ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 8672

10088 SENATE JUDICIARY

over nonexempt assets at fair market value.[30] The use of this concept in chapter 9 was somewhat artificial, since a municipality cannot be liquidated under the Bankruptcy Code with the proceeds being used to pay its creditors.[31] Also, most assets of a municipality are exempt from execution for payment of debts, as a matter either of state constitutional or statutory law or public policy.[32] As a result, nearly all municipalities were "insolvent" under this definition. Congress recognized the anomaly created by using the traditional bankruptcy definition of insolvency in the municipal context when it enacted the 1988 Amendments.

[i]—Insolvency for Chapter 9 Eligibility Purposes Is Determined as of Petition Date.

The determination of insolvency should be made as of the date of the petition.[33] Municipalities need relief under chapter 9 by reason of their inability to raise sufficient revenues through taxes or otherwise to meet their debts as they mature.[34] Under former Chapter IX, a municipality was unable to meet its debts as they mature when it had exercised its taxing authority to the fullest extent permitted by applicable law or by the municipality's economy and was still unable to meet its debts.[35] The latter condition prevails when the imposition of taxes over and above those already imposed has a counterproductive effect of causing more tax defaults and tax foreclosures by reason of the inability of the private

[30] *See* ch. 101 *supra.*

[31] *See* ¶ 900.01[1] *infra. But see* Fano v. Newport Heights Irr. Dist., 114 F.2d 563, 565 (9th Cir. 1940) (comparison of assets and liabilities).

[32] S. Rep. No. 100-506, 100th Cong., 2d Sess. 10 (1988), *reprinted in* App. Pt. 41(g)(i) *infra. But see In re* City of Wellston, 11 C.B.C. 2d 512, 43 B.R. 348 (Bankr. E.D. Mo. 1984) (municipal debtor sought release of prepetition garnishment of bank account).

[33] *In re* Hamilton Creek Metropolitan Dist., 143 F.3d 1381, 1384 (10th Cir. 1998); *In re* Town of Westlake, Texas, 38 C.B.C.2d 1046, 1050, 211 B.R. 860, 864 (Bankr. N.D. Tex. 1997).

[34] *See* ¶ 900.01[1] *infra.*

[35] Moody v. James Irr. Dist., 114 F.2d 685, 687 (9th Cir. 1940); *In re* Corcoran Irr. Dist., 27 F. Supp. 322, 326-27 (S.D. Cal. 1939), *aff'd sub nom.*, Newhouse v. Corcoran Irr. Dist., 114 F.2d 690 (9th Cir. 1940). It does not matter in determining ability to pay debts whether the municipality's bonds have yet matured. It is sufficient if the municipality is unable to meet current interest payments. Lorber v. Vista Irr. Dist., 127 F.2d 628, 638-39 (9th Cir. 1942). Similarly, the fact that a municipality has partially consummated a plan of adjustment before filing a Chapter IX petition and thereby reduced its obligations by the time the petition is filed "does not have any bearing on the question of insolvency." West Coast Life Ins. v. Merced Irr. Dist., 114 F.2d 654, 677 (9th Cir. 1940). *Cf.* 11 U.S.C. § 946.

property or private activities within the municipality to support the taxes imposed. For example, in an irrigation or drainage district, if farm prices are sufficiently low that the land cannot be farmed profitably and still pay the taxes imposed, the taxes imposed are beyond the maximum that may be economically imposed. This situation frequently occurred during the Great Depression and was the cause of many of the municipal bankruptcies that were filed under the 1937 Act.[36]

Under a more modern view, a municipality need not exercise its taxing or assessment authority to the fullest extent before a court may conclude that it is unable to meet its debts as they mature.[37] The purpose of chapter 9 is to permit debt adjustment. Thus, whenever a municipality is unable to pay its debts, it should have access to the debt adjustment procedure. As one court commented:

> [T]he mere contingency that the District could improve its financial situation by increasing its rates does not alter the fact that at the present time the District cannot meet its debts as they mature.[38]

[ii]—The Chapter 9 Insolvency Standard of Not Generally Paying Debts as They Become Due.

A municipality is insolvent and therefore within this eligibility requirement if it is generally not paying its debts as they become due, unless the debts are the subject of a *bona fide* dispute.[39] Reliance on this portion

[36] *See* ¶ 900.01[1] *infra.*

[37] *See In re* Ellicott Schapter Bldg. Auth., 150 B.R. 261, 265 (Bankr. D. Colo. 1992); *In re* Villages at Castlerock Metro. Dist. No. 4, 145 B.R. 76, 84 (Bankr. D. Colo. 1990); *In re* Sullivan County Regional Refuse Disposal Dist., 165 B.R. 60, 75-76 (Bankr. D.N.H. 1994) (failure to levy a special assessment does not preclude a claim of insolvency); *In re* Pleasant View Util. Dist., 24 B.R. 632, 639 n.6, (Bankr. M.D. Tenn.), *aff'd.*, 27 B.R. 552 (M.D. Tenn. 1982). Some courts however, rely upon a debtor's failure to exercise (or consider) tax assessments as a means to solve its financial difficulties as an indicia of bad faith. *See, e.g., In re* Sullivan County Regional Refuse Disposal Dist., 165 B.R. 60, 76.

[38] *In re* Pleasant View Util. Dist., 24 B.R. 632, 639 n.6, (Bankr. M.D. Tenn.), *aff'd.*, 27 B.R. 552 (M.D. Tenn. 1982). This reasoning would not apply equally at plan confirmation, when the fair and equitable rule, if invoked, requires use of the taxation power to the fullest extent. *See* ch. 943 *infra.*

[39] *See In re* Town of Westlake, Texas, 38 C.B.C.2d 1046, 1050, 211 B.R. 860, 864-865 (Bankr. N.D. Tex. 1997) (when debtor was current on 76% of its obligations and was delinquent on 24% due to a "temporary political dispute over authority to sign checks from admittedly ample funds," the debtor was not insolvent by reason of "generally not paying its debts as they become due")

of the definition may obviate the need for litigation over ability to pay, because proof of nonpayment is generally simpler than proof of inability to pay. In most circumstances, proof of nonpayment may amount to proof of inability, for municipalities, invested as they are with the public trust, will generally cease paying only in circumstances in which they are unable to pay or if the debts are in *bona fide* dispute. However, general nonpayment of undisputed amounts may not by itself qualify the municipality as eligible for chapter 9. Similarly, nonpayment of debts which are not yet due does not constitute "not generally paying debts as they come due."[40] For purposes of the "unable to pay" test, qualifying unpaid debt must be "unconditionally owing and presently enforceable."[41] One court has held that debt which accrues, but is only payable if a cash flow availability test is met, is not "due" when the test had not been met and thus the accrued obligation was not payable.[42] If the nonpayment is not in good faith, the case may be dismissed under section 921(c) for failure to meet the requirement that the case be filed in good faith.[43] While nonpayment in bad faith may differ from filing the chapter 9 petition in bad faith, bad faith nonpayment may constitute a strong element of proof of a bad faith filing.

Nonpayment by reason of a dispute will not render a municipality insolvent if the municipality has the ability to pay, because of the exception in the definition. While a similar exception for *bona fide* disputes in section 303(b)(1)[44] protects a commercial debtor from an involuntary petition by a creditor with whom it has the dispute, such an exception in the definition of municipal insolvency has a less important protective effect in chapter 9, since a municipality is not subject to an involuntary petition. The exception should prevent a financially healthy municipality from using a chapter 9 petition to obtain a stay pending appeal of an adverse judgment, since the nonpayment by reason of the dispute will take the nonpayment out of the definition, and the municipality will not be "insolvent" unless it is also unable to pay the debt if the judgment is affirmed. The effect

[40] *In re* Hamilton Creek Metropolitan Dist., 143 F.3d 1381, 1386 (10th Cir. 1998) ("[U]nder a cash flow analysis of insolvency, obligations that are enforceable only if cash flow is available cannot, by definition, render a debtor insolvent.").

[41] *In re* Hamilton Creek Metropolitan Dist., 143 F.3d. 1381, 1385 (10th Cir. 1998).

[42] *In re* Hamilton Creek Metropolitan Dist., 143 F.3d. 1381, 1385 (10th Cir. 1998).

[43] 11 U.S.C. § 921(c). *See* ch. 921 *infra*.

[44] 11 U.S.C. § 303(b)(1). *See* ch. 303 *supra*.

of this provision will be mitigated to the extent that the municipality's assets are exempt from process and the municipality is thereby otherwise able under state law to prevent the payment of the judgment until appeals are exhausted.

[iii]—The Chapter 9 Insolvency Standard of Being Unable to Pay Debts as They Become Due.

The "unable to pay" test is in addition to the "generally not paying" test discussed above. A municipality may actually be paying its debts generally as they mature at the petition date yet still be unable to pay in the future. Thus, the "unable to pay" test "requires a prospective analysis."[45] Otherwise, the two tests would be redundant. However, the application of the unable to pay test should not look too far into the future. One court has held that the test should be applied only to the municipality's "current fiscal year or, based on an adopted budget, in its next fiscal year."[46] The court also concluded that the evaluation "should be judged by a cash flow, not a budget deficiency, analysis," on the ground that it was cash, not budgeted amounts, that is used to pay debts as they mature.[47] The mere fact that a municipality has adopted a budget that reflects a cash flow shortfall is not independently sufficient to meet the requirement of the "unable to pay" test. An adopted budget must be evaluated in light of past and current practices, the practices of similar municipalities, and the extant facts and circumstances. The obligations with respect to which there is a projected shortfall must be inescapably due and the prospect that they will not be paid must be certain, not a mere possibility or a speculative probability.[48] A municipality cannot deliberately budget or spend itself into insolvency when other scenarios are possible.[49]

[45] *In re* Hamilton Creek Metropolitan Dist., 143 F.3d 1381, 1384 (10th Cir. 1998); *In re* City of Bridgeport, 25 C.B.C.2d 269, 277, 129 B.R. 332, 336 (Bankr. D. Conn. 1991).

[46] *Id.*, 129 B.R. 332, 338.

[47] *Id.* 129 B.R. 332, 337.

[48] *In re* Town of Westlake, Texas, 38 C.B.C.2d 1046, 1052, 211 B.R. 860, 866 (Bankr. N.D. Tex. 1997).

[49] *In re* Town of Westlake, Texas, 38 C.B.C.2d 1046, 1053, 211 B.R. 860, 867 (Bankr. N.D. Tex. 1997). However, the possibility that taxes can be assessed to pay municipal debts does not preclude a finding of insolvency. *In re* Ellicott Schapter Bldg. Auth., 150 B.R. 261, 265 (Bankr. D. Colo. 1992); *In re* City of Columbia Falls, Montana, Special Improvement Dist. Nos. 25, 26 and 28, 1991 Bankr. LEXIS 905 (Bankr. D. Mont. 1991).

[d]—The "Desire to Effect a Plan" Requirement for Chapter 9 Eligibility.

A municipality must "desire to effect a plan to adjust such debts."[50] This language was also found in the 1937 Act[51] and the 1976 Act.[52] It is an element of the "good faith" requirement of section 921(c).[53] It simply requires that the purpose of the filing of the chapter 9 petition not simply be to buy time or to evade creditors. The chapter 9 petition must be designed to result in a plan of adjustment of debts by which creditors' claims will be satisfied or discharged. One court has concluded that the adjustment of debts requires that the debts be impaired or modified;[54] this conclusion is at odds with section 1124 which is incorporated into chapter 9 by section 901. Another court has concluded that this requirement was satisfied by a postfiling submission of a proposed plan of adjustment because it demonstrated a postfiling desire to effectuate a plan of adjustment.[55] This same court also concluded that the debtor's prefiling conduct in refusing to propose a plan of adjustment that could be implemented in chapter 9 and in failing to resort to tax assessment powers evidenced a lack of good faith such that the debtor did not meet the requirements of sections 109(c)(5)(B) or 921(c).[56] The desire to effectuate a plan of adjustment does not necessarily mean that the municipality must yield to creditor pressures.[57]

[e]—The Creditor Negotiation Requirement for Chapter 9 Eligibility.

The final requirement was inserted by Congress to prevent the capricious filing of a chapter 9 petition.[58] It supplements and reinforces the last

[50] 11 U.S.C. § 109(c)(4).

[51] Bankruptcy Act § 83(a), former 11 U.S.C. § 403(a).

[52] Bankruptcy Act § 84, former 11 U.S.C. § 404.

[53] 11 U.S.C. § 921(c).

[54] *See In re* Town of Westlake, Texas, 38 C.B.C.2d 1046, 1053,-54, 211 B.R. 860, 867 (Bankr. N.D. Tex. 1997).

[55] *In re* Sullivan County Regional Refuse Disposal Dist., 165 B.R. 60, 76 (Bankr. D.N.H. 1994).

[56] *In re* Sullivan County Regional Refuse Disposal Dist., 165 B.R. 60, 76-82 (Bankr. D.N.H. 1994).

[57] *In re* Ellicott Schapter Bldg. Auth., 150 B.R. 261, 265 (Bankr. D. Colo. 1992).

[58] *See In re* Town of Westlake, Texas, 38 C.B.C.2d 1046, 1054, 211 B.R. 860, 867-68 (Bankr. N.D. Tex. 1997) (suggesting that section 109(c)(5) requires that a municipality have an intent to negotiate with creditors and not leave them unimpaired).

mentioned requirement that the debtor "desire to effect a plan to adjust [its] debts." It is derived almost verbatim from the 1976 legislation,[59] but represents a departure from the 1937 Act. Under the 1937 Act, a municipality was required to present to the court a reorganization plan that had been agreed to by at least 51% in amount of its creditors,[60] in keeping with the limited purpose of Chapter IX, which contemplated no court interference in the affairs of the municipality, but only court approval or disapproval of the petition and the plan.[61] As early as 1973, the requirement that an accepted plan be filed with the petition was recognized as anachronistic and unsuitable.[62] House and Senate versions of the 1976 legislation both attempted to do away with this requirement entirely.[63] The 1976 amendment was made necessary by the 1975 financial crisis that affected New York and other large cities. It was immediately recognized that the then current Chapter IX would not allow its use because of the impossibility of such a city to meet the plan acceptance requirement. Thus, the 1976 amendment eased the filing requirements to permit the Chapter's use by a sizeable city.[64] However, the skittishness of the municipal bond community about a municipal bankruptcy law with "virtually limitless" access[65] resulted in a compromise, maintaining the prior consent requirement but also recognizing that in certain situations such a procedure was impracticable or could seriously harm the municipality while it was attempting to obtain the necessary consents. The resistance against free access to chapter 9 was reminiscent of the opposition of the bond community to the original Municipal Bankruptcy Act in 1934.[66] It failed to recognize, however, what became of that opposition by 1946,[67] and shortsightedly imposed a cumbersome and unnecessary procedure on distressed municipalities.

[59] Bankruptcy Act § 84, former 11 U.S.C. § 404.

[60] Bankruptcy Act § 83(a), former 11 U.S.C. § 403(a).

[61] *See* ¶ 900.LH *infra*.

[62] 1 Commission on the Bankruptcy Laws of the United States, Report, H.R. Doc. No. 93-137, 93d Cong., 1st Sess. 274 (1973), *reprinted in* App. Pt. 4(c) *infra*.

[63] H.R. Rep. No. 9686, 94th Cong., 1st Sess. 6-7 (1975); H.R. Rep. No. 438, 94th Cong., 2d Sess. 3 (1976) (Conference Report).

[64] *See* ¶ 109.04[3][e][iii] *infra*.

[65] H.R. Rep. No. 686, 94th Cong., 1st Sess. 6-7 (1975); H.R. Rep. No. 938, 94th Cong., 2d Sess. 3 (1976) (Conference Report).

[66] *See* ¶ 900.LH *infra*.

[67] *See* ¶ 900.LH *infra*.

The compromise provides four virtually meaningless alternatives.

[i]—Alternative # 1: Agreement of Creditors Obtained.

The first alternative is that the debtor "obtained the agreement of creditors holding at least a majority in amount of the claims of each class, that [the debtor] intends to impair under a plan in a case under [chapter 9]."[68] This requirement is the same as that contained in the 1937 Act,[69] with the exception of the use of the word "impair," which is a concept new to the Bankruptcy Code.[70] Under the former Bankruptcy Act, the word used was "affected," which had a similar purpose.

[ii]—Alternative # 2: Negotiated in Good Faith but Failed to Obtain Consent of Creditors.

