# STATE OF ALASKA

## Legislative Affairs Agency

# A

# REPORT TO THE

# TWENTY-THIRD STATE LEGISLATURE

Listing Alaska Statutes with
Delayed Repeals or Delayed Amendments
and
Examining Court Decisions
and Opinions of the
Attorney General
Construing Alaska Statutes

Prepared by
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DECEMBER 2003

# A REPORT TO THE TWENTY-THIRD STATE LEGISLATURE

## Listing Alaska Statutes with Delayed Repeals or Delayed Amendments

## and

## Examining Court Decisions and Opinions of the Attorney General Construing Alaska Statutes

The report lists Alaska Statutes that will be amended or repealed between March 1, 2004, and March 1, 2005, according to laws enacted before the 2003 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the state courts between October 1, 2002, and September 30, 2003, and by the federal courts and reported in 290 F.3d 326 to 332 F.3d 82 and in 198 F.Supp.2d 1182 to 258 F.Supp.2d 1249

and

Opinions of the Attorney General that were made available through Internet distribution between October 30, 2002, and September 30, 2003

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# INTRODUCTION

AS 24.20.065(a) requires that the Legislative Council annually examine administrative regulations, published opinions of state and federal courts and of the Department of Law that rely on state statutes, and final decisions adopted under the Administrative Procedure Act (AS 44.62) to determine whether or not

(1) the courts and agencies are properly implementing legislative purposes;

(2) there are court or agency expressions of dissatisfaction with state statutes;

(3) the opinions or regulations indicate unclear or ambiguous statutes;

(4) the courts have modified or revised the common law of the state.

Under AS 24.20.065(b) the Council is to make a comprehensive report of its findings and recommendations to the members of the Legislature at the start of each regular session.

This edition of the review by the attorneys of the Legislative Affairs Agency examines the opinions of the Alaska Supreme Court, the Alaska Court of Appeals, the United States Court of Appeals for the Ninth Circuit, and the United States District Court for the District of Alaska. As in the past, those cases where the court construes or interprets a section of the Alaska Statutes are analyzed. Those cases where no statute is construed or interpreted or where a statute is involved but it is applied without particular examination by the court are not reviewed. In addition, those major cases that have already received legislative scrutiny are not analyzed. However, cases that reject well-established common law principles or reverse previously established case law that might be of special interest to the legislature are analyzed. Because the purpose of the report is to advise members of the legislature on defects in existing law, we have generally not analyzed those cases where the law, though it may have been criticized, has been changed since the decision or opinion was published.

The formal and informal opinions of the Attorney General are also reviewed. As with court opinions, we have only analyzed those opinions where a provision of the Alaska Statutes is construed or interpreted, or which might otherwise be of special interest to the legislature.

The review of administrative regulations is the responsibility of the Administrative Regulation Review Committee under AS 24.20.460 and is not included within this review.

This report also includes a list of Alaska Statutes that, absent any action by the 2004 Legislature, will be repealed or amended before March 1, 2005, because of repealers or amendments enacted by previous legislatures with delayed effective dates.

The review of court decisions was prepared by Jerry Luckhaupt and Mike Ford, Legislative Counsel. The review of the Opinions of the Attorney General and the list of delayed repeals and amendments were prepared by James Crawford, Assistant Revisor of Statutes. Both reviews and preparation of the list were undertaken under the general direction of Tamara Brandt Cook, Director of the Division of Legal and Research Services, Legislative Affairs Agency.

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# DELAYED REPEALS OR AMENDMENTS
## taking effect between March 1, 2004, and March 1, 2005

**AS 04.11.491(f) and 04.11.494.** Various provisions relating to designation of a liquor delivery site in a local option community. (Amended or repealed, effective 7/1/2004.)

**AS 14.03.123(a).** Performance designations for schools. (Effective 9/2004.)

**AS 14.03.123(f).** School improvement plan monitoring. (Effective 1/2005.)

**AS 14.11.008(a) and (f), and AS 14.11.011.** Certain grants to school districts. (Amended or repealed, effective 1/1/2005.)

**AS 16.43.906 and 16.43.911.** Vessel permits for weathervane scallop fisheries. (Repealed, effective 7/1/2004.)

**AS 16.55.100(7) - (9).** Certain duties of the Alaska Seafood Marketing Institute. (Repealed, effective 6/30/2004.)

**AS 18.56.300(b).** Inspection of residential housing that is the subject of an AHFC housing loan. (Amended, effective 7/1/2004.)

**AS 22.10.120.** Decrease number of judges in third judicial district. (Amended, effective 6/30/2004.)

**AS 23.15.620 - 23.15.660.** State training and employment (STEP) program. (Repealed, 6/30/2004.)

**AS 28.10.161(b).** Gold rush commemorative license plate is discontinued. (Amended, effective 1/1/2005.)

**AS 29.45.030(a).** Exemptions from municipal property tax. (Amended, effective 7/1/2004, contingent on the outcome of *Alaska Legislative Council v. Knowles*.)

**AS 42.04.090.** Restrictions relating to hearing panels of the Regulatory Commission of Alaska. (Repealed, effective 6/30/2004.)

**Elimination of state correspondence school; duties of school boards.**

**AS 14.07.020(a)(9).** Correspondence study programs. (Amended, effective 7/1/2004.)

**AS 14.08.111(1).** Regional school board duties. (Amended, effective 7/1/2004.)

**AS 14.14.090(2).** School board duties. (Amended, effective 7/1/2004.)

**AS 14.14.120(c).** Duties of inoperative school boards. (Amended, effective 7/1/2004.)

**AS 39.25.160(e)(7).** Exceptions to certain requirements for public employees who run for state or national elected office. (Amended, effective 7/1/2004.)

**Repeal of underground petroleum tank cleanup grant program.**

**AS 46.03.360(e).** Adoption of regulations by the Board of Storage Tank Assistance. (Amended, effective 7/1/2004)

**AS 46.03.365(c).** Relating to certain regulations adopted by the Department of Environmental Conservation. (Amended, effective 7/1/2004.)

**AS 46.03.405.** Prohibitions relating to underground petroleum storage tanks. (Amended, effective 7/1/2004.)

**AS 46.03.410.** Underground storage tank revolving loan fund. (Amended, effective 7/1/2004.)

**AS 46.03.420.** Underground oil tank cleanup grant program. (Repealed, effective 7/1/2004.)

**AS 46.03.422(a), (e), and (g).** Underground storage tank revolving loan fund. (Amended, effective 7/1/2004.)

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**PLEASE NOTE:** Additional delayed "sunset" of boards and commissions occurs under AS 08.03.010 and AS 44.66.010. Those "sunsets" are not reflected in the list above. Also not listed above are repeals that have been delayed to allow for an orderly transition to new law, such as when a new versions of a uniform act is enacted and the repeal of the old version of the uniform act is delayed a year or two.

Art. I, sec. 1,
Constitution of the
State of Alaska
AS 18.80.220(a)

**NATIVE AMERICAN HIRING PREFERENCE HELD UNCONSTITUTIONAL.**

The Alaska Supreme Court ruled that a North Slope Borough ordinance that created a mandatory hiring preference for Native Americans violates the Alaska Constitution. Under Article I, section 1 of the Alaska Constitution, all persons are entitled to equal protection under the law. The Court used the traditional three-step sliding scale test and concluded that the borough lacked a legitimate governmental interest to justify enactment of a hiring preference favoring one class of citizens at the expense of other citizens. The Court also pointed out that even assuming that there was a constitutionally legitimate borough interest supporting the hiring preference, the ordinance would fail because the nexus between the borough's asserted interests and the means selected to implement those interests is not sufficiently close to survive constitutional challenge.

Malabed v. North Slope Borough, 70 P.3d 416 (Alaska 2003)

Legislative review is not recommended.

Art. I, sec. 7
Constitution of the
State of Alaska

**SUPERMAJORITY VOTE REQUIREMENT DOES NOT VIOLATE DUE PROCESS.**

The Alaska Supreme Court ruled that conditioning occupational disability benefits on approval by a supermajority of the membership of a board does not violate the due process requirements of the Alaska Constitution. In this case, board action had to be supported by five of the seven board members. Therefore, although the claimant persuaded a majority of the board members who attended the hearing to support the claim, the claimant failed to receive the necessary five votes for action by the board. The Court, in a 3/2 decision, held that the supermajority requirement was not a denial of due process. Two Justices would have found the supermajority vote provision fundamentally arbitrary and therefore a violation of due process.

Palmer v. Municipality of Anchorage, 65 P.3d 832 (Alaska 2003)

Unless the legislature wishes to examine voting requirements set by municipal code for boards, legislative review is not recommended.

