



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
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State Capitol
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A REPORT TO THE
TWENTY-EIGHTH STATE LEGISLATURE

Listing Alaska Statutes with Delayed Repeals,
Delayed Enactments, or Delayed Amendments
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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The report lists Alaska Statutes that will be amended or repealed between February 28, 2013, and March 1, 2014, according to laws enacted before the 2013 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2011, and September 30, 2012,

and

Opinions of the Attorney General
that were made available through Internet distribution between
October 1, 2011, and September 30, 2012.

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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 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.

January 2013

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**DELAYED REPEALS, ENACTMENTS
OR AMENDMENTS**
taking effect between February 28, 2013 and March 1, 2014
according to laws enacted before the 2013 legislative session

Laws enacted in 1998

ch. 12, SLA 1998, as amended by sec. 1, ch. 17, SLA 2003 -- Alaska Minerals Commission
AS 44.33.431 repealed effective February 1, 2014

ch. 43, SLA 2000, as amended by sec. 1, ch. 110, SLA 2003, sec. 1, ch. 51, SLA 2005, and sec.1,
ch. 69, SLA 2008 -- Alaska Regional Economic Assistance Program
AS 44.33.895 repealed effective July 1, 2013

Laws enacted in 2002

ch. 137, SLA 2002, as amended by ch. 69, SLA 2008 -- Commercial Fisheries Limited Entry
System

AS 16.43.010(a)	amended effective December 30, 2013
AS 16.43.100(a)(20)	repealed effective December 30, 2013
AS 16.43.450	repealed effective December 30, 2013
AS 16.43.460	repealed effective December 30, 2013
AS 16.43.470	repealed effective December 30, 2013
AS 16.43.480	repealed effective December 30, 2013
AS 16.43.490	repealed effective December 30, 2013
AS 16.43.500	repealed effective December 30, 2013
AS 16.43.510	repealed effective December 30, 2013
AS 16.43.520	repealed effective December 30, 2013
AS 16.43.960(a)	amended effective December 30, 2013
AS 16.43.970	amended effective December 30, 2013

Laws enacted in 2003

ch. 35, SLA 2003, am ch. 69, SLA 2008 -- Revisor's Bill (amendments to take effect when
AS 44.33.895 is repealed under sec. 2, ch. 43, SLA 2000 as amended)

AS 09.65.170(c)(2)	amended effective July 1, 2013
AS 36.30.850(b)(29)	amended effective July 1, 2013

ch. 126, SLA 2003, ch. 115, SLA 2008 -- Teachers and Health Care Professionals Housing Loan
Program

AS 18.56.109	repealed effective July 1, 2013
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Laws enacted in 2008

ch. 63, SLA 2008, as amended by ch. 51, SLA 2012 -- Film Production Tax Credit

AS 43.98.030	amended effective July 1, 2013
AS 44.33.231	repealed and reenacted July 1, 2013
AS 44.33.232 - 44.33.239	repealed July 1, 2013 or the date that the commissioner of revenue notifies the presiding officers of each house of the legislature and the revisor of statutes in writing that the number of tax credits provided under AS 43.98.030(f) in the aggregate and the estimated amount of tax credits that could be claimed based on notices of qualification issued by the film office under AS 44.33.234(b), together equal \$100,000,000.

Laws enacted 2012

ch. 49, SLA 2012 -- Eligibility for Interscholastic Activities

AS 14.30.365	enacted effective July 1, 2013
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ch. 51, SLA 2012 -- Film Tax Credits; Film Office; Film Incentive Review

AS 43.77.060(e)	amended effective July 1, 2013
AS 44.25.135	enacted effective July 1, 2013
AS 44.25.140	enacted effective July 1, 2013
AS 44.25.145	enacted effective July 1, 2013
AS 44.25.150	enacted effective July 1, 2013
AS 44.25.190	enacted effective July 1, 2013

ch. 68, SLA 2012 -- Veteran Designation on Identification Cards

AS 18.65.310(l)	enacted effective March 1, 2013
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ch. 73, SLA 2012 -- Big Game Guides

AS 08.54.610(d) - (e)	amended effective April 1, 2013
AS 08.54.710(j)	enacted effective April 1, 2013

ch. 74, SLA 2012 -- Alaska Performance Scholarship

AS 14.43.415(a)	amended effective April 1, 2013
AS 14.43.820(a)	amended effective April 1, 2013
AS 14.43.820(c) - (g)	enacted effective April 1, 2013
AS 14.43.825(b)	amended effective April 1, 2013
AS 14.43.830(a)	amended effective July 1, 2013
AS 14.43.915(d)	enacted effective April 1, 2013

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 AND OPINIONS OF THE ATTORNEY GENERAL

PASSENGER IN AUTO ACCIDENT WAS AN ADDITIONAL INSURED AND INTENDED BENEFICIARY UNDER THE POLICY AND WAS ENTITLED TO BRING A CAUSE OF ACTION FOR BAD FAITH.

A passenger in a car was seriously injured in an accident. The insurer paid the policy limits to cover the driver's possible liability to the passenger. Several years later, the insurer discovered that its policy was inconsistent with the Alaska statutes, and, some time after discovering that its policy did not properly comply with Alaska uninsured motorist coverage law, paid the passenger underinsured motorist benefits. The passenger sued the insurer, alleging that the insurer settled the claim in bad faith. The superior court held, in part, that because the passenger did not own the insurance policy, the insurer did not owe the passenger a duty of good faith and fair dealing. However, the Alaska Supreme Court reversed, holding that an insured who is not the actual policy holder may bring an action for bad faith if the passenger was an additional insured and an intended third-party beneficiary under the policy, even though the driver and the passenger have an adversarial relationship. The court distinguished the case from the ordinary rule that a tort victim who benefits from an insurance policy cannot enforce a policy between the insured and an insurer because the tort victim is only an incidental beneficiary to a policy that protects the insured from tort liability.

Ennen v. Integon Indem. Corp., 268 P.3d 277 (Alaska 2012).

Legislative review is not recommended unless the legislature disagrees with the court's conclusion holding that passengers may be additional insured under an insurance policy.

POST-SALE DUTY TO WARN WHEN A DANGER IS POTENTIALLY LIFE THREATENING.

A worker suffered an above-the-knee amputation in a work-related accident when he used his foot to push a bale of mulch into a hydromulcher machine. The machine was sold and used

without a guard. The worker sued the manufacturer of the hydromulcher for failure to warn of the danger in using his foot. The evidence showed that the manufacturer became aware of workers using feet to unclog the machine in lawsuits filed after the sale of the machine. Although a post-sale duty to warn is unusual in most states, some states have adopted such a duty when circumstances involving varying levels of danger become known to a manufacturer after sale. In this case, the Alaska Supreme Court adopted for the first time a post-sale duty to warn when a danger that is potentially life threatening becomes apparent to a manufacturer after the sale of its product. The court stopped short, however, of imposing a duty when technological improvements are made to a product. Because adequate guarding was not a technological innovation, the court found the manufacturer liable for failure to warn its customers of the danger of feeding mulch into the hydromulcher with a foot.

