

ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672

10600 SENATE JUDICIARY

(vii) A violation of 1979 PA 53, MCL 752.791 to 752.797.

(b) "Instrumentality of a crime" means any property, other than real property, the use of which contributes directly and materially to the commission of a crime.

(c) "Person" means an individual, corporation, partnership, or other business entity, or an unincorporated or voluntary association.

(d) "Proceeds of a crime" means any property obtained through the commission of a crime, including any appreciation in the value of the property.

(e) "Security interest" means any interest in real or personal property that secures payment or performance of an obligation.

(f) "Substituted proceeds of a crime" means any property obtained or any gain realized by the sale or exchange of proceeds of a crime.

History: Add. 1988, Act 104, Eff. June 1, 1988 ;—Am. 1993, Act 245, Eff. Apr. 1, 1994 ;—Am. 1995, Act 229, Eff. Jan. 1, 1996 ;—Am. 1996, Act 327, Eff. Apr. 1, 1997 ;—Am. 1997, Act 156, Eff. Mar. 1, 1998 ;—Am. 1998, Act 141, Eff. Sept. 1, 1998 ;—Am. 1998, Act 547, Eff. Mar. 23, 1999 ;—Am. 2000, Act 184, Eff. Sept. 18, 2000 .

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Wife turns in spouse for child pornography

October 15, 2000

ANCHORAGE--An Anchorage man was arrested after police say his new wife found electronic mail messages suggestive of child pornography on his computer.

Ronald Becker, 37, was arrested Thursday. He was charged with 21 counts related to child pornography. One of the counts, distribution of child pornography, is a felony punishable by up to 10 years in prison. The other 20 counts are for possession.

Police said Becker had 5,000 computer disks and CDs at his home containing sexual images of children.

Becker's wife became suspicious because he was spending an inordinate amount of money. She began nosing around their house and found the suggestive e-mails on his computer, police said.

The woman met her future husband on-line in February and married him a few months later. She went to police in September to report his behavior and they obtained a search warrant.

Becker frequented chat rooms where he posed as a 15-year-old boy, police said.

Becker was convicted of indecent assault involving minors in Pennsylvania in 1992, according to charging documents. The charge was a misdemeanor. He was put on probation and ordered to perform 200 hours of community service.

Becker was being held at the Cook Inlet Pre-Trial Facility.

Bethel Air Terminal holds grand opening

BETHEL--The former Mark Air Terminal in Bethel re-opened Saturday with a new name and a new look.

About 300 people gathered for the opening of the Bethel Air Terminal, said Dwight Lefner, whose company purchased the facility from the state last December.

Pen Air, Frontier Airlines and mail carrier Bel Air moved into the terminal earlier this year. Reeve Aleutian Airways moved into the newly-renovated building Friday.

The 21-thousand-square-foot terminal has been vacant for over three years. Lefner said he's invested \$300,000 in the building. But he said the investment promises to be a good one because passenger service and mail volume is increasing every year.

The renovated building also has a store, a restaurant and an espresso bar.

"We have overhauled completely," said Lefner, owner of Lefner Investments who has lived in Bethel for 32 years. "We are just leasing space and seeing what



happens."

Lefner said he expects a barber shop to move into the building soon.

The state took over the facility after Mark Air filed for bankruptcy.



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Internet service worker charged with sex abuse

June 30, 2000

By BETH IPSEN
Staff Writer

A worker for a local Internet service provider has been indicted on charges of sexual abuse of two 15-year-old girls he met through an Internet chat room.

A 15-member grand jury decided the evidence was sufficient to charge Robert "Shawn" Christian, 22, with three counts of sexual abuse of a minor. The indictment was issued June 21.

Christian, a systems administrator at MosquitoNet, is charged with using the Internet and chat rooms to meet underage females to initiate sexual relationships.

The investigation arose when the sister of the second alleged victim went to police claiming her underage sister and Christian had sex the day before, said Detective Randy Coffey of the Fairbanks Police Department.

The second victim told her sister that she and her boyfriend, Christian, had been meeting every day at lunch for "hugging and kissing" before they had sex May 18, according to the sister's testimony in search warrants.

The first two counts arose later after an investigation, Coffey said. Those charges come from incidents involving a girl Christian allegedly contacted on the Internet when he was still living in Arizona, he said. Christian, now a University of Alaska Fairbanks student, later met the girl and her family when he vacationed in Alaska, Coffey said.

The family then invited Christian to live with them for almost six months in 1997 and 1998 while "he got on his feet in Fairbanks," he said.

Christian was 19 years old at the time he allegedly had a relationship involving sex with the first victim, Coffey said. Police are researching whether he had sexual relationships with minors in Arizona.

"We believe he has made contact with other girls over the Internet," Coffey said. "We're trying to contact them now. We're requesting if anybody has any knowledge to get ahold of us."

Police, with the assistance of an interagency computer crime task force, have seized several computers and countless computer discs and files. However, they're still trying to determine where all the contacts originated, said police Sgt. Dan Hoffman.

"Some of his work on computers seem to be routed through home," he said.

MosquitoNet President Bill St. Pierre said he was surprised by the charges. Christian



has worked for the company about 18 months, he said.

"He's been a real good employee, he's a good guy," St. Pierre said. "I hope there's some confusion here that can be cleared up."

Christian didn't return telephone calls Thursday.

If found guilty of the felony charges, Christian could face up to 10 years in prison for each count, according to the District Attorney's office.

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Internet worker sentenced for sex crimes

March 24, 2001

By BETH IPSEN
Staff Writer

Superior Court Judge Mary Greene sentenced a 22-year-old man she called a sexual predator who met young girls in chat rooms and had cybersex that eventually led to sexual relationships with them, to spend two years in prison Friday.

Local Internet service worker Robert "Shawn" Christian was convicted Dec. 1 of having sex with a 15-year-old girl he met through an Internet chat room, and was acquitted of having sex with another underage girl.

In the case in which he was exonerated, prosecutors claimed he had sex with a 15-year-old girl between November 1997 and 1998 while he was 19 years old. However, a jury convicted Christian of having sex with the other girl two weeks before her 16th birthday when he was 22.

"I've read far too many chat rooms and seen what he has done not to believe he's ... a predator," Greene said.

The sentence of four years, with two suspended, was what Assistant District Attorney Scott Mattern asked for. Greene added five years probation, extensive sex offender treatment and a bevy of other conditions, including a ban on computer use, and a ban on unsupervised contact with any girls under the age of 18. He is currently in a relationship with a 17-year-old who turns 18 on April 3.

Greene said Christian has a sexual boundary issue, evidenced by his having sexual relationships with the first 15-year-old girl and her mother during the same period of time. She also said he has shown a lack of remorse.

"He really thinks he doesn't need to be in jail and it wouldn't do any good," Greene said. The relationships were "more thrill-seeking than anything else," because he knew that the second 15-year-old girl's father was a police officer and it was two weeks before she was considered of age, Greene said.

Defense attorney Mike Kramer asked for leniency because Christian has no prior record and is a productive member of society. He also

accused Fairbanks police of extreme scrutiny because the one 15-year-old girl's father is a Fairbanks police officer.

Greene sees a pattern in Christian's current relationship.

Like the 15-year-old girl that Christian was convicted of having sex with, the 17-year-old girl was forbidden to see Christian, but continued to without her parents' knowledge, Mattern said during the sentencing.

The 17-year-old's mother testified Friday that as soon as she had heard about Christian's conviction, she told the girl and Christian that he was to be "gone from our family's life."

But the girl continued to see Christian in secret.

Police Detective Randy Coffey informed the mother Thursday that the couple was still together.

"I don't understand because she's never lied to us until she met him," the 17-year-old girl's mother said Friday.

After the mother heard her daughter was still seeing Christian, a confrontation broke out between the three. A drama unfolded the morning of the sentencing when the daughter was listed as a runaway.

The mother called the girl's school Friday, only to learn that her daughter had a forged a note to get out of school.

The daughter vehemently testified that it was her choice to pen the note and that Christian has never pressured her into doing anything during their relationship.

The girl emerged from Christian's residence Friday, Coffey testified, and called Alaska State Troopers. Mattern said that troopers are submitting a complaint charging Christian with contributing to the delinquency of a minor by harboring the girl despite efforts by Fairbanks police officers to talk him into giving her up.

Greene scolded Christian for the incident but said it didn't have any bearing on the sentencing.

"If it's one time to behave yourself, it's right before your sentencing," she said.

Defense attorney Kramer questioned the relevance to the "high drama" of the morning events because Christian had already been convicted of the one charge.

"The events today shifted the focus unfairly away from Mr. Christian's rehabilitation potential," Kramer said.



He had asked that Christian only serve 90 days with some "substantial community service" and possibly serve some time during the weekends to ensure he kept his job as a systems administrator at MosquitoNet.

Greene declined.

"Most sexual offenders have pretty good jobs, no crime records," Greene countered. "He seems to be a pretty typical offender."

Christian will remain free for a little while longer, provided he comes up with a \$1,000 bond by Tuesday and \$4,000 more within two weeks while Kramer appeals the case.

If the appeal is denied, Christian could be paroled for good behavior after serving only one-third of the sentence.

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Man charged with sex abuse of teen

Saturday August 28, 1999

Staff report

Alaska State Troopers arrested a man Friday morning on charges that he simulated having sex with a teen-age girl and photographed the act to send over the Internet, according to court documents.

Richard L. Oehrig, 44, has been charged with six felonies, including three counts of sexual abuse of a minor, unlawful exploitation, distributing child pornography and witness tampering.

Troopers said they found nude photographs of the girl on Oehrig's computer, discs and digital camera. He is also accused of soliciting her to have sex with him at his North Pole home. The acts allegedly occurred between January and July.

In one picture -- for which Oehrig allegedly wanted the girl to pose so he could send it to someone over the Internet -- it looks as if he is having intercourse with her, according to court documents. The victim told investigators that although their genitals were touching for that photograph, there was no penetration.

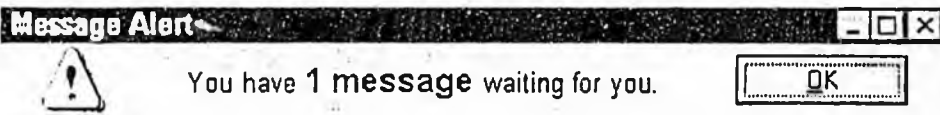
As the case was being investigated, Oehrig allegedly sent a computer note to the victim Aug. 16 telling her to stick to an initial account of what happened: "They don't have a thing unless you change your story."

He also threatened that if she told the truth "all hell breaks loose" and "everyone will suffer," according to court documents.

Oehrig was arrested about 11 a.m. in North Pole. Troopers had requested a warrant because he reportedly asked for a leave of absence from work and was considering leaving the state.

Bail is set at \$50,000, according to Fairbanks Correctional Center staff.

Troopers continue to investigate the case with help from a University of Alaska Fairbanks officer who specializes in Internet crime, according to court documents and UAF police.



Fort Wainwright man charged with sex crimes

January 30, 2000

By Staff report

A Fairbanks grand jury this past week indicted a Fort Wainwright man on charges that he sexually assaulted a teenage girl in North Pole.



Miguel Duque, 36, was indicted on charges of sexual abuse of a minor in the second degree, sexual abuse of a minor in the third degree, second degree sexual assault, and third-degree sexual assault.

Duque had apparently met a friend of the girl's in an Internet chat room, where he went by the name Macdaddy, Alaska State Troopers said.

In October he allegedly drove the girls either to a gravel pit or to the end of a road in North Pole, where he supplied them with alcohol, troopers said. One of the charges alleges that the girl was intoxicated at the time of the assault.

Troopers had thought the man's name might have been "Mike," and they had been looking for him over the past three months. They discovered his identity with the help of tips that came in after they distributed the man's description to the media earlier this month.



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Two Eielson airmen held on sex abuse charges

November 12, 1999

The Associated Press

SOLDOTNA—Two Eielson airmen have been charged with sexual abuse of a minor after allegedly spending a night in a Soldotna hotel room with two underaged girls they met on the Internet.

The suspects, Eielson Air Force Base airmen Angel R. Berrios, 25, and Jeremy Nguyen, 20, were indicted Friday on three counts each of sexual abuse of a minor.

Kenai Superior Court Judge Jonathan Link issued an arrest warrant for the men Tuesday. They were to be held on \$10,000 cash bail.

Neither had been arrested by Wednesday evening, according to Eielson spokesman Master Sgt. Christopher Shock. Much of the base was closed for the Veterans Day holiday Thursday and Shock did not immediately return a phone call seeking comment.

In addition to the abuse charges, the men were indicted on two misdemeanor charges each of furnishing alcohol to a minor.

Nguyen apparently struck up a relationship over the Internet with one of the girls, possibly through a chat room, said Soldotna Police Chief Shirley Warner, who investigated the case.

The two then talked on the telephone and made arrangements to meet at Soldotna's King Salmon Motel over Labor Day weekend, Warner said. Police say Nguyen and Berrios spent the night of Sept. 4 with the girls.

Warner said she could not comment further about the computers that were used or how the men hooked up with the girls over the Internet.

"Since chat rooms have become available, I think this kind of thing happens," she said. "I don't think it's anything new."

Warner said the recent indictments might serve as a wake-up call to families.

"I think this is a case where the information needs to get out to parents that this type of thing happens, so they can provide a safeguard to protect their kids," Warner said.

The indictments came about after the girls' parents started asking questions, Warner said. "We did have some parents who were on the ball and had a suspicion that things were going on and gave us the call," she said.



FORFEITURE IS REASONABLE, AND IT WORKS

Stefan D. Cassella*

Asset forfeiture has become one of the most powerful and important tools that federal law enforcement can employ against all manner of criminals and criminal organizations -- from drug dealers to terrorists to white collar criminals who prey on the vulnerable for financial gain. Derived from the ancient practice of forfeiting vessels and contraband in Customs and Admiralty cases, forfeiture statutes are now found throughout the federal criminal code.

Why do forfeiture?

Federal law enforcement agencies use the forfeiture laws for a variety of reasons, both time-honored and new. Like the statutes the First Congress enacted in 1789, the modern laws allow the government to seize contraband -- property that is simply unlawful to possess, like illegal drugs, unregistered machine guns, pornographic materials, smuggled goods and counterfeit money.

Forfeiture is also used to abate nuisances and to take the instrumentalities of crime out of circulation. For example, if drug dealers are using a "crack house" to sell drugs to children as they pass by on the way to school, the building is a danger to the health and safety of the neighborhood. Under the forfeiture laws, we can shut it down. If a boat or truck is being used to smuggle illegal aliens across the border, we can forfeit the vessel or vehicle to prevent its use time and again for the same purpose. The same is true for an airplane used to fly cocaine from Peru into Southern California, or a printing press used to mint phony \$100 bills.

The government also uses forfeiture to take the profit out of crime, and to return property to victims. No one has the right to retain the money gained from bribery, extortion, illegal gambling, or drug dealing. With the forfeiture laws, we can separate the criminal from his profits -- and any property traceable to it -- thus removing the incentive others may have to commit similar crimes tomorrow. And if the crime is one that has victims -- like carjacking or fraud -- we can use the forfeiture laws to recover the property and restore it to the owners far more effectively than the restitution statutes permit.

Finally, forfeiture undeniably provides both a deterrent against crime and as a measure of punishment for the criminal. Many criminals fear the loss of their vacation homes, fancy cars, businesses and bloated bank accounts far more than the prospect of a jail sentence. In fact, in many cases, prosecution and incarceration are not needed to achieve the ends of justice. Not every criminal act must be answered with the slam of the jail cell door. Sometimes, return of the property to the victim and forfeiture of the means by which the crime was committed will suffice to ensure that the community is compensated and protected and the criminal is punished.

The parade of horrors

The expansion of forfeiture into all of these areas has, of course, been controversial. When laws that were designed to seize pirate ships from privateers are applied, over the course of a decade, to the seizure of homes, cars, businesses and bank accounts, there are a lot of issues to sort out. How do we protect innocent property owners? What procedures afford due process? When does forfeiture go too far, in violation of the Excessive Fines Clause of the Eighth Amendment? The ten forfeiture cases that the Supreme Court has had on its docket in the past five terms are part of this sorting out process. There are certain to be more; and Congress will need to pass legislation to fill in many of the loopholes.