Art. I, sec. 14
Constitution of the
State of Alaska

**NO SEARCH WARRANT NECESSARY FOR POLICE SEARCH AFTER PRIVATE SEARCH AND SEIZURE.**

A relative of the defendant brought a videotape into the Sitka Police Department. The relative claimed that he had broken into the locked bedroom of his uncle and removed the videotape. He told the police that he had viewed the videotape and that it showed his uncle having sex with his 15 or 16 year old cousin. The police viewed the videotape and then obtained a search warrant for the uncle's bedroom and person. The search found at least one other videotape showing the uncle and cousin having sex. At trial, the defendant moved to suppress the original videotape and the subsequent search, but the Court denied the motion. Based upon stipulated facts the trial court found the defendant guilty of single counts of unlawful exploitation of a minor, incest, and sexual abuse of a minor in the third degree. The defendant appealed arguing that the police could not lawfully view the videotape brought into the police station without first obtaining a warrant. The Alaska Court of Appeals found that the police viewing of the videotape was proper as the police had not expanded the scope of the prior private search by the relative. Any expectation of privacy the defendant had in the videotape had already been compromised by the relative's viewing of the tape.

Paul v. State, 57 P.3d 698 (Alaska App. 2002)

Legislative review is not recommended.

Art. II, sec. 6
Constitution of the
State of Alaska
AS 24.40.010

**LEGISLATORS HELD IMMUNE FOR ACTS COMMITTED DURING LEGISLATIVE HEARING.**

The Alaska Supreme Court held that in a lawsuit for alleged defamation occurring during a finance committee meeting, legislators are entitled to absolute immunity from civil liability for these types of acts. Under Art. II, sec. 6 of the Alaska

Constitution and AS 24.40.010, legislators are given immunity for statements made in the exercise of their legislative duties. The Court found that legislative duties that are immune include acts related to committee meetings, voting, and floor actions. The alleged defamation involved acts that were clearly within the scope of legislative immunity.

Whalen v. Hanley, 63 P.3d 254 (Alaska 2003)

Legislative review is not recommended.

Art. IX, sec. 7
Constitution of the
State of Alaska

**SALE OF FUTURE REVENUES FROM TOBACCO SETTLEMENT HELD CONSTITUTIONAL.**

The Alaska Supreme Court held that the legislature's sale of the right to receive future revenues from the settlement of a tobacco lawsuit does not violate the Alaska Constitution. Under Article IX, section 7, of the Alaska Constitution, the legislature is prohibited from dedicating future revenues directly to any special purpose. In this case, the legislature sold the state's right to receive future revenues from the settlement of a tobacco lawsuit and then appropriated the proceeds of the sale. In a 3/2 decision, the majority of the Court concluded that the sale and appropriation did not violate the dedicated funds prohibition. In approving the action of the legislature the Court cited three reasons: (1) the legislative power of appropriation includes the power to sell assets; (2) lawsuit settlements are not traditional sources of public revenue; and (3) the legislature has the responsibility to manage the state's risk. The dissent argued that the appeal record was insufficient to resolve the constitutional issues and that the proper action was to vacate the summary judgment order and remand to the trial court for further proceedings.

Myers v. Alaska Housing Finance Corporation, 68 P.3d 386 (Alaska 2003)

Legislative review is not recommended.

Art. XII, sec. 7
AS 14.25
AS 39.35

**CONSTITUTIONAL PROTECTIONS FOR PUBLIC EMPLOYEE AND TEACHER RETIREMENT SYSTEMS CONSTRUED.**

The Alaska Supreme Court ruled that the state's group health insurance plan for retired public employees and teachers may be changed, if any detriments to benefits are offset by advantages to benefits. Under Article XII, section 7 of the Alaska Constitution, accrued benefits of retirement systems may not be diminished or impaired. The Court interpreted the term "accrued benefits" as including health insurance benefits and concluded that the term includes all retirement benefits that make up the retirement benefit package when an employee is first hired. The Court further held that in determining if health insurance benefits have been diminished, measurements are made from a group rather than an individual standpoint. Finally, the Court rejected an argument that the protection given by the Alaska Constitution to retirement benefits is limited to whatever the dollar contribution in force at the time of retirement can purchase. The Court held that in the context of health insurance coverage, it is the coverage provided, not the cost of the insurance, that is protected by the Alaska Constitution.

Duncan v. Retired Public Employees of Alaska, 71 P.3d 882 (Alaska 2003)

Unless the legislature desires to review the issue of insurance benefits for retired employees, legislative review is not recommended.

U.S. Constitution,
4th Amendment

**CONTINGENT SEARCH WARRANTS.**

A law enforcement officer applied for a contingent search warrant to search Magee's property. In the application for the warrant the officer admitted that probable cause did not exist currently but that after the search of other property pursuant to another warrant and the discovery of evidence of criminal activity that probable cause would then exist. The magistrate issued the contingent warrant. The Alaska Court of Appeals found that while contingent warrants are permitted under the 4th Amendment, the contingency must be "clear, explicit, and narrowly drawn." The Court found that the contingency in this case was not a "clearly defined, readily ascertainable event"

and "gave the police far too much discretion to decide whether to search Magee's property."

Magee v. State, 77 P.3d 732 (Alaska App. 2003)

Legislative review is not recommended.

Rule 404(b)(4), A.R.E.

**EVIDENCE OF PRIOR BAD ACTS ADMISSIBLE IF RELEVANT AND THE PROBATIVE VALUE OF THE EVIDENCE OUTWEIGHS THE DANGER OF UNFAIR PREJUDICE.**

The Alaska Court of Appeals considered Alaska Rule of Evidence 404(b)(4) in this appeal. Rule 404(b)(4) authorizes the admission of evidence of other crimes involving domestic violence in domestic violence prosecutions. The Court found that the various provisions of Rule 404 which authorize the use of character evidence against a defendant do not violate constitutional due process protections. The Court also found that a court considering the admission of evidence under Rule 404(b)(4) must first determine if the evidence is relevant under Rule 402 and if it is relevant the Court must then determine under Rule 403 if the probative value of the evidence outweighs "the danger that it will engender unfair prejudice, confuse the issues, or mislead the jury." The Court noted that this process does not give a court the authority to exclude evidence of prior bad acts merely because the jury could use these other bad acts as evidence that the defendant more likely committed the present crime, but the Court must assure that the defendant is being tried for the current charge and not for the prior bad acts. In this case the Court found that many of the prior bad acts that were admitted "had little or nothing to do" with the present charges and the Court failed to exclude that evidence as required by Evidence Rules 402 and 403 thereby requiring reversal of the conviction.

Bingaman v. State, 76 P.3d 398 (Alaska App. 2003)

Legislative review is not recommended.

AS 04.16.050(a)

**PERSON CHARGED WITH MINOR CONSUMING IS ENTITLED TO A TRIAL BY JURY.**

Candice Auliye was charged with consuming or possessing alcoholic beverages while younger than 21 years. The trial court found that the penalties for this offense were sufficiently severe that Candice was entitled to a trial by jury. The state petitioned the Alaska Court of Appeals for review of this ruling. The Court found that the penalties for violation of AS 04.16.050 are sufficiently severe and a defendant is entitled to trial by jury and to appointment of counsel at public expense if the defendant is indigent. The Court found that although the legislature attempted to decriminalize minor consuming, and therefore remove the right to a jury trial and court-appointed counsel from being available to persons accused of this offense, the penalties that the legislature allowed the Court to impose (these penalties include custodial in-patient treatment and community work service) and the probation that the legislature required the Court to impose made the offense sufficiently severe under the constitution that trial by jury and appointed counsel were required.

State v. Auliye, 57 P.3d 711 (Alaska App. 2002)

Legislative review is recommended.

AS 05.15.100
AS 05.15.180

**USE OF ANIMALS IN CHARITABLE GAMING.**

The Attorney General's office issued an informal opinion stating that charitable gaming permit holders could not raise money by conducting wagering games involving hamsters, rats, bovines, chickens, or other animals. The office based this conclusion on two grounds. First, such uses are not encompassed by AS 05.15.100's list of allowable charitable gaming activities. Second, such uses are not within the category of activities that AS 05.15.180 authorizes the commissioner of revenue to permit, given that implements of such uses are designed "primarily for gaming," and thus contrary to AS 05.15.180's provisions.

2002 Informal Op. Att'y Gen. (November 1, 2002; File No. 663-03-0081)

Legislative review is not recommended.