Jones v. Bowie Industries, ___ P.3d ___ (Alaska 2012).

Legislative review is not recommended, unless the legislature desires to limit the duty of a manufacturer to warn.

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

POLICE RESPONDING TO A SERIOUS DOMESTIC VIOLENCE CALL MAY REASONABLY BELIEVE THAT AN UNKNOWN PERSON(S) MIGHT BE INJURED AND MAY ENTER THE PREMISES WITHOUT A WARRANT TO SEARCH FOR POSSIBLE VICTIMS.

The police responded to a domestic dispute involving a knife. After both parties to the dispute were secured in patrol cars, the police entered the trailer without a warrant using a standard operating procedure for "clearing" the trailer. While in the trailer, the officers discovered evidence suggesting methamphetamine manufacturing. Later, a detective obtained and executed a search warrant seizing methamphetamine production evidence from the trailer. The defendant moved to exclude the evidence because it was the result of the warrantless search of the trailer. The superior court denied the motion, finding that the warrantless entry was justified based on the "emergency aid doctrine" as an exception to the warrant requirement. The Alaska Court of Appeals reversed the superior court, holding that the circumstances surrounding the search would not have led a prudent and reasonable officer to enter a home without a warrant based on the emergency aid

exception. The Alaska Supreme Court reversed the court of appeals, finding that the emergency aid exception applied to the facts of this case. The court held that when a warrantless search is conducted under the emergency aid doctrine (1) the police must have objectively reasonable grounds to believe that an emergency is at hand which requires immediate assistance for the protection of life or property, but does not require the existence of an actual emergency, (2) the search must not be primarily motivated by the intent to arrest a person or seize evidence, and (3) there must be a reasonable basis to associate the emergency with the place searched. The court found that this result is more restrictive than the U.S. Supreme Court has required but is necessary due to the explicit right to privacy provided by art. I, sec. 22, Constitution of the State of Alaska.

State v. Gibson, 267 P.3d 645 (Alaska 2012).

Legislative review is not recommended as the decision is of constitutional dimension.

AS 04.16.050

**OFFENSE OF HABITUAL MINOR CONSUMING
REQUIRES PROOF OF PREVIOUS CONVICTIONS AS
ELEMENTS OF THE OFFENSE.**

Oskolkoff was convicted of habitual minor consuming under AS 04.16.050. Oskolkoff appealed, arguing that the trial court applied the statute incorrectly and did not require the state to prove Oskolkoff's previous convictions as elements of the offense. The trial court merely looked to those previous convictions as factors to be considered at sentencing. The Alaska Court of Appeals reversed, finding that the legislative history was unclear how the legislature intended the previous convictions to be applied, as an element of the offense or as factors to be considered at sentencing. The court applied its previous decisions that if legislative intent is not clearly indicated, then proof of previous convictions will be construed as being an element of the offense.

Oskolkoff v. State, 276 P.3d 490 (2012).

Legislative review is not recommended unless the legislature wants to provide that previous convictions are not elements of the offense of habitual minor consuming.

AS 08.80

PHARMACISTS LICENSED IN ANOTHER STATE AND EXCLUSIVELY EMPLOYED BY A TRIBAL HEALTH PROGRAM ARE EXEMPT FROM STATE LICENSING REQUIREMENTS.

The Chair of the Board of Pharmacy asked the attorney general whether Alaska professional licensing requirements apply to pharmacists working for Alaska Native tribal health programs. The attorney general opined that those pharmacists do not need to be licensed in Alaska so long as they are licensed in another state. A pharmacist with a valid license in another state and exclusively employed by a tribal health program in the state that operates under an Indian Self-Determination and Education Assistance Act agreement between the federal Indian Health Service and a tribal organization is exempt from Alaska professional licensing requirements for pharmacists. The exemption is authorized by 25 U.S.C. § 1621t and preempts state law. However, Alaska licensing requirements apply to a pharmacist employed by a tribal health program if the pharmacist is licensed in Alaska or is employed in Alaska for another employer in addition to the tribal health program employer.

2012 Op. Alaska Att'y Gen. (April 17, 2012; File No. AN2009102500).

Legislative review is not recommended.

AS 09.55.580

ADULT CHILD NOT A POTENTIAL BENEFICIARY IN A WRONGFUL DEATH ACTION UNLESS FINANCIALLY DEPENDENT ON DECEASED PARENT.

Spouse and adult children brought a wrongful death action against a hunter/client that shot and killed the hunting guide/spouse/father. The United States District Court for the District of Alaska found that adult children were not "children" under the "spouse or children or other dependents" language in AS 09.55.580(a) because of the adult status of the children and the fact that the children were not financially dependent on their deceased father.

Millo v. Delius, ___ F.Supp.2d ___ (D.Alaska 2012).

Legislative review is recommended to consider whether an adult child may only be a beneficiary in a wrongful death action if financially dependent on the deceased parent.

AS 11.56.835
AS 11.56.840
AS 12.63.010
AS 12.55.120

REGISTRATION OF SEX OFFENDERS; COURT OF APPEALS LACKS JURISDICTION TO CONSIDER APPEALS WITHIN PRESUMPTIVE RANGE.

The defendant appealed his conviction for second-degree sexual abuse of a minor, fourth-degree assault, and failure to register as a sex offender by failing to timely file a quarterly verification that his address had not changed. The defendant argued, among other issues, that (1) his failure to quarterly verify his address for sex offender registration was improperly referred to as "failure to register as a sex offender" and (2) he had a right to appeal his sentence to the Alaska Court of Appeals. The Alaska Court of Appeals noted differences between sex offender registration and address verification, and suggested that the title of the statute "is mistaken, or at least misleading." However, the court concluded that all of the parties used the phrase "failure to register" when it was clear from the context that they were speaking of failure to file the address verification and the jurors were not misled, therefore the erroneous instructions did "not constitute plain error." The court found that it did not have jurisdiction to hear the defendant's appeal of his sentence. Under AS 12.55.120(a), a felony defendant may appeal a sentence for an aggregate term exceeding two years of incarceration. This right of appeal is limited by AS 12.55.120(e), which states that a sentence within the presumptive range may not be appealed to the Alaska Court of Appeals, but is subject to discretionary review by the Alaska Supreme Court. Here, the court found that the defendant's term of imprisonment was within the presumptive range for his offense. But, if the court considered the time suspended (25 years) in addition to the time to be served, the sentence exceeded the presumptive range. Based on the legislative history, the court concluded that a defendant's right to pursue a sentence appeal under AS 12.55.120(e) is determined by the defendant's time to serve, and does not include time suspended.

