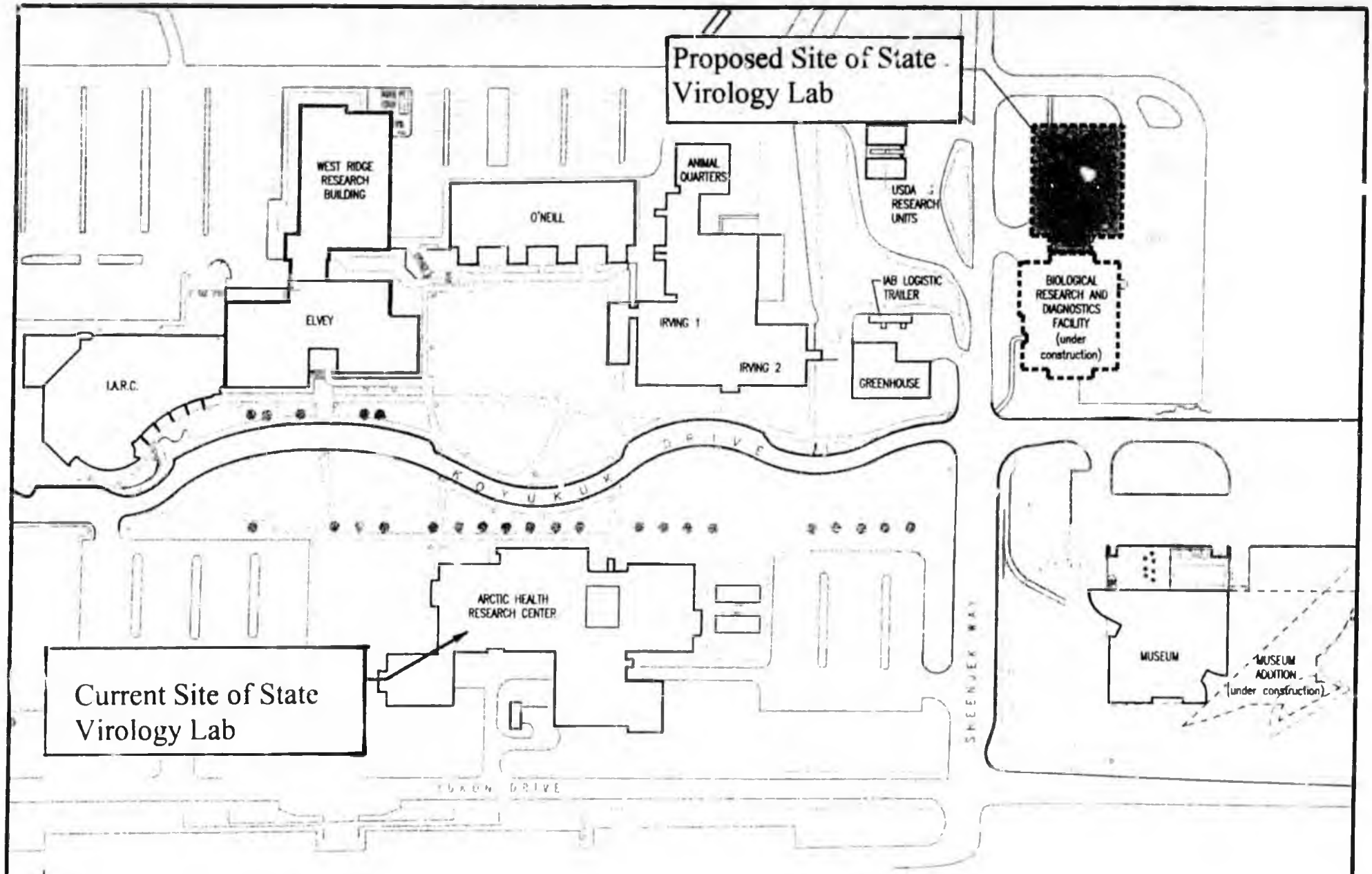
HB 100: Construction of a State Public Health Virology Laboratory in Fairbanks

- Cost: $24.2 Million for
  - Design
  - Construction
  - Equipping
- Financing: Certificates of Participation (COPs)
- Annual Lease-Purchase (estimated)
  - 15-year term
  - 4.90% interest
  - $2,375.0/year

- Long term land lease negotiated with UAF (no cost)

PUBLIC HEALTH
PROTECTING AND PROMOTING THE
HEALTH OF ALL ALASKANS



NTS

UAF WEST RIDGE
PROPOSED SITE of STATE VIROLOGY LAB

UNIVERSITY OF ALASKA FAIRBANKS
FACILITIES SERVICES
Division of Design & Construction
February 2005

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: HB 100
(H) Publish Date: 1/21/05

Revision Date/Time (Note if correction):
Dept. Affected: Revenue
Title: Virology Lab Lease-Purchase
RDU: Revenue Programs & Services
Component: Treasury Management
Sponsor: Rules Committee
Requester: Request of the Governor
Component No.: 121

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel	10.0					
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Debt Service		2,370.4	2,373.1	2,371.8	2,372.5	2,371.3
TOTAL OPERATING	**10.0**	**2,370.4**	**2,373.1**	**2,371.8**	**2,372.5**	**2,371.3**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	10.0	2,370.4	2,373.1	2,371.8	2,372.5	2,371.3
1005 GF/Program Receipts						
1037 GF/Mental Health						
Certicates sale proceeds	0.0					
TOTAL	**10.0**	**2,370.4**	**2,373.1**	**2,371.8**	**2,372.5**	**2,371.3**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill authorizes sale of $24 million in certificates of participation (in a state lease financing obligation) to finance construction of a virology laboratory on the University of Alaska Fairbanks Campus. This fiscal note and analysis contemplates 15-year level debt service, debt issuance costs of 200,000 , a competitive sale, and state credit ratings remaining at current levels. The financing could take place 60 to 90 days after authorization became effective.

Financing assumptions include debt service beginning in FY07, and a 4.9% interest rate/true interest cost.

Prepared by: Deven Mitchell
Phone: 465-3750
Division: Treasury Division
Date/Time: 1/19/05 1:33 PM
Approved by: Jerry Burnett, Special Assistant to the Commissioner
Date: 1/19/2005
Agency: Department of Revenue

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: HB 100
(H) Publish Date: 1/21/05
Revision Date/Time (Note if correction):
Dept. Affected: Health & Social Services

Title: CONSTRUCTION OF A STATE PUBLIC HEALTH VIROLOGY LAB IN FAIRBANKS
RDU: Public Health
Component: Public Health Laboratories

Sponsor: (RLS) BY REQUEST OF THE GOVERNOR
Requester: GOVERNOR
Component No.: 2252

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual					200.0	200.0
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	200.0	200.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts						
1003 GF Match						
1004 GF					200.0	200.0
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	200.0	200.0

Estimate of any current year (FY2005) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal: [ ]

POSITIONS						
Full-time						
Part-time						
Temporary						

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

The Department is requesting funds for construction of a new virology laboratory in Fairbanks. The project would be financed through Certificates of Participation (COPs). As a result of the project, the operational expenses of the building will increase. The Department currently pays $150,000 annually to the University under a lease for the cost of building operational expenses. This includes all utilities, building insurance, fire and police protection, waste disposal, custodial, grounds keeping, maintenance and repair, and snow removal. This cost will increase by an estimated $200,000 annually due to the increased size of the proposed virology laboratory. Since maintenance and repair are included in this amount, the Department will not need to include this building in the Department's overall deferred maintenance capital request when renovation and repair needs arise. The increase will take effect in FY 2010, when the new lab is expected to be complete and occupied by public health staff.

Prepared by: Janet Clarke, Assistant Commissioner — Phone 465-1630
Division: Finance and Management Services — Date/Time 01/10/2005
Approved by: Joel S. Gilbertson, Commissioner — Date 01/20/2005
Agency: Department of Health and Social Services

(Revised 9/23/2004 OMB)

COMMITTEE COPY

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 100
(H) Publish Date: 1/21/05
Dept. Affected: Health & Social Services

Revision Date/Time (Note if correction)

Title: CONSTRUCTION OF A STATE PUBLIC HEALTH VIROLOGY LAB IN FAIRBANKS
RDU: Departmental Support Services
Component: Administrative Support Svcs

Sponsor: (RLS) BY REQUEST OF THE GOVERNOR
Requester: GOVERNOR
Component No.: 320

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous		2,375.0	2,375.0	2,375.0	2,375.0	2,375.0
TOTAL OPERATING	**0.0**	**2,375.0**	**2,375.0**	**2,375.0**	**2,375.0**	**2,375.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF		2,375.0	2,375.0	2,375.0	2,375.0	2,375.0
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	**0.0**	**2,375.0**	**2,375.0**	**2,375.0**	**2,375.0**	**2,375.0**

Estimate of any current year (FY2005) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal: X

POSITIONS

Full-time						
Part-time						
Temporary						

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

The legislation identified $24.2 million in funding for the design, construction and equipping of a state owned and operated virology laboratory in Fairbanks. The funding is comprised of $24,000,000 in proceeds from the sale of Certificates of Participation (COPs) and $200,000 in investment earning on the COPs.

Annual debt service on the $24.2 million is estimated at $2,375,000 using the assumptions of a 15-year term and a true interest cost of 4.09%. Debt service will begin in fiscal year 2007, with total repayment estimated at just under $35,575,000. The interest rate listed here is an estimate based on current rates. The rate at the time of the sale of the bonds may slightly differ.

An appropriation of debt service in the language section of the annual operating or capital budget will be made to the debt service fund.

Prepared by: Janet Clarke, Assistant Commissioner — Phone 465-1630
Division: Finance and Management Services — Date/Time 01/18/2005
Approved by: Joel S. Gilbertson, Commissioner — Date 01/20/2005
Agency: Department of Health and Social Services

COMMITTEE COPY

HB

103

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB103 LAW-Various-3-2
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act requiring an actionable claim against the state to be tried without a jury."
RDU CIVIL
Component Torts & Workers' Compensation, Labor & State Affairs
Sponsor Representative Kelly
Requester House State Affairs
Component No.

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	(********)	(********)	(********)	(********)	(********)	(********)
Travel	(********)	(********)	(********)	(********)	(********)	(********)
Contractual	(********)	(********)	(********)	(********)	(********)	(********)
Supplies	(********)	(********)	(********)	(********)	(********)	(********)
Equipment	(********)	(********)	(********)	(********)	(********)	(********)
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	(********)	(********)	(********)	(********)	(********)	(********)
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill adds a new subsection under AS 09.50.250 requiring that actionable claims against the state falling under this statute be tried by a court without a jury.

Caveat: Although the state conducts approximately 5 to 10 jury trials per year, the number of actual jury trials only reveals part of the picture. Statistically, the greatest group of civil cases for damages (not just cases filed against the state) are worked extensively through motion and pretrial practice, and then settled after much of the motion and pretrial work has been completed (greater than 92% is the figure often quoted for cases settled, rather than tried). It is anticipated that HB 103 would effect not only the number of cases that are actually tried, but also result in savings in a much greater group of cases during the pretrial phase of litigation.

Prepared by: Kathryn Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 3/2/05 4:30 PM
Approved by: K. Daughhetee for Scott Nordstrand, Attorney General
Date 3/2/2005
Agency Department of Law

(Revised 9/23/2004 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO. _____**
2005 LEGISLATIVE SESSION

ANALYSIS CONTINUATION

Indeterminate savings to the state should result because of the following factors:

1. Cases may resolve without trial because there is more predictability of anticipated results with a court trial,

2. If the case is a court trial rather than a jury trial, the length of jury trials should be shortened by an average of two days because there would be no jury selection, no jury instructions, and some witnesses or evidence may not need to be produced at trial;

3. If the case is tried by the court rather than a jury there would be less pretrial preparation time and expense. For example, the parties will not need to draft instructions, draft jury voir dire or jury questionnaires, and they may not generate evidentiary motions.

4. In cases where summary judgment is currently precluded because there are genuine issues of material fact, the judge could do abbreviated, summary trials limited to the contested issues of fact that are relevant to the summary judgment motion.

5. It is also anticipated that some number of cases that are currently settled may be tried by a court because of the greater predictability in a court trial

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 103
( ) Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected:
Title: Claims Against the State
BRU: Alaska Court System
Component: Trial Courts
Sponsor: Representative Kelly
Requester:
Component No.: 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual	(16.0)	(16.0)	(16.0)	(16.0)	(16.0)	(16.0)
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**(16.0)**	**(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 G'	(16.0)	(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	**(16.0)**	**(16.0)**	**(16.0)**	**(16.0)**	**(16.0)**	**(16.0)**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

House Bill 103 would require that claims against the state be tried by a court without a jury. Court records and information from the Department of Law show that over the past five years there have been an average of roughly four jury trials a year where the state was a defendant. Court records also show that the average jury trial costs the court $4,000 in jury fees, travel, meals and lodging. This fiscal note reflects the average yearly jury costs that would be saved by passage of this bill.

Prepared by: Douglas Wooliver, Administrative Attorney
Phone 463-4750
Division: Alaska Court System
Date/Time 3/2/05 3:56 PM
Approved by: Doug Wooliver for Stephanie Cole, Administrative Director
Date 3/2/2005
Agency: Alaska Court System

(Revised 9/2002 OMB)

Immunity

This page was last updated on Wednesday, 28 January 2004

Most of us expect each individual to behave in a way that is consistent with the moral and social foundation that respects the truth and the rights of others. Conduct that is inconsistent with these precepts, though customary or accepted, remains reprehensible.

A good Samaritan is one who unselfishly helps another without expectation of remuneration or reward. Good Samaritan laws provide some level of protection from lawsuits to those who give aid to, or rescue, another injured or endangered person. The qualities of care are those that society expects of each person for the protection of their self and others.

Immunity is a legal exemption from penalty, duty, or liability and is a vestige of the long discredited notion of social supremacy. Therefore, with the exception of Good Samaritan laws, the establishment of immunity that leads to the distain of truth and the deprivation of the rights of others is against the premise of this essay.

The notion of immunity and class distinction is as old as human civilization. Today, we derive immunity, in part, from the common (judge made) law of England. The common law of England forms a part of the California Civil code (Sections 22-22.2), as it does in other states of our union.

Qualified immunity first appears in the Constitution of the United States of America (Article I Section 6 Part 1). Constitutional framers wanted to ensure that members of congress had rights of free speech and debate in both houses of congress. However, members were not immune in matters of treason, felony, or breach of the peace. Breach of the peace can be any criminal act.

The first session of Congress proposed and sent the first 12 amendments (the Bill of Rights) to the Federal Constitution to the States. Nine of the thirteen states ratified the 10 amendments on December 15, 1791. These amendments were made to ensure that every person has certain rights and immunities.

Sovereign immunity comes from the idea that a sovereign is superior to all others in authority and power. It prevents, in advance, a suit against a sovereign (a monarch, ruler, or a government) without the sovereign's consent. The problem is, why would a sovereign consent to liability?

The Eleventh Amendment to the U.S. Constitution prohibits federal courts from hearing cases against a state by any resident or nonresident citizen unless the state consents. This amendment is an expression of sovereign immunity.

Sovereign immunity does have its use. Sometime ago, the larva of the Mediterranean fruit fly destroyed fruit in parts of California. The State decided to break the fly's life cycle by introducing sterile flies. Unfortunately, the State released fertile flies and the problem escalated to a higher level of urgency. Government officials decided to spray the infested areas with an

insecticide and in doing so, caused extensive property damage.

If it wasn't for sovereign immunity, California taxpayers would bear the cost of lengthy litigations. In a political decision, California set up a program to compensate people for the damages caused by its negligence. California and the Federal Government have created programs to compensate victims.

Another form of sovereign immunity is the right of a government entity to take private property for public use, without the owner's consent. The law calls this the Right of Eminent Domain and requires that the government entity pay just compensation to the property owner. What is just compensation? Some government agencies have abused the right of Eminent Domain by taking property from one person and reselling it to another at a profit. The innocent property owners lost their home, land, and the precious memories that went with it.

Judicial Immunity is another artifact from English Common Law. It is the absolute immunity of a judge from civil liability for any act performed in the judges official capacity. Apparently, no one can deprive a judge of this immunity for reckless error, malice, unlawful discrimination, or exceeding authority. However, when a victim seeks money damages, the 1964 Civil Rights Act provides some civil relief.

Prosecutorial Immunity is a hybrid of judicial immunity, for prosecutors act in executive and judicial roles. A large part of this arises from the long discredited notion of prosecutorial discretion. Moreover, the 'Separation of Powers' doctrine prohibits one branch of government, at any level, from infringing or exercising the powers belonging to another branch of government. Discretion does require each of us to find the truth without prejudice.

No one has the right to ignore, misrepresent, destroy, contaminate, or conceal the truth. These acts of perjury and dishonesty.

In Hoffman vs. Harris (511 U.S. 1060 (1994)) a father sued his former wife, two social workers, and Kentucky's Cabinet for Human Resources. His former wife told the social workers that she suspected that her husband was sexually molesting his daughter. Though this is a common ploy in custody disputes, the social workers did not investigate the allegation and did obtain an ex-parte order that suspended the father's visitation rights.