The second alternative is that the debtor "has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that [the debtor] intends to impair."[71] This provision was inserted in recognition of the possibility that the debtor could not obtain the consents it needed by reason of recalcitrance among creditors, but could still confirm a plan of reorganization under chapter 9 by use of the cram down power.[72] This provision has been interpreted to require that a comprehensive, but not formal, workout plan that can be implemented in chapter 9 must be presented to creditors.[73] This is an overly restrictive view of the requirement of section 109(c)(5)(B) which, in contrast to its predecessor provision under the 1976 Act, does not make reference to negotiations with respect to any specific plan of adjustment.[74]

Just how yielding a debtor must be in its prepetition negotiations will be subject to judicial review based upon the specific facts.[75]

[iii]—Alternative # 3: Negotiations Are Impracticable.

The third alternative is that the municipality "is unable to negotiate with creditors because such negotiation is impracticable."[76] This alternative was inserted in the 1976 Act as a means of dealing with the difficult problems created by major municipalities, such as New York City, whose bonds are exceedingly numerous and are frequently in bearer form. Under these circumstances, negotiation is difficult at best, because of the extreme difficulty in identifying the creditors with whom the municipality must negotiate. Even if the creditors were identified and a committee were formed for purposes of negotiation, obtaining the requisite consent from such a large body in a relatively short period of time could impossible.[77] Further, where it is necessary to file chapter 9 to preserve the assets of a municipality, delaying the filing to negotiate with creditors and risking, in the process, the assets of the municipality makes such negotiations impracticable.[78]

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[68] 11 U.S.C. § 109(c)(5)(A). *See* New Smyrna-DeLand Drainage Dist. v. Thomas, 234 F.2d 338 (5th Cir. 1956). In that case, the district court dismissed the petition for defects in the plan, but granted leave to amend. The debtor filed an "amended plan," but relied on prior consents to the original plan, arguing that the new plan was more favorable to creditors. The court of appeals upheld dismissal of the amended plan and petition on the grounds that the plan was a new plan, not a modification of the original plan, and that the prior consents to one plan could not be counted toward the new plan.

[69] Bankruptcy Act § 83(a), former 11 U.S.C. § 403(a).

[70] *See* ch. 1124 *infra.*

[71] 11 U.S.C. § 109(c)(5)(B).

[72] 11 U.S.C. § 1129(b). *See* chs. 943 and 1129 *infra.*

[73] *In re* Sullivan County Regional Refuse Disposal Dist., 165 B.R. 60, 78 (Bankr. D.N.H. 1994).

[74] *Compare* Bankruptcy Act Section 84(2), former 11 U.S.C. § 404 (1976) (requiring that prepetition negotiations be with respect to a plan of adjustment) *with* section 109(c)(5)(B) (no reference to negotiations being held with respect to a plan of adjustment).

[75] *Compare In re* Sullivan County Regional Refuse Disposal Dist.,165 B.R. 60, 76-79 (Bankr. D.N.H. 1994) (debtor never set forth a comprehensive workout plan dealing with all of its assets and liabilities in terms comparable to a plan of adjustment, ignored unambiguous contract rights of creditors and failed to exercise tax assessment powers) *with In re* Ellicott Schapter Bldg. Auth., 150 B.R. 261, 266 (Bankr. D. Colo. 1992) (debtor did not negotiate in good faith where it indicated that the economic terms of its proposed plan were nonnegotiable); *and In re* Villages At Castle Rock Metro. Dist. No. 4, 145 B.R. 76, 84-86 (Bankr. D. Colo. 1990) (debtor's meetings with institutional bondholders to develop a financial model and to reach a conceptual agreement held to be sufficient). *See also In re* Cottonwood Water and Sanitation Dist., 26 C.B.C.2d 1786, 1793, 138 B.R. 973, 979 (Bankr. D. Colo. 1992) (requiring an evidentiary hearing on the scope of prepetition negotiations).

[76] 11 U.S.C. § 109(c)(5)(C).

[77] *In re* Sullivan County Regional Refuse Disposal Dist., 165 B.R. 60, 79 n.54 (Bankr. D.N.H. 1994) (section 109(c)(5)(C) is "intended to cover situations in which a very large body of creditors would render prefiling negotiations impractical") (citing *Treatise*).

[78] *In re* Orange County, 183 B.R. 594, 608 (C.D. Cal. 1995) ("The OCIP had no time to enter into negotiations with its participants before acting to protect its portfolio assets.")

[iv]—Alternative # 4: Preventing Creditors from Obtaining Preferences.

The fourth alternative is that the debtor "reasonably believes that a editor may attempt to obtain a preference."[79] This provision is derived om the second paragraph of Section 83(c) of the 1937 Act, which ermitted the debtor to obtain from the bankruptcy court a stay against ggressive creditor action while it was attempting to negotiate a plan of ljustment. Rather than requiring a municipality to seek stays piecemeal did the 1937 Act, chapter 9 of the Code permits the municipality to le its petition and obtain the benefits of the Code's automatic stay[80] while negotiates its plan with creditors, when aggressive creditor action may sult in a preferential payment, which by its nature is unfair to other editors. One court has suggested, without analysis, that a debtor cannot asonably believe that a justifiable prebankruptcy termination of an xecutory contract constitutes an avoidable transfer under section 547.[81] ut perhaps, under certain circumstances, a termination of an executory ontract can constitute a transfer that is potentially avoidable under section 47.[82]

¶ 109.05. Who May Be a Debtor Under Chapter 11.

The criteria for eligibility for relief under the provisions of chapter 11 re set forth in section 109(d), which provides that "[o]nly a person that nay be a debtor under chapter 7 of this title, except a stockbroker or a ommodity broker, and a railroad may be a debtor under chapter 11 of his title." As under chapter 7, entities that do not qualify as "persons" nder section 101 are not eligible to be chapter 11 debtors.[1] However,

[79] 11 U.S.C. § 109(c)(5)(D).

[80] 11 U.S.C. §§ 362, 922; chs. 362 and 922 *infra.*

[81] *In re* Sullivan County Regional Refuse Disposal Dist., 165 B.R. 60, 76 n.50 (Bankr. D.N.H. 1994) (*relying on In re* Jermoo's Inc., 38 B.R. 197, 203-04 (Bankr. W.D. Wis. 1984)) (noting hat it would be surprising to read transfer to include a justifiable prebankruptcy termination of in executory contract).

[82] *See* 11 U.S.C. § 101(54) (broad definition of transfer; a property interest of the debtor would iave to be found).

¶ 109.05.

[1] *See* ¶ 109.03 *supra* for a discussion of the eligibility requirements under chapter 7. *In re* Constitutional Trust #2-562, 23 C.B.C.2d 1577, 114 B.R. 627 (Bankr. D. Minn. 1990) (trusts that have s their principal purpose the preservation of property held for the benefit of beneficiaries are not

a decision of the Court of Appeals for the Second Circuit suggests that, notwithstanding the common definition, the analysis may be different in chapter 11 than in chapter 7 because state law may permit an entity in dissolution proceedings to liquidate but not to reorganize.[2]

[1]—Individual Not Engaged in Business May Be Chapter 11 Debtor.

The Supreme Court in *Toibb v. Radloff,*[3] relying on the "plain language" of section 109, held that an individual debtor not engaged in business could reorganize under chapter 11. In holding that the Code contains no ongoing business requirement for reorganization under chapter 11, the Court resolved a split of authority between the Eighth and Eleventh Circuits.[4] While most debtors commencing cases under chapter 11 are corporations,[5] individuals[6] and partnerships may also become debtors under chapter 11. A joint chapter 11 case may be filed, but only by a husband and wife.[7] The most common use of chapter 11 by individuals not engaged in business is by those who wish to reorganize but whose debts exceed the chapter 13 debt limits of section 109(e).[8]

[2]—Stockbroker or Commodity Broker May Not Be Chapter 11 Debtor.

Stockbrokers and commodity brokers may only be liquid: ed under subchapters III and IV, respectively, of chapter 7.[9] Those subchapters are

recognized as business trusts and, therefore, cannot use that statutory category to become eligible as a chapter 11 debtor).

[2] *In re* C-TC 9th Ave. Partnership, 113 F.3d 1304, 38 C.B.C.2d 115 (2d Cir. 1997) (New York partnership in dissolution not eligible to be debtor in chapter 11 because it was not permitted to have ongoing business under state law).

[3] 501 U.S. 157, 111 S. Ct. 2197, 115 L. Ed. 2d 145, 24 C.B.C.2d 1179 (1991)

[4] *In re* Toibb, 902 F.2d 14, 15 C.B.C.2d 1043 (8th Cir. 1990); Wamsganz v. Boatmen's Bank of DeSoto, 804 F.2d 503, 13 C.B.C.2d 910 (8th Cir. 1986); *In re* Moog, 774 F.2d 1073 (11th Cir. 1985).

[5] For a discussion of debtor eligibility for a dissolved corporation, *see* ¶ 109.02[1][a] *supra*

[6] Toibb v. Radloff, 501 U.S. 157, 111 S. Ct. 2197, 115 L. Ed. 2d 145, 24 C.B.C.2d 1179 (1991)

[7] 11 U.S.C. § 302. *See In re* Funneman, 29 C.B.C.2d 52, 155 B.R. 197 (Bankr. S.D. Ill. 1993) (although a partnership may be a debtor in bankruptcy in its own right, it may not jointly seek relief with any other person, including a partner); ch. 302, *infra*

[8] *See* ¶ 109.06[2] *infra.*

[9] *See In re* Co Petro Mktg. Group, 680 F.2d 566, 7 C.B.C.2d 128 (9th Cir. 1982) (discussing definition of "commodity broker"); chs. 741 *et seq.*, *infra*

HB
239

No: 1

FISCAL NOTE

Bill Version: CSHB 239(L&C)

B (H) Publish Date: 2/11/00

STATE OF ALASKA
2000 LEGISLATIVE SESSION

Revision Date/Time:		Dept Affected:	Natural Resources
Title:	"An act relating to the Uniform Commercial Code...."	BRU:	Information/Data Management
		Component:	Recorder's Office/UCC
Sponsor:	Rep. Murkowski		
Requestor:	(H) L&C	Component No.	802

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	1.5	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	16.5	24.0	0.0	0.0	0.0	0.0
SUPPLIES	2.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	6.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS & CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	26.0	24.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES (1005)	0.0	(20.0)	(16.0)	(12.0)	(9.0)	(6.7)

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts	26.0	24.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	26.0	24.0	0.0	0.0	0.0	0.0

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

POSITIONS

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

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

Under HB239, all UCC filings (except fixture filings, timber to be cut and as-extracted collateral) would be filed at the central filing office. Local district offices would continue to accept filings on fixtures, timber to be cut and as-extracted collateral, but all other filings would occur at the central office, simplifying the process immensely for filing officers and secured lenders alike.

The declining revenues shown above represent the decrease attributable to the gradual elimination of dual filings over the transitional period. Decreasing revenues are expected until all filings have transitioned to UCC Central or lapsed.

.... continued on page 2...........

Prepared by:	Sharon Young [signature] for	Phone:	907-269-8882
Division:	Support Services Division	Date:	03-Feb-00
Approved by Commissioner:	John Shively [signature] for John Shively	Date:	03-02-2000
Agency:	Natural Resources		

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Government Hill • Elmendorf • East Anchorage

Sponsor Statement
House Bill 239

Revised Uniform Commercial Code
Article 9 – Secured Transactions

Trillions of dollars of commercial and consumer credit are granted each year in secured transactions under Article 9 of the Uniform Commercial Code (UCC). UCC Article 9 – Secured Transactions, provides a statutory framework that governs transactions in which a creditor takes a security interest in specific property of a debtor, allowing the creditor to take the property in the event the debtor defaults on the debt. Article 9 of the UCC has been adopted in every state and was last revised in 1972. Major revisions to Article 9 by the Uniform Law Commissioners were completed in 1998. These revisions bring Article 9 into the 21st Century.

There are many reasons Revised Article 9 should be adopted in Alaska:

- **Technology** Paper-based transactions are giving way to electronic transactions and revised Article 9 allows for this.

- **Volume** Article 9 was first proposed in 1951 and was last updated in 1972. Since then, the volume of commerce and credit has increased exponentially. The filing system revisions are particularly necessary to meet the problem of increased volume.

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- **Certainty of Perfection** Uncertainties about where to perfect a security interest under the original Article 9 are overcome in the revisions making the location of the debtor the place where the creditor perfects the security interest.

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CORRECTION

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

No: 1

FISCAL NOTE

Bill Version: CSHB 239(L&C)

B (H) Publish Date: 2/11/00

STATE OF ALASKA
2000 LEGISLATIVE SESSION

Revision Date/Time:		Dept Affected:	Natural Resources
Title:	"An act relating to the Uniform Commercial Code...."	BRU:	Information/Data Management
		Component:	Recorder's Office/UCC
Sponsor:	Rep. Murkowski		
Requestor:	(H) L&C	Component No.	802

Expenditures/Revenues (Thousands of Dollars)
Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	1.5	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	16.5	24.0	0.0	0.0	0.0	0.0
SUPPLIES	2.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	6.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS & CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	26.0	24.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES (1005)	0.0	(20.0)	(16.0)	(12.0)	(9.0)	(6.7)

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts	26.0	24.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	26.0	24.0	0.0	0.0	0.0	0.0

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

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

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

Under HB239, all UCC filings (except fixture filings, timber to be cut and as-extracted collateral) would be filed at the central filing office. Local district offices would continue to accept filings on fixtures, timber to be cut and as-extracted collateral, but all other filings would occur at the central office, simplifying the process immensely for filing officers and secured lenders alike.

The declining revenues shown above represent the decrease attributable to the gradual elimination of dual filings over the transitional period. Decreasing revenues are expected until all filings have transitioned to UCC Central,or lapsed.

.... continued on page 2..........

Prepared by:	Sharon Young	Phone :	907-269-8882
Division:	Support Services Division	Date :	03-Feb-00
Approved by Commissioner:	John Shively	Date:	03-02-2000
Agency:	Natural Resources		

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Continuation of fiscal note for: HB239

The initial anticipated increase in filings at UCC Central will be 30 to 40 percent per year, with a corresponding decrease at the local district level. After the transition period, the UCC Central volume should stabilize at 150 to 167 percent of its current total. The overall decrease in revenues for the component as a result of the change in filing office is expected to total $63.7 over the five year transition period. The component regularly generates between $1 and $2.5 million in excess of its operating budget annually.

With the expected 50 to 67 per cent increase in UCC Central filings under this bill (approximately 10,000 to 15,000 documents per year), the component estimates that an additional two to two and a half FTE staff would be required in the UCC Central office to process the increased volume. This staffing would be handled via lateral transfers from the larger recording district offices. Little impact would be seen at the remote office sites as they do not currently have large volumes of UCC transactions under the current law. Because the component expects to utilize existing cross-trained employees from larger recording offices to handle the increased filing volume at UCC Central, the fiscal note does not request any new personal services funding to implement this bill. However, because this code revision would result in some major operational changes in the way UCC documents are processed, there are some secondary costs, including programming costs, that have to be considered in the implementation phase.

In order to meet the July 1, 2001 target implementation date, some programming costs would be incurred to implement usage of check digits as required by the bill, to establish a status code, to add a page count to UCC filings, and to facilitate purging of lapsed and terminated filings. This cost is estimated at one month of labor at a cost of $6,000 in programming time. This expense would need to be incurred during FY01 in order to be ready for the July 1, 2001 target date. Other costs that would be required to implement this bill are related to staff training, user education sessions, notifications to users regarding changes, additional equipment for UCC Central public access library, and preparation and implementation of administrative rules and reporting mechanisms required under HB239. The component estimates a total expense in this area of $20,000.

One of the goals of the revised UCC is to pave the way toward electronic filing and increased usage of technology in the UCC systems throughout the country. The component has identified costs of $18,000 in information systems staff time to work toward accepting UCC filings electronically, accept payment for such filings electronically and utilize the national standard forms for electronic filings. An additional $6,000 in programming time (one man-month) may be needed to update the UCC search programs to meet specifications expected to be included in the Model Administrative Rules referenced in the bill. Because the Model Rules are not yet in a final format, it is unknown at this time what their impact may be on existing programs.

ALASKA STATE LEGISLATURE

Chair:
MILITARY AND VETERANS AFFAIRS

Member:
JUDICIARY
COMMUNITY AND REGIONAL AFFAIRS
LABOR AND COMMERCE

Session:
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- **Clarification of Rules** Historically, courts have interpreted provisions of Article 9 in conflicting ways. Some of their decisions have dealt with issues that were not explicitly addressed in the original Article 9. This has resulted in an ambiguous application of some rules. The revisions to Article 9 address and rectify the accrued ambiguities.