Reandean v. State, 265 P.3d 1045 (Alaska 2011).

Legislative review is not recommended with respect to the failure to register issue. It appears that the court is applying the term "registration" more narrowly than the legislature has used the term with regard to the registration of sex offenders. Legislative review is only recommended with respect to the issue of the right of sentencing appeals if the legislature wants courts to consider suspended terms of imprisonment when deciding whether a defendant may appeal under AS 12.55.120.

AS 11.61.110(a)(5)

COURT CONSTRUES "FIGHTING" FOR PURPOSES OF DISORDERLY CONDUCT LAW.

AS 11.61.110 declares that a person commits disorderly conduct if the person "engages in fighting other than in self-defense." The defendant was charged with assault and disorderly conduct for hitting her domestic partner with fists and a baking pan. The question for the court was whether "engages in fighting" includes situations like this in which there is no mutual combat or response. The court, reversing a previous opinion, interpreted the phrase to require proof of a physical struggle in which some degree of mutuality exists. The court reviewed the history of the assault statutes and the addition of disorderly conduct and found that the legislature's intention was to punish non-mutual combat as assault, not disorderly conduct.

Dawson v. State, 264 P.3d 851 (Alaska 2011).

Legislative review is recommended to determine whether the statutory interpretation is consistent with legislative intent.

AS 11.61.220(a)(1)(A)(i) **"DEADLY WEAPON" INCLUDES STEAK KNIVES.**

The defendant was convicted of, among other crimes, fifth-degree weapons misconduct for not informing the arresting officer that he was carrying a steak knife. The defendant claimed that he was entitled to reversal of his weapons misconduct conviction because, he argued, a steak knife does not meet the statutory definition of a "deadly weapon." After reviewing the legislative history, the court concluded that a steak knife falls within the definition of a deadly weapon, and that the trial court did not err in denying the defendant's motion for judgment of acquittal on the weapons misconduct charge.

Liddicoat v. State, 268 P.3d 355 (Alaska 2011).

Legislative review is not recommended as the decision appears reasonable.

AS 12.47.100(d)
Art. I, sec. 9,
Constitution of the
State of Alaska

**DEFENDANT'S TESTIMONY MAY NOT BE
COMPELLED IN A COMPETENCY HEARING.**

A criminal defendant requested a competency hearing before his criminal trial. The question the Alaska Court of Appeals faced was whether the defendant could be forced to testify at the competency hearing. The applicable statute prohibits statements made by a defendant at a competency hearing to be used in a criminal proceeding unless a defense based on insanity or defect is raised. The court held that the Fifth Amendment prohibition of self incrimination, embodied in art. I, sec. 9 of the Alaska Constitution and applied to all "criminal proceedings," included all stages of a criminal case. The competency hearing was one stage of the case and, therefore, the protection against compelled testimony extended to competency hearings.

Diggs v. State, 274 P.3d 504 (Alaska 2012).

Legislative review is not recommended since a constitutional principle is being interpreted by the court.

AS 12.55.025(c)
AS 12.55.027

**DEFENDANTS ARE NOT ENTITLED TO CREDIT
AGAINST A CRIMINAL SENTENCE FOR TIME
SPENT IN RESIDENTIAL TREATMENT PROGRAM
THAT PROVIDES PASSES FOR COMMUNITY
COUNSELING SESSIONS.**

A criminal defendant sought five months' sentencing credit for time spent in a Salvation Army adult rehabilitation program. The Salvation Army program has six phases. Beginning in the second phase, the program provides "therapeutic passes" that allow for attendance at community counseling sessions and to leave for three hours with another program participant. AS 12.55.027 was enacted in 2007 to clarify the meaning of "custody" for purposes of sentencing when involving a non-prison residential treatment program. The statute requires, among other things, that participants in a treatment program "be confined at all times to the grounds of the facility" or be in the physical custody of an employee of the facility. The Alaska Court of Appeals noted the inconsistency between the 2007 statutory restrictions and previous Alaska Supreme Court decisions that gave credit for participation in programs that included work release. The court also reviewed the legislative history of the statute and, based on that, strictly interpreted the

statute to prevent credit for time spent in phases two through six of the Salvation Army program.

McKinley v. State, 275 P.3d 567 (Alaska 2012).

Legislative review is only recommended if the legislature desires to allow credit for time spent in residential treatment in situations other than those specifically allowed in AS 12.55.027.

AS 12.55.045

STATE MEDICAID PROGRAM IS ENTITLED TO RESTITUTION.

The Alaska Court of Appeals interpreted the restitution statute to authorize a sentencing court to include payments to the state medical assistance program for reimbursed medical expenses paid on behalf of the victim of a crime. The defendant asserted a narrow interpretation of the statutory clause, "that has provided medical services to the victim" for purposes of awarding restitution as excluding state medical assistance that provided reimbursement but not direct services. The court disagreed and pointed out that the Alaska Supreme Court had previously awarded restitution to an insurance company that had compensated a victim for losses attributable to a crime. The court found that the medical assistance program, as a public insurer, is in the same position as a private insurer for purposes of restitution.

Maille v State, 276 P.3d 476 (Alaska 2012).

Legislative review is not recommended as the decision is consistent with state policy on seeking reimbursement for publicly reimbursed medical expenses.

AS 13.26.145

APPOINTMENT OF PUBLIC GUARDIAN NOT LIMITED TO CASES IN WHICH NO OTHER GUARDIAN WITH HIGHER STATUTORY PRIORITY IS AVAILABLE.

The superior court appointed the Office of Public Advocacy (OPA) to serve as guardian to a woman who objected to the appointment. The woman asserted that her own mother should have been appointed since she had a statutory priority despite her mother's failure to protect her from alleged sexual abuse in the past. The woman also argued that as the guardian of last

resort, OPA was limited to appointments in which no other guardian was available. AS 13.26.145(f) provides that a court may decline to appoint a person who has priority when it is in the best interest of the ward to do so. AS 13.26.370(b) provides that the public guardian may be appointed if no person is willing and qualified to serve the function. The court reviewed the legislative history of these statutes and stated that "while the available legislative history reinforces the notion that the public guardian exists to provide services when no other person is qualified, it does not indicate legislative intent to limit the appointment of OPA only to such cases."

In the Matter of the Protective Proceedings of M.K., 278 P.3d 876 (Alaska 2012).

