STATE OF ALASKA

Legislative Affairs Agency

A

REPORT TO THE

TWENTY-EIGHTH 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
Legal Services
Division of Legal and Research Services
Legislative Affairs Agency
State Capitol
Juneau, Alaska 99801-1182

DECEMBER 2013

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

January 21, 2014

Updated Case Citations to the 2013 Oversight Report

Please note the following updated citations for cases summarized in the 2013 oversight report and the corresponding page of the report where the case is located:

Brown v. Knowles, 307 P.3d 915 (Alaska 2013). 2013 report pgs. 12-13.

Calais v. Ivy, 303 P.3d 410 (Alaska 2013). 2013 report pgs. 7-8.

George v. State and Price v. State, 307 P.3d 4 (Alaska 2013). 2013 report pgs. 18-19.

McDonnell v. State Farm, 299 P.3d 715 (Alaska 2013). 2013 report pg. 12.

Native Village of Tununak v. State of Alaska, 303 P.3d 431 (Alaska 2013). 2013 report pg. 22.

State v. Silvera; State v. Perez, 309 P.3d 1277 (Alaska 2013). 2013 report pg. 10.

Sullivan v. Resisting Environmental Destruction on Indigenous Lands (REDOIL), 311 P.3d 625 (Alaska 2013). 2013 report pgs. 19-20.

A REPORT TO THE TWENTY-EIGHTH STATE LEGISLATURE

Listing Alaska Statutes with Delayed Repeals, Delayed Enactments, 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The report lists Alaska Statutes that will be amended or repealed between February 28, 2014, and March 1, 2015, according to laws enacted before the 2014 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2012, and September 30, 2013,

and

Opinions of the Attorney General that were made available through Internet distribution between October 1, 2012, and September 30, 2013.

Prepared by
Legal Services
Division of Legal and Research Services
Legislative Affairs Agency
State Capitol
Juneau, Alaska 99801-1182

December 2013

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 or the common law of the state;
(3) the opinions, decisions, 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 review also covers formal and informal opinions of the Attorney General. 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 in this report.

This report also includes a list of Alaska Statutes that, absent any action by the 2013 Legislature, will be repealed or amended before March 1, 2014, because of repealers or amendments enacted by previous legislatures with delayed effective dates.

Reviews of state court decisions were prepared by Jean Mischel and Dennis Bailey, Legislative Counsel, and Jerry Luckhaupt, Assistant Revisor of Statutes. Don Bullock, Legislative Counsel, reviewed federal court decisions and opinions of the Attorney General. Lisa Kirsch, Assistant Revisor of Statutes, prepared the list of delayed repeals and amendments.

December 2013

TABLE OF CONTENTS

ANALYSIS OF COURT CASES

DELAYED REPEALS, ENACTMENTS OR AMENDMENTS

taking effect between February 28, 2014, and March 1, 2015, according to laws enacted before the 2014 legislative session

Laws enacted in 2004

ch. 70, SLA 2004, as amended by sec. 3, ch. 61, SLA 2009, sec. 1, ch. 48, SLA 2010, sec. 1, ch. 13, SLA 2011, and sec. 1, ch. 30, SLA 2012 -- Sport Fishing

AS 16.05.340(a)(26)	repealed effective January 1, 2015
AS 16.40.260	repealed effective January 1, 2015
AS 16.40.270	repealed effective January 1, 2015
AS 16.40.280	repealed effective January 1, 2015
AS 16.40.290	repealed effective January 1, 2015
AS 16.40.299	repealed effective January 1, 2015
AS 25.27.244(s)(2)(A)(xviii)	repealed effective January 1, 2015
AS 25.27.244(s)(2)(A)(xix)	repealed effective January 1, 2015

Laws enacted in 2007

ch. 40, SLA 2007 -- Citizens Advisory Commission on Federal Management Areas

AS 41.37.160	repealed effective June 30, 2014
AS 41.37.170	repealed effective June 30, 2014
AS 41.37.180	repealed effective June 30, 2014
AS 41.37.190	repealed effective June 30, 2014
AS 41.37.200	repealed effective June 30, 2014
AS 41.37.210	repealed effective June 30, 2014
AS 41.37.220	repealed effective June 30, 2014
AS 41.37.230	repealed effective June 30, 2014
AS 41.37.240	repealed effective June 30, 2014
AS 41.37.250	repealed effective June 30, 2014
AS 41.37.260	repealed effective June 30, 2014

Laws enacted in 2010

ch. 11, SLA 2010 -- Farm to School Program

AS 03.05.010(a)(7)	repealed effective July 1, 2014
AS 03.20.100	repealed effective July 1, 2014
AS 14.07.020(a)(18)	repealed effective July 1, 2014
AS 14.30.375	repealed effective July 1, 2014

ch. 58, SLA 2010 -- Revisor's Bill

AS 41.21.506(b)	amended contingent on repeal of AS 16.40.260 and 16.40.270 under ch. 70, SLA 2004 as amended, currently scheduled for January 1, 2015 (see ch. 70, SLA 2004, above)

ch. 83, SLA 2010 -- Emerging Energy Technology Fund
AS 42.45.375 repealed effective January 1, 2015

PLEASE NOTE: "Sunsets" of boards and commissions under AS 08.03.010 and AS 44.66.010 are not reflected in the list above. Also, the list does not include repeals of uncodified law, including sunset of advisory boards and task forces, and pilot projects of limited duration created in uncodified law.

