STATE OF ALASKA

Legislative Affairs Agency

A

REPORT TO THE

TWENTY-FIFTH 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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State Capitol
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A REPORT TO THE TWENTY-FIFTH 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The report lists Alaska Statutes that will be amended or repealed between March 1, 2007, and March 1, 2008, according to laws enacted before the 2007 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2005, and September 30, 2006,

and

Opinions of the Attorney General that were made available through Internet distribution between October 1, 2005, and September 30, 2006.

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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 2007 Legislature, will be repealed or amended before March 1, 2008, because of repealers or amendments enacted by previous legislatures with delayed effective dates.

The review of state court decisions was prepared by Jerry Luckhaupt and Jean Mischel, Legislative Counsel. Brian Kane, Legislative Counsel, reviewed federal court decisions, Don Bullock, Legislative Counsel, reviewed Opinions of the Attorney General, and Kathryn Kurtz, Assistant Revisor of Statutes, prepared the list of delayed repeals and amendments.

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DELAYED REPEALS, ENACTMENTS OR AMENDMENTS

taking effect between March 1, 2007, and March 1, 2008 according to laws enacted before the 2007 legislative session

Laws enacted in 2000

Ch. 117, SLA 2000 -- Municipal Property Tax Exemptions

AS 29.45.030(a)	amended effective date July 1, 2007

Laws enacted in 2003

Ch. 24, SLA 2003 -- Annulment of Alaska Coastal Policy Council Regulations

6 AAC 80.10 - 6 AAC 80.900	annulled effective March 1, 2007
6 AAC 85.20 - 6 AAC 85.900	annulled effective March 1, 2007

Laws enacted in 2004

Ch. 69, SLA 2004 -- Accidents Involving the Vehicle of a Person under the Influence

AS 09.65.310	repealed 7/1/2007

Ch. 163, SLA 2004 -- Administrative Hearings

AS 44.64.030(a)	amended effective July 1, 2007
AS 46.15.065(c)	amended effective July 1, 2007

Laws enacted in 2005

Ch. 89, SLA 2005 -- Senior Care Program

AS 09.38.015(a)(10)	repealed 6/30/2007
AS 37.05.146(c)(80)	repealed 6/30/2007
AS 47.45.300	repealed 6/30/2007
AS 47.45.310	repealed 6/30/2007
AS 47.45.320	repealed 6/30/2007
AS 47.45.340	repealed 6/30/2007
AS 47.45.350	repealed 6/30/2007
AS 47.45.360	repealed 6/30/2007
AS 47.45.390	repealed 6/30/2007
sec. 5, ch. 89, SLA 2005	repealed 6/30/2007
sec. 6, ch. 89, SLA 2005	repealed 6/30/2007
sec. 7, ch. 89, SLA 2005	repealed 6/30/2007

Ch. 10, FSSLA 2005 -- Workers Compensation, usual, customary, and reasonable fees

AS 23.30.097(a)(1)	repealed 8/1/2007

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 appropriations, and repeals that have been delayed to allow for an orderly transition to new law, such as when a new version of a uniform act is enacted and the repeal of the old version of the uniform act is delayed a year or two.

ANALYSIS OF COURT CASES AND OPINIONS OF THE ATTORNEY GENERAL

LOSS OF USE DAMAGES ARE AVAILABLE WHEN A LESSEE TOTALLY DESTROYS PROPERTY.

Alaska Construction Equipment (ACE) leased a Volvo rock dump truck to Star Trucking. Star damaged the truck at the Fort Knox mine and after some disputes the parties agreed the truck was totaled. ACE sued for damages, including damages for loss of use because ACE was unable to lease the vehicle out to others. Without comment the trial court found for Star and ACE appealed. The Alaska Supreme Court noted that it had not previously considered whether loss of use damages are available when property is destroyed and that other jurisdictions are split on this issue. The court found that in cases of total destruction, loss of use damages are available for the period of time that is reasonably necessary to obtain a suitable replacement.

Alaska Construction Equipment, Inc. v. Star Trucking, Inc., 128 P.3d 164 (Alaska 2006)

Legislative review is not recommended unless the legislature desires to eliminate or modify the availability of these damages.

IMMUNITY FOR TESTIMONY AS A WITNESS EXTENDED TO EXPERTS.

A personal injury plaintiff sued an expert witness who conducted an independent medical examination of her and testified in an arbitration hearing against her interests. The court, for the first time, extended common law witness immunity to expert witnesses, and affirmed summary judgment in favor of the expert witness.

Gilbert v. Sperbeck, Ph.D., 126 P.3d 1057 (Alaska 2005)

Legislative review is not recommended.

Art. I, sec. 1, Constitution of the State of Alaska

DENIAL OF EMPLOYMENT BENEFITS TO SAME SEX PARTNERS VIOLATES EQUAL PROTECTION PRINCIPLES.

The plaintiffs challenged the State and Anchorage employment benefit eligibility requirement that conferred benefits to non-participants to married couples and children only. In a case of first impression, the Supreme Court found the practice of excluding same sex partners from employment benefits was a denial of equal protection since a heterosexual employee could marry the employee's partner to qualify the partner for benefits and same sex employees could not. The state interests of administrative efficiency and cost savings were not substantially related to a blanket denial of benefits and the state and municipal governments were ordered on remand to fashion a system to allow for same sex employment-related benefits similar to those offered married partners.

Alaska Civil Liberties Union et al. v. State of Alaska et al., 122 P.3d 781 (Alaska 2005)

Legislative review is recommended since current statutory authority may not address policy or procedure associated with the newly available benefits.

Art. I, secs. 14 and 22, Constitution of the State of Alaska
AS 28.15.166

EXCLUSIONARY RULE FOR CLAIMS OF ILLEGAL SEARCHES AND SEIZURES DOES NOT APPLY TO LICENSE REVOCATION HEARINGS.

State troopers stopped a vehicle on the Parks Highway and the driver fled the scene on foot. The driver was tracked to a home in Wasilla and officers entered the home and arrested Nevers for drunk driving. Nevers refused to submit to a chemical breath test and the division of motor vehicles revoked his driver's license for three years. Nevers appealed, arguing that the evidence against him in the license revocation was the result of an illegal warrantless search and therefore must be suppressed under the exclusionary rule. The Alaska Supreme Court disagreed, holding "that the exclusionary rule is inapplicable to search and seizure violations in administrative license revocation hearings."

Nevers v. State, 123 P.3d 958 (Alaska 2005)

Legislative review is not recommended.

Art. I, sec. 22, Constitution of the State of Alaska
AS 11.71.040

POSSESSION OF 25 OR MORE MARIJUANA PLANTS NOT PROTECTED UNDER RIGHT TO PRIVACY.