- **Simplified Filing** A simplified and unified statewide filing system of finance statements to perfect security interests replaces the original filing system, which allowed only certain local filing.

- **Consumer Impact** Revised Article 9 addresses consumer issues that were not considered in the original Article 9 such as a specific disclosure of creditor's deficiency rights and notice requirements upon repossession.

- **Commitment to Uniformity** Amendments to Article 9 have varied from state to state and thus have created differences that have impaired interstate transactions. In an effort to reestablish uniformity of the laws governing these transactions, the revisions address specific types of secured transactions like oil and gas and agriculture.

States that have adopted Revised Article 9

Arizona
California
Maryland
Montana
Nebraska
Nevada
Texas

2000 Introductions:

Alaska
Delaware
District of Columbia
Hawaii
Illinois
Indiana
Kansas
Kentucky
Maine
Michigan
Minnesota
Missouri
New Hampshire
New Mexico
Oklahoma
South Carolina
Tennessee
Vermont
Virginia
Washington

Prepared by Amy Erickson, Office of Representative Lisa Murkowski (465-6584)
Last updated February 9, 2000.

UNIFORM COMMERCIAL CODE, ARTICLE 9, SECURED TRANSACTIONS
THE 1998 REVISIONS
AN INTRODUCTION

The Uniform Commercial Code has eleven substantive articles. Article 9, Secured Transactions may be the most important of the eleven. Article 9 provides the rules governing any transaction (other than a finance lease) that couples a debt with a creditor's interest in a debtor's personal property. If the debtor defaults, the creditor may repossess and sell the property (generally called collateral) to satisfy the debt. The creditor's interest is called a "security interest." Article 9 also covers certain kinds of sales that look like a grant of a security interest.

The operation of Article 9 appears deceptively simple. There are two key concepts: "attachment" and "perfection." These terms describe the two key events in the creation of a "security interest." Attachment generally occurs when the security interest is effective between the creditor and the debtor, and that usually happens when their agreement provides that it takes place. Perfection occurs when the creditor establishes his or her "priority" in relation to other creditors of the debtor in the same collateral. Perfection occurs usually when a "financing statement" is filed in the appropriate public record. Generally, the first to file has the first priority, and so on.

Article 9 relies on the public record because it provides the means for creditors to determine if there is any security interest that precedes theirs--a notice function. A subsequent secured creditor cannot complain that his or her grant of credit was made in ignorance of the prior security interests that the record displays, and cannot complain of the priority of the prior interests as a result. Every secured creditor has a priority over any unsecured creditor.

The somewhat simple description in the prior paragraphs should not mislead anyone. Article 9 is not simple. There are substantial exceptions to the above-stated perfection rule, for example. Filing is not the only method for perfection. Much depends upon the kind of property that is collateral. Possession of collateral by the secured party is an alternative method of perfection for many kinds of collateral. For some kinds of property, control (a defined term) either perfects the interest or provides a better priority than filing does. There are kinds of transactions for which attachment is perfection. Priority is, also, not always a matter of perfecting a security interest first in time.

The following chapters of this backgrounder are meant to suggest and highlight Article 9 as revised in 1998. They are not a treatise on revised Article 9, but are meant to be a schematic guide to it. Each chapter addresses a specific topic qua issue. What follows in this introduction is an introduction to each of those issues.

1. The Scope Issue. The 1998 revision expands the "scope" of Article 9. What this means literally is that the kinds of property in which a security interest can be taken by a creditor under Article 9 increases over those available in Article 9 before revision. Also, certain kinds of transactions that did not come under Article 9 before, now come under Article 9.

2. Perfection. Although filing a financing statement remains the dominant way to perfect a security interest in most kinds of property, there are expanded property types in which "control" is the operative method of perfection. Specific perfection rules are extended to property that comes under the scope of Article 9 for the first time in the 1998 revisions.

3. Choice of Law. In interstate secured transactions, it is necessary to determine which state's laws apply to perfection, the effect of perfection and the priority of security interests. It is particularly important to know where to file a financing statement. The 1998 revisions to Article 9 change the rules substantially.

4. The Filing System. Improvements in the filing system in the 1998 revisions to Article 9 include a full commitment to centralized filing--one place in every state in which financing statements are filed, and a filing system that escorts filing from the world of filed documents to the world of electronic communications and records.

5. Consumer Transactions. Revised Article 9 makes a clearer distinction between transactions in which the debtor is a consumer than prior Article 9 did. Enforcement of a security interest that is included in a consumer transaction is handled differently in certain respects in the 1998 revisions to Article 9 than it was pre-1998. Although it governs more than consumer transactions, the good faith standard becomes the objective standard of commercial reasonableness in the 1998 revisions to Article 9.

6. Default and Enforcement. Article 9 provisions on default and enforcement deal generally with the procedures for obtaining property in which a creditor has a security interest and selling it to satisfy the debt, when the debtor is in default. Normally, the creditor has the right to repossess the property. Revised Article 9 includes new rules dealing with "secondary" obligors (guarantors), new special rules for some of the new kinds of property subject to security interests, new rules for the interests of subordinate creditors with security interests in the same property, and new rules for aspects of enforcement when the debtor is a consumer debtor.

SCOPE OF UCC ARTICLE 9

What kinds of property may become collateral under Uniform Commercial Code, Article 9? This is the "scope" question. In the 1998 revision to Uniform Commercial Code, Article 9, scope expands. That is, more kinds of property may be used as collateral and more types of transactions are covered. Also, some kinds of property that may have fallen into a more general category of collateral under pre-1998 Article 9, become defined and subject to specific rules.

SCOPE OF UCC ARTICLE 9 BEFORE THE 1998 REVISIONS

These kinds of property were (and will continue to be in the 1998 revisions to Article 9) subject to Article 9:

1. Tangible personal property. Property that is not real estate, but is tangible in form. Subdivisions of "tangible personal property" include "consumer goods," "equipment," "farm products," and "inventory."

2. Fixtures. This category of tangible personal property is separated from other personal property. Fixtures are items of tangible personal property that become so attached to real property that they are treated as part of the real estate. Fixtures begin as personal property, become real estate, but become personal property again when removed from the real estate. Special rules apply to fixtures under Article 9.

3. Documents. These are "documents of title" which, in general, establish that the person in possession has the rights to the goods which . e represented in the title document. Bills of lading, dock warrants, dock receipts and warehouse receipts are included.

4. Instruments. An instrument generally is a negotiable instrument that evidences a right to the payment of money. An instrument becomes negotiable when it meets the criteria for negotiability in Article 3 of the Uniform Commercial Code. A note or draft is an example.

5. General Intangibles Any intangible (meaning not goods) property interest that is not specifically addressed in Article 9. This is a gap-filling concept. Investment property is intangible property, for

example, but because it is specifically addressed in Article 9, it is not a general intangible.

6. Chattel Paper. The writings that evidence a debt owed coupled with a security interest in goods or a lease of goods are chattel paper.

7. Accounts. An account is any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper. A "deposit account" like a bank account is not included.

SPECIFIC EXCLUSIONS FROM UCC ARTICLE 9 BEFORE 1998

These kinds of property or transactions are specifically excluded in the pre-1998 Article 9:

1. Statutory or common law liens.

2. Tort claims.

3. Deposit accounts (except those represented by certificates of deposit).

4. Governmental transfers.

5. Insurance claims or interests.

6. A right represented by a judgment.

7. Creation or transfer of an interest in or a lien on real estate.

8. Federally preempted rights.

9. Set off.

10. Transfer of a claim for wages, salary or compensation.

11. Sale of accounts and chattel paper as part of a sale of the business from which they arose.

12. Assignment of accounts and chattel paper for collection only, and

13. Transfer for performance of a contract or transfer of a single account to satisfy a pre-existing indebtedness.

14. Transfer of interest in a letter of credit, except for proceeds of a written letter of credit.

CHANGES IN THE SCOPE OF UCC ARTICLE 9 IN 1998

The 1998 revision to Article 9 keeps many of the exclusions in pre-1998 Article 9 but makes some significant changes as well. This list of changes tend to fall (though not wholly) into two categories, interests that are no longer excluded and interests that were included under more general categories such as "general intangibles" or "accounts" but that need to be addressed with specific secured transaction rules:

1. Nonpossessory, statutory agricultural liens. These liens were excluded under Article 9 prior to 1998. They are included for purposes of perfection and priority in revised Article 9. *Note other nonpossessory*

statutory liens remain excluded.

2. Sales of payment intangibles and promissory notes. Payment intangibles were a kind of general intangible, now distinguished by the characteristic of a primary monetary obligation. Promissory notes are a kind of instrument. These interests are sold, securitized and pooled. The interests sold are so like security interests that distinguishing these sales transactions from secured transactions is virtually impossible. The 1998 revision to Article 9 includes these kinds of property.

3. Security interests created by governmental debtors. The general pre-1998 exclusion has been narrowed. Only those governmental transfers that are subject to another statute on establishing and enforcing security interests are excluded. Federal preemption would, also, apply.

4. Health insurance receivables. The general exclusion of insurance proceeds in pre-1998 Article 9 is curbed for these specific kinds of receivables.

5. Consignments. Consignments of goods are included within the scope of Article 9 in the 1998 revisions. A consignment is a delivery of goods by the owner to another person, who sells for the consignor. A consignor is deemed to hold a purchase money security interest as against the consignee's secured creditors in the 1998 revisions to Article 9. Failure to comply with the requirements for a purchase money security interest potentially subjects the goods to the consignee's secured creditors. Before the 1998 revisions, a consignor had to perfect by filing a financing statement even though consignments fell within the scope of Article 2.

6. Commercial tort claims. The general exclusion of tort claims is narrowed so that security interests may be taken in commercial tort claims.

7. Liens on property. Certain liens on real property are included to the extent the lien establishes a right to payment.

8. Deposit accounts. Security interests may be taken in deposit accounts (with some restrictions). A security interest can be taken, therefore, in an ordinary bank account.

9. Supporting obligations. An example is a guarantee of payment or a letter of credit supporting an obligation to pay money.

PERFECTION OF SECURITY INTERESTS

A security interest is perfected when the secured creditor has met the statutory requirements for notice to unsecured creditors, and most creditors who perfect their interests after the first secured creditor's perfection. There are four basic kinds of perfection: 1) perfection by filing; 2) perfection by possession; 3) perfection by control; and, 4) automatic perfection. All forms of perfection were available in Article 9 before 1998. However, Article 9 assigns a perfection method for each new kind of property within its scope in the 1998 revisions. "Control" as a method of perfection is expanded beyond the single kind of property, investment property, in which a security interest could be perfected by control in the pre-1998 Article 9. Thus "control" takes on new and larger significance after 1998 than it did before 1998.

Automatic perfection is specific to certain kinds of transactions. Purchase money security interests in consumer goods are a kind of security interest that perfects automatically. However, automatic perfection is usually temporary and extinguishes unless another appropriate form of perfection occurs during the temporary period of automatic perfection. There are more kinds of automatic perfection in the 1998 revisions than was the case before 1998.

Unless otherwise noted, conflicting security interests take priority in order of filing or other perfection in time. First in time usually wins, but note that purchase money security interests often provide a creditor priority notwithstanding the time perfection took place.

Each method of perfecting a security interest is discussed as follows:

1. Filing a financing statement. Filing a financing statement in the appropriate place of record maintained by a state will perfect almost every kind of security interest (There are some exceptions.). The 1998 revisions make it clearer that filing will perfect, even if there is another method of perfection available. The old maxim, "When in doubt, file," is even more appropriate after the 1998 revisions. This is the time-honored method of perfection.

2. Possession. A secured creditor may perfect a security interest in a broad range of collateral by taking possession of that collateral. Possession is the only way to perfect a security interest in money, except for proceeds from a sale of property subject to a security interest. The 1998 revisions to Article 9 clarify issues of possession as a method of perfection, but do not change the rules materially. For example, there is a method for a third-party bailee to acknowledge the creditor's interest. Such a method is not expressly provided pre-1998.

3. Control. Control as a method of perfection first applied to investment property in amendments to Article 9 that followed the 1994 revision of Uniform Commercial Code, Article 8. A creditor has control, and a perfected security interest, when the debtor's interest can be transferred by the secured creditor without the debtor's consent. For certain kinds of property, like certificated securities, possession is tantamount to control. The 1998 revisions of Article 9 allow a creditor to perfect a security interest in deposit accounts and letter-of-credit rights by control, as well as in investment property. Control is effectively the only way to perfect a security interest in deposit accounts and letter-of-credit rights. It is possible to perfect an interest in investment property by filing, but perfection by control always has priority over perfection by filing if there are conflicting security interests, no matter which kind of perfection occurs first in time.

4. Automatic perfection. In some kinds of secured transactions, attachment is perfection. The "purchase money security interest" (PMSI) in consumer goods is such a case of automatic perfection. It arises when credit is extended to purchase goods. Other types of security interests are automatically perfected but only temporarily. An example is a security interest in a certificated security perfected for 20 days even though there is no filing or possession when it is delivered for sale or the like. Generally, a purchase money security interest has priority over security interests perfected before it in time. There are new specific PMSI's in the 1998 revisions, such as a PMSI in computer software and livestock.

Examples of other kinds of security interests that perfect upon attachment are a sale of a payment intangible, a sale of a promissory note, a security interest in a healthcare insurance receivable (all new in 1998), and a broker's security interest in investment property created by the broker (from the 1994 Article 8 revisions). Most of these security interests will, also, have priority over other kinds of security interests that perfect earlier in time.

CHOICE OF LAW RULES

A transaction in which a creditor takes a "security interest" in the collateral of a debtor may involve more than one state. The creditor may be in one state, the debtor in another, and the collateral in another. Further, the collateral may move at some point in the transaction from one state to another. Both the creditor and the debtor may be able to claim more than one place as residence or domicile. Therefore, Article 9 has always had rules that determine which state's law will apply to the perfection, the effect of perfection and the priority of creditors in collateral.

When perfection requires filing a "financing statement" it is important to identify with certainty the state in which to file the financing statement. It is also important that creditors know with certainty that same state is the state in which they must search the record for financing statements indicating the existence of prior security interests. The state which the "choice of law" rules identify as the state whose law governs perfection, effect of perfection and the priority of creditors in the collateral, is the state in which the financing statement must be filed.

The 1998 revisions to Article 9 both simplify and substantially change the "choice of law" rules, meaning that in some cases different states will be the states in which perfection, the effect of perfection and the priority of creditors will be established than is the case under pre-1998 Article 9. The ultimate result is greater certainty for those who file financing statements and those who search for filed financing statements about which state is the right state.

Major Changes

There are two major changes in the "choice of law" rules:

1. Pre-1998, the basic rule chooses the law of the state in which the collateral is found to govern perfection and the effect of perfection of a security interest. If perfection occurs when a financing statement is filed, then the filing must take place in the state where the collateral is found. In the 1998 revisions, the basic rule chooses the law of the state in which the debtor is located as the law governing perfection, effect of perfection and the priority of a security interest in collateral. If a filing of a financing statement is required, then the statement must be filed where the debtor is, without regard for the location of the collateral. The location of the debtor is less likely to change than the location of the collateral and reliance on the location of the debtor provides creditors with more certainty about where to file and where to search. (Exceptions to both these rules to be discussed later on.)

2. If the debtor is a registered organization (corporation, limited partnership, limited liability partnership, limited liability company, etc.), pre-1998 treated the state with the chief executive office as the debtor's state. In the 1998 revisions, the debtor's state is the state in which it is a registered organization. Again, the objective of certainty about the place to file and the place to search is better served by the new rule than by the old rule, but the change will probably result in very little change in the actual place of filing in the vast number of cases.

Exceptions and Continuity

There are prominent exceptions to the new general rule in the 1998 revisions to Article 9. In most instances these exceptions mean no practical change in the choice of law rules from pre-1998 Article 9:

1. All possessory (meaning that there is no filing of a financing statement) security interests are perfected under the law of the state in which the collateral is located (where the creditor has possession). The practical effect is to leave the law unchanged for possessory security interests in any kind of collateral.

2. For other kinds of collateral, there are also no effective changes in the "choice of law" rules. These other kinds of collateral include property subject to certificates of title, and minerals, letter of credit rights and investment property.

3. For deposit accounts, which were not in the scope of pre-1998 Article 9, the location of the bank determines the place for perfection, effect of perfection and non-perfection , and the priority of security interests.