ANALYSIS OF COURT CASES

ASSERTING A MENTAL ANGUISH CLAIM FOR EMPLOYMENT DISCRIMINATION DOES NOT AUTOMATICALLY WAIVE THE PHYSICIAN AND PSYCHOTHERAPIST PRIVILEGE.

Two Anchorage police officers brought claims against the city for racial discrimination that included claims for damages for mental anguish. The officers asserted the physician and psychotherapist privilege in response to the municipality's request for discovery concerning the nature of the mental health claims. The court found that under prior case precedent, damages for mental anguish claims are available for violations of the statute prohibiting racial discrimination. The existence of, and amount of, damages resulting from the discrimination may be established by the testimony of the claimant. The question of whether mental health records are protected by the privilege depends on whether the plaintiff puts a mental condition at issue. If so, the privilege may be waived. The court held that employment discrimination plaintiffs in a garden-variety case who allege mental anguish damages do not automatically waive the physician and psychotherapist privilege.

Kennedy v. Municipality of Anchorage, 305 P.3d 1284 (Alaska 2013).

Legislative review is not recommended unless the legislature wants to further define how the physician and psychotherapist privilege applies in an employment discrimination case.

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

NO UNREASONABLE SEARCH THROUGH BROKEN WINDOW BLIND.

A police officer followed the defendants to a multiunit apartment complex and walked along a common deck when he saw, through a broken but closed window blind, evidence of a crime. In a case of first impression, the Alaska Court of Appeals considered whether a warrantless search through a closed blind was reasonable. Because the officer was on a

walkway open to the public and was able to see through the broken blind by standing on the walkway, the Alaska Court of Appeals held that the search was lawful.

Martin v. State, 297 P.3d 896 (Alaska 2013).

Legislative review is not recommended.

Art. IV, sec. 11, Constitution of the State of Alaska
Alaska R. App. P. 106

JUDICIAL DECISIONS ENTITLED TO PRECEDENTIAL EFFECT.

The Alaska Supreme Court held in 2008, in a two-to-one decision, that applying the amendments to Alaska's Sex Offender Registration Act retroactively violated the ex post facto clause in art. I, sec. 15, Constitution of the State of Alaska. Two years later the court adopted Rule 106, Alaska Rules of Appellate Procedure, which provides that a two-to-one decision is not entitled to precedential effect. In the present case the court held that Appellate Rule 106 did not apply retroactively to cases decided before its adoption because the court did not expressly declare that it applied retroactively. In reaching the conclusion that Appellate Rule 106 did not apply retroactively, the court found that Rule 106 was substantive in nature and that (1) its two-to-one decisions made before Appellate Rule 106 was promulgated were relied on as binding precedent, so retroactively removing those decisions' precedential value eliminated rights they created; (2) changing the number of votes required to create binding precedent did not primarily concern the administration of justice but public policy; and (3) litigants could no longer depend on previously settled law.

State v. John Doe A and John Doe B, 297 P.3d 885 (Alaska 2013).

Legislative review is not recommended unless the legislature wants to consider limiting the precedential value of plurality decisions of the Supreme Court either by amending Appellate Rule 106 or by some other method.

Alaska R. Civ. P. 90.3

ADOPTION SUBSIDY AND EARNED INCOME TAX CREDIT NOT INCOME FOR PURPOSES OF CHILD SUPPORT.

Five years after a divorce, both parents sought modification of child custody and support agreements. The mother had adopted hard-to-place foster children after the divorce and received a state subsidy payment for them. She also qualified for an earned income tax credit on her federal tax return. In a case of first impression, the Alaska Supreme Court excluded both the adoption subsidy and the tax credit from the mother's income for purposes of calculating child support and declined to modify the support order. The court equated the adoption subsidy to child support received for other children. With respect to the tax credit, the court held that since the credit is based on the number of children and the income of the parent, the court considers it a means-based source of income, like a public assistance payment, that is not countable for calculating child support.

Martin v. Martin, 303 P.3d 421 (Alaska 2013).

Legislative review is not recommended unless the legislature disagrees with the court's decision to exclude from income adoption subsidies and needs-based tax credits when calculating child support .

Alaska R. Evid. 504

PRIVILEGE BETWEEN THERAPIST AND PATIENT INCLUDES INFORMATION GENERATED, NOT JUST COMMUNICATIONS.

In a sexual assault case involving a victim who was alleged to be an alcoholic and to suffer from mental illness, the trial court issued an order that required the victim to disclose all of her health care providers during the previous two decades, and to sign a release to turn all of her psychotherapy records over to the court. The Alaska Court of Appeals concluded that the order was premised on a mistakenly narrow interpretation of the psychotherapist-patient privilege and that information generated from the professional relationship, including diagnoses and test results, was confidential. The court also found that the order was inconsistent with Evidence Rule 504, which governs the circumstances in which a court has the authority to order disclosure of privileged psychotherapy records. Further, the defendant's offer of proof was

insufficient to justify an *in camera* examination of the victim's privileged psychotherapy records. The court concluded, in a case of first impression, that a court may not override a witness's assertion of the psychotherapist-patient privilege in a criminal case and order disclosure of privileged information on the court's general assessment that the defendant's interest in disclosure is more important than the witness's interest in maintaining confidentiality.