Hotrum was convicted of misconduct involving a controlled substance in the fourth degree for possessing more than 25 marijuana plants (AS 11.71.040(a)(3)(G)). Hotrum contended that the plants he possessed were small plants and only yielded approximately two ounces of marijuana. Because of this small amount of marijuana, Hotrum further contended that his possession of the plants was protected under the privacy provision of Art. I, § 22, Constitution of State of Alaska, and the Alaska Supreme Court decision in *Ravin v. State*, 537 P.2d 494 (Alaska 1975). The Alaska Court of Appeals disagreed, finding "that the legislature has the power to set reasonable limits on the amount of marijuana that people may possess for personal use in their homes." The court further found that the legislature could conclude that "small marijuana plants could grow to become a substantial amount of marijuana" and that a "defendant should not benefit from the fact that he was prosecuted before the plants could grow to that level." The court therefore concluded that the legislature was entitled to make this type of judgment without offending the right to privacy provision of the Alaska Constitution.

Hotrum v. State, 130 P.3d 965 (Alaska App. 2006)

Legislative review is not recommended.

Art. I, sec. 22, Constitution of the State of Alaska
AS 47.30.836
AS 47.30.839

COURTS MAY NOT AUTHORIZE THE STATE TO ADMINISTER PSYCHOTROPIC DRUGS TO A NON-CONSENTING MENTAL PATIENT UNLESS THE COURT DETERMINES THAT THE MEDICATION IS IN THE BEST INTERESTS OF THE PATIENT AND NO LESS INTRUSIVE TREATMENT IS AVAILABLE.

Myers was involuntarily committed to the Alaska Psychiatric Institute. Alaska statutes allow the forcible administration of psychotropic medication in nonemergency situations without a judicial determination that the treatment is in the patient's best interests and that no less intrusive course of treatment is available. Myers challenged these statutes arguing that they abridged her liberty and privacy interests under the Constitution of the State of Alaska. The Alaska Supreme Court agreed, finding that the right to refuse psychotropic medication is a fundamental right. The court held that, to

overcome this fundamental right, a court must find that the treatment is in the patient's best interests and that no less intrusive measures are available.

Myers v. Alaska Psychiatric Institute, 138 P.3d 238 (Alaska 2006)

Legislative review is recommended to conform the statutes to the mandates of the Constitution of the State of Alaska.

Art. III, sec. 21, Constitution of the State of Alaska
AS 33.20.080(a)

THE BOARD OF PAROLE IS AUTHORIZED TO ESTABLISH CLEMENCY ELIGIBILITY CRITERIA EVEN THOUGH THE CONSTITUTION GRANTS THAT AUTHORITY TO THE GOVERNOR.

The Board of Parole has established clemency criteria and procedures. In a challenge on constitutional grounds, the court held that the delegation by the governor to the parole board was consistent with the constitutional and statutory authority granted the governor over matters of clemency.

Lewis v. State of Alaska, Department of Corrections, 139 P.3d 1266 (Alaska 2006)

Legislative review is not recommended.

Alaska R.Cr.P. Rule 35.1

COURT DOES NOT HAVE AUTHORITY ON ITS OWN MOTION TO DISMISS AN APPLICATION FOR POST-CONVICTION RELIEF.

In ch. 79, SLA 1995, the legislature rewrote Rule 35.1, Alaska Rules of Criminal Procedure. Prior to that rewrite the superior court could dismiss an application for post-conviction relief on its own motion "if the court was satisfied 'that the applicant (was) not entitled to post-conviction relief' and the court notified the applicant why the application was deficient and allowed the applicant an opportunity to respond or cure the deficiency." The current rule does not authorize dismissals of applications on the court's own motion. Serradell beat his girlfriend to death in 1999, pleaded to second-degree murder, and received a 45-year term of imprisonment with 15 years suspended. Serradell filed an application for post-conviction relief, the state answered, and the court denied the application. Serradell appealed, arguing that the court was required to give him notice that it was going to deny or dismiss his application.

The Alaska Court of Appeals agreed with Serradell, finding that the current rule does not allow the trial court to deny or dismiss an application on its own motion and, even if the trial court has an inherent power to deny or dismiss an application, it cannot do so without prior notice to the parties.

Serradell v. State, 129 P.3d 461 (Alaska App. 2006)

Legislative review is only recommended if it was not the legislature's intent when rewriting Criminal Rule 35.1 to eliminate a court's authority to deny or dismiss an application on its own motion.

Alaska R.Cr.P. Rule 45

DEFENDANT IS SERVED FOR PURPOSES OF THE SPEEDY TRIAL RULE WHEN FORMALLY SERVED UNDER THE CRIMINAL RULES OR FORMALLY ARRAIGNED.

Gottschalk was on probation for drunk driving when it was alleged that he violated his probation and a petition was filed to revoke his probation. The basis for the petition was Gottschalk's recent indictment in Bethel for felony drunk driving. He was arrested and brought into court on the probation violation and provided a copy of the Bethel indictment. Gottschalk was not formally served with the Bethel indictment until approximately three months later. A little over a month later Gottschalk argued that the 120-day time limit for being brought to trial under Criminal Rule 45 (the speedy trial rule) began when he received a copy of the indictment at his probation violation hearing and not when he was formally served with the indictment, and that the felony drunk driving indictment should be dismissed. The trial court agreed with Gottschalk and dismissed the indictment. The state sought review and the Alaska Court of Appeals reversed. The Court of Appeals noted that Criminal Rule 45 is "flawed" as it does not identify when a charging document is served to start the speedy trial clock running. The court ruled that the 120-day period of Criminal Rule 45 does not begin until the defendant is formally served under Criminal Rules 4 or 9, or formally arraigned under Criminal Rule 10. The Court of Appeals further noted that Alaska is the only state to have a speedy trial rule that is dependent upon the service of the charging document and therefore other states have not had to answer the question of when the defendant is served in order to start the speedy trial time clock.

State v. Gottschalk, 138 P.3d 1170 (Alaska App. 2006)

Legislative review is not recommended unless the legislature wishes to use its authority to amend procedural court rules to alter the speedy trial rule of Criminal Rule 45.

AS 09.10.053

A CAUSE OF ACTION FOR BREACH OF THE DUTY TO DEFEND ACCRUES WHEN THE INSURANCE COMPANY DENIES A DEFENSE BUT IS EQUITABLY TOLLED UNTIL ENTRY OF FINAL JUDGMENT.

Normally, a breach of contract claim accrues upon discovery of loss or harm. A breach of a duty to defend an insured, however, is not validated until the final judgment on a claim for the breach. For this reason, the Alaska Supreme Court held that the statutory period for breach of the duty to defend commences upon the refusal to defend but is equitably tolled until the underlying action is terminated by final judgment. The court explained that the doctrine of equitable tolling is well established in Alaska since the defendant is notified of the claim by the filing of the lawsuit, evidence gathering is not delayed, and the plaintiff has acted reasonably and in good faith by bringing the claim.

