislative Office

# FISCAL NOTE

STATE OF ALASKA  
2000 LEGISLATIVE SESSION

BILL NO. CSSB 259 (JUD)

Revision Date/Time (Note if correction) _____	Dept. Affected <u>Law</u>
Title <u>"An Ac. relating to crimes and offenses relating to aural representations, ... access devices ... computers; ..."</u>	BRU <u>Criminal Division</u>
Sponsor <u>Senator Taylor</u>	Component <u>1st Judicial Dist; 4th Judicial Dist; Criminal Appeals/Special Litigation</u>
Requester <u>Senate Judiciary Committee</u>	Component No. <u>2198;2201;2203</u>

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel	3.3	3.3	3.3	3.3	3.3	3.3
Contractual	6.7	6.7	6.7	6.7	6.7	6.7
Supplier						
Equipm	5.0	5.0	5.0	5.0	5.0	5.0
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>15.0</b>	<b>15.0</b>	<b>15.0</b>	<b>15.0</b>	<b>15.0</b>	<b>15.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	15.0	15.0	15.0	15.0	15.0	15.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
<b>TOTAL</b>	<b>15.0</b>	<b>15.0</b>	<b>15.0</b>	<b>15.0</b>	<b>15.0</b>	<b>15.0</b>

Estimate of any current year (FY2000) cost: \_\_\_\_\_

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

CSSB 259 (JUD) amends and expands the substantive criminal law to address the use of computers and other technology in the widespread perpetration of crimes. Child pornography, theft of personal information with the intent to defraud, theft of personal information resulting in damage to a person's financial reputation, deceptive business practices, "hacking" to get unauthorized information or introduce false information, and introducing damaging viruses, are all offenses where technology has offered new ways for criminals to victimize individuals. The amendments in this bill will update existing law to help law enforcement prosecute those who cause harm to others through the use of computers and other technology.

Prepared by: <u>Joan M. Kasson</u> <i>Joan M. Kasson</i>	Phone <u>465-5370</u>
Division: <u>Attorney General's Office</u>	Date/Time: <u>3/21/00, 11:39 AM</u>
Approved by: <u>Commissioner</u> <i>Hedley</i> <u>Bruce M. Botelho, Attorney General</u>	Date: <u>3/21/00</u>
Agency: <u>Department of Law</u>	

**PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE**

For further distribution information, call the Governor's Legislative Office

## FISCAL NOTE

STATE OF ALASKA  
2000 LEGISLATIVE SESSION

BILL NO. CSSB 259 (JUD)

### ANALYSIS CONTINUATION

Much of the bill expands on existing crimes already being prosecuted, and is not anticipated to cause increased workload. The new crimes defined in the bill are expected to result in approximately ten new prosecutions in the first year, with the number increasing in future years. These new white-collar cases will be handled by existing staff. Although no new personnel are believed to be necessary, other resources will be needed.

Investigation and prosecution of cybercrimes require that the prosecutor keep up with the constantly changing world of information technology. Those who use computers to commit crimes are very knowledgeable about technology, and usually have state-of-the-art equipment. Prosecutors must have the same or better knowledge and equipment as those who use the equipment for illegal purposes.

The Department of Law intends to have three of its prosecutors specialize in this technology driven area of law: one in Anchorage OSPA, and one each in the Juneau and Fairbanks district attorney's offices. These assistant district attorneys will need on-going training to stay ahead of the inventive ways people come up with to use technology to cause harm to others and to keep up with how law enforcement is responding in other jurisdictions. The department estimates \$10.0 per year will be spent on training, divided equally between the three components. \$5.0 per year is included to maintain state-of-the-art computer equipment, software, peripherals, and associated communications devices in Anchorage OSPA as a resource for the entire Criminal Division to use in preparing and presenting its cases.

## Library References

- Jury instructions, vehicle prowling. Elements, see Wash.Prac. vol. 11,  
 Definition, see Wash.Prac. vol. 11, WPIC 61.02.  
 WFIC 61.01.