4. For agricultural liens, which were not within the scope of pre-1998 Article 9, the location of the farm products determines the place for perfection, effect of perfection and non-perfection, and the priority of security interests.

5. There are security interests that perfect in the location of the debtor under pre-1998 Article 9. Since the location of the debtor is the fundamental rule in the 1998 revisions, perfection rules effectively do not change for these security interests under the 1998 revisions to Article 9. Included are security interests in accounts, general intangibles and mobile goods (no distinction between mobile and other goods in the 1998 revisions), automatic perfection of a broker in investment property, and automatic perfection of the security interest of a commodity broker in a commodity contract.

Important Differences for Some Collateral

Under the 1998 revisions, the law governing perfection may be different from the law governing effect of perfection and priority of security interests for some kinds of property. These kinds of property include negotiable documents, goods, instruments, money and tangible chattel paper. The effect of perfection and priority of nonpossessory security interests in these kinds of collateral will be determined by the location of the collateral. This means that the place to file or the place where automatic perfection takes place, is the location of the debtor, but the impact of filing may be determined under the law of the state where the collateral is.

THE FILING SYSTEM

The primary and principal method for perfecting a security interest under Uniform Commercial Code, Article 9 is to file a financing statement with the filing authority or authorities in the appropriate state. Before 1998, most states had centralized the filing of financing statements covering most collateral in one state office. A few states continued to have both general central and local filing for all collateral. Many of the states that have centralized filing for most collateral, still continue to have local filing for some kinds of collateral. The result is a very mixed array of filing and search requirements. For filing must facilitate the search of records by subsequent creditors who must be able to find prior security interests. The fundamental objective of uniformity has been substantially impaired by the lack of uniformity just in the filing systems.

The new filing system is designed to forge a uniform system that is simpler and more reasonable to use:

1. Medium neutral. The new system is designed to be medium neutral. This simply means that the filing systems are no longer to be required to file paper only. The systems can convert to any and all forms of electronic communications for filing purposes.

2. Centralized filing. Every state will have a central filling authority. One place to file and one place to search. The only exception is fixture filings, which must continue to be made (and searched) in the real estate records.

3. Simplified financing statement. The statement must name debtor, creditor and generally describe some collateral. No signature is required. Identity of filer is immaterial.

4. Filing office operations. No discretion resides in the filing office as to sufficiency of a filing. A file cannot be cleared until one year after a termination occurs, extending the availability of the record for

one year longer than pre-1998 Article 9.

5. Correction statement. A debtor can file a correction to an improper or falsely filed financing statement.

6. Extended effective dates. Most financing statements lapse after five years from the date of filing. Two kinds of financing statements, those for public-finance transactions and for manufactured-home transactions are initially effective for 30 years.

7. National forms and fees. There is an effort to establish the same forms for filing in every state and to nationalize filing fees. Uniformity, therefore, is intended to go to the administration of filing as well as to the basic law.

CONSUMER TRANSACTIONS

In the 1998 revisions to Uniform Commercial Code, Article 9, there are special provisions for secured transactions in which the debtor is a consumer. A "consumer transaction" is defined to be one in which an individual incurs an obligation primarily for personal, family, or household purposes, a security interest secures the obligation, and the collateral is held or acquired primarily for personal, family, or household purposes. Most consumer secured transactions are consumer-goods transactions, meaning that an individual purchases an item, i.e. a refrigerator, a couch, and finances the purchase. The item, i.e., the refrigerator, the couch, are the collateral. If the consumer debtor defaults on the debt, the item is repossessed. The 1998 revisions make a distinction between a consumer debtor and a consumer obligor. In Article 9, a "debtor" is defined in terms of an interest in the collateral. An "obligor" is a person obligated to pay the debt. Usually they are the same person, but there are obligors who are not debtors, i.e., a person who guarantees the payment of the debt for the debtor. Most of the special consumer transaction rules pertain to enforcement of a security interest after the debtor defaults on the basic obligation. Some of these rules are as follows:

1. Right to Redeem. A consumer-goods transaction debtor may not waive the right to redeem collateral taken to satisfy the debt, a right which all debtors have. Redemption is the right under Article 9 that collateral be returned to the debtor if the debt is satisfied after a default. Commercial and business debtors are able to waive that right as part of credit acquisition. Consumer debtors will not be able to waive their right.

2. Process Presumption. In an action against a secured creditor for errors in enforcement and collection process, the presumption is that the collateral is worth the debt. In order to establish a deficiency, a creditor must rebut the presumption. These rules do not apply to consumer transactions. The courts will determine the rule to apply in consumer transactions and could choose a different rule.

3. No Dual Status Rule. The 1998 revisions to UCC Article 9 provide that the same collateral may secure a purchase-money security interest and non-purchase-money security interest. This "dual status" rule is adopted in the 1998 revisions to Article 9, rejecting the opposing "transformation" rule applied in some pre-1998 court cases. Because the "dual status" rule may limit the benefit of purchase money security interests, consumer-goods transactions are excepted from its application. In a consumer-goods transaction, the courts must determine the appropriate rule to apply.

4. Pre-Payment Rights. Amendments to Article 2 of the Uniform Commercial Code that accompany the 1998 revisions to Article 9 provide greater protection for a consumer buyer of goods who pays in whole or in part before delivery of the goods. The buyer has an enforceable interest under Article 2 that allows the buyer to obtain the goods.

5. FTC Rule 433. A consumer's rights under Federal Trade Commission Rule 433 on preservation of claims and defenses are specifically recognized in the 1998 revisions to Article 9, and will continue even if the required notification in the appropriate record is missing.

6. Deficiency Statement. A consumer-goods debtor or consumer obligor is entitled to a written statement which provides the amount of a deficiency (what is owed after collateral is sold to satisfy the debt) and the calculation which results in that amount.

7. No Partial Satisfaction. A secured party may not accept collateral as partial satisfaction of a consumer obligation.

8. Sufficient Description. A description of consumer goods, a security entitlement, a security account, or a commodity account that is by category only is not a sufficient description when there is a consumer transaction. A security entitlement, a security account and a commodity account are types of investment property under Article 8 of the Uniform Commercial Code.

GOOD FAITH

The 1998 revisions to Article 9 adopt the more "objective" good faith standard: "honesty in fact and observance of reasonable commercial standards of fair dealing."

DEFAULT AND ENFORCEMENT

When a debtor defaults on an obligation secured under Uniform Commercial Code, Article 9, a secured creditor has a right to take the collateral, sell that collateral, and apply the proceeds to pay off the debt. If the proceeds are insufficient to satisfy the debt, there may be a deficiency that the debtor will be obligated to pay. The creditor will be entitled to pursue the deficiency with the creditor's remedies available under other law. If there is a surplus after sale, that surplus will be the debtor's, unless other creditors act to obtain satisfaction of their debts, as well. Strict foreclosure is an alternative to sale. The creditor keeps the collateral in a strict foreclosure. The procedures under Article 9 are generally non-judicial procedures. (Although a creditor may seek enforcement in court.) Usually the secured creditor will repossess the collateral and pursue the available remedies without a court proceeding. Article 9 has its own procedural requirements for creditors. Not following them may mean that a creditor will not obtain a full remedy under Article 9.

The 1998 revisions do not fundamentally change the rules for enforcement of a security interest upon a debtor's default. The revisions provide for problems perceived in enforcement prior to 1998. Some of the important changes are as follows:

1. Secondary Obligors. A secured party owes duties to "secondary" obligors on the secured debt. A secondary obligor is liable for a debt only if the primary obligor does not satisfy the debt. A guarantor is an example. There are notifications that must be given to known secondary obligors by secured parties upon default. Contrary to the law of suretyship, the 1998 revisions generally prohibit waiver of rights by a secondary obligor. A secondary obligor can waive notification of disposition of the collateral, and (in a non-consumer transaction) the right to redeem, but only after the default has actually taken place.

2. Deposit Accounts. The enforcement rights of a depositary bank holding a security interest in a deposit account are expressly provided for. Security interests in deposit accounts under Article 9 were not possible before the 1998 revision.

3. Warranties. A secured party is subject to warranties of title, quiet possession and the like, applicable under other law (usually Uniform Commercial Code, Article 2), including rules for their exclusion or

modification when disposing of collateral.

4. Notification of Junior Creditors. A secured party taking collateral and disposing of it upon default, has a broader obligation to notify other secured parties and lienholders who have filed financing statements against the debtor covering the same collateral than is the case under pre-1998 Article 9. There are specific notification requirements and a requirement for notification within a reasonable time (no less than 10 days after the earliest time of disposition of the collateral).

5. Transfer to a Secondary Obligor from Secured Party. A secondary obligor obtains the rights and assumes the duties of a secured party if it takes an assignment of the secured obligation, agrees to assume the secured party's obligations, or is subrogated to the rights of the secured party. This is not a disposition of the collateral by the secured party, but relieves the secured party of further duties and obligations.

6. Transfer of Title to Secured Party. The 1998 revisions make it clear that a transfer of record or legal title to a secured party in order to facilitate a disposition, is not of itself a disposition of the collateral.

7. Strict Foreclosure. A secured party may accept collateral in partial (except in consumer-goods transactions) or full satisfaction of a debt. Junior claimants rights are accounted for. Acceptance of collateral in satisfaction of a debt is not of itself an unreasonable delay of disposition. Strict foreclosure is permissible if it is commercially reasonable, and unreasonable delay can occur only if the foreclosure itself is not commercially reasonable.

8. Damages for Secured Party's Noncompliance. Secured parties are subject to a "rebuttable presumption" that the collateral value equals the debt if they do not comply with the enforcement procedures and requirements in Article 9 for non-consumer transactions. If there is breach on the part of the secured party, the obligor is credited with the difference between the actual disposition price and the price that would have been paid if the disposition had been conducted in a commercially reasonable manner. The "absolute bar" rule is not mentioned but should be unnecessary (except that it may be selected for consumer transactions).

9. Deficiency Calculation. If there is a procedurally regular disposition that nonetheless fetches a low price, and the disposition is to an insider transferee, the deficiency is calculated on the basis of what the price should have been in a commercially reasonable disposition.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

☐ 1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

☐ KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 451-2811
FAX: (907) 451-2846

☒ P.O. BOX 110300-DIMOND COURT HOUS
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-6735

March 6, 2000

The Honorable Gene Therriault
The Honorable Eldon Mulder
Co-Chairs
House Finance Committee
State Capitol
Juneau, AK 99801 - 1182

Re: HB 239(L&C) (relating to UCC, Article 9 - secured transactions)

Dear Representatives Therriault and Mulder:

HB 239(L&C) has been referred to the House Finance Committee.

Alaska Uniform Law Commissioners request an early hearing on HB 239(L&C), relating to Uniform Commercial Code, Article 9 - secured transactions. The bill updates our statutes to conform to amendments recommended by the National Conference of Commissioners on Uniform State Laws. Uniform laws are especially important to keep Alaska as an attractive market for interstate commerce.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Deborah E. Behr
Deborah E. Behr
Assistant Attorney General

DEB:jf

cc: Representative Lisa Murkowski
House Judiciary Committee
All Uniform Law Commissioners
Chrystal Smith, Legislative Contact, Dept. of Law
Pat Pourchot, Legislative Director, Office of the Governor

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
SUPPORT SERVICES DIVISION
RECORDER'S OFFICE

550 WEST 7TH AVENUE, SUITE 1210
ANCHORAGE, ALASKA 99501-3564
PHONE: (907) 269-8882
FAX: (907) 269-8912

January 25, 2000

The Honorable Lisa Murkowski
House of Representatives
Alaska State Legislature
Alaska State Capitol
Juneau, AK 99801-1182

Re: HB 239 – Uniform Commercial Code Revision

Dear Representative Murkowski:

HB239 contains a number of significant revisions of the Uniform Commercial Code in Alaska, including the modernization of the filing system operated by the Recorder's/UCC component in the Department of Natural Resources. As State Recorder, my duties include administration of the state's recording system as well as the Uniform Commercial Code Central File System in Alaska. I strongly support passage of this bill as it would serve to streamline the state's UCC filing system in a number of ways that are important to our customers.

While the bill contains other substantive changes that are important to secured lenders (e.g. making perfection easier, strengthening the purchase money security interest, facilitating foreclosure, etc.), our concern here in the Recorder's/UCC section is primarily with the filing provisions found in proposed Article 5 of AS 45.09. My office, with assistance from the Attorney General's office, had earlier submitted some minor revisions necessary to more closely align the filing provisions of the bill with the national version and to accommodate the implementation of HB239 under our present processing structure and indexing system. It is my understanding that these recommendations are being incorporated into the bill.

Since the objective of the national UCC revision process is to achieve uniformity in the handling of secured transactions among the states, it is critical that each state's legislation remain as close as possible to the recommended national version. While implementation of this bill would result in an increased workload in our UCC Central office, we anticipate handling this increase through lateral transfers from larger recording offices which would concurrently experience lower filing volumes.

Passage of this bill would afford many benefits to our UCC customers. Among other benefits, this bill would eliminate the confusion regarding place of filing by doing away with all local district filings other than fixtures, it would eliminate signature requirements on all filings, it would limit the number of reasons that could be used to reject filings, and it would pave the way for implementation of electronic filings in the future. This is a long overdue step toward bringing real uniformity to the Uniform Commercial Code!

Sincerely,

Sharon Young

Sharon Young
State Recorder

Cc: Nico Bus
Admin Services Manager

Linda Kesterson
Assistant Attorney General

Alaska State Escrow Association

January 24, 2000

Representative Lisa Murkowski
State Capitol
Juneau, AK 99801-1182

RE: House Bill 239
Article 9

Dear Representative Murkowski:

Thank you for the opportunity for our association to comment on HB239.

After careful review, we find this bill to be a benefit to our industry as it simplifies the filing process.

In centralizing the file system, our risk is greatly reduced in searching the system for existing liens on our clients' personal property. We currently search the recording district where the property is located as well as the Central File System. As you can see, there is a larger margin for error if a filing district is missed.

We feel that this bill enhances the uniformity necessary for the Uniform Commercial Code and we support its passage.

Respectfully,

Cinda

LUCINDA M. ECKERT
Legislative Affairs Chairman
Alaska State Escrow Association
301 W. Northern Lights Blvd.
Anchorage, AK 99503

ALASKA LAND TITLE ASSOCIATION

P. O. Box 241181, Anchorage Alaska 99524-1811

January 24, 2000

Rep. Lisa Murkoswki
State Capitol
Juneau AK 99801-1182

RE: HB239 - Revision of Uniform Commercial Code

The Alaska Land Title Association represents more than 28 offices and over 400 employees statewide dealing in the title insurance industry.

We have reviewed SB239 and feel that this bill could help streamline the current UCC system in Alaska.

Our association is in full support of HB239 and urge the passage of said bill.

We appreciate your efforts on matters affecting our industry.

Sincerely

Mary Ann Rowe
Legislative Co-Chair

Jeff Blake
Legislative Co-Chair

BRIAN W. DURRELL P.C.
LAW OFFICE

BRIAN W. DURRELL

Direct: 907 258.3225
bdurrell@durrell.com

1400 West Benson Blvd
Suite 370
Anchorage, Alaska 99503

Phone: 907 258.3224
Fax: 907 258.3229

February 3, 2000

Representative Lisa Murkowski
Alaska State Legislature
Alaska State Capitol
Juneau, Alaska 99801-1182

Re: HB 239

Dear Representative Murkowski:

I send this letter to offer my support and endorsement of HB 239, which of course deals with the revisions to AS 45.09 (UCC Article 9). I have had substantial experience working with commercial law matters in Alaska. I spent the first fourteen years of my law career anchoring the commercial law practice at the Anchorage office of Bogle & Gates. Three years ago, I opened my own law office to continue my work in representing Alaska entrepreneurs, businesses and financial institutions in negotiating and documenting a wide variety of commercial transactions. I deal with issues controlled by AS 45.09 on a daily basis.

I believe that it is imperative that Alaska modernize its commercial code provisions to keep them up to date in light of changes in today's business worl I also believe that for Alaska to continue to develop of local, national and international commerce, we must have a set of commercial laws that follow as closely as possible the Uniform Commercial Code, deviating only when necessary to address matters peculiar to Alaska.

For these reasons, I urge the Alaska Legislature to act upon HB 239 so that it may be passed as swiftly as possible this session.

Very truly yours,

BRIAN W. DURRELL, P.C.