AS 08.40.090
AS 08.40.260

**APPLICABILITY OF ELECTRICAL AND MECHANICAL ADMINISTRATOR STATUTORY REQUIREMENTS TO GOVERNMENTAL EMPLOYEES.**

The Attorney General's office issued an informal opinion interpreting statutory electrical and mechanical administrator licensure requirements as they relate to state employees. An earlier informal A.G. opinion from 1979 had found an implied exemption for state employees from AS 08.40.090's prohibition on persons acting as electrical administrators without a license. This opinion had been based on statutory definitions at the time considered in light of the ambiguity of the overall statutory scheme and the principle that a statute does not apply to a sovereign governmental entity unless it specifically so provides. Revisiting the 1979 opinion, the office upheld its earlier interpretation. Although the office noted that changes relating to pertinent definitions had since occurred, the office pointed out that eliminating the implied exemptions for state employees would likely impose additional costs on the state. In light of this, the office concluded that any changes to the exemption should be made by the legislature. The office also reaffirmed the 1979 opinion's state employee exemption from AS 08.40.260's prohibition on persons acting as mechanical administrators without a license. This aspect of the opinion had also been based in part on a statutory definition. Although the definition also had changed, the office again concluded that the implied exception should continue unless altered by the legislature.

2002 Informal Op. Att'y Gen. (November 12, 2002; File No. 663-98-0264)

Legislative review is recommended so that the applicability of electrical and mechanical administrator licensure requirements to state employees can be clarified statutorily.

AS 08.87.210(2)

**OCCUPATIONAL LICENSING - SUSPENSION FOR CRIMINAL CONDUCT.**

Ronald Wendte, a licensed residential real estate appraiser, volunteered his time to handle financial matters for several nonprofit children's sports organizations in Ketchikan. Over several years he stole more than $250,000 from those organizations. He pled no contest to first degree theft and was

sentenced to prison, probation, community service, and restitution. While imprisoned, the Alaska Division of Occupational Licensing began disciplinary actions regarding his appraiser license for having committed a crime of moral turpitude under AS 08.87.210(2), i.e., the theft conviction. The Board of Certified Real Estate Appraisers suspended Wendte's license for two years with five additional years of probation. Wendte appealed, the superior court affirmed the Board's decision, and Wendte appealed to the Alaska Supreme Court. Wendte argued that the Board could not suspend his license for the theft offense, a crime of moral turpitude, as there was no "nexus" between that offense and his appraisal license - since the theft was not directly related to his appraisal duties he could not be sanctioned. The Alaska Supreme Court found Wendte's argument "unconvincing." The Court found that sanctions under AS 08.87.210(2) are not limited to crimes of moral turpitude committed only while performing appraisal duties, but that crimes committed while engaged in other activities may bear upon the licensee's fitness to practice the particular profession.

Wendte v. State of Alaska, Board of Real Estate Appraisers, 70 P.3d 1089 (Alaska 2003)

Legislative review is not recommended.

AS 09.55.580
AS 09.60.040

**STATUTORY WRONGFUL DEATH BENEFICIARIES NOT LIABLE FOR COSTS AND ATTORNEY FEES.**

The Alaska Supreme Court ruled that statutory wrongful death beneficiaries who are not parties to a lawsuit cannot be held liable for costs and attorney fees resulting from the litigation. Under AS 09.55.580, the amount recovered in a wrongful death action is required to go to certain specified beneficiaries, if the decedent is survived by a spouse or children. The Court ruled that although these statutory beneficiaries receive any recovery from the lawsuit, when the beneficiaries are not parties to the litigation they cannot be held liable for costs and attorney fees resulting from the litigation. Only when the statutory beneficiaries personally appear and become parties to the claim would they be liable for costs and attorney fees.

Zaverl v. Hanley, 64 P.3d 809 (Alaska 2003)

Legislative review is not recommended.

AS 09.60.070

**CRIME VICTIM NEED NOT BE PREVAILING PARTY TO RECEIVE ATTORNEY FEES.**

The Alaska Supreme Court ruled that a crime victim need not be a prevailing party under the civil rules in order to be awarded attorney fees. Under AS 09.60.070, a crime victim has the right to recover full reasonable attorney fees in a civil action. In this case, the crime victim was not the prevailing party under Alaska Civil Rule 82. The Court examined the legislative history of AS 09.60.070 and concluded that the prevailing party requirement of Civil Rule 82 did not preclude an award of attorney fees under AS 09.60.070 or other statutory provisions that use standards separate from the rule. When attorney fees are awarded to the prevailing party under Civil Rule 82 and to another party under AS 09.60.070, the two fees are offset.

Fleegel v. Estate of Boyles, 61 P.3d 1267 (Alaska 2002)

Legislative review is not recommended.

AS 11.16.110(2)

**ACCOMPLICE LIABILITY FOR CRIMES INVOLVING UNINTENDED INJURY OR DEATH.**

Riley and a companion opened fire on a crowd of young people, seriously wounding two people. Riley was convicted of eight different charges including two counts of first degree assault. Regarding the assault counts the jurors found that Riley had acted as an accomplice in the wounding of the two persons. Under AS 11.16.110, an accomplice is legally accountable for the conduct of a principal who perpetrates a crime under certain circumstances including aiding another person in planning or committing the crime with the purpose of promoting or facilitating the commission of the offense. Riley contended his convictions for the two counts of assault were flawed because the state did not show that he had intended to cause the injury or death as required under Echols v. State, 818 P.2d 691 (Alaska App. 1991). On appeal, the Alaska Court of Appeals held that Echols was wrongly decided and that Riley's convictions were proper. To be liable for an unintended injury or death as an accomplice the state merely has to show that the accomplice acted with the same culpable mental state required for the commission of the crime and that the accomplice was liable for the principal's conduct,

that is the accomplice solicited, encouraged, or assisted the planning or commission of the crime and intended to promote or facilitate the conduct that produces the injury or death *even if the accomplice did not intend that specific result.*

Riley v. State, 60 P.3d 204 (Alaska App. 2002)

Legislative review is not recommended.

AS 11.31.100
AS 11.41.100

**DOCTRINE OF TRANSFERRED INTENT DOES NOT APPLY TO PROSECUTIONS FOR ATTEMPTED MURDER.**

Evan Ramsey entered Bethel High School with a shotgun hidden under his jacket, killed a fellow student and the principal, wounded two other students, and pointed the gun at other students and teachers. Ramsey was convicted of two counts of first degree murder, one count of attempted murder in the first degree, and numerous counts of assault in the third degree. Among other arguments raised on appeal Ramsey asserted that his conviction for attempted first degree murder was improper. The attempted first degree murder conviction was based upon the doctrine of transferred intent. That doctrine arose under the common law to find a person criminally liable who when acting with the intent to harm a particular person caused injury to an unintended victim. Basically, the doctrine said: A wants to kill B, A shoots at B and misses and hits C, killing C; A's intent to kill B is under the doctrine transferred to C, allowing A to be tried and convicted for the first degree murder of C. The Alaska Court of Appeals found that the doctrine of transferred intent already is encompassed in AS 11.41.100, the first degree murder statute which makes it illegal to cause the death of *any* person while intending to cause the death of a person. The Court noted that an attempted first degree murder conviction requires a finding that a person intends to cause the death of another and takes a substantial step causing the death of another person. The defendant's intent as to each unintended victim must be examined to determine the appropriate crime when the defendant completes a crime with regard to the intended victim.

Ramsey v. State, 56 P.3d 675 (Alaska App. 2002)

Legislative review is not recommended.

AS 11.41.110

**JUVENILE CANNOT BE HELD TO AN ADULT STANDARD OF CARE IN DELINQUENCY PROCEEDINGS FOR MURDER IN THE SECOND DEGREE.**

Evan Ramsey took a shotgun to school and killed the school principal and a fellow student in Bethel. Later investigation disclosed that J.R. taught Ramsey how to use the shotgun and urged Ramsey to carry out his plan to kill, while encouraging others not to interfere with Ramsey's plan. The state filed a delinquency petition against J.R. and a jury found that J.R. had knowingly engaged in a course of conduct that manifested an extreme indifference to the value of human life in adjudicating him delinquent for two counts of second degree murder. J.R. appealed, contending that the jury was improperly instructed that they should judge his conduct against that of a reasonable adult in determining whether he was reckless in his actions. J.R. contended that the jury should have judged his actions against the standard of a reasonable juvenile, that is a reasonable person of his age, intelligence, and experience under similar circumstances. The trial court rejected J.R.'s contentions finding that J.R. had been engaged in an adult activity, using a firearm, and accordingly his actions should be judged against those of a reasonable adult. The Alaska Court of Appeals reversed, finding that if juveniles were held to an adult standard of care under these circumstances that the Court "would effectuate a broad and major change in the law."