## Notes of Decisions

## 1. Vehicle

There was no violation of defendant's right to equal protection of laws when defendant, who broke and entered semitrailer, was convicted of burglary in second degree rather than of lesser offense such as vehicle prowling since semitrailer was not a motor vehicle. *State v. Tyson* (1983) 33 Wash.App. 859, 658 P.2d 55.

Person who broke and entered semi-trailer could be convicted of burglary in

the second degree, a class B felony; charges were not required to be brought under statutes defining lesser offenses such as vehicle prowling (this section and §§ 9A.04.110 and 46.04.320) since semitrailer is a separate detachable container or structure from truck tractor unit which is used to draw it. *State v. Tyson* (1983) 33 Wash.App. 859, 658 P.2d 55.

## 9A.52.110. Computer trespass in the first degree

(1) A person is guilty of computer trespass in the first degree if the person, without authorization, intentionally gains access to a computer system or electronic data base of another; and

(a) The access is made with the intent to commit another crime; or

(b) The violation involves a computer or data base maintained by a government agency.

(2) Computer trespass in the first degree is a class C felony. Enacted by Laws 1984, ch. 273, § 1.

## Notes of Decisions

Authorization 2  
 Evidence 1

college coeds which were in no way connected to any ongoing police investigation. *State v. Olson* (1987) 47 Wash.App. 514, 735 P.2d 1362.

## 1. Evidence

Evidence showed at most unauthorized use of computer data, which was not prohibited by this section, and was insufficient to sustain conviction for computer trespass; defendant, a university police officer who had an access code and permission to approach, instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of computer, was found retrieving computer printouts of

## 2. Authorization

Trial court was required to find lack of authorization to use computer beyond a reasonable doubt after independently reviewing evidence in prosecution for computer trespass, and it committed error when it relied on pretrial order to find lack of authority to access computer. *State v. Olson* (1987) 47 Wash.App. 514, 735 P.2d 1362.

## 9A.52.120. Computer trespass in the second degree

(1) A person is guilty of computer trespass in the second degree if the person, without authorization, intentionally gains access to a

## HINGTON CRIMINAL CODE

### References

Elements, see Wash.Prac. vol. 11, WPIC 61.02.

### Definitions

In the second degree, a class B felony; targets were not required to be brought under statutes defining lesser offenses such as vehicle prowling (this section and §§ 9A.04.110 and 46.04.320) since a trailer is a separate detachable container or structure from truck tractor unit which is used to draw it. State v. Olson (1983) 33 Wash.App. 859, 658 P.2d

### In the first degree

Computer trespass in the first degree if intentionally gains access to a computer system or data base of another; and intent to commit another crime;

Computer system or data base maintained by another person;

Computer trespass in the first degree is a class C felony.

### Definitions

Illegally obtained records which were in no way connected to any ongoing police investigation. State v. Olson (1987) 47 Wash.App. 14, 735 P.2d 1362.

### Authorization

Trial court was required to find lack of authorization to use computer beyond reasonable doubt after independently reviewing evidence in prosecution for computer trespass, and it committed error when it relied on pretrial order to find lack of authority to access computer. State v. Olson (1987) 47 Wash.App. 14, 735 P.2d 1362.

### In the second degree

Computer trespass in the second degree if intentionally gains access to a

## BURGLARY AND TRESPASS

9A.52.130

computer system or electronic data base of another under circumstances not constituting the offense in the first degree.

(2) Computer trespass in the second degree is a gross misdemeanor.

Enacted by Laws 1984, ch. 273, § 2.

### 9A.52.130. Computer trespass—Commission of other crime

A person who, in the commission of a computer trespass, commits any other crime may be punished for that other crime as well as for the computer trespass and may be prosecuted for each crime separately.

Enacted by Laws 1984, ch. 273, § 3.

### Cross References

Physical damage to computer programs, see § 9A.48.100.