Legislative review is recommended to determine whether the court correctly reconciled the statutory best interest requirement with the statutory authorization for OPA to be appointed as guardian to a ward who has no other available guardianship option.

AS 15.45.180(a)

INITIATIVE SECTION SUMMARY LIMITATION.

The Alaska Coastal Management Program Initiative Application (11ACMP) included a bill with a single bill section and 18 statutory sections in that single bill section. AS 15.45.180(a) requires the lieutenant governor, with the assistance of the attorney general, to prepare a ballot title of no more than 25 words and an impartial summary of the proposed law. The number of words in the summary may not exceed 50 words multiplied by the number of sections in the proposed law. In the review of the initiative application for the lieutenant governor, the attorney general opined that the proper approach for this initiative application was to treat each of the 18 proposed statutory sections as a "section" for determining the word limit for the impartial summary of the proposed law. Thus, the summary for the proposed law may not exceed 900 words.

2011 Op. Alaska Att'y Gen. (November 29, 2011; File No. JU2011200659).

Legislative review is recommended to resolve the ambiguity in the use of the term "section" for purposes of limiting the number of words authorized in an impartial summary of a law proposed in an initiative. Specifically, does the term "section"

refer to initiative "bill sections" or to sections of statute enacted or amended by the initiative?

AS 15.45.550

DENY CERTIFICATION OF RECALL IF THE FACTUAL STATEMENTS IN THE SUMMARY FAILED TO ALLEGE A LEGALLY SUFFICIENT GROUND FOR RECALL.

The Department of Law advised the director of the division of elections to deny certification of the application for recall of a state representative because the application was not substantially in the form required by AS 15.45.550(1). The application was factually insufficient because the particular factual statements in the summary did not support a claim for incompetence or for neglect of duties. To be in the required form, an application must be technically sufficient, factually sufficient, and legally sufficient.

2011 Op. Alaska Att'y Gen. (October 3, 2011; File No. JU2011200574).

Legislative review is not recommended.

AS 18.80.110

HUMAN RIGHTS COMMISSION MUST INTERVIEW COMPLAINANT'S WITNESSES.

An African-American man filed a complaint with the Alaska State Commission for Human Rights (commission) alleging that a liquor store discriminated against racial minority groups in the policies pertaining to banning of customers. The investigator for the commission conducted some interviews but failed to interview witnesses that the complainant offered to corroborate his allegations. One of the witnesses offered was the manager of a satellite store that purportedly agreed with the allegations in the complaint. The commission is under a statutory obligation to conduct an impartial investigation into complaints received. The court found that the commission abused its discretion in dismissing the complaint when it interviewed witnesses who were favorable to the respondent but none of the witnesses offered by the complainant. The court remanded the complaint with instructions to complete an impartial investigation.

Toliver v. Alaska State Commission for Human Rights, 279 P.3d 619 (Alaska 2012).

Legislative review is not recommended.

AS 23.30.045

"PROJECT OWNER" STATUS UNDER THE ALASKA WORKERS' COMPENSATION ACT IS NOT LIMITED TO INSTANCES WHEN A BUSINESS CONTRACTS OUT ITS USUAL WORK TO OTHERS.

A "project owner" is defined by the Alaska Workers' Compensation Act as a person who, in the course of the person's business, engages the services of a contractor and enjoys the beneficial use of the work. Project owners are potentially liable for workers' compensation benefits if the benefits are not provided by a contractor or subcontractor. A project owner is protected by the exclusive liability provisions of the Act.

The Alaska Supreme Court addressed an ambiguity in the application of the term "project owner" relating to the phrase "in the course of a person's business." Reviewing the statutory language, the legislative history, and the purpose of the statute, the court concluded that this phrase does not limit a project owner's liability to instances where a business contracts out its *usual* work to others. Instead, the court concluded that the legislature intended that the liability of a project owner and the exclusive liability protection would apply more broadly to *any* business that hired contractors to remodel or renovate structures. The court applied this principle to the facts of the case, which involved both business and nonbusiness work, and held that the business nature of the work allowed the business owner to assert the status of a "project owner."

Trudell v. Hibbert, 272 P.3d 331 (Alaska 2012).

Legislative review is not recommended unless the legislature intended that the phrase "in the course of a person's business" to have a different meaning than that determined by the court.

AS 23.30.127(e)
AS 44.62.540(a)

RECONSIDERATION OF BOARD DECISIONS REGULATED BY ALASKA ADMINISTRATIVE PROCEDURE ACT.

A dispute arose between an employer and the Workers' Compensation Second Injury Fund concerning payments from the Fund. After the Workers' Compensation Board decided

against the Fund, the Fund asked the board to reconsider its decision. At a prehearing conference, the hearing officer stated that he would inform the parties about what action the board was taking on the reconsideration request. Several months later, the hearing officer served a decision on the parties finding that the request for reconsideration had not been acted upon by the board and, therefore, the time for reconsideration of the decision (and therefore the time for appeal to the Workers' Compensation Appeals Commission) had expired by operation of statute. The commission denied the Fund's request to file a late appeal and dismissed the appeal. The Fund appealed the commission's decision to the Alaska Supreme Court for review. The court reversed the commission's decision and remanded for consideration of the Fund's appeal. The court noted that AS 23.30.127(e) provides for an appeal to the commission when a party files a request for reconsideration of a board decision and sets the time for filing the notice of appeal to the commission, but does not expressly address reconsideration of board decisions. The court held that, in the absence of regulation of reconsideration of a board decision under the workers compensation statute, the Alaska Administrative Procedure Act (AS 44.62.540(a)) governs reconsideration requests. The court applied AS 44.62.540(a), determined that the appeal had been timely filed, and remanded to the commission to hear the appeal on the merits.

State v. Tongass Business Center, 276 P.3d 453 (Alaska 2012), 2012 Alas. LEXIS 70.

Legislative review is recommended to clarify the procedures for reconsideration of a Workers' Compensation Board decision under the workers' compensation statute rather than applying the Alaska Administrative Procedure Act.

AS 23.40.070

UNION REPRESENTATIVES' COMMUNICATIONS ARE PRIVILEGED.

A former state employee filed a grievance and later a lawsuit for wrongful termination. The employee was represented in the grievance procedure by a representative of the Alaska State Employees' Association (ASEA) who was not an attorney. In the course of the lawsuit, the State of Alaska subpoenaed all written communications between the ASEA representative and the employee's trial attorney. The trial court denied a protective order on the grounds that the trial attorney waived

attorney-client privilege by communicating with the union representative. In a case of first impression, the Alaska Supreme Court interpreted the Alaska Public Employment Relations Act (PERA) to implicitly provide a union-relations privilege. The court noted the PERA recognition of the right of public employees to organize and the establishment of labor practices that prevent a public employer from interfering with an employee's statutory rights. The court also noted previous case law in which the court found a strong policy interest in encouraging employees to communicate fully and frankly with their union representative. The employee also raised a due process challenge under the constitution, which the court declined to address in light of the court's interpretation of the statute.