Brian Durrell

Brian W. Durrell

BWD:jk

AlaskaUSA
Federal Credit Union

Honorable Lisa Murkowski
Alaska State House of Representatives
Juneau, AK 99801

February 9, 2000

Dear Representative Murkowski:

Thank you for the opportunity to submit comment on HB 239 regarding proposed amendments to Article 9 of the Uniform Commercial Code (UCC). As you know, the revised Article 9 has been approved by the National Conference of Commissioners on Uniform Sate Laws (NCCUSL) with a target date for adoption in all 50 states by July 2001.

This legislation will not fundamentally alter the law of secured transactions; however, it will introduce numerous significant changes designed to clarify and moderniz the current version. While we have not had an opportunity to review the sectional analysis directly associated with HB 239, we have reviewed the comparative information provided by the NCCUSL. We support the early adoption of this legislation and believe it is in the best interest of Alaska's lenders to maintain conformity with other states with respect to the rules associated with secured transactions.

Of particular interest is the introduction in this proposal to the concept of "electronic chattel paper," which refers to chattel paper in the form of a record or records consisting of information stored in an electronic medium. We believe this provision will significantly benefit the efficient and timely execution of secured transaction agreements and filings.

At your request, we have read the amendments being offered by the State Recorder's Office and find no areas of disagreement with their proposals. For the most part, they appear to be "housekeeping" in nature for the purposes of bringing the provisions of the UCC into line with State operational considerations.

This proposal can be somewhat intimidating due to its volume and complexity. It has been twelve years in the making. The benefits associated with Alaska's adoption of these provisions will provide certainty for lenders and with early adoption, the opportunity to transition to the new rules in a comprehensive and sensible manner.

Thank you again for the opportunity to comment. Should you be interested in a more specific discussion of these issues, I invite you to contact Mr. Tom Greene, Alaska USA's Senior Vice President, Consumer Lending, who will be pleased to discuss the implications of this proposal with you in greater detail. He may be reached in Anchorage at (907) 786-2733.

Sincerely,

Nancy Bear Usera
Senior Vice President,
Corporate Development

Alaska Bankers Association
P.O. Box 100600 Anchorage, Alaska 99510-0600 (907) 265-2920

February 14, 2000

Representative Lisa Murkowski
Alaska State Legislature
Room #406 State Capital Building
Juneau, AK 99801
Via Fax (907) 465-2293

Re: HB 239- Revisions of Article 9, Uniform Commercial Code (UCC)

Dear Representative Murkowski:

The Alaska Bankers Association has voted to strongly support passage of HB 239 which will update and improve Article 9 of the UCC as it relates to secured transactions. The original UCC Article 9 has worked well to support commerce in Alaska for many years. We are convinced HB 239 refinements will improve the day-to-day work relationships with Article 9 and it clarify and resolves some controversies that have arisen over the last thirty years.

As I testified before the House of Labor and Commerce Committee last week the Alaska Bankers Association also believes HB 239 needs to becomes law this session of the legislature because we will only have one year from July 2000 to do the comprehensive training that will be necessary to inform and train both bankers and customers before the New Article 9 is introduced in most states of the Nation on July 1, 2001.

Your strong support is appreciated.

Sincerely,

Jerry K. Weaver
Secretary/Treasurer

Post-it® Fax Note 7671

To Ms. Amy Erickson	Date 2-15-00 / # of pages ▸ 1
Co./Dept. Office of Representative	From Jerry Weaver
Phone #	Co. NBA
Fax # 907-465-2293	Phone # 265-2920
	Fax # 265-2141

SENATE COMMITTEE REPORT

DATE: 3/6/00

FURTHER: Finance

DATE TURNED
IN TO OFFICE: ____________________

Judiciary Committee considered CS FOR HOUSE BILL NO. 259(FIN)

"An Act relating to eligibility to be represented by the public defender before and during the probable cause and temporary placement hearing that is held after the state takes emergency custody of a child."

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*
Rick Halford	√	[signature]	X		
		[signature]	✓		
CHAIR: [signature]	✓	*CHAIR:*			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
Administration	3/8	✓	

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

[ ] **APPROPRIATION -- no fiscal note**

***include fiscal notes accompanying Governor's bill**

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. CSHB 259 (STA)

Revision Date: January 27, 2000
Title: "An Act relating to a parent's eligibility to be represented by the public defender..."
Sponsor: Representative Coghill
Requestor: (H) STA

Department Affected: Administration
BRU: Legal and Advocacy Services
Component: Public Defender Agency

COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2 003	FY 2004	FY 2005	FY 2006
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						

CHANGE IN REVENUES ( )						

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 99) cost: $________

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

See attached.

Prepared by: Barbara Brink, Director
Phone: (907) 264-4414
Division: Public Defender Agency
Date: January 27, 2000

Approved by Commissioner: Robert Poe, Jr.
Agency: Department of Administration
Date: January 27, 2000

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Rev 10/97

FISCAL NOTE

STATE OF ALASKA BILL NO. CSHB 259 (STA)

2000 LEGISLATIVE SESSION

ANALYSIS: (continued)

This bill would allow the Public Defender Agency to represent parents whose children have been taken into emergency custody by state social workers without the parents first having to go through a formal indigency screening process and appointment by the court.

The Public Defender Agency does not anticipate any fiscal impact from this legislation if it is amended so that we are not obligated to represent non-indigent parents. We have to do the same amount of work in these cases anyway. If we can get started a little earlier, so much the better.

However, in predicting the lack of any fiscal impact, we are making the following assumptions. First, we assume that the bill will be amended so we do not represent non-indigent people. Our lawyers can ask a few questions and get a pretty clear idea of whether someone is indigent or not. If people are able to hire their own lawyers, we can refer them to private attorneys.

Second, we assume the words "may be represented" give us leeway as to whom we represent and the scope of the representation. We must be able to turn down requests for this type of immediate representation if we have a conflict of interest or for other legitimate reasons. In addition to conflicts of interest, we have to be careful that the Public Defender Agency takes the most serious case. For example, if a mother calls saying her children have been taken because her husband is accused of sexual abuse, we should make sure that we end up representing the husband, not her. The husband may end up being a defendant in an expensive criminal case. If we can represent him in both the Child in Need of Aid and criminal cases, we can save the expense of having another lawyer appointed through the Office of Public Advocacy in the criminal case. Finally, we have limited resources and cannot promise an immediate response in every case. If all our lawyers are in court hearings, we may have to delay taking intake calls.

ALASKA STATE HOUSE OF REPRESENTATIVES

Interim Address:
119 N. Cushman, Suite 211
Fairbanks, AK 99701
(907)-456-5081
Fax# (907)-456-8245

Session Contact:
(907)-465-3719
FAX# (907)-465-3258
State Capitol
Room 416

REPRESENTATIVE JOHN COGHILL

<u>HB 259 PUBLIC DEFENDERS FOR 48 HOUR HEARING</u>
SPONSOR STATEMENT

Pursuant to AS 47.10.142 (4)(d) after DFYS takes physical custody of a child, the court must immediately hold a hearing at which the court shall determine whether probable cause exists to deem the child a "Child In Need of Assistance" (CINA). The public defender's office would welcome the statutory change to allow them to legally provide assistance in an area they feel is necessary.

When a child is removed from the family home, the effects can be traumatic; so much so that the parents are unaware of what has just happened, why it has happened, and what should be done next. The common situation is that the parents are distraught because their child has been removed by the state and feel intimidated by the judicial process for CINA determinations. They don't even know they can ask the judge for a continuance to seek legal advice.

Under current law a person does not qualify for assistance from the public defender's office until indigence is determined. Many parents go to court not knowing their rights or the process because they can not find legal assistance in time for the 48-hour hearing. This legislation allows any parent or guardian to get legal assistance from the Public Defender's office for the 48-hour CINA hearing regardless of whether or not they are indigent. The best case scenario in many cases will mean an end to the case and the child is returned to the parents. In other cases, a continuance would be issued to allow the parents to provide additional information to the court that the caseworker and the Attorney General's office have not provided.

If, after the court has reviewed the evidence, it rules the child is a CINA during the 48 hour hearing, the parents would then apply for further assistance from the public defender's office and their qualification would be determined by whether or not they were indigent.

While some may argue this legislation will result in added expenses to the State, this legislation could actually reduce the cost of CINA cases in Alaska. By providing all the information in a professional manner at the first hearing of determination, the number of children in state custody for 90 days to six months then returned to their family will be reduced. This means a reduction in foster care, caseworker, and health care costs, as well as, long-term public defender, guardian ad litem, and AG expenses.

STATE OF ALASKA

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF FAMILY AND YOUTH SERVICES

TONY KNOWLES, GOVERNOR

P.O. BOX 110630
JUNEAU, ALASKA 99811-0630
PHONE: (907) 465-3170
FAX: (907) 465-3397

MEMORANDUM

DATE: December 27, 1999

TO: Elmer Lindstrom
Special Assistant to the Commissioner

FROM: Roger P. Withington
Research Analyst

SUBJECT: Children Returned Home

Per your request of December 23, 1999, I have calculated, from PROBER®, for all of the children who were released from DFYS custody and returned to their parents during FY1999, the length of time these children spent in continuous DFYS custody. This information is provided in the following table.

Length of Time in Custody Episode	Number of Children
2 Days or Less	50
3 to 90 Days	56
91 to 182 Days	45
6 Months to 1 Year	56
1 – 2 Years	75
2 – 3 Years	44
3 – 4 Years	20
4 + Years	30
Total	376

I urge you to use caution when interpreting these numbers. The DFYS has a chronic and ongoing problem with field staff entering accurate information into PROBER® with respect to releases from custody.

If I may be of further assistance, please feel free to contact me.

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STATE OF ALASKA

(907) 465-3808
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 400
Juneau, Alaska 99801-2105

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

Mary Pagenkopf

House State Affairs, January 25, 2000, 8:05 a.m.

House Finance, February 25, 2000, 1:45 p.m.

No: 1

FISCAL NOTE

Bill Version: CSSSHB 275(JUD)

(H) Publish Date: 2/25/00

STATE OF ALASKA
2000 LEGISLATIVE SESSION

Revision Date/Time (Note if correction)

Dept. Affected Law

Title "An Act relating to the Uniform Probate Code, including trusts and governing instruments; ..."

BRU Civil Division

Component Commercial

Sponsor Representative Therriault

Requester House Judiciary 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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2000) cost:

POSITIONS

Full-time						
Part-time						
Temporary						

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

SSHB 275, relating to the Uniform Probate Code, is not anticipated to have a fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson Joan M. Kasson

Phone 465-5370

Division Attorney General's Office

Date/Time 2/21/00, 10:46 AM

Approved by Commissioner Bruce M. Botelho, Attorney General

Date 2/21/00

Agency Department of Law

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(Rev 10/99) 2000inform ak/OMB

COMMITTEE COPY

CORRECTION

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

No: 1

FISCAL NOTE

Bill Version: CSSSHB 275(JUD)
(H) Publish Date: 2/25/00

STATE OF ALASKA
2000 LEGISLATIVE SESSION

Revision Date/Time (Note if correction)		Dept. Affected	Law
Title	"An Act relating to the Uniform Probate Code, including trusts and governing instruments; ..."	BRU	Civil Division
		Component	Commercial
Sponsor	Representative Therriault		
Requester	House Judiciary 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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2000) cost: ______

POSITIONS

Full-time						
Part-time						
Temporary						

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

SSHB 275, relating to the Uniform Probate Code, is not anticipated to have a fiscal impact on the Department of Law.

Prepared by:	Joan M. Kasson	Phone	465-5370
Division	Attorney General's Office	Date/Time	2/21/00, 10:46 AM
Approved by Commissioner	Bruce M. Botelho, Attorney General	Date	2/21/00
Agency	Department of Law		

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GENE THERRIAULT
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Fairbanks, Alaska 99701
(907) 488-0857
Fax: (907) 488-4271

While in session
State Capitol
Juneau, Alaska
99801-1182
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House District 33

House Of Representatives

CSSS House Bill 275 (JUD)
Sponsor: Representative Gene Therriault
Bill Summary

House Bill 275:

- Changes the way proceeds are distributed when a piece of property has been sold and the decedent did not receive full payment before death.
- Makes the rules of construction that apply to wills under 13.12.606 also applicable to trusts.
- Allows trusts to qualify for a new family-owned business deduction of Internal Revenue Code section 2057.
- Changes the amount of interest paid on a gift of a monetary amount, and the length of time allowed for settling the estate before interest begins to accrue.
- Adds a new section stating that no interest must be paid on a pecuniary marital bequest, but that a pro-rata portion of the income earned by the estate must be credited to the pecuniary marital bequest from the date of death. This provision assures Alaskans that a trust established for the benefit of a spouse will meet the "all the income" requirement established by Internal Revenue Code sections 2056(b) and 2523(f), which is required of trusts qualifying for the marital deduction.
- Gives the personal representative more discretion over how to distribute the residuary estate assets to heirs, as long as it is "in the best interests of the distributees."
- Limits distributions by a person who is not an independent trustee, (for example, a person who is both a trustee and beneficiary), by requiring an "ascertainable standard" relating to maintenance and support.
- Provides that, under certain conditions, a trustee may divide a trust into two or more separate trusts as long as the resulting trusts are substantially identical in terms to the existing trust.
- States that certain asset distribution provisions applicable to the administration of a probated estate also apply to the administration of a revocable trust following the death of the settlor of the trust.
- Provides that in those trusts where the spouse is entitled to all the income earned by a trust paid no less frequently than annually, and a marital deduction is claimed for the trust, the spouse has the power to require the trustee to make the trust assets produce income. This provision is a required statement in all trusts intending to qualify for the marital deduction.
- Clarifies that a person, including a trustee, may convey property to a trust and that a trustee can convey property from a trust whether or not the trustee is actually named on the deed. This section also provides protection for good faith purchasers who purchase property held in the name of a trust.

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House Of Representatives

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House District 33

CSSS House Bill 275 (JUD)

Sponsor: Representative Gene Therriault

Sponsor Statement

House Bill 275 further refines the Uniform Probate Code to continue enhancing the estate planning climate in the State of Alaska. By a nearly unanimous vote in both the House and Senate, in 1996 the Twentieth State Legislature passed a major overhaul of the laws that had governed decedent's estates, guardianships, transfers and trusts since 1972. The changes, based on the 1990 version of the national Uniform Probate Code, as subsequently amended in 1991 and 1993, were made to adapt our laws to the increasing complexity of family structure and investment alternatives that have developed in recent decades. House Bill 275 proposes further revisions to clarify ambiguities, simplify the probate procedure, and minimize tax consequences.

Much of the language is derived from statutes of other states and reflects a consensus of ideas agreed upon by Alaskan estate planning lawyers who have met informally over the last two years to discuss possible improvements.

Section 1

This section changes a very limited rule of construction contained in the 1993 Uniform Probate Code enacted by the Legislature in 1996.

"Nonademption of specific devises" pertains to the rules that apply when a person creating a trust or will (the decedent) designates that a specific person (specific devisee) is to receive a specific gift (specific devise), and the request is unable to be carried out, because, for example, the decedent lost or sold the gift. The question is whether, when a decedent designates a specific gift, the decedent means to give specifically *that gift* or whether the decedent would want the person to receive the *value* of the gift in the absence of the gift. **Section 1** of HB 275 deals with the specific instance of nonademption when a decedent has sold the specific devise prior to the decedent's death and is still owed money for the property. Under current law, if the property were sold and the decedent received full payment before death, the payment would be distributed equally between all parties because the identity of the property, and thus its designation as a specific devise, is presumed to have been lost. If, however, the property were sold and the decedent did not receive full payment before death, the payment received after death and any promissory note would go to the specific devisee. Under HB 275 the payment received after the decedent's death and any promissory note would not go to the specific devisee. Instead, the payment and any promissory note would be treated in the same manner as all other property that the decedent owned, and would be distributed equally among the beneficiaries. The rationale for the change is that the question of who ultimately receives the proceeds should not depend on whether the decedent received full or partial payment before death.

For example, Susan Smith provides in her will that her son David Smith is to receive the family farm and the remaining property in her estate is to be divided equally between David and his brothers and sisters. In this case, the family farm is the specific devise. Under current law, if Mrs. Smith sold the farm prior to her death and received cash for the transaction, at her death the money would be included in the estate and shared equally between all the children. If, however, Mrs. Smith sold the farm and received a seller-financed note because the buyer was unable to obtain sufficient third-party financing, when Mrs. Smith dies, David would receive the balance of the promissory note owed to Mrs. Smith, to the exclusion of his brothers and sisters. These sections change that result and would treat the promissory note in the same manner as all other property Mrs. Smith might own. The promissory note would be shared equally by all the children. As this is only a rule of construction that controls in the absence of other language, if Mrs. Smith really wants the balance of the promissory note to go to David to the exclusion of the other children, she could state this in her will or trust.