## BBERY

drafts.  
 ermission.

rented machinery, equipment,

efinition—Access devices, pre-

ic first degree.  
 ic second degree.  
 ic third degree.  
 e.

is.  
 n services.  
 rice used to commit violation.

er.

ic  
 ws 1959, ch. 229, §§ 1, 2.  
 ws 1961, ch. 63, § 1.  
 ws 1965, ch. 32, § 1.  
 ws 1967, ch. 76, § 1.  
 ws 1975, 1st Ex.Sess., ch. 61, §§ 1, 2.

### c Research

ic of Washington Annotated and  
 a citation in INSTA-CITE for

## THEFT AND ROBBERY

9A.56.010

display of any parallel citations and case history. Enter a constitution, statute or rule citation in a case law database for cases of interest.

Example query for INSTA-CITE: IC 692 P.2d 874

Example query for Washington Constitution:

Const. Constitution /s 8 +3 5

Example query for statute: 59.12.030

Also, see the WESTLAW guide following the Preface pages of this volume.

### 9A.56.010. Definitions

The following definitions are applicable in this chapter unless the context otherwise requires:

(1) "Appropriate lost or misdelivered property or services" means obtaining or exerting control over the property or services of another which the actor knows to have been lost or mislaid, or to have been delivered under a mistake as to identity of the recipient or as to the nature or amount of the property;

(2) "By color or aid of deception" means that the deception operated to bring about the obtaining of the property or services; it is not necessary that deception be the sole means of obtaining the property or services;

(3) "Access device" means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument;

(4) "Deception" occurs when an actor knowingly:

(a) Creates or confirms another's false impression which the actor knows to be false; or

(b) Fails to correct another's impression which the actor previously has created or confirmed; or

(c) Prevents another from acquiring information material to the disposition of the property involved; or

(d) Transfers or encumbers property without disclosing a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether that impediment is or is not valid, or is or is not a matter of official record; or

(e) Promises performance which the actor does not intend to perform or knows will not be performed.

**9A.56.040. Theft in the second degree**

(1) A person is guilty of theft in the second degree if he commits theft of:

--(a) Property or services which exceed(s) two hundred and fifty dollars in value, but does not exceed one thousand five hundred dollars in value; or

(b) A public record, writing, or instrument kept, filed, or deposited according to law with or in the keeping of any public office or public servant; or

(c) An access device; or

(d) A motor vehicle, of a value less than one thousand five hundred dollars; or

(e) A firearm, of a value less than one thousand five hundred dollars.

(2) Theft in the second degree is a class C felony.

Enacted by Laws 1975, 1st Ex.Sess., ch. 260, § 9A.56.040. Amended by Laws 1982, 1st Ex.Sess., ch. 47, § 15; Laws 1987, ch. 140, § 2.

**Historical Note**

Laws 1982, 1st Ex.Sess., ch. 47, § 15, Source:  
inserted subsec. (1)(c).

Laws 1987, ch. 140, § 2, rewrote subsec. (1)(c), which previously read: "A credit-card; or".

**Severability**—Laws 1982, 1st Ex. Sess., ch. 47: See Historical Note following § 9.41.190.

Laws 1909, ch. 249, § 353.

RRS § 2605.

Former §§ 9.27.030, 9.54.090.

Laws 1955, ch. 97, § 1.

Laws 1963, ch. 133, § 1.

Former § 9.61.220.

Laws 1970, Ex.Sess., ch. 36, § 3.

**Cross References**

Civil action for shoplifting by adults, minors, see § 4.24.230.

Larceny, see ch. 9.54.

**Library References**

Criminal Law ¶27.

Larceny ¶5, 24.

C.J.S. Criminal Law § 5 et seq.

C.J.S. Larceny §§ 2 et seq., 66 et seq.

C.J.S. Motor Vehicles § 588.

Criminal practice, disposition without trial, reduction of charge, see Wash.