Peterson v. State, 280 P.3d 559 (Alaska 2012).

Legislative review is recommended to determine whether the court properly interpreted the Public Employment Relations Act and state policy pertaining to privileged communications.

AS 25.20.110

PASSPORT CONSENT MAY BE ORDERED IN JOINT CUSTODY CASE WHEN PARENTS DISAGREE.

Parents who had joint custody of a child disagreed on whether to acquire a passport for their child. The approved parenting plan did not address the issue and federal law requires both parents' consent. Current state law authorizes the modification of an award of custody based on the best interests of the child but is silent on modifications of the terms of custody, including a parenting plan. The trial court ordered the parents to cooperate but held that the passport was "not required" based on the age and circumstances of the child. The Alaska Supreme Court noted that the legislature provided little guidance regarding the applicable legal test for a court to apply when there is a dispute between parents who share joint legal custody of a child. The court reviewed the facts of the case by applying a best interest of the child standard and ordered both parents to obtain a passport for the child.

Patrawke v. Liebes, 285 P.3d 268 (Alaska 2012).

Legislative review is recommended to determine whether the Alaska Supreme Court applied the correct standard for matters requiring joint parental consent that are not included in the approved parenting plan in cases involving joint child custody.

AS 25.23.020(a)

BIOLOGICAL PARENT MAY NOT ADOPT CHILD TO TERMINATE RIGHTS OF ANOTHER PARENT.

An unmarried biological mother of a child petitioned to adopt her own son. The mother wanted to terminate the parental relationship of the father and to receive sole legal and physical custody without the father's consent. The adoption statute expressly provides for an unmarried parent to adopt their own child, a provision that was based on a prior version of the Uniform Adoption Act. The uniform act was subsequently amended to allow "any individual to adopt another for the purpose of creating the relationship of parent and child between them." State law on adoption remained unchanged. In this case, the court refused to authorize the adoption, finding that the mother already had a parental relationship to the child. The court held that the adoption could not serve to terminate the father's rights as a substitute for a custody dispute.

In the Matter of Xavier K., 288 P.3d 274 (Alaska 2012).

Legislative review is recommended to determine whether the adoption provision should be clarified.

AS 25.24.150(h)

PRESUMPTION AGAINST AWARDING CUSTODY IN CASES INVOLVING DOMESTIC VIOLENCE INTERPRETED.

The case applied the presumption against awarding custody to a parent with a history of domestic violence. AS 25.24.150(h) provides that the presumption "may" be overcome by the completion of a batterers' treatment program "where available." The Alaska Supreme Court found that the trial court correctly ruled that the presumption under AS 25.24.150(h) against awarding custody to the father was triggered by his two acts of domestic violence against his wife but erred in interpreting the statutory presumption as providing that the only way to rebut the presumption is through completion of a batterers' treatment program. The Alaska Supreme Court held that the plain language of AS 25.24.150(h), stating "where reasonably available," supported the conclusion that the legislature did not intend that completion of a batterers' treatment program was the only way to overcome the rebuttable presumption against awarding custody to a parent with a history of domestic violence.

Stephanie F. v. George C., 270 P.3d 737 (Alaska 2012).

Legislative review is recommended to determine whether the statutory interpretation by the court is consistent with legislative intent.

AS 28.35.030(n)

**TEN YEAR LOOK BACK PERIOD FOR PRIOR
CONVICTIONS INCLUDES DEFERRED
PROSECUTION.**

The defendant was convicted of driving under the influence of alcohol in the state after being charged with a DUI in 1994 in Washington state. That charge was deferred for prosecution until the defendant was convicted ten years later, in 2004, of a DUI in Oregon. The Alaska Court of Appeals allowed consideration of all three convictions for sentencing purposes in a ten year look back period on the basis of the conviction dates, not the charging or offense dates.

Eberhardt v. State, 275 P.3d 560 (Alaska 2012).

Legislative review is not recommended unless the legislature intended that the ten-year look back apply only to the date the prior offense was committed or that the person was adjudged guilty of the offense.

AS 29.26.100
Art. VI, sec. 7,
Constitution of the
State of Alaska

**ALLOWING VOTER APPROVAL OF CAPITAL
PROJECTS IS AN IMPERMISSIBLE
APPROPRIATION.**

A citizen group sought to enforce an initiative approved by municipal voters that required voter approval of any capital appropriation by the borough costing over \$1 million dollars. The Alaska Supreme Court held that allowing voters to veto any capital improvement project costing over \$1 million has the effect of diluting the borough assembly's exclusive control over the budget and violates the constitutional prohibition on making or repealing an appropriation using the initiative power. In particular, the court held that an initiative can run afoul of art. VI, sec. 7, Constitution of the State of Alaska, "when it allocates public assets away from a particular purpose."

Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough, 273 P.3d 1123 (Alaska 2012).

Legislative review is not recommended because the decision appears to be a reasonable interpretation of art. VI, sec. 7, Constitution of the State of Alaska.

AS 29.45.650(e)

CITY'S SALE TAX LIEN DOES NOT APPLY TO INTANGIBLE PERSONAL PROPERTY OR MONEY REALIZED FROM THE SALE OF INTANGIBLE PERSONAL PROPERTY.

Based on a lien for unpaid sales tax, the City of Adak sought to recover cash and intangible personal property from the bankruptcy estate of a taxpayer. The city claimed that its sales tax lien under AS 29.45.650(e) and city ordinance applied to all property of the person owing the tax, including cash and intangible personal property. The bankruptcy court disagreed and found that the lien applied only to real and tangible personal property and did not "encumber funds that the trustee has realized from the debtor's intangible personal property -- the settlement proceeds [from a settlement with a fish buyer] and insurance refunds." The court found that the ordinance that provided for a lien against "all property" exceeded the authority in AS 29.45.650(e); the statute authorized a lien only against real and tangible personal property. Because a municipality may only exercise the powers that are specifically enumerated in AS 29 or those "necessarily or fairly implied in or incident to the purpose of all powers and functions conferred in [AS 29]," the court concluded that the city's sales tax lien did not encumber funds the trustee realized from the debtor's intangible personal property.

In re Adak Fisheries, LLC, ___ B.R. ___ (Bankr. D. Ak), Case No. A09-00623-DMD (Jan. 10, 2012) (Memorandum on Trustee's Objections to City of Adak's Claims Nos. 21 and 114).

Legislative review is recommended to determine whether intangible personal property should be subject to a municipal sales tax lien.