The United States Court of Appeals for the Sixth Circuit held that social workers are absolutely immune from liability. Its reasoning was that, due to their quasi prosecutorial function in the initiation of child abuse proceedings, social workers are absolutely immune from liability for filing juvenile abuse petitions. The father petitioned for appellate review by the Supreme Court that it subsequently denied.

In his Supreme Court dissent, Thomas objected to absolute immunity, as applied to social workers. Thomas doubted that any social worker enjoyed absolute immunity for their official duties in 1871. He doubted that social workers with official duties existed in 1871. The social workers did not convince Thomas, who are often involved in civil family welfare proceedings, can ever function as prosecutors. He said that we should address the important threshold question whether social workers are, under any circumstances, entitled to absolute immunity. Justice Scalia provisionally joined in Thomas' dissent.

In Kalina vs. Fletcher (522 U.S. 118 (1997)) a prosecutor filed a complaint against a

defendant in connection to a school robbery. Based on the prosecutor's certification, a trial court found probable cause leading to the arrest of the defendant. However, the prosecutor's certification contained two untruthful statements. The defendant sued the prosecutor for damages, claiming that the prosecutor had violated the defendant's constitutional right to be free from unreasonable seizures. A Federal District Court denied the prosecutor's claim to absolute prosecutorial immunity. Eventually, the case reached the Supreme Court.

42 U.S.C. Sec. 1983.
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Notes
(1) Color of law means the appearance of some legal right. Action under color of law has the apparent authority of law but is contrary to law.
(2) Suits in equity pertains to such matters where an adequate and complete remedy cannot be resolved or had at law.

Justice John Paul Stevens wrote the unanimous opinion of the Supreme Court. The Court ruled that Section 1983 creates a remedy against a prosecutor who makes false declarations in a written statement made under an oath. Doctrine of absolute prosecutorial immunity does not protect such conduct. Even if that person is an attorney, the only function the person performs is that of a witness.

Note: I have condensed the Supreme Court Justices' opinions for the purpose of this essay. I have included case identifiers so those who read this paper can locate the original case documents.

Edward S. Nunes

Alaska State Legislature

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Representative Mike Kelly

House District 7

HB 103

"An Act requiring an actionable claim against the state to be tried without a jury."

HB 103 makes a small but important change to the manner in which claims against the state will be adjudicated. The doctrine of "sovereign immunity", originally taken from English common law, is a familiar one within our legal system. The doctrine precludes the institution of a suit against the sovereign [government] without its consent. This concept is intrinsic to our legal system.

We see this doctrine manifest itself in the 11th Amendment to the United States Constitution, and by extension this power is granted to the states through the 10th Amendment. More importantly, the Alaska State Constitution addresses the issue of sovereign immunity in Article 2, sec. 21 when it expressly grants the legislature sole authority to determine the manner in which suits against the state will be tried. Without that addition, the language in Article 1, sec.16 which specifically refers to "common law" would presuppose that sovereign immunity is absolute in Alaska.

Although HB 103 does change from the current standard of a trial by jury in a claim against the state, it returns to the standard that was in place from statehood until 1975. Our legal research revealed that Sen. John Butrovich (R-Fairbanks) sponsored SB 80, which changed to the current standard of a jury trial. Our research has further revealed that during the same period in 1975, the University of Alaska was in the midst of a lawsuit in which it had petitioned the court for a trial by jury and was denied. Although we have not been able to make the explicit connection, it seems that SB 80 was a legislative response to the controversy arising from that case.

Since that time, there have been a number of cases that have resulted in exorbitant jury awards against the state that may have been more reasonable had the court, rather than a jury tried them. Frequently, these awards are reversed on appeal, thus doubling the court time required for resolution. While responsible government requires the state make whole any person or entity that it harms in the course of its business, responsible government also dictates that we prevent such abuses and minimize exposure to the state. HB 103 accomplishes both ends with a simple and direct statutory change.

We further anticipate that the Alaska Court System will realize an additional benefit of less court time being consumed and thus a reduction in court operating expenses that will also allow our already overburdened courts the opportunity to address other cases with greater ease and expediency.

It is for these reasons that we appreciate your consideration and encourage you to support HB 103.

Member: House Finance Committee

reviewable by the courts. In the end, the senate rules committee, which heard the evidence, did not find sufficient cause for the full senate and house to proceed with the matter.

Section 21. Suits Against The State

The legislature shall establish procedures for suits against the State.

The long-standing common law doctrine of sovereign immunity prevents the government from being sued. However, the federal government and most state governments have waived through statute their immunity from suit in certain types of cases. A few state constitutions still prohibit all suits against the state, but even here various exceptions and evasions have been devised so that justice may be served. This section of Alaska's constitution, which commands the legislature to establish procedures for suits against the state, has only a few counterparts elsewhere; typically, state constitutions that address sovereign immunity make the matter of its waiver permissive.

The Alaska legislature has complied with this constitutional directive in AS 09.50.250, which authorizes a person or corporation to bring a contract, quasi-contract, or tort claim against the state. This law is based on the federal tort claims act. Like its federal counterpart, the state statute contains certain exceptions to the waiver of immunity from suit, one of which is for the exercise of policy-making discretion by state officials. The supreme court has often rejected the use of this defense by the state, however, ruling that once a policy decision has been made to do something (e.g. maintain a road in winter), it must be done with reasonable care (see for example, *Carlson v. State*, 598 P.2d 969, 1979).

The state's limited waiver of sovereign immunity does not extend to suits against the state in federal court. It does not mean that money judgments against the state are paid automatically. These may require a legislative appropriation (AS 09.50.270).

II. THE IDEOLOGIZATION OF WAIVER DOCTRINE

The Supreme Court's approach to the issue of waiver may be divided into distinct periods, with the 1945 case of *Ford Motor Co. v. Department of Treasury of Indiana*[93] marking an important dividing line. Two notable principles characterized the pre-1945 cases. First, the pre-1945 cases recognized two distinct traditions governing two different kinds of waivers. In some cases a state voluntarily, knowingly, and intentionally agreed to be sued.[94] In other cases, state officials took actions that had the effect of relinquishing the state's sovereign immunity whether they knew it or not and whether they intended it or not.[95] Very different rules governed these different kinds of cases.

Unfortunately, these two kinds of cases do not have distinct, standard names. Both may be said to involve "waiver" of state sovereign immunity.[96] Inasmuch, however, as the cases were governed by quite different rules, it will prove useful to have different terms for them. Drawing on the language of the pre-1945 cases, this Article will say that when a state voluntarily and knowingly agrees to be sued, it has *consented to suit*, and that when a state's actions otherwise eliminate its immunity, the state has *waived its immunity from suit without consent*.[97] The choice of these terms is somewhat arbitrary (and, where context permits, the term "waiver" will still refer to both kinds of cases), but the key point is that, whatever terms are used, there were two different concepts that the cases treated very differently.[98]

The second notable point about the pre-1945 cases is that they struck a balance between states' rights and the reasonable and legitimate interests of private plaintiffs and the federal judicial system. State sovereignty was not the only value the Court considered as it made its decisions. The Court also considered the effect of immunity on plaintiffs and on the judicial system itself.

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93. 323 U.S. 459 (1945).

94. *See infra* Part II.A.1.

95. *See infra* Part II.A.2.

96. *See, e.g.*, Lapides v. Bd. of Regents of the Univ. Sys., 535 U.S. 613, 624 (2002) ("[T]he State's action joining the removing of this case to federal court waived its Eleventh Amendment immunity . . . ."); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985) ("A State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision . . . .").

97. *See* Gunter v. Atl. Coast Line R.R. Co., 200 U.S. 273, 284 (1906) ("Although a state may not be sued without its consent, such immunity is a privilege which may be waived . . . .").

98. *See infra* Part II.A.

Starting in 1945 and continuing until quite recently, the Court's rulings reflected a sharp hardening and ideologization of state sovereign immunity principles. The Court conflated the lines of cases concerning consent and waiver. State sovereign immunity was transformed from an important but rather easily waivable defense into an almost sacred principle that could be avoided only by the clearest and most unequ[illegible]ocal consent to suit or waiver of immunity.[99]

Then, starting in 1998, the Court created a countertrend. The Court's most recent cases overruled *Ford Motor Co.* and vitiated the rules of the post-1945 period. The trend is to return to the traditional rules regarding waivers of state sovereign immunity.[100]

This Part first explores these little-known cases descriptively, in order to understand what the Court has done and to exhume the useful, but lost, distinction between consent cases and waiver cases. The next Part examines this area normatively and explains the way in which a non-ideological doctrine would approach the question of waivers of state sovereign immunity.

A. The Traditional Rules of Consent and Waiver

Prior to 1945, the Supreme Court's Eleventh Amendment jurisprudence combined severity with mildness. On the one hand, during this period, the Court created and continually expanded the rule that state sovereign immunity bars suits against states without regard to the text of the Eleventh Amendment.[101] It also looked askance at claims that a state had consented to suit in federal court.[102] On the other hand, the Court tempered the rigors of immunity by recognizing waivers of a state's immunity from suit without consent.[103] In general, the Court treated the defense of state sovereign immunity rather

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99. *See infra* Part II.B.

100. *See infra* Part II.E.

101. *See* Monaco v. Mississippi, 292 U.S. 313, 329–30 (1934) (holding that immunity applies to suits against a state by a foreign state, although a foreign state is not a "citizen or subject of" a foreign state); *Ex parte* New York, 256 U.S. 490, 497 (1921) (holding that immunity applies to suits in admiralty against a state, even though the Eleventh Amendment refers only to suits in law or equity); Smith v. Reeves, 178 U.S. 436, 449 (1900) (holding that immunity applies to suits against states by federally chartered corporations, even though such corporations are neither citizens of any other state nor citizens or subjects of a foreign state); Hans v. Louisiana, 134 U.S. 1, 20 (1890) (holding that immunity bars a suit against a state by one of its own citizens, even though the Eleventh Amendment covers suits only by citizens of other states or by citizens or subjects of a foreign state).

102. *See infra* Part II.A.1.

103. *See infra* Part II.A.2.

like the defense of personal jurisdiction. The defense certainly existed and could lead to dismissal of a case, but the defendant had to assert the defense, and had to do so in a timely fashion. If the defense was not seasonably asserted, it was waived and could not be reasserted thereafter.

1. *Consent Cases.* In cases in which a state had allegedly consented to suit against itself, the Supreme Court employed very strict, pro-state rules. Consent to suit, the Court held, was "altogether voluntary" on the part of a state, and a state was free to set conditions on any consent that it chose to give.[104] In particular, a state could consent to be sued in its own courts, but not in federal courts.[105] Indeed, not only could a state give such a limited consent, but the Supreme Court held as early as 1900 that it was appropriate to read state consent statutes narrowly and interpret them to permit suit against the state only in its own courts, even when that restriction was not clearly specified.[106] This rule has persisted.[107]

Moreover, and perhaps most strikingly, the Court held that, because a state's consent to suit was wholly voluntary, a state remained free to withdraw its consent, even after a suit against it had commenced in accordance with that consent. In *Beers v. Arkansas*,[108] the plaintiff sued Arkansas in its own courts, as state law permitted, for failure to pay on state bonds.[109] Subsequently, the state legislature enacted a new statute providing that, in any such suit, the court should order that the original bonds be filed with the court, and, if they were not so filed, the case should be dismissed.[110] The plaintiff, upon being

104. Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1858).

105. *Reeves*, 178 U.S. at 441.

106. *Id.*

107. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 676 (1999); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985).

108. *Beers*, 61 U.S. (20 How.) at 527.

109. *Id.* at 528.

110. *Id.* Arkansas's requirement was just one of many schemes used by states to avoid paying bond debts throughout the nineteenth century. For example, Virginia, after defaulting on its bond obligations, managed to obtain new credit in 1871 by issuing bonds with a statutory promise that the bond coupons, if past maturity, could be used to pay any tax owed to the state. Then, in 1882, the state passed a new statute directing its tax collectors to refuse to accept the coupons in payment of taxes. Poindexter v. Greenhow (*Virginia Coupon Cases*), 114 U.S. 269, 273-74 (1885). Other states, including Mississippi and Florida, simply repudiated their debts. MARGARET G. MYERS, A FINANCIAL HISTORY OF THE UNITED STATES 144 (1970). The frustration of state bondholders following Pennsylvania's repudiation of its debts in 1843 was expressed in this acerbic letter to the *Morning Chronicle*:

ordered to file his bonds in accordance with the law, failed to do so, and his case was dismissed.[111] The plaintiff took the case to the Supreme Court on the claim that Arkansas's modification of its prior consent to be sued impaired the obligation of its contracts in violation of the Contracts Clause of the federal Constitution.[112]

The Supreme Court might have treated the case narrowly; it could have held that Arkansas had not withdrawn its consent to be sued but had merely regulated the procedures to be followed in a suit based on that consent. Instead, the Court announced a broad rule. It held that, inasmuch as a state's consent to suit is voluntary, the state "may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."[113] The state's consent to be sued was not, the Court held, a contract subject to the Contracts Clause.[114]

The consent cases thus reflect a strongly pro-state rule. A state could consent to suit, or not, as it pleased; it could attach such conditions to its consent as it thought appropriate; and it could withdraw its consent even after a suit against it had commenced.

2. *Waiver Cases.* Simultaneously with these consent cases, however, the Supreme Court decided cases evincing a quite different tradition regarding *waiver* of a state's immunity from suit without consent. Unlike consent, such waiver did not have to occur expressly. It could arise by implication, and it could occur without regard to the intent of the state or its officials. Moreover, a state's waiver of sovereign immunity was irrevocable.[115]

[I never meet a Pennsylvanian at a London dinner] without feeling a disposition to seize and divide him—to allot his beaver to one sufferer and his coat to another—to appropriate his pocket-handkerchief to the orphan, and to comfort the widow with his silver watch, Broadway rings, and the London Guide, which he always carries in his pockets. How such a man can set himself down at an English table without feeling that he owes two or three pounds to every man in company, I am at a loss to conceive.

HESKETH PEARSON, THE SMITH OF SMITHS: BEING THE LIFE, WIT AND HUMOUR OF SYDNEY SMITH 268 (1977).

111. *Beers*, 61 U.S. (20 How.) at 529.

112. *Id.*

113. *Id.*

114. *Id.* at 529–30.

115. *See infra* notes 132–33 and accompanying text.

The waiver cases began, as noted earlier, with *Clark v. Barnard*,[116] in which Rhode Island's claim to money in the possession of a federal district court was held to constitute a waiver of any objection to the court's power to determine that claim.[117] *Clark* was a somewhat unusual case in that the state appeared not solely in the character of a defendant, but also as a party that had made an affirmative claim to a fund that was in a federal court's possession.[118] The Court might therefore have chosen to write a narrow opinion in *Clark*, establishing nothing more than the principle that when a state affirmatively invokes the jurisdiction of a federal court, it necessarily consents to the court's determination of the claim that the state has brought to it. Such a rule has, indeed, persisted in the bankruptcy area, where a state's filing of a proof of claim acts as a waiver of any objection to the federal courts' ability to rule on that claim, even if the ruling goes against the state.[119]

Notably, however, the *Clark* opinion contained broad language regarding waiver that would support a more general rule. The Court said:

> The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction . . . .[120]

Notwithstanding the particular circumstances presented by *Clark*, this language—directed specifically at cases in which a state's interest was as a defendant—suggested that the Court believed that a state waives its immunity not only by affirmatively *invoking* the jurisdiction of a federal court, but also by merely *appearing* in federal court in a case in which it has been summoned as an ordinary defendant.

Subsequent cases confirmed the rule implied by *Clark*'s broad language. *Gunter v. Atlantic Coast Line Railroad Co.*[121] concerned a

116. 108 U.S. 436 (1883).
117. *Id.* at 447–48.
118. *Id.* at 447.
119. Gardner v. New Jersey, 329 U.S. 565, 573–75 (1947).
120. *Clark*, 108 U.S. at 447.
121. 200 U.S. 273 (1906).

tax exemption granted to a railroad by South Carolina.[122] After the railroad and its successors had enjoyed the exemption for thirteen years, the state passed a new tax law, pursuant to which the treasurers of two counties within the state started taxing the railroad's property.[123] The railroad sued the treasurers and claimed that the new law impaired the obligations of a contract between the state and the railroad company.[124] The treasurers were represented in this litigation by the state attorney general.[125] No issue of immunity was, apparently, raised in this litigation, which proceeded to the United States Supreme Court and was resolved in favor of the railroad.[126]

Another twenty-five years passed, after which the state attempted once again to tax the railroad.[127] In subsequent litigation, the Supreme Court decided that the state was effectively a party to, and was therefore bound by the judgment in, the first case.[128] Although noting that private parties may not sue a state without its consent, the Court observed that:

> Although a State may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.[129]

The *Gunter* case made several noteworthy points. First, the Court distinguished a state's *consent* to be sued from the subtly different concept of the state's *waiver* of its immunity from suit without consent. The Court had jealously guarded the states' right to limit the former,[130] but here it said that the latter may occur when a state simply "voluntarily becomes a party to a cause and submits its rights for judicial determination."[131] Moreover, the Court held such a waiver to be irrevocable: the state could not later invoke its immunity to "escape

122. *Id.* at 277.
123. *Id.*
124. *Id.* at 278.
125. *Id.*
126. Humphrey v. Pegues, 83 U.S. (16 Wall.) 244, 249 (1872).
127. *Gunter*, 200 U.S. at 279.
128. *Id.* at 289
129. *Id.* at 284 (citing Clark v. Barnard, 108 U.S. 436, 447 (1883)).
130. *See supra* Part II.A.1.
131. *Gunter*, 200 U.S. at 284.

the result of its own voluntary act."[132] The Court determined that the state attorney general, by virtue of his authority to litigate on behalf of the state, could effectively bind the state and waive the state's immunity by failing to assert it in the initial litigation.[133] Finally, and most important, *Gunter* extended the rule of *Clark* to the situation in which the state was an ordinary defendant and not the party invoking federal jurisdiction; even in such a case, the state's voluntary appearance would constitute a waiver of its immunity. Thus, although *Gunter* was another slightly peculiar case (because immunity was waived in the first, separate suit), it applied a broad rule that states waive their immunity by simply failing to assert it.