Prac. vol. 13, Ferguson, § 3014.

Jury instructions, theft, second degree,

Definition, see Wash.Prac. vol. 11,  
WPIC 70.05.

Elements, see Wash.Prac. vol. 11,  
WPIC 70.06.

**WESTLAW Electronic Research**

See WESTLAW guide following the Preface of this volume.

4. Knowledge or intent

Act is done "knowingly," for purposes of statute prohibiting fraud and related activity in connection with identification documents, if it is done voluntarily and intentionally rather than by mistake, accident or other innocent reason. *U.S. v. Smith, D.Or.1988, 685 F.Supp. 1623, affirmed in part, reversed in part 876 F.2d 898, certiorari denied 110 S.Ct. 194, 493 U.S. 869, 107 L.Ed.2d 149.*

4a. Unlawfulness of intended use

Parole violation is a violation of New York law, and thus defendant's alleged unlawful use of identification, which constituted parole violation, could establish element of intent to use "unlawfully" in charge of knowingly possessing with intent to use unlawfully five or more identification documents. *U.S. v. Chandler, C.A.2 (N.Y.) 1998, 98 F.3d 711.*

To enable jury to conclude that defendant intended to use false identifications unlawfully, as required to convict defendant for knowingly possessing with intent to use unlawfully five or more false identification documents, government is required to establish uses to which defendant intended to put false identifications and that those intended uses would violate one or more federal, state, or local laws. *U.S. v. Rohn, C.A.4 (Md.) 1992, 964 F.2d 310.*

5. Identification documents

Defendant may be convicted of using false identification document with intent to defraud United States, within meaning of federal criminal statute, though defendant's conduct does not violate local, state or federal law; violation of such law is not necessary element of statutory offense. *U.S. v. McCormick, C.A.9 (Nev.) 1995, 72 F.3d 1404.*

Nonimmigrant visa was not identification document under statute barring possession of instruments that can be used to make false identification documents; visa only identifies someone as eligible to enter United States without identifying bearer. *U.S. v. Harunouda, C.A.D.C.1995, 51 F.3d 288, 311 U.S.App.D.C. 145, certiorari denied 116 S.Ct. 2290, 516 U.S. 1128, 132 L.Ed.2d 291.*

Possession of credentials appearing to be those of Drug Enforcement Administration (DEA) supported conviction on false credentials charge, even if identification document was contained in leather cover bearing defunct agency's seal and even if statute required that identification document purport to be that of existing agency. *U.S. v. Canan, C.A.6 (Ky.) 1995, 49 F.3d 954, rehearing and suggestion for rehearing en banc denied, certiorari denied 116 S.Ct. 716, 516 U.S. 1050, 133 L.Ed.2d 670.*

For purposes of statute prohibiting fraud and related activity in connection with identification documents, "identification document" is an authentic or real document issued by some governmental body and a "false identification document" is *inter alia* a document procured by false statements or fraud and also may be a non-authentic document. *U.S. v. Smith, D.Or.1988, 685 F.Supp. 1623, affirmed in part, reversed in part on other grounds 876 F.2d 898, certiorari denied 110 S.Ct. 194, 493 U.S. 869, 107 L.Ed.2d 149.*

6. Possession of document-making implements

Evidence that defendants possessed various document-making implements, which were made in other states and countries, and possessed identification cards from three other states was sufficient to establish that unlawful activity was "in or affecting interstate commerce," for purpose of conviction for violating statute which prohibited fraud in connection with identification documents. *U.S. v. Pearce, C.A.4 (N.C.) 1996, 65 F.3d 22.*

Defendant violated statute prohibiting fraud and related activity in connection with identification documents, by possessing document-making implements which would be used in production of false identification document by possessing Texas seal, two blank Rhode Island birth certificates, blank New Jersey driver's license, two blank Social Security cards and blank chauffeur's license form, and by possessing identification document that appeared to be identification document of United States which was stolen or produced without authority knowing that such document was stolen or produced without authority by her possession of blank Social Security card. *U.S. v. Smith, D.Or.1988, 685 F.Supp. 1623, affirmed in part, reversed in part 876 F.2d 898, certiorari denied 110 S.Ct. 194, 493 U.S. 869, 107 L.Ed.2d 149.*