Section 2, 13.12.712 makes the rules of construction under 13.12.606 applicable to trusts.

Section 2, 13.12.720

This section relates to the new family-owned business deduction of Internal Revenue Code section 2057. Section 2057 provides an additional estate tax deduction for the owners of family businesses. This provision follows a similar statute found in Michigan law. It is meant to provide a correct tax result by having this deduction taken into account under a provision that defines the credit shelter trust so the deduction will not be wasted on a marital bequest. It is an important provision, especially in Alaska where so many businesses are family owned.

Section 3

This section would change the amount of interest that is paid on a pecuniary devise, and would usually allow more time for the trust or will to be settled before interest begins accruing.

A pecuniary devise is a gift of a monetary amount, whether given outright or placed in trust for the beneficiary. Our present statute states interest must be paid on a pecuniary devise and begin one year after the appointment of a personal representative. Interest is set at the legal rate, which is presently 10.5%. This is unrealistically high and does not take into account that interest rates fluctuate. It can also shortchange other heirs. For instance, Mrs. Smith leaves $100,000 in trust for the benefit of her grandchild and leaves the rest of her estate in equal shares to her children. If a federal estate tax return is required, and taxes must be paid, the $100,000 cannot be distributed to the grandchild until the personal representative has received a closing letter from the IRS. Typically it might be 2-3 years after a decedent's death before the closing letter is received. Under present law the interest payment made to the grandchild will come out of the children's share of the estate, for no other reason than that federal bureaucracy makes it impossible for the estate to be distributed within a year. This section changes the interest rate from 10.5 % to a variable rate taken verbatim from AS 45.45.010(b) and commonly referred to as the discount borrowing rate.

In addition, an adverse generation-skipping transfer tax can result if appropriate interest as defined by state law isn't paid in a timely manner. The principle consequence is that a trust that might otherwise be shielded from generation-skipping transfer tax may now be subjected to it. HB 275 changes the time at which interest begins to accrue from one year after a personal representative is appointed to two years after the decedent dies. This amendment allows the administrator more time to fund pecuniary bequests when the estate may still be in the process of being audited by federal tax authorities, which in turn gives the personal representative more time to settle the estate.

Our present statute comes from Uniform Probate Code Provision promulgated in 1963. Many states, such as Washington, do not require the payment of interest on pecuniary devises.

Section 4

This section also pertains to interest on a pecuniary devise. It adds a new section stating that no interest must be paid on a pecuniary marital bequest, but that a pro-rata portion of the income earned by the estate must be credited to the pecuniary marital bequest from the date of death. The provision requiring the payment of income comes from a similar provision found in Virginia law. This provision assures Alaskans that a trust established for the benefit of a spouse will meet the "all the income" requirement established by Internal Revenue Code sections 2056(b) and 2523(f), which is required of trusts qualifying for the marital deduction.

Although this section eliminates the requirement that any interest be paid on a pecuniary marital bequest, this section nonetheless meets the appropriate interest requirement set forth in the generation-skipping transfer tax regulations. Lastly, it should be noted that, under recently promulgated federal regulations governing the allocation of estate and trust income to separate shares, the payment of interest would not only increase the amount that must be paid to a pecuniary marital bequest, (a result one generally wants to avoid because more property will ultimately be subjected to estate tax), but unnecessarily creates taxable income for the family with no corresponding deduction to the estate.

Section 5

This section gives the personal representative more discretion over how to distribute the residuary estate assets to heirs, as long as it is "in the best interests of the distributees." For example, it would allow the personal representative to make non pro-rata distributions of assets. This means if an estate consists of two assets of equal value and there are two heirs, the personal representative could distribute one asset entirely to one heir and the other asset entirely to the other heir instead of having to make a distribution of ½ of each asset to each heir. This section allows the personal representative to use this method of funding even though the authority for doing so might be absent in the will or trust. As a result better tax planning is possible. This section follows North Carolina legislation.

Section 6

This adds a new section to Chapter 36, Trust Administration. AS 13.36.153 is meant to provide a beneficial interpretation to a document that would otherwise produce a negative tax consequence in the limited circumstances addressed by this section. To achieve this, it limits distributions by a person who is not an independent trustee, (for example, a person who is both a trustee and beneficiary), by requiring an "ascertainable standard" relating to maintenance and support.

As an example, presume the settlor of a trust wants to benefit his spouse. He wants to name his spouse as trustee and also wants to give his spouse as many rights to the trust assets as possible without having the trust assets included in his spouse's gross estate for federal estate purposes. Internal Revenue Service regulations state that, in her position as trustee, the spouse can possess the right to distribute principal, provided that right is "limited by an ascertainable standard." The regulations state an ascertainable standard will be found if the spouse is given the power to use principal for her "support in reasonable comfort." However, the regulations also provide that a right to use principal for "her comfort, welfare, or happiness" is not limited by the requisite standard. While most people would think there is no meaningful difference between "support in reasonable comfort" and "comfort, welfare, or happiness," the use of the latter phrase would create the unwanted consequence of having the trust principal included in the spouse's estate for federal estate tax purposes. Section 6 prevents inadvertently triggering this horrendous tax result by providing that, unless specifically stated in the trust document, the spouse would only have the right to distribute principal to herself in a manner limited to an ascertainable standard.

This section also provides that principal and income can not be used to discharge an individual legal obligation of certain trustees who are not independent trustees.

Furthermore, these provisions would apply to a trustee who is related or subordinate to the person who has the right to remove and replace a trustee. Were it not for these provisions an unintended and harmful tax result would occur. This section is taken principally from Colorado law.

Section 7

In order to make favorable marital deduction and generation-skipping tax elections, it is necessary to be able to split a single trust into two trusts. The beneficial interests in each trust remain the same, the only difference is that the two trusts will be administered separately. This section provides that, under certain conditions, a trustee may divide a trust into two or more separate trusts as long as the resulting trusts are substantially identical in terms to the existing trust. This provision will allow a trustee to make favorable tax elections whether it relates to the marital deduction or to an allocation of generation-skipping transfer tax exemption. Trust instruments drafted subsequent to the changes in tax law that necessitate the ability of a trustee to divide trusts most likely include a provision stating the trustee can divide a trust. However, this provision might not exist in a trust created before or shortly after the change in the tax law. This section assists individuals affected by trusts lacking this provision. Typically the trustee making these elections will be the surviving spouse, who will also be named as the lifetime income beneficiary of the trust. Because the surviving spouse is also a beneficiary, she may benefit personally from the election. Subsection (a) states nonetheless a trustee can split the trust to make tax elections even though the trustee, in the trustee's dual status of beneficiary, might personally benefit from the election.

This section follows Washington legislation.

Section 8

This section states that certain asset distribution provisions applicable to the administration of a probated estate also apply to the administration of a revocable trust following the death of the settlor of the trust. The provisions that apply are: AS 13.16.540, Distribution; order in which assets appropriated; abatement. AS 13.16.545, Right of retainer. AS 13.16.550, Interest on general pecuniary devise. AS 13.16.560, Distribution in kind; valuation; method; and AS 13.38.030(a), a provision pertaining to when an income beneficiary becomes entitled to the income from a trust.

Section 9

This section relates back to Sections 6 and 7. Section 9 describes those individuals who for some unforeseen reason might want to elect out of these sections. While it can be fairly stated no one aware of the tax implications of electing out would do so, this section nonetheless defines who the "parties in interest" would be if a decision to opt out is made.

Section 10

This section provides that in those trusts where the spouse is entitled to all the income earned by a trust paid no less frequently than annually, and a marital deduction is claimed for the trust, the spouse has the power to require the trustee to make the trust assets produce income. This simple provision is a required statement in all trusts intending to qualify for the marital deduction. This section provides the required language for those trusts lacking this provision.

Section 11

This section ends the confusion over the ability to transfer real property to or from a trust in the name of the trust, whether or not the trustee is actually named on the deed. In addition, this section provides protection for good faith purchasers who purchase property held in the name of a trust.

HB

288

SENATE COMMITTEE REPORT

DATE: 3/2/00

FURTHER: Finance

DATE TURNED
IN TO OFFICE: ____________________

Judiciary Committee considered CS FOR HOUSE BILL NO. 288(JUD)

"An Act relating to the creation of an aggravating factor for the commission of domestic violence in the physical presence or hearing of a child."

and recommends:

[X] be replaced with S CS CSHB 288 (Jud)

[ ] adopt **previous** ____ CS ____________________(________)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by ____________________ Committee

[ ] further referral to the ____________________ Committee

Senate Bill:
[X] same title
[ ] new title
House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR#_____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*NR*	*DNP*	*AM*
[signature]	✓	[signature] Ellis	✓		
Rick Halford	✓				
CHAIR: [signature] Taylor	✓	*CHAIR:*			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal
COURT	2/25/00	✓	
CORRECTIONS	2/25/00	✓	
LAW	2/4/00	✓	
PUBLIC SAFETY	2/4/00	✓	
ADMINISTRATION	2/4/00	✓	

[ ] **APPROPRIATION -- no fiscal note**

***include fiscal notes accompanying Governor's bill**

FISCAL NOTE

No: 6

STATE OF ALASKA
2000 Legislative Session

Bill Version: CSHB 288(JUD)
(H) Publish Date: 2/25/00

Revision Date		Dept. Affected	Alaska Court System
Title	Aggravating Factor for Domestic Violence Committed in the Presence of a Child	BRU	Alaska Court System
		Component	Trial Courts
Sponsor	Representative Kott		
Requester	House Judiciary	Component Serial No.	769

Expenditures/Revenues *(Thousands of Dollars)*

OPERATING EXPENDITURES	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE *(Thousands of Dollars)*

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

Estimate of any current year (FY99) cost: *None*

POSITIONS

Full-time						
Part-time						
Temporary						

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

House Bill 288 adds an aggravating factor to a felony domestic violence crime if the crime was committed in the physical presence or hearing of a child. Although this bill may result in more lengthy sentencing hearings in some cases, the number of cases is too speculative to support a fiscal note.

Prepared by:	Doug Wooliver, Administrative Attorney	Phone:	264-8265
Agency	Alaska Court System	Date/Time:	2/16/00 11:40 AM
Approved by:	Stephanie J. Cole, Administrative Director	Date	2/16/00
Agency	Alaska Court System		

(Rev 1/99)

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No: 5

FISCAL NOTE

Bill Version: CSHB 288 (JUD)
(H) Publish Date: 2/25/00

STATE OF ALASKA
2000 LEGISLATIVE SESSION

Revision Date/Time (Note if correction) Feb. 19, 2000
Title: An act relating to the creation of an aggravating factor for the commission of domestic violence
Sponsor: Representative Kott
Requester: House Finance Committee

Dept. Affected: Department of Corrections
BRU: Administration and Operations
Component: All
Component No. #0694

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		24.0	24.0	24.0	24.0	24.0
TOTAL OPERATING	0.0	24.0	24.0	24.0	24.0	24.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF		24.0	24.0	24.0	24.0	24.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	24.0	24.0	24.0	24.0	24.0

Estimate of any current year (FY2000) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

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

See attached analysis.

Prepared by: Candace Brower
Phone: 465-3307
Division: Commissioner's Office
Date/Time: 2/21/00 11:01 AM
Approved by Commissioner Margaret M. Pugh Margaret M. Pugh
Date: 2-21-00
Agency: Dept. of Corrections

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FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION
DEPARTMENT OF CORRECTIONS

BILL NO. CS HB 288 (HFIN)
PAGE 2 of 2
DATE 2/21/00

Assumptions:

1. The Department of Corrections' data show that in 1999 approximately 2365 prisoners were admitted to correctional facilities on domestic violence charges. Of those admissions, 268 were charged with felony assault and 2097 with misdemeanor assault. The Department of Law reports that they anticipate 75 convictions for felony domestic violence assault in calendar year 1999. This number is based on convictions over the past 3 years.

2. Assuming 65% of those incidents occured in the physical presence of children, this bill would affect 49 cases.

3. Assuming that perhaps one-half of those 49 would be presumptive cases affected by aggravating factors, that impacts 25 defendents.

4. Assuming 20% of those would result in increased sentences of approximately three months, (60 days to serve) the final number actually being impacted would be approximately 5. Since these cases are felony domestic violence, some may be ineligible to furlough into the community because of their risk factor, so the cost of incarceration for those inmates would be at the institutional rate which is currently $110.73 per day. Three out of the five will possible be furloughed to a CRC at a cost of $59.61 per day. The cost of care for the two inmates, serving 60 days each at a cost of $110.73/day is $13,288. The cost of care for the three inmates serving 60 days each at a cost of 59.61/day is $10,730. The total fiscal impact to the Department of Corrections will be approximately $24,000 per year beginning in FY 02, since the aggravator would not be served until after FY01.

No: 4

FISCAL NOTE

Bill Version: HB 288
(H) Publish Date: 2/4/00

STATE OF ALASKA
2000 LEGISLATIVE SESSION

Revision Date/Time (Note if correction)
Title "... to the creation of an aggravating factor for ... ... domestic violence in the physical presence of a child."
Sponsor Representative Kott
Requester House HESS Committee

Dept. Affected Law
BRU Criminal Division
Component 1st-4th Judicial Districts; Criminal Appeals/Special Litigation
Component No. 2198-99;2201;03;61;79

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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2000) cost:

POSITIONS

Full-time						
Part-time						
Temporary						

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

HB 288 creates an aggravating factor for the commission of domestic violence in the physical presence of a child.

This new aggravator would apply to felony domestic violence cases. Felony domestic violence cases are already taken very seriously by the Department of Law's prosecutors, and many have other aggravating factors. While a new aggravating factor will require putting forward additional evidence to prove it, the department anticipates any fiscal impact from passage of this bill to be minimal.

Prepared by: Joan M. Kasson — Phone 465-5370
Division: Attorney General's Office — Date/Time 1/31/00, 10:32 AM
Approved by Commissioner: Bruce M. Botelho, Attorney General — Date 1/31/00
Agency: Department of Law

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LAW

No: 3

FISCAL NOTE

Bill Version: HB 288
(H) Publish Date: 2/4/00

STATE OF ALASKA
2000 LEGISLATIVE SESSION

Revision Date 1/27/00
Title Children Witnessing Domestic Violence
Sponsor Representative Kott
Requester H. HES

Dept. Affected Public Safety
BRU CDVSA
Component: CDVSA
Component No. 521

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						
TOTAL OPERATING						

CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2000) cost: 0.0

POSITIONS

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

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

This bill would not impact our budget.

Prepared by: Royce Weller, Special Assistant
Phone 465-4322
Division Office of the Commissioner
Date/Time 1/28/00 12:00 PM
Approved by: D. L. Smith
Date 1-31-00
Agency Commissioner Ronald L. Otte, Dept. of Public Safety

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No. 2

FISCAL NOTE

Bill Version: HB 288

(H) Publish Date: 2/4/00

STATE OF ALASKA
2000 LEGISLATIVE SESSION

Revision Date:
Title: "An Act relating to the creation of an aggravating factor for the commission of domestic violence in presence of child"
Sponsor: Representaive Kott
Requestor: (H) HESS

Department Affected: Administration
BRU: Legal and Advocacy Services
Component: Public Defender Agency

COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2 003	FY 2004	FY 2005	FY 2006
PERSONAL SERVICES	**	**	**	**	**	**
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	**	**	**	**	**	**
CAPITAL EXPENDITURES	**	**	**	**	**	**
CHANGE IN REVENUES ( )	**	**	**	**	**	**

FUND SOURCE: (Thousands of Dollars)

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

Estimate of any current year (FY 00) cost: $ -0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

See attached.

Prepared by: Barbara Brink, Director
Division: Public Defender Agency
Phone: (907) 264-4414
Date:

Approved by Commissioner: Robert Poe, Jr. [signature]
Agency: Department of Administration
Date: 1/31/00

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110 A

FISCAL NOTE

STATE OF ALASKA BILL NO. HB 288

2000 LEGISLATIVE SESSION

ANALYSIS: (continued)

This bill would add another aggravating factor to the list of aggravating factors used in sentencing in felony cases. The aggravating factor would provide for increased sentences if the crime involved domestic violence and was committed in the presence of a child under 16. The child would have to be a member of the household at the time of the offense.