N.G. v. Superior Court, 291 P.3d 328 (Alaska 2012).

Legislative review is not recommended unless the legislature wishes to place general limits on the confidentiality of health information or on a victim's assertion of the psychotherapist-patient privilege or to otherwise broaden a court's authority to review confidential mental health records.

AS 09.10.240

STATUTE OF LIMITATIONS AND SAVINGS STATUTE DO NOT REQUIRE NOTICE OF INITIAL COMPLAINT.

A creditor filed a cause of action that was dismissed for lack of service. Nearly a year later, the creditor filed a second complaint against the same parties. The statute of limitations and savings statute provide that if an action is commenced within the designated time period for filing a new action and is dismissed or appealed after the time limit for filing a new action, the plaintiff may commence a new action within one year after the dismissal or reversal on appeal. The question presented was whether the defendant must be given timely notice of the initial complaint before the savings statute applies. The court held that the notice of the initial action is not required.

American Marine Corp. v. Sholin, 295 P.3d 924 (Alaska 2013).

Legislative review is not recommended unless the legislature wants to require notice of the initial filing before the savings statute applies.

AS 09.45.730

RESTORATION DAMAGES MUST BE OBJECTIVELY REASONABLE.

A landowner brought suit for restoration damages against a neighbor who cleared trees from the landowner's property without his permission. The jury awarded the landowner $161,000 in compensatory restoration damages. The jury also found that the landowner was entitled to statutory treble damages. Evidence showed that the value of the property was $40,000 and would have been minimally affected, if at all, by the removal of the trees. The person who cleared the trees appealed, arguing that the damage award was manifestly unreasonable as a matter of law. The court addressed the reasonableness of restoration costs that exceed the diminution in the market value of the plaintiff's property and reviewed existing cases that address the issue. The court noted the rule that restoration costs exceeding diminished market value may be awarded only if the costs are objectively reasonable in light of the personal reasons for restoration and in light of the diminished value. The court concluded that no reasonable juror would award restoration costs totaling more than four times the value of the property before the trees were cleared and remanded the case for a new trial on damages.

Wiersum v. Harder, ___ P.3d ___ (Alaska 2013), 2013 WL 4500328.

Legislative review is not recommended unless the legislature wants to clarify whether restoration damages should be limited to the market value of a property.

AS 10.06.630(a)

FAIR VALUE UNDER THE CORPORATE LIQUIDATION STATUTE MEANS THE LIQUIDATION VALUE, NOT NECESSARILY THE FAIR MARKET VALUE OF THE CORPORATION.

After a corporate shareholder sought involuntary dissolution of a corporation, the parties' settlement agreement provided that the corporation would buy the shareholders' shares for fair value, as determined by a three-member panel of appraisers. The appraisers were to use appraisal methods set out in the agreement and determine the fair value of the corporation according to a method described by statute. The agreement provided that the value of the corporation need only be reached by two of the three appraisers, and provided that a superior

court judge could assist to resolve any dispute. The appraisers disagreed over the fair value of the corporation and the methods used to determine the value.

The Alaska Supreme Court ruled that the appraisers' definition of "fair value" violated the agreement. The court concluded that the meaning of "fair value" under the corporate dissolution statutes means the liquidation value, not necessarily the fair market value, and remanded the case to the superior court with instructions describing the method for appraisal.

Calais v. Ivy, ___ P.3d ___ (Alaska 2013), 2013 WL 2367884.

Legislative review is not recommended.

AS 11.56.310(a)(1)(B)
AS 11.81.900(b)(40)

TRANSPORTATION OF A PAROLEE TO PRIVATE CENTER IS NOT DETENTION FOR PURPOSES OF ESCAPE IN THE SECOND DEGREE.

An appellant was released on parole conditions that required him to reside at a private community residential center. While being transported to the community residential center in a police van, the appellant opened the van door, left the van, and then left the area. He was convicted of both a parole violation and a charge of escape in the second degree. "Escape in the second degree" is defined as removing oneself from official detention for a felony without lawful authority. "Official detention" is defined as custody, arrest, surrender in lieu of arrest, or actual or constructive restraint under an order of a court in a criminal or juvenile proceeding, other than an order of conditional bail release. The Alaska Supreme Court found that the appellant was not in official detention while in the van. The court therefore vacated the escape conviction.

Williams v. State 301 P.3d 196 (Alaska 2013).

Legislative review is recommended to determine whether the statute should be amended to clarify the meaning of "official detention."

AS 11.61.190(a)(2)

MENTAL STATE FOR WEAPONS MISCONDUCT IN THE FIRST DEGREE INTERPRETED TO BE RECKLESSNESS.

Misconduct involving weapons in the first degree is defined in AS 11.61.190(a)(2) as "discharg[ing] a firearm from a propelled vehicle while the vehicle is being operated and under circumstances manifesting substantial and unjustifiable risk of physical injury to a person or damage to property." This statute does not specify any mental element, but the phrase "substantial and unjustifiable risk" is used in the separate statutory definitions of both "recklessly" and "with criminal negligence." However, under AS 11.81.610(b), "if a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to (1) conduct is 'knowingly'; and (2) a circumstance or a result is 'recklessly.'" Lacking clear legislative intent to the contrary, the court applied the mental state of recklessness to the circumstance and rejected criminal negligence as the required mental state.