AS 34.15.010

PROHIBITION ON SALE OF HOMESTEAD BY ONE SPOUSE ONLY APPLIES TO PRIMARY RESIDENCE AT TIME OF SALE.

A couple separated sometime after the husband conveyed his interest in the former family home to the wife's reciprocal trust

for estate planning purposes. The home was originally purchased with the husband's separate funds and the family lived there for 15 years. The wife's trust purchased a second home in which the family lived for three years, using the original home as collateral. After the separation, the husband filed a notice of interest in the former marital home in which he had no title interest. The court concluded that the phrase "family home or homestead," for purposes of protecting a marital interest in property before its sale, was limited to a family residence at the time of the sale. The court reasoned that the protection was for a right of occupancy and did not create a new interest or title to the property.

Gottstein v. Kraft, 274 P.3d 469 (Alaska 2012).

Legislative review is recommended to determine whether the judicial interpretation of the applicable statutory protection of an ownership interest should be limited to the current residence.

AS 34.35.125
AS 34.35.130
AS 34.35.155

LIEN FOR WORK ENCUMBERS A GEOTHERMAL WELL AND DRILL RIG WORKING ON THE WELL; MINING LIEN FOR LABOR INCLUDES WORK PERFORMED BY MACHINERY; LIEN AGAINST A WELL DOES NOT ATTACH TO A DRILL RIG THAT IS NOT AFFIXED TO AND IS NOT A FIXTURE ON THE WELL.

The bankruptcy court considered the applicability of mining liens to a geothermal well and drilling rig under AS 34.35.125 (liens on mines and oil wells) and AS 34.35.130 (liens on mill or machine). The court found that AS 34.35.125 was applicable to the geothermal well and AS 34.35.130 applied to the drilling rig. The lien under AS 34.35.125 did not encumber the drilling rig because the rig was not a fixture affixed to the well. The court also concluded that the term "labor" in AS 34.35.155 included work by machinery and equipment as well as physical work by laborers, and a lien for labor was applicable to more than one class of property.

Baker Hughes Oilfield Operations, Inc. v. Nat'l Rural Utils. Coop. Fin. Corp. (In re Naknek Elec. Ass'n), 471 B.R. 225 (Bankr. D. Alaska 2012).

Legislative review is recommended to consider whether the mining lien statutes were properly applicable to geothermal

wells, and whether the term "labor" in AS 34.35.155 is limited to physical labor or includes work performed by machinery.

AS 34.77.030
AS 25.24.160(a)
AS 28.10.261

EQUITABLE DISTRIBUTION PRINCIPLE IN DIVORCE DOES NOT APPLY ON DEATH OF SPOUSE.

A woman died intestate and was survived by her second husband and her three children from her first marriage. The children made an equitable claim against a boat and fishing business purchased and operated during the marriage. The husband held title to the boat and claimed that it was his separate property, unavailable for distribution as the wife's marital property on death, despite the timing of the purchase and the fact that the wife worked in the business during their marriage. The court refused to apply equitable principles that apply to distribution of property acquired during a marriage, whether joint or separate, on divorce and relied on presumption of ownership based on title. Since the facts didn't rebut the presumption based on title in the husband's name, the children's claim to the marital share of the boat and business was rejected.

Pestrikoff v. Hoff, 278 P.3d 281 (Alaska 2012).

Legislative review is recommended to determine whether the court correctly applied the probate statutes in a way that was inconsistent with marital property principles.

AS 38.04.005
AS 38.04.065
AS 38.05.020(b)(1)
AS 44.62.640(a)(3)
Alaska R. App. P.
602(a)(2)

AN AREA LAND USE PLAN CREATED BY THE DEPARTMENT OF NATURAL RESOURCES IS NOT NECESSARILY A REGULATION SUBJECT TO THE ALASKA ADMINISTRATIVE PROCEDURES ACT.

In 2005, the Department of Natural Resources (DNR) developed a revised area plan for the Bristol Bay area. Several tribal councils and other organizations ("the Tribes") sued, challenging provisions of the plan. Two issues were accepted by the Alaska Supreme Court for interlocutory review: (1) whether the plan was a regulation that must have been adopted under the Administrative Procedures Act (APA) and (2) whether Appellate Rule 602, which applies to appeals from administrative agencies, barred the appeal because of the requirement that an appeal from an administrative agency decision must be made within 30 days. The court noted that land classifications are not required to be adopted under the

APA, although adoption by regulation is not necessarily precluded. The court also noted that the APA does not directly address land use plans. The court held that the plan was not a regulation, in part because it is not itself enforceable against the public in a meaningful way until implemented by further agency action. If the plan is later implemented by regulation it could be challenged under the appeal procedures for administrative decisions. The court found that a land use plan is an intermediate step that guides DNR's behavior but the public is directly affected only by later regulation and other action that may follow from the plan. With respect to the issue of appeal under Appellate Rule 602, the court held that the requirements of the appellate rule do not bar the Tribes' claims because the plan was not a final agency decision, and the plan lacked notice of the 30-day appeal period.

State v. Nondalton Tribal Council, 268 P.3d 293 (Alaska 2012).

Legislative review is not recommended unless the legislature wishes to reconsider the land use planning and classification statutes and revise the land use planning process.

AS 39.52.120
AS 39.52.160

A MEMBER OF THE BOARD OF CHIROPRACTIC EXAMINERS MAY RECEIVE AN HONORARIUM AND CONTINUING EDUCATION CREDIT FOR ADMINISTERING PRACTICAL EXAMINATIONS FOR THE NATIONAL BOARD OF CHIROPRACTIC EXAMINERS WITHOUT VIOLATING THE EXECUTIVE BRANCH ETHICS ACT.

In response to a request from the chair of the Board of Chiropractic Examiners, the attorney general considered whether the receipt of an honorarium and continuing education credit by a board member in return for administering an examination for the National Board of Chiropractic Examiners violated the Executive Branch Ethics Act. In the past, a board member was reimbursed for travel and expenses for administering the national examination, but the state kept the honorarium and the board member was not permitted to receive continuing education credit. The attorney general concluded that the receipt of an honorarium and continuing education credit by a board member does not violate the Executive Branch Ethics Act. The receipt of the honorarium and credit is not a misuse of official position for personal gain, does not violate AS 39.52.120(a), and is not compensation for

the performance of official duties or responsibilities that would be a violation under AS 39.52.120(b)(2). Also, the attorney general concluded that it would not be improper for a board member that received continuing education credit to participate in the adoption of regulations outlining a standard applicable to all licensees that included a credit for some or all activities related to the National Board of Chiropractic Examiners.