An informed debate on these issues is welcome. The debate is not informed, however, if it is muddled by the misconceptions and plain old-fashioned misstatements that seem to pop up in every article critical of asset forfeiture. Roger Pilon's article, containing the usual parade of horrors, is a good example.

Once again we are told that forfeiture is based on an absurd legal "fiction" that the property is guilty of the crime, which implies that property can be forfeited without proof that a crime was committed by a real live person. We're told that the government can seize property "almost at will," i.e. without due process, and that innocent people find the process so unfair that they walk away from their property without filing claims. And we're told that even when they do file claims, innocent owners just don't have any rights. Let's see if we can't inject a little truth and understanding into the debate on these points.

The legal "fiction"

There are three types of forfeiture under federal law: administrative forfeiture, civil judicial forfeiture, and criminal forfeiture. An administrative forfeiture is essentially a default proceeding. It occurs when property is seized and no one files a claim contesting the forfeiture. By definition, all administrative forfeitures are uncontested. Between 80 (eighty) and 85 (eighty-five) percent of all forfeitures handled by the Department of Justice fall into this category.

If someone does file a claim to the property, the government has a choice (assuming Congress has provided both options by statute). It can file a civil complaint against the property in district court, thus commencing a civil judicial forfeiture; or it can include a forfeiture count in the indictment in a criminal case, which sets the stage for a criminal forfeiture. In 1995, the Justice Department began aggressively training criminal prosecutors in the use of the forfeiture laws, so that now more than half of all contested forfeitures are criminal forfeitures.

Just because a forfeiture is handled administratively or civilly, of course, doesn't mean that there isn't a related criminal case. In all forfeiture cases there must be proof that a crime was committed by someone. In fact, in more than eighty percent of all forfeitures, including administrative and civil forfeitures, there is a parallel arrest and/or criminal prosecution. There wouldn't have been such a wail and cry about forfeiture constituting a violation of the Double Jeopardy Clause a few years ago if that weren't so. (Between the Ninth Circuit's decision in *United States v. \$405,089.23* in 1994 and the Supreme Court's decision putting the double jeopardy issue to rest in *United States v. Ursery*, thousands of federal prisoners filed post-conviction actions alleging that their criminal conviction and the civil forfeiture of their property constituted double jeopardy.)

The legal "fiction" that the property is "guilty" of the crime is simply a shorthand for the way a civil forfeiture case is styled: *United States v. \$405,089.23*, *United States v. 92 Buena Vista Ave.*, and so forth. In legal parlance, the property in such a case is the "defendant." But property doesn't commit crimes; people do. If there isn't proof that a person committed a crime, there is no forfeiture. If our normally verbose legal system styled its civil forfeiture cases to set forth the full legal theory, this would be obvious. The above cases, for example, might have been called *United States v. \$405,089.23 in Proceeds Earned by Charles Arlt From Selling Methamphetamine*; or *United States v. A Residence at 92 Buena Vista Ave. Purchased with Drug Proceeds that Joseph Brenna, a Drug Dealer, Gave to His Girlfriend*.

In short, forfeiture is a way of reaching the property involved in a crime, but the focus is on the crime, without which there can be no forfeiture.

Why do civil forfeiture?

If all forfeitures involve the commission of a crime, and the vast majority involve an arrest or prosecution, why does the government use civil forfeiture at all? It is not, as many contend, because it is necessarily easier. To the contrary, the easiest way to forfeit a criminal defendant's property in many cases is not to file a separate civil action, but to present the forfeiture issue to the same jury that just convicted the defendant in the criminal case. But sometimes, criminal forfeiture isn't available or doesn't make sense.

Take the administrative forfeiture cases for example. There is no point in including a criminal forfeiture count in an indictment and presenting the issue to a jury if the defendant is not going to contest the forfeiture. If a defendant facing criminal conviction for drug trafficking thinks it pointless to contest the forfeiture of the cash seized from him as drug proceeds at the time of his arrest, it is equally pointless to clutter the indictment with a forfeiture count when administrative forfeiture will answer.

What about the contested forfeitures that are done civilly? The reasons for this are many. First, while there are over 100 civil forfeiture statutes, there are relatively few criminal forfeiture statutes. Drug proceeds can be forfeited either civilly or criminally, for example, but firearms, gambling proceeds, vehicles used to smuggle illegal aliens, and counterfeiting paraphernalia can only be forfeited civilly. See 28 U.S.C. §2461(a). This is a problem Congress needs to fix.

Second, criminal forfeiture requires a federal conviction for the crime giving rise to the forfeiture. If the defendant is dead or is a fugitive, there can be no prosecution and therefore no criminal forfeiture. If the defendant was prosecuted in a State case, the federal forfeiture has to be civil, because there is no federal prosecution for the criminal offense. And if the defendant is prosecuted for one crime, but the property was involved in a related but separate crime, the forfeiture has to be civil, because the criminal forfeiture is limited to the offense of conviction. For example, drug proceeds seized from a defendant at the time of his arrest must be forfeited civilly if the defendant is charged with possession of drugs with intent to distribute, because such money was necessarily the proceeds of an earlier drug deal, not the one for which the defendant is actually prosecuted.

Third, and perhaps most important, criminal forfeiture is limited to the property of the defendant. If the defendant uses someone else's property to commit the crime, criminal forfeiture accomplishes nothing. Only civil forfeiture will reach the property. For example, if a drug dealer uses an airplane to smuggle drugs into California, the government has an interest in seizing and forfeiting the plane. But suppose the only person arrested and prosecuted is the pilot. If he owns the plane outright, criminal forfeiture is the way to go. But if the plane is owned by a corporation, or a third-party in South America, or by the pilot jointly with his spouse, criminal forfeiture is pointless.

The same is true if we want to forfeit a crack house. We can prosecute the tenants in the building until the cows come home, but we will never be able to forfeit the building criminally if the tenants don't own it. If the building belongs to a slumlord who allowed his property to be turned into a crack house, we need civil forfeiture to shut it down.

Due Process

Whatever the reasons why civil forfeiture is essential to federal law enforcement, it goes without saying that the process must be fair. All property owners -- whether they be criminal defendants or third parties -- are entitled to due process of law. Mr. Pilon contends that due process is lacking. He says that the government can seize property "almost at will," that officials can "seize property, real or personal, without notice or hearing," and that innocent parties find the system so daunting that they abandon their property without filing a claim. On all points, he is greatly mistaken.

Seizures of property for forfeiture are governed by the same rules that govern seizure of property for evidence — the search and seizure requirements of the Fourth Amendment. See *United States v. Lasanta*, 978 F.2d 1300 (2d Cir. 1992). If federal agents want to seize property for forfeiture, they have to get a warrant, unless one of the recognized exceptions to the Fourth Amendment applies, like when cash is found in plain view in a vehicle that can be driven away, and there is probable cause to believe it's drug proceeds, or when property is found during a search incident to a lawful arrest. In fact, in many instances, forfeiture seizures are more limited than their evidentiary counterparts. See 18 U.S.C. §981(b) (2) (in money laundering cases, warrantless seizures are authorized during searches incident to arrest, but not in other exigent circumstances).

In real property cases, the rules are still more restrictive. In *United States v. James Daniel Good Property*, 114 S. Ct. 492 (1993), the Supreme Court held that real property may not be seized at all, even with a warrant based on a showing of probable cause, until the property owner has been given notice and an opportunity to be heard. In short, in real property cases, the Due Process Clause of the Fifth Amendment requires the government to give property owners more "process" than is due under the Fourth Amendment.

Moreover, seizing the property isn't the end of the process; it's only the beginning. If someone wants to contest a forfeiture he has a right to file a claim, thereby forcing the government to file a civil or criminal forfeiture action in federal court. If the case is civil, the claimant has all the rights that attend normal civil litigation, including the right to discovery and the right to a trial by jury. Finally, the forfeiture verdict must be based on a preponderance of the admissible evidence, not the probable cause evidence that was sufficient for the seizure.

Of course, any system can be improved. The Justice Department has proposed legislation to make the government carry the burden of proof in civil forfeiture cases. We also have suggested making it easier for people to file claims in forfeiture cases by extending the filing deadlines, and we have proposed a remedy for those whose property is damaged in government custody. (The Justice Department's legislative proposal and supporting testimony are published in the record of the Hearing on the Civil Asset Forfeiture Reform Act, H.R. 1916, House Committee on the Judiciary, 104th Congress, 2d Sess., Sclal No. 94, July 22, 1996.) But it is preposterous to say that property owners are denied due process under current law.

The Uncontested Forfeitures

What should we make of the fact that so many forfeitures are uncontested? The critics, of course, see this as evidence that innocent property owners are walking away from their property without filing a claim because the procedures are unfair. But the opposite is far more likely. Four out of five forfeitures are uncontested because in most cases the evidence is so overwhelming that contesting the forfeiture would be pointless. A defendant charged with smuggling illegal aliens, for example, might see little advantage in contesting the forfeiture of the truck he was driving when he was arrested and the aliens were found. Remember, eighty percent of all forfeitures involve a parallel arrest or prosecution. Those are cases in which the defendant is in court anyway, has counsel, and yet most of the time does not object to the forfeiture.

Certainly, there are still due process issues to be worked out. One of the most nettlesome involves the current flood of post-conviction pleadings being filed by federal prisoners who contend that they didn't contest forfeiture actions because they didn't receive proper notice. See e.g. *United States v. Clark*, 84 F.3d 378 (10th Cir. 1996). Most commonly, the prisoners complain that the government sent the notice to the wrong jail or to a home address when the government knew that the person was incarcerated. Criminals have due process rights just like everyone else, so the government must find a way to provide

notice of forfeiture actions to persons being held in jail. But these are hardly cases that involve innocent claimants not filing claims because the procedures are stacked against them.

Innocent Owners

In his discussion of *Bennis v. Michigan*, Mr. Pilon makes a persuasive argument that the Constitution does not adequately protect innocent owners in civil forfeiture cases. It is an argument, however, that has little relevance to federal forfeiture law.

Bennis, it must be remembered, was a State case. Michigan, apparently, does not provide statutory protection for innocent owners, and the Supreme Court held that no such protection is required by the Due Process Clause. Fair enough. But the fact that the Constitution doesn't protect innocent owners doesn't mean that the legislature cannot do so. In fact, Congress has included an innocent owner defense in virtually all of the most widely used federal forfeiture statutes. For example, the drug statutes, 21 U.S.C. §881(a)(4) and (7), say that neither vehicles nor real property, respectively, may be forfeited if they were used to commit a crime without the knowledge or consent of the owner.

Mr. Pilon's claim that "hotels and apartment buildings are today forfeited when their owners are unable to prevent drug transactions in them" is just plain wrong. Even a property owner who "knows" that his property is being used for an illegal purpose is protected from forfeiture if he shows that he took all reasonable steps to prevent the activity. See *United States v. 141st Street Corp.*, 911 F.2d 870, 877-78 (2nd Cir. 1990) (landlord who knew building was being used for drug trafficking had opportunity to show he did not consent to such use), cert. denied, 111 S. Ct. 1017 (1991); *United States v. Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d 618, 626 (3rd Cir. 1989) (wife who knew of husband's use of residence for drug trafficking had opportunity to show she did not consent to such use); *United States v. One Parcel of Real Estate at 1012 Germantown Road*, 963 F.2d 1496 (11th Cir. 1992).

For example, the owner of a residential hotel doesn't have to put a stop to drug transactions on his property; he just has to do what a reasonable owner would do to try to stop it, like call the police, evict tenants convicted of committing drug crimes on the premises, and install security devices like locks and adequate lighting. See *United States v. All Right, Title and Interest (Kenmore Hotel)*, 77 F.3d 648 (2d Cir. 1996).

What Congress Can Do

A key provision in the Justice Department's legislative proposal would codify this concept and thus extend the innocent owner defense to all federal forfeiture statutes. In addition to the other due process reforms discussed above, this would go a long way toward making sure that the forfeiture laws are up to date and protect the rights of all property owners. But there is more that Congress can do to enhance the forfeiture laws.

First, the criminal forfeiture statutes should be revised to make sure the government can use them in all cases where it's appropriate to do so. Criminal forfeiture should be available wherever civil forfeiture is authorized. The government also needs better tools to enforce criminal forfeiture judgments against convicted defendants, and needs to be able to restrain property subject to forfeiture, including substitute assets, pre-trial, to make sure that the assets are still around once the defendant is convicted.

Also, there is no rhyme or reason to the current forfeiture laws regarding the forfeiture of criminal proceeds. We can forfeit proceeds in drug cases, but not in fraud cases; we can forfeit the money paid to a "bag man" in a money laundering case, but not the money paid to a "hit man" in a murder-for-hire

case. All criminal proceeds should be subject to forfeiture, and the term "proceeds" should be defined to mean gross proceeds, not net profits. It is absurd that some courts have allowed heroin traffickers to deduct their overhead expenses from the amount of proceeds subject to forfeiture. See *United States v. McCarroll*, 1996 U.S. Dist. LEXIS 8975 (N.D. Ill. Jun. 19, 1996).

In these and many other ways, the forfeiture laws can be improved both to protect the rights of property owners and to allow the government to make full use of this dramatically successful law enforcement tool. Congress has that opportunity this year. If we can avoid the misstatements and misconceptions that serve only to polarize the debate, law enforcement, defense attorneys and legislators can work together to produce a genuinely comprehensive and effective body of laws to make forfeiture work for all of us.

**Stefan D. Cassella is the Assistant Chief, Asset Forfeiture and Money Laundering Section U.S. Department of Justice. The opinions expressed in this article are solely those of the author and do not necessarily reflect the views or policies of the Department of Justice.*



February 6, 2001

Representative Joe Hayes

Dear Mr. Hayes:

My name is Marc Poeschel. I have been in law enforcement in Alaska since 1991. Through my career I have seen the damage caused by crimes against children and the long lasting effects on the family as well as the devastation to our most precious resource. In this, the most sinister type of crimes arise and are perpetrated on our youth with alarming frequency and ease through the use of the internet. The increase of child pornography, sexual abuse of minors and unlawful exploitation cases is a red flag to the problems on the horizon.

I have created a task force to combine forces against the Internet predator, the computer criminal and provide training and assistance to those sworn to protect. We have a duty to work together to send the message to molesters and criminals of the electronic realm that Alaska will not tolerate their types of crimes. HB 31 and HB 32 are a welcome addition to laws geared toward sending that message.

The ability to apply for forfeiture of computers used in crimes will tell the cyber criminal that their tools of the trade are not going to be returned for future use against other victims. It will give law enforcement the ability to use their own tools against them and provide equipment to agencies that need it. To give a child pornographer his computer back is akin to giving a drunk driver back alcohol and car keys.

There is a need to stop the crimes against children before they start. Luring a child to a meeting in an attempt to engage in sex with the child is common practice for molesters and child killers as well. There are few laws that address the specifics of Internet crimes and the ability to attack the crime before it has the chance to ruin a life is vital.

I look forward to enforcing these new laws and hope they are a hint of the progressive attack on the evil that lurks the cyber highways we depend on to bridge the vastness of this great state. Thank you for your dedication to the children of this state.

Sincerely,

Olc. Marc Poeschel, EECS
Coordinator IAF Task Force

Note: We received this by email. The original is in the mail.

STATE OFFICE
ALASKA PEACE OFFICERS ASSOCIATION

P.O. Box 240106 Anchorage, Alaska 99524-0106 Phone (907) 277-0515 Fax (907) 272-5355



January 26, 2001

Representative Joe Hayes
Alaska State Legislature
State Capitol Building, Room 422
Juneau, Alaska 99801-1182

Dear Representative Hayes,

On behalf of the Alaska Peace Officer's Association (APOA), I would like to thank you for introducing HB32 (22-LS0270/A) relating to the forfeiture of property as it relates to child pornography and other sexually related crimes.