Hutton v. State, 305 P.3d 364 (Alaska 2013).

Legislative review is recommended to determine whether applying a "reckless" mental state to misconduct involving weapons in the first degree is consistent with the intent of the legislature.

AS 12.55.125
AS 12.55.165(a)

DEVIATION FROM PRESUMPTIVE SENTENCING RANGE BY REFERRAL TO A THREE-JUDGE PANEL EXPANDED.

A 20-year-old defendant was sentenced to 20 years for a first time sexual offense involving his girlfriend's sister, who asked for leniency in sentencing. The defendant had no prior history of unprosecuted sexual offenses and no significant criminal or juvenile history, but he did not qualify for a mitigating factor under the 2006 enhanced penalties for sexual offenses. The court reviewed the legislative history and policy assumptions underlying the enhanced penalties and found that the assumption that typical sex offenders are repeat offenders with very poor prospects for rehabilitation may not have applied to the defendant because he was young when he committed the offense, had no juvenile record, and only had a limited adult record. The court therefore expanded the opportunity for a

referral to a three-judge panel outside that of the statutory guidelines if the defendant shows, by clear and convincing evidence, that the legislature's assumptions did not apply to him because the defendant (1) has no history of unprosecuted sex offenses, or (2) has good prospects for rehabilitation.

Collins v. State, 287 P.3d 791 (Alaska 2012).

Legislative review is recommended to determine whether the expansion of a three-judge panel review of presumptive sentencing ranges in the circumstances described is consistent with legislative intent.

AS 12.55.165(a)
AS 12.55.175(b)

PRESUMPTIVE SENTENCING RANGE MAY BE MODIFIED FOR "HARSH COLLATERAL CONSEQUENCE" OF DEPORTATION.

Two defendants, in a consolidated appeal, faced a risk of deportation from the imposition of a sentence of one year or more for first time felony convictions. Both defendants had resided in the country for most of their lives and one defendant had served honorably in the United States military for six years. The Alaska Court of Appeals held that a substantial risk of deportation from the imposition of a sentence of one year or more was a "harsh collateral consequence" that could be considered as a mitigating factor by a three-judge panel to reduce a sentence below the presumptive range of one year. The court expressly rejected the state's claim that federal and state law prohibit the three-judge sentencing panel from considering deportation as a harsh collateral consequence.

State v. Silvera; State v. Perez, ___P.3d___ (Alaska 2013).

Legislative review is recommended to determine whether the court correctly interpreted the authority of the three-judge sentencing panel to consider deportation in finding manifest injustice from imposing a presumptive sentence.

AS 12.63.020(a)(1)(B)

SEX OFFENDER REGISTRATION REQUIRED FOR TWO OR MORE OFFENSES, NOT CASES.

In consolidated proceedings, the issue was raised whether the Alaska Sex Offender Registration Act, requiring a person convicted of two or more sex offenses to register as a sex offender for life, mandated that the two offenses arise out of

separate proceedings or whether the two offenses could occur in a single proceeding. Both defendants had been convicted of two or more sex offenses in one proceeding. The Supreme Court found that the statute was unambiguous and only required convictions on two sex offenses, regardless of whether they arose from a single criminal episode or from separate proceedings.

Ward v. State and State v. Boles, 288 P.3d 94 (Alaska 2012).

Legislative review is not recommended.

AS 13.12.502
AS 13.12.507(a)(2)

THE EXISTENCE OF A LOST WILL MUST BE PROVED BY CLEAR AND CONVINCING EVIDENCE.

Three daughters disputed the administration of their mother's estate. The dispute involved a will that was revoked by a subsequent revised will that was alleged to be accurate but was unsigned. The superior court concluded that the unsigned will was not valid and the estate must be administered under the statutory intestacy laws.

The Alaska Supreme Court found that it had never addressed the standard of proof required to prove the execution or contents of a lost will. The court concluded that a lost will must be proved by clear and convincing evidence, and remanded the case to the superior court to determine whether the clear and convincing standard had been met. Further, the Alaska Supreme Court noted that under the common law there is a rebuttable presumption that, when a will can be traced to the testator but cannot be found, the law presumes that the testator destroyed or revoked the will. The court remanded for a determination of whether the evidence presented at trial overcame the presumption.

Dan v. Dan, 288 P.3d 480 (Alaska 2012).

Legislative review is not recommended unless the legislature wishes to codify the holding of the court or wishes to create another standard for proof of a lost will or modify the presumption that a missing will has been destroyed or revoked.

AS 21.96.035

MANDATORY APPRAISAL STATUTE DOES NOT APPLY TO PERSONAL INJURY CLAIMS.