J.R. v. State, 62 P.3d 114 (Alaska App. 2003)

Legislative review is recommended.

AS 11.41.115

**AVAILABILITY OF DEFENSE OF HEAT OF PASSION.**

Jana attempted to kill her former lover, Craig, by shooting him. She was unsuccessful and was ultimately convicted of attempted first degree murder. Jana contended she acted in a heat of passion but the trial court did not allow Jana to present this defense to the jury as the provocation for the heat of passion had occurred years previously. On appeal, Jana contended that her heat of passion was based upon a whole series of provocations, including some remote in time and others more recent in time. The Alaska Court of Appeals

found that heat of passion is an available defense to a charge of first degree murder which would reduce the crime to attempted manslaughter. The Court then rejected Jana's argument that heat of passion was an available defense in her case finding that Alaska law does not allow the defense of heat of passion for Jana's two most recent purported provocations: that Craig had bought a new truck and a telephone call from a paralegal concerning counseling expenses for her son; that those provocations were not in fact provocations under Alaska law; and that therefore Jana had not proved a series of provocative acts sufficient to justify the defense of heat of passion.

Dandova v. State, 72 P.3d 325 (Alaska App. 2003)

Legislative review is recommended to consider whether heat of passion should be allowed as a defense to attempted murder thereby creating a crime of attempted manslaughter which has not previously been recognized in Alaska. The Court noted that a person who intentionally kills another person in a heat of passion would face conviction for manslaughter (and a 20 year maximum sentence) while a person who in a heat of passion attempts to intentionally kill another person but fails would face a maximum 99-year term for attempted murder. This innocuous result could potentially be better dealt with in a sentencing context than by recognition of a new offense.

AS 11.41.320(a)

**DEFENDANT IN CUSTODIAL INTERFERENCE PROSECUTION MAY PRESENT EVIDENCE OF HIS INTENT AND REASONS FOR HOLDING CHILD ON ISSUE OF WHETHER HE INTENDED TO HOLD THE CHILD FOR A PROTRACTED PERIOD.**

Custodial interference in the second degree makes it a crime for a relative of a child to take a child or keep a child from the child's lawful custodian for a protracted period of time while knowing that they have no right to do so. Custodial interference is aggravated to a first degree offense if the relative takes the child out of state. Perrin after exercising his weekend visitation in May with his child, failed to return the child to the child's mother, the lawful custodian of the child. Approximately three months later, Perrin and the child were found in Oklahoma. Perrin had altered his physical appearance and kept moving to stay ahead of authorities who were searching for the child and him. Perrin contended that he had acted because he had feared that his child was being

abused in the mother's household but that he had not intended to keep the child for a "protracted period." The trial court refused to allow Perrin to present this defense, finding that a defense of necessity was not available in custodial interference prosecutions, as parents could not resort to self-help when court and other remedies are available to protect children. Perrin asserted that he was not attempting to present this evidence to show he was justified in taking the child but to show that his intent in taking the child was limited in scope, he wanted to obtain counseling and care for the child, and did not intend to keep the child for a protracted period. A majority of the Alaska Court of Appeals agreed that Perrin had a right to present this evidence to a jury and reversed Perrin's conviction. Justice Mannheimer argued in dissent that the majority had incorrectly applied the statute and the meaning of the term "intent to hold the child . . . for a protracted period" finding that the term "refers to the defendant's intent to withhold the child from the victim-custodian for so long a time as to substantially defeat the victim's right to physical custody." The dissent further concludes that the Alaska custodial interference statutes were drafted to punish those that ignore custody decrees and not to allow the defendant to argue that he acted reasonably in removing a child while knowing that the removal violated the custody decree.

Perrin v. State, 66 P.3d 21 (Alaska App. 2003)

Legislative review is recommended based upon the arguments raised by the dissent. The majority's allowance of this type of evidence does not appear to have been intended by the legislature.

AS 11.46.200
AS 11.46.990(12)(B)

**THEFT OF CABLE TELEVISION SERVICES.**

Cruz-Reyes was convicted of theft of services for having a "black box" connected to his television that was capable of converting or unscrambling premium cable services. On appeal, Cruz-Reyes contended that to be convicted of theft of services, the state had to prove that he had actually watched cable television programming obtained with the black box. The Alaska Court of Appeals rejected this contention, finding that subscribing to cable television service provides a person with access to the service - the opportunity to watch shows if one wishes. By attaching the black box to the television, Cruz-Reyes obtained access to the service without paying for it,

thereby committing theft of services.

Cruz-Reyes v. State, 74 P.3d 219 (Alaska App. 2003).

Legislative review is not recommended.

AS 11.46.310
Rule 12(b)(2),
A.R.Cr.P.

**BURGLARY INDICTMENT REQUIRES THAT SPECIFICATION OF ULTERIOR CRIME INTENDED TO BE COMMITTED.**

Wayne Semancik believed that his neighbors had stolen his dog. Although this belief was incorrect, Semancik proceeded to threaten his neighbors with a firearm and to break a window of their house in an attempt to gain entry to the house. Semancik was indicted for attempted first degree burglary. Although the crime of burglary consists of unlawfully entering or remaining in a building with an intent to commit a crime, the indictment did not identify the crime that Semancik was intending to commit. In Adkins v. State, 389 P.2d 915 (Alaska 1964), the Alaska Supreme Court held that a burglary indictment must specify this intended crime because it is an essential element of the charge. Semancik was convicted despite the flaw in the indictment. On appeal to the Alaska Court of Appeals, Semancik attacked the indictment for the first time. The Court noted that while Rule 12(b)(2), Alaska Rules of Criminal Procedure, normally requires the defendant to raise all "defenses or objections based on defects in the indictment" before trial, objections based upon the indictment's failure to charge a crime may be raised at any time. Since the indictment did not charge a crime (by failing to identify the intended crime of the burglary), the indictment was flawed and Semancik could properly raise this issue on appeal. The state conceded that Adkins required reversal of the conviction but asked the Court to reconsider Adkins and overrule it based upon several arguments the state made. The Alaska Court of Appeals noted that the "State's arguments have considerable force" but found that they "have no authority to alter the supreme court's resolution of this issue of statutory construction."

Semancik v. State, 57 P.3d 682 (Alaska App. 2003)

The dissent argues that later Supreme Court cases have left the vitality of Adkins in doubt. The dissent further questions the policy of allowing a defendant to lie in wait before challenging

his indictment as the defendant did here. The legislature may wish to address this issue, therefore, legislative review is recommended.

AS 11.56.310(a)(1)(B)

**PERSON FOUND NOT GUILTY BY REASON OF INSANITY AND COMMITTED TO CUSTODY OF COMMISSIONER OF HEALTH AND SOCIAL SERVICES MAY BE CONVICTED OF ESCAPE.**

Alto beat and killed a woman in 1973 and was found not guilty by reason of insanity and committed to the custody of the commissioner of health and social services for a term not to exceed 30 years. Alto was committed to the Alaska Psychiatric Institute. While on a field trip from that institution Alto escaped and was subsequently recaptured in New York. He was returned to Alaska and charged with second degree escape, removing himself from official detention for a felony. Alto was subsequently convicted and on appeal he contended that while he was in official detention that he was not in official detention *for a felony,* as he was in official detention not for a felony but as an insane person. The Alaska Court of Appeals found that Alto was properly convicted of escape. The Court found that escape is broadly divided into two main categories: official detention for a felony and official detention for a misdemeanor. The underlying charge that causes a defendant to be placed in official detention determines the level of offense. Alto was in official detention because of his commission of a number of felony offenses. Although he was found not guilty by reason of insanity he was still committed to the custody of the Department of Health and Social Services for not more than 30 years because of those felony offenses. Therefore he was in official detention for a felony.

Alto v. State, 64 P.3d 141 (Alaska App. 2003)

Legislative review is not recommended.