At a recent meeting of the APOA Board of Directors, we unanimously agreed to endorse HB32 in its current draft format. We believe that this legislation will help law enforcement in permanently taking away the electronic tools of offenders committing such crimes and will perhaps act as a deterrent as well.

Please contact us if there is anything we can do to assist you with this bill as it proceeds through the legislative process. You may contact us at the APOA office in Anchorage at 277-0515.

Once again, thank you for sponsoring this legislation.

Sincerely,

Leo Brandlen
President

Business Manager

Joseph Young
Anchorage

Board of Directors

Leo Brandlen, President
Anchorage

Chuck Kopp, Vice President
Kenai

John Charbonneau, Past Pres
Anchorage

Kim Wannamaker, Member
Kenai
Pres. Kenai Chapter

Nick VanderVeur, Member
Anchorage
Pres. Anchorage Chapter

Angella Long, Member
Wasilla
Pres. Mat-Su Chapter

Lonnie Hatman, Member
Fairbanks
Pres. Fairbanks North Chapter

Jerry Hankervis, Member
Juneau
Pres. Capital City Chapter

Lercy Mestas, Member
Ketchikan
Pres. First City Chapter

James See, Member
Craig
Pres. Prince of Wales Chapter

John Lucking, Jr., Member
Unalaska
Pres. Aleutian Islands Chapter

Scott Chafn, Member
Wrangell
Pres. Wrangell Chapter



George P. Wuerch,
Mayor

ANCHORAGE POLICE DEPARTMENT

4501 South Bragaw Street • Anchorage, Alaska 99507-1599

Telephone (907) 786-8500

<http://www.ci.anchorage.ak.us>



Duane Udland
Chief

January 22, 2001

Representative Joe Hayes
Alaska State Legislature
State Capitol, Room 422
Juneau, AK 99801-1182

Dear Representative Hayes:

This letter is written in support of HB 32, An Act relating to the forfeiture of property used to possess or distribute child pornography, to commit indecent viewing or photography, to commit a sex offense, or to solicit the commission of, attempt to commit, or conspire to commit possession or distribution of child pornography, indecent viewing or photography, or a sexual offense.

Law enforcement agencies are often required to return equipment used in these crimes to the perpetrator or to another person whom the perpetrator has designated. Many of these items have been specially designed or adapted for no other purpose than to commit specific criminal acts. This equipment is generally costly and sometimes hard to obtain.

We feel it is necessary and appropriate to deprive those convicted of sexual crimes of the means to commit them again or allow others to use them for the same purpose. We therefore offer our support for House Bill 32. Thank you for bringing this legislation forward.

Sincerely,

Mark T. Mew
Acting Chief of Police

Public Safety Employees Association, Inc.
"Representing Alaska's Finest"

February 1, 2001

Representative Joe Hayes
State Capitol, Room 422
Juneau, AK 99801-1182

Re: HB 31 and HB 32

Dear Representative Hayes.

The Public Safety Employees Association whole-heartedly supports both House Bill 31 and House Bill 32. These bills will not only help law enforcement officials do their jobs more efficiently, but the new laws will go a long ways towards correcting some of the ills of our society.

Sex crimes are amongst the most devastating to people. Not only does the victim suffer, but the victim's family members and friends suffer as well.

Children are too often exploited, and they can become victims of predator-like individuals far too easily. HB 31 and HB 32 will help to provide the means to put such individuals on notice that our children will now have more protection. It will also help ensure that those who perpetrate such crimes shall be punished.

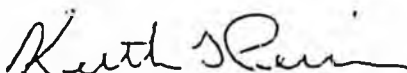
Moreover, I want to congratulate you for his thoughtful approach in this effort to protect Alaska's children. With the methods of law enforcement inherent in these two bills, I know many of Alaska's children will be saved from a devastating experience that some would never recover from.

I further want to encourage legislators to co-sponsor and cross-sponsor HB 31 and HB 32 and demonstrate that they have no tolerance for the crimes mentioned herein.

Please support the above-mentioned bills and ensure that they pass and become law in a timely manner.

Thank you for your support.

Sincerely,



Keith Perrin
Business Manager


House Committees

Labor & Commerce
Military & Veterans Affairs
State Affairs
Regulation Review

Alaska State Legislature
Representative
Joe Hayes

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Fairbanks, AK 99701
(907) 456-7423 / Fax: 451-9293
While in Juneau
State Capitol
Juneau, AK 99801-1182
(907) 465-3466 / Fax: 465-2937

Memorandum

To: Senator Taylor, Chair Senate Judiciary Committee
From: Representative Joe Hayes 
Date: April 20, 2001
Re: Sectional Analysis, HB32

Section 1. Provides legislative intent that in cases where the owner of the forfeited property is innocent of the crime, their property is returned to them following existing procedure and as the courts deem reasonable.

Section 2. Adds a new section that authorizes forfeiture of property, specifically electronic equipment as defined in the section, used to aide in the commission of a sexual offense under AS 11.41.410 – 11.41.470 including inchoate forms of those sexual offenses.

Section 3. Adds a new section that authorizes forfeiture of property, specifically electronic equipment as defined in the section, used to aide in the commission of indecent photography or child pornography under AS 11.61.123 – 11.61.127 including inchoate forms of those offenses.

House Committees

Labor & Commerce
Military & Veterans Affairs
State Affairs
Regulation Review

Alaska State Legislature
**Representative
Joe Hayes**

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(907) 456-7423 / Fax: 451-9293

While in Juneau
State Capitol
Juneau, AK 99801-1182
(907) 465-3466 / Fax: 465-2937



Memorandum

To: Senator Taylor, Chair Senate Judiciary Committee
From: Representative Joe Hayes
Date: April 2, 2001
Re: Sectional Analysis, HB32

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House Committees
Labor & Commerce
Military & Veterans Affairs
State Affairs
Regulation Review

Alaska State Legislature
Representative
Joe Hayes

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Juneau, AK 99801-1182
(907) 465-3466 / Fax: 465-2937



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To: Senator Taylor, Chair Senate Judiciary Committee
From: Representative Joe Hayes *JH*
Date: April 20, 2001
Re: Sectional Analysis, HB32

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District 30

representative_joe_hayes@legis.state.ak.us

House Committees

Labor & Commerce
Military & Veterans Affairs
State Affairs
Regulation Review

Alaska State Legislature
Representative
Joe Hayes

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District 30

representative_joe_hayes@legis.state.ak.us

House Committees

Labor & Commerce
Military & Veterans Affairs
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Regulation Review

Alaska State Legislature
**Representative
Joe Hayes**

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A M E N D M E N T

OFFERED IN THE SENATE

TO: CSHB 32(JUD) am

1 Page 1, lines 7 - 12:

2 Delete all material and insert:

3 "* Section 1. The uncodified law of the State of Alaska is amended by adding a new
4 section to read:

5 "INTENT. The forfeitures contemplated by this Act are intended to be forfeitures
6 imposed in connection with conviction for a crime. The legislature intends for the courts to
7 continue to provide hearings to interested persons who have an ownership interest in
8 equipment subject to forfeiture under this Act and to allow for remission to innocent
9 nonnegligent third parties as applied in State v. Rice, 626 P.2d 104 (Alaska 1981), Fehir v.
10 State, 755 P.2d 1107 (Alaska 1988), and Baum v. State, __ P.2d __ (Alaska App. 2001)."

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HB

34

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: SSHB 34
(H) Publish Date: 2/26/01

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
Title "An Act relating to the statutory rule against BRU Civil Division
perpetuities, to nonvested property interests and trusts . . ." Component Commercial
Sponsor Representative McGuire
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 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
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 (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Under current law certain powers of appointment are invalid unless the power is exercised or it terminates within 1,000 years after its creation. SSHB 34 generally makes technical corrections to the Rule Against Perpetuities by distinguishing between a generally exercisable general power of appointment and a testamentary general power of appointment. It also determines when the time begins to compute when the property interest must vest or terminate. Finally, it applies the same general rules to the power of alienation.

Passage of SSHB 34 would have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson Phone 465-5370
Division Attorney General's Office Date/Time 2/21/01 11:54 AM
Approved by: Kathryn Daughhete for Bruce M. Botelho, Attorney General Date 2/21/01
Agency Department of Law

For distribution information, call the Governor's Legislative Office

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SSHB 34
(H) Publish Date: 2/26/01

Revision Date/Time (Note if correction) _____ Dept. Affected _____
Title Rule Against Perpetuities BRU Alaska Court System
Component Trial Courts
Sponsor Rep. McGuire
Requester House Judiciary Component No. 768

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
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 (FY2001) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The court system does not anticipate any fiscal impact from the passage of HB 34.

Prepared by: Douglas Wooliver Phone 463-4750
Division: Alaska Court System Date/Time 2/15/01 12:46 p.m.
Approved by: Stephanie Cole Date 2/15/01
Agency: Alaska Court System

For distribution information, call the Governor's Legislative Office

Alaska State Legislature

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Chair, House Special Committee
on Economic Development, Trade
and Tourism

Chair, Joint House and Senate
Administrative Regulation and
Review Committee

Member
Resources Committee
Rules Committee

Representative Lesil McGuire

House District 17

SPONSOR STATEMENT

HB 34

"An Act relating to the statutory rule against perpetuities, to non-vested property interests and trusts, and to the suspension of the power of alienation of property; and providing for an effective date."

Alaska has become the most forward thinking trust jurisdiction in the United States and our trust laws have become the model by which other states have changed their respective laws. Our trust laws have been carefully scrutinized and commented upon by nonresident practitioners as well as legal academicians. To maintain Alaska's position as a leader in trusts, our trust laws need to be a model of clarity. As with most technically complex areas, trust law legislation must evolve to meet its intended purpose.

Senate Bill No. 162, as passed by the Twenty-First legislature in the Second Session, corrected the deficiency found in our state's previous version of the Rule Against Perpetuities. In that version any beneficiary of a generation-skipping trust who exercised a non-general power of appointment to create a successive trust giving the beneficiaries of the second trust a non-general power of appointment, created an immediate estate or gift tax liability under Internal Revenue Code sections 2041(a)(3) and 2514(d). This tax trap has become known in estate planning circles as the "Delaware Tax Trap." House Bill 34 is a technical correction to Senate Bill 162 and clarifies the wording and application of the previously passed statute in making the same distinction that the common law has made between a presently exercisable general power of appointment and testamentary general power of appointment.

AS 34.27.051(b) is amended to clarify that only a presently exercisable general power of appointment can create a new perpetuities period within which property must vest. On the other hand, AS 34.27.051(c) is amended to clarify that property interests subject to a testamentary general power of appointment relate back to the date of the original instrument and must vest within the prescribed time set forth in the statute. The current law does not make the distinction between presently exercisable general powers of appointment and testamentary general powers of appointment. The distinction that this bill makes, in conformance with the common law, is discussed in the Commentary to Section 2-902 of the Uniform Statutory Rule Against Perpetuities passed by the National Conference of Commissioners on Uniform State Laws, as well as in the Restatement, Second, Property (Donative Transfers) at § 1.4, Comment 1.

The change in this bill is a clarification of the Suspension of the Power of Alienation as presently enacted. AS 34.27.100, passed by the Twenty-First legislature in the Second Session, adopted a second line of defense to the Delaware Tax Trap. It was meant to track the language of a similar Wisconsin statute that was found to avoid the Delaware Tax Trap. Estate of Mary Margaret Murphy v. Commissioner, 71 T.C. 671 (1979).

The modification made to AS 34.27.100 (a)(2)-(4) more clearly sets forth the computation of the permissible time period in which property must be made alienable and in addition makes a distinction between presently exercisable general powers of appointment and testamentary general powers of appointment, as noted above.

Explanation of Changes
The Who, When, What & Why of SB 162
By Stephen E. Greer

This bill follows the intent of originally proposed SB 162 which would abolish the Rule Against Perpetuities but does so in a manner which avoids a potential tax trap, discovered after SB 162 was introduced last year. The following discussion is as close as the law comes towards approaching rocket science. Nonetheless even though complicated, the proposed legislative fix encompassed by this bill is extremely important to: individuals who have established dynasty trusts in our state; the lawyers who drafted them; and our reputation as the premier state in which to establish a trust. This legislation is strictly remedial in nature and attempts to fix a later discovered tax problem attendant with the manner in which the Rule Against Perpetuities was abolished in April of 1997.

I. Who is behind this bill and why?

A group of estate planning attorneys in Alaska meet informally on a continual basis to discuss the very complex and continually changing aspects of the estate planning profession. These attorneys are dedicated to the improvement of Alaska's laws to keep us in the forefront of the trust industry. Alaska has been on the cutting edge of this industry on a nationwide basis in recent years. This reputation is the result of our state enacting creative and innovative trust laws, which not coincidentally is being replicated by an increasing number of other states. Nonetheless if we in Alaska are to remain in the forefront, our laws must be kept current. Being a leader has its disadvantages. The strength and weakness of any new law can not be fully assessed at the outset. Only after some time passes can this assessment be made. The burden of constantly improving existing law and the willingness to address change is the one which any leader must bear whatever the profession. Make no mistake about it, we in Alaska are nationally respected as a leader in the trust industry. Unfortunately compounding our responsibility of remaining a leader in trust law is its inextricable link with federal tax law. As we all know, federal tax law constantly changes. Our laws must both anticipate and keep current with these changes. If we fail in this effort, all previous efforts to establish a trust industry in this state will go for naught. This bill addresses and answers that challenge. There are other bills concerning trust and probate law which have been or will be introduced in this legislature which address the challenge of remaining a leader in the field of trusts. No attorney who has expressed a desire to participate in the formulation of these laws has been excluded; on the contrary all those who have been willing to contribute have been invited to participate. It can also be said none of these bills represents the exclusive position of the drafter but more often than not are a product of compromise and painstaking review.

II. History of our state law concerning the Rule Against Perpetuities and its importance to trusts.

The common law rule against perpetuities ("RAP") as it relates to trusts states every beneficial interest and the property subject to those beneficial interests, must vest within a period of time measured from the time the trust was originally created. The period of time is the lifetimes of all beneficiaries alive at the time the trust was created, plus 21 years. If it is determined at the time the trust was created that there exists a possibility an interest of a beneficiary might not vest within this period of time, then this interest is void. The Alaska legislature enacted the Uniform Statutory Rule Against Perpetuities ("USRAP") effective January 1, 1996. This Uniform Rule ameliorates the harshness of the common law rule and adopts a "wait and see" approach to determine whether a beneficial interest might vest and establishes a term of 90 years as an alternative within which time a beneficial interest can vest.

In April of 1997, our legislature amended AS 34.27.050(a) by including (3) which states the RAP is inapplicable to those trusts where a trustee has the ability to make a distribution to a person who is living at the time the trust is created. Because in almost every case a trustee can make the above described distribution, it was generally accepted we had abolished the RAP, if not explicitly, at least implicitly. Abolishing the RAP is a significant reason for the growth of our state's trust business since 1997. By rendering the RAP ineffective as applied to trusts, it became possible to create a trust which could continue forever. These trusts are frequently referred to as "perpetual trusts" or "dynasty trusts" and the terms are used interchangeably here. By making a trust "perpetual" it is also possible to avoid the diminishing effect of estate tax as the trust property passes from one generation to the next. As a result trust assets can grow dramatically, resulting in Alaska becoming a very attractive place to create a trust. When we enacted this legislation in 1997, we were not the first state to abolish the RAP, although we were one of the few states to have done so. Unfortunately an increasing number of other states have seen the benefit of abolishing the RAP. Illinois, Idaho, South Dakota, Maryland, Wisconsin and Ohio are just a few of those states which have joined the parade. Many other states have legislation either pending or under consideration.

III. Why was it decided to abolish the RAP with the introduction of SB 162?

The manner in which we abolished the RAP left some uncertainty in the minds of outside practitioners whether or not we had in fact done so. As a result it was felt it would be better for us to just come out and say so by statute. This would have the practical effect of making our trust laws more understandable to outside observers and would naturally increase the marketing potential of our state. In addition it would also cure a technical glitch which was discovered after the 1997 law was passed, where it was unclear whether a charitable lead dynasty trust could be created in our state or whether a trust funded exclusively with Crummy withdrawal rights would be considered perpetual. That was the frame of mind which existed when SB 162 was originally introduced.