Following a car accident with an uninsured motorist, the plaintiff filed suit against her insurer claiming, in part, that she was entitled to have her personal injury claims settled by appraisal under the mandatory appraisal statute. The mandatory appraisal statute requires a motor vehicle policy to include an appraisal clause providing a contractual means to resolve a dispute between the insured and the insurer over the value of the covered first party loss for real, personal, business, or similar risks. The plaintiff argued that her personal injury claim is a type of personal property, a chose in action that is covered by the statute. The Alaska Supreme Court acknowledged that it had previously held that a chose in action is a form of property. However, the court held that, under the plain language of the statute, the legislature did not intend "personal property" to include all choses in action. The court concluded that the mandatory appraisal procedure only applies to disputes over the value of tangible property claims.

McDonnell v. State Farm, ___ P.3d ___ (Alaska 2013), 2013 WL 1786567.

Legislative review is not recommended unless the legislature wishes to make choses in action subject to appraisal under the mandatory appraisal statute.

AS 23.05.140

BANKRUPTCY DISCHARGE OF CORPORATION'S LIABILITY DOES NOT PREVENT STATE COURT FROM ESTABLISHING CORPORATE INDEBTEDNESS FOR THE PURPOSE OF HOLDING THE PRESIDENT LIABLE.

An unpaid employee of a closely-held corporation sued the corporation and its president for back wages. The corporation filed for bankruptcy and the bankruptcy court discharged the corporation's debts. The superior court dismissed the corporation but allowed trial against the president of the corporation based on the theory of piercing the corporate veil. The Alaska Supreme Court held that the plaintiff did not allege injury to the corporation, so the corporation could not have brought the plaintiff's claim against the president. Therefore, the plaintiffs veil-piercing claim did not become property of the bankruptcy estate and the discharge did not prevent the

superior court from establishing the corporation's liability for the sole purpose of holding the president liable. The Alaska Supreme Court also affirmed the superior court holding that the corporation was the mere instrumentality of the president and affirmed the superior court decision to pierce the corporate veil.

Brown v. Knowles, ___ P.3d ___ (Alaska 2013), 2013 WL 4399131.

Legislative review is not recommended.

AS 23.30.125(c)

A WORKERS' COMPENSATION STAY ON APPEAL APPLIES TO FUTURE MEDICAL BENEFITS.

Two cases were consolidated on appeal to address the issue of whether a stay on appeal applies to future medical benefits and what an appellant must show to obtain a stay during appeal. The Alaska Supreme Court found that the statutory phrase "continuing future periodic compensation payments" was ambiguous, as applied to a stay on appeal for future medical payments. The court interpreted the phrase to include future medical benefits. As with other compensation, to stay future medical benefits, the employer must show probable success on the merits. The court also held that a balance of the hardship test applies to the probable success test when the appellant files an appeal. If the stay involves ongoing benefits that an injured worker would use as a salary substitute, then the balance of hardships tips in favor of the injured worker. If the issue involves a lump sum, the balance of hardships favors the employer.

Municipality Of Anchorage v. Adamson, 301 P.3d 569 (Alaska 2013).

Legislative review is not recommended unless the legislature wishes to exclude future medical benefits from the benefits stayed during appeal.

AS 23.30.250

"KNOWINGLY" FOR PURPOSES OF WORKERS' COMPENSATION FRAUD CLAIMS REQUIRES SUBJECTIVE INTENT TO DEFRAUD.

An employer obtained surveillance videos of an employee who was receiving workers' compensation benefits that showed the

employee's activities at an herb store owned by her boyfriend. The employer filed a petition with the Workers' Compensation Board alleging that the employee had fraudulently misrepresented her employment status for the purpose of obtaining benefits and sought reimbursement of past benefits, costs, and attorney's fees. The board found credible the employee's testimony that she did not consider her activities to be work that needed to be reported.

On appeal, the Alaska Workers' Compensation Appeals Commission found that the board erred in its determination that the employee had not knowingly misrepresented her work status, but affirmed the ruling in favor of the employee on other grounds. On further appeal, the Alaska Supreme Court held that the commission erred in its determination of the "knowingly" element of the test for fraud and affirmed the commission's decision in favor of the employee based on the board's binding credibility determination that the employee's statements were not knowingly false, and therefore not knowingly fraudulent. The Alaska Supreme Court concluded that "knowingly" for purposes of the workers' compensation statute prohibiting the making of false or misleading statements for the purpose of obtaining benefits requires a finding that the employee had the subjective intent to defraud.

Arctec Services v. Cummings, 295 P.3d 916 (Alaska 2013).

Legislative review is not recommended unless the legislature wants to change the definition of "knowingly" for purposes of the workers' compensation fraud statute.

AS 25.20.095(a)
AS 25.24.150(c)

TEMPORARY DEPLOYMENT INTERPRETED FOR CHILD CUSTODY PURPOSES.

AS 25.20.095(a), effective June 2010, requires that a court, in determining the availability of a parent for custody or visitation of a child, take particular care to ensure that the child has the maximum opportunity, consistent with the best interests of the child, to have contact with the parent if the parent is deployed or in a position where the parent may be deployed. However, the statute explicitly excludes military duty, mobilization, or deployment as a consideration only when it is "temporary" and when it causes only a "temporary disruption" to the child. The Alaska Supreme Court found that common definitions of "temporary" include "lasting for a time only"; "existing or continuing for a limited time";

"impermanent, transitory." Interpreting the exclusion of temporary military duty for custody determinations, the court held that regular, four-month annual deployments were not "temporary" and should be considered in a custody decision.