Further developments confirmed the broad rule of waiver. *Porto Rico v. Ramos*[134] was a somewhat tangled case concerning title to real property. The plaintiff, Ramos, claiming to be the owner of certain real property, sued Eduardo Wood, who was holding the property as an estate administrator.[135] Because Wood was an alien, Ramos sued in federal district court.[136] Wood asserted that the property had escheated to Puerto Rico.[137]

Puerto Rico then appeared by its attorney general and sought time to determine whether it should be made a party defendant in the case.[138] The case was continued, after which Puerto Rico again appeared and claimed an interest in the action.[139] The district court ordered Puerto Rico to be made a party defendant, and Ramos amended his complaint accordingly.[140] Puerto Rico then, however, demurred to the complaint on the ground of sovereign immunity.[141] The demurrer was overruled, and Ramos won at trial.[142]

The Supreme Court affirmed.[143] Puerto Rico, it noted, was not the defendant in the beginning; it had voluntarily petitioned to be

132. *Id.*
133. *Id.* at 288.
134. 232 U.S. 627 (1914).
135. *Id.* at 628.
136. *Id.*
137. *Id.* at 628–29.
138. *Id.* at 629.
139. *Id.*
140. *Id.*
141. *Id.* at 630.
142. *Id.* at 630–31.
143. *Id.* at 633.

made a defendant.[144] The attorney general had taken time to consider this action, and had decided to intervene so as to be better able to look after Puerto Rico's interests in the litigation.[145] Having done so, Puerto Rico had consented to be a party to the case.[146] Moreover, its consent was irrevocable. The Court explained, "the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step."[147]

Like *Clark*, *Ramos* shows the willingness of the Supreme Court to hold sovereign defendants to the consequences of their own litigation decisions. Puerto Rico challenged the court's jurisdiction immediately upon being made a defendant; nonetheless, the Court held that it could not first ask to be made a defendant and then challenge the court's power over it. The case also evinces judicial concern for the interests of the private plaintiff. By observing that the sovereign cannot "come in and go out of court at its will, the other party having no right of resistance to either step," the Court suggests that, notwithstanding the sovereign character of the defendant, some regard must be given to the interests of the other party.

Although *Ramos* is yet another slightly unusual case in that the sovereign defendant itself sought to be made a party to the suit, the case represents an extension beyond *Clark*, because in *Ramos*, the sovereign intervened as a defendant, not as a claimant to a fund in the possession of the court. Moreover, *Ramos* continued the pattern of *Clark* and *Gunter* in that its language and reasoning were broad. The Court stated a strong pro-plaintiff rule that, without reference to the particular circumstances of the case, constricted the ability of sovereign defendants to assert sovereign immunity.

Moreover, once again, further developments showed the Court giving full effect to the broad language employed in the previous cases. The starkest example of this period's jurisprudence came in *Richardson v. Fajardo Sugar Co.*,[148] decided in 1916. In *Richardson*, the plaintiff, a corporation, sought a refund of an allegedly unlawful

144. *Id.* at 631.
145. *Id.*
146. *Id.* at 632.
147. *Id.*
148. 241 U.S. 44 (1916).

tax, which it had paid under protest to the treasurer of Puerto Rico.[149] The plaintiff sued the treasurer in federal court.[150] The treasurer answered the plaintiff's complaint, and some other steps were also taken: the parties fixed a day for trial by stipulation, and the plaintiff filed an amended and supplemental complaint, which the defendant answered.[151] Then, eight months after the action was first instituted, the defendant moved for dismissal on the ground of sovereign immunity.[152]

The Supreme Court briskly denied the defendant's assertion of immunity as untimely. Citing *Ramos* and *Gunter*, the Court simply said: "Whatever might have been the merit of [defendant's] position if promptly asserted and adhered to, we hold . . . that having solemnly appeared and taken the other steps above narrated, [defendant] could not thereafter deny the court's jurisdiction."[153] The Court did not appear to believe that the case required any lengthy discussion.

Richardson unequivocally evinces a strongly pro-plaintiff rule of waiver. The case is simple and straightforward. It shows that, unlike the rules regarding *consent* to suit, the traditional rule regarding *waivers* of sovereign immunity strongly favored plaintiffs.

The defendant in *Richardson* appeared in the ordinary character of a defendant; he was not the one invoking the federal court's jurisdiction. The defendant never expressly waived immunity or consented to suit. The waiver of immunity arose only implicitly, from the defendant's failure to assert immunity at the proper time. Moreover, the defendant did not wait very long before attempting to assert immunity. The assertion was made while the case was still in trial court and was, indeed, only a few months old and still in its pretrial stages. Notwithstanding all of these points, the Supreme Court held that the defendant had waited too long and that his implicit waiver of immunity from suit was binding.[154]

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149. *Id.* at 46–47.

150. *Id.* at 44, 47.

151. *Id.* at 47.

152. *Id.*

153. *Id.* (citations omitted).

154. One detail remains: in *Richardson*, and in *Ramos* as well, the defendant was Puerto Rico, which is a United States territory, not a state. Several indications, however, show that the cases provide the rule that would have applied to state defendants in the same period. Most importantly, the Court's opinions in the two cases make no reference to the territorial status of Puerto Rico. The opinions appear to treat the cases as involving general rules of sovereign immunity that would apply equally to the case of a state defendant. Moreover, a year before *Ramos*, the Court had expressly stated that Puerto Rico "is of such nature as to come within the

Considered together, the Supreme Court's early cases on waiver of state sovereign immunity reflected a very different, and much more pro-plaintiff, rule than its cases regarding state consent to suit. Even where a state never consented to suit, it could be held to have waived its immunity from suit without consent. Such waivers could arise implicitly from a state's conduct, including its mere failure to assert its immunity at the proper time. A state could be bound by the actions of its litigation counsel. Finally, a state's waiver of its immunity, once made in litigation, was irrevocable. These principles persisted until 1945.[155]

B. Waiver Doctrine Constricted

The year 1945 witnessed a marked shift in the Supreme Court's approach to waiver issues, which occurred in the case of *Ford Motor Co. v. Department of Treasury of Indiana*.[156] *Ford Motor Co.* was in form quite similar to the *Richardson* case just discussed: it was an action brought in federal court to recover an allegedly illegal tax collected by state officials.[157] The defendants were the state's Department of the Treasury and three officials who together constituted the department's board.[158] The defendants, represented by the state's attorney general, defended the case on its merits throughout proceedings in the trial and appellate courts. They made no mention of the issue of sovereign immunity in either court.[159] When the case reached

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general rule exempting a government sovereign in its attributes from being sued without its consent." Porto Rico v. Rosaly, 227 U.S. 270, 273 (1913). This statement suggests that the rules for suits against Puerto Rico would be the same as those for cases against state sovereigns. The Court cited this case in *Richardson*, 241 U.S. at 47, so it had not forgotten about it. Similarly, Puerto Rico is today treated as a state for Eleventh Amendment purposes. *See* P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 141–42 n.1 (1993) (assuming this point *arguendo*); Ramirez v. P.R. Fire Serv., 715 F.2d 694, 697 (1st Cir. 1983) (holding that the Eleventh Amendment applies to Puerto Rico in all respects). Finally, in *Richardson*, the Court relied upon *Gunter*, a case involving a state defendant. 241 U.S. at 47; *see supra* notes 148–53 and accompanying text. The fair inference from all these indications is that the holdings of *Richardson* and *Ramos* would apply to state defendants.

155. *See* Hill v. Blind Indus. & Servs. of Md., 179 F.3d 754, 760 (9th Cir. 1999) ("Before 1945, it was generally acknowledged that a state waives its Eleventh Amendment immunity by litigating a case on the merits without timely objecting to the federal court's assertion of jurisdiction."), *amended by* 201 F.3d 1186 (9th Cir. 2000); The Sao Vicente v. Transportes Maritimos do Estado, 281 F. 111, 115 (2d Cir. 1922) ("The underlying principle of Clark v. Barnard has been consistently followed."), *cert. dismissed*, 260 U.S. 151 (1922).

156. 323 U.S. 459 (1945).

157. *Id.* at 460–61.

158. *Id.* at 460.

159. *Id.* at 466–67.

the Supreme Court, however, the defendants, for the first time, asserted that sovereign immunity barred the plaintiff's suit.[160] Possibly the defendant's tardiness resulted from another shift in the Supreme Court's sovereign immunity doctrines: it was only a year earlier, in the case of *Great Northern Life Insurance Co. v. Read*,[161] that the Supreme Court had ruled that an action against state officials seeking a refund of wrongfully collected taxes constituted a suit against the state itself subject to the defense of sovereign immunity, rather than an action against officials subject to the rule of *Ex parte Young*.[162] Therefore, it might not have occurred to the defendants to assert immunity from suit until after the appellate proceedings were already concluded.[163] In any event, the defendants did not raise their immunity until the case reached the last possible court.

The Supreme Court made several important rulings in favor of the defendants. First, it reiterated its holding from *Read*, that the suit, although naming individual defendants, was effectively a suit against the state of Indiana and subject to the rules of state sovereign immunity.[164] Second, the Court, relying on its earlier decision in *Reeves*, held that the state had not consented to be sued in federal court, even though a state statute authorized a refund action against the state treasury department "in any court of competent jurisdiction."[165] The Court held that the statute evinced the state's consent only to suits in the state's own courts.[166]

Finally, the Supreme Court determined that the defendants' assertion of immunity "was in time."[167] The defendants added a new wrinkle to the issue of waivers of state sovereign immunity: the issue of state law authority. Defense counsel conceded that their failure to assert immunity from suit in the lower courts constituted a waiver of immunity, but only if they were authorized by state law to make such

160. *Id.* at 467.

161. 322 U.S. 47 (1944).

162. *Id.* at 53.

163. The *Read* decision did not come until one month after Indiana had already prevailed in the court of appeals on the merits of Ford's suit against it. *Id.* at 47; Ford Motor Co. v. Dep't of Treasury, 141 F.2d 24, 24, 26 (7th Cir. 1944).

164. *Ford Motor Co.*, 323 U.S. at 462–63.

165. *Id.* at 465–66 (quoting BURNS, IND. STAT. ANN. § 64-2602 (1943 Replacement)).

166. *Id.*

167. *Id.* at 467.

a waiver.[168] They claimed that under the relevant state law they were not competent to waive the state's sovereign immunity.[169]

The Supreme Court agreed. The Constitution of Indiana, the Court observed, provided that the state legislature might generally waive immunity for a class of cases, but expressly forbade it to waive immunity in a particular case or to pay damages to a particular claimant.[170] From this provision, the Court inferred that the legislature would not, except by clear language, confer discretion on state executive or administrative officials to waive immunity in a particular case.[171] Although the state attorney general was generally authorized to represent the state in litigation, the state supreme court had construed his powers strictly and had held that he did not have the broad authority of an attorney general at common law.[172] Accordingly, the Court held that the defendants could not have effected a waiver of the state's sovereign immunity.[173]

The Court's holding represented a considerable departure from the waiver cases discussed in Part II.A.2. In none of the previous cases had the Court demanded that, before a court could find that a state had waived its sovereign immunity from suit, the court first inquire into the authority of the state's attorneys to waive immunity as a matter of state law. To the contrary, in *Gunter*, the Court had held that the state attorney general's appearance had waived the state's sovereign immunity based simply on his general authority under state law to represent the state in litigation.[174] In *Ford Motor Co.*, the Court said that in *Gunter*, the state's submission to the court was authorized by state statute, not by the unauthorized consent of an official.[175] This argument, however, hardly seems like a persuasive distinction, inasmuch as the attorney general's authority in both cases was simply the authority to represent the state in litigation. In one case this was held to be sufficient to bind the state to a waiver of immunity; in the other,

168. *Id.*
169. *Id.*
170. *Id.* at 468.
171. *Id.*
172. *Id.* at 468–69.
173. *Id.* at 469–70.
174. Gunter v. Atl. Coast Line R.R. Co., 200 U.S. 273, 288 (1906).
175. *Ford Motor Co.*, 323 U.S. at 469–70.

it was not.[176] The Court also dismissed *Richardson* with the cryptic observation that in that case "without consideration of any limitations on his powers, we held that the attorney general of Puerto Rico could waive its sovereign immunity."[177] The Court's statement acknowledges that it had previously recognized a waiver of sovereign immunity based on the mere failure of counsel to assert the immunity seasonably.

Ford Motor Co. thus tightened waiver doctrine considerably. A state's counsel's inadvertent—or even, apparently, advertent—failure to raise immunity could not waive state sovereign immunity unless state law authorized the counsel to waive. Most state attorneys general have, of course, the power to represent the state in litigation, but few if any have express statutory authority to waive the state's sovereign immunity from suit.[178]

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176 The Court also suggested that *Gunter* had turned on res judicata principles. *Id.* This suggestion at least had the merit of pointing to a real distinction between *Gunter* and *Ford Motor Co.*, although it was not consistent with the broad waiver language used in *Gunter*.

177 *Id.* at 469 n.14.

178 *See, e.g.*, *id.* at 468:

> [None] of the general or specific powers conferred by statute on the Indiana attorney general to appear and defend actions brought against the state or its officials can be deemed to confer on that officer power to consent to suit against the state in courts when the state has not consented to be sued.

See also Montgomery v. Maryland, 266 F.3d 334, 399 (4th Cir. 2001) ("'[T]he Attorney General of Maryland lacks the authority to waive Eleventh Amendment immunity on behalf of the state and its officials.'" (quoting *Booth v. Maryland*, 112 F.3d 139, 145 n.2 (4th Cir. 1997))), *vacated*, 122 S. Ct. 1958 (2002); Lapides v. Bd. of Regents of the Univ. Sys., 251 F.3d 1372, 1375 (11th Cir. 2001) (concluding that "the Attorney General of the State of Georgia lacks the statutory authority to waive the State's Eleventh Amendment immunity"), *rev'd on other grounds*, 535 U.S. 613, 624 (2002); Santee Sioux Tribe v. Nebraska, 121 F.3d 427, 432 (8th Cir. 1997) ("The Tribe has failed to demonstrate that waiver of the State's Eleventh Amendment immunity is within the authority of Nebraska's attorney general."); Estate of Porter v. Illinois, 36 F.3d 684, 691 (7th Cir. 1994) ("As Illinois law now stands, the Attorney General is *not* authorized to waive Illinois' Eleventh Amendment immunity."); Dagnall v. Gegenheimer, 645 F.2d 2, 3 (5th Cir. 1981) ("Louisiana law does not clearly give attorneys for the State authority to waive its eleventh amendment immunity."); Taylor v. Perini, 503 F.2d 899, 905 (6th Cir. 1974) (Weick, J., concurring) ("The Attorney General of Ohio had no power or authority to waive sovereign immunity of either the State or its officers and agent . . . ."), *vacated*, 421 U.S. 982, 982–83 (1975); Mallon v. City of Long Beach, 11 Cal. Rptr. 15, 22 (Cal. Ct. App. 1961) ("At bar there was no evidence that any authority had been conferred on the attorney general to waive the state's right of immunity."); Dep't of Pub. Safety v. Great Southwest Warehouses, Inc., 352 S.W.2d 493, 495 (Tex. Civ. App. 1961) (noting that the Texas Attorney General is "without legal power or authority to waive the right of the State to immunity"). *But see* ALASKA STAT. § 44.23.020(c) (Michie 2002) (giving Alaska's Attorney General power, expiring January 1, 1999, to waive the state's Eleventh Amendment immunity in a very limited class of cases).