IV. What was wrong with SB 162?

The intent of SB 162 was commendable. However after SB 162 was introduced it was discovered the manner in which we abolished the RAP in April of 1997 created a potential tax consequence. Passage of SB 162 would only perpetuate this problem. The tax problem is very difficult to understand but it exists with any perpetual trust in which a beneficiary is given a special power of appointment. This bill follows the intent of SB 162 in abolishing the RAP except in the one limited circumstance where property is subject to a special power of appointment which is exercised to create a successive power of appointment. Even then the perpetuity term is being extended for all practical purposes into perpetuity. This bill is distinguishable from SB 162 because this bill provides a legislative fix for perpetual trusts drafted after April 1, 1997 by avoiding the "Delaware Tax Trap." As will be discussed, giving future beneficiaries special powers of appointment are an indispensable tool in the formulation of a perpetual trust. By giving beneficiaries the special power to appoint trust assets, it is possible to make this otherwise irrevocable trust, flexible so future events can be addressed.

V. Typical Perpetual Trust with Special Powers of Appointment.

In a trust it is quite common to give beneficiaries special powers of appointment. A beneficiary who has a special power of appointment can decide who can benefit from the trust property either at their death or during their life depending on whether the power is a testamentary or an inter vivos special power of appointment. If a special power of appointment is not exercised then the trust document invariably provides for a disposition in some alternative manner.

Example 1. A creates a trust for B and gives B a special power to appoint the trust property at B's death to any individual other than to B's estate or creditors of B's estate. The trust document further states if B fails to exercise the special power of appointment, the property will be distributed outright to B's 2 children, C and D. C turns into a drug addict and D is an anesthesiologist with a high exposure to liability. B could exercise the special power of appointment and appoint the trust property away from C and give it to D in trust for the benefit of D. The trust for D could be drafted to prevent the attachment of the trust assets by D's creditors. Furthermore D could be given a special power of appointment to further appoint the trust assets to those beneficiaries which D might choose and in the manner in which D might choose, whether as an outright distribution or in trust for those beneficiaries.

VI. Detailed explanation of tax problem.

The Internal Revenue Code ("Code") imposes estate tax on property owned by a person at the moment of death. Property subject to the exercise of a special power of appointment will not be included in the estate of a person who holds this special power of appointment. This is because the ownership rights attendant to a special power of appointment do not rise to a level where the property subject to this power of appointment would be included in a person's estate for estate tax purposes. On the other hand property subject to a general power of appointment will be included in the holder's estate.

In 1951 virtually every state in the country had adopted the RAP. The federal government was satisfied with this rule because this rule states all trusts must eventually terminate. When trusts terminate and the assets are distributed to the beneficiaries, the property will be exposed to estate tax when the beneficiaries die. The RAP states whenever the holder of a special power of appointment exercises it to create other trusts which in turn give beneficiaries of those trusts the further ability to exercise special power of appointments, the time period within which these powers may be exercised and the time period in which the property interests subject to these successive special powers of appointment must vest, is measured by calculating the perpetuities period from the date of creation of the trust instrument granting the first special power of appointment. Sounds complicated but really not.

Example 2. A creates a trust for B and gives B a special power of appointment. B exercises the special power of appointment to create trusts for C and D, and gives both C and D special powers of appointment. C and D can validly exercise their special power of appointments only if those special powers can be exercised within the applicable perpetuities period. This period is measured from the date of the instrument creating the first special power of appointment. Moreover the property subject to this power also must vest within this same time period.

Delaware modified its RAP to provide whenever a holder of a special power of appointment exercises a special power of appointment to create another trust which in turn gives the beneficiaries of those trusts the ability to exercise special power of appointments, a new beginning date for measuring the perpetuities period arises at the moment a special power of appointment is exercised to create a successive special power of appointment. Thus it was possible in Delaware to create a trust which gave holders of special powers of appointment the ability to exercise them to create successive special powers of appointment and these trusts could last forever. Furthermore if a beneficiary was given a special power of appointment as opposed to a general power of appointment, the trust property would not be included in the beneficiary's estate and would escape estate tax. The ability to have trusts go on forever and avoid the imposition of estate tax naturally promoted the trust industry in Delaware.

The federal government attempted to fix the Delaware problem by enacting the predecessor to now Internal Revenue Code section IRC 2041(a)(3) and its gift tax counterpart 2514(d). These sections provide property subject to special power of appointment will be included in the estate of the holder of a special power of appointment if the holder exercises the special power of appointment in a manner which creates successive special powers of appointment, but only if on the date in which the successive power of appointment was created, the determination of the perpetuity period did not relate back to the date of the instrument creating the first special power of appointment. As indicated in the example 2, above, in every other state, except Delaware, the date for determining the validity of the exercise of a special power of appointment and the determination of the vesting period of property subject to its exercise relates back to the date of the instrument creating the first special power of appointment. In Delaware successive special power of appointments did not relate back, instead a whole new perpetuities period is commenced when successive special power of appointments are exercised. Eventually Internal Revenue Code sections 2041(3) and 2514(d) became known as the "Delaware Tax Trap" because a Delaware practitioner could inadvertently "fall into the trap" and subject the trust property to either gift or estate tax if they created a trust which gave beneficiaries the ability to exercise special powers of appointment to create a successive special powers of appointment.

VII. How have other states avoided the Delaware Tax Trap when they abolished the RAP?

As previously indicated, other states have seen it in their interest to abolish the RAP. However in at least a few of those states, they have done so in a way which does not run afoul of the Delaware Tax Trap by coming under the holding of a Tax Court case, known as the Estate of Murphy v. Commissioner, 71 T.C. 671 (1979). These jurisdictions do not state their RAP as a time in which property interests must vest but rather as a time in which the power of alienation can not be suspended. A rule against the suspension of power of alienation states by implication that it is permissible to create a trust which prevents the trust property from being sold. At common law this would be considered a restraint on alienation and this direction would be considered void as against the public policy of promoting the free transferability of property. In those states which have stated their RAP as a time in which the power of alienation can not be suspended, they place a time period on the inalienability of property after which time the property must be capable of being sold. This period of time is invariably stated as a variation of the same time period found in the RAP pertaining to vesting of property interests.

Treasury regulations under 2041(a)(3) provide whether a state articulates its RAP as a rule against the remote vesting of property or as a rule against the suspension of the power of alienation, if a power of appointment is exercised to create another power of appointment then the period of time in which the vesting of property is delayed (if local law states the rule as one against the remote vesting of property) or in which the power of alienation is suspended (if local law states the rule as one against the power of alienation) must be ascertainable by referring back to the date the first power of appointment was created. When one thinks about it this makes little sense. Even though a local law might state its rule as one against the suspension of power of alienation, having the power of alienation does not address the concern which Congress had in mind when it passed the predecessor of sections 2041(a)(3) and 2514(d). If a trust is created in a jurisdiction where a trust can continue forever but the only condition is the property of the trust must be capable of being sold at either the direction of the trustee or the beneficiaries, then it is still possible to have property continue in trust forever without the imposition of estate tax. The only requirement is the property of the trust must be capable of being exchanged for other property within a stated period of time. The Tax Court in Estate of Murphy v. Commissioner, held 2041(a)(3) is to be read in the alternative, so, if Wisconsin had no RAP pertaining to the vesting of property, but instead had a rule limiting the time in which the power of alienation can be suspended, and furthermore provided that all special powers of appointment relate back, then 2041(a)(3) is not violated. Even though this interpretation does nothing to prevent the use of perpetual trusts to avoid estate tax, the Court found itself bound by Treasury's own regulations. Furthermore Treasury acquiesced in the Tax Court's decision which means the IRS will be bound by the Tax Court's interpretation in future cases. As a result some states which permit perpetual trusts simply provide that although the RAP is otherwise abolished they do have a rule against the suspension of the power of alienation. Furthermore they go on to state any exercise of a special power of appointment must relate back to the date the first special power of appointment was created. These states have a distinct competitive edge over Alaska because in these states a beneficiary can exercise a special power of appointment and exercise it to create successive special powers of appointment, without fear of IRC sections 2041(a)(3) and 2514(d) being violated. Although the vesting of property interests might be delayed, the power of alienation will not be suspended beyond the permissible period, provided the trustee or beneficiaries are given the ability to direct the sale or exchange of trust property for other property.

VIII. How does the Murphy case affect Alaska?

In our state the RAP has always been stated as a rule against the remote vesting of property and not as a rule against the suspension of the power of alienation. When we changed AS 34.27.050 in 1997 we continued to state the RAP as a rule against the remote vesting of property. As a result, any perpetual trust created after April 1, 1997 which gave a beneficiary a special power of appointment which could be exercised to create successive powers of appointment, has the potential for running afoul of Internal Revenue Code sections 2041(a)(3) and 2514 (d). This is because under present Alaska law when a special power of appointment is exercised to create a successive power of appointment, the property subject to these powers will have its vesting delayed for a period of time that can not be ascertained by referring back to the date of the instrument creating the first power of appointment. In Alaska for trusts created after April 1, 1997, there is no stated period of time in which property interests must vest. As a result, the maximum length of time in which vesting can be delayed can not be determined by referring back to the date of the instrument creating the first power of appointment. Thus, all trust property subject to the exercise of a special power of appointment, which was exercised to create a further trust giving those beneficiaries special powers of appointment, renders that property subject to estate tax or gift tax. This creates a potential problem because it defeats the expectations of those individuals who created these trusts.

IX. Legislative Fix.

We in Alaska could fix this problem by abolishing the RAP and enacting a rule against the suspension of the power of alienation. In so doing we would fall squarely within the Murphy decision. This is what many other states have seen fit to do and this would protect all perpetual trusts drafted after the date of enactment of this bill. However this would do nothing to protect perpetual trusts created after April, 1997 which contain special power of appointments.

This legislation is meant to fix the potential tax problem in both scenarios. For all trusts created after the effective date, the RAP would be abolished except in those instances in which property interests are subject to a special power of appointment which in turn is exercised to create a successive special power of appointment. In this one limited circumstance, the period of time within which these property interests must vest will relate back to the date the first special power of appointment was created, thus avoiding 2041(a)(3). The period of time in which property interests must vest which are subject to a special power of appointment exercised to create a successive special power of appointment would be extended to 1000 years. Although this trust might not be perpetual, a 1000 year term is nonetheless a very large period of time for a trust to last. The 1000 year term is not unique to Alaska. In fact the idea of a 1000 year term was taken directly from legislation now pending in Florida.

Alaska's legislation further provides contingent special power of appointments are valid if exercised within a 1000 years from the date the trust was first created. This corrects an oversight in the 1997 legislation which left in tact a USRAP provision that contingent special power of appointments were valid only if exercised within a 90 year period from the date the trust was created. This oversight dramatically reduces the effectiveness of using special power of appointments in perpetual trusts created under our present law and thus makes Alaska noncompetitive with other states which permit perpetual trusts.

The ability to make the provisions of this bill retroactive to April of 1997 is possible by the clear wording of the second sentence of AS 34.27.070(a) as it now exists in our law. This provision provides the law in effect at the time a power of appointment is exercised to create a successive power of appointment controls, even though for purposes of determining the vesting period the date of exercise relates back to the date of the instrument creating the first power of appointment, which of course predates the date of enactment of this bill. This provision would be removed from 34.27.070(a) and restated and added as a new subsection (d).

Example 3. A created an inter-vivo trust for B on May 1, 1997 and gave B a special power of appointment which B exercised on January 1, 2001 (or any date after April 1, 1997) to create trusts for C and D, giving both C and D special powers of appointment. A's exercise of the special power of appointment on January 1, 2001 would take into account the law in effect on January 1, 2001. If this bill becomes law, it would provide the determination of the period of time in which the vesting of all property interests which are subject to the power of appointment exercised on January 1, 2001 relate back to May 1, 1997 (the date of the instrument creating the first special power of appointment). The period of time in which the property must vest is 1000 years computed from May 1, 1997. Because the period of time in which this property must vest can not be ascertained without regard to the date of the first power, there is no violation of IRC sections 2041(a)(3) or 2514(d).

The Delaware Tax Trap and the Abolition of the Rule Against Perpetuities

Advisors should keep in mind the relationship between the Delaware Tax Trap and the applicable rule against perpetuities when drafting a trust that permits a beneficiary to exercise a nongeneral power of appointment to create successive ones

STEPHEN E. GREER, ATTORNEY

This article discusses the relationship between the Delaware Tax Trap and the abolition of the rule against perpetuities. The principal premise of the author is that in some states, a beneficiary of a dynasty trust can safely exercise a nongeneral power of appointment to create a successive power of appointment without running afoul of the Delaware Tax Trap, while in other states this cannot be done without causing gift or estate tax liability.

Retaining flexibility in perpetual trusts via nongeneral powers of appointment

The settlor of a typical "dynasty trust" establishes an irrevocable trust with an inclusion ratio of zero. Beneficiaries can be given extensive control and use of the trust assets but not to the extent that the trust assets will be included in their own estates.¹ In addition, the trust

can be made flexible to address future circumstances by giving a beneficiary an inter vivos or testamentary nongeneral power to appoint the trust assets to anyone in the world except the donee of the power, his creditors, his estate, or creditors of his estate.²

The primary, though not sole, barrier to any trust continuing into perpetuity is the rule against perpetuities.³ The common law rule against perpetuities (hereinafter the "Perpetuities Rule") and the Uniform Statutory Rule Against Perpetuities ("USRAP") complement the transfer tax system because under the rule, the trust principal eventually must be distributed to the trust beneficiaries.

The main reason formerly given in support of a perpetuities rule was to ensure the alienability of property by invalidating remotely nonvested interests that had the effect of restraining alienation.⁴ Now, the principal reason given in support of the rule is to prevent the control of capital by a settlor long since dead.⁵ Giving beneficiaries the ability to alter the disposition of a trust through the

use of nongeneral powers of appointment in many respects overcomes this objection.

Powers of appointment and the rule against perpetuities

The common law Perpetuities Rule and USRAP both provide that the validity of an interest in trust created by the exercise of a nongeneral or general testamentary power of appointment is measured from the date the original trust was created.⁶ Thus, the measuring period for determining the validity of non-vested interests created by the exercise of a nongeneral or a general testamentary power of appointment "relates back" to the date the original trust was created.⁷

The "relation back" doctrine not only determines the inception of the time period in which trust interests must vest but also the inception of the time period in which nongeneral and general testamentary powers of appointment must be exercised.⁸ As a result, under both the Perpetuities Rule and USRAP, whenever the donee of a nongeneral power of appoint-

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ment (the first power) exercises it by giving a beneficiary the further ability to exercise a nongeneral power of appointment (second power), the time period within which the second power may be exercised and the time period in which an interest created by the second power must vest, is measured by calculating the perpetuities period from the date of the trust instrument creating the first power.⁸

The 'Delaware Tax Trap,' the Code, and Regulations

Delaware's former Perpetuities Rule as originally enacted in 1933 stated that the validity of an interest in trust which is created by the exercise of a power of appointment is measured from the date the power of appointment is exercised to create the appointed interest rather than from the date the power of appointment is created.⁹ Accordingly, in Delaware, it was possible to create a trust—giving the beneficiary a nongeneral power of appointment, which could then be exercised to create a successive nongeneral power of appointment, and a trust not only could last forever in Delaware, but the trust

assets could escape federal estate tax at each beneficiary's generation.

The Powers of Appointment Act of 1951 added Sections 811(f)(4) and 1000(c)(4) to the Internal Revenue Code of 1939. These sections, the predecessors to Sections 2041(a)(3) and 2514(d), were enacted in response to the perceived "Delaware" problem.¹¹ The legislative history to this Act notes that "in at least one State a succession of powers of appointment, general or limited, may be created and exercised over an indefinite period without violating the rule against perpetuities. In the absence of some special provision in the statute, property could be handed down from generation to generation without ever being subject to estate tax."¹²

Code Sections 2041(a)(3) and 2514(d) provide that a gift or estate taxable event will occur if a power of appointment is exercised so as to create another power of appointment which, under applicable local law, can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such

property, for a period ascertainable without regard to the date of the creation of the first power. Under former Delaware law, one did not refer back to the date the first power was created to determine the time in which the property subject to this power must vest. Hence, vesting was "without regard to the date of the creation of the first power." The result was that the donee of the power who exercised it to create a successive power was subject to either gift tax or estate tax on all property subject to this power, depending on whether the power was exercised during life or at death.