Rosenblum v. Perales, 303 P.3d 500 (Alaska 2013).

Legislative review is not recommended unless the legislature wishes to limit the meaning of "temporary deployment" and "temporary disruption" for child custody decisions by a court.

AS 25.24.150(c)

IN CAMERA INTERVIEW OF CHILD FOR CUSTODY PURPOSES DOES NOT VIOLATE PARENTS' DUE PROCESS RIGHTS.

The parents of three children between the ages of 12 and 16 disagreed about custody of the children and the father asked the court to interview the children before trial. The mother objected to judicial interviews and asked for a custody investigator. The court noted the statutory requirement to consider the children's preference and the exigencies of time, and conducted private *in camera* interviews of each child. After the interviews, the court summarized them for the parents, including each child's custody preference. The mother appealed the custody ruling and argued that the court violated her right to due process by not providing her with the evidence used against her when it conducted and summarized the interviews. In a case of first impression, the Alaska Supreme Court held that courts have discretion to interview children *in camera* and that the conduct of the interviews, including the availability of a summary of the interviews, did not violate the mother's due process rights. The court weighed the parents' due process rights against the privacy rights and best interests of the children in making the decision.

Helen S. K. v. Samuel M. K., 288 P.3d 463 (Alaska 2012).

The decision seems reasonable as the trial court must balance competing constitutional interests and evaluate the facts of each case to determine whether constitutional rights are protected. Legislative review is not recommended unless the legislature wishes to restrict the use of private *in camera* interviews by the court of children during custody determinations.

AS 25.24.150(c)
AS 25.24.150(g)

PRESUMPTION AGAINST CUSTODY OF CHILD WITH PARENT WHO COMMITS DOMESTIC VIOLENCE MODIFIED.

Both parents were found to have committed two acts of domestic violence during the marriage and neither parent was found to be less likely than the other to perpetrate domestic violence in the future. The Alaska Supreme Court upheld the trial court's refusal to modify an award of sole custody to the mother, based on the children's preferences. The Supreme Court found that the trial court did not abuse its discretion when the court elected not to apply the presumption against an award of custody to a parent who perpetrates domestic violence and instead weighed the best interest factors in making the custody determination. The Supreme Court held that if domestic violence has been committed by both parents, a trial court must measure the amount and extent of domestic violence inflicted by both parents. If the trial court finds that the amount and extent of the violence inflicted by one parent is roughly proportional to the violence inflicted by the other parent, and both parents are otherwise found to be fit parents, the presumption against awarding custody to either perpetrating parent ceases to exist. In such a case, the trial court is not bound by any presumption, but may consider the remaining customary best-interest factors in making its custody decision.

Mallory D. v. Malcolm D., 290 P.3d 1194 (2012).

Legislative review is recommended to determine whether the court's disregard of the statutory presumption under the facts presented is consistent with the legislature's intent.

AS 25.24.160(a)(4)

MARITAL PROPERTY DIVISION NOT BARRED BY STATUTE OF LIMITATIONS.

18 years after a divorce, a woman filed a motion seeking a post-decree equitable division of property citing AS 25.24.160(a), which allows a court to divide property between the parties "[i]n a judgment in an action for divorce or action declaring a marriage void *or at any time after judgment.*" The man opposed on the grounds of statute of limitations, laches, and estoppel. The superior court ordered a division of the parties' marital assets, including the parties' retirement benefits, starting with the date of the filing of the

motion, because no statute placed a limit on the time during which a motion could be filed. The Alaska Supreme Court upheld the decision not to bar the property division on the grounds of the statute of limitations because the bar applied only to a new action, not subsequent adjudication of an unresolved issue arising from the original dissolution proceeding. However, laches provided an equitable defense arising from one party's unreasonable delay that prejudices another party to prevent a retroactive division of property. The court based the division on the date of the hearing, not the filing of the motion.

Schaub v. Schaub, 305 P.3d 337 (Alaska 2013).

Legislative review is recommended to determine whether a time limit or a statute of limitations should be applied to post-divorce dissolution of property, absent fraud, or other reasons for delay.

AS 28.15.181

LIFETIME REVOCATION OF DRIVER'S LICENSE NOT LIMITED TO "CHRONIC OFFENDERS."

The defendant pled no contest to manslaughter, assault in the third degree, and failure to render assistance for driving while intoxicated and hitting a boy, nearly hitting his brother, and leaving the scene of an accident. The defendant also attempted to bribe a witness to the accident who followed him. The defendant had no prior history of driving violations. As part of his sentence, the court revoked his driver's license for life. Although AS 28.15.181 establishes certain minimum periods of revocation of a driver's license, including a 30-day period for a first offense, it does not set upper limits. In these circumstances, the Alaska Supreme Court established a standard for lifetime revocation for extreme cases when it is required to protect the public. The court held that a finding of chronic offender status before lifetime revocation is not necessary.

Bottcher v. State, 300 P.3d 528 (Alaska 2013).

Legislative review is recommended if the legislature disagrees with the court's decision that lifetime revocation should be imposed only in extreme cases when necessary to protect the public, and without finding that the person is a chronic offender.

AS 29.35.050
AS 29.35.210

BOROUGH DOES NOT HAVE AUTHORITY TO CREATE A LIEN TO SECURE PAYMENT FOR GARBAGE SERVICES.