Moreover, the Court expanded the holding of *Ford Motor Co.* even further with its later decision in *Edelman v. Jordan*.[179] The case is known principally for its holding that the "officer suit fiction" of *Ex parte Young* is limited to cases in which the plaintiff seeks prospective, injunctive relief and cannot be applied to cases seeking retroactive monetary damages.[180] The case also, however, almost casually, effected a significant extension of *Ford Motor Co.*

Edelman was a class action challenge to the administration of the Aid to the Aged, Blind, or Disabled (AABD) program by Illinois.[181] Like many welfare programs, AABD was a combined federal-state program that was administered largely by state officials and partially funded by the federal government.[182] Plaintiffs sued the state officials administering the program in Illinois and asserted that the state's implementation of the program violated federal law in various respects.[183] The district court agreed with the plaintiffs. It ordered the defendants to administer the program properly in the future and to pay benefits it had wrongfully denied in the past.[184]

On appeal, the defendants, for the first time, asserted sovereign immunity from suit.[185] The Supreme Court held that the defendants could raise immunity on appeal for the first time.[186] Quoting *Ford Motor Co.*, the Court simply observed that "it has been well settled since the decision in *Ford Motor Co. v. Department of Treasury*, . . . that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."[187]

As the above discussion suggests, the Court's statement is not a fully accurate rendering of *Ford Motor Co.* It is true that, in *Ford Motor Co.*, the Court made the following broad statement: "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this

179. 415 U.S. 651 (1974).
180. *Id.* at 664–71.
181. *Id.* at 653.
182. *Id.*
183. *Id.*
184. *Id.* at 656.
185. *Id.* at 657–58, 677.
186. *Id.* at 677–78.
187. *Id.*

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MEMORANDUM January 18, 2005

SUBJECT: Constitutional right to jury trial (Work Order no. 24-LS0403\A)

TO: Representative Mike Kelly
Attn: Heath Hilyard

FROM: Donald M. Bullock Jr.
Legislative Counsel

Enclosed is the draft of the bill you requested to require that an actionable case against the state be tried by a judge without a jury.

Although I initially expressed some concern about whether denying a plaintiff a jury trial may raise constitutional concern, I find that such a limitation is valid. Prior to 1975, AS 09.50.290 limited claims against the state to be tried before a judge without a jury. The application of that provision to claims against the state was upheld in *University of Alaska v. National Aircraft Leasing, Ltd.*, 536 P.2d 121, 128-29 (Alaska 1975). The legislature repealed AS 09.50.290 in 1975.[1]

If I may be of further assistance, please advise.

DMB:jad
05-012.jad

Enclosure

[1] Ch. 147, SLA 1975.

such rental acceleration clauses.[8] While this court has not decided the question, we decline to do so here where the enforceability issue was not raised below.[9]

Affirmed.

UNIVERSITY OF ALASKA, Petitioner,

v.

NATIONAL AIRCRAFT LEASING, LTD., and Alaska International Air, Inc., for themselves and for Insurers at Lloyds of London and certain other Insurance underwriters, Respondents.

No. 2365.

Supreme Court of Alaska at Fairbanks.

May 30, 1975.

Action was brought against University of Alaska for damage to aircraft in attempting to land on experimental floating ice strip maintained by the university. The Superior Court, Fourth Judicial District, Victor D. Carlson, J., denied university's request for jury trial and university petitioned for review. The Supreme Court, Dimond, J. pro tem, held that despite the degree of constitutional as well as statutory autonomy the university possesses and despite university's unique corporate character and its power to sue and be sued in its own name, university falls within ambit of language of statute governing suits against the state, and trial by jury is not allowed in actions against the university; and that distinction between proprietary and governmental functions will not be made in suits involving the state or its agencies.

Order affirmed.

Erwin, Boochever and Burke, JJ., did not participate.

1. Appeal and Error ⇐70(6)

Interlocutory order striking University of Alaska's demand for jury trial in action for damages against university would be reviewed to avoid possibility that postponing review until time for normal appeal could result in the necessity of a new trial. AS 09.50.250–09.50.300, 09.50.290; Rules of Civil Procedure, rule 38(b); Rules of Appellate Procedure, rule 23(e).

2. Jury ⇐18
States ⇐191(2)

Despite degree of constitutional as well as statutory autonomy possessed by the University of Alaska, university is an integral part of the state educational system mandated by the constitution and neither the corporate status of the university nor its power to sue and be sued in its own name militate against conclusion that university falls within ambit of statute governing suits against the state, including

8. Among the cases enforcing rental acceleration clauses are the following: Maddox v. Hobbie, 228 Ala. 80, 152 So. 222 (1934); Jimmy Hall's Morningside, Inc. v. Blackburn & Peck Enterprises, Inc., 235 So.2d 344 (Fla.App.1970); Erickson v. O'Leary, 127 Kan. 12, 273 P. 414 (1929); Shepard Realty Co. v. United States Stores Co., 193 La. 211, 190 So. 383 (1939); Pierce v. Hoffstot, 211 Pa.Super 380, 236 A.2d 828 (1967).

On the other hand, courts in New York and California have refused to enforce acceleration clauses. *See, e. g.*, Ricker v. Rombough, 120 Cal.App.2d Supp. 912, 261 P.2d 328 (1953); 884 W. End Ave. Corp. v. Pearlman, 201 App.Div. 12, 193 N.Y.S. 670 (1922). For additional cases from other jurisdictions see Annot., 58 A.L.R. 300 (1929); Annot., 128 A.L.R. 750 (1940).

9. University of Alaska v. Simpson Bldg. Supply Co., 530 P.2d 1317, 1324 (Alaska 1975); Padgett v. Theus, 484 P.2d 697, 700 (Alaska 1971); Lumbermen's Mut. Cas. Co. v. Continental Cas. Co., 387 P.2d 104, 109 (Alaska 1963). We note that the trial court gave the lessee the right of use of the premises for the balance of the term, and as noted in this opinion at page 118, lessee had the right to use the premises during the entire term of the lease. Otherwise, we might have waived the rule in order to consider the rent acceleration clause as well as possible duty of the lessor to mitigate damages.

provisions that trial by jury is not allowed in actions against the state. Const. art. 7, § 1 et seq.; AS 09.50.250–09.50.300, 14.40.-040.

3. Jury ⇐18

Fact that University of Alaska is not a department of the executive branch allocated among the principal departments did not place university beyond purview of statute providing that actions against the state shall be tried by the court without a jury inasmuch as university enjoyed in some relative respects a status which was coequal rather than subordinate to that of the executive or legislative arms of government. Const. art. 3, § 22; AS 09.50.-290, 44.15.010.

4. States ⇐193

Distinction between proprietary and governmental functions will not be made in suits against the state or its agencies under statute authorizing such suits on contract, quasi-contract or tort claim. AS 09.50.-250–09.50.300.

Howard P. Staley, of Merdes, Schaible, Staley & DeLisio, Inc., Fairbanks, for petitioner.

William B. Rozell, of Faulkner, Banfield, Doogan, Gross & Holmes, Juneau, for respondents.

OPINION

Before RABINOWITZ, C. J., CONNOR, J., and DIMOND, Justice Pro Tem.

DIMOND, Justice Pro Tem.

Within certain limitations, one is authorized by statute to sue the State of Alaska on a contract, quasi-contract or tort claim.[1] One of these limitations is that the action must be tried by the court; under AS 09.-50.290 a trial by jury is not allowed in actions against the state.[2]

It is this statutory condition upon the state's waiver of sovereign immunity which gave rise to this petition for review. The petitioner, University of Alaska, has been sued for damages by the respondents, National Aircraft Leasing, Ltd., and Alaska International Air, Inc. The suit arose when an aircraft being operated by Alaska International Air, Inc., was damaged in attempting to land on an experimental floating ice air strip maintained by the University. The University demanded a trial by jury under Civil Rule 38(b).[3] Applying AS 09.50.290, however, the trial judge refused to grant a jury trial on the grounds that the University and the state are the same for purposes of AS 09.50.250-.300 which set forth the conditions under which suits against the state may be maintained. The court's reasoning was that the protections afforded the state by AS 09.-50.250–.300 apply to all entities that are similarly situated, e. g., possessing publicly owned assets and dependent upon the taxpayers for support. The petitioner asserts that the trial court erred in this ruling.

[1] This matter is before us, not on appeal from a final judgment, but on petition for review from an interlocutory order. In the exercise of our discretion we have granted review at this stage of the proceedings in order to avoid the possibility that postponing review of this question until the time for a normal appeal could result in the necessity of a new trial. The unnecessary delay and expense attendant upon such a possibility can be avoided by

1. AS 09.50.250–.300.

2. AS 09.50.290 provides:
Actions against the state under §§ 250–300 of this chapter shall be tried by the court without a jury.

3. Civil Rule 38(b) provides:
(b) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand shall be made in a separate written document signed by the party making the demand or by his attorney.

deciding the question now.[4] Moreover, the issue here presented is of sufficient importance to "justify deviation from the normal appellate procedure by way of appeal and to require the immediate attention of this court . . . ."[5]

All governmental authority in Alaska originates in the people of this state and is founded upon their will only.[6] The people formulated the basic government of our state by ratifying the Alaska Constitution which was drafted by delegates elected by the people to represent them at a constitutional convention. It is the Alaska Constitution, therefore, that forms the basis for the fundamental government of this state.

Article VII of the constitution frames the mandate whereby the health, education and welfare of the people are provided for. Section 1 of article VII directs the legislature to establish and maintain by general law a system of public schools open to all children of the state, and allows the legislature to provide for other public educational institutions. Section 2 of article VII, the import and construction of which is crucial to the resolution of this case, provides:

> The University of Alaska is hereby established as the state university and constituted a body corporate. It shall have title to all real and personal property now or hereafter set aside for or conveyed to it. Its property shall be administered and disposed of according to law.

The question before us is whether the University of Alaska constitutes in function and character such an arm or instrumentality of the state as to bring it within the scope of those statutes which govern the conditional waiver of sovereign immunity in this state. If it is, then the ruling of the trial court on the applicability of AS 09.50.290 to this action must be affirmed.

By constitutional provision, the University as a corporate entity holds title to all property which is conveyed or set aside to it. The disposition and administration of such property, however, is made expressly subject to a degree of legislative control. The board of regents is empowered by the constitution to "govern" the university. Nevertheless it is obliged to formulate policy as well as appoint its chief executive "in accordance with law." The regents, moreover, hold office by virtue of the approval of both the governor and both houses of the legislature.[7]

Through legislative enactments, the University enjoys a considerable degree of statutory independence. Not only does the board of regents have the constitutional authority to appoint the president of the University, formulate policy, and act as the governing body for the institution, but the legislature has specifically empowered it to fix the president's compensation and the compensation of all teachers, professors, instructors and other officers; to confer such appropriate degrees as it may determine; to have care, control and management of all the real and personal property and all money of the University; and to

4. Appellate Rule 23(e) provides in part that an aggrieved party may petition this Court for review of nonappealable orders
> [w]here postponement of review until normal appeal may be taken from a final judgment . . . will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship or other related factors.

3. Appellate Rule 24(a)(1). *See, e. g.*, Peter v. State, 531 P.2d 1283 (Alaska 1975).

6. Alaska Const. art. I, § 2 provides:
> All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole.

7. Alaska Const. art. VII, § 3 provides:
> The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The board shall, in accordance with law, formulate policy and appoint the president of the university. He shall be the executive officer of the board.

receive, manage and invest money or property obtained from sources other than the state legislature or by way of federal appropriation.[8] In addition, the legislature has provided that title and control or possession of land and personal property, other than monies, which are devised, bequeathed or given to the University, shall be taken by the University in its corporate capacity acting through the regents or an authorized agent, and shall be entered in the perpetual inventory of the University.[9] The board of regents is also authorized to execute leases for mining, agriculture, or other purposes to the lands granted by Congress to the University for the benefit of an agricultural college and school of mines.[10] In addition, the board of regents may select the lands granted to Alaska by the Act of Congress approved January 21, 1929, and may sell or lease such lands.[11]

But the University is also subject to some executive and legislative control. As mentioned, the constitution provides that the regents of the University shall be appointed by the governor, subject to confirmation by the legislature.[12] Furthermore, as has been pointed out, the formulation of university policy as well as the administration and disposition of University property are made subject to legislative enactment. At the beginning of each regular session of the legislature the board of regents is required to make a written report to the legislature showing the condition of University property, all receipts and expenditures, and the educational and other work performed.[13] In addition, the board must make an annual report to the governor which shall include a statement of all trust funds the University possesses.[14]

All monetary gifts, bequests or endowments received for the University expansion program or other uses must be turned over to the Department of Revenue where they are placed in a separate fund.[15] This fund, denominated as a trust fund, shall also include all monies derived by the University from the sale or lease of lands granted by act of Congress. These funds shall be invested by the Department of Revenue in interest-bearing securities as approved by the governor.[16] The proceeds from the sale or lease of lands granted to Alaska for University purposes by acts of Congress shall be deposited in the state treasury by the board of regents.[17] The governor is the person authorized to make all certificates required by law or by regulations of the federal Departments of Agriculture or Interior to entitle the state to grants of money for the benefit of state colleges of agricultural and mechanical arts authorized under acts of Congress.[18]

Finally, there is the matter of financing the operations of the University from state funds. In 1974 the total funding of the University of Alaska was over 41 million dollars. Approximately 65 per cent of that amount, 26½ million dollars, was appropriated by the legislature from the state's general fund.[19]

[2] Despite the degree of constitutional as well as statutory autonomy the University clearly possesses, we are of the opinion that it must be considered to be an integral part of the state educational system mandated by the constitution. In its constitutional status it stands as the single governmental entity which was specifically created by the people to meet the statewide need for a public institution of higher education. In this light, the University must be regarded as uniquely an instrumentality of the state itself. Unlike other public educational institutions created to meet the

8. AS 14.40.170; AS 14.40.250.
9. AS 14.40.280.
10. AS 14.40.350.
11. AS 14.40.360.
12. Note 7 *supra*.
13. AS 14.40.190.
14. AS 14.40.370.
15. AS 14.40.280.
16. AS 14.40.400.
17. AS 14.40.360.
18. AS 14.40.450.
19. § 17, ch. 147, SLA 1974.

needs of local areas, it exists constitutionally to act for the benefit of the state and the public generally.

We reach this conclusion not only from article VII of the constitution, which we construe to be the expression of the will of the people of this state that there shall be an institution of higher learning within the scope of the constitutional mandate providing for public education, but also from the degree of control over the affairs of the University which is exercised by the executive and legislative branches of our government, and from the financial dependence the University has upon the state.

It is true that the constitution has established the University as a body corporate.[20] The fact that the University has had conferred upon it the status of a juristic person is not dispositive, however, of our ruling in this case. There are several reasons why this structural approach may have been taken.[21] It may have been created as a corporation so as to simplify its transactions with the federal government in accepting grants of lands, and to facilitate its dealings with other persons in leasing and selling the lands it acquires or in conducting general business activities. Also, this corporate status may have been chosen in order to shield the individual members of the board of regents from personal liability in actions which might lead to a judgment for money damages against the University.

Whatever the framers' intentions, we have in the past recognized that corporate status alone is not determinative of the question of whether or not an entity performing public or governmental functions is an agent or instrumentality of the state. In Alaska State Housing Authority v. Dixon, 496 P.2d 649, 651 (Alaska 1972), we concluded that ASHA was a "state agency" within the intendment of the Administrative Procedure Act even though it was created as a "public corporate authority." In *Dixon* we also construed the holding in Bridges v. Alaska Housing Authority, 349 P.2d 149 (Alaska 1959), to the effect that the Alaska Housing Authority was not the state for purposes of eminent domain proceedings, to mean only that that agency was not "identical" with the state.[22]

The same general conclusion was reached in DeArmond v. Alaska State Development Corp., 376 P.2d 717 (Alaska 1962). There we held that the act creating ASDC as an "instrumentality of the state within the Department of Commerce" was constitutional even though it also provided that the agency was a corporation with a "legal existence independent of and separate from the state." We concluded that this latter provision was nothing more than "a declaration of the legal relationship that most corporations have with respect to their creators."[23] Such corporate status did not have the effect of removing ASDC from the Department of Commerce.[24]

Although these decisions are not wholly dispositive of the question before us,[25] they are indicative of the fact that this Court has not been disposed to treat independent corporate status as sufficient to require the conclusion that a given entity is not in fact part of the State of Alaska. We recognize that the guideposts for such an inquiry are to be found more in political and functional realities than in organizational formali-

20. Alaska Const. art. VII, § 2.

21. Unfortunately the records from our constitutional convention offer no help in disclosing the thinking of the drafters on this matter.

22. 496 P.2d at 651 n. 4.

23. 376 P.2d at 724.

24. *See also* Walker v. Alaska State Mortgage Ass'n, 416 P.2d 245 (Alaska 1966), where the reasoning of *DeArmond* was followed in concluding that ASMA was not by virtue of its independent corporate nature an agency not within the Department of Commerce.

25. We are aware of the crucial fact that each of these cases dealt with a corporate entity which had been specifically declared in its organic act to be "within" a given executive department of the state. That is not the case here.

ties. This approach is in harmony with that of leading authorities in the area.[26]

Other courts have reached various conclusions as to the status and standing of their state universities with respect to the issue of sovereign immunity; there is a marked split of authority on the question.[27] There is, nevertheless, sound authority for the proposition that even where created as a corporate entity, a state university, because of its relation to the state, is a mere agent or instrumentality of the state to carry out its public purpose.[28] Moreover, there are two jurisdictions whose decisions on this question are particularly persuasive since they have considered the unique status of universities created as constitutional corporations.