Eventually, Sections 2041(a)(3) and 2514(d) became known as the "Delaware Tax Trap" because a beneficiary of a trust established in Delaware could inadvertently subject the trust property to gift or estate tax if the trust gave a beneficiary a nongeneral power of appointment which was exercised to create a successive nongeneral power of appointment. On the other hand, this "trap" might prove advantageous where it is better to subject the trust property to a non-skip beneficiary's gift or estate tax rate as opposed to having the trust assets subjected to GST tax (for instance, if insufficient GST exemption was allocated to the trust).

The non-skip donee could exercise the nongeneral power (first power) by giving a presently exercisable general power of appointment (second power) to new donee. The creation of the presently exercisable general power of appointment (second power) commences a new perpetuity period, which is "without regard to the date of the creation of the first power."¹³ Depending on when the first power was exercised to create the second power, the donee of the first

¹ See Dukeminier, "Dynasty Trusts: Sheltering Descendants From Transfer Taxes," 23 ETPL 417 (Nov 1996); Oshins and Blattmachr, "Megatrust: An Ideal Family Wealth Preservation Tool," Tr. & Est. (Nov 1991); Blattmachr, "The Right Answer: Put It All in Trust," Tr. & Investments (Sept/Oct 1998); Oshins and Oshins, "Protecting and Preserving Wealth Into the Next Millennium," Part I, 137 Tr. & Est. 52 (Sept 1998), Part II, 137 Tr. & Est. 68 (Oct 1998).

² Reg. 20.2041-1(c)(1). See Forsberg, "Special Powers of Appointment: The Key to Flexibility in Planning," 27 ETPL 13 (Jan 2000).

³ Some states have statutes that expressly limit the duration of private trusts, but more typically it might be the common law of a state, aside from the rule against perpetuities, which prevents perpetual trusts. Bogert, *Trusts and Trustees*, § 218 (Rev. 2d ed., 1992); Restatement, Second, Property (Donative Transfers) § 2.1, Duration of Trust.

⁴ Bloom, "The GST Tax Tail Is Killing the Rule Against Perpetuities," 87 Tax Notes 569, ¶ 10 (4/21/00). This article provides an excellent discussion of past and present reasons for the rule.

⁵ *Id.*
⁶ Waggoner, *Estates in Land and Future Interests in a Nutshell*, p. 320 (2d ed., 1993).

⁷ The "relation back" doctrine does not apply to a presently exercisable general power of appointment, which is the equivalent of ownership for perpetuities purposes.

⁸ Restatement, Second, Property (Donative Transfers) § 1.2 h.

⁹ USRAP (with 1990 amendments) at § 2.

¹⁰ Del. Laws 1833, ch. 168 (codified at Del. Code Ann. Tit. 25) § 501 (1974).

¹¹ The Revenue Act of 1942 was the first attempt to fix the "Delaware problem" but it was roundly criticized, and the Powers of Appointment Act of 1951 was made retroactive to 10/21/42. This date is important because unexercised general powers created before this date are exempt from taxation.

¹² S. Rep't 382, 82d Cong., 1st Sess., 1951 U.S. Code Cong. & Ad. Serv., Vol. 2 Legislative History, p. 1535.

¹³ See Blattmachr and Pennell, "Adventures in Generation-Skipping or How We Learned to Love the 'Delaware Tax Trap,'" 24 Real Prop., Prob. and Tr. J. 75 (1989).

power (who was the donor of the second power) would expose the appointive property to gift or estate tax. The appointive property would again be subject to either gift or estate tax, depending on when the second power was subsequently exercised, lapsed, or released by the donee of the second power.

Notably, Sections 2041(a)(3) and 2514(d) involve only beneficially held powers of appointment. Although the Second Restatement of Property characterizes a trustee's discretionary power to invade principal as a power of appointment,¹⁴ the legislative history of these Code sections excludes a trustee's discretionary power to invade principal, which is not coupled with an interest, as a power of appointment for purposes of these sections.¹⁵

Interestingly, the legislative history provides an explanation of these sections only in terms of traditional Perpetuities Rule analysis (i.e., the rule against remoteness of vesting).¹⁶ The legislative history does not illustrate the application of these sections in terms of the rule against the suspension of the power of absolute ownership or the suspension of the power of alienation. This suggests, as do the Regulations, that the rule against perpetuities as it relates to vesting and the rule against the suspension of the absolute power of alienation are one and the same.¹⁷ Conceding that there is a similarity in objective between the two—namely, to foster the alienability of property—they operate in two very different ways.¹⁸

The rule against perpetuities invalidates those categories of future interests which indirectly impede the alienation of property.¹⁹

Example. O at death directs income to A for life in trust, then to A's children for their lives (who

are unborn) at O's death, then income to A's grandchildren for their lives, remainder to B, but if not then surviving, to B's heirs. The income interests to A, A's children, and A's grandchildren are subject to a spendthrift clause.

Under the traditional rule against perpetuities, the income interest to A's children is valid because this interest must either vest or fail by A's death. The executory interest to B's heirs is also valid because this interest is certain to vest or terminate within the period of the rule. The income interest to A's grandchildren is invalid because it is not certain that this interest will vest within the period of the rule.²⁰ If it were held otherwise and the income interest to A's grandchildren were indestructible, it is unlikely the corpus, particularly when a trust isn't involved, could be restored to commerce within the period of the rule because of the difficulty in valuing the non-vested interest to A's grandchildren and joining this interest in a sale to another person.²¹

Importantly, the Perpetuities Rule does not require possession of the property within the period of the rule but requires only a certainty of vesting within the permissible period. In the above example, although the remainder to B is presently vested, more than likely B will be dead at the death of the last surviving child of A. The property will be distributed to B's heirs but not be included in their estates until well after the perpetuities period has ended.²²

The statutory rule against the suspension of the absolute power of alienation ("Alienation Rule") operates differently. The Alienation Rule should not be confused with direct restraints against alienation which per se may be ineffec-

tive, no matter what their length.²³ The common law rule generally forbids direct restraints against alienation, whether expressed as prohibition or forfeiture clauses and whether applied to legal or equitable interests, except as they might apply to equitable interests under a spendthrift provision.²⁴

Early in its history, the Alienation Rule was interpreted to mean that *not later than at the end of the permissible period*, there must exist persons in being who—alone or in combination with others—could convey an absolute fee in possession of land, or full ownership of personalty. The test was whether or not the trust would or could end during the permissible period, thus providing the beneficiaries the ability to sell the trust assets.²⁵ In other words, the pow-

¹⁴ Restatement, Second, Property (Donative Transfers) § 11.1 d.

¹⁵ S. Rep't 382, *supra* note 12, at 1635.

¹⁶ S. Rep't 382, *supra* note 12, at 1635. The Senate Report reads "Under Section 811(H4), the exercise of any power of appointment after October 21, 1942, will be taxable if it is exercised by creating another power of appointment which under local law can in turn be exercised so as to postpone the vesting (emphasis added) of the property for a period which is ascertainable without regard to the date of the creation of the first power."

¹⁷ Regs. 20.2041-3(e)(1)(H) and 25.2514-3(d).

¹⁸ For purpose of this article, the rule against perpetuities and the rule against the suspension of the power of alienation are discussed only in the context of trusts.

¹⁹ Restatement, Second, Property (Donative Transfers) Pt. 1, Rationale, at B.

²⁰ Leach, "Perpetuities in a Nutshell," 61 Harv. L. Rev. 638, 647 (1938).

²¹ Bloom, *supra* note 4, at § 10, and Newman, "Perpetuities, Restraints on Alienability, and the Duration of Trusts," 16 Vand. L. Rev. 57, 62 (1962-1963).

²² *Id.* See, generally, Levin and Mukoney, "The Rule Against Perpetuities and the Generation-Skipping Tax: Do We Need Both?," 35 Vill. L. Rev. 333 (1990).

²³ McDonnell, "Trusts-Perpetuities-Restraints on Alienation of Property Held in Trust," 36 Marq. L. Rev. 97 (1952).

²⁴ Bogert, *supra* note 3, at § 219.

²⁵ Bloom, "Transfer Tax Avoidance: The Impact of Perpetuities Restrictions Before and After Generation-Skipping Taxation," 45 Alb. L. Rev. 261 (1981). This excellent and definitive article examines the history of the rule against perpetuities, the rule against the suspension of the power of alienation, Sections 2041(a)(3) and 2514(d), and Estate of Murphy, discussed later.

er of alienation had to reside in the beneficiaries.

Therefore, in the example above, the contingent income interests to A's grandchildren would be invalidated under the Alienation Rule because the grandchildren might not be ascertainable within the period of the rule.²⁶ However, the

Alienation Rule goes farther than the Perpetuities Rule by invalidating A's children's income interest, or at least shortening it so that it would not last longer than the permissible period.²⁷ The theory is that any impediment (such as a spendthrift clause), which prevents the trustee from selling the trust assets, distributing the proceeds to the beneficiaries, and terminating the trust within the perpetuities period, results in the entire interest that is subject to the legal impediment being held invalid.²⁸

Whatever subtleties exist between the two rules, if it were held that a trustee's power of sale prevented a suspension of the power of alienation and there was no requirement that beneficial

interests vest, a trust could continue into perpetuity. It was generally held, though, that a trustee's power of sale did not prevent a suspension of the power of alienation.²⁹ However, in 1950, the Supreme Court of Wisconsin held, in *In re Walker's Will*,³⁰ that a trustee's power of sale satisfied the Alienation Rule, and noted the possibility that trusts could continue indefinitely in that state.

In *Estate of Murphy*,³¹ a beneficiary of a Wisconsin trust exercised a power of appointment by creating in her husband another power, which he in turn could validly exercise by placing the property subject to the power in a perpetual trust for the benefit of his children and descendants. The

²⁶ See, generally, Newman, *supra* note 21.

²⁷ Bloom, *supra* note 25, and Newman, *supra* note 21, at 71 and 73.

²⁸ Bogert, *supra* note 3, at § 218. The American endowment rule is that a trust cannot be terminated if doing so would defeat a material intention of the settlor in establishing the trust. *Clafin v. Clafin*, 149 Mass. 19, 20 N.E. 454 (1889). A spendthrift provision indicates a material intention of the settlor that the beneficial interest should not be assigned or terminated.

²⁹ McDonnell, *supra* note 23, at 104.

³⁰ 258 Wis. 65, 45 N.W.2d 94 (1950).

³¹ 71 TC 671 (1978).

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government's position was that Section 2041(a)(3) applied whenever a power was exercised to create a successive power if, as a result, only one of the three prohibited conditions of title existed: "a postponement of vesting, the suspension of absolute ownership or suspension of the power of alienation of property."³²

Under the government's interpretation, in a state adopting the Alienability Rule without a corresponding Perpetuities Rule, a taxable event would occur when a power is exercised to create a successive power because the exercise would delay vesting for a period ascertainable without regard to the date of the creation of the first power. The reason is that under the laws of that state, there is no period within which property must vest which can be ascertained by referring back to the date the first power was created.

Although the Tax Court in *Murphy* agreed that the government's position comported with a literal reading of the statute, the court nonetheless found the government's position unsupported by its own Regulations, and held that Section 2041(a)(3) required only an examination of the applicable local law to determine whether there is a postponement of vesting or a suspension of the absolute ownership or power of alienation. The court found Section 2041(a)(3) inapplicable because the trustee was given a power of sale and under Wisconsin law, the permissible alienation period is measured from the date the first power is created.

The government with prescience asserted that the court's holding would leave open the possibility that other states would enact laws similar to those in Wisconsin and thus avoid the provisions of Sec-

tion 2041(a)(3). The court responded by saying that the 1976 generation-skipping transfer (GST) tax provisions indirectly closed the loophole perceived by the government, and the court believed any potential for abuse would be better curbed by Congress.³³

Ironically, the IRS became the author of its own demise in *Murphy* when the IRS changed its Regulations in 1958 as part of a wholesale change of all existing estate tax Regulations under the Internal Revenue Code of 1939.³⁴ The original Regulations to Sections 811(f)(4) and 1000(c)(4)³⁵ did not contain the following language found today in Regs. 20.2041-3(e) and 25.2514-3(d): "if a power is exercised by creating another power of appointment, which can be validly exercised so as to (a) postpone ... vesting ..., or (b) (if the applicable rule against perpetuities is stated in terms of the suspension of ownership or of the power of alienation, rather than of vesting)." (Emphasis added.) It was this language which the Tax Court in *Murphy* found decisive in its determination that Congress did not intend for Section 2041(a)(3) to apply in a state that had only a rule against the suspension of the power of alienation. Furthermore, the IRS acquiesced in this decision.³⁶

The vast majority of states that allow perpetual trusts have followed the Wisconsin model. That is, they have repealed the Perpetuities Rule and have adopted instead a rule against the suspension of the power of alienation, but specify that the power of alienation is not suspended if a trustee has a power of sale. Moreover, state law will provide a "relation back doctrine" regarding the exercise of nongeneral and general testamentary powers of appointment.

implications for states that have abolished the Perpetuities Rule but have not adopted a rule against the suspension of the power of alienation

In a jurisdiction that abolished the rule against perpetuities and has no rule against the suspension of the power of alienation, there is no stated period of time within which a property interest must vest. When a power of appointment is exercised to create a successive nongeneral power of appointment, the property subject to this power will have its vesting postponed for a period of time that can not be ascertained by referring back to the date of the instrument creating the first power of appointment. As stated in the legislative history accompanying Florida's HB 599, "there is no 'period' ascertainable by reference to the date [a] .. power was created, because there is no rule against perpetuities and thus there simply is no "period."³⁷ Thus, if trust property is subject to the exercise of a nongeneral power of appointment, the exercise of that

³² *Id.* at 676.

³³ *Id.* at 681. Section 1433(c)(1) of TRA '86 retroactively repealed the 1976 GST tax provisions of Chapter 13.

³⁴ TD 6796, 23 F.R. 4529 (6/24/58), which reenacted and changed the existing estate tax Regulations found in Part 81, Subchapter 1, Title 26, Code of Federal Regulations (1939), Regulations 105, Estate Tax, as prescribed and made applicable to the Internal Revenue Code of 1954 by TD 6091, 19 F.R. 5167 (6/17/54).

³⁵ The predecessors to present-day Regs. 20.2041-3(e) and 25.2514-3(d) are Title 26, Chapter 1, Subchapter 8, Part 81.24(b)(2)(vi) and Part 86.2(b)(6), respectively. Part 81 was revised by TD 6078, 19 F.R. 4303 (7/14/54), and TD 6077, 19 F.R. 4308 (7/14/54), to conform the estate and gift tax Regulations, respectively, to the Powers of Appointment Act of 1951.

³⁶ 1979-2 CB 2.

³⁷ See House of Representatives Committee on Real Property & Probate Analysis to HB 689, prepared by Bruce Stone, which in turn cited Summary of Committee Proposal to Modify the Rule Against Perpetuities and for Statutory Authority to Reform Trusts, prepared for the Real Property, Probate and Trust Law Section of the Florida Bar, Rule Against Perpetuities Committee. It was Mr. Stone's insight that caught the attention of this author and proved the impetus behind Alaska's move to amend its perpetuities statute.

power to create a trust giving the beneficiaries nongeneral powers of appointment renders that property subject to estate tax or gift tax.