Brannon v. Continental Casualty et al., 137 P.3d 280 (Alaska 2006)

Legislative review is not recommended.

AS 09.17.020(b)

CIVIL DEFENDANT CONVICTED OF CRIMINAL OFFENSE COLLATERALLY ESTOPPED FROM DENYING ESSENTIAL ELEMENTS OF OFFENSE IN A RESULTING CIVIL ACTION.

Lamb was seriously injured when Anderson who was driving drunk crashed his vehicle into Lamb's motorcycle. Anderson pled no contest to various offenses, including assault in the second degree and drunk driving, and was sentenced to seven years in prison. Lamb filed suit against Anderson and argued that Anderson was collaterally estopped from disputing the essential elements of the offense. The Alaska Supreme Court agreed. The court found that Anderson was estopped from contesting recklessness as recklessness was an element of his assault offense. As a result, the court found that the jury must

be instructed that they may award punitive damages as the requirement of reckless indifference has been proven based upon Anderson's conviction.

Lamb v. Anderson, 126 P.3d 132 (Alaska 2005)

Legislative review is not recommended.

AS 09.17.080
AS 09.17.900

INTENTIONAL TORT CASE CANNOT ASSIGN DAMAGES AGAINST THE PLAINTIFF FOR COMPARATIVE FAULT.

A plaintiff sued and won a jury verdict for wrongful termination and intentional interference with a contract. The jury was instructed in comparative fault principles and the jury awarded some portion of the damages to the defendant for the plaintiff's perceived "unprofessional conduct" which may have contributed to the intentional interference of his employment contract by the defendant. The court held that, as a matter of law, "fault" cannot be apportioned to the plaintiff for an intentional tort committed by the defendant.

Domke v. Alyeska Pipeline Service Co. et al., 137 P.3d 295 (Alaska 2006)

Legislative review is recommended since the court interpreted broad statutory language pertaining to fault to reach its conclusion.

AS 09.17.080

IN A CIVIL CASE IN WHICH SOME DEFENDANTS WERE NOT NAMED PARTIES, THE COURT ESTABLISHED COMMON LAW TO ALLOW CONTRIBUTION ACTIONS BY THE NAMED DEFENDANTS AGAINST THE UNNAMED DEFENDANTS.

An investor sued property owners and won a judgment against them. The investor also negotiated a settlement with the property owners' attorney in a claim against him, thereby depleting all of the attorney's malpractice insurance benefits. The property owners subsequently won a large malpractice claim against the same attorney and sued the attorney's law firm for contribution to that judgment even though the law firm wasn't named as a party in the underlying action. Although the availability of statutory contribution claims had

been repealed by the voters many years ago when comparative fault principles allocated liability, the Alaska Supreme Court found, as a matter of common law, that when contribution is consistent with comparative fault and several liability and when interpleader is not efficient to bring a third party into the underlying case, contribution actions are still available. The court construed a contribution claim as an "equitable apportionment claim" that should be available if the contribution claim did not accrue when the underlying tort was committed but upon settlement or judgment of the underlying claim.

McLaughlin et al. v. Lougee et al., 137 P.3d 267 (Alaska 2006)

Legislative review is recommended since the court is interpreting voter and legislative intent while fashioning a new common law remedy.

AS 09.17.900

GUARDIAN'S ATTORNEY IS SEVERALLY LIABLE TO WARD IF THE ATTORNEY KNEW OR HAD REASON TO KNOW OF A CRIME OR FRAUD BEING COMMITTED AGAINST THE WARD AND THE ATTORNEY FAILED TO TAKE APPROPRIATE ACTION TO PREVENT OR RECTIFY IT.

An attorney who represented a guardian on his guardianship petition submitted financial statements on the guardian's behalf that a jury later found to be obviously fraudulent, including inflated interest rates and large missing sums. In a case of first impression, the attorney was held liable for failing to take action to prevent a crime or fraud against the ward even though the attorney did not perpetrate the fraud. The court also applied, for the first time, the several liability standard in duty-to-protect cases.

Pederson v. Barnes, 139 P.3d 552 (Alaska 2006)

Legislative review is recommended since the court relied upon general reference materials that may be contrary to legislative intent.

AS 09.35.250
AS 34.20.070(b)
AS 34.20.090(a)

COURT ESTABLISHES A COMMON LAW REDEMPTION RIGHT FOR JUNIOR LIEN HOLDERS ON A DEED OF TRUST.

A bed and breakfast and home of a single man shared by his unmarried partner was the subject of an executed deed of trust to a third party. When the owner subsequently granted a lien on the property to his unmarried partner, she became, unwittingly, a junior lien holder to the third party who held the deed of trust. The owner defaulted on both loan obligations and the third party foreclosed on the deed of trust. While mortgage statutes provide for redemption rights, provisions pertaining to deeds of trusts do not unless an explicit right of redemption has been provided in the deed of trust. Instead, the Alaska Supreme Court interpreted statutory deed of trust cure language applicable to trust obligors to confer a redemption right on a junior lien holder before foreclosure.

Young v. Embley, ___ P.3d ___ (Alaska 2006)(2006 WL 2578649)

Legislative review is recommended since the court relied upon imprecise statutory language and implied legislative intent to fashion a redemption right for lien holders contrary to a deed of trust holder's interest.

AS 09.50.250(3)

STATE NOT LIABLE FOR HOLDING PRISONER FOR SEVEN DAYS AFTER HIS TERM OF IMPRISONMENT ENDED.

Kinegak pleaded to two misdemeanor charges "and was sentenced to two concurrent sentences of 60 days, with twenty days off for good behavior and additional credit for time served. With the credits, Kinegak should have been released on July 3, 2002." Kinegak was not released until July 10, 2002, the day after he wrote a letter to his probation officer pointing out the error. Kinegak sued and the state claimed that the legislature has not waived the sovereign immunity of the state for claims involving false imprisonment. Kinegak claimed that his suit was for negligent record keeping. The trial court agreed with the state and dismissed the suit and Kinegak appealed. The Alaska Supreme Court affirmed and in doing so overruled its prior decision in *Zerbe v. State*, 578 P.2d 597 (Alaska 1978). Zerbe had been mistakenly arrested and held for nine hours

after a judge issued a warrant for his arrest for a criminal charge that had previously been dismissed. *Zerbe* ruled that negligent record keeping resulting in a false arrest or imprisonment does not amount to the tort of false imprisonment (for which sovereign immunity is not waived under AS 09.50.250) and that Zerbe could maintain a suit against the state for negligent record keeping. In its definition of Kinegak's appeal, the Supreme Court found that claims of negligent record keeping that result in false arrest or imprisonment are merely claims of false arrest or imprisonment, that *Zerbe* had been wrongly decided, and that Kinegak's claim was merely a claim for false imprisonment for which the legislature has not waived the sovereign immunity of the state.