A property owner's contractor incurred substantial garbage collection fees during the tear down of a fire-damaged house. Following unsuccessful attempts to collect garbage collection fees, the borough filed a lien on the real property. The purchaser of the property filed a cause of action asserting that the lien was invalid and sought damages for wrongful recording of a nonconsensual common law lien. Although the borough code provided for a lien against the property and foreclosure, the Alaska Statutes granting the borough garbage-services authority did not authorize a lien against the property to collect the fees. The court held that the authority to file a lien was not authorized by the legislature and may not be implied, but must be expressly authorized by the legislature.

Cutler v. Kodiak Island Borough, 290 P.3d 415 (Alaska 2012).

Legislative review is recommended if the legislature intends to allow municipalities to file real property liens as a method to collect garbage service fees.

AS 33.20.010

PROBATIONER NOT ENTITLED TO GOOD TIME CREDIT FOR HALFWAY HOUSE RESIDENCY.

In consolidated appeals, two defendants were convicted of probation violations after spending some time at a halfway house as a condition of probation. While the defendants received day-for-day credit against their sentences for the time at the halfway house, the trial court refused to provide good time credit even though a parolee can qualify for good time credit for time spent at a halfway house. AS 33.20.010 provides that a prisoner "is entitled to a deduction of one-third of the term of imprisonment . . . if the prisoner follows the rules of the correctional facility in which the prisoner is confined." By its terms, the statute applies only to prisoners who are serving sentences in correctional facilities. The Alaska Court of Appeals distinguished parolees from probationers because probation is "an act of grace and clemency" intended as a more lenient alternative to imposition of the statutory penalty for the defendant's crime. In contrast, mandatory parole is an established variation on imprisonment. For that reason, the court found that a prisoner released on

mandatory parole is still technically a prisoner serving a sentence of imprisonment and is therefore covered by the good time statute. Acknowledging the differential treatment of a parolee and probationer, the court reasoned that the results of this distinction are not arbitrary when viewed from a policy perspective. The legislative purpose of the good time statute is to provide prisoners with an incentive to remain on good behavior. Defendants on probation have a different incentive for good behavior — if they violate the conditions of their probation, the court can revoke their probation and require them to serve the remainder of their sentence.

George v. State and Price v. State, __ P.3d __ (Alaska 2013).

Legislative review is only recommended if the legislature determines that probationers should be entitled to good time reductions for time served in halfway houses.

AS 38.05.035
Art. III, Constitution of the State of Alaska

BEST INTEREST FINDING IS NOT REQUIRED AT EACH PHASE OF AN OIL AND GAS PROJECT BUT THE STATE MUST CONSIDER THE CUMULATIVE IMPACTS OF A PROJECT THROUGHOUT THE COURSE OF A PROJECT.

A best interest finding by the Department of Natural Resources (DNR) relating to an oil and gas lease sale used a phased review process. The best interest finding focused on the lease sale phase and addressed future phases of exploration, development, production, and transport in general terms. DNR claimed that (1) the statutory criteria for phasing had been met; (2) the constitutionality of phasing is beyond the scope of a best interest finding; and (3) a best interest process is not statutorily required for post-lease phases. The plaintiffs alleged that the review was inadequate and DNR had violated art. VIII of the Constitution of the State of Alaska by failing to fully analyze the impacts of oil and gas activities. At issue was the 2001 legislative amendment that only required DNR to prepare a single public interest finding when approving an oil lease contract. The plaintiffs argued that DNR had a constitutional duty to find that the leases were in the public's best interest, and was constitutionally required to make a best interest finding at each phase of the process.

The Alaska Supreme Court affirmed the constitutionality of the legislative changes to the statute, which only require a single best interest finding at the lease sale phase of

development and do not require DNR to speculate about possible future effects. However, the court also held that the state is constitutionally required to consider these potential impacts "in the future, at each subsequent phase, as more information becomes known, and particularly as DNR decides whether to issue permits for future activities."

Sullivan v. Resisting Environmental Destruction on Indigenous Lands (REDOIL), ___ P.3d ___ (Alaska 2013), 2013 WL 1281786.

Legislative review is not recommended.

AS 38.35.140(a)

DEPARTMENT OF NATURAL RESOURCES INTERPRETATION OF FAIR MARKET VALUE OF LEASEHOLD UPHELD.

The Department of Natural Resources (DNR) appraised a leasehold interest for the Trans Alaska Pipeline (TAPS) at 100 percent value without a reduction for rights granted and retained under the lease. The Alaska Supreme Court upheld DNR's interpretation of AS 38.35.140(a), as the basis for calculating the lease price for the TAPS to be the fair market rental value of the state's interest in the land included in the right-of-way, not the leasehold interest granted to the lessee. In addition, since AS 38.35.120(a)(12) protected the right-of-way from third-party interference, there was no indication that third-party interests had affected the value. The court further held that DNR's interpretation was not a regulation as defined in AS 44.62.640(a)(3), and thus was not subject to the notice and public comment provisions of the Administrative Procedure Act, AS 44.62.010 - 44.62.950.

Alyeska Pipeline Service Co. v. State of Alaska, 288 P.3d 736 (Alaska 2012).