The Public Defender Agency will need to do more work in many of its felony sentencing cases if this aggravating factor is established. The prosecution will have to prove the aggravating factor by clear and convincing evidence. Where the facts are at issue, Public Defender attorneys will have to prepare for and conduct evidentiary hearings. If the aggravating factor is established, the court will need to hear argument concerning the weight to be given to the factor in the case before the court.

However, the amount of additional work is difficult to quantify. Although more work will need to be done, we do not anticipate more criminal cases being brought or sentencings conducted as a result of this bill. In addition, it is not possible to say how many felony sentencings this aggravating factor would affect. Because of these uncertainties, we are submitting an indeterminate fiscal note.

CS FOR HOUSE BILL NO. 288(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 2/11/00
Referred: Finance

Sponsor(s): REPRESENTATIVES KOTT, Dyson, Green, Coghill, Murkowski, Croft

A BILL

FOR AN ACT ENTITLED

"An Act relating to the creation of an aggravating factor for the commission of domestic violence in the physical presence or hearing of a child."

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

* **Section 1.** AS 12.55.155(c)(18) is amended to read:

(18) the offense was a felony

(A) specified in AS 11.41 and was committed against a spouse, a former spouse, or a member of the social unit comprised of those living together in the same dwelling as the defendant; [OR]

(B) specified in AS 11.41.410 - 11.41.458 and the defendant has engaged in the same or other conduct prohibited by a provision of AS 11.41.410 - 11.41.460 involving the same or another victim; **or**

(C) specified in AS 11.41 that is a crime involving domestic violence and was committed in the physical presence or hearing of a child under 16 years of age who was, at the time of the offense, a household

within the household.

New Text Underlined *[DELETED TEXT BRACKETED]* member of the victim; in this paragraph, "household member" has the meaning given in AS 18.66.990;)

Alaska State Legislature

House of Representatives

COMMITTEES
JUDICIARY COMMITTEE, CHAIR
RULES
MILITARY & VETERANS AFFAIRS
UTILITY RESTRUCTURING
ETHICS

INTERIM:
10928 EAGLE RIVER RD., SUITE 141
EAGLE RIVER, AK 99577

SESSION:
ALASKA STATE CAPITOL
JUNEAU, AK 99801

THE SEAL OF THE STATE OF ALASKA

Sponsor Statement

HB 288

"An Act relating to the creation of an aggravating factor for the commission of domestic violence in the physical presence or hearing of a child"

This bill lets the courts be tougher on those having been convicted of domestic violence if they committed that crime with their children present. If passed, the criminal justice system would have a new tool to further Alaska's fight against domestic violence and child abuse.

HB 288 creates an aggravated factor when domestic violence is committed in the presence of children who are also household members of the perpetrator. Under current law, a person convicted on domestic violence charges is subject to Alaska's presumptive sentencing rules found in AS 12.55.125. Although the count is given guidelines, under AS12.55.155, it may also consider factors that can mitigate or aggravate the severity of the crime and resulting sentence. Considering the totality of the factors, the court may adjust the sentence up to the maximum or down to the minimum term of imprisonment prescribed by presumptive sentencing laws.

What is an aggravating factor? It is an act or circumstances characterized by some unique feature that enhance the severity of crime. For example that may be what the intentions of the criminal were or it may be the special vulnerability of the victim. This bill would expand the list of aggravating circumstances to include the special vulnerability of children.

Domestic violence is a scourge all over our state and Alaskans are fighting back to protect the lives of the victims and the children involved. HB 288 takes us a step further by recognizing that even if a child is not on the receiving end of the violence, they are profoundly damaged when they become witnesses to parents and caregivers engaging in this abhorrent behavior.

Representative Pete Kott
JUNEAU OFFICE (907) 465-3777 TOLL FREE 1-800-861-KOTT(5688) FAX (907) 465-2819
EAGLE RIVER OFFICE (907) 694-8944 FAX (907) 694-8945 E-MAIL: representative_pete_kott@legis.state.ak.us

Sec. 12.55.155. Factors in aggravation and mitigation.

(a) If a defendant is convicted of an offense and is subject to sentencing under AS 12.55.125 (c), (d)(1), (d)(2), (e)(1), (e)(2), (e)(4), or (i) and

(1) the presumptive term is four years or less, the court may decrease the presumptive term by an amount as great as the presumptive term for factors in mitigation or may increase the presumptive term up to the maximum term of imprisonment for factors in aggravation;

(2) the presumptive term of imprisonment is more than four years, the court may decrease the presumptive term by an amount as great as 50 percent of the presumptive term for factors in mitigation or may increase the presumptive term up to the maximum term of imprisonment for factors in aggravation.

(b) Sentence increments and decrements under this section shall be based on the totality of the aggravating and mitigating factors set out in (c) and (d) of this section.

(c) The following factors shall be considered by the sentencing court and may aggravate the presumptive terms set out in AS 12.55.125 :

(1) a person, other than an accomplice, sustained physical injury as a direct result of the defendant's conduct;

(2) the defendant's conduct during the commission of the offense manifested deliberate cruelty to another person;

(3) the defendant was the leader of a group of three or more persons who participated in the offense;

(4) the defendant employed a dangerous instrument in furtherance of the offense;

(5) the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance;

(6) the defendant's conduct created a risk of imminent physical injury to three or more persons, other than accomplices;

(7) a prior felony conviction considered for the purpose of invoking the presumptive terms of this chapter was of a more serious class of offense than the present offense;

(8) the defendant's prior criminal history includes conduct involving aggravated or repeated instances of assaultive behavior;

(9) the defendant knew that the offense involved more than one victim;

(10) the conduct constituting the offense was among the most serious conduct included in the definition of the offense;

(11) the defendant committed the offense pursuant to an agreement that the defendant either pay or be paid for the commission of the offense, and the

pecuniary incentive was beyond that inherent in the offense itself;

(12) the defendant was on release under AS 12.30.020 or 12.30.040 for another felony charge or conviction or for a misdemeanor charge or conviction having assault as a necessary element;

(13) the defendant knowingly directed the conduct constituting the offense at an active officer of the court or at an active or former judicial officer, prosecuting attorney, law enforcement officer, correctional employee, fire fighter, emergency medical technician, paramedic, ambulance attendant, or other emergency responder during or because of the exercise of official duties;

(14) the defendant was a member of an organized group of five or more persons, and the offense was committed to further the criminal objectives of the group;

(15) the defendant has three or more prior felony convictions;

(16) the defendant's criminal conduct was designed to obtain substantial pecuniary gain and the risk of prosecution and punishment for the conduct is slight;

(17) the offense was one of a continuing series of criminal offenses committed in furtherance of illegal business activities from which the defendant derives a major portion of the defendant's income;

(18) the offense was a felony

(A) specified in AS 11.41 and was committed against a spouse, a former spouse, or a member of the social unit comprised of those living together in the same dwelling as the defendant; or

(B) specified in AS 11.41.410 - 11.41.455 and the defendant has engaged in the same or other conduct prohibited by a provision of AS 11.41.410 - 11.41.460 involving the same or another victim;

(19) the defendant's prior criminal history includes an adjudication as a delinquent for conduct that would have been a felony if committed by an adult;

(20) the defendant was on furlough under AS 33.30 or on parole or probation for another felony charge or conviction that would be considered a prior felony conviction under AS 12.55.145 (a)(1)(B);

(21) the defendant has a criminal history of repeated instances of conduct violative of criminal laws, whether punishable as felonies or misdemeanors, similar in nature to the offense for which the defendant is being sentenced under this section;

(22) the defendant knowingly directed the conduct constituting the offense at a victim because of that person's race, sex, color, creed, physical or mental disability, ancestry, or national origin;

(23) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the delivery of a controlled substance under circumstances manifesting an intent to distribute the substance as part of a commercial enterprise;

(24) the defendant is convicted of an offense specified in AS 11.71 and the

offense involved the transportation of controlled substances into the state;

(25) the defendant is convicted of an offense specified in AS 11.71 and the offense involved large quantities of a controlled substance;

(26) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance that had been adulterated with a toxic substance;

(27) the defendant, being 18 years of age or older,

(A) is legally accountable under AS 11.16.110 (2) for the conduct of a person who, at the time the offense was committed, was under 18 years of age and at least three years younger than the defendant; or

(B) is aided or abetted in planning or committing the offense by a person who, at the time the offense was committed, was under 18 years of age and at least three years younger than the defendant;

(28) the victim of the offense is a person who provided testimony or evidence related to a prior offense committed by the defendant;

(29) the defendant committed the offense for the benefit of, at the direction of, or in association with a criminal street gang.

(d) The following factors shall be considered by the sentencing court and may mitigate the presumptive terms set out in AS 12.55.125 :

(1) the offense was principally accomplished by another person, and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim;

(2) the defendant, although an accomplice, played only a minor role in the commission of the offense;

(3) the defendant committed the offense under some degree of duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but which significantly affected the defendant's conduct;

(4) the conduct of a youthful defendant was substantially influenced by another person more mature than the defendant;

(5) the conduct of an aged defendant was substantially a product of physical or mental infirmities resulting from the defendant's age;

(6) in a conviction for assault under AS 11.41.200 - 11.41.220, the defendant acted with serious provocation from the victim;

(7) except in the case of a crime defined by AS 11.41.410 - 11.41.470, the victim provoked the crime to a significant degree;

(8) [Repealed, sec. 42 ch 143 SLA 1982].

(9) the conduct constituting the offense was among the least serious conduct included in the definition of the offense;

(10) before the defendant knew that the criminal conduct had been discovered, the defendant fully compensated or made a good faith effort to fully compensate the victim of the defendant's criminal conduct for any damage or injury sustained;

(11) the defendant was motivated to commit the offense solely by an overwhelming compulsion to provide for emergency necessities for the defendant's immediate family;

(12) the defendant assisted authorities to detect, apprehend, or prosecute other persons who committed an offense;

(13) the facts surrounding the commission of the offense and any previous offenses by the defendant establish that the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment;

(14) the defendant is convicted of an offense specified in AS 11.71 and the offense involved small quantities of a controlled substance;

(15) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance, other than a schedule IA controlled substance, to a personal acquaintance who is 19 years of age or older for no profit;

(16) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the possession of a small amount of a controlled substance for personal use in the defendant's home;

(17) in a conviction for assault or attempted assault or for homicide or attempted homicide, the defendant acted in response to domestic violence perpetrated by the victim against the defendant and the domestic violence consisted of aggravated or repeated instances of assaultive behavior.

(e) If a factor in aggravation is a necessary element of the present offense, or requires the imposition of a presumptive term under AS 12.55.125(c)(2), that factor may not be used to aggravate the presumptive term. If a factor in mitigation is raised at trial as a defense reducing the offense charged to a lesser included offense, that factor may not be used to mitigate the presumptive term.

(f) If the state seeks to establish a factor in aggravation at sentencing or if the defendant seeks to establish a factor in mitigation at sentencing, written notice must be served on the opposing party and filed with the court not later than 10 days before the date set for imposition of sentence. Factors in aggravation and factors in mitigation must be established by clear and convincing evidence before the court sitting without a jury. All findings must be set out with specificity.

(g) Voluntary alcohol or other drug intoxication or chronic alcoholism or other drug addiction may not be considered an aggravating or mitigating factor.

(h) In this section, "serious provocation" has the meaning given in AS 11.41.115(f).

Sec. 12.55.165. Extraordinary circumstances.

(a) If the defendant is subject to sentencing under AS 12.55.125 (c), (d)(1), (d)(2), (e)(1), (e)(2), (e)(4), or (i) and the court finds by clear and convincing evidence that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155 or from imposition of the presumptive term, whether or not adjusted for aggravating or mitigating factors, the court shall enter findings and conclusions and cause a record of the proceedings to be transmitted to a three-judge panel for sentencing under AS 12.55.175 .

HB 294

STATE OF ALASKA

Tony Knowles, Governor
Ronald L. Otte, Commissioner

DEPARTMENT OF PUBLIC SAFETY

DIVISION OF ADMINISTRATIVE SERVICES

P.O. BOX 111200
JUNEAU, ALASKA 99811-1200

PHONE: (907) 465-4336
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February 28, 2000

The Honorable Robin Taylor
Chair, House Judiciary Committee
State Capitol, Room 30
Juneau, AK 99801

Dear Senator Taylor:

This is to request a hearing of SB 201, "An act relating to violations of an order to submit to deoxyribonucleic acid (DNA) testing, to court orders and conditions of parole to collect samples for DNA testing, to removal of material from the DNA identification registration system; and to the collection and processing of samples from certain burglary perpetrators for the DNA identification registration system; and providing for an effective date." DNA identification is an increasingly effective tool for law enforcement investigation. This bill would expand the State's ability to use this method for detecting and abating the conviction of serious crimes by allowing the State to obtain DNA samples from convicted burglars.

In 1995, Alaska adopted a DNA identification registration system. In this program, persons convicted of most felony offenses against a person, and minors 16 years of age or older adjudicated delinquent for similar crimes, must provide a DNA sample to the Department of Public Safety for testing. Most other states in the country have a similar system of obtaining DNA samples from persons convicted of serious crimes. Since 1995, the technology and research into the uses of this information has grown rapidly. Research in other states into the criminal history of persons convicted of homicide and serious sexual assault has shown that over half the persons convicted of homicide or sexual assault were convicted of burglary before their convictions for the more serious crimes. DNA information from burglary convictions would be invaluable to law enforcement in the investigation of subsequent, more serious crimes against a person.

The bill also allows juvenile and adult correctional, probation, and parole officers and peace officers to collect oral DNA samples. The collection technology has improved so that a simple, inexpensive, non-obtrusive kit allows the tested person to take an oral swab without the need of a medical professional. If a blood sample is required, it would still be taken by a medical professional.

Penalties are provided for failure to cooperate with these sample requests. The bill also clarifies the procedures for removal of DNA material from the identification registration system, specifying that a court order is necessary for such removal.

Your consideration of this request is greatly appreciated.

Sincerely,

Kenneth Bischoff

Kenneth Bischoff
Director

Past Criminal History Offenses
Of Offenders Matched in Sexual Assault and Homicide Investigations

The Criminal history records were pulled on any offender that was involved in an offender to casework match with the Florida Department of Law Enforcement's Convicted Offender DNA Database. The majority of these matches were to sexual assaults and homicides.

The percentages do add up to more than 100% due to the fact that some of the offenders and committed one or more of the offenses noted.

OFFENSE	%
Firearm Possession	9%
Database Collection Offense	18% *
Drug Charge	29%
Robbery	33%
Grand Theft	33%
Burglary	52% **

*The definition of Collection offense is past criminal behavior that corresponded to the current crimes for which we collect. The 18 % on this category means that there were only 18 % of the offenders that had ***only*** crimes we collect for in their criminal history

**This high percentage indicates to our system that we need to add at least burglary convictions and also work burglary crime scene evidence for DNA.

Criminal History Activity of Offenders Matched to Sexual Assaults and Homicides in the State of Florida

(Updated 1/26/99)

The following numbers represent the breakdown of offenses identified in the criminal history of offenders we have matched to sexual assaults and homicide cases. You will notice that the % totals add up to be more than 100, this is because some offenders have had one or more of the specified offenses. It is interesting to note that there seem to be 5main categories of crimes. The state of Florida collects for 6 conviction offenses, sexual assault, lewd and lascivious, home invasion robbery, aggravated battery, carjacking and homicide, only 16% of the offenders in this study only had these 6 offenses in their criminal history.

Firearm Possession	11%
Drug Charge	30%
Robbery	34%
Grand Theft	34%
Burglary	52%

FLORIDA DEPARTMENT OF LAW ENFORCEMENT
DNA DATABASE

BLOOD COLLECTION STATUTES
VS
UNSOLVED CRIME HITS

Updated 8/26/99

The following data compares the casework to offender hits the state of Florida has had with the statutes requiring blood collection.