Kinegak v. State, 129 P.3d 887 (Alaska 2006)

Legislative review is not recommended unless the legislature desires to waive the sovereign immunity of the state when claims of false imprisonment arise from negligent record keeping.

AS 11.56.510
AS 09.17.020(j)

WITNESS RETALIATION IS AN ACTIONABLE CLAIM AND AWARDING HALF OF THE PUNITIVE DAMAGES TO THE STATE DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS.

The plaintiff was awarded compensatory and punitive damages for wrongful termination on the basis of a claim of witness retaliation since the plaintiff testified against the employer in previous litigation. Both the basis for the award and the splitting of the punitive damages were appealed. The Supreme Court held that retaliation against a person for testifying as a witness is a violation of public policy and could therefore support a claim of wrongful termination. In the same case, the court again upheld the sharing of punitive damages with the state under a substantive due process challenge.

Reust v. Alaska Petroleum Contractors, Inc. et al., 127 P.3d 807 (Alaska 2005)

Legislative review is not recommended since the decision is consistent with similar policy and constitutional interpretations.

AS 11.56.610(a)(1)

PERSON DOES NOT COMMIT EVIDENCE TAMPERING BY MERELY THROWING AWAY EVIDENCE.

Anderson and a companion committed a home invasion robbery in Anchorage, shooting one of the residents in the process. After leaving the scene, Anderson's vehicle was spotted by police who gave chase. "During the chase, Anderson tossed various articles out of [the] car, including the handgun that was used in the shooting, the magazine for this handgun, and a box of matching .45 caliber ammunition." The pursuing police officers observed Anderson tossing these items out of the vehicle and the items were subsequently recovered. At trial a firearms expert testified that the weapon Anderson tossed from the vehicle was the weapon used in the shooting. Anderson was convicted of numerous offenses, including tampering with evidence for tossing the handgun out of the car during the chase. The Alaska Court of Appeals reversed Anderson's conviction for tampering with evidence, finding that merely throwing away evidence does not constitute tampering with evidence. The court held that to constitute evidence tampering the defendant must dispose of the evidence in a manner that destroys it or that makes its recovery substantially more difficult or impossible.

Anderson v. State, 123 P.3d 1110 (Alaska App. 2005)

Legislative review is recommended to determine if this interpretation comports with the legislature's intention in adopting the statute.

AS 12.55.025(e), (g) (repealed)

CONSECUTIVE SENTENCING FACT-FINDING DECISION MAY BE MADE BY A JUDGE WITHOUT A JURY.

This is another of the long line of cases applying the United States Supreme Court decision in *Blakely v. Washington*, 542 U.S. 296 (2004). Vandergriff burglarized a number of items from a number of remote residences outside of Petersburg. Vandergriff pled guilty to three felonies and was sentenced to consecutive three year terms for two of the felonies and the sentence for the other felony was suspended. The sentencing court complied with the common law *Neal-Mutschler* rule which requires the court to make findings that consecutive sentences are necessary to protect the public. Vandergriff argued that under *Blakely* these findings must be made by a

jury and not a judge because, he argued, the findings increased the potential sentence he could receive from a concurrent sentence to a consecutive sentence. The Alaska Court of Appeals rejected Vandergriff's argument, finding that consecutive sentences were authorized by the legislature and application of the *Neal-Mutschler* findings did not increase the potential sentence but only assured that judges would impose consecutive sentences after a careful examination of the facts.

Vandergriff v. State, 125 P.3d 360 (Alaska App. 2005)

Legislative review is not recommended.

AS 12.55.101(a)
AS 12.61.010
AS 24.65.100

A CRIME VICTIM THAT IS DISSATISFIED WITH THE RESOLUTION OF A CRIMINAL CASE DOES NOT HAVE AN INDEPENDENT RIGHT TO APPEAL OR SEEK REVIEW OF THAT CASE. THE OFFICE OF VICTIMS' RIGHTS DOES NOT HAVE AN INDEPENDENT RIGHT TO FILE SUIT OR TO APPEAL OR SEEK REVIEW IN A CRIMINAL CASE. A COURT HAS DISCRETION IN DETERMINING A PARTICULAR REHABILITATION PROGRAM THAT A CRIMINAL DEFENDANT CONVICTED OF A CRIME OF DOMESTIC VIOLENCE MUST ATTEND.

Respondent Daniel Cooper was prosecuted by the Municipality of Anchorage for misdemeanor assault of his wife Cynthia. Daniel pleaded no contest and received a suspended imposition of sentence conditioned on his successful completion of a year's probation. One of the conditions of that probation required Daniel to attend a rehabilitation program with a particular doctor. That program was not a program approved by the Department of Corrections as a batterer's intervention program. Cynthia contended that Daniel's sentence was illegal because the program he was attending was not a batterer's intervention program approved by the department and therefore the court was without authority to require Daniel to attend any program but an approved batterer's program.

The municipal prosecutor and the trial court disagreed with Cynthia's interpretation. Cynthia then filed an original application for relief in the Alaska Court of Appeals contending that she has standing as the crime victim to challenge the trial court's sentence of Daniel and that, independently of the prosecutor, she may seek appellate

review of that sentence. The Office of Victims' Rights represented Cynthia and also argued that the office, independently of Cynthia or the prosecutor, may seek appellate review in any criminal case in which the office has assisted the victim of a crime.

The Alaska Court of Appeals found that Daniel's sentence was legal. The court found that AS 12.55.101(a) provides that a court "may" require a defendant to attend a batterer's intervention program while on probation but that a court who finds that a defendant is in need of a treatment or rehabilitation program is not limited to only requiring the defendant to attend those programs. The court also found that a crime victim does not have an independent right to seek appellate review of a sentencing judge's decision in a criminal case. The court further found that the Office of Victims' Rights does not have the independent authority to file a lawsuit or seek appellate review in criminal cases.

Cooper v. District Court and Cooper, 133 P.3d 692 (Alaska App. 2006)

Legislative review is not recommended.

AS 12.55.155(c)

NO RIGHT TO GRAND JURY INDICTMENT ON AGGRAVATING FACTORS THAT HAVE TO BE FOUND BY A JURY AT TRIAL.

In *Blakely v. Washington*, the United States Supreme Court held that when the maximum punishment for an offense, or an increase in punishment, depends upon the proof of some additional fact then the defendant has the right to a jury trial on that fact and the fact must be proved beyond a reasonable doubt. This is the latest case applying this decision to Alaska's presumptive sentencing system.