The solution for states that have this problem is to introduce an Alienation statute or, alternatively, to merely extend the permissible period when non-vested interests must vest and the time in which nongeneral and general testamentary powers of appointment may be exercised. It is this latter course of action that Alaska and Florida have chosen. Alaska extended its perpetuities period to 1,000 years but only in the limited circumstance of the time in which a nongeneral and general testamentary power of appointment must be exercised and the time in which property subject to the exercise of

these powers must vest.³⁸ Florida amended its USRAP provisions by extending the permissible "wait and see" period to 360 years.³⁹

If there was concern that existing "perpetual" trusts might stumble into the Delaware Tax Trap, then a better solution would be to make these provisions retroactive to the date when perpetual trusts became possible in the state, but no farther back than 9/25/85; otherwise, grandfathered GST trusts would lose their GST-exempt status under the final GST modification Regulations.⁴⁰ Alaska gave retroactive effect to its statute back to the time when perpetual trusts became possible in Alaska, or 4/2/97.⁴¹

The ability to make the provisions of a perpetuities bill retroactive is sanctioned in section 5(a) of USRAP.⁴² This section provides that, with respect to a non-vested property interest and a power of appointment created by the exercise of a power of appointment, the law in effect at the time a power of appointment is exercised to create a successive power of appointment controls, even though for purposes of determining the vesting period, the date of exercise relates back to the date of the instrument creating the first power of appointment. The purpose of this provision was to make the "wait and see" provision of 90

years applicable to trust instruments created prior to the enactment of USRAP.

States that may have avoided or stumbled into the Delaware Tax Trap
This article is not intended to be an extensive survey of all state law in the rapidly evolving area of perpetuity legislation but, based on the foregoing analysis, this author is of the opinion that a state which doesn't have a rule against perpetuities as it relates to vesting but which has (1) the Alienability Rule, (2) a statute which provides that the power of alienation is not suspended if the trustee has a power of sale, and (3) a "relation back" statute regarding the exercise of a nongeneral and general testamentary power of appointment, falls within the safe harbor of *Murphy* and thus such state's statute is outside the reach of Sections 2041(a)(3) and 2514(d).⁴³ As a result, the following states are within this safe harbor: Ohio,⁴⁴ New Jersey,⁴⁵ South Dakota,⁴⁶ and Wisconsin.⁴⁷

Analyzing the laws of Illinois,⁴⁸ Maryland,⁴⁹ and Maine⁵⁰ is more problematic. Illinois and Maryland both provide an "opt-out" provision regarding the rule against perpetuities for property held in trust. Illinois, Maryland, and Maine all contain a provision that the trustee must be given a power of sale while the trust is in existence. This indirect-

³⁸ AS 34 27 051, signed into law on 4/22/00 but retroactive to 4/2/97. In addition, a new section 34 27 100 was adopted, which adds a rule governing the rule against perpetuities and the suspension of the power of alienation. If the attempt to extend the perpetuity period to 1,000 years was considered a de facto repeal, coming within the holding of the *Murphy* will provide a second line of defense. A technical amendment will be introduced in the next legislative session to clarify the language of the new rule governing the rule against perpetuities and the suspension of the power of alienation.

³⁹ Fla Stat Ann § 689.225, signed into law on 6/7/00 and applicable after 1/1/01.

⁴⁰ Reg 26.2601-1(b)(4), Example 4, involving a change in trust situs from a state that had a perpetuity provision to a state that had abolished the rule against perpetuities. TD 8912, effective 12/20/00.

⁴¹ AS § 34.27 070(c).

⁴² The pertinent provision is found in the second sentence of section 5(a) of USRAP with 1990 amendments.

⁴³ This opinion is based solely on the holding in *Murphy*. If the Regulations were changed and made retroactive or the acquiescence withdrawn, this author would be of a different opinion. See *Manhattan General Equipment Co.*, 297 U.S. 129, 17 AFTR 214 (S Ct., 1936), in which a legislative Regulation was subsequently amended after taxpayer reliance on an original Regulation and the Court upheld application of the subsequent amendment to the taxpayer's transaction.

⁴⁴ Ohio Rev. Code § 2131.09.

⁴⁵ N.J.S.A. 46:2F-9.

⁴⁶ SDCL 43-6-3.

⁴⁷ Wis. Stat Ann. § 700.16.

⁴⁸ 765 ILCS 305/3.

⁴⁹ Md. Est. & Trusts Code Ann. § 11-102.

⁵⁰ 33 M.R.S.A. § 101-A.

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ly suggests that each of these states has a statutory period against the suspension of the power of alienation. While not posing a problem, it would have been helpful if there had been a direct expression of the rule prohibiting the suspension of the power of alienation, as was done in New Jersey.⁶¹ Furthermore, although not statutorily expressed, it can be assumed that nongeneral powers under the common law "relate back," and thus these statutes also come within the holding of *Murphy*.

The statutes of two states, Alaska and Florida, are outside the reach of Sections 2041(a)(3) and 2514(d) because, in Florida, and in Alaska (but only in circumstances where 2041(a)(3) and 2514(d) would have otherwise applied), the Perpetuities Rule was not abolished—only extended. However, there may be an additional problem in Florida. The Florida legislature added judicial and non-judicial trust modification provisions in a salutary attempt to eliminate concerns over dead-hand control. F.S.A. § 737.4032 permits a non-judicial modification of a trust, including a full termination with the consent of the trustee and all beneficiaries. If the trustee and the beneficiary are the same person, an argument can be made that the beneficiary possesses an unexercised general power of appointment as a matter of state law. Additionally, even where there may be more than one beneficiary, there still could be a general power of appointment as to each beneficiary's aliquot share.⁶²

The statutes of five states seem especially at risk of being within the reach of Sections 2041(a)(3) and 2514(d). In Arizona,⁶³ Delaware,⁶⁴ Idaho,⁶⁵ Rhode Island,⁶⁶ and Virginia,⁶⁷ the rule against perpetuities either was never in force, was repealed, or can

be repealed at the option of the settlor. The problem lies in the apparent absence of a state statute prohibiting the suspension of the power of alienation.

Delaware repealed the Perpetuities Rule with respect to personal property held in trust in 1995. That state recently amended its perpetuities statute on 7/6/00.⁶⁸ The amendment provides that if a first power is exercised to create a second power, then the second power of appointment and every interest in property created through the exercise of this power "relate back" to the creation of the first power. It is unclear how this amendment avoids the Delaware Tax Trap because the "period" within which the property must vest by referring back to the date the first power was created still cannot be determined, even though the successive power of appointment relates back to the creation of the first power.

Arizona has a potentially bigger problem. Arizona adopted USRAP in 1994. In 1998, the state amended its statute to allow perpetual trusts.⁶⁹ However, Arizona failed to amend the corresponding USRAP provision which requires the exercise of a general testamentary and nongeneral power of appointment within the 90-year permissible period. Moreover, there appears to be no rule governing the period of time in which the power of alienation may be suspended. As a result, Sections 2041(a)(3) and 2514(d) would apply if a nongeneral power of appointment were exercised within the permissible USRAP period to create a successive power of appointment. An exercise of a nongeneral power of appointment beyond the permissible USRAP period would be invalid.⁶⁰

Conclusion

The central problem with the language of Sections 2041(a)(3) and 2514(d) is that Congress used a rule of local property law in an attempt to solve a tax problem perceived to exist only in Delaware, but which also existed in Wisconsin for a different reason.⁶¹ The disquieting aspect of the Delaware Tax Trap is that in some states a beneficiary of a dynasty trust creates a gift or estate tax liability if a nongeneral power of appointment is exercised in a manner that gives a successive beneficiary a nongeneral power of appointment. At the same time, an equivalent exercise by a beneficiary of a dynasty trust established in another jurisdiction is unlikely to fall into the Delaware Tax Trap. Accordingly, practitioners should keep in mind the relationship between Sections 2041(a)(3) and 2514(d) and the applicable perpetuities rule when drafting a dynasty trust that gives a beneficiary the ability to exercise a nongeneral power of appointment to create a successive nongeneral power of appointment. ■

⁶¹ N.J.S.A. 46:2F-14.

⁶² Reg. 20.2041-3(c)(3).

⁶³ A.R.S. § 14-2801.

⁶⁴ 25 Del. Code Ann. § 503. The Perpetuities Rule was abolished as to interests created in personal property in trust.

⁶⁵ I.C.A. § 66-111. No Alienability Rule regarding personal property held in trust.

⁶⁶ R.I. Gen. Laws § 34-11-38.

⁶⁷ Va. Code § 66-13.3.

⁶⁸ 25 Del. Code Ann. § 504.

⁶⁹ See note 53, *supra*.

⁶⁰ See Covey, "Rule Against Perpetuities Changes and Perpetual (Dynasty) Trusts: Problems and Opportunities," *Practical Drafting*, pp. 5871-5893, 61 p. 5877 (Mar. 2000), for an excellent analysis of (1) the problem confronting Arizona and (2) the Rule Against Perpetuities as it relates to the Delaware Tax Trap.

⁶¹ The problems associated with the language used in the Code and Regulations are best exemplified by the effect in Delaware at the time the provisions became applicable. If the first power was exercised without creating a second power, taxation in Delaware could be extended for at least another generation. See Bloom, *supra* note 25, at 283.

HB

40

CS FOR HOUSE BILL 40(FIN)

SUMMARY: Requires the court to revoke for one year the driving privileges of a person who violated traffic laws in a way that was a significant contributing cause of an accident that resulted in a death.

Sectional Analysis

Sections 1 and 4 provide for a mandatory court appearance for a driver who has violated a traffic law and the accident resulted in death. Section 4 requires a 2/3 vote because Section 1 indirectly amends a court rule.

Section 2 provides for a mandatory court revocation of driving privileges for one year if the court finds by clear and convincing evidence that the driver's violation of a traffic law contributed significantly to an accident that caused the death of another person. The court can, however, grant a limited license if the person's ability to earn a livelihood would be severely impaired, or the person's ability to act as primary caregiver to another who is disabled would be severely impaired.

Section 3 defines "traffic law" according to the current definition that includes statutes, regulations and municipal ordinances that govern the driving or movement of motor vehicles.

Section 5 makes the new law applicable to accidents occurring on or after the effective date set out in **Section 6** of September 1, 2001 (must be amended to 2002).

Examples: These are actual cases of the type that CSHB 40(FIN) is intended to address:

Case 1 – A man driving along Glenn Highway into Anchorage one summer afternoon fell asleep at the wheel and violated a traffic regulation by driving onto the bike path. His car struck and killed a woman riding her bicycle on the bike path.

Case 2 – A woman drove from Anchorage to Cooper Landing, where she violated a traffic law by crossing the double yellow line and crashing into another car head on, killing the driver of the other car.

Case 3 – A teenage girl drove down Dimond Boulevard in Anchorage late at night. She violated a traffic law by driving over the median and collided with another vehicle head-on, killing the driver of the other car.

Case 4 –On a winter night, the driver of a pick-up truck on C Street in Anchorage was going under the posted speed limit, but still too fast for icy conditions. This is a violation of the state's "basic speed" law, which prohibits driving faster than is safe under existing road and weather conditions. The driver lost control and crossed into the opposite lane, hitting another car, and killing Albert Taylor's son.

In all these cases, alcohol and drug tests were negative, and there was no reported erratic driving prior to the collisions. There was no evidence of mechanical causes for the collisions.

No criminal prosecutions were possible because the state could not prove that the driver acted recklessly or with criminal negligence.

Prepared by the Department of Law 2-20-02

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: CS HB 40(FIN)
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
 Title An act providing for the revocation BRU Motor Vehicles
of driving privileges by a court.... Component _____
 Sponsor House Rules for Governor
 Requester Senate Judiciary Component No. 2348

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
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						
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CHANGE IN REVENUES (1005)	1.0	1.0	1.0	1.0	1.0	1.0
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

There will be approximately 10 revocations per year and the reinstatement fee for each driver is \$100. The 10 revocations is only a very small fraction of the total revocation workload and will not require extra expenditure.

Prepared by: Charles R. Hosack Phone 269-5559
 Division: Motor Vehicles Date/Time 2/6/02 8:19 AM
 Approved by: Jim Duncan, Commissioner Date 2/6/2002
 Agency: Department of Administration

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: CSHB 40 (FIN)
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
Title "An Act relating to revocation of driving privileges BRU Criminal Division
by a court . . . in connection with a fatal motor vehicle accident . . ." Component 1st-4th Judicial Districts; Criminal
Sponsor Rules Committee by Request Appeals/Special Litigation
Requester Senate Judiciary Committee 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 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
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						
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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-Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
CSHB 40 (FIN) would require the revocation of driving privileges of a person who drives a vehicle, including a commercial vehicle, that is involved in a fatal traffic accident if the person is convicted of a violation of traffic laws in connection with the accident, and the violation of the traffic laws was a significant contributing cause to the accident that resulted in the death of another person.

Because conviction of the traffic offense may result in loss of a valuable license, the person has a right to a jury trial. However, a jury trial on traffic matters is a relatively short time commitment. The Department of Law estimates no more than a dozen of these trials will occur statewide per year, and does not anticipate a measurable fiscal impact from passage of this legislation.

Prepared by: Joan M. Kasson Phone (907) 465-5370
Division: Attorney General's Office Date/Time 2/8/02 12:51 PM
Approved by: Kathryn Daughhete for Bruce M. Botelho, Attorney General Date 2/8/2002
Agency: Department of Law

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: CS HB 40 (FIN)
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
 Title "An Act relating to license BRU Legal and Advocacy Services
revocation for fatal accident..." Component Public Defender Agency
 Sponsor House Rules for Governor
 Requester Senate Judiciary Component No. 1631

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type-Do not abbreviate)						
TOTAL

Estimate of any current year (FY2002) cost: 0.0
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The Public Defender Agency's operations may be affected by this bill. Drivers generally do not have a right to a court-appointed attorney in traffic violation proceedings. However, the Alaska Supreme Court has held that a person has a right to a jury trial (and court-appointed counsel) for people who cannot afford to hire a lawyer for offenses which may result in loss of a valuable license such as a driver's license. Baker v. City of Fairbanks, 471 P. 2d 386 (Alaska 1970). The Public Defender Agency does not anticipate many of these cases and does not have a reliable way of estimating the costs. Therefore, there is a possibility that the courts might decide to appoint an attorney. However, the Public Defender Agency does not anticipate that there would be many cases even if we were appointed. Therefore, an indeterminate fiscal note is being submitted.

Prepared by: Barbara Brink, Director Phone (907) 334-4416
 Division Public Defender Agency Date/Time 2/6/02 8:10 AM
 Approved by: Jim Duncan, Commissioner Date 2/6/2002
 Agency Department of Administration

FISCAL NOTE

**STATE OF ALASKA
2001 LEGISLATIVE SESSION**

Fiscal Note Number: 3
 Bill Version: HB 40
 (H) Publish Date: 1/10/01

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
 Title: "An Act relating to revocation of driving privileges
by a court . . . in connection with a fatal motor vehicle accident . . ." BRU Criminal Division
 Sponsor: Rules Committee Component: 1st-4th Judicial Districts; Criminal
Appeals/Special Litigation
 Requester: Governor 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 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
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						
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CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
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 (FY2001) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill would require the revocation of driving privileges of a person who drives a vehicle, including a commercial vehicle, that is involved in a fatal traffic accident if the person is convicted of a violation of traffic laws in connection with the accident, and the violation of the traffic laws contributed to the accident that resulted in the death of another person.

Because conviction of the traffic offense may result in loss of a valuable license, the person has a right to a jury trial. However, a jury trial on traffic matters is a relatively short time commitment. The Department of Law estimates no more than a dozen of these trials will occur statewide per year, and does not anticipate a measurable fiscal impact from passage of this legislation.

Prepared by: Joan M. Kasson Phone 465-5370
 Division: Attorney General's Office Date/Time 1/5/01 1:36 PM
 Approved by: Kathryn Duaghhetee for Bruce M. Botelho, Attorney General Date 1/5/01
 Agency: Department of Law

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FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: HB 40
 (H) Publish Date: 1/10/01

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
 Title: License Revocation fro Fatal Accidents BRU: Legal and Advocacy Serv
 Component: Public Defender Agency
 Sponsor: Rules Committee
 Requester: Governor Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
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						
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CHANGE IN REVENUES ()						
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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 (FY2001) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The Public Defender Agency's operations may be affected by this bill. Drivers generally do not have a right to a court-appointed attorney in traffic violation proceedings. However, the Alaska Supreme Court has held that a person has a right to a jury trial (and court-appointed counsel) for offenses which may result in loss of valuable license such as a driver's license. Baker v. City of Fairbanks, 471 P. 2d 386 (Alaska 1970). The Public Defender Agency does not anticipate many of these cases and does not have a reliable way of estimating the costs. Therefore, the fiscal impact is indeterminate.