In People, for Use of Regents of University of Michigan v. Brooks, 224 Mich. 45, 194 N.W. 602 (1923), the Supreme Court of Michigan observed that the regents of the University of Michigan had been created as a "constitutional corporation." The court concluded that for the purposes of a statute authorizing proceedings by "the state" to condemn private property for public use, this constitutional corporation, although a separate entity independent from the state as to the management and control of the University, was nevertheless "a department of the state government, created by the Constitution to perform state functions . . . ."[29]

In a later case, the Court of Appeals of Michigan, in Branum v. State, 5 Mich. App. 134, 145 N.W.2d 860 (1966), considered the status of the University of Michigan's board of regents with respect to that state's statutory waiver of governmental immunity. It was concluded that the statute was applicable to the board even though, as a constitutional corporation, it was not subject to legislative control as to many university affairs. In so doing, the court specifically held that

> [i]n spite of its independence, the Board of Regents remains a part of the government of the state . . . . The University of Michigan is an independent branch of the government of the state of Michigan, but it is not an island. Within the confines of [its exclusive constitutional powers] it is supreme. Without these confines, however, there is no reason to allow the Regents to use their independence to thwart the clearly established public policy of the people of Michigan [waiving governmental immunity to tort actions].[30]

A United States district court, considering the unique constitutional status of the board with respect to its immunity from suit under maritime law, concluded that the University of Michigan's board of regents was "a unique constitutional corporation . . . similar to a department of the

26. *See, e. g.*, 1 K. Davis, Administrative Law § 1.01, at 1 (1958) (where the author recognizes that administrative agencies may be designated by many names, including that of "corporation"), *as quoted in* Dixon, 496 P. 2d at 651.

27. *See generally* Annot., 33 A.L.R.3d 703, § 4[d] (1970); Annot., 86 A.L.R.2d 489, § 7 (1962); Annot., 130 A.L.R. 7, § 4 (1940); 15 Am.Jur.2d Colleges and Universities §§ 7, 15, 35 (1964); 72 Am.Jur.2d States, Territories and Dependencies §§ 104–106 (1974); 14 C.J.S. Colleges and Universities §§ 2, 18 (1939).

28. *See, e. g.*, Wolf v. Ohio State University Hospital, 170 Ohio St. 49, 162 N.E.2d 475 (1959) (recognizing that the state university and its hospital are "instrumentalities of the state" which may not be sued until the legislature enacts statutes determining "the manner in which such suits may be brought against the state."); University of Maryland v. Maas, 173 Md. 554, 197 A. 123 (1938); State v. Miser, 50 Ariz. 244, 72 P.2d 408, 412 (1937) (deciding that the fact that the University of Arizona is incorporated "does not make it any of the less an arm, branch or agency of the state for educational purposes").

29. 194 N.W. at 603.

30. 145 N.W.2d at 862.

state" which consequently enjoyed the immunity of the state from such suits.[31]

The character of the University of Minnesota's board of regents, also created as a "constitutional corporation," has been viewed by the supreme court of that state in the same general light. In State ex rel. University of Minnesota v. Chase, 175 Minn. 259, 220 N.W. 951 (1928), it was decided that while the legislature could not subject the board to executive control in matters reserved by the state constitution to the board alone, the board was nevertheless

> an agency of government to accomplish a state purpose, just as a municipal corporation, however independent it may be under its charter is an agency of [local] government for the accomplishment of local purposes.[32]

More recently, a United States district court observed in Reid v. University of Minnesota, 107 F.Supp. 439, 442 (N.D.Ohio 1952), that

> [t]he "Regents of the University of Minnesota" is a constitutional corporation created to carry out State purposes and the acts of the Regents are, therefore, the acts of the State of Minnesota.

We conclude from the foregoing that the corporate status of the University of Alaska under the Alaska Constitution does not militate against our conclusion that the University falls within the ambit of the language of AS 09.50.250–.300 which governs suits against the State of Alaska. Furthermore, this Court's actions in the recent case of University of Alaska v. Chauvin, 521 P.2d 1234 (Alaska 1974), do not, as is urged by petitioner, require a contrary ruling.[33]

Petitioner also argues that the University is not subject to AS 09.50.250–.300 since the legislature has chosen to confer upon it the statutory power to "sue and be sued" in its own name.[34] This fact is not dispositive of the issue at hand. As a constitutional corporation, owing its existence not to the legislature but to a charter from the ultimate sovereign, the will of the people of this state, this basic corporate power would inhere in the University regardless of the legislature's declaration.[35]

In short, it is our conclusion that neither the University's unique corporate character nor its power to sue and be sued in its own name detracts in any degree from what we consider most significant and controlling in this case: that the University, in performing its constitutional functions, acts for the benefit of the state and of the public generally in the process of government; and that it was created to pursue the govern-

31. Huckins v. Board of Regents of University of Michigan, 263 F.Supp. 622, 624 (E.D. Mich.1967).

32. 220 N.W. at 953.

33. In *Chauvin*, where we ultimately concluded that under the fourteenth amendment to the Consitution of the United States a tenured employee of the University was entitled to a hearing before termination of his employment, this Court denied the University's motion for a stay of execution pending appeal under Rule 62(e) of the Alaska Rules of Civil Procedure. Rule 62(e) provides that no supersedeas bond is required when a stay of execution is granted pending an appeal by the state or its officers or agencies. In denying its motion, we did not specifically rule on the question of the University's status as an agency of the state for purposes of Rule 62. Moreover, we do not feel constrained in this case to decide whether the applicability of AS 09.50.290 to the University is dispositive of the University's standing with respect to Rule 62.

34. AS 14.40.040 provides:
> *General powers of the university.* There is created and established a corporation to be called the University of Alaska. It may in that name
> (1) sue and be sued;
> (2) receive and hold real and personal property;
> (3) contract and be contracted with;
> (4) adopt, use and alter a corporate seal;
> (5) do and have done all matters necessary for the purpose of any function set forth in this chapter.

35. Such a power, for example, is recognized to be a normal incident and attribute of corporate status per se. *See, e. g.*, H. Henn, Law of Corporations § 79, at 109 (1970).

mental task of providing education in accordance with an express mandate of the constitution, the fundamental and basic government of this state.

Article III, section 22 of the Alaska Constitution requires that all executive and administrative offices, departments, and agencies of the state government shall be allocated by law among and within not more than twenty principal departments. Petitioner contends that the University is not subject to AS 09.50.290 since it is not a department of the executive branch allocated among the 17 principal departments now identified under AS 44.15.010.[36]

[3] The answer to this contention is that the University could not be so allocated. In the light of our foregoing consideration of the unique character of the University as a constitutional corporation, we are persuaded that it is an instrumentality of the sovereign which enjoys in some limited respects a status which is co-equal rather than subordinate to that of the executive or the legislative arms of government.[37] We therefore conclude that it is not necessarily subject to such allocation under AS 44.15.010.

[4] Lastly, petitioner argues that in maintaining an experimental air strip on floe ice, the University was acting in a "proprietary," rather than "governmental" capacity, and that therefore, consistent with the common law principle in such cases, the privileges incident to sovereignty should not be recognized in this case.

We are aware of the historic force of this distinction and acknowledge that it would appear to be honored in many jurisdictions.[38] We note, however, that some states have recognized that the distinction between proprietary and governmental functions has little if any relevance in actions involving the question of the immunity or liability of the state, as opposed to its political subdivisions, in connection with the activities of public schools or institutions of higher learning.[39] We observe that the proprietary-governmental distinction was abandoned by this court with respect to municipal tort liability in the case of City of Fairbanks v. Schaible.[40] We take this opportunity to extend that ruling to suits involving the state or its agencies under AS 09.50.250–.300.

We reach the conclusion that the University of Alaska is an integral part of the state government and an instrumentality of the state in performing its educational function. This being so, AS 09.50.290, which provides that a suit against the state

36. AS 44.15.010 provides:
Offices and departments. There are in the state government the following principal offices and departments:
(1) Office of the Governor
(2) Department of Administration
(3) Department of Law
(4) Department of Revenue
(5) Department of Education
(6) Department of Health and Social Services
(7) Department of Labor
(8) Department of Commerce
(9) Department of Military Affairs
(10) Department of Natural Resources
(11) Department of Fish and Game
(12) Department of Public Safety
(13) Department of Public Works
(14) Department of Economic Development
(15) Department of Highways
(16) Department of Environmental Conservation
(17) Department of Community and Regional Affairs

37. *See* State ex rel. Sholes v. University of Minnesota, 54 N.W.2d 122, 125-26 (Minn. 1952).

38. *See* Annot., 33 A.L.R.3d 703, §§ 7 et seq. (1970).

39. *See* McCoy v. Board of Regents, 196 Kan. 506, 413 P.2d 73 (1966); Holsworth v. State, 298 N.W. 163 (1941).

40. 375 P.2d 201, 208 (Alaska 1962). It is significant that our decision in *Schaible* was predicated upon a statutory waiver of governmental immunity which, in all respects material to this case, is the functional equivalent of AS 09.50.250.

shall be tried by the court without a jury, is applicable in this case.

The order striking petitioner's demand for a jury trial is affirmed.

ERWIN, BOOCHEVER and BURKE, JJ., not participating.

EMPLOYERS COMMERCIAL UNION COMPANY, a Foreign Corporation and Aspeotis Construction Company, Appellants,

v.

Peter LIBOR and Alaska Workmen's Compensation Board, Appellees.

No. 2119.

Supreme Court of Alaska.

June 6, 1975.

Review was sought with regard to award made to claimant by Workmen's Compensation Board. The Superior Court, Third Judicial District, Anchorage, Eben H. Lewis, J., affirmed Board's decision, and appeal was taken. The Supreme Court, Connor, J., held that substantial evidence, apart from statutory presumption that a claim for compensation is within Workmen's Compensation Act, supported Board's finding that claimant's herniated disc was caused by work-related injury and that Board, in making award to claimant, could additionally rely on statutory presumption.

Affirmed.

1. Workmen's Compensation ⇐1532

Substantial evidence, apart from statutory presumption that a claim for compensation is within Workmen's Compensation Act, supported Workmen's Compensation Board's finding that claimant's herniated disc was caused by work-related injury occurring when he was struck in small of back by accidentally dislodged rock as he was bent over in a ditch. AS 23.30.120(1).

2. Workmen's Compensation ⇐1357

Workmen's Compensation Board, in making award to claimant, could additionally rely on statutory presumption that a claim is within Workmen's Compensation Act where such presumption was not overcome by substantial evidence to contrary. AS 23.30.120(1).

Sanford M. Gibbs, of Hagans, Smith & Brown, Anchorage, for appellants.

Suzanne C. Pestinger and William K. Jermain of Birch, Jermain, Horton & Bittner, Anchorage, for appellee Libor.

OPINION

Before RABINOWITZ, C. J., and CONNOR, ERWIN, BOOCHEVER and FITZGERALD, JJ.

CONNOR, Justice.

This is an appeal from the judgment of the superior court reviewing a decision of the Alaska Workmen's Compensation Board.

About May 24, 1969, Peter Libor, while employed by the Aspeotis Construction Company, was struck in the small of his back by a rock which had been accidentally dislodged. At the time, appellee was in a bent over position standing in a ditch. The rock, which fell from above, was approximately eight inches across and weighed between four and five pounds. The injury was diagnosed as a fracture of the transverse process of the right side of vertebrae L2 and L3. Libor was absent from work for about two weeks. He then returned to work until February 25, 1971, at which time, because of increased pain in his low back, he went to see Dr. Tryon Wieland in Anchorage.

Dr. Wieland prescribed exercise and physical therapy. When that procedure afforded little relief, Libor consulted Dr. George A. Lyon, who diagnosed Libor's

HB

114

HB 114

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 25, 2005

The Honorable John Harris
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, AK 99801-1182

Dear Speaker Harris:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the retaining of certain privileges of a parent in a relinquishment and termination of a parent and child relationship proceeding, relating to eligibility for Permanent Fund dividends for certain children in the custody of the state, and relating to child in need of aid proceedings under AS 47.10 and juvenile delinquency proceedings under AS 47.12.

The bill would add language to AS 25.23.180 to permit parents to relinquish their parental rights to a child while retaining certain privileges, such as ongoing communication or visitation with the child. This proposed amendment is in response to a recent Alaska Supreme Court decision holding that current law prohibits a parent from retaining any rights or privileges in a relinquishment. In some cases, ongoing contact with the parent is in the child's best interest, particularly in cases involving adoption by relatives or family acquaintances. Before the Supreme Court's decision, retention of privileges in relinquishments was a common practice. The proposed amendment would authorize retained privileges in appropriate cases.

The bill would add language to AS 43.23.005 to allow children who are placed temporarily by the Department of Health and Social Services (DHSS) outside of the state--in out-of-state treatment facilities, for example--to maintain their eligibility for Permanent Fund dividends. Some children require long-term treatment of a nature that is currently unavailable in this state; such children are at risk of losing their Permanent Fund dividend eligibility if they remain placed out of state for more than a year and are unable to return to the state to meet permanent fund dividend eligibility requirements. These Alaskan children should not lose the privilege of dividend eligibility as a result of being placed by the DHSS in a treatment program that is only available out-of-state.

The bill would add language to AS 47.10.020 to clarify that the court may issue any orders necessary to aid the DHSS in its investigation of an allegation of child abuse or neglect. Orders to aid DHSS are not prohibited by existing law;

however, the proposed clarification would resolve any ambiguity regarding the ability of judges to issue such orders.

The bill also would add a new provision to permit courts to dispense with unnecessary and costly expert witness appearances in child in need of aid cases involving parents who cannot be located or identified. Under existing federal law, in order for a court to authorize the out-of-home placement of, or termination of parental rights to, an Indian child, the court must consider the testimony of a qualified expert witness. In cases involving a parent whose whereabouts remain unknown despite a diligent search, this federal law would appear to require that an expert witness be called solely to support the self-evident finding that placement of a child with the parent who cannot be found is likely to place the child at risk of harm. The proposed addition to AS 47.10 would permit a court to conclude, as a matter of law, that the testimony of a qualified expert witness would support a finding that placing the child with an absent parent would place a child at substantial risk of serious harm. This provision will satisfy federal legal requirements.

Finally, the bill would amend the definition of the term "mental health professional" for purposes of child in need of aid and juvenile delinquency proceedings. In order to authorize placement of children in secure residential psychiatric treatment facilities, courts must hear the testimony of a "mental health professional." The current definition of that term, contained in AS 47.30.915, excludes professionals who may be licensed to practice in other states, but not in Alaska. The testimony of such professionals is often critical in cases involving Alaska children who are already placed out of state by DHSS. Thus, expansion of the existing definition is necessary to ensure that Alaska children who are placed outside of this state receive the psychiatric treatment they need.

Each of the provisions of this bill constitutes a step toward making Alaska's children safer, healthier, and more secure, without unreasonably expanding governmental powers.

I urge your prompt and favorable action on this measure.

Sincerely yours,

Frank H. Murkowski
Governor

Enclosure

24-GH1108\Y
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3/18/05

CS FOR HOUSE BILL NO. 114( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

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

A BILL

FOR AN ACT ENTITLED

"An Act relating to proceedings regarding voluntary relinquishments and terminations of a parent and child relationship; relating to eligibility for permanent fund dividends for certain children in the custody of the state; relating to child-in-need-of-aid proceedings, adoption proceedings, and juvenile delinquency proceedings; relating to findings in permanency hearings in child-in-need-of-aid proceedings; amending Rules 9 and 13, Alaska Adoption Rules and Rules 17.2 and 18, Child in Need of Aid Rules; and providing for an effective date."

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

*** Section 1.** AS 25.23.180 is amended by adding new subsections to read:

(j) In a relinquishment of parental rights executed under (a) of this section, a parent may retain privileges with respect to the child, including the ability to have future contact, communication, and visitation with the child. A retained privilege must be stated with specificity in writing, and, not less than 10 days after the

relinquishment is signed, the court may enter an order terminating parental rights if the court finds that termination of parental rights under the terms of the agreement is in the child's best interest. If a parent has retained one or more privileges, the court shall incorporate the retained privileges into the termination order with a recommendation that the retained privileges be incorporated in an adoption or legal guardianship decree.

(k) A voluntary relinquishment may not be withdrawn and a termination order may not be vacated on the ground that a retained privilege has been withheld from the relinquishing parent or that the relinquishing parent has been unable, for any reason, to act on a retained privilege, except as provided in Rule 60(b), Alaska Rules of Civil Procedure.

(*l*) After a termination order is entered, a person who has voluntarily relinquished parental rights under this section may request a review hearing, upon a showing of good cause, to seek enforcement or modification of or to vacate a privilege retained in the termination order. The court may modify, enforce, or vacate the retained privilege if the court finds, by clear and convincing evidence, that it is in the best interest of the child to do so.