Dague was charged with second degree murder for the death of a 10-month old infant that was in her care. Second degree murder carried an indeterminate sentence and was not subject to presumptive sentencing and aggravating factors. The jury though convicted Dague of manslaughter, a class A felony subject to presumptive sentencing. The state asserted that it was entitled to prove to the jury the existence of aggravating factors that could result in an increase in the sentence. The trial court rejected the state's argument, finding that aggravating factors must be alleged in the indictment in order

to comply with *Blakely*, that Dague had been indicted for second degree murder, and that no aggravating factors were contained in her indictment. The state appealed and the Alaska Court of Appeals reversed, finding that aggravating factors do not have to be alleged in the indictment.

State v. Dague, ___ P.3d ___ (Alaska App. 2006)(2006 WL 2641732)

Legislative review is not recommended.

AS 13.16.435

WHETHER A PERSONAL REPRESENTATIVE LITIGATED IN GOOD FAITH SO AS TO BE ENTITLED TO ATTORNEY'S FEES FROM AN ESTATE DEPENDS UPON WHAT THE PERSONAL REPRESENTATIVE SOUGHT TO ACCOMPLISH BY THE LITIGATION.

AS 13.16.435 provides that a personal representative may recover attorney's fees from an estate when the personal representative undertakes litigation in "good faith." While "good faith" is not defined, the Alaska Supreme Court has previously held that "good faith" depends upon whether there were reasonably arguable grounds for the litigation. In this case, the court held that whether there are reasonably arguable grounds does not depend upon whether the litigation merely survives summary judgment but rather depends upon what the personal representative was seeking to accomplish by the litigation. If a pure question of law was being litigated, then a reasonable chance of prevailing at summary judgment would show good faith. If factual issues were being litigated, then a reasonable chance of prevailing at trial would indicate good faith.

Enders v. Parker, 125 P.3d 1027 (Alaska 2005)

The court's construction of the statute appears reasonable, therefore legislative review is not recommended.

AS 16.43

EMERGENCY REGULATION PERMITTING COOPERATIVE FISHERIES VIOLATED LIMITED ENTRY ACT.

In a previous decision invalidating a cooperative fishery regulation, the Supreme Court held that the Limited Entry Act

required active participation in fishing by permit holders. A subsequently adopted emergency regulation permitting cooperative fisheries added a ten-delivery requirement for all participants in a cooperative fishery. The court invalidated the emergency regulation as exceeding the Board of Fisheries' authority under the Limited Entry Act by allowing permit holders to benefit from the work of others if the deliveries exceeded ten. The court also noted other problems with the regulation, including the failure to determine the optimum number of permits based on time spent fishing and investments in gear and vessels.

State of Alaska et al. v. Grunert et al., 139 P.3d 1226 (Alaska 2006)

Legislative review is recommended to clarify the authority of the Board of Fisheries to establish cooperative fisheries.

AS 18.66.100
AS 11.56.740

A PERSON DOES NOT COMMIT THE CRIME OF VIOLATING A DOMESTIC VIOLENCE PROTECTIVE ORDER MERELY BY BEING IN THE SAME PLACE AS ANOTHER PERSON.

Cynthia and Daniel were a married couple when Daniel was arrested for assaulting Cynthia. Cynthia obtained a long-term domestic violence protective order that prohibited Daniel from committing acts of domestic violence, stalking, or harassment against Cynthia. After the order was issued, Cynthia claimed that she saw Daniel at Gottschalks at the Dimond Mall in Anchorage, on two occasions at the Alaska Bar Association Annual Convention (both Cynthia and Daniel are attorneys), and on several other occasions. Daniel disputed seeing Cynthia on at least some of these occasions. Cynthia called the police after seeing Daniel at the bar convention the second time and Daniel was arrested for violating a protective order. The next day Cynthia moved to clarify the protective order and the court held that Daniel's attendance at the bar convention was not a violation of the protective order on its own. Several weeks later Cynthia filed for a new protective order and an ex parte order was initially granted by a different judge. After a hearing, the court vacated the ex parte order and refused to grant a long-term protective order, finding that Daniel had not committed a crime of domestic violence and that Daniel had not "contacted" Cynthia in violation of the existing protective order. Cynthia appealed, claiming that Daniel's conduct

amounted to stalking and that his conduct also amounted to "contacting" her in violation of the protective order and therefore the court should have issued a new protective order. The Alaska Supreme Court disagreed. The court agreed with the trial court that Daniel's conduct did not amount to stalking and that merely appearing in someone's line of sight, without more, is not "contacting" as that term is used in AS 18.66.100(c)(2).

Cooper v. Cooper, ___ P.3d ___ (Alaska 2006) (2006 WL 2789371)

The court's construction of the statute appears reasonable and in accord with the intent of the legislature. Review is not recommended.

AS 23.20.485
AS 11.46.130(a)(1)

PROSECUTION FOR MAKING FALSE STATEMENT TO OBTAIN UNEMPLOYMENT INSURANCE BENEFITS DOES NOT BAR PROSECUTION FOR THEFT OF BENEFITS.

Ornelas made false statements to obtain $12,152 in unemployment insurance benefits. Ornelas was charged with 23 counts of knowingly making a false statement to obtain unemployment insurance under AS 23.20.485 (a class B misdemeanor). In addition the state charged Ornelas with felony theft in the second degree. Ornelas argued that the state could not charge him with theft as the unemployment insurance statutes, specifically AS 23.20.485, constitute the sole remedy for wrongfully receiving unemployment insurance. The Alaska Court of Appeals disagreed, finding that the unemployment insurance statutes only criminalize knowingly making false statements to obtain unemployment benefits -- the statutes do not criminalize the actual receipt of those benefits and that the legislature had not intended that AS 23.20 would be the sole criminal remedy for unemployment insurance benefit theft. The court found that charging violations of the criminal code, in this case theft, is the proper method to prosecute the fraudulent obtaining of unemployment insurance benefits and that this is what the legislature intended.

Ornelas v. State, 129 P.3d 934 (Alaska App. 2006)

Legislative review is not recommended.

AS 23.30.215

DOMESTIC PARTNER NOT ENTITLED TO SURVIVOR BENEFITS UNDER THE WORKERS' COMPENSATION ACT.

The plaintiff lived with the deceased for four years as his unmarried intimate partner until he was killed in a work related accident. Since the Workers' Compensation Act authorized survivor benefits only for spouses, the board denied benefits and the plaintiff appealed on equal protection and privacy grounds. The Alaska Supreme Court upheld the denial of benefits, finding that denial of death benefits to the plaintiff did not substantially burden her freedom not to marry and that the marriage requirement was substantially related to the Act's goal of providing quick, efficient, fair, and predictable benefits to families of deceased workers at a reasonable cost to employers.