Prepared by: Barbara K. Brink, Director Phone (907) 334-4414
 Division: Public Defender Agency Date/Time 11/07/00 3PM
 Approved by: Alison Elgøe, Deputy Commissioner Date 11/8/00
 Agency: Department of Administration

For distribution information, call the Governor's Legislative Office

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: HB 40
 (H) Publish Date: 1/10/01

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
 Title: License Revocation for Fatal Accidents BRU: Motor Vehicles
 Component: _____
 Sponsor: Rules Committee
 Requester: Governor Component Number: 2348

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
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						
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CHANGE IN REVENUES ()	1.0	1.0	1.0	1.0	1.0	1.0
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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 (FY2001) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

There will be approximately 10 revocations per year and the reinstatement fee for each driver is \$100. The 10 revocations are only a small fraction of the total revocation workload and will not require extra expenditure.

Prepared by: Charles R. Hosack Phone 269-5559
 Division: Motor Vehicles Date/Time 11/1/00 12:00 AM
 Approved by: Alison Elgee, Deputy Commissioner Date 11/8/00
 Agency: Department of Administration

For distribution information, call the Governor's Legislative Office

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION

TONY KNOWLES,
GOVERNOR

Mailing: PO Box 110300
Juneau, AK 99811-0300
Delivery: 123 4th Street, Ste 717
Juneau, AK 99801
Phone: (907) 485-3428
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January 12, 2001

JAN 12 2001

2:50 pm fo

The Hon. Norman Rokeberg, Chair
House Judiciary Committee
Alaska State Legislature
State Capitol, Room 118
Juneau, AK 99801

Re: HB 40 (Revocation of Driving Privileges)

Dear Rep. Rokeberg:

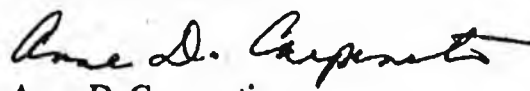
House Bill 40 was introduced January 10, 2001, and referred to your committee. I am writing to request that the bill be scheduled for a hearing at your earliest convenience.

The bill requires that a court revoke the driving privileges of a driver who violates the traffic laws, and the violation contributes to an automobile accident that results in a death. Drivers who violate traffic laws may not have committed a crime, but if their poor driving causes the death of another person, their driving privileges should be revoked. Several traffic deaths occur in Alaska every year when a driver causes the death of another by poor driving and the only consequence is a small fine. This is very difficult for the families of the victims. House Bill 40 provides for a one-year revocation of driving privileges under these circumstances. This period would be concurrent with any other revocation that might apply, and the court may grant a limited license if the court finds the limited license will not endanger the public.

If you have any questions about the bill or require further information, please feel free to call me at any time. Thank you for your consideration of this request.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: 
Anne D. Carpeneti
Assistant Attorney General

ADC:vr

Information
Statement

Here are four actual cases of the type that HB 40 is intended to address.

Case 1 – A man driving along Glenn Highway into Anchorage one summer afternoon fell asleep at the wheel and violated a traffic regulation by driving onto the bike path. His car struck and killed a woman riding her bicycle on the bike path.

Case 2 – A woman drove from Anchorage to Cooper Landing, where she violated a traffic law by crossing the double yellow line and crashing into another car head on, killing the driver of the other car.

Case 3 – A teenage girl drove down Dimond Boulevard in Anchorage late at night. She violated a traffic law by driving over the median and collided with another vehicle head-on, killing the driver of the other car.

Case 4 – On a winter night, the driver of a pick-up truck on C Street in Anchorage was going under the posted speed limit, but still too fast for icy conditions. This is a violation of the state's "basic speed" law, which prohibits driving faster than is safe under existing road and weather conditions. The driver lost control and crossed into the opposite lane, hitting another car, and killing Albert Taylor's son.

In all these cases, alcohol and drug tests were negative, and there was no reported erratic driving prior to the collisions. There was no evidence of mechanical causes for the collisions.

No criminal prosecutions were possible because the state could not prove that the driver acted recklessly or with criminal negligence.

Sectional Analysis

Sections 1 and 4 provide for a mandatory court appearance for a driver who has violated a traffic law and the accident resulted in death. Section 4 requires a 2/3 vote because Section 1 indirectly amends a court rule.

Section 2 provides for a mandatory court revocation of driving privileges for one year if the court finds that the driver's violation of a traffic law contributed to an accident that caused the death of another person. The court can, however, grant a limited license if the person's ability to earn a livelihood would be severely impaired.

Section 3 defines "traffic law" according to the current definition that includes statutes, regulations and municipal ordinances that govern the driving or movement of motor vehicles.

Section 5 makes the new law applicable to accidents occurring on or after the effective date set out in **Section 6** of September 1, 2001.


Representative Norman Rokeberg
February 28, 2001
Page 2

the purview of HB 40 would not involve imprisonment, a finding by the court under the bill as worded probably would not be admissible under the *Scott v Robertson* holding, unless violation of the traffic law was punishable by imprisonment, e.g., driving under the influence.

There are any number of reasons why someone may not contest a traffic citation. My basic point is that the proposed legislation should not affect, one way or the other, a civil action arising out of the motor vehicle accident. Upon reflection, there probably is no need to add additional language to the proposed bill in light of existing Alaska law.

Thank you for your consideration of these comments.

Sincerely yours,



David S. Carter

DSC:ph/141894

ALASKA STATE LEGISLATURE

Sen. Robin Taylor, Chair
Sen. Dave Donley, Vice-Chair
Sen. John Cowdery
Sen. Gene Therriault
Sen. Johnny Ellis




State Capitol
Juneau, AK 99801-1
(907) 465-3717
Fax: 465-3922

Senate Judiciary Committee

Date: January 18, 2002

To: Legal Services

From:  Darrell Thomas, Judiciary Aide

Subject: HB 40

Please prepare a Work Draft CS of CSHB40, incorporating the changes made to the attached copy of the bill.

We have this scheduled for hearing in Senate Judiciary Committee on March 27.

Please call me at Ext. 3717 if you have any questions or cannot read the handwriting on the bill.

Thank you.

CS FOR HOUSE BILL NO. 40(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - FIRST SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered: 4/21/01

Referred: Rules

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

A BILL

FOR AN ACT ENTITLED

1 **"An Act providing for the revocation of driving privileges by a court for a driver**
2 **convicted of a violation of traffic laws in connection with a fatal motor vehicle or**
3 **commercial motor vehicle accident; amending Rules 43 and 43.1, Alaska Rules of**
4 **Administration; and providing for an effective date."**

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

6 *** Section 1.** AS 28.05.151 is amended by adding a new subsection to read:

7 (e) The supreme court, in establishing scheduled amounts of bail under this
8 section, and each municipality that establishes or has established a fine schedule under
9 this section may not allow for the disposition of an offense without court appearance
10 for a person who is cited for violation of the traffic laws in connection with a motor
11 vehicle accident if the accident resulted in the death of a person. In this subsection,
12 "traffic laws" has the meaning given in AS 28.15.261.

13 *** Sec. 2.** AS 28.15 is amended by adding a new section to read:

14 **Sec. 28.15.182. Court revocation of license for accident causing death. (a)**

1 A court convicting a person for a violation of the traffic laws shall revoke the driver's
2 license, privilege to drive, or privilege to obtain a license of a person if the court finds
3 by clear and convincing evidence that

4 (1) the person was operating a motor vehicle or commercial motor
5 vehicle that was involved in an accident;

6 (2) the accident caused the death of another person; and

7 (3) the violation of traffic laws by the person was a significant
8 contributing cause of the accident. *may be for a period up to*

9 (b) The ~~period of~~ revocation under (a) of this section is ~~one year~~. This period *three*
10 is concurrent with any other period of revocation under AS 28.15.165 or 28.15.181, or *years*
11 any other action imposed by the department or court in connection with the accident.

12 (c) A court revoking a person's driver's license, privilege to drive, or privilege
13 to obtain a license under (a) of this section may consider a request for a limited license
14 by the person. A court may not grant a limited license if another statute prohibits a
15 limited license for violation of its provisions. A court shall require a certification of
16 employment to prove any claim based on the person's employment and a certification
17 of need by a licensed health care practitioner to prove a claim based on care for
18 another person. After a review has been made of the person's driving record and other
19 relevant information, the court may grant limited license privileges for all or part of
20 the period of revocation if the court finds that a limitation can be placed on the license
21 that will enable the person to drive without danger to the public and that, without a
22 limited license,

23 (1) the person's ability to earn a livelihood would be severely impaired;
24 or

25 (2) the person would be severely impaired in acting as the primary
26 caregiver for someone with a debilitating physical or mental condition.

27 (d) When imposing a limitation under (c) of this section, the court shall

28 (1) require the surrender of the driver's license; and

29 (2) issue to the person a certificate valid for the duration of the
30 limitation specifying the terms of the limited license.

31 (e) ~~The findings made by the court under (a) of this section are not admissible~~

Asst A

1 ~~in a civil, criminal, or administrative action arising out of the motor vehicle accident.~~

2 * Sec. 3. AS 28.15.219 is amended by adding a new paragraph to read:

3 (4) "traffic laws" has the meaning given in AS 28.15.261.

4 * Sec. 4. The uncodified law of the State of Alaska is amended by adding a new section to
5 read:

6 INDIRECT COURT RULE AMENDMENT. (a) AS 28.05.151(e), added by sec. 1 of
7 this Act, has the effect of amending Rules 43 and 43.1, Alaska Rules of Administration, by
8 not allowing for the disposition of an offense without a court appearance for certain violations
9 of traffic laws in connection with a motor vehicle accident or a commercial motor vehicle
10 accident resulting in the death of a person.

11 (b) Section 1 of this Act takes effect only if (a) of this section receives the two-thirds
12 majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

13 * Sec. 5. The uncodified law of the State of Alaska is amended by adding a new section to
14 read:

15 APPLICABILITY. This Act applies to actions taken regarding a motor vehicle or
16 commercial motor vehicle accident that caused the death of a person and that occurred on or
17 after the effective date of this Act.

18 * Sec. 6. This Act takes effect September 1, 2001.

1A

(e) A representative of the family of a person who died in the accident may testify at any hearing addressing a revocation under (a) of this section or a request for a limited license under (c) of this section.

HB

52

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 52 am
 () Publish Date: _____

Revision Date/Time: 4/30/02 8:33 am Dept. Affected: Corrections
 Title: "An Act relating to the Interstate Comp BRU: Administration & Operations
 Adult Offender: Supervision; amending Rules 4 and 24... Component: Community Corrections
 Sponsor: Rules Committee
 Requester: Senate Judiciary Committee Component No.: 1382

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous	0.0	16.0	16.0	16.0	16.0	16.0
TOTAL OPERATING	0.0	16.0	16.0	16.0	16.0	16.0

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

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

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	16.0	16.0	16.0	16.0	16.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	16.0	16.0	16.0	16.0	16.0

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

All states joining the Interstate Compact for Adult Offender Supervision will be assessed a fee depending on the size of the offender population, etc. The State of Alaska has been tentatively assessed at \$18,000 per year. These fees will pay for the administrative costs of the Compact as well as travel to Washington D.C. for the compact commissioners to attend meetings.

It is now estimated that the fee assessment is not likely to be implemented until FY04 due to the need for the Commission to meet, sets fees, get started and implement the Compact so there is no fiscal impact expected the first year. We currently pay \$2,000 per year for the current compact fees so we there will only be an expected \$16,000 impact per year.

Prepared by: Candace Brower
 Division: Commissioner's Office
 Approved by: Margaret Pugh, Commissioner
 Agency: Department of Corrections

Phone 465-4652
 Date/Time 4/30/02 10:00 AM
 Date 4/30/02

STATE OF ALASKA

DEPARTMENT OF CORRECTIONS
Commissioner's Office

TONY KNOWLES, GOVERNOR

431 N. Franklin Street, Suite 400
Juneau, AK 99801
PHONE: (907) 465-4652
FAX: (907) 465-3390

February 22, 2002

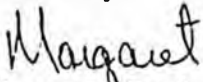
The Honorable Robin Taylor
Judiciary Committee Chair
Alaska State Senate
State Capitol, Room 30
Juneau, Alaska 99801

Dear Senator Taylor:

I am respectfully requesting that House Bill 52, "An Act relating to the Interstate Compact for Adult Offender Supervision and the State Council for Interstate Adult Offender Supervision; amending Rules 4 and 24, Alaska Rules of Civil Procedure; and providing for an effective date" be scheduled for a hearing in Senate Judiciary. The bill was amended and passed out of the House of Representatives on April 28, 2001 with 35 yeas, 4 nays and 1 excused. On May 6, 2001 you, in your capacity as the Judiciary Chair, waived the Senate Judiciary referral and it was referred to Senate Finance. On February 13, 2002 it was heard in Senate Finance and was passed out of committee with Senator Donley, Cochair, and Senators Lemman and Ward signing do pass and Senator Kelly, Cochair, and Senators Green, Austerman, Wilken and Olson signing no recommendation. Senator Donley amended the fiscal note and the bill was given a further committee referral back to Senate Judiciary.

If you have any questions, please feel free to give me a call.

Sincerely,


Margaret Pugh
Commissioner of Corrections

cc: Shari Kochman, Deputy Legislative Director
Office of the Governor

**REQUEST FOR
HEARING**

Journal Text



01-10-2001

House Journal

0054.

The following fiscal note(s) apply:

1. Fiscal, Dept. of Corrections

The Governor's transmittal letter dated January 10, 2001, appears below:

"Dear Speaker Porter:

With this bill I transmit today, Alaska has the opportunity to increase supervision of criminal offenders who travel across state lines, thereby contributing to the growing national interest in protecting victims' rights. This bill allows Alaska to participate in the Interstate Compact for Adult Offender Supervision, joining other states in replacing the now-outdated Interstate Compact on Probation and Parole.

The current compact was enacted in 1937 and can no longer adequately deal with the more than four million offenders on probation and parole, 250,000 of which will cross state lines this year. The proposed new compact provides for an interstate commission to coordinate the transfer and supervision of probationers and parolees between states, as well as enforcement mechanisms for states who fail to abide by the rules of the compact.

A state council would also be created to exercise oversight and advocacy concerning the state's participation in the Interstate Commission as well as to make recommendations to the legislature to facilitate the operations and procedures of the compact within the state.

I urge your prompt and favorable consideration of this bill.

Sincerely,
/s/
Tony Knowles
Governor"

Bill Root:



TO REPORT PROBLEMS WITH BASIS INQUIRY

LIVE KTOO STREAMS



Sectional Analysis of HB 52
(An Act Relating to the Interstate Compact for Adult Offender Supervision)

Section 1. Legislative findings that: (1) the existing Interstate Compact (ICSPP) is the oldest corrections compact among the states and has not been amended since its adoption 63 years ago; (2) the ICSPP currently has jurisdiction over more than a quarter million offenders and is inadequate to address problems associated with interstate movement of probationers and parolees; and (3) acknowledges national recommendations to change the ICSPP to effectively manage interstate movement of probationers/parolees to better address public safety and offender accountability.

Section 2. Repeals and reenacts AS 33.36.110 (current Interstate Compact) as the Interstate Compact For Adult Offender Supervision. [This Compact was drafted by a group sponsored by the National Institute of Corrections.]

- Article I (pages 2-3) – discusses Purpose and Policy of Compact to promote public safety and protect victims' rights through better management, control, and tracking of movement of interstate offenders, and to equitably distribute the costs, benefits and obligations of the Compact among participating states.

Discusses creation of Interstate Commission that will establish uniform procedures to manage and track interstate movement of offenders, improve information systems that will assist in goals of public safety and victim notice, report on activities of Compact to all branches of government, and coordinate training of officials monitoring offenders.