(m) After a termination order is entered and before the entry of an adoption or legal guardianship decree, a prospective adoptive parent or a guardian of the child may request, after providing notice as specified under this subsection, that the court decline to incorporate a privilege retained in a termination order and recommended for incorporation in an adoption or guardianship decree under (j) of this section. If the person who has relinquished parental rights to the child who is the subject of the adoption or guardianship decree did not waive rights to notice of adoption under (b) of this section, the request made under this subsection may only be considered after providing at least 10 days' notice by certified mail to the last known address of the person who has voluntarily relinquished parental rights to the child. The notice under this subsection must describe the request and explain that the recipient of the notice may submit a written affidavit to the court in support of or in opposition to the request. The court may decline to incorporate a retained privilege if the person who retained the privilege supports the request or if the court finds that it is in the child's best

interest.

(n) After a termination order is entered and before the entry of an adoption order, a person who voluntarily relinquished parental rights to a child under this section may request a review hearing, upon a showing of good cause, to vacate the termination order and reinstate parental rights relating to that child. A court shall vacate a termination order if the person shows, by clear and convincing evidence, that reinstatement of parental rights is in the best interest of the child and that the person is rehabilitated and capable of providing the care and guidance that will serve the moral, emotional, mental, and physical welfare of the child.

(o) A person seeking a review hearing under (m) or (n) of this section is entitled to the appointment of an attorney to the same extent as if the parent's rights had not been terminated in a child-in-need-of-aid proceeding.

*** Sec. 2.** AS 43.23.005(f) is amended to read:

(f) **The** [IN A TIME OF NATIONAL MILITARY EMERGENCY, THE] commissioner may waive the requirement of (a)(4) of this section for an individual absent from the state

(1) in a time of national military emergency under military orders while serving in the armed forces of the United States, or for the spouse and dependents of that individual; **or**

(2) while in the custody of the Department of Health and Social Services in accordance with a court order under AS 47.10 or AS 47.12 and placed outside of the state by the Department of Health and Social Services for purposes of medical or behavioral treatment.

*** Sec. 3.** AS 47.10.020(a) is amended to read:

(a) Whenever circumstances subject a child to the jurisdiction of the court under AS 47.10.005 - 47.10.142, the court shall appoint a competent person or agency to make a preliminary inquiry and report for the information of the court to determine whether the best interests of the child require that further action be taken. **The court shall make the appointment on its own motion or at the request of a person or agency having knowledge of the child's circumstances.** If, under this subsection, the court appoints a person or agency to make a preliminary inquiry and to report to it,

or if the department is conducting an investigation of a report of child abuse or neglect, the court may issue any orders necessary to aid the person, the agency, or the department in its investigation or in making the preliminary inquiry and report. Upon [THEN, UPON THE] receipt of the report **under this subsection**, the court may

(1) close the matter without a court hearing;

(2) determine whether the best interests of the child require that further action be taken; or

(3) authorize the person or agency having knowledge of the facts of the case to file with the court a petition setting out the facts.

*** Sec. 4.** AS 47.10.020 is amended by adding a new subsection to read:

(e) Nothing in this section requires the department to obtain authorization from the court before

(1) conducting an investigation of a report of child abuse or neglect; or

(2) filing a petition.

*** Sec. 5.** AS 47.10.080(*l*) is amended to read:

(*l*) Within 12 months after the date a child enters foster care as calculated under AS 47.10.088(f), the court shall hold a permanency hearing. The hearing and permanent plan developed in the hearing are governed by the following provisions:

(1) the persons entitled to be heard under AS 47.10.070 or under (f) of this section are also entitled to be heard at the hearing held under this subsection;

(2) when establishing the permanent plan for the child, the court shall make appropriate written findings, including findings related to whether

(A) and when the child should be returned to the parent or guardian;

(B) the child should be placed for adoption or legal guardianship and whether a petition for termination of parental rights should be filed by the department; and

(C) the child should be placed in another planned, permanent living arrangement and what steps are necessary to achieve the new arrangement;

(3) if the court is unable to make a finding required under (2) of this subsection, the court shall hold another hearing within a reasonable period of time;

(4) in addition to the findings required by (2) of this subsection, the court shall also make appropriate written findings related to

(A) whether the department has made the reasonable efforts required under AS 47.10.086 to offer appropriate family support services to remedy the parent's or guardian's conduct or conditions in the home that made the child a child in need of aid under this chapter;

(B) whether the parent or guardian has made substantial progress to remedy the parent's or guardian's conduct or conditions in the home that made the child a child in need of aid under this chapter; [AND]

(C) if the permanent plan is for the child to remain in out-of-home-care, whether the child's out-of-home placement continues to be appropriate and in the best interests of the child; **and**

(D) whether the department has made reasonable efforts to finalize the permanent plan for the child;

(5) the court shall hold a hearing to review the permanent plan at least annually until successful implementation of the plan; if the plan approved by the court changes after the hearing, the department shall promptly apply to the court for another permanency hearing, and the court shall conduct the hearing within 30 days after application by the department.

* **Sec. 6.** AS 47.10 is amended by adding a new section to read:

Sec. 47.10.089. Voluntary relinquishment of parental rights and responsibilities. (a) When a child is committed to the custody of the department under AS 47.10.080(c)(1) or (3) or released under AS 47.10.080(c)(2), the rights of a parent with respect to the child, including parental rights to control the child, to withhold consent to an adoption, or to receive notice of a hearing on a petition for adoption, may be voluntarily relinquished to the department and the relationship of parent and child terminated in a proceeding as provided under this section.

(b) A voluntary relinquishment must be in writing and signed by a parent, regardless of the age of the parent, in the presence of a representative of the

department or in the presence of a court of competent jurisdiction with the knowledge and approval of the department. A copy of the signed relinquishment shall be given to the parent.

(c) A voluntary relinquishment may be withdrawn within 10 days after it is signed. The relinquishment is invalid unless the relinquishment contains the right of withdrawal as specified under this subsection.

(d) A parent may retain privileges with respect to the child, including the ability to have future contact, communication, and visitation with the child in a voluntary relinquishment executed under this section. A retained privilege must be in writing and stated with specificity.

(e) Not less than 10 days after a voluntary relinquishment is signed, the court shall enter an order terminating parental rights if the court finds that termination of parental rights under the terms of the relinquishment is in the child's best interest. If a parent has retained one or more privileges under (d) of this section, the court shall incorporate the retained privileges in the termination order with a recommendation that the retained privileges be incorporated in an adoption or legal guardianship decree.

(f) A voluntary relinquishment may not be withdrawn and a termination order may not be vacated on the ground that a retained privilege has been withheld from the relinquishing parent or that the relinquishing parent has been unable, for any reason, to act on a retained privilege, except as provided in Rule 60(b), Alaska Rules of Civil Procedure.

(g) After a termination order is entered, a person who has voluntarily relinquished parental rights under this section may request a review hearing, upon a showing of good cause, to seek enforcement or modification of or to vacate a privilege retained in the termination order. The court may modify, enforce, or vacate the retained privilege if the court finds, by clear and convincing evidence, that it is in the best interest of the child to do so.

(h) After a termination order is entered and before the entry of an adoption or legal guardianship decree, a person who voluntarily relinquished parental rights to a child under this section may request a review hearing, upon a showing of good cause,

to vacate the termination order and reinstate parental rights relating to that child. A court shall vacate a termination order if the person shows, by clear and convincing evidence, that reinstatement of parental rights is in the best interest of the child and that the person is rehabilitated and capable of providing the care and guidance that will serve the moral, emotional, mental, and physical welfare of the child.

(i) A person seeking a review hearing under (g) or (h) of this section is entitled to the appointment of an attorney to the same extent as if the parent's rights had not been terminated in a child-in-need-of-aid proceeding.

(j) After a termination order is entered and before the entry of an adoption or legal guardianship decree, a prospective adoptive parent or a guardian of the child m y request, after providing notice as specified under this subsection, that the court decline to incorporate a privilege retained in a termination order and recommended for incorporation in an adoption or guardianship decree under (e) of this section. If the person who has relinquished parental rights to the child who is the subject of the adoption or guardianship decree did not waive rights to notice of adoption under (a) of this section, the request made under this subsection may only be considered after providing at least 10 days' notice by certified mail to the last known address of the person who has voluntarily relinquished parental rights to the child. The notice under this subsection must describe the request and explain that the recipient of the notice may submit a written affidavit to the court in support of or in opposition to the request. The court may decline to incorporate a retained privilege if the person who retained the privilege supports the request or if the court finds that it is in the child's best interest.

* **Sec. 7.** AS 47.10 is amended by adding a new section to read:

Sec. 47.10.145. Expert witness testimony regarding absent parent, guardian, or custodian. If the court finds by clear and convincing evidence that a parent, guardian, or custodian of a child cannot be located after a reasonable search for the parent, guardian, or custodian has been conducted by the department, the court may conclude that the testimony of a qualified expert witness would support a finding that continued custody of the child by the absent parent, guardian, or custodian is likely to result in serious emotional or physical damage to the child.

* **Sec. 8.** AS 47.10.990(16) is amended to read:

(16) "mental health professional" has the meaning given in AS 47.30.915, **except that, if the child is placed in another state by the department, "mental health professional" also includes a professional listed in the definition of "mental health professional" in AS 47.30.915 who is not licensed to practice by a board of this state but is licensed by a corresponding licensing authority to practice in the state in which the child is placed**;

* **Sec. 9.** AS 47.12.990(10) is amended to read:

(10) "mental health professional" has the meaning given in AS 47.30.915, **except that, if the minor is placed in another state by the department, "mental health professional" also includes a professional listed in the definition of "mental health professional" in AS 47.30.915 who is not licensed to practice by a board of this state but is licensed by a corresponding licensing authority to practice in the state in which the minor is placed**;

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

DIRECT COURT RULE AMENDMENT. Rule 9(a), Alaska Adoption Rules, is amended to read:

(a) **Form.** A consent or relinquishment must be in writing and must include:

(1) notice of the person's right to withdraw the consent or relinquishment as provided by paragraphs (g) and (h) of this rule;

(2) the address and telephone number of the court in which the adoption or relinquishment proceeding has or is expected to be filed;

(3) a statement of the right to counsel as stated in Rule 8;

(4) a statement concerning whether or not any visitation rights **or other parental privileges** are sought to be retained after the adoption;

(5) if a consent, the information required in AS 25.23.060; and

(6) if signed by a parent, a statement of whether the parent is a minor.

* **Sec. 11.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 9(g), Alaska Adoption Rules,

is amended to read:

(g) **Withdrawal of Consent or Relinquishment of a Non-Indian Child.** The parent of a non-Indian child may withdraw a consent or relinquishment by notifying in writing the court, or the person or agency obtaining the consent or relinquishment, within 10 days of the birth or signing of the consent or relinquishment, whichever is later. Notification is timely if received or postmarked on or before the last day of this time period. The parent may move the court to permit withdrawal of the consent or relinquishment after the 10 day period pursuant to AS 25.23.070 for a consent or AS 25.23.180(g) **or AS 47.10.089(h)** for a relinquishment.

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

DIRECT COURT RULE AMENDMENT. Rule 13(a), Alaska Adoption Rules, is amended to read:

(a) **Voluntary Relinquishment.** A decree terminating parental rights may be entered after a voluntary relinquishment pursuant to AS 25.23.180 **or AS 47.10.089**. The court shall enter findings of fact which must include a statement concerning whether visitation rights are being allowed under AS 25.23.130(c) **or other privileges are being retained under AS 25.23.180 or AS 47.10.089,** and whether the time limit for withdrawal of the relinquishment has elapsed. If the relinquishment was signed in the presence of the court, findings also must be entered as to whether the parent understood the consequences of the relinquishment, and whether the relinquishment was voluntarily signed.

In the case of a voluntary relinquishment of parental rights to an Indian child, the court shall make additional findings concerning whether any notice required by Rule 10(e) was timely given; whether the relinquishment was voluntary and in compliance with the requirements of 25 U.S.C. Section 1913; and whether the child's placement complies with the preferences set out in 25 U.S.C. Section 1915 or good cause exists for deviation from the placement preference.

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

DIRECT COURT RULE AMENDMENT. Rule 17.2(f), Alaska Child in Need of Aid Rules, is amended to read:

(f) **Additional Findings.** In addition to the findings required under paragraph (e), the court shall also make written findings related to

(1) whether the Department has made reasonable efforts required under AS 47.10.086 or, in the case of an Indian child, whether the Department has made active efforts to provide remedial services and rehabilitative programs as required by 25 U.S.C. Sec. 1912(d);

(2) whether the parent or guardian has made substantial progress to remedy the parent's or guardian's conduct or conditions in the home that made the child a child in need of aid; [AND]

(3) if the permanent plan is for the child to remain in out-of-home care, whether the child's out-of-home placement continues to be appropriate and in the best interests of the child**; and**

(4) whether the Department has made reasonable efforts to finalize the permanent plan for the child.

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

DIRECT COURT RULE AMENDMENT. Rule 18(d)(1), Alaska Child in Need of Aid Rules, is amended to read:

(d) **Relinquishment.**

(1) Notwithstanding other provisions of this rule, the court may terminate parental rights after a voluntary relinquishment pursuant to **AS 47.10.089** [AS 25.23.180]. In the case of an Indian child, the relinquishment must meet the requirements set forth in 25 U.S.C. § 1913(c).

*** Sec. 15.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENT. (a) AS 25.23.180(j) - (o) and AS 47.10.089, added by secs. 1 and 6 of this Act, amend Rules 9 and 13, Alaska Adoption Rules, by requiring retained privileges to be set out in the relinquishment form and order and by providing additional procedures related to the relinquishment.

(b) AS 25.23.180(k) - (o) and AS 47.10.089(g), (h), and (j), added by secs. 1 and 6 of this Act, amend Rule 13, Alaska Adoption Rules, by authorizing review hearings for voluntary relinquishments.

(c) AS 47.10.089, added by sec. 6 of this Act, amends Rule 18(d)(1), Alaska Child in Need of Aid Rules, by providing that a relinquishment be in writing, allowing for the withdrawal of the relinquishment, allowing for the retention of certain privileges, and authorizing a review hearing before the entry of an adoption or legal guardianship decree.

(d) AS 47.10.089, added by sec. 6 of this Act, amends Rule 18, Alaska Child in Need of Aid Rules, by authorizing a review hearing for a termination before entry of an adoption or legal guardianship decree.

*** Sec. 16.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTION. The revisor of statutes is instructed to change the heading of AS 47.10.088 from "Termination of parental rights and responsibilities" to "Involuntary termination of parental rights and responsibilities."

*** Sec. 17.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. (a) Rule 9(a), Alaska Adoption Rules, as amended by sec. 10 of this Act, takes effect only if sec. 10 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) Rule 9(g), Alaska Adoption Rules, as amended by sec. 11 of this Act, takes effect only is sec. 11 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(c) Rule 13(a), Alaska Adoption Rules, as amended by sec. 12 of this Act, takes effect only if sec. 12 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(d) Section 5 of this Act and Rule 17.2(f), Alaska Child in Need of Aid Rules, as amended by sec. 13 of this Act, take effect only if sec. 13 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(e) Rule 18(d)(1), Alaska Child in Need of Aid Rules, as amended by sec. 14 of this Act, takes effect only if sec. 14 of this Act receives the two-thirds majority vote of each house

requir.d by art. IV, sec. 15, Constitution of the State of Alaska.

(f) AS 25.23.180(j) - (o), added by sec. 1 of this Act, and AS 47.10.089, added by sec. 6 of this Act, take effect only if sec. 15 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

*** Sec. 18.** This Act takes effect immediately under AS 01.10.070(c).

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CS FOR HOUSE BILL NO. 114( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

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

A BILL

FOR AN ACT ENTITLED

"An Act relating to proceedings regarding voluntary relinquishments and terminations of a parent and child relationship; relating to eligibility for permanent fund dividends for certain children in the custody of the state; relating to child-in-need-of-aid proceedings, adoption proceedings, and juvenile delinquency proceedings; relating to findings in permanency hearings in child-in-need-of-aid proceedings; amending Rules 9 and 13, Alaska Adoption Rules, Rules 17.2 and 18, Child in Need of Aid Rules of Procedure, and Rules 14 and 15, Rules of Probate Procedure; and providing for an effective date."

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

*** Section 1.** AS 13.26 is amended by adding a new section to read:

Sec. 13.26.064. Guardianship after voluntary relinquishment; procedure. In addition to the applicable procedures under this chapter, a guardianship decree and

review of a guardianship decree are governed by the procedures established under AS 25.23.180 and, for a child-in-need-of-aid, AS 47.10.089, pertaining to voluntary relinquishment of parental rights and retaining of parental privileges in a guardianship decree.