AS 11.56.740(a)

**DEFENDANT'S MISTAKEN BELIEF THAT NO-CONTACT ORDER IS INAPPLICABLE IS NOT A DEFENSE TO A CHARGE OF VIOLATING A PROTECTIVE ORDER.**

Strane was charged with violating a domestic violence protective order after police found him in a car with D.A., who had recently obtained a domestic violence protective order prohibiting Strane from having contact with her. Violating a domestic violence protective order makes it a crime to "knowingly commit or attempt to commit an act in violation of a" protective order. Strane tried to defend on the ground that he mistakenly believed that the no-contact order did not apply if D.A. consented to the contact. The trial court refused to allow Strane to present this defense. Strane waived his right to a jury trial and submitted the case to the trial court on stipulated facts, including that Strane understood "that the protective order prohibited him from contacting D.A." Strane was convicted. Strane appealed to the Alaska Court of Appeals and that Court reversed Strane's conviction. The Alaska Supreme Court vacated the appeals court opinion and ordered the appeals court to reconsider the case in light of the stipulated facts. The appeals court again reversed Strane's conviction ruling that Strane had the right to argue that he made a good faith mistake as to requirements of the protective order. The appeals court held that AS 11.56.740(a) was ambiguous as to the culpable mental state of the offense and applied the mental state both to the conduct element of the offense and to the circumstance element of the offense. The appeals court further held that the application of the "knowing" mental state to the circumstances of the offense meant that Strane could only be convicted if the state proved that Strane knowingly disregarded the fact that his conduct violated the protective order; basically the state would have to show that Strane knew that the conduct was prohibited and disregarded that fact. The Alaska Supreme Court reversed the appeals court finding that while the appeals court was correct to apply the mental state to both the conduct and circumstances elements of the offense, the appeals court was incorrect with regard to its knowing disregard requirement. The Court held that the appeals court was in effect allowing a mistake of law defense when AS 11.81.620(a) limits mistake of law defenses only to offenses when the law "clearly so provides." Since AS 11.56.740(a) does not clearly so provide, a mistake of law defense is improper. The Supreme Court held that Strane was

properly convicted as he knew of the existence and contents of the protective order and he recklessly disregarded a substantial and unjustifiable risk that his conduct violated the order.

State v. Strane, 61 P.3d 1284 (Alaska 2003)

Both the Alaska Court of Appeals and Alaska Supreme Court opinions ignore the effect of AS 11.81.900(b) which prescribes the culpable mental state for AS 11 crimes when the culpable mental state is not set out for the specific crime. Applying this provision would supply a "reckless" mental state for the circumstances element of the offense and not a "knowing" mental state as supplied by the Courts. In any event, legislative review is not recommended as the legislature amended AS 11.56.740(a) in 2002 to insert a "reckless" mental state with regard to the circumstances of this offense.

AS 11.56.840
AS 12.63.010

**CRIME OF FAILURE TO REGISTER AS A SEX OFFENDER.**

Dailey was required to register as a sex offender under the Sex Offender Registration Act. While Dailey filed required quarterly reports, he refused to sign and swear that the information in the report was accurate as required by the Act. Dailey was convicted of AS 11.56.840(a)(4) for not filing sworn quarterly reports as required by the Act. Dailey appealed, contending that the criminal statute did not adequately provide him notice that it was a crime to "knowingly fail to file sworn verification forms." The Alaska Court of Appeals rejected this contention finding that the statute required Dailey to register as a sex offender as required by AS 12.63.010, which requires sworn quarterly verifications. The Court also found that the jury instructions in the case failed to adequately reflect all of the elements of the crime, that is that Dailey was aware of the circumstances giving rise to the duty to file sworn quarterly statements and that he knowingly failed to perform that duty. The Court found this error harmless due to the overwhelming evidence presented to the jury that Dailey knew he was required to sign and attest to the verification forms.

Dailey v. State, 65 P.3d 891 (Alaska App. 2003)

Legislative review is not recommended.

AS 11.71.060(a)

**POSSESSION OF LESS THAN FOUR OUNCES OF MARIJUANA BY AN ADULT IN THE ADULT'S OWN HOME IS PROTECTED BY THE PRIVACY PROVISION OF THE CONSTITUTION OF THE STATE OF ALASKA.**

Noy was convicted after a trial by jury of possession of less than eight ounces of marijuana. The Alaska Court of Appeals reversed Noy's conviction finding that the statute Noy was convicted under criminalizes conduct the Alaska Supreme Court has found to be protected under art. I, § 22, Constitution of the State of Alaska. In 1975 the Alaska Supreme Court in Ravin v. State, 537 P.2d 494 (Alaska 1975), found that the possession by an adult of quantities of marijuana that are indicative of personal use, and not indicative of an intent to sell, for personal use in the adult's own home was protected under the constitution. Eventually, in response to this decision, the legislature amended the marijuana laws to make the possession of four ounces or more of marijuana a crime, while the possession of less than four ounces by an adult for personal use in their own home was not a crime. In 1990 the people by initiative amended this law and again made the possession of any amount of marijuana a crime. The appeals court found that the initiative's change to the marijuana laws violated the constitution. The appeals court found that it had a duty to construe the initiative in a manner that was consistent with the constitution and therefore found that the four ounce ceiling contained in the pre-initiative law could be preserved. As Noy could have been convicted for possessing less than four ounces of marijuana, the Court reversed his conviction noting that the state may retry Noy to show that he possessed more than four ounces of marijuana.

Noy v. State, ___ P.3d ___ (Alaska App. 2003), No. A-8327 Decided August 29, 2003

The appeals court found that the initiated statute intruded upon conduct protected by the privacy provision of the constitution. This result is consistent with the decision of the Alaska Supreme Court in Ravin. To avoid striking down the initiated statute in its entirety the appeals court sought to construe the statute in a manner that preserved its constitutionality. To that end the Court applied the law as it existed before the initiative took effect, using four ounces of marijuana as the dividing line between protected and nonprotected conduct. In reaching this

decision the Court found that the legislature has the authority to implement the privacy provision of the constitution. The legislature may wish to use its authority under art. I, § 22 to implement that provision and adjust or refine the amount and extent of protection available under that section.

AS 11.81.400(a)

**PERSONS ARE NOT AUTHORIZED TO USE FORCE TO RESIST POLICE OFFICERS USING FORCE TO DETAIN A PERSON DURING AN INVESTIGATIVE STOP.**

Anchorage police officers contacted Melson concerning an assault that had allegedly occurred in his apartment. Melson claimed to have not been home during the evening although the officers knew this claim was not true due to Melson's presence at the apartment earlier in the evening. The officers pressed Melson to explain this inconsistency at which time, according to the officers, Melson decided he no longer wanted to talk to the officers and attempted to retreat into his apartment. As Melson attempted to retreat into his apartment one of the officers grabbed Melson's arm while an associate of Melson's slammed the door on the officer's arm. The other officer freed his partner's arm and the officers left to obtain a search warrant. Melson told a completely different version of events claiming that the officer's arm was never caught in the door and that they attempted an illegal entry into his apartment after he had denied them access. The officers returned with the warrant and arrested Melson for assault and resisting arrest. At trial, Melson sought jury instructions that he was permitted to use non-deadly force to resist the officers illegal entry into his home. The trial court refused these instructions and Melson was convicted of the two offenses. Melson appealed to the Alaska Court of Appeals. The Court affirmed Melson's convictions finding that a person has no right to use force to assault a police officer who has entered the person's home even if the person believes the officer's entry is illegal, if the person has reason to believe the officer is engaged in official duties and the officer does not use excessive force.

Melson v. Municipality of Anchorage, 60 P.3d 199 (Alaska App. 2002)

Legislative review is not recommended.

AS 12.20.020
AS 12.20.050

**DISMISSAL OF PROSECUTION FOR STATE'S FAILURE TO APPEAR AT ARRAIGNMENT DOES NOT BAR REFILING OF CHARGES.**

Wayne Schouten and Roy Roberts were cited for taking a moose out of season; Schouten was also charged with hunting without a valid license. On the day scheduled for their arraignment for these misdemeanors no one appeared to represent the state and the magistrate dismissed the charges against them. Four days later the state again charged them with the misdemeanor offense of taking a moose out of season. Schouten and Roberts argued that the earlier dismissal acted as a bar to the refiling of charges. The trial court disagreed and the Alaska Court of Appeals affirmed the trial court. The appeals court examined the history of AS 12.20.050 and concluded that that provision only bars further prosecution of persons charged with misdemeanors when those persons have been held to answer or indicted. Since Schouten and Roberts had not been held to answer or indicted, AS 12.20.050 did not bar the state from refiling the charges against them.

Schouten and Roberts v. State, 77 P.3d 739 (Alaska App. 2003)

Legislative review is not recommended.

AS 12.55.045(f)

**COURT MUST CONSIDER A DEFENDANT'S ABILITY TO PAY RESTITUTION ASSESSED TO MORE THAN ONE DEFENDANT AS IF THE DEFENDANT WOULD HAVE TO PAY THE FULL AMOUNT INDIVIDUALLY.**

Thompson and three others were convicted of jointly participating in a first degree assault. The trial court held each of the four jointly and severally liable for the full amount of restitution, $33,197. Thompson argued that he would be unable to pay this full award and pursuant to AS 12.55.045(f) sought reduction of the award. The trial court refused to reduce the amount that Thompson was required to pay finding that Thompson had the ability to pay one-fourth of the award. Thompson appealed and Alaska Court of Appeals reversed the sentencing court. The Court found that because Thompson was jointly and severally liable, the sentencing court should have considered whether Thompson had the ability to pay the entire award and not just one-fourth of the award.