Ranney v. Whitewater Engineering et al., 122 P.3d 214 (Alaska 2005)

AS 25.23.050(a)
AS 25.23.120(c)

JUDICIAL REVIEW OF THE DECISION TO WITHHOLD CONSENT FOR ADOPTION BY A GUARDIAN OR CUSTODIAN IS A SEPARATE INQUIRY FROM WHETHER THE ADOPTION IS IN THE BEST INTEREST OF THE CHILD.

The State Office of Children's Services withheld consent for an adoption of two children by their foster parents who had been the subject of reports of harm involving the children. The trial court found that the adoptions were in the best interest of the children but did not expressly determine whether the office's decision to withhold consent was unreasonable. The Supreme Court held that in cases involving adoption petitions filed by a child's guardian or custodian, courts must make a two-step inquiry before deciding on the petition. The court must separately find first, by clear and convincing evidence, that the office's withheld consent, if any, was unreasonable and second, whether the adoption serves the best interest of the child.

In re Adoption of Missy M. and Cameron H., 133 P.3d 645 (Alaska 2006)

Legislative review is not recommended.

AS 25.23.140(b)

ONE YEAR STATUTE OF LIMITATIONS APPLIES TO ADOPTION CHALLENGES UNDER INDIAN CHILD WELFARE ACT.

Since the federal Indian Child Welfare Act (ICWA) did not include a statute of limitations that applied generally, the Alaska Supreme Court held for the first time that state law pertaining to adoption decree challenges applied and that adoption challenges under the ICWA are barred after one year.

In the Matter of the Adoption of Erin G., 140 P.3d 886 (Alaska 2006)

Legislative review is not recommended since the decision applies already codified public policy in favor of limiting challenges of adoption decrees to one year.

AS 25.24.140(b)

DURING THE PENDENCY OF A DIVORCE ACTION, A COURT MAY ORDER THE SALE OF PROPERTY UNDER A PRESERVATION OF ASSETS EXCEPTION BUT ONLY IN EXCEPTIONAL CIRCUMSTANCES.

A statute authorizing a protective order to preserve marital assets during divorce proceedings contains an exception referencing court orders of property sales. The Alaska Supreme Court interpreted the statute as implicit authority to order a sale of a home while a divorce was pending but limited the exercise of that authority to exceptional circumstances. In the case before it, involving a threatened foreclosure and subsequent sale agreement, the court held that exceptional circumstances did not exist and reversed the order permitting the sale.

Watega v. Watega et. al., 143 P.3d 658 (Alaska 2006)

Legislative review is recommended since the statutory authority relied upon by the court is not explicit and the exceptional circumstances standard is absent.

AS 25.30.500(a)

FULL REASONABLE ATTORNEY'S FEES MAY BE AWARDED TO THE PREVAILING PARTY IN A CHILD CUSTODY ENFORCEMENT ACTION.

The appellants lost a child custody enforcement dispute after

an adoption was lawfully revoked by the appellee. The Alaska Supreme Court upheld the award of full reasonable attorney's fees and costs under the Uniform Child Custody Jurisdiction and Enforcement Act rather than partial fees under Alaska Civil Rule 82.

Vazquez v. Campbell, ___ P.3d ___ (Alaska 2006) (2006 WL 2089385)

Legislative review is not recommended since the decision is consistent with state obligations under the Uniform Act.

AS 26.05.070
AS 01.10.060

ALASKA STATE DEFENSE FORCE AS STATE LAW ENFORCEMENT OFFICERS WHEN IN STATE ACTIVE SERVICE.

In response to a request from the Commissioner and Adjutant General of the Department of Military and Veterans' Affairs, the opinion considered whether the Alaska State Defense Force, also known as the Alaska State Defense Force 49th Military Police Brigade, is a "state law enforcement agency" and whether its personnel are "state law enforcement officers" for the purposes of providing assistance to the United States Coast Guard. The Governor called the defense force into active duty under the authority of AS 26.05.070 for the purpose of assisting the Coast Guard in enforcing security zones around high capacity passenger vessels (e.g. cruise ships and state ferries). The opinion concluded that the defense force was a "state law enforcement agency" and its personnel were "state law enforcement officers." However, the law enforcement authority of the defense force was limited by the terms and purpose of the activation order and the request for assistance by the Coast Guard.

2006 Informal Op. Att'y Gen. (March 30, 2006; File No. 661-06-0093).

Legislative review is not recommended.

AS 28.15.021(5)
AS 28.15.291(a)

EXEMPTION FROM LICENSING REQUIREMENT FOR OPERATION OF OFF-HIGHWAY VEHICLES ONLY APPLIES WHEN THOSE VEHICLES ARE BEING OPERATED OFF OF A HIGHWAY.

Stevens was observed driving a four-wheeled all-terrain

vehicle on a street. Stevens' driver's license had previously been revoked for drunk driving. Stevens was convicted of driving a motor vehicle on a highway when his license was revoked in violation of AS 28.15.291. Stevens contended that AS 28.15.291 does not prohibit a person from driving an all-terrain vehicle on a highway. In support, Stevens pointed to AS 28.15.021(5), which provides that a license is not required to operate an off-highway vehicle not designed for highway use. The Alaska Court of Appeals rejected Stevens argument, finding that the legislature only intended AS 28.15.021(5) to apply to the operation of an off-highway vehicle when the vehicle is operated off of a highway.

Stevens v. State, 135 P.3d 688 (Alaska App. 2006)

Legislative review is not recommended.

AS 28.35.030

DEFENDANTS AWAITING SENTENCING FOR CRIMES RECEIVE BENEFIT OF MORE LENIENT SENTENCES THAT TAKE EFFECT BEFORE THEY ARE SENTENCED BUT AFTER THEY HAVE BEEN CONVICTED.

Stafford and Castrey were convicted of drunk driving arising from separate incidents. Each had a prior drunk driving conviction that was more than 15 years old. The lifetime look-back for prior drunk driving convictions was in effect when each committed his offense and when each was convicted. While they were awaiting sentencing, the legislature reduced the look-back period for prior drunk driving convictions to 15 years. The trial court in each case sentenced the defendants under the new law as if each did not have a prior drunk driving conviction. The state sought review of the sentences and the Alaska Court of Appeals consolidated the appeals and found that the trial court had acted properly. The court reasoned that defendants are entitled to the benefits of more lenient sentencing laws that take effect after they are convicted but before they are sentenced unless the legislature intends a contrary result. The court found no evidence that the legislature intended a contrary result.

State v. Stafford, 129 P.3d 927 (Alaska App. 2006)

Legislative review is recommended so that the legislature may consider if it wants more lenient sentencing laws to apply to persons committing their crimes after the law takes effect,

persons convicted after the law takes effect, or persons who have not yet been sentenced.