7. Instructions

General unanimity charge instructing jury that it had to return unanimous verdict was sufficient with respect to charge of knowingly possessing and using false identification documents; trial court was not required to provide specific unanimity charge that all jurors had to agree on particular theory of how defendant violated law. *U.S. v. Chandler, C.A.2 (N.Y.) 1996, 98 F.3d 711.*

Defendant was not entitled to venue instruction in prosecution for unlawful production and transfer of false identification documents, as defendant did not interpose question in timely fashion; any asserted defects in venue were apparent to defendant at time defendant entered into stipulation that waived venue issue. *U.S. v. Sotton, C.A.2 (N.Y.) 1994, 13 F.3d 666.*

In prosecution for knowingly possessing with intent to use unlawfully five or more false identification documents, citation to jury of particular law which defendant's intended uses of false identification documents would have violated was required; unlawfulness was determined not by reference to abstract notions of right and wrong, but by standards prescribed by appropriate lawmaking bodies, and to demonstrate un-

lawfulness, jury had to be instructed that particular conduct would have violated specific law. *U.S. v. Rohn, C.A.4 (Md.) 1992, 964 F.2d 310.*

8. Weight and sufficiency of evidence

Evidence that defendant possessed 108 counterfeit birth certificates, which he transported from Peru to the United States, that he secreted certificates in newspaper, and that he knew certificates could be used unlawfully to obtain driver's licenses, which produced \$200-\$300 per certificate, was sufficient to establish that defendant had willful intent to transfer certificates unlawfully, to support conviction of possession with intent to transfer unlawfully five or more false identification documents, considering additionally defendant's false exculpatory statements at time of arrest and his discredited claim that he was working for FBI. *U.S. v. Alejandro, C.A.11 (Fla.) 1997, 118 F.3d 1513.*

Evidence that both defendants had constructive, if not actual, possession of residence and rental car in which document-making implements were found was sufficient to sustain convictions for violating statute which prohibited fraud in connection with identification documents. *U.S. v. Pearce, C.A.4 (N.C.) 1996, 65 F.3d 22.*

Government's proposed inference that defendant intended unlawful uses of multiple false identification documents which she possessed as there were no possible lawful uses for false identifications was not sufficient to establish that defendant's intended uses of false identifications would violate federal, state, or local laws, so as to permit conviction for knowingly possessing with intent to use unlawfully five or more false identification documents. *U.S. v. Rohn, C.A.4 (Md.) 1992, 964 F.2d 310.*

9. Admissibility of evidence

Any "Oriental prejudice" suffered by defendant charged under federal statute with making false identification cards as result of evidence that defendant's activities violated Illinois law as well as federal law did not require mistrial, where any prejudice was outweighed by probative value of state employee's testimony on element of government's case. *U.S. v. Bell, C.A.7 (Ill.) 1997, 980 F.2d 1096.*

10. Discipline of attorneys

One-year suspension is appropriate sanction for attorney who is convicted of aiding and abetting in possession and use of identification document in order to fraudulently obtain passport, not involving moral turpitude. *In re McBride, D.C.1994, 642 A.2d 1270.*

§ 1029. Fraud and related activity in connection with access devices

(a) Whoever—

(1) knowingly and with intent to defraud produces, uses, or traffics in one or more counterfeit access devices;

(2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating \$1,000 or more during that period;

(3) knowingly and with intent to defraud possesses fifteen or more devices which are counterfeit or unauthorized access devices;

(4) knowingly, and with intent to defraud, produces, traffics in, has control or custody of, or possesses device-making equipment;