Thompson v. State, 64 P.3d 132 (Alaska App. 2003)

The decision appears to be consistent with AS 12.55.045(f). The legislature may wish to review the subject of restitution and whether restitution orders should be reduced at sentencing.

AS 12.55.080
5th Amendment, U.S. Constitution

**REVOCATION OF PROBATION IMPROPER FOR VIOLATION OF CONDITION PROTECTED BY PRIVILEGE AGAINST SELF-INCRIMINATION.**

James was convicted of sexual assault and sexual abuse of a minor and was sentenced to a composite sentence of 10 years with four years suspended during which time James would be on probation. James was also placed on probation for an additional five years after his release. As a special condition of the probation, James was required to participate in a sex offender treatment program while he was incarcerated. To participate in sex offender treatment programs, the Department of Corrections requires offenders to admit their guilt. James refused to do this and asserted that he had a 5th Amendment privilege not to participate as he had a pending appeal of the dismissal of his application for post-conviction relief. The trial court revoked James' probation and reimposed a portion of the suspended sentence. James appealed and the Alaska Court of Appeals reversed the revocation finding that because (1) James had a pending application for post conviction relief (actually a pending appeal from the denial of that petition), and (2) James testified at trial that he had not committed the offense, he faced a realistic threat of self-incrimination either by use of his statements against him at a retrial if his post conviction relief was successful or by a prosecution for perjury. In either event, the Court found that this was sufficient to justify the protections of the 5th Amendment.

James v. State, 75 P.3d 1065 (Alaska App. 2003)

If the legislature feels that sex offender treatment is important enough, the legislature could review this issue to attempt to craft a means of providing transactional immunity for statements made in treatment.

AS 12.55.155

**SENTENCING COURT NOT PROHIBITED FROM SENTENCING FIRST FELONY OFFENDER TO TERM IN EXCESS OF PRESUMPTIVE TERM FOR THIRD FELONY OFFENDER WHEN AGGRAVATING FACTORS ARE PRESENT.**

Lottie Beasley was convicted of one consolidated count of third degree assault of three of her children. The sentencing court found five aggravating factors under AS 12.55.155(c) applied to Beasley's conduct and sentenced Beasley to three and one-half years imprisonment with one year suspended. Beasley appealed claiming this sentence was illegal under AS 12.55.155(k) and that the Court could not sentence her to a term of greater than three years, the presumptive term for a third felony offender. The Alaska Court of Appeals rejected this contention finding that AS 12.55.155(k)(2) allows a court to enhance the sentence of a first felony offender beyond the sentence of a second felony offender if the Court finds the existence of an aggravating factor under AS 12.55.155(c). Although AS 12.55.155(k) was amended in 1999 to add paragraph (k)(1) dealing with sentences when a child is killed, the Court found that the legislature did not intend any change to the language of AS 12.55.155(k) that existed at the time of the amendment and which is now AS 12.55.155(k)(2). The Court found that its decision was consistent with the prior interpretations of that subsection by the courts.

Beasley v. State, 56 P.3d 1082 (Alaska App. 2002)

Legislative review is not recommended.

AS 12.63.100

**SEX OFFENDER REGISTRATION NOT VIOLATIVE OF SEPARATION OF POWERS PRINCIPLES.**

Herreid pleaded no contest to attempted third degree sexual assault. As a result of this conviction, Herreid was required to register and report annually for a period of 15 years under the Sex Offender Registration Act. Herreid appealed this reporting requirement contending that the reporting requirement was a form of punishment, and the legislature's imposition of a uniform reporting requirement infringed on the separate powers of the judicial branch to fashion an individualized sentence. The Alaska Court of Appeals rejected Herreid's argument finding that the Sex Offender Registration

Act was not punitive but a civil regulatory measure based solely on the fact of previous conviction and not upon the fact of current dangerousness. Therefore, there is no obligation to tailor the registration to the offender and no separation of powers concerns raised by the Sex Offender Registration Act.

Herreid v. State, 69 P.3d 507 (Alaska App. 2003)

Legislative review is not recommended.

AS 12.72.020
AS 18.85.100(c)

**RIGHT TO COUNSEL IN A FIRST APPLICATION FOR POST-CONVICTION RELIEF IS REQUIRED UNDER THE ALASKA CONSTITUTION; SECOND APPLICATION FOR POST-CONVICTION RELIEF TO CHALLENGE EFFECTIVENESS OF COUNSEL IN FIRST APPLICATION IS REQUIRED UNDER THE ALASKA CONSTITUTION.**

AS 12.72.020(a)(6) provides that defendants are only entitled to one application for post-conviction relief. Successive petitions for post-conviction relief are to be dismissed. Grinols was convicted of three counts of sexual abuse of a minor in 1994. In 1995, the Alaska Court of Appeals affirmed the convictions. In 1998, the Alaska Court of Appeals affirmed the denial of a petition for post-conviction relief that Grinols had filed earlier in the superior court challenging his convictions. In 1999, Grinols filed a self-styled petition for writ of habeas corpus again challenging his convictions. It is this 1999 petition that is the subject of this case. The Alaska Supreme Court held that this petition was properly treated as a second application for post-conviction relief. Because the application contained a claim that counsel appointed to represent Grinols under the first application was ineffective, the Court held that the due process clause of the Constitution of the State of Alaska required the courts to entertain this successive petition despite AS 12.72.020(a)(6). The Court found that the right to counsel in a first application for post-conviction relief embodied in AS 12.72.020 is required under the due process clause of the Constitution of the State of Alaska. The Court also found that the right to counsel included the right to effective counsel. Therefore, if a defendant claims that counsel was ineffective in a first application for post-conviction relief, the defendant must be permitted to present that claim in a second application for post-conviction relief.

Grinols v. State, 74 P.3d 889 (Alaska 2003)

Although the Alaska Supreme Court failed to follow the legislature's direction (AS 12.72.020(a)(6)) that successive applications for post-conviction relief must be dismissed, the Court held that this result is mandated by the Constitution of the State of Alaska. Therefore, legislative review is not recommended.

AS 13.06.015
AS 25.24.030

**VALID MARRIAGE PRECLUDES IMPOSITION OF CONSTRUCTIVE TRUST.**

The Alaska Supreme Court ruled that a valid marriage precludes imposition of a constructive trust on a surviving spouse's statutory benefits. While there was evidence of fraudulent conduct by the surviving spouse, the conduct was not sufficient to void the marriage. The Court held that a key element necessary to support imposition of a constructive trust is a finding that the surviving spouse is unjustly receiving a portion of the estate. However, by holding the marriage valid, the surviving spouse is by law entitled to a share of the estate, which precludes any finding that the surviving spouse is unjustly receiving a statutory share. The Court also held that under general equitable principles of law, a constructive trust was improper in these circumstances for two reasons. First, the legislature has by statute provided for transfer of property interests after death and, second, use of a constructive trust would allow a court to indirectly accomplish what could not be accomplished directly under the law.

Riddell v. Edwards, 76 P.3d 847 (Alaska 2003)

Legislative review is not recommended.

AS 13.16.435

**RECOVERY OF ESTATE LITIGATION EXPENSES CONSTRUED BY THE COURT.**

The Alaska Supreme Court ruled that estate litigation need not result in a benefit to the estate in order for a personal representative to recover necessary litigation expenses. The Court examined the language of AS 13.16.435 and in a 3/2 decision held that it contained no requirement that litigation over a will must benefit the estate in order to allow recovery of

litigation expenses. In a sharply worded dissent, two justices argued that the Court's opinion was confused over a distinction between a requirement that the litigation must benefit the estate versus determining if the motives of the personal representative were in fact acts that benefited the estate.

Enders v. Parker, 66 P.3d 11 (Alaska 2003)

Legislative review is not recommended.

AS 15.15.010
AS 15.25.110

**GUBERNATORIAL CANDIDATE RUNNING IN THE GENERAL ELECTION WITHOUT A RUNNING MATE.**

Responding to a situation not directly addressed by statute, the Attorney General's office concluded that if no candidate of a given party ran for the office of lieutenant governor in a primary election, that party's gubernatorial candidate could run in the general election without a running mate. The office acknowledged that Alaska constitutional and statutory law generally contemplated that gubernatorial candidates run with running mates. However, to avoid the disqualification of a gubernatorial candidate, the office interpreted Alaska law under a principle of liberal construction favoring open access to the ballot. Thus, relying on the authority granted by AS 15.15.010, the office recommended that the division of elections issue an emergency regulation that adopted the procedures set out in AS 15.25.110 for addressing candidate vacancies occurring after a primary election.