2012 Op. Alaska Att'y Gen. (April 19, 2012; File No. AN2010100306).

Legislative review is not recommended unless the legislature decides that acceptance of the same or similar benefits should be a violation of the Executive Branch Ethics Act.

AS 40.21.010
AS 41.21.150

PERMANENT DIGITAL RECORDS OF THE ALASKA STATE ARCHIVES MAY BE STORED OUT-OF-STATE.

The state archivist asked whether the permanent digital records of the Alaska State Archives may be stored on servers at the facilities of the Washington State Digital Archives in Washington State. The Department of Law concluded that the "State Records Management Act" does not require the state archivist to retain physical custody of permanent state records or to store those records in Alaska. The state archivist may use the Washington State Digital Archives for the storage of permanent records after determining and ensuring, through an enforceable agreement, that the requirements of the State Records Management Act will be met. The requirements include ensuring that the out-of-state archives are adequate to preserve and secure the records and promptly make them available, and that the facility where the records would be stored agrees that the records will remain the exclusive property of the State of Alaska.

2011 Op. Alaska Att'y Gen. (October 10, 2011; File No. AN2011103297).

Legislative review is recommended to determine whether the permanent digital records of the state should be stored within the state.

AS 42.05.830
AS 42.05.850

**REGULATORY COMMISSION OF ALASKA MAY
CORRECT CERTAIN ERRORS WITHOUT MAKING
RETROACTIVE RATES.**

The Regulatory Commission of Alaska (RCA) approved long distance access charge rates based on an erroneous spreadsheet that was a part of the rate filing. When the error was discovered, the RCA corrected the rates prospectively but declined to correct rates retroactively based on the case law prohibiting retroactive rate making. On appeal, the superior court held that the rule against retroactive rate making applied and only allowed prospective application of the corrected rate. The Alaska Supreme Court reversed the superior court and reaffirmed the rule prohibiting retroactive rate making in "second look" cases, but held that the RCA is authorized to make corrections of clerical or procedural mistakes under certain conditions without violating the rule against retroactive rate making.

Alaska Exch. Carriers Ass'n v. Regulatory Comm'n of Alaska,
262 P.3d 204 (Alaska 2011).

Legislative review is not recommended.

AS 43.05.280
AS 43.10.210(a)
AS 09.30.070

**PREJUDGMENT CALCULATION ON CLASS ACTION
INVOLVING LIMITED ENTRY FISHING LICENSING
AND PERMITTING.**

The case is one of several appeals to the Alaska Supreme Court involving a class action relating to Title 16 licensing and permitting fees charged to nonresidents. The class successfully proved that the fees charged did not merely compensate the state for added enforcement burden, and the court concluded that the class was entitled to a refund of overpaid fees and interest on the overpayment using the punitive interest calculation for overpayment or underpayment of taxes under AS 43.05.280 and AS 43.05.225(a). In this case, the Alaska Supreme Court overruled its earlier decision with respect to the correct manner of calculating the prejudgment interest and instead concluded that the calculation should have been determined using the general rate for prejudgment interest under AS 09.30.070.

State v. Carlson, 270 P.3d 755 (Alaska 2012).

Review is not recommended unless the legislature wishes to establish a different prejudgment interest rate for an award of a refund of overpaid fees relating to commercial fishing licenses and permits.

AS 43.23.008

TEN-YEAR LIMIT ON ABSENCE FROM STATE FOR PFD ELIGIBILITY UPHELD.

Brian Ross challenged the denial of his and his three children's eligibility for a permanent fund dividend ten years after the eligibility statute was amended to provide a ten year limit on allowable absences, with an exception for members of Congress and their staff and families. The court reviewed the statute for a rational basis under the equal protection clauses of the United States and Alaska Constitutions and found that the statute's purpose in preventing fraud and instilling efficiency into the permanent fund dividend eligibility process were legitimate government purposes that were rationally related to the ten-year rule. The court also upheld the rule on equal protection and substantive due process grounds despite an exception for members of Congress since, the court found, the Alaska delegation has significant ties and interest in the state regardless of their physical presence or absence.

Ross v. State, 286 P.3d 495 (Alaska 2012).

Legislative review is not recommended since the court upheld the legislative change as intended.

AS 43.70.075

TOBACCO ENDORSEMENT PROCEDURE MEETS DUE PROCESS STANDARD.

In 2007, the legislature amended the tobacco endorsement sales statute, AS 43.70.075, to address various due process concerns while a store that held an endorsement challenged the original statute in court. (See ch. 61, SLA 2007.) In *Godfrey v. State*, 175 P.3d 1198 (Alaska 2007), the Alaska Supreme Court rejected the due process concerns and upheld the original tobacco endorsement statute. In this case, another store challenges the amended statute, arguing that it violates due process. The amended statute provides for notice to the store of minor offenses pending against employees, an opportunity for a hearing, and rebuttal against the presumption of negligence. All of that, the court found, met due process standards.

Holiday Alaska v. State, 280 P.3d 537 (Alaska 2012).

Legislative review is not recommended unless the legislature wants to return the endorsement procedure to that utilized in the original statute.

AS 44.21.410(a)(4)

OFFICE OF PUBLIC ADVOCACY MAY BE APPOINTED WHEN OPPOSING PARTY IS REPRESENTED BY A NONPROFIT AGENCY.

The superior court appointed the Office of Public Advocacy (OPA) to represent an indigent father in a custody dispute. OPA appealed the appointment on the basis that their statutory authority was limited to representation of a party in a custody dispute only against a "public agency." The mother was represented by the Alaska Network on Domestic Violence and Sexual Assault, a private nonprofit agency. The court held that "public agency" for purposes of OPA's statutory authority included a private nonprofit agency if the agency accepted significant public funding support.

In the Matter of Alaska Network on Domestic Violence and Sexual Assault, 284 P.3d 835 (Alaska 2012).

Legislative review is recommended to determine whether the court correctly interpreted OPA's authority and properly defined "public agency" for that purpose.

AS 44.62.040
AS 44.62.180 -
AS 44.62.290

STANDING FOR AN ASSOCIATION DOES NOT REQUIRE THE PARTICIPATION OF ALL MEMBERS OF THE ASSOCIATION; LAND USE PLAN IS NOT A REGULATION THAT MUST BE ADOPTED UNDER THE ALASKA ADMINISTRATIVE PROCEDURE ACT.

Property owners near a lake formed an association to dispute regulation of Willow Lake by the Department of Transportation and Public Facilities under a land use plan that related to float plane operations on the lake. The Alaska Supreme Court reversed a superior court decision that dismissed the case because the homeowners lacked standing to bring its claims. The Alaska Supreme Court concluded that the organization had interest-injury standing because they had a sufficient stake in the outcome, the organization sought to protect interests germane to its purpose, and participation of

individual members of the organization in the litigation was not required. The Alaska Supreme Court also affirmed the superior court ruling that the use plan was not a regulation that must be adopted under formal administrative procedures and that the plan was properly issued. The case was remanded for further consideration by the superior court.