- Article II (pages 3-5) – definitions of terms used in the Compact.
- Article III (pages 5-6) – creates the **Interstate Commission** for Adult Offender Supervision, which consists of representatives from each member state (commissioners) appointed by a **State Council** from each state. Discusses membership of the State Council, which is created in Alaska through AS 33.36.140 in section 3 of this bill (page 20).

Provides that, in addition to the commissioners from each state, who shall be the voting members, the Interstate Commission shall include ex-officio non-voting members, including representatives from governor's organizations, legislators, state chief justices, attorneys general, and crime victims.

Each compacting state has one vote on the Interstate Commission, which shall meet at least once each year. The Interstate Commission shall establish an executive committee to act on its behalf when not in session, except for rule-making and amending the Compact.

- Article IV (pages 6-8) – provides the Powers and Duties of the Interstate Commission, the most important of which include: rule-making authority which shall be binding on the compacting states; oversee, supervise and coordinate the interstate movement of

offenders; enforce compliance with compact provisions; appoint committees and hire staff; provide for dispute resolution among the compacting states; report annually to the legislatures, governors, judiciary and state councils of the compacting states concerning the preceding year's activities of the Interstate Commission; coordinate education, training and public awareness regarding interstate movement of offenders; and establish uniform standards for reporting, collecting and changing data.

- Article V (pages 8-10) – Organization and Operation of the Interstate Commission. The Interstate Commission shall, within 12 months of its first meeting, adopt by-laws to govern its conduct and carry out the purposes of the Compact; lists several areas that must be addressed in by-laws.
- Article VI (pages 10-12) – Activities of the Interstate Commission. Highlights include: each member state shall have one vote; authorizes Interstate Commission to adopt by-law to provide for telephonic or telecommunication or electronic participation in meetings; all meetings shall be open to the public with public notice given, with limited exceptions.
- Article VII (pages 12-14) – Rulemaking Functions of the Interstate Commission. Mandates the Interstate Commission to adopt rules to effectively achieve the purposes of the Compact, including transition rules during the period in which the Compact is being considered and enacted by the states. Rulemaking shall substantially comply with the federal Administrative Procedure Act. A majority of the compacting states can reject a rule through legislative action. Proposed rules must be published, a hearing provided and the opportunity for public comment before they may be enacted.

This section also provides what subjects must be addressed through rulemaking within 12 months of the first meeting of the Interstate Commission, including: notice to victims; offender registration; transfer procedures; restitution; level of supervision; transition rules between effective date of the Compact and date on which the last eligible state adopts the Compact; and mediation and dispute resolution between member states.

Provides that the existing rules for the current Interstate Compact will remain in effect only until 12 months after the first meeting of the Interstate Commission.

- Article VIII (pages 14-15) – Oversight, Enforcement and Dispute Resolution by the Interstate Commission. Requires the Interstate Commission to oversee interstate movement of offenders in compacting states and monitor these activities in non-compacting states that may significantly affect compacting states. Directs the courts and executive agencies in members states to enforce the Compact; and provides that the Interstate Commission is entitled to receive service of process, and has the right to intervene, in all judicial or administrative proceedings that pertain to the Compact and that may affect the powers, responsibilities or actions of the Interstate Commission (implemented by two court rule changes in section 6 of this bill (pages 21-22)).

Provides procedures for the Interstate Commission to resolve disputes between states, and to enforce the provisions of the Compact using any of the enforcement mechanisms set out in Article XI (pages 16-19).

- Article IX (pages 15-16) – Finance. Obligates the Interstate Commission to pay for the costs it incurs, to levy and collect annual dues from each compacting state to cover operational costs based upon a formula focusing on population of the state and the volume of interstate offender movement [Alaska is projected to be in the group of states with the lowest annual assessment]. Provides that the Interstate Commission must follow usual responsible rules of finance and accounting, and requires an annual audit by a certified or licensed public accountant to be included in annual report.
- Article X (page 16) – Compacting States' Effective Date and Amendments. Provides that the Compact shall become effective after 35 states have enacted it. No amendment to the Compact shall become effective unless it is enacted into law by unanimous consent of the compacting states.
- Article XI (pages 16-19) – Withdrawal, Default, Termination and Judicial Enforcement. A compacting state may withdraw from the compact by enacting a statute repealing the statute that enacted the Compact. Provides authority for the Interstate Commission to impose penalties on a member state that defaults in any of its obligations under the compact, the by-laws or duly adopted rules, including fines, suspension and termination of membership in the Compact, and judicial enforcement of compliance with Compact requirements.
- Article XII (page 19) – Severability and Construction. Standard language re enforceability of remaining provisions if any particular provision is found to be unenforceable.
- Article XIII (pages 19-20) – Binding effect of Compact and other laws. Clarifies relationship between the Compact and any conflicting laws.

Section 3. AS 33.36 is amended to add sections to implement provisions of the Compact in Alaska.

- AS 33.36.130 provides that the governor shall appoint the compact administrator in Alaska, and describes the responsibilities of the compact administrator to manage the state's supervision and transfer of offenders, and to report to the State Council under AS 33.36.140.
- AS 33.36.140 creates the State Council to implement the provisions of the Compact, the State Council is composed of seven members including five voting members; the commissioner of corrections, the compact administrator, and attorney employed in the Department of Law appointed by the governor, two members appointed by the governor from citizens of the state, at least one of whom must be a representative from victim's groups; and on ex officio nonvoting member from the judicial branch selected by the judiciary. (Note: The makeup of the State council is consistent with the requirements of Article III (b) of the Compact on page 5 of the bill.)

The commissioner of corrections or the commissioner's designee serves as the chair of the State Council. The citizen members of the State Council serve for three-year terms, and these members and the Department of law representative serve at the pleasure of the governor.

This section sets out the duties of the State Council, including: designating the compact administrator as the state's commissioner to the Interstate Council, exercising oversight and advocacy concerning the state's participation in the Interstate Commission, and making recommendations to the legislature to facilitate the implementation of the Compact and its rules and bylaws.

- Section 4. Amends AS 39.25.120(c) to place the compact administrator in the partially exempt service.
- Section 5. Repeals AS 33.36.120, the definition section of the current Interstate Compact.
- Section 6. Amends Civil Rule of Procedure 4 to require service of process on the Interstate Commission As required by Article VIII(a)(2) of the Compact (page 14), and makes clear that this section of the Compact takes effect only if it receives a two-thirds majority of each house.
- Section 7. Amends Civil Rule of Procedure 24 to give the Interstate Commission standing to intervene in a judicial proceeding as required by Article VIII(a)(2) of the Compact(page 14), and makes clear that this section of the Compact takes effect only if it receives a two-thirds majority of each house.
- Section 8. Instructs the reviser of statutes to change the name of the Compact to the Interstate Compact for Adult Offender Supervision.
- Section 9. Effective date. Provides that this Act takes effect only if at least 34 other states ratify the Compact, and the effective date will be the day the commissioner of corrections notifies the reviser of statutes that at least 34 other states have ratified the Compact, or July 1, 2001, whichever is later.



RECEIVED
NATIONAL INSTITUTE
OF CORRECTIONS

00 MAR 27 PM 2:38

OFFICE OF THE DIRECTOR

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March 21, 2000

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*Formerly
The National Victim Center*

Mr. Morris L. Thigpen
Director
National Institute of Corrections
320 First Street, N.W.
Washington, D.C. 20534

Dear Mr. Thigpen:

The National Center for Victims of Crime strongly supports the proposed Interstate Compact for Adult Offender Supervision. With an estimated quarter of a million probationers and parolees crossing state borders each year, and no unified national system to monitor their interstate movement, many offenders have been able to move without notification to the receiving state and reside in new communities with little or no supervision.

As you know, the current Interstate Compact for the Supervision of Parolees and Probationers has not been amended since its adoption over 62 years ago. Since the Compact predated most of the state laws enacted to give victims basic rights to be notified, present, and heard during the criminal justice process, and to receive restitution from convicted offenders, we are especially pleased to see that the proposed Compact addresses the implementation of victims' rights along with public safety concerns and offender accountability.

We applaud the victim representation on both the task force that investigated the need for an amended Compact and the drafting committee. The proposed Compact gives victims meaningful roles in the membership of each State Council and on the national Interstate Commission. By including victims in the activities of these governing bodies, we are confident victims' perspectives will be considered as the new Compact is implemented nationwide.

The National Center for Victims of Crime encourages all fifty states and affected territories of the United States to adopt the new, amended Interstate Compact for Adult Offender Supervision.

Best wishes,

Susan Herman



International Community Corrections Association

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U.S. Bureau of Prisons Liaison
Jim Beck
Washington, DC • (202) 307-3171

**Correctional Services
of Canada Liaison**
James Murphy
Ottawa, Ontario • (613) 942-3374

BOARD RESOLUTION INTERSTATE COMPACT

Whereas: The interstate compact for the supervision of Parolees and Probationers was established in 1937, it is the earliest corrections "compact" established among the states and has not been amended since its adoption over 62 years ago;

Whereas: This compact is the only vehicle for the controlled movement of adult parolees and probationers, and it currently has jurisdiction over more than a quarter of a million offenders;

Whereas: The complexities of the compact have become more difficult to administer, and many jurisdictions have expanded supervision expectations to include currently unregulated practices such as sex offender registration and victim notification requirements.

Whereas: After hearings, national surveys, and a detailed study by a task force appointed by the National Institute of Corrections, the overwhelming recommendation has been to amend the document to bring about a more effective compact that addresses the public safety concerns and offender accountability;

Be it resolved: That the International Community Corrections Association endorse and pledge its support to this effort to amend the compact.

Passed by unanimous vote of the Board
on March 10, 1999.

Richard J. Billak, Ph.D.
President

RJB:kjb

AMERICAN CORRECTIONS ASSOCIATION (ACA)

**RESOLUTION RELATING TO THE
INTERSTATE COMPACT FOR THE SUPERVISION
OF PAROLEES AND PROBATIONERS**

Whereas: The interstate compact for the supervision of Parolees and Probationers was established in 1937, it is the earliest corrections "compact" established among the states and has not been amended since its adoption over 62 years ago;

Whereas: This compact is the only vehicle for the controlled movement of adult parolees and probationers across state lines, and it currently has jurisdiction over more than a quarter million offenders;

Whereas: The complexities of the compact have become more difficult to administer, and many jurisdictions have expanded supervision expectations to include currently unregulated practices such as sex offender registration and victim notification requirements;

Whereas: After hearings, national surveys, and a detailed study by a task force appointed by the National Institute of Corrections, the overwhelming recommendation has been to amend the document to bring about a more effective compact that addresses public safety concerns and offender accountability;

Be it resolved: That the ACA endorse and pledge its support to this effort to amend the compact.

Passed: January 1999

**RESOLUTION OF THE
AMERICAN PROBATION AND PAROLE ASSOCIATION**

Whereas, The interstate compact for the supervision of Parolees and Probationers was established in 1937, it is the earliest corrections "compact" established among the states and has not been amended since its adoption over 62 years ago;

Whereas, This compact is the only vehicle for the controlled movement of adult parolees and probationers across state lines, and it currently has jurisdiction over more than a quarter million offenders;

Whereas, The complexities of the compact have become more difficult to administer, and many jurisdictions have expanded supervision expectations to include currently unregulated practices such as victim input, victim notification requirements and sex offender notification;

Whereas, After hearings, national surveys, and a detailed study by a task force appointed by the National Institute of Corrections, the overwhelming recommendation has been to amend the document to bring about an effective management capacity that addresses public safety concerns and offender accountability.

BE IT THEREFORE RESOLVED,

That the Board of Directors of the American Probation and Parole Association hereby endorses and recommends adoption of the amended and newly titled Interstate Compact for Adult Offender Supervision by 50 states and affected territories of the United States of America on this, the first day of November, 1999.

**The Council of State Governments
Executive Committee**

“Interstate Compact for Adult Offender Supervision”

Whereas, The interstate compact for the supervision of Parolees and Probationers was established in 1937, it is the earliest corrections “compact” established among the states and has not been amended since its adoption over 62 years ago; and

Whereas, This compact is the only vehicle for the controlled movement of adult parolees and probationers across state lines, and it currently has jurisdiction over more than a quarter million offenders; and

Whereas, The complexities of the compact have become more difficult to administer, and many jurisdictions have expanded supervision expectations to include currently unregulated practices such as victim input, victim notification requirements and sex offender registration; and

Whereas, After hearings, national surveys, and a detailed study by a task force appointed by the National Institute of Corrections, the overwhelming recommendation has been to amend the document to bring about an effective management capacity that addresses public safety concerns and offender accountability.

BE IT THEREFORE RESOLVED, That the Council of State Governments’ Corrections and Public Safety Task Force endorse and recommends adoption of the Interstate Compact for Adult Offender Supervision by all member states and territories.

Adopted December 1999, CSG Annual Meeting & State Leadership Forum

effective December 15, 1986; by SCO 811 effective August 1, 1987; by SCO 1097 effective January 15, 1993; by SCO 1128 effective July 15, 1993; and by SCO 1269 effective July 15, 1997)

Note to SCO 1269: Civil Rule 3(h) was added by § 68 ch. 64 SLA 1996. Section 8 of this order is adopted for the sole reason that the legislature has mandated the amendment.

Note: In 1996, the legislature enacted AS 37.15.583(b), which requires that certain actions pertaining to Alaska clean water fund revenue bonds be commenced and conducted in the superior court at Juneau. According to § 13 ch. 141 SLA 1996, this statute has the effect of amending Civil Rule 3.

Cross References

CROSS REFERENCE: AS 09.10.010

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Rule 4. Process.

(a) **Summons -- Issuance.** Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it to the plaintiff or the plaintiff's attorney, who shall cause the summons and a copy of the complaint to be served in accordance with this rule. Upon request of the plaintiff separate or additional summonses shall issue against any defendants.

(b) **Summons -- Form.**

(1) The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint.

(2) The summons must be on a form developed by the administrative director or a duplicate of the court form. A party or attorney who lodges a duplicate certifies by lodging the duplicate that it conforms to the current version of the court form.

(c) **Methods of Service -- Appointments to Serve Process -- Definition of Peace Officer.**

(1) Service of all process shall be made by a peace officer, by a person specially appointed by the Commissioner of Public Safety for that purpose or, where a rule so provides, by registered or certified mail.

(2) A subpoena may be served as provided in Rule 45 without special appointment.

(3) Special appointments for the service of all process relating to remedies for the seizure

of persons or property pursuant to Rule 64 or for the service of process to enforce a judgment by writ of execution shall only be made by the Commissioner of Public Safety after a thorough investigation of each applicant, and such appointment may be made subject to such conditions as appear proper in the discretion of the Commissioner for the protection of the public. A person so appointed must secure the assistance of a peace officer for the completion of process in each case in which the person may encounter physical resistance or obstruction to the service of process.

(4) Special appointments for the service of all process other than the process as provided under paragraph (3) of this subdivision shall be made freely when substantial savings in travel fees and costs will result.

(5) The term "peace officer" as used in these rules shall include any officer of the state police, members of the police force of any incorporated city, village or borough, United States Marshals and their deputies, other officers whose duty is to enforce and preserve the public peace, and within the authority conferred upon them, persons specially appointed pursuant to paragraph (3) of this subdivision.

(d) **Summons -- Personal Service.** The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) *Individuals.* Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally, or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) *Infants.* Upon an infant, by delivering a copy of the summons and complaint to such infant personally, and also to the infant's father, mother or guardian, or if there be none within the state, then to any person having the care or control of such infant, or with whom the infant resides, or in whose service the infant is employed; or if any service cannot be made upon any of them, then as provided by order of the court.

(3) *Incompetent Persons.* Upon an incompetent person, by delivering a copy of the summons and complaint personally --

[a] To the guardian of the person or a competent adult member of the person's family with whom the person resides, or if the person is living in an institution, then to the director or chief executive officer of the institution, or if service cannot be made upon any of them, then as provided by order of the court; and

[b] Unless the court otherwise orders, also to the incompetent.

(4) *Corporations.* Upon a domestic or foreign corporation, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.

(5) *Partnerships.* Upon a partnership, by delivering a copy of the summons and of the