2002 Informal Op. Att'y Gen. (September 13, 2002; File No. 663-03-0064)

Legislative review is recommended so that the legislature can determine whether it prefers to address this situation by statute.

AS 16.05.675
AS 16.43.140

**PARTICIPANTS IN FEDERAL FISHERY CANNOT BE PROSECUTED FOR LANDING CATCH IN ALASKA.**

The Court of Appeals of Alaska ruled that participants in the federally controlled halibut and sablefish fisheries who landed their catch in Alaska cannot be prosecuted for failure to have a state interim-use or landing permit. The Court examined the provisions of AS 16.43.140 regarding issuance of interim-use permits and the provisions of AS 16.05.675 regarding the

issuance of landing permits. Interim-use permits may only be issued to participants in a fishery potentially subject to limited entry. In this case the participants were fishing in federal waters, an area not subject to the jurisdiction of the state. Requiring an interim-use permit in this situation exceeds the authority granted under AS 16.42.140. Further, although the legislature has authorized the issuance of landing permits, these permits have never been issued because the Department of Fish and Game has never established eligibility criteria.

State v. Dupier, 74 P.3d 922 (Alaska App. 2003)

Legislative review is not recommended.

AS 18.60.120
AS 44.41.020

**STATE HAS NO STATUTORY DUTY TO CONDUCT SEARCH AND RESCUE OPERATIONS.**

The Alaska Supreme Court ruled that the state does not have a statutory duty to conduct search and rescue operations. Under AS 44.41.020 the Department of Public Safety is responsible for administering functions relating to protecting life and property. The Court rejected an argument that the Alaska State Troopers had a mandatory duty to conduct search and rescue regardless of the circumstances in a given situation. The Court pointed to AS 18.60.120, under which the commissioner of public safety is authorized, but not required, to conduct search and rescue operations. The state's duty to conduct search and rescue efforts may or may not exist, depending on the circumstances presented.

Kiokun v. State, 74 P.3d 209 (Alaska 2003)

Legislative review is not recommended.

AS 21.42.220
3 AAC 26.550

**NONCONFORMING INSURANCE POLICY PROVISION NOT ENFORCEABLE AGAINST INSURED.**

The Alaska Supreme Court held that a liability insurer's policy provision limiting coverage for attorney fees was not enforceable against an insured, because the provision did not conform with law. Under 3 AAC 26.550, an insurer that wants to limit coverage for Civil Rule 82 attorney fees had to provide certain notice to the insured or get prior approval from the director of the division of insurance. In this case the notice

given by the insurer failed to comply with the notice provisions of 3 AAC 26.550 and the insurer also failed to get prior approval for the policy provision. The Court held that the policy provision could not be enforced against the insured. The Court also rejected an argument that under AS 21.42.220, the nonconforming policy provision was enforceable. Under the language of AS 21.42.220, nonconforming policy provisions are required to be construed as required by the provisions of Title 21. The Court declined to read AS 21.42.220 to uphold a defective policy provision that attempts to limit coverage.

Therchik v. Grant Aviation, Inc., 74 P.3d 191 (Alaska 2003)

Legislative review is not recommended.

AS 21.78.170(d)
AS 21.78.293(b)

**COURT CONSTRUES STATUTE ON CLAIMS AGAINST INSURER IN LIQUIDATION.**

The Alaska Supreme Court ruled that only claims filed against an insurer in liquidation proceedings that are allowed by the receiver are subject to automatic approval by the superior court. Under AS 21.78.293(b), claims before the superior court that are not rejected within 120 days after the receiver's report is filed are considered approved. The Alaska Supreme Court held that this automatic approval provision only applied to claims that were approved by the receiver, not to all claims before the superior court. This conclusion is further supported by AS 21.78.170(d) that requires the superior court to hold a hearing on claims rejected by the receiver.

In re Life Insurance Company of Alaska, 76 P.3d 366 (Alaska 2003)

Legislative review is not recommended.

AS 23.30.095(c)
8 AAC 45.195

**COURT CONSTRUES TREATMENT PLAN PROVISIONS FOR WORKERS' COMPENSATION.**

The Alaska Supreme Court ruled that failure to provide a treatment plan as required by statute cannot be waived by the Alaska Workers' Compensation Board. Under AS 23.30.095(c), while notice of treatment can be waived in the interest of justice, failure to furnish a treatment plan is not waivable.

The Court also ruled that furnishing a treatment plan late, or more than fourteen days after treatment begins, means that any treatments in excess of frequency standards and occurring more than fourteen days before the plan is furnished are not the responsibility of the employer.

Crawford & Company v. Baker-Withrow, 73 P.3d 1227 (Alaska 2003)

Legislative review is not recommended.

AS 23.30.250(b)
AS 44.62.460(e)

**FRAUDULENT WORKERS' COMP CLAIMS SUBJECT TO PREPONDERANCE STANDARD OF PROOF.**

The Alaska Supreme Court ruled that in determining whether an employee has fraudulently obtained workers' compensation benefits, the standard of proof is preponderance of the evidence. Under AS 23.30.250(b), the Workers' Compensation Board can order an employee to reimburse an employer if the board determines that the employee has received benefits as a result of a false or misleading statement. The board concluded that the appropriate standard of proof in this type of proceeding was the clear and convincing evidence. The Court pointed out that when a standard of proof is not specified by law, under AS 44.62.460(e)(1) the default standard of preponderance of the evidence applies. The Court further rejected arguments that the preponderance standard of proof was unconstitutional on due process and equal protection grounds.

Denuptiis v. Unocal Corporation, 63 P.3d 272 (Alaska 2003)

Unless the legislature wishes to change the standard of proof, legislative review is not recommended.

AS 28.20.445(e)

**UNINSURED AND UNDERINSURED MOTOR VEHICLE COVERAGE CONSTRUED BY THE COURT.**

The Alaska Supreme Court ruled that costs, interest, and attorney fees are not to be included in determining whether policy limits have been exhausted for purpose of drawing on underinsured motor vehicle coverage. Under AS 28.20.-445(e)(1), underinsured coverage is not available unless the

policy's "limits of liability" have been used up. The Court concluded that this means the face value of the policy and does not include items such as attorney fees and prejudgment interest. Justice Eastaugh dissented, arguing that the holding is contrary to the meaning intended by the legislature and that "limits of liability" was intended to include everything the insurer would have had to pay, including attorney fees, costs, and prejudgment interest.

Coughlin v. Government Employees Insurance Company, 69 P.3d 986 (Alaska 2003)

Unless the legislature desires to review uninsured and underinsured motor vehicle coverage, legislative review is not recommended.

AS 28.35.030

**PRIOR CONVICTIONS FROM OTHER STATES SUPPORT FELONY DRUNK DRIVING CHARGE IN ALASKA.**

Gregory Simpson was charged with felony driving while intoxicated. Normally driving while intoxicated is a misdemeanor but the state alleged that Simpson had two prior California convictions for driving while intoxicated, thereby allowing the felony charge as provided in AS 28.35.030. Simpson contended that these California convictions could not be used in Alaska because he alleged California did not constitutionally guarantee a person accused of driving an independent test of the breath sample supporting the conviction. The trial court agreed saying that Simpson could only be charged with a misdemeanor. The state appealed and the Alaska Court of Appeals reversed the trial court. The Court found that the United States Supreme Court and most state courts have found that there is no constitutional right to an independent test as has been found to exist in Alaska. The Court further found that the right to an independent test in Alaska is not absolute. The Court then found that this right is not so crucial as to lead one to believe that the trial process leading to a conviction in a state that does not guarantee this right is fundamentally flawed and should not be accepted by the courts of this state. Therefore, driving while intoxicated convictions from states that do not guarantee independent tests of breath samples may properly be used as prior convictions in Alaska.

State v. Simpson, 73 P.3d 596 (Alaska App. 2003)

Legislative review is not recommended.

AS 29.26.110(a)

**REQUIREMENTS FOR VALID INITIATIVE PETITION INTERPRETED BY COURT.**

The Alaska Supreme Court ruled that an initiative petition must be certified by a municipal clerk even when the petition raises constitutional issues. Under AS 29.26.110(a)(4), initiative petitions are required to be enforceable as a matter of law. The Court stated that there is a presumption of constitutionality applicable to initiatives and therefore only clearly unconstitutional initiative petitions should be rejected by the clerk. The fact that an initiative petition raises unresolved constitutional issues is not valid grounds to reject the petition.