AS 29.35.150
AS 29.71.800(14)

A STATUTORY REQUIREMENT THAT BOROUGH TAXES BE "AREAWIDE" NOT VIOLATED BY EXEMPTIONS.

Voters in the Fairbanks North Star Borough approved a referendum imposing a sales tax on alcoholic beverages with limited exemptions for alcoholic beverages sales already taxed by the cities of Fairbanks and North Pole. The relevant industry trade association argued that the exemptions violated statutory requirements for imposing "areawide" taxes and the court disagreed. The court reasoned that boroughs have broad exemption authority and the exemptions did not make the tax "not areawide" as defined in statute.

Interior Cabaret, Hotel, Restaurant and Retailers Assn. v. Fairbanks North Star Borough, 135 P.3d 1000 (Alaska 2006)

Legislative review is recommended.

AS 31.05.080(b)
AS 22.10.020(d)

SUPREME COURT IMPLIES REPEAL OF TRIAL *DE NOVO* PROVISION FOR OIL AND GAS LEASE APPEAL.

The Twenty-Third Alaska Legislature passed a general appellate provision making all administrative agency appeals to the superior court on the record unless the superior court grants a trial *de novo*. An inconsistent provision pertaining to oil and gas leases that pre-dated the Twenty-Third Legislature provided trials *de novo* for appeals. The Supreme Court looked to the purpose indicated by the legislature and any irreconcilable conflicts between the two statutes and found that the legislature implicitly repealed AS 31.05.080(b), which provided trials de novo for any oil and gas lease appeals.

Allen et al. v. Alaska Oil and Gas Conservation Commission et al., 139 P.3d 564 (Alaska 2006)

Legislative review is recommended to either expressly repeal AS 31.05.080(b) or to reconcile the two statutes.

AS 33.30.081

INTERPRETATION BY THE DEPARTMENT OF CORRECTIONS OF THE STATUTE REGARDING RELEASE TRANSPORTATION PAYMENTS IS CORRECT.

AS 33.30.081(b) provides that the commissioner of corrections "shall make available return transportation to the place of arrest for a prisoner" upon release from custody. AS 33.30.081(d) requires the commissioner to adopt regulations implementing this provision. The Department of Corrections interprets this provision to require transportation to the "community" nearest the exact location of the prisoner's arrest. Wilson was arrested at his home on Columbia Cove about 3.5 miles from Tenakee Springs (and connected by a footpath), subsequently convicted of assault in the second degree, and sentenced to a term of imprisonment. As his release date neared, Wilson requested that the department provide him transportation to his home on Columbia Cove. The department declined, stating that transportation would be provided to Tenakee Springs in keeping with policy. Wilson disagreed and appealed. The Alaska Supreme Court affirmed finding that the department's interpretation of the statute was "in line with 'reason, practicality, and common sense'" and achieved "the legislative purpose of getting 'the prisoner home' in a cost-effective manner." The court did identify a number of circumstances when the department's interpretation might not be reasonable but did not go into much detail as those circumstances were not presented by this case.

Wilson v. State, 127 P.3d 826 (Alaska 2006)

Legislative review is recommended to clarify what is meant by "return transportation to place of arrest" especially as it applies to those special circumstances identified by the Alaska Supreme Court.

AS 36.30.585

BID PROTESTER WAS NOT ENTITLED TO ALL BID PREPARATION COSTS BUT ONLY ACTUAL DAMAGES CAUSED BY BID IRREGULARITIES.

The University of Alaska issued an addendum to a bid solicitation on the day scheduled for opening bids and after the plaintiff submitted its bid. The University allowed the plaintiff to respond to the addendum but eventually rejected all bids as being over project funds. The plaintiff successfully protested

the bid irregularities but the remedy did not include full bid preparation costs as demanded. The Supreme Court for the first time interpreted the bid remedy statute to require proof of actual damages caused by bid irregularities rather than awarding all bid preparation costs.

Lakloey, Inc. v. University of Alaska, 141 P.3d 317 (Alaska 2006)

Legislative review is recommended to determine consistency with legislative intent involving remedies for bid irregularities.

AS 36.30.690

EXCLUSIVE REMEDY PROVISION IN STATE PROCUREMENT CODE DOES NOT BAR CLAIM AGAINST AN INDIVIDUAL STATE EMPLOYEE.

An unsuccessful bidder protested a contract award and won on the basis of an appearance of impropriety in the bidding procedures. The bidder later sued the state agency and the project manager employed by the agency under tort and contract theories. While the Alaska Supreme Court upheld summary judgment in favor of the state agency under the exclusive remedy provision of the Alaska State Procurement Code, the court declined to apply the exclusive remedy provision to bar claims against the individual employee.

J & S Services v. Tomter et al., 139 P.3d 544 (Alaska 2006)

Legislative review is recommended to determine whether the court's interpretation of the remedy provision is consistent with legislative intent.

AS 39.35.410(b), (g)
AS 39.35.680

RULE TERMINATING DISABILITY BENEFITS AT EARNINGS OF 75 PERCENT OF FORMER SALARY VIOLATES STATUTORY STANDARD OF "RECOVERY FROM DISABILITY" FOR PERS EMPLOYMENT PURPOSES.

A state employee was awarded occupational disability retirement benefits. Three years later, the benefits were terminated on the basis that the employee was earning outside income in an amount that was more than 75 percent of his former state salary and therefore he had "recovered from his disability." The Alaska Supreme Court held that the 75 percent rule was inconsistent with the statutory standard of

recovery that required a finding that the employee was capable of performing the duties of a "comparable position or job that an employer makes available." Since "employer" is defined by statute to mean a PERS employer and since the retirement system goal was one of maintaining benefits eligibility, not of protecting a worker's ability to earn a certain wage, the court overruled the Public Employees' Retirement Board and reversed the termination of disability retirement benefits.

State Public Employees' Retirement Board v. Morton, 123 P.3d 986 (Alaska 2005)

Legislative review is recommended to review policy assumptions made by the court and to clarify the statute.

AS 39.35.680(9)

PAYMENTS FOR UNUSED COMPENSATORY TIME IS NOT "COMPENSATION" FOR PURPOSES OF CALCULATING AN EMPLOYEE'S RETIREMENT BENEFIT.

The opinion addressed the issue of whether payments to petroleum inspectors employed by the Alaska Oil and Gas Conservation Commission for unused compensatory leave were "compensation" for purposes of the Public Employees' Retirement System. The inspectors and the commission had a compensatory leave agreement that entitles inspectors to compensatory time for all overtime worked in excess of 40 hours a week. The opinion concluded that the payments made for the inspector's time off duty were within the definition of compensation, but that payments for leave not used by the employee were specifically excluded from the definition of "compensation" in AS 39.35.680(9), as amended by sec. 67, ch. 137, SLA 1982.