* **Sec. 2.** AS 25.23.180 is amended by adding new subsections to read:

(j) In a relinquishment of parental rights executed under (a) of this section, a parent may retain privileges with respect to the child, including the ability to have future contact, communication, and visitation with the child. A retained privilege must be stated with specificity in writing, and, not less than 10 days after the relinquishment is signed, the court may enter an order terminating parental rights if the court finds that termination of parental rights under the terms of the agreement is in the child's best interest. If a parent has retained one or more privileges, the court shall incorporate the retained privileges into the termination order with a recommendation that the retained privileges be incorporated in an adoption or legal guardianship decree.

(k) A voluntary relinquishment may not be withdrawn and a termination order may not be vacated on the ground that a retained privilege has been withheld from the relinquishing parent or that the relinquishing parent has been unable, for any reason, to act on a retained privilege, except as provided in Rule 60(b), Alaska Rules of Civil Procedure.

(l) After a termination order is entered, a person who has voluntarily relinquished parental rights under this section may request a review hearing, upon a showing of good cause, to seek enforcement or modification of or to vacate a privilege retained in the termination order. The court may modify, enforce, or vacate the retained privilege if the court finds, by clear and convincing evidence, that it is in the best interest of the child to do so.

(m) After a termination order is entered and before the entry of an adoption or legal guardianship decree, a prospective adoptive parent or a guardian of the child may request, after providing notice as specified under this subsection, that the court decline to incorporate a privilege retained in a termination order and recommended for incorporation in an adoption or guardianship decree under (j) of this section. If the

person who has relinquished parental rights to the child who is the subject of the adoption or guardianship decree did not waive rights to notice of adoption under (b) of this section, the request made under this subsection may only be considered by the court after providing at least 20 days' notice by certified mail to the last known address of the person who has voluntarily relinquished parental rights to the child. The notice under this subsection must describe the request and explain that the recipient of the notice may submit a written statement under penalty of perjury to the court that the recipient either agrees with or opposes the request. The notice must also include the deadline for submitting the statement and the mailing address of the court. The court may decline to incorporate a retained privilege if the person who retained the privilege agrees with the request or if the court finds that it is in the child's best interest.

(n) After a termination order is entered and before the entry of an adoption decree, a person who voluntarily relinquished parental rights to a child under this section may request a review hearing, upon a showing of good cause, to vacate the termination order and reinstate parental rights relating to that child. A court shall vacate a termination order if the person shows, by clear and convincing evidence, that reinstatement of parental rights is in the best interest of the child and that the person is rehabilitated and capable of providing the care and guidance that will serve the moral, emotional, mental, and physical welfare of the child.

(o) A person who relinquished parental rights is entitled to the appointment of an attorney if a hearing is requested under (*l*), (m), or (n) of this section to the same extent as if the parent's rights had not been terminated in a child-in-need-of-aid proceeding.

*** Sec. 3.** AS 43.23.005(f) is amended to read:

(f) **The** [IN A TIME OF NATIONAL MILITARY EMERGENCY, THE] commissioner may waive the requirement of (a)(4) of this section for an individual absent from the state

(1) in a time of national military emergency under military orders while serving in the armed forces of the United States, or for the spouse and dependents of that individual**; or**

(2) while in the custody of the Department of Health and Social

Services in accordance with a court order under AS 47.10 or AS 47.12 and placed outside of the state by the Department of Health and Social Services for purposes of medical or behavioral treatment.

*** Sec. 4.** AS 47.10.020(a) is amended to read:

(a) Whenever circumstances subject a child to the jurisdiction of the court under AS 47.10.005 - 47.10.142, the court shall appoint a competent person or agency to make a preliminary inquiry and report for the information of the court to determine whether the best interests of the child require that further action be taken. **The court shall make the appointment on its own motion or at the request of a person or agency having knowledge of the child's circumstances.** If, under this subsection, the court appoints a person or agency to make a preliminary inquiry and to report to it, **or if the department is conducting an investigation of a report of child abuse or neglect, the court may issue any orders necessary to aid the person, the agency, or the department in its investigation or in making the preliminary inquiry and report. Upon** [THEN, UPON THE] receipt of the report **under this subsection**, the court may

(1) close the matter without a court hearing;

(2) determine whether the best interests of the child require that further action be taken; or

(3) authorize the person or agency having knowledge of the facts of the case to file with the court a petition setting out the facts.

*** Sec. 5.** AS 47.10.020 is amended by adding a new subsection to read:

(e) Nothing in this section requires the department to obtain authorization from the court before

(1) conducting an investigation of a report of child abuse or neglect; or

(2) filing a petition.

*** Sec. 6.** AS 47.10.080(*l*) is amended to read:

(*l*) Within 12 months after the date a child enters foster care as calculated under AS 47.10.088(f), the court shall hold a permanency hearing. The hearing and permanent plan developed in the hearing are governed by the following provisions:

(1) the persons entitled to be heard under AS 47.10.070 or under (f) of

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this section are also entitled to be heard at the hearing held under this subsection;

(2) when establishing the permanent plan for the child, the court shall make appropriate written findings, including findings related to whether

(A) and when the child should be returned to the parent or guardian;

(B) the child should be placed for adoption or legal guardianship and whether a petition for termination of parental rights should be filed by the department; and

(C) the child should be placed in another planned, permanent living arrangement and what steps are necessary to achieve the new arrangement;

(3) if the court is unable to make a finding required under (2) of this subsection, the court shall hold another hearing within a reasonable period of time;

(4) in addition to the findings required by (2) of this subsection, the court shall also make appropriate written findings related to

(A) whether the department has made the reasonable efforts required under AS 47.10.086 to offer appropriate family support services to remedy the parent's or guardian's conduct or conditions in the home that made the child a child in need of aid under this chapter;

(B) whether the parent or guardian has made substantial progress to remedy the parent's or guardian's conduct or conditions in the home that made the child a child in need of aid under this chapter; [AND]

(C) if the permanent plan is for the child to remain in out-of-home-care, whether the child's out-of-home placement continues to be appropriate and in the best interests of the child; **and**

(D) whether the department has made reasonable efforts to finalize the permanent plan for the child;

(5) the court shall hold a hearing to review the permanent plan at least annually until successful implementation of the plan; if the plan approved by the court changes after the hearing, the department shall promptly apply to the court for another permanency hearing, and the court shall conduct the hearing within 30 days after

application by the department.

* **Sec. 7.** AS 47.10 is amended by adding a new section to read:

Sec. 47.10.089. Voluntary relinquishment of parental rights and responsibilities. (a) When a child is committed to the custody of the department under AS 47.10.080(c)(1) or (3) or released under AS 47.10.080(c)(2), the rights of a parent with respect to the child, including parental rights to control the child, to withhold consent to an adoption, or to receive notice of a hearing on a petition for adoption, may be voluntarily relinquished to the department and the relationship of parent and child terminated in a proceeding as provided under this section.

(b) A voluntary relinquishment must be in writing and signed by a parent, regardless of the age of the parent, in the presence of a representative of the department or in the presence of a court of competent jurisdiction with the knowledge and approval of the department. A copy of the signed relinquishment shall be given to the parent.

(c) A voluntary relinquishment may be withdrawn within 10 days after it is signed. The relinquishment is invalid unless the relinquishment contains the right of withdrawal as specified under this subsection.

(d) A parent may retain privileges with respect to the child, including the ability to have future contact, communication, and visitation with the child in a voluntary relinquishment executed under this section. A retained privilege must be in writing and stated with specificity.

(e) Not less than 10 days after a voluntary relinquishment is signed, the court shall enter an order terminating parental rights if the court determines that termination of parental rights under the terms of the relinquishment is in the child's best interest. If a parent has retained one or more privileges under (d) of this section, the court shall incorporate the retained privileges in the termination order with a recommendation that the retained privileges be incorporated in an adoption or legal guardianship decree.

(f) A voluntary relinquishment may not be withdrawn and a termination order may not be vacated on the ground that a retained privilege has been withheld from the relinquishing parent or that the relinquishing parent has been unable, for any reason, to

change from finds

act on a retained privilege, except as provided in Rule 60(b), Alaska Rules of Civil Procedure.

(g) After a termination order is entered, a person who has voluntarily relinquished parental rights under this section may request a review hearing, upon a showing of good cause, to seek enforcement or modification of or to vacate a privilege retained in the termination order. The court may modify, enforce, or vacate the retained privilege if the court finds, by clear and convincing evidence, that it is in the best interest of the child to do so.

(h) After a termination order is entered and before the entry of an adoption or legal guardianship decree, a person who voluntarily relinquished parental rights to a child under this section may request a review hearing, upon a showing of good cause, to vacate the termination order and reinstate parental rights relating to that child. A court shall vacate a termination order if the person shows, by clear and convincing evidence, that reinstatement of parental rights is in the best interest of the child and that the person is rehabilitated and capable of providing the care and guidance that will serve the moral, emotional, mental, and physical welfare of the child.

(i) A person who relinquished parental rights is entitled to the appointment of an attorney if a hearing is requested under (g), (h), or (j) of this section to the same extent as if the parent's rights had not been terminated in a child-in-need-of-aid proceeding.

(j) After a termination order is entered and before the entry of an adoption or legal guardianship decree, a prospective adoptive parent or a guardian of the child may request, after providing notice as specified under this subsection, that the court decline to incorporate a privilege retained in a termination order and recommended for incorporation in an adoption or guardianship decree under (e) of this section. If the person who has relinquished parental rights to the child who is the subject of the adoption or guardianship decree did not waive rights to notice of adoption under (a) of this section, the request made under this subsection may only be considered by the court after providing at least 20 days' notice by certified mail to the last known address of the person who has voluntarily relinquished parental rights to the child. The notice under this subsection must describe the request and explain that the recipient of the

new wording + cross ref to J.

notice may submit a written statement under penalty of perjury to the court that the recipient either agrees with or opposes the request. The notice must also include the deadline for submitting the statement and the mailing address of the court. The court may decline to incorporate a retained privilege if the person who retained the privilege agrees with the request or if the court finds that it is in the child's best interest.

*** Sec. 8.** AS 47.10.990(16) is amended to read:

(16) "mental health professional" has the meaning given in AS 47.30.915, **except that, if the child is placed in another state by the department, "mental health professional" also includes a professional listed in the definition of "mental health professional" in AS 47.30.915 who is not licensed to practice by a board of this state but is licensed by a corresponding licensing authority to practice in the state in which the child is placed;**

*** Sec. 9.** AS 47.12.990(10) is amended to read:

(10) "mental health professional" has the meaning given in AS 47.30.915, **except that, if the minor is placed in another state by the department, "mental health professional" also includes a professional listed in the definition of "mental health professional" in AS 47.30.915 who is not licensed to practice by a board of this state but is licensed by a corresponding licensing authority to practice in the state in which the minor is placed;**

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

DIRECT COURT RULE AMENDMENT. Rule 9(a), Alaska Adoption Rules, is amended to read:

(a) **Form.** A consent or relinquishment must be in writing and must include:

(1) notice of the person's right to withdraw the consent or relinquishment as provided by paragraphs (g) and (h) of this rule;

(2) the address and telephone number of the court in which the adoption or relinquishment proceeding has or is expected to be filed;

(3) a statement of the right to counsel as stated in Rule 8;

(4) a statement concerning whether or not any visitation rights **or other parental privileges** are sought to be retained after the adoption;

(5) if a consent, the information required in AS 25.23.060; and

(6) if signed by a parent, a statement of whether the parent is a minor.

* **Sec. 11.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 9(g), Alaska Adoption Rules, is amended to read:

(g) **Withdrawal of Consent or Relinquishment of a Non-Indian Child.** The parent of a non-Indian child may withdraw a consent or relinquishment by notifying in writing the court, or the person or agency obtaining the consent or relinquishment, within 10 days of the birth or signing of the consent or relinquishment, whichever is later. Notification is timely if received or postmarked on or before the last day of this time period. The parent may move the court to permit withdrawal of the consent or relinquishment after the 10 day period pursuant to AS 25.23.070 for a consent or AS 25.23.180(g) **or AS 47.10.089(h)** for a relinquishment.

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

DIRECT COURT RULE AMENDMENT. Rule 13(a), Alaska Adoption Rules, is amended to read:

(a) **Voluntary Relinquishment.** A decree terminating parental rights may be entered after a voluntary relinquishment pursuant to AS 25.23.180 **or AS 47.10.089**. The court shall enter findings of fact which must include a statement concerning whether visitation rights are being allowed under AS 25.23.130(c) **or other privileges are being retained under AS 25.23.180 or AS 47.10.089,** and whether the time limit for withdrawal of the relinquishment has elapsed. If the relinquishment was signed in the presence of the court, findings also must be entered as to whether the parent understood the consequences of the relinquishment, and whether the relinquishment was voluntarily signed.

In the case of a voluntary relinquishment of parental rights to an Indian child, the court shall make additional findings concerning whether any notice required by Rule 10(e) was timely given; whether the relinquishment was voluntary and in

compliance with the requirements of 25 U.S.C. Section 1913; and whether the child's placement complies with the preferences set out in 25 U.S.C. Section 1915 or good cause exists for deviation from the placement preference.

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

DIRECT COURT RULE AMENDMENT. Rule 17.2(f), Alaska Child in Need of Aid Rules, is amended to read:

(f) **Additional Findings.** In addition to the findings required under paragraph (e), the court shall also make written findings related to

(1) whether the Department has made reasonable efforts required under AS 47.10.086 or, in the case of an Indian child, whether the Department has made active efforts to provide remedial services and rehabilitative programs as required by 25 U.S.C. Sec. 1912(d);

(2) whether the parent or guardian has made substantial progress to remedy the parent's or guardian's conduct or conditions in the home that made the child a child in need of aid; [AND]

(3) if the permanent plan is for the child to remain in out-of-home care, whether the child's out-of-home placement continues to be appropriate and in the best interests of the child**; and**

(4) whether the Department has made reasonable efforts to finalize the permanent plan for the child.

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

DIRECT COURT RULE AMENDMENT. Rule 18(d)(1), Alaska Child in Need of Aid Rules, is amended to read:

(d) **Relinquishment.**

(1) Notwithstanding other provisions of this rule, the court may terminate parental rights after a voluntary relinquishment pursuant to AS 47.10.089 [AS 25.23.180]. In the case of an Indian child, the relinquishment must meet the requirements set forth in 25 U.S.C. § 1913(c).

*** Sec. 15.** The uncodified law of the State of Alaska is amended by adding a new section to

read:

INDIRECT COURT RULE AMENDMENT. (a) AS 13.26.064, added by sec. 1 of this Act, amends Rules 14 and 15, Rules of Probate Procedure, by providing that retained privileges be set out in the guardianship decree and by providing additional procedures related to a voluntary relinquishment of parental rights.

(b) AS 25.23.180(j) - (o) and AS 47.10.089, added by secs. 2 and 7 of this Act, amend Rules 9 and 13, Alaska Adoption Rules, by requiring retained privileges to be set out in the relinquishment form and order and by providing additional procedures related to the relinquishment.

(c) AS 25.23.180(k) - (o) and AS 47.10.089(g), (h), and (j), added by secs. 2 and 7 of this Act, amend Rule 13, Alaska Adoption Rules, by authorizing review hearings for voluntary relinquishments.

(d) AS 47.10.089, added by sec. 7 of this Act, amends Rule 18(d)(1), Alaska Child in Need of Aid Rules, by providing that a relinquishment be in writing, allowing for the withdrawal of the relinquishment, allowing for the retention of certain privileges, and authorizing a review hearing before the entry of an adoption or legal guardianship decree.

(e) AS 47.10.089, added by sec. 7 of this Act, amends Rule 18, Alaska Child in Need of Aid Rules, by authorizing a review hearing for a termination before entry of an adoption or legal guardianship decree.

*** Sec. 16.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTION. The revisor of statutes is instructed to change the heading of AS 47.10.088 from "Termination of parental rights and responsibilities" to "Involuntary termination of parental rights and responsibilities."

*** Sec. 17.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. (a) Rule 9(a), Alaska Adoption Rules, as amended by sec. 10 of this Act, takes effect only if sec. 10 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) Rule 9(g), Alaska Adoption Rules, as amended by sec. 11 of this Act, takes effect only is sec. 11 of this Act receives the two-thirds majority vote of each house required by art.

IV, sec. 15, Constitution of the State of Alaska.

(c) Rule 13(a), Alaska Adoption Rules, as amended by sec. 12 of this Act, takes effect only if sec. 12 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(d) Section 5 of this Act and Rule 17.2(f), Alaska Child in Need of Aid Rules, as amended by sec. 13 of this Act, take effect only if sec. 13 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(e) Rule 18(d)(1), Alaska Child in Need of Aid Rules, as amended by sec. 14 of this Act, takes effect only if sec. 14 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(f) AS 13.26.064, added by sec. 1 of this Act, AS 25.23.180(j) - (o), added by sec. 2 of this Act, and AS 47.10.089, added by sec. 7 of this Act, take effect only if sec. 15 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

*** Sec. 18.** This Act takes effect immediately under AS 01.10.070(c).

24-GH1108\F
Mischel
3/8/05

CS FOR HOUSE BILL NO. 114( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

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

A BILL

FOR AN ACT ENTITLED

"An Act relating to the retaining of certain privileges of a parent in a relinquishment and termination of a parent and child relationship proceeding; relating to eligibility for permanent fund dividends for certain children in the custody of the state; relating to child-in-need-of-aid proceedings, adoption proceedings, and juvenile delinquency proceedings; amending Rules 9 and 13, Alaska Adoption Rules; and providing for an effective date."