Kodiak Island Borough v. Mahoney, 71 P.3d 896 (Alaska 2003)

Legislative review is not recommended.

AS 33.30.061(a)

**SENTENCING COURT MAY NOT RESTRICT THE DISCRETION OF THE DEPARTMENT OF CORRECTIONS REGARDING WHERE A PRISONER MAY BE INCARCERATED.**

Combs pleaded no contest to attempted first degree assault and was sentenced to a term of imprisonment. The sentencing court also issued an order requiring the Department of Corrections to hold Combs in a different facility than another prisoner who had previously shot Combs. The Court issued this order after the prosecuting attorney told the Court that the state did not object to the order. The Central Office of the Criminal Division of the Department of Law apparently after finding out about the order then asked the Court to reconsider the housing restriction but the Court declined to reconsider the order. The Department of Law then appealed this housing restriction and the Alaska Court of Appeals agreed that it was improper. The Court found that incarceration decisions are committed to the Department of Corrections. Regardless of the propriety of the decision, Combs asserted that the Department of Law could not challenge that decision on

appeal because the prosecuting attorney, an employee of the Department of Law, had agreed to it. The Court rejected this assertion finding that the housing restriction was void because the sentencing court had no authority to enter it, and that the prosecuting attorney's agreement to the order did not require the Department of Corrections to accept the invalid order.

State v. Combs, 64 P.3d 135 (Alaska App. 2003)

Legislative review is not recommended.

AS 33.30.081(f)

**STATUTE GOVERNING PRISONER TRANSPORTATION TO CIVIL PROCEEDINGS CONSTRUED.**

The Alaska Supreme Court elaborated on factors that a trial court should consider when deciding whether to grant a prisoner's request to be transported to a civil proceeding. Under AS 33.30.081(f), a court may order a prisoner to be transported and personally appear at a civil proceeding only if the prisoner's personal appearance is essential to the just disposition of the action. A court is required to consider available alternatives to a personal appearance, including deposition and telephone testimony. In this case, the Court pointed to a set of factors that trial courts should balance, in deciding whether to grant a prisoner's request to personally appear in a civil matter. Those factors include cost and inconvenience to the state of transporting the prisoner, security risks, substantiality of the matter at issue, probability of success on the merits, integrity of the correctional system, and the interests of the inmate.

Richard B. v. State, 71 P.3d 811 (Alaska 2003)

Legislative review is not recommended.

AS 34.15.010

**SPOUSE HAS STATUTORY AUTHORITY TO SET ASIDE DEED.**

The Alaska Supreme Court ruled that a spouse who does not join in a conveyance of the family home and also does not appear on the title to the property has the right to have the deed set aside. The Court interpreted AS 34.15.010(d) as making a distinction between a spouse who appears on the title and one

who does not. A conveyance of a family home is per se invalid if a spouse appears on the title and does not join in the conveyance. In this case the spouse seeking to set aside the deed did not appear on the title to the property. The Court found that under AS 34.15.010(d), a non-titled spouse has the right to file suit to set aside the conveyance if filed within one year after the conveyance is recorded. The Court also noted that AS 34.15.010 does not create an interest in the family home for an untitled spouse, but does protect valid property rights created by other statutes.

National Bank of Alaska v. Ketzler, 71 P.3d 333 (Alaska 2003)

The Court's interpretation seems reasonable. Legislative review is not recommended.

AS 37.13.145(b)

**TRANSFERS FROM THE EARNINGS RESERVE ACCOUNT OF THE ALASKA PERMANENT FUND.**

AS 37.13.145(b) requires a portion of the money in the Alaska Permanent Fund's earnings reserve account to be transferred to the Department of Revenue to pay permanent fund dividends. Pertinently, this transfer is to occur "[a]t the end of each fiscal year." Despite this, the transfer occurs approximately 80 days after the close of the fiscal year under a memorandum of understanding between the Alaska Permanent Fund Corporation and the Department. The Attorney General's office concluded that this was not consistent with the statutory requirement. Instead, the office advised that the transfer should occur as soon as administratively practicable after the close of the fiscal year – typically about 20 business days. Such time is necessary, according to the Corporation's Director of Finance, in order to conduct the end-of-year steps necessary to verify and reconcile the fund's value and to compute its income.

2002 Informal Op. Att'y Gen. (July 23, 2002; File No. 663-03-0022)

Legislative review is not recommended.

AS 39.50.010
AS 39.50.060

## DISCLOSURE REQUIREMENTS OF ELECTION LAW SATISFIED BY SUBSTANTIAL COMPLIANCE.

The Alaska Supreme Court ruled that so long as a person substantially complies with the disclosure requirements of AS 39.50, penalties imposed under AS 39.50.060(b) are not applicable. The Court rejected an argument that strict compliance should be the appropriate standard. Requiring substantial compliance is consistent with the requirements of AS 39.50.030 that each disclosure statement be an accurate representation of financial affairs, and consistent with the purposes of the disclosure statute as stated under AS 39.50.010(a). Finally, the Court noted that applying a standard of substantial compliance is consistent with Alaska's election law, that election results should be upheld in the face of technical irregularities.

Grimm v. Wagoner, 77 P.3d 423 (Alaska 2003)

Unless the legislature desires to review election law disclosure penalties, legislative review is not recommended.

AS 43.55.011
AS 43.55.013
AS 43.55.016

## TAX TREATMENT OF OIL AND GAS PRODUCED FROM FEDERAL LEASES.

The Attorney General's office issued an opinion concluding that oil and gas production from leases in the National Petroleum Reserve in Alaska was taxable under AS 43.55 but that oil and gas production from leases in the Outer Continental Shelf in the Northstar Unit was not. The office also outlined principles governing the taxability of oil and gas production from onshore federal leases in the Cook Inlet area and generally concluded that oil and gas produced from such leases was taxable. In addition, the office concluded that for production tax purposes, Northstar Unit oil and gas production volumes should be determined on the basis of allocation under the unit agreement. Finally, the office concluded that oil and gas production from the Outer Continental Shelf may and should be counted in calculating an economic limit factor for the Northstar Participating Area.

2002 Formal Op. Att'y Gen. No. 2 (November 22, 2002)

Legislative review is not recommended.

AS 44.03.010

**NO PROSECUTION IN ALASKA FOR CRIME COMMITTED ON ALASKA STATE FERRY IN CANADIAN WATERS.**

Jack engaged in sexual contact and penetration with and assaulted S.N.F. while aboard the Alaska State Ferry Matanuska. The criminal activity all occurred while the vessel was in Canadian waters. An Alaska State Trooper happened to be aboard the vessel and arrested Jack, and Jack was later indicted for several assault and sexual assault offenses. The superior court dismissed the indictment finding that the state's criminal jurisdiction did not extend to Canadian waters. The state filed a petition for review with the Alaska Court of Appeals and that court affirmed the superior court's decision dismissing the indictment. The appeals court noted that the state relied solely on AS 44.03.010 to justify jurisdiction. The Court examined AS 44.03.010 and concluded that this statute does not give the state jurisdiction over the criminal acts in this case.

State v. Jack, 67 P.3d 673 (Alaska App. 2003)

In response to the superior court's action in this case the legislature adopted AS 12.05.020 which purports to give the state jurisdiction to prosecute crimes committed on state ferries. Further legislative review is warranted to determine if the jurisdiction of the state should be further addressed as the effects of this decision potentially reach far beyond crimes committed on state ferries.

AS 47.12.120(b)
AS 47.12.260

**STATE NOT LIABLE FOR INJURIES CAUSED AFTER RELEASE OF JUVENILE OFFENDER.**

The Alaska Supreme Court ruled that the State of Alaska is not liable for civil damages caused by a juvenile offender following the offender's release from state custody. The Court reviewed the duty of care owed by the state and held that the legislature had crafted a balance between the interests of the child and the broader interest of public safety. The Court concluded that imposing tort liability on the state for harm

caused by released juveniles would distort this balance. The Court also considered prior caselaw, particularly the issue of foreseeability of harm, and held that given the nature of the relationship between the state and the juvenile offender, no tort duty should be imposed. Two justices concurred in the opinion and also suggested the ruling should be expanded to include torts committed by adult offenders as well.

State v. Sandsness, 72 P.3d 299 (Alaska 2003)

Legislative review is not recommended.

# SUBJECT INDEX FOR COURT CASES AND OPINIONS OF THE ATTORNEY GENERAL

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