(5) knowingly and with intent to defraud effects transactions, with 1 or more access devices issued to another person or persons, to receive payment or any other thing of value during any 1-year period the aggregate value of which is equal to or greater than \$1,000;

(6) without the authorization of the issuer of the access device, knowingly and with intent to defraud solicits a person for the purpose of—

(A) offering an access device; or

(B) selling information regarding or an application to obtain an access device;

(7) knowingly and with intent to defraud uses, produces, traffics in, has control or custody of, or possesses a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications services;

(8) knowingly and with intent to defraud uses, produces, traffics in, has control or custody of, or possesses a scanning receiver;

(9) knowingly uses, produces, traffics in, has control or custody of, or possesses hardware or software, knowing it has been configured to insert or modify telecommunication identifying information associated with or contained in a telecommunications instrument so that such instrument may be used to obtain telecommunications service without authorization; or

(10) without the authorization of the credit card system member or its agent, knowingly and with intent to defraud causes or arranges for another person to present to the member or its agent, for payment, 1 or more evidences or records of transactions made by an access device;

shall, if the offense affects interstate or foreign commerce, be punished as provided in subsection (c) of this section.

(b)(1) Whoever attempts to commit an offense under subsection (a) of this section shall be subject to the same penalties as those prescribed for the offense attempted.

(2) Whoever is a party to a conspiracy of two or more persons to commit an offense under subsection (a) of this section, if any of the parties engages in any conduct in furtherance of such offense, shall be fined an amount not greater than the amount provided as the maximum fine for such offense under subsection (c) of this section or imprisoned not longer than one-half the period provided as the maximum imprisonment for such offense under subsection (c) of this section, or both.

(c) Penalties.—

(1) Generally.—The punishment for an offense under subsection (a) of this section is.—

(A) in the case of an offense that does not occur after a conviction for another offense under this section.—

(i) If the offense is under paragraph (1), (2), (3), (6), (7), or (10) of subsection (a), a fine under this title or imprisonment for not more than 10 years, or both; and

(ii) If the offense is under paragraph (4), (5), (8), or (9), of subsection (a), a fine under this title or imprisonment for not more than 15 years; or both;

(B) in the case of an offense that occurs after a conviction for another offense under this section, a fine under this title or imprisonment for not more than 20 years, or both; and

(C) in either case, forfeiture to the United States of any personal property used or intended to be used to commit the offense.

(2) Forfeiture procedure.—The forfeiture of property under this section, including any seizure and disposition of the property and any related administrative and judicial proceeding, shall be governed by section 413 of the Controlled Substances Act, except for subsection (d) of that section.

(d) The United States Secret Service shall, in addition to any other agency having such authority, have the authority to investigate offenses under this section. Such authority of the United States Secret Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Attorney General.



## Note 16

relate to sufficiency of the evidence, but rather to manner in which defendant was charged. *U.S. v. Akpl*, C.A.4 (Md.) 1994, 28 F.3d 24.

## 17. Questions of fact

Evidence presented jury question as to whether defendant was guilty, either as aider and abettor or as principal, of bank fraud and access device fraud; with respect to direct use of access device, at least one automatic teller machine (ATM) photograph showed defendant in driver's seat of vehicle parked at drive-through ATM, and defendant was pictured with codefendant as another card was being used, which suggested that he knew of and did nothing to prevent the crime. *U.S. v. Padayini*, C.A.D.C.1994, 28 F.3d 1238, 307 U.S.App.D.C. 369, rehearing denied.

## 18. Cloned cellular telephones

Defendant's cellular telephone cloning activities, involving use of electronic scanning and computer programming equipment to erase and reprogram electronic chip containing cellular phone's electronic serial number and mobile identification number with account number of another user, so that calls made on modified phone would be charged to other user's account, violated statute prohibiting knowing possession, production, use, and trafficking of counterfeit access devices and access device equipment, even before statute was amended to specifically address cellular telephone cloning. *U.S. v. Watson*, C.A.9 (Cal.) 1997, 118 F.3d 1916.