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

*** Section 1.** AS 25.23.180 is amended by adding new subsections to read:

(j) In a relinquishment of parental rights executed under (a) of this section, a parent may retain privileges with respect to the child, including the ability to have future contact, communication, and visitation with the child. A retained privilege must be stated with specificity in writing, and, if a termination order is entered following the relinquishment, the court shall incorporate a retained privilege into the

termination order. A relinquishment may be withdrawn before the entry of a termination order if a retained privilege is not included in the termination order.

(k) A parent who voluntarily relinquished parental rights to a child may request a review hearing of the termination order entered by a court relating to that child at any time before entry of an adoption order. A court shall invalidate a termination order if the parent can show good cause that the invalidation is in the best interest of the child ~~because~~ and that the parent is rehabilitated and capable of providing the care and guidance that will serve the moral, emotional, mental, and physical welfare of the child.

*** Sec. 2.** AS 43.23.005(f) is amended to read:

(f) **The** [IN A TIME OF NATIONAL MILITARY EMERGENCY, THE] commissioner may waive the requirement of (a)(4) of this section for an individual absent from the state

(1) in a time of national military emergency under military orders while serving in the armed forces of the United States, or for the spouse and dependents of that individual**; or**

(2) while in the custody of the Department of Health and Social Services in accordance with a court order under AS 47.10 or AS 47.12 and placed outside of the state by the Department of Health and Social Services for purposes of medical or behavioral treatment.

*** Sec. 3.** AS 47.10.020(a) is amended to read:

(a) Whenever circumstances subject a child to the jurisdiction of the court under AS 47.10.005 - 47.10.142, the court shall appoint a competent person or agency to make a preliminary inquiry and report for the information of the court to determine whether the best interests of the child require that further action be taken. **The court shall make the appointment on its own motion or at the request of a person or agency having knowledge of the child's circumstances.** If, under this subsection, the court appoints a person or agency to make a preliminary inquiry and to report to it, **or if the department is conducting an investigation of a report of child abuse or neglect, the court may issue any orders necessary to aid the person, the agency, or the department in its investigation or in making the preliminary inquiry and**

report. Upon [THEN, UPON THE] receipt of the report **under this subsection**, the court may

(1) close the matter without a court hearing,

(2) determine whether the best interests of the child require that further action be taken; or

(3) authorize the person or agency having knowledge of the facts of the case to file with the court a petition setting out the facts.

*** Sec. 4.** AS 47.10.020 is amended by adding a new subsection to read:

(e) Nothing in this section requires the department to obtain authorization from the court before

(1) conducting an investigation of a report of child abuse or neglect; or

(2) filing a petition.

~~*** Sec. 5.** AS 47.10 is amended by adding a new section to read:~~

Sec. 47.10.145. Expert witness testimony regarding absent parent, guardian, or custodian. If the court finds by clear and convincing evidence that a parent, guardian, or custodian of a child cannot be located after a reasonable search for the parent, guardian, or custodian has been conducted by the department, the court may conclude that the testimony of a qualified expert witness would support a finding that continued custody of the child by the absent parent, guardian, or custodian is likely to result in ~~serious emotional or physical damage~~ to the child.

*** Sec. 6.** AS 47.10.990(16) is amended to read:

(16) "mental health professional" has the meaning given in AS 47.30.915**, except that, if the child is placed in another state by the department, "mental health professional" also includes a professional listed in the definition of "mental health professional" in AS 47.30.915 who is not licensed to practice by a board of this state but is licensed by a corresponding licensing authority to practice in the state in which the child is placed**;

*** Sec. 7.** AS 47.12.990(10) is amended to read:

(10) "mental health professional" has the meaning given in AS 47.30.915**, except that, if the minor is placed in another state by the department, "mental health professional" also includes a professional listed in**

the definition of "mental health professional" in AS 47.30.915 who is not licensed to practice by a board of this state but is licensed by a corresponding licensing authority to practice in the state in which the minor is placed;

* **Sec. 8.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 9(a), Alaska Adoption Rules, is amended to read:

(a) **Form.** A consent or relinquishment must be in writing and must include:

(1) notice of the person's right to withdraw the consent or relinquishment as provided by paragraphs (g) and (h) of this rule;

(2) the address and telephone number of the court in which the adoption or relinquishment proceeding has or is expected to be filed;

(3) a statement of the right to counsel as stated in Rule 8;

(4) a statement concerning whether or not any visitation rights **or other parental privileges** are sought to be retained after the adoption;

(5) if a consent, the information required in AS 25.23.060; and

(6) if signed by a parent, a statement of whether the parent is a minor.

* **Sec. 9.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 13(a), Alaska Adoption Rules, is amended to read:

(a) **Voluntary Relinquishment.** A decree terminating parental rights may be entered after a voluntary relinquishment pursuant to AS 25.23.180. The court shall enter findings of fact which must include a statement concerning whether visitation rights are being allowed under AS 25.23.130(c) **or AS 25.23.180, whether other privileges are being retained under AS 25.23.180,** and whether the time limit for withdrawal of the relinquishment has elapsed. If the relinquishment was signed in the presence of the court, findings also must be entered as to whether the parent understood the consequences of the relinquishment, and whether the relinquishment was voluntarily signed.

In the case of a voluntary relinquishment of parental rights to an Indian child,

the court shall make additional findings concerning whether any notice required by Rule 10(e) was timely given; whether the relinquishment was voluntary and in compliance with the requirements of 25 U.S.C. Section 1913; and whether the child's placement complies with the preferences set out in 25 U.S.C. Section 1915 or good cause exists for deviation from the placement preference.

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

INDIRECT COURT RULE AMENDMENT. (a) AS 25.23.180(j), added by sec. 1 of this Act, amends Rules 9 and 13, Alaska Adoption Rules, by requiring retained privileges to be set out in the relinquishment form and order.

(b) AS 25.23.180(k), added by sec. 1 of this Act, amends Rule 13, Alaska Adoption Rules, by authorizing a review hearing for a voluntary relinquishment before the entry of an adoption decree.

*** Sec. 11.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. (a) Rule 9(a), Alaska Adoption Rules, as amended by sec. 8 of this Act, takes effect only if sec. 8 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) Rule 13(a), Alaska Adoption Rules, as amended by sec. 9 of this Act, takes effect only if sec. 9 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(c) AS 25.23.180(j) and (k), added by sec. 1 of this Act, take effect only if sec. 10 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

*** Sec. 12.** This Act takes effect immediately under AS 01.10.070(c).

[redacted]

24-GH1108\F
Mischel
3/8/05

CS FOR HOUSE BILL NO. 114( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

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

A BILL

FOR AN ACT ENTITLED

"An Act relating to the retaining of certain privileges of a parent in a relinquishment and termination of a parent and child relationship proceeding; relating to eligibility for permanent fund dividends for certain children in the custody of the state; relating to child-in-need-of-aid proceedings, adoption proceedings, and juvenile delinquency proceedings; amending Rules 9 and 13, Alaska Adoption Rules; and providing for an effective date."

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

*** Section 1.** AS 25.23.180 is amended by adding new subsections to read:

(j) In a relinquishment of parental rights executed under (a) of this section, a parent may retain privileges with respect to the child, including the ability to have future contact, communication, and visitation with the child. A retained privilege must be stated with specificity in writing, and, if a termination order is entered following the relinquishment, the court shall incorporate a retained privilege into the

termination order. A relinquishment may be withdrawn before the entry of a termination order if a retained privilege is not included in the termination order.

(k) A parent who voluntarily relinquished parental rights to a child may request a review hearing of the termination order entered by a court relating to that child at any time before entry of an adoption order. A court shall invalidate a termination order if the parent can show good cause that the invalidation is in the best interest of the child because the parent is rehabilitated and capable of providing the care and guidance that will serve the moral, emotional, mental, and physical welfare of the child.

* **Sec. 2.** AS 43.23.005(f) is amended to read:

(f) **The** [IN A TIME OF NATIONAL MILITARY EMERGENCY, THE] commissioner may waive the requirement of (a)(4) of this section for an individual absent from the state

(1) in a time of national military emergency under military orders while serving in the armed forces of the United States, or for the spouse and dependents of that individual**; or**

(2) while in the custody of the Department of Health and Social Services in accordance with a court order under AS 47.10 or AS 47.12 and placed outside of the state by the Department of Health and Social Services for purposes of medical or behavioral treatment.

* **Sec. 3.** AS 47.10.020(a) is amended to read:

(a) Whenever circumstances subject a child to the jurisdiction of the court under AS 47.10.005 - 47.10.142, the court shall appoint a competent person or agency to make a preliminary inquiry and report for the information of the court to determine whether the best interests of the child require that further action be taken. **The court shall make the appointment on its own motion or at the request of a person or agency having knowledge of the child's circumstances.** If, under this subsection, the court appoints a person or agency to make a preliminary inquiry and to report to it, **or if the department is conducting an investigation of a report of child abuse or neglect, the court may issue any orders necessary to aid the person, the agency, or the department in its investigation or in making the preliminary inquiry and**

report. Upon [THEN, UPON THE] receipt of the report **under this subsection**, the court may

(1) close the matter without a court hearing;

(2) determine whether the best interests of the child require that further action be taken; or

(3) authorize the person or agency having knowledge of the facts of the case to file with the court a petition setting out the facts.

*** Sec. 4.** AS 47.10.020 is amended by adding a new subsection to read:

(e) Nothing in this section requires the department to obtain authorization from the court before

(1) conducting an investigation of a report of child abuse or neglect; or

(2) filing a petition.

~~*** Sec. 5.** AS 47.10 is amended by adding a new section to read:~~

Sec. 47.10.145. Expert witness testimony regarding absent parent, guardian, or custodian. If the court finds by clear and convincing evidence that a parent, guardian, or custodian of a child cannot be located after a reasonable search for the parent, guardian, or custodian has been conducted by the department, the court may conclude that the testimony of a qualified expert witness would support a finding that continued custody of the child by the absent parent, guardian, or custodian is likely to result in serious emotional or physical damage to the child.

Delete

*** Sec. 6.** AS 47.10.990(16) is amended to read:

(16) "mental health professional" has the meaning given in AS 47.30.915**, except that, if the child is placed in another state by the department, "mental health professional" also includes a professional listed in the definition of "mental health professional" in AS 47.30.915 who is not licensed to practice by a board of this state but is licensed by a corresponding licensing authority to practice in the state in which the child is placed;**

*** Sec. 7.** AS 47.12.990(10) is amended to read:

(10) "mental health professional" has the meaning given in AS 47.30.915**, except that, if the minor is placed in another state by the department, "mental health professional" also includes a professional listed in**

the definition of "mental health professional" in AS 47.30.915 who is not licensed to practice by a board of this state but is licensed by a corresponding licensing authority to practice in the state in which the minor is placed;

*** Sec. 8.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 9(a), Alaska Adoption Rules, is amended to read:

(a) **Form.** A consent or relinquishment must be in writing and must include:

(1) notice of the person's right to withdraw the consent or relinquishment as provided by paragraphs (g) and (h) of this rule;

(2) the address and telephone number of the court in which the adoption or relinquishment proceeding has or is expected to be filed;

(3) a statement of the right to counsel as stated in Rule 8;

(4) a statement concerning whether or not any visitation rights **or other parental privileges** are sought to be retained after the adoption;

(5) if a consent, the information required in AS 25.23.060; and

(6) if signed by a parent, a statement of whether the parent is a minor.

*** Sec. 9.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 13(a), Alaska Adoption Rules, is amended to read:

(a) **Voluntary Relinquishment.** A decree terminating parental rights may be entered after a voluntary relinquishment pursuant to AS 25.23.180. The court shall enter findings of fact which must include a statement concerning whether visitation rights are being allowed under AS 25.23.130(c) **or AS 25.23.180, whether other privileges are being retained under AS 25.23.180,** and whether the time limit for withdrawal of the relinquishment has elapsed. If the relinquishment was signed in the presence of the court, findings also must be entered as to whether the parent understood the consequences of the relinquishment, and whether the relinquishment was voluntarily signed.

In the case of a voluntary relinquishment of parental rights to an Indian child,

the court shall make additional findings concerning whether any notice required by Rule 10(e) was timely given; whether the relinquishment was voluntary and in compliance with the requirements of 25 U.S.C. Section 1913, and whether the child's placement complies with the preferences set out in 25 U.S.C. Section 1915 or good cause exists for deviation from the placement preference.

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

INDIRECT COURT RULE AMENDMENT. (a) AS 25.23.180(j), added by sec. 1 of this Act, amends Rules 9 and 13, Alaska Adoption Rules, by requiring retained privileges to be set out in the relinquishment form and order.

(b) AS 25.23.180(k), added by sec. 1 of this Act, amends Rule 13, Alaska Adoption Rules, by authorizing a review hearing for a voluntary relinquishment before the entry of an adoption decree.

*** Sec. 11.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. (a) Rule 9(a), Alaska Adoption Rules, as amended by sec. 8 of this Act, takes effect only if sec. 8 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) Rule 13(a), Alaska Adoption Rules, as amended by sec. 9 of this Act, takes effect only if sec. 9 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(c) AS 25.23.180(j) and (k), added by sec. 1 of this Act, take effect only if sec. 10 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

*** Sec. 12.** This Act takes effect immediately under AS 01.10.070(c).

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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MEMORANDUM March 16, 2005

SUBJECT: CSHB 114 ( ), Amendment F.1
(Work Order No. 24-GH1108\F.1)

TO: Representative Paul Seaton
Attn: Louie Flora

FROM: Jean M. Mischel
Legislative Counsel

Enclosed is the requested amendment to the above referenced bill draft. Other than a few formatting changes, we have made two additional changes to the version submitted by the Department of Law.

The first is at page 7, line 1 of the amendment that now refers to subsection (e), rather than subsection (d) of the new section AS 47.10.089. The reason for the changed reference for court rule purposes is that subsection (e), rather than (d), refers directly to court actions.

The other significant change made was the addition of modifying language to the new section AS 47.10.089 that appears as new section 5 of the bill at page 3, line 14 of the amendment. Since the voluntary relinquishment procedure was taken out of AS 25.23.180, relating to adoptions, and placed in AS 47.10, relating to CINA cases, I made a judgment call as to the applicability of the new procedure being limited to children placed in the custody of the department or otherwise adjudicated a child-in-need-of-aid. If this is not the case, the placement of the new relinquishment procedures should be back in AS 25.23. I made an unsuccessful attempt this evening to call Stacy Kraly at the Department of Law to discuss this change.

If I may be of further assistance, please advise.

JMM:lmb
05-080.lmb

Enclosure

24-GH1108\F.1
Mischel
3/16/05

AMENDMENT

OFFERED IN THE HOUSE BY THE HOUSE STATE AFFAIRS COMMITTEE

TO: CSHB 114( ), Draft Version "F"

Page 1, line 1:

Delete "**the retaining of certain privileges of a parent in a**"

Insert "**proceedings regarding voluntary**"

Page 1, line 2:

Delete "**proceeding**"

Page 1, line 4:

Delete "**, adoption proceedings,**"

Page 1, line 5, following "**proceedings;**":

Insert "**relating to findings in permanency hearings in child-in-need-of-aid proceedings;**"

Page 1, line 5, following "**Adoption Rules**":

Insert "**, and Rules 17.2 and 18, Child in Need of Aid Rules**"

Page 1, line 8, through page 2, line 9:

Delete all material.

Page 2, line 10:

Delete "**Sec. 2.**"

Insert "**Section 1.**"

Renumber the following bill sections accordingly.

Page 3, following line 12:

Insert new bill sections to read:

"*** Sec. 4.** AS 47.10.080(*l*) is amended to read:

(*l*) Within 12 months after the date a child enters foster care as calculated under AS 47.10.088(f), the court shall hold a permanency hearing. The hearing and permanent plan developed in the hearing are governed by the following provisions:

(1) the persons entitled to be heard under AS 47.10.070 or under (f) of this section are also entitled to be heard at the hearing held under this subsection;

(2) when establishing the permanent plan for the child, the court shall make appropriate written findings, including findings related to whether

(A) and when the child should be returned to the parent or guardian;

(B) the child should be placed for adoption or legal guardianship and whether a petition for termination of parental rights should be filed by the department; and

(C) the child should be placed in another planned, permanent living arrangement and what steps are necessary to achieve the new arrangement;

(3) if the court is unable to make a finding required under (2) of this subsection, the court shall hold another hearing within a reasonable period of time;

(4) in addition to the findings required by (2) of this subsection, the court shall also make appropriate written findings related to

(A) whether the department has made the reasonable efforts required under AS 47.10.086 to offer appropriate family support services to remedy the parent's or guardian's conduct or conditions in the home that made the child a child in need of aid under this chapter;

(B) whether the parent or guardian has made substantial progress to remedy the parent's or guardian's conduct or conditions in the home