Solved Crimes	Blood Collection Statute	
Sexual Assault	Sexual Assault	(33)
Sexual Assault	Aggravated Battery	(18)
Sexual Assault	Lewd and Lascivious	(11)
Sexual Assault	Car-Jacking	(1)
Sexual Assault	Homicide	(6)
Burglary	Sexual Assault	(6)
Sexual Assault	Home Invasion	(1)
Homicide	Sexual Assault	(2)
Homicide	Aggravated Battery	(2)
Homicide	Home Invasion	(1)
Homicide	Lewd and Lascivious	(3)
Burglary	Lewd and Lascivious	(3)
Burglary	Homicide	(2)
Burglary	Aggravated Battery	(3)

Criminal History Activity of Offenders Matched to Sexual Assaults and Homicides in the State of Florida

(Updated 1/26/99)

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Firearm Possession	11%
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Burglary	52%

August 16, 1999

Police Chiefs Join in Call for More DNA Sampling

Related Articles
- New York Plan Widely Expands the Sampling of Criminals' DNA (Aug. 7)
- DNA Traces Link Suspect to 17 Rapes, Police Say (April 9)

Forum
- Join a Discussion on Issues in Law Enforcement

By JAYSON BLAIR

The leadership of a worldwide association of police agencies has called for collecting DNA samples from all crime suspects as soon as they are arrested.

The resolution was pushed by New York City's Police Commissioner, Howard Safir, who told the group's executive board that collecting DNA from suspects when they were arrested was much more important than collecting it just from some felons after they were convicted, because the broader database would solve more crimes before the criminals it uncovered could strike again.

Safir is a member of the executive committee of the group, the International Association of Chiefs of Police. The committee unanimously endorsed a resolution calling on the Federal and state governments to pass broad DNA collection plans at a meeting at New York City Police Headquarters on Saturday. Safir proposed such a procedure for the city last year.

Law enforcement officials at the association's meeting said the expansion of New York State's database of convicts would help catch some suspects who had serious felony convictions. But officials said they needed to collect DNA at arrests to catch more violent criminals after their first serious offense.

Safir said the value of a broad DNA database was demonstrated by the case of a man who this year was accused of sexually assaulting 51 women in the Bronx over five years. If the early collection plan had been in place, the Commissioner said, the police would have had DNA from the suspect, who had a criminal record, on file. They would then have been able to identify him after the first attack, Safir said, and "we would have had 50 less rapes."

Safir said in an interview that he supported destruction of DNA samples after they were entered into a database so they could not be used to disseminate detailed genetic information on suspects. The limited information taken from a DNA sample and put into a database is sufficient to allow law enforcement officials to match against a sample, like one collected at a crime scene.

The Commissioner also said that under his plan, information put in the database would be removed if charges were dropped or a suspect was acquitted.

The proposed early collection procedure goes far beyond a DNA database program passed by the New York State Legislature earlier this month. The state program will require felons convicted of any of a long list of crimes, including murder, manslaughter, sexual assault, robbery and burglary, to provide DNA samples. Most other states collect DNA samples only from limited categories of convicted criminals, usually including sex offenders.

"I think it's a terrific first step," Safir said of the new state program. "But we need more."

Norman Siegel, the executive director of the New York Civil Liberties Union, who had expressed misgivings about possible abuses of privacy even in a DNA collection program limited to convicted felons, said civil libertarians would vigorously oppose collection from unconvicted suspects.

He said the association's proposal "underscores the threat to civil liberties posed by the potential use of DNA by law enforcement zealots." He maintained that Safir's proposal "ignores privacy concerns and violates fundamental Fourth Amendment principles that protect individual privacy from unreasonable searches and seizures by police agencies."

"In less than a decade," he said, "we seem to be moving from collecting DNA from convicted killers to the collection of those samples from the innocent."

Siegel said that broader collection laws would be more vulnerable to legal attacks than laws limited to the kinds of offenders most likely to be recidivists.

But the action by the influential police chiefs' group provides support for broader collection measures.

The resolution was "a clear mandate" from the association's leadership supporting the expansion of the use of DNA as a tool for law enforcement, said Ronald S. Nueber, the president of the association, which represents 12,500 police agencies in 112 countries.

"We have to do a better job of taking advantage of tools that make it easier for law enforcement to solve crimes, and DNA collection is a very important tool for that end," added Nueber, who is the Chief of Police in St. Peters, Mo.

"This is a good move," said James W. McMahon, the Superintendent of the New York State Police, who is also a member of the association's executive committee.

The resolution urges the Federal Government to create a national DNA database based on samples collected at the time of arrest, a concept that the Justice Department is studying. The resolution also called on states to pass laws supporting DNA collection at arrest.

Association officials said the resolution would be brought before the group's full membership for a vote at its annual convention in Charlotte, N.C., in October. Michael D. Robinson, vice president of the association and director of the Michigan State Police, said the membership was expected to support the resolution.

Anchorage Police Department

Service Since 1921

From: Detective Linda Branchflower
West District
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To: Dep. Comm. Del Smith

Date: 09-24-99

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No. of Pg: 1 (Including Cover Sheet)

Del - In 1995 Doris Hainta, an Indian female, age 33, was found raped and strangled near Ship Creek in Anchorage. At the time there were few clues, except that a blue van was seen in the area where the body was later discovered. Until last year, the case was unsolved. Last year a detective from North Carolina investigated a case where a young prostitute was raped and murdered and put in a car and the body burned. Gene Poirer (he would have been 28 at the time of the Anchorage murder), was arrested for the murder in North Carolina. Realizing that this may not be Poirer's first murder, the North Carolina detective questioned Poirer about where he lived in the past. He said that he lived in Anchorage. Further, the detective had blood drawn from Poirer. After contacting APD Detectives, Poirer's blood was matched through DNA testing to DNA found at the crime scene in Anchorage. APD now considers the case solved.

Crime-Fighting in the Blood

PUBLIC OFFICIALS OF THE YEAR 1999

JAMES T. MOORE

Just five years ago, Florida had a new crime-fighting tool, a DNA database containing samples from convicted sex offenders and murders. But it also had a crisis. Crippled by a lack of funds and staff to manage it, the database was too small to be useful. Only once had the database successfully matched crime scene evidence with a suspect. A state audit suggested that lawmakers consider scrapping the program altogether.

To Tim Moore, Florida's law enforcement commissioner, killing the database seemed a crime of bureaucratic impatience. Moore knew that, beyond money, the biggest thing this cutting-edge tool needed was time. It would take years for the database to grow to a viable size. And its targets—recidivist criminals—hadn't yet committed crimes again because most were still behind bars. "The answer is not to just quit now because you don't have it at 100 percent," Moore said at the time. "We're committed to the DNA database. It will make a difference."

In 1995, Moore persuaded lawmakers to hang tight. Not only did they boost the database's funding but they expanded the list of crimes for which convicts had to give blood samples. The results have been impressive. With some 60,000 samples, Florida's DNA database is today considered the nation's best. Already, it has helped in more than 300 investigations. Of all the suspect matches made from DNA databases around the country, more than one-third came from Florida alone.

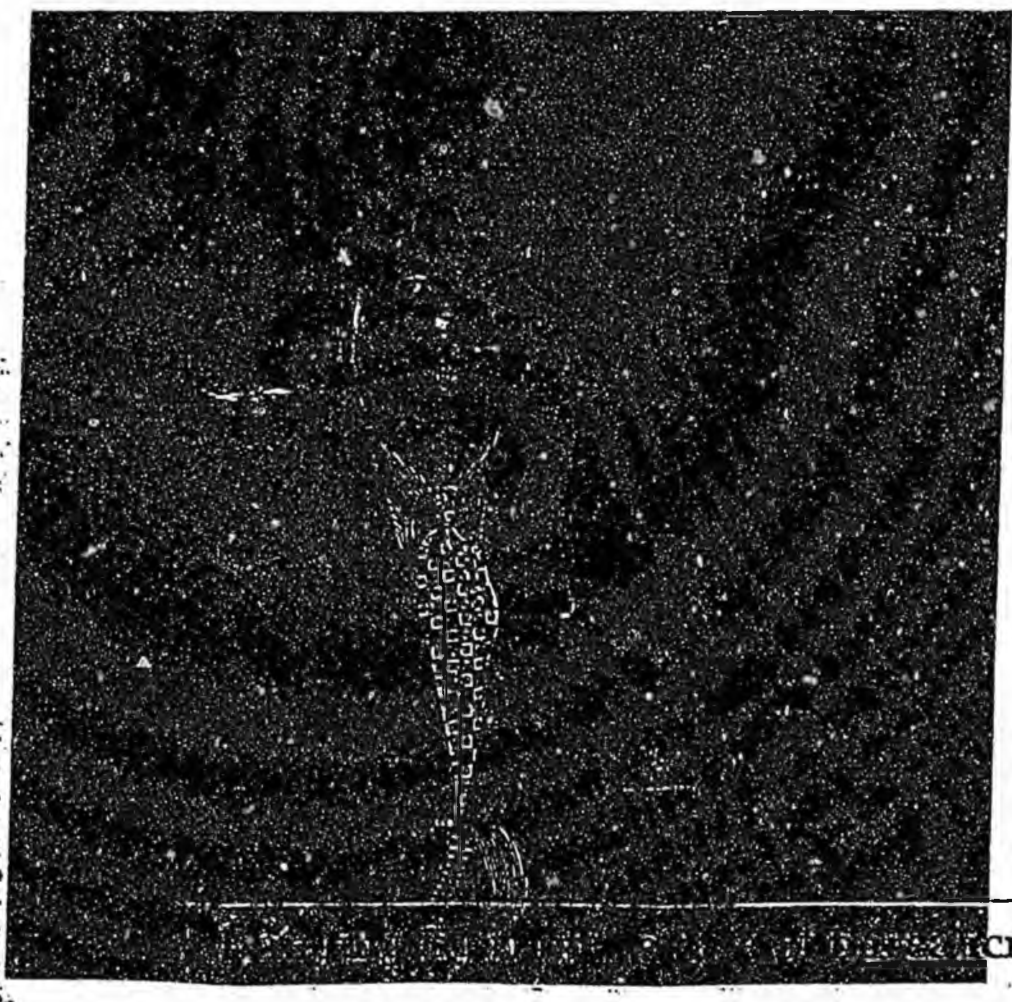
Moore's embrace of new techniques and technologies—often before their time has come—has been a hallmark of his 11 years as Florida's top crime-fighter. It is a major reason why Florida's Department of Law Enforcement is today one of the most advanced and respected in the nation. While not a scientific whiz himself, Moore trusts those on his staff who are. And he throws his weight behind good ideas when he sees them. "He's an entrepreneurial public manager who takes risks, but not inordinate risks," says Dominic Calabro, president of the nonpartisan Florida Tax Watch. "He knows just how far to push."

No doubt Moore knows the department he leads as well as anyone ever could. He has spent his entire 26-year career at FDLE, working up the ladder at almost every job available (he started as a data entry clerk working nights in college). That head-to-toe familiarity with FDLE came in handy a few years back as Moore set out to restructure his agency around a performance measurement model.

At the time, the legislature was just starting to phase in its new system of performance-based budgeting. While many agency heads feared the change, Moore volunteered to make FDLE one of the first to go. The shift, in his view, was to be seen not as a threat but an opportunity. Moore flattened the department's chain-of-command, and gave regional directors more autonomy. To ensure accountability, he signed performance contracts between himself and his managers. As other state agencies now make the transition themselves, they are looking to FDLE as a model.

Meanwhile, other law enforcement agencies are watching what Moore does on the next crime frontier: computer crime. Long before the Internet gave criminals a new outlet, Moore made Florida the first state to create a forensic unit to pluck crime evidence out of their hard drives. Now, FDLE has set up a computer crime center with agents, analysts and computer experts dedicated solely to pursuing criminals who use modems rather than guns. "Whether it's someone's server getting hacked in to, or his identity getting stolen, computer crime will be the crack cocaine of the 2000s," Moore says. "The time to worry about it is not when you're up to your eyeballs in it."

—*Christopher Swope*



...cratic impatience.

Its Uses Aren't Restricted to Labs

DNA Goes Mainstream

By Abraham McLaughlin
The Christian Science Monitor

"(DNA) shows enormous promise for human benefit, but in almost every instance it can also be a tool for questionable or immoral behavior." — *Mark Hanson*

BOSTON, Oct. 21 — It used to be that the science of genetics—the study of all those double helixes of DNA—thrived only in the realm of bleached lab coats and dry scientific journals. But not anymore.

DNA has gone decidedly mainstream. Today, the people who grapple with this subject—one that probes the molecules that hold the very blueprint for organic life—come from law offices and police stations, fertility clinics and jury boxes.

Moreover, the growing reach of DNA is forcing ordinary citizens to confront the double-edged nature of genetic science. Indeed, the wider application of DNA research is raising a host of concerns, from tough privacy issues to questions about the dangers of predicting that offspring of certain parents will be predisposed to disease.

"It shows enormous promise for human benefit, but in almost every instance it can also be a tool for questionable or immoral behavior," says Mark Hanson, an associate at The Hastings Center, a bioethics think tank in Garrison, N.Y. "It's a double-edged sword in just about any application you can think of."

On the positive side, DNA research is an aid in a growing number of arenas.

Used as a Crime-Fighting Tool

Its use as a crime-fighting tool is skyrocketing. The FBI's new nationwide DNA database will help catch criminals on the basis of a few strands of hair or drops of sweat they leave behind.

It's helping to set free those wrongly convicted of crimes, including a handful of death-row inmates.

It's helping moms determine, with little doubt, the identity of their children's father, thus lowering the number of paternity suits.

A case in Chicago dramatically illustrates the promise of DNA.

In the days after the August rape and murder of a young girl, police charged two boys, ages 7 and 8, with the crime, making national headlines. But their case fell apart and languished for months.

Then a DNA test of evidence at the scene made a near-match to a convict named Eddie Durr. Police suspected a close relative of Durr's had committed the crime. His brother gave a DNA sample and is now charged with the crime, as well as with two other rapes.

DNA Becomes the Main Clue

Why police waited so long to test the evidence isn't clear—and may point to the time and expense that DNA testing requires. But in the end, DNA was the main clue to finding a new suspect. Indeed, Florida tops US states with 155 "cold hits" from its database in cases where police had no other leads.

FBI officials expect more matches like these, now that the DNA databases of all 50 states are being linked. The move, announced last week, mimics a database in Great Britain. Since going online in 1995, the British DNA files have matched 28,000 people to crime scenes.

But Britain has few of the civil-rights safeguards enshrined in the United States Constitution. The American database, moreover, has many skeptics.

Currently the database is made up of samples from convicts. Each state decides which crimes—from burglary to rape or murder—qualify an offender to give a blood, saliva, or other sample.

For critics of a DNA database, it's a privacy issue that could someday affect more than just convicts.

What About the Others?

"It's invading their privacy because they're more likely to commit crimes. If you open that door, why not all men ages 16 to 36? Or all welfare recipients?" says Ruth Hubbard, biology professor emeritus at Harvard University in Cambridge, Mass. Indeed, one British police group is calling for all residents to submit DNA samples.

There's also the possibility that research would be done on the inmates' samples—and lead to discrimination based on people having a kind of "criminal" gene.

But DNA testing is also helping to prove innocence. Some 55 people, including several death-row inmates, have been exonerated with its help. Also, a recent FBI report on prime suspects found that a full 25 percent of those who were DNA-tested had no link to the crime.

In a more unusual application of DNA testing, it has helped Maine state game wardens nab 12 poachers this year. In one case, wardens raided a resident's freezer and found slabs of deer meat. The suspect said it was from a deer he shot legally last year. But DNA tests showed the meat was from two deer. He then admitted to killing a deer this year, illegally.

A Question of Paternity

Yet there's more to DNA testing than solving crimes. Take the fast-growing Houston-based paternity service, Identigene. Its 800 number is advertised on billboards from Los Angeles to Atlanta. For $475, a client can confirm paternity within a week.

The 300 to 400 calls the firm gets each day come from all kinds: fathers who want to be sure a child is biologically theirs before they commit to raising it, adults who have doubts about their parentage, or mothers who want to force a father to pay child support.

DNA testing is encouraging many reluctant fathers to settle out of court. In one Massachusetts county that includes Boston, 3,430 paternity suits were filed in 1996. This year, the total may be half as many.

But in parenting, breakthroughs in DNA research are also causing much debate. Scientists' recent declaration that certain genes may make their bearers—and their offspring—predisposed to anxiety or certain diseases makes for tough decisions, especially for aspiring parents.

If parents have a child—knowing the child is at risk for a disease or bad behavior—are they responsible for the problem? Could they even be charged with child abuse? And should an insurer have to pay for treatment for that child? These are some of the questions on the horizon.

Some couples are glad to know the information, so they can act accordingly. But the ominous part of genetics for some ethicists is the iron-clad description of destiny—medical or behavioral.

"Somehow, concrete information about the kind of person we're predisposed to be runs counter to our sense that our futures are open," says Mr. Hanson of the Hastings Center. "The biological equivalent of damnation of the soul is something people want to resist."

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