Cloned cellular telephone, i.e., one with identification numbers identical to another existing legitimate unit, fell within ambit of federal statute governing fraud and related activity in connection with access devices, in prosecution for violations of statute arising from defendant's alleged use, possession, and trafficking of cloned cellular telephone; defendant's conduct involved use of altered telecommunications instrument to obtain access to telecommunications services for purpose of defrauding carrier, and cellular carriers were damaged since, by cloning of cellular telephones to enable users to have extension telephone, cellular carriers were defrauded of activation fee and monthly service fee they charged for each cellular telephone. *U.S. v. Yates*, E.D.Ky.1995, 914 F.Supp. 162.

## 19. Intent

Statute making it illegal to knowingly and with intent to defraud possess 16 or more coun-

terfeit or unauthorized access devices if offense affects interstate commerce requires government to prove only that aggregate possession of 16 or more unauthorized access devices affected interstate commerce does not require government to prove intent to defraud with respect to each individual device. *U.S. v. Clayton*, C.A.9 (Cal.) 1997, 108 F.3d 1114, certiorari denied 118 S.Ct. 293, 139 L.Ed.2d 165.

To convict for use of unauthorized access devices, government must prove that defendant acted knowingly and with intent to defraud, but proof of such intent may be established with circumstantial evidence. *U.S. v. Immola*, C.A.5 (Tex.) 1996, 100 F.3d 380, rehearing denied, certiorari denied 117 S.Ct. 1712, 137 L.Ed.2d 836, certiorari denied 117 S.Ct. 1858, 137 L.Ed.2d 1060.

## 20. Instructions

Defendant charged with possession of cloned cellular phones, cloning equipment, and unauthorized cellular phone identification numbers was not entitled to instruction emphasizing that intent to defraud was necessary element of offenses, as instructions given already listed fraud as element of offense. *U.S. v. Clayton*, C.A.9 (Cal.) 1997, 108 F.3d 1114, certiorari denied 118 S.Ct. 293, 139 L.Ed.2d 165.

## 21. Value of loss

Court did not err in calculating amount of intended loss through use of fake credit cards at \$2,500,000 by adding the number of completed false cards, unembossed cards, signature panels, other unembossed cards found in safe in hotel where some of defendants were staying and then multiplying by the \$6,900 average amount charged per account during two weeks prior to defendant's arrest. *U.S. v. Wal-Keung*, C.A.11 (Fla.) 1997, 115 F.3d 874, rehearing and suggestion for rehearing en banc denied 127 F.3d 42, certiorari denied 118 S.Ct. 1096, 140 L.Ed.2d 160.

## 22. Unauthorized device

Merchant account numbers used by defendants in furtherance of bank fraud scheme were "unauthorized" access devices, based on evidence that merchant bank prohibited practice of factoring, by which business would use third party as conduit for depositing credit card sales, and that defendants knew of and intentionally violated bank's policy. *U.S. v. Dabbs*, C.A.11 (Fla.) 1998, 184 F.3d 1071.

## § 1030. Fraud and related activity in connection with computers

## (a) Whoever—

(1) having knowingly accessed a computer without authorization or exceeding authorized access, and by means of such conduct having obtained information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data, as defined in paragraph y of section 11 of the Atomic Energy Act of 1954, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation willfully communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same

ut rather charged. F.3d 24.

as to as' sider fraud and direct use the teller defendant at drive- red with ing used, did noth- Fadayinl. App.D.C.

terfeit or unauthorized access devices if offense effects interstate commerce requires government to prove only that aggregate possession of 15 or more unauthorized access devices affected interstate commerce does not require government to prove intent to defraud with respect to each individual device. U.S. v. Clayton, C.A.9 (Cal.) 1997, 108 F.3d 1114, certiorari denied 118 S.Ct. 233, 139 L.Ed.2d 165.