Friends of Willow Lake, Inc. v. State, 280 P.3d 542 (Alaska 2012).

Legislative review is not recommended unless the legislature wishes to consider legislation changing the parameters of associational standing.

AS 45.50.471

LIABILITY UNDER THE ALASKA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT DOES NOT REQUIRE A KNOWING OR INTENTIONAL MISREPRESENTATION.

A used motor home dealer sold a used motor home to the plaintiff. The model year was changed on the documents at the dealership to inaccurately state that the motor home was a 2003 model rather than a 2002 model. The title from the State of Alaska showed that the motor home was a 2003 model, but a vehicle identification number showed that the motor home was a 2002 model, and the former owner told the dealer that the motor home was a 2002 model. The parties disputed the source of the error. The buyer alleged violation of the Alaska Unfair Trade Practices and Consumer Protection Act (UTPA), among other claims. The seller argued that a mistaken but good faith misrepresentation cannot be the basis of a UTPA claim. The jury verdict was inconsistent, finding on one hand that the dealer had not engaged in an unfair or deceptive practice but, on the other hand, the defendant knew or should have known that the statement concerning the model year was false or misleading and that the misrepresentation was the legal cause of harm to the plaintiff. The Alaska Supreme Court resolved the inconsistent verdict, concluding that the elements for a case for misrepresentation under the UTPA are (1) a misrepresentation, (2) the misrepresentation is material, and (3) the misrepresentation caused damages. However, the court also concluded the prohibition on deceptive acts or practices under the UTPA encompasses innocent material misrepresentations without requiring proof of bad faith or permitting a defense of good faith.

Borgen v. A&M Motors, Inc., 273 P.3d 575 (Alaska 2012).

Legislative review is not recommended unless the legislature wishes to require proof of bad faith in order to prove a claim of misrepresentation under the UTPA.

AS 45.50.471
AS 45.50.545

**APPLICATION OF FEDERAL TRADE COMMISSION
RULES TO ALASKA'S UNFAIR TRADE PRACTICES
ACT.**

The case involves a contract dispute between the Golden Valley Electric Association and Global Power and Communications. Among other issues, the court considered whether an unfair trade practice had occurred. The Alaska Unfair Trade Practices and Consumer Protection Act (UTPA) prohibits unfair or deceptive acts, and requires Alaska courts applying the UTPA to give due consideration and great weight to interpretations of the Federal Trade Commission Act (FTC Act). Since the UTPA was enacted, the FTC Act has modified the definition of unfair practices to refine the standard of unfairness and refine the definition and limits of the applicable criteria. The Alaska Supreme Court found that when the legislature adopted AS 45.50.545, it did not intend that Alaska courts would be required to abandon Alaska precedent where later changes in the federal approach conflicted with Alaska law. The court noted that the basic elements of the federal and state interpretations have remained the same and applying the restrictions in the FTC Act would result in less protection for Alaska consumers and business people. The court concluded that Alaska courts interpreting the UTPA are not required to overrule Alaska precedent and standards for interpreting deception and unfairness in order to give effect to the new federal standards under the FTC Act.

ASRC Energy Services Power & Communications, LLC v. Golden Valley Elec. Ass'n., 267 P.3d 1151 (Alaska 2011), *reh. denied*, 2012 Alas. LEXIS 30 (2012).

Review is not recommended unless the legislature wishes to incorporate the federal limitations into Alaska's UTPA.

AS 45.50.471(a)
AS 45.50.481(a)(1)
AS 45.50.531(a)

THE UNFAIR TRADE PRACTICES ACT APPLIES TO CORPORATIONS.

Alaska Interstate Construction (AIC) sued Pacific Diversified Investment (PDI) relating to disputes concerning a management contract and operating agreement, the purchase and sale of corporate interests, and aircraft lease and support services. AIC alleged fraud, breach of the covenant of good faith and fair dealing, violation of the Alaska Unfair Trade Practices Act (UTPA), breach of the parties' operating agreement, and conversion. PDI alleged a number of counterclaims. The jury returned a verdict in favor of AIC on its claims for fraud, violation of the UTPA, and breach of fiduciary duty.

On appeal and after reviewing post trial motions, the Alaska Supreme Court held, in part, that (1) the UTPA applies to intra-corporate disputes, not just to individuals, and (2) the jury's finding of fraud compels the conclusion that a material breach of the operating agreement occurred in this case.

Alaska Interstate Constr., LLC v. Pac. Diversified Investments, 279 P.3d 1156 (Alaska 2012), 2012 Alas. LEXIS 29 (Alaska Feb. 10, 2012).

Legislative review is recommended only if the legislature wishes to limit the application of the UTPA to individuals.

AS 47.30.710

APPEAL OF INVOLUNTARY COMMITMENT ORDER NOT MOOT AFTER PATIENT RELEASE.

A patient was involuntarily committed to a psychiatric facility for 30 days and appealed the order after she was released from the facility, asking the court to vacate the order. The state argued that the appeal was moot as the patient had been released but the Alaska Supreme Court reviewed the potential collateral consequences of such an order, including employment restrictions and other future effects, and held that those consequences, without a particularized showing of harm, defeated the mootness argument. The court noted, however, that collateral consequences may not apply to a case involving a person with prior commitment orders.

In the Matter of Joan K., 273 P.3d 594 (Alaska 2012).

Legislative review is not recommended.

ADJUSTED INCOME USED FOR CHILD SUPPORT CALCULATIONS DURING SHARED CUSTODY ALLOWS A DEDUCTION FOR CHILD SUPPORT PAID FOR THE CHILDREN OF A PRIOR MARRIAGE BUT DOES NOT ALSO ALLOW A DEDUCTION FOR THE COST OF CARING FOR THE CHILDREN.

In a divorce proceeding, when calculating adjusted income for purposes of setting child support during shared custody, a parent was allowed a deduction for child support actually paid for the children from a prior marriage. However, the parent was not allowed to also deduct a percentage of his income to account for the cost of caring for his children from the prior marriage. The Alaska Supreme Court held that the part of the rule for calculating child support that allows a parent to deduct an amount necessary to raise and care for children of a prior marriage only applies when the children of the prior marriage are living full time with the parent. The court held that the parent was not entitled to both deductions.

Gorton v. Mann, 281 P.3d 81 (Alaska 2012).

Legislative review is not recommended unless the legislature wishes to allow both deductions during shared custody, or wishes to modify the statutes to reflect the decision of the court.

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