2006 Informal Op. Att'y Gen. (March 21, 2006; File No. 661-06-0348).

Legislative review is not recommended.

AS 43.82.010
AS 43.82.020

EFFECT OF ARTICLE IX, SECTIONS 1 AND 4 OF THE ALASKA CONSTITUTION ON PROPOSED STRANDED GAS DEVELOPMENT ACT CONTRACT TERMS.

The opinion considered whether Art. IX, secs. 1 and 4 of the Alaska Constitution and the provisions of the Stranded Gas Development Act (AS 43.82) permit the state to enter into a long-term fiscal contract that replaces taxes on oil and gas production and transportation with specified payments in lieu of those taxes. The opinion anticipated that the payment-in-lieu-of-tax provisions would be in place for 30 years for oil and up to 45 years for gas. Although Art. IX, sec. 1 generally states that the power of taxation shall never be surrendered, suspended, or contracted away, the section ends with the phrase, "except as provided in this article." Section 4 of the article lists specific exemptions and further allows other exemptions "of like or different kind" to be granted by general law. The Attorney General opined that Art. IX, secs. 1 and 4 of Alaska's constitution, unlike the constitutions of many states, leaves the legislature with the authority to suspend or contract away the power to tax as part of its power to grant tax exemptions by general law. The conclusion of the opinion was that the powers of taxation set forth in the Alaska Constitution are alienable and that a fiscal contract providing for payments-in-lieu-of-taxes "will likely be enforceable by the parties to the contract."

2006 Informal Op. Att'y Gen. (May 10, 2006; File No. 661-03-0485).

Legislative review is recommended. Although the issue discussed in the opinion ultimately may be decided only in court, opinions issued by the Division of Legal and Research Services concluded that contracting away the power to tax as described in the informal opinion of the attorney general is more likely than not contrary to Art. IX, secs. 1 and 4 of the Alaska Constitution.

AS 43.82.435

CONSTITUTIONALITY OF REQUIRING THE GOVERNOR TO SUBMIT A FISCAL CONTRACT UNDER THE STRANDED GAS DEVELOPMENT ACT TO THE LEGISLATURE FOR AUTHORIZATION.

After discussing the principles of the "separation of powers"

doctrine, the attorney general stated his belief that "legislative approval of the [fiscal contract under the Stranded Gas Development Act] is constitutionally required because the contract changes taxes that would be paid by the [oil and gas] producers." The letter also related the governor's statement that the governor would follow the law and submit the fiscal contract to the legislature for approval.

Letter from David Marquez, Att'y Gen., to Hon. Lesil McGuire, Chair, House Judiciary Committee (July 24, 2006).

Legislative review is not recommended. However, a final resolution of the issue of the constitutionality of the legislative approval requirement may only be determined by the courts.

AS 44.03.010(2)
AS 44.03.030(1)

THE STATE OF ALASKA HAS JURISDICTION IN THE WATERS OFFSHORE OF THE STATE TO THE SAME EXTENT THAT THE UNITED STATES HAS JURISDICTION. THE STATE HAS JURISDICTION OVER A PERSON WHEN THE "EFFECTS" OF THE PERSON'S ACTIONS OR INACTIONS ARE FELT IN ALASKA.

Jack was accused of sexually assaulting a woman on board the state ferry Matanuska while in Canadian territorial waters on a voyage from Bellingham, Washington to Southeast Alaska. An Alaska State Trooper happened to be on board the Matanuska and investigated Jack's conduct and arrested Jack. Jack was later indicted in Ketchikan. The superior court dismissed the indictment finding that Alaska did not have jurisdiction over Jack's criminal acts as they occurred in Canadian territorial waters and the Alaska Court of Appeals affirmed. The Alaska Supreme Court reversed, finding that Alaska did have jurisdiction under AS 44.03.010 and 44.03.030.

AS 44.03.010. The court first found that AS 44.03.010 provides that the jurisdiction of the state extends to the high seas offshore of the coast of the state if the United States claims jurisdiction over those waters. The court found that the legislature intended that the jurisdictional statutes of the state be given a broad construction. The court further found that "high seas," while susceptible to different interpretations, includes all waters offshore of the state without limitation. The court finally concluded that the United States could exercise jurisdiction over the waters where Jack's alleged

crime occurred and therefore Alaska also had jurisdiction under this section given Alaska's substantial interest in the Marine Highway System.

AS 44.03.030. The court found that under AS 44.03.030(1) jurisdiction was also properly exercised in Alaska because the effects of Jack's offense were felt here and the state had a substantial interest in the exercise of jurisdiction. In support of this finding, the court found that the Alaska Marine Highway System is an important transportation link inside Alaska and with the other states and that Alaska's interests would suffer if people believed that crimes committed aboard system vessels could not be prosecuted. Also significant was the fact that it was unlikely that any other jurisdiction could or would exercise jurisdiction in this type of case.

State v. Jack, 125 P.3d 311 (Alaska 2005)

Legislative review is not recommended.

AS 47.12.100

DECISION WHETHER JUVENILE IS PROSECUTED FOR CRIMINAL ACTS IN ADULT COURT DOES NOT HAVE TO BE MADE BY JURY.

Juveniles who commit criminal acts are normally dealt with in juvenile court. AS 47.12.100 allows for the waiver of juvenile court jurisdiction over juveniles who commit certain serious criminal acts and the prosecution of those juveniles as an adult in the criminal court if the juvenile is not amenable to treatment as a juvenile. This decision is made by a judge not a jury. Kalmakoff was 15 when he killed his aunt and sexually assaulted her. The state filed a petition to waive juvenile jurisdiction so that Kalmakoff could be tried as an adult. The trial court found that the decision as to whether Kalmakoff was amenable to treatment had to be made by a jury not a judge and found that AS 47.12.100 was unconstitutional. The state appealed and the Alaska Court of Appeals reversed, finding that the procedure enacted by the legislature in AS 47.12.100 was both rational and constitutional.

State v. Kalmakoff, 122 P.3d 224 (Alaska App. 2005)

Legislative review is not recommended.

AS 47.45

COURT UPHOLDS VETO OF LONGEVITY BONUS APPROPRIATION.

The Supreme Court affirmed the authority of the legislature and the governor to change or eliminate an entitlement program even if a promise was made never to do so. The line item veto was a constitutionally valid exercise by the governor that had the effect of eliminating the longevity bonus program even if the legislature declined to repeal the statutory authority for the program and appropriated funds to the program.

Simpson et al. v. Murkowski et al., 129 P.3d 435 (Alaska 2006)

Legislative review is recommended since statutory authorization for the program still exists and the lack of funding of the program has caused some of the program's operative provisions to lapse.

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