To convict for use of unauthorized access devices, government must prove that defendant acted knowingly and with intent to defraud, but proof of such intent may be established with circumstantial evidence. U.S. v. Ismoila, C.A.5 (Tex.) 1990, 100 F.3d 380, rehearing denied, certiorari denied 117 S.Ct. 1712, 137 L.Ed.2d 836, certiorari denied 117 S.Ct. 1858, 137 L.Ed.2d 1060.

20. Instructions

ig activi- ning and rraac and cellular I mobile mber of modified account, scession, unterfeit ulpment, ecifically i. v. Wat-

Defendant charged with possession of cloned cellular phones, cloning equipment, and unauthorized cellular phone identification numbers was not entitled to instruction emphasizing that intent to defraud was necessary element of offenses, as instructions given already listed fraud as element of offense. U.S. v. Clayton, C.A.9 (Cal.) 1997, 108 F.3d 1114, certiorari denied 118 S.Ct. 233, 139 L.Ed.2d 165.

21. Value of loss

th identi- existing eral stat- y in con- tion for defendant's of cloned involved ument to vices for lar carri- f cellular extension aided of fee they U.S. v.

Court did not err in calculating amount of intended loss through use of fake credit cards at \$2,500,000 by adding the number of completed false cards, unembossed cards, signature panels, other unembossed cards found in safe in hotel where some of defendants were staying and then multiplying by the \$6,900 average amount charged per account during two weeks prior to defendants' arrest. U.S. v. Wai-Keung, C.A.11 (Fla.) 1997, 115 F.3d 874, rehearing and suggestion for rehearing en banc denied 127 F.3d 42, certiorari denied 118 S.Ct. 1096, 140 L.Ed.2d 160.

22. Unauthorized device

igly and ro coun-

Merchant account numbers used by defendants in furtherance of bank fraud scheme were "unauthorized" access devices, based on evidence that merchant bank prohibited practice of factoring, by which business would use third party as conduit for depositing credit card sales, and that defendants knew of and intentionally violated bank's policy. U.S. v. Dabbe, C.A.11 (Fla.) 1998, 184 F.3d 1771.

ity in connection with computers

sed a computer without authorization or exceeding uns of such conduct having obtained information that United States Government pursuant to an Executive ction against unauthorized disclosure for reasons of ations, or any restricted data, as defined in paragraph Energy Act of 1954, with reason to believe that such be used to the injury of the United States, or to the tion willfully communicates, delivers, transmits, or ivered, or transmitted, or attempts to communicate, e communicated, delivered, or transmitted the same

to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains—

(A) information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.);

(B) information from any department or agency of the United States; or

(C) information from any protected computer if the conduct involved an interstate or foreign communication;

(3) intentionally, without authorization to access any nonpublic computer of a department or agency of the United States, accesses such a computer of that department or agency that is exclusively for the use of the Government of the United States or, in the case of a computer not exclusively for such use, is used by or for the Government of the United States and such conduct affects that use by or for the Government of the United States;

(4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$5,000 in any 1-year period;

(5)(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage;

(6) knowingly and with intent to defraud traffics (as defined in section 1029) in any password or similar information through which a computer may be accessed without authorization, if—

(A) such trafficking affects interstate or foreign commerce; or

(B) such computer is used by or for the Government of the United States;

(7) with intent to extort from any person, firm, association, educational institution, financial institution, government entity, or other legal entity, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to cause damage to a protected computer;

shall be punished as provided in subsection (c) of this section.

(b) Whoever attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section.

(c) The punishment for an offense under subsection (a) or (b) of this section is—

(1)(A) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(1) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than twenty years, or both, in the case of an offense under subsection (a)(1) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(2)(A) a fine under this title or imprisonment for not more than one year, or both, in the case of an offense under subsection (a)(2), (a)(3), (a)(5)(C), or (a)(6) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(2), if—

(i) the offense was committed for purposes of commercial advantage or private financial gain;