Legislative review is not recommended unless the legislature disagrees with the court's interpretation of fair market value for leasehold interests of state lands.

AS 40.21
AS 40.25

A PUBLIC RECORD IS AN AGENCY RECORD THAT IS PRESERVED OR APPROPRIATE FOR PRESERVATION. THE DUTY TO PRESERVE E-MAILS BOTH ON OFFICIAL ACCOUNTS AND ON PRIVATE ACCOUNTS IS NOT EXTINGUISHED BY A PUBLIC OFFICIAL'S DECISION NOT TO PRESERVE THE E-MAILS, AND THE USE OF PRIVATE E-MAIL ACCOUNTS IS NOT A PER SE VIOLATION OF THE PUBLIC RECORDS ACT.

The governor and employees of the Office of the Governor used personal e-mail accounts to conduct state business. The plaintiff made a public records request that included a request for e-mails to and from the governor and her husband related to the conduct of official state business and records relating to the collection and preservation of public records by the governor's office. The plaintiff also sought declaratory relief and an injunction requiring the governor's office to comply with the Records Management Act.

The court held that public records are those records that are preserved or that should be preserved for their informational value or as evidence of the organization or operation of a public agency. The court noted that text of the Public Records Act suggests that the legislature intended "preservation" as a step for a document to become a public record. Further, the court held that use of a private e-mail account to conduct state business is not a per se violation of the proscription against obstructing public records inspection. The court commented, however, that the decision had narrow application and did not address questions that might arise if an employee used a private e-mail account to conduct business outside of the state's record preservation system and deliberately failed to appropriately preserve an e-mail.

McLeod v. Parnell, 286 P.3d 509 (Alaska 2012).

Legislative review is recommended if the legislature wishes to further clarify the means to determine which private e-mails are public records or when state business may be conducted using private e-mail accounts.

AS 47.14.100(e)
Appellate Rule 11(f)
24 U.S.C. sec. 1915(b)

CLEAR AND CONVINCING EVIDENCE OF GOOD CAUSE IS REQUIRED TO DEVIATE FROM THE INDIAN CHILD WELFARE ACT PLACEMENT PREFERENCES.

The Alaska Supreme Court considered the standard of proof required to deviate from adoptive placement preferences for Native children under the Indian Child Welfare Act (ICWA), 25 U.S.C. 1915(a). The ICWA established standards of proof for some determinations but does not specify a standard of proof for establishing good cause to deviate from adoptive or foster placement preferences. State law and a court rule apply different standards of proof for good cause determinations, depending on whether the placement is for foster care or adoption, regardless of the heritage of the child. AS 47.14.100(e) requires foster placement of a child in need of aid with a family member unless there is evidence to deviate from the requirement that meets the clear and convincing standard of proof. Adoption Rule 11 uses a lower standard of proof, the preponderance of the evidence standard, as the test for deviating from ICWA placement preferences in an adoption. In the case under consideration, an Alaska Native child was placed by consent with a non-Native family for foster care so that the child could remain near the mother. When the mother relinquished her parental rights, the tribe objected to the subsequent adoption by a non-Native family. The Alaska Supreme Court concluded that the clear and convincing evidence standard applies to good cause determinations under ICWA and that there was insufficient evidence under that standard to deviate from the ICWA preferences. The Court remanded the case for further review.

Native Village of Tununak v. State of Alaska, __P.3d__ (Alaska 2013).

Legislative review is recommended to clarify the standard of proof that should apply to adoptions, foster care placement, or when deviating from the ICWA preferences.

AS 47.24.120(a)
AS 47.32.160(a)

QUALIFIED IMMUNITY OF MANDATORY REPORTER QUESTIONED.

The owner of an assisted living home sued the state, a state employee, and a care coordinator for a report and investigation of harm at her facility. The investigation was ultimately

dismissed administratively because of the timing and a lapse of the facility license. The owner's subsequent complaint for damages against both the state and its employee were dismissed by the court on the basis of the broad immunity provided by the legislature under AS 47.32.160(a) for "an act or omission" in the licensure process. However, because the case was on appeal from a grant of summary judgment, the Alaska Supreme Court remanded the case for a trial involving the actions of the care coordinator who filed the original report of harm, who was not a state employee, and who was protected by qualified, not complete, immunity by law. The court noted, with some concern, the lesser immunity provided under AS 47.24.120(a) to mandatory reporters that required good faith. Since the plaintiff raised the issue of good faith in filing the report of harm, summary judgment could not be upheld in favor of the mandatory reporter. Both the dissenting and concurring opinions of the court questioned the policy of providing only qualified immunity to a mandatory reporter since that may put the reporter in a Catch-22 of being liable for choosing not to report and also being liable for choosing to report and thereby incur the costs associated with a trial. This Catch-22 may restrict, rather than fulfill, the legislative policy of encouraging, the filing of reports of harm.

Mary Hill, dba Wild Rose Garden v. Giani, et. al., 296 P.3d 14 (Alaska 2013).

Legislative review is recommended to determine whether qualified immunity for mandatory reporters fulfills legislative policy of encouraging reports of harm.

SUBJECT INDEX FOR COURT CASES

INDEX BY ALASKA STATUTE REFERENCES IN CASES ANALYZED

INDEX OF CASES ANALYZED

Cases