STATE OF ALASKA

Legislative Affairs Agency

A

REPORT TO THE

TWENTY-NINTH STATE LEGISLATURE

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

Prepared by
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A REPORT TO THE TWENTY-NINTH 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The report lists Alaska Statutes that will be amended or repealed between February 28, 2015, and March 1, 2016, according to laws enacted before the 2015 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2013, and September 30, 2014,

and

Opinions of the Attorney General that were made available through Internet distribution between October 1, 2013, and September 30, 2014.

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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 2014 Legislature, will be repealed or amended before March 1, 2015, because of repealers or amendments enacted by previous legislatures with delayed effective dates.

Reviews of state court decisions, federal court decisions, and opinions of the Attorney General were prepared by Hilary Martin, Emily Nauman, and Megan Wallace, Legislative Counsel, and Jean Mischel, Assistant Revisor of Statutes. Lisa Kirsch, Assistant Revisor of Statutes, prepared the list of delayed repeals and amendments.

January 2015

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DELAYED REPEALS, ENACTMENTS OR AMENDMENTS

taking effect between February 28, 2015, and March 1, 2016, according to laws enacted before the 2015 legislative session

Laws enacted in 2003

Ch. 61, SLA 2003, secs. 2 and 5 -- Incentive Tax Credit (as amended by sec. 16, ch. 15, SLA 2009)

AS 43.20.043	repealed January 1, 2016

Laws enacted in 2007

Ch. 56, SLA 2007, secs. 2, 5, 7, 9, and 13 -- Commercial Passenger Vehicles

AS 46.03.462(a)	amended January 1, 2016
AS 46.03.462(c)	repealed January 1, 2016
AS 46.03.463(b)	amended January 1, 2016
AS 46.03.463(c)	amended January 1, 2016
AS 46.03.465	repealed January 1, 2016

Laws enacted in 2009

Ch. 26, SLA 2009, sec. 2 -- Air Quality Tax Credit

AS 29.45.048	repealed January 1, 2016

Laws enacted in 2014

Ch. 15, SLA 2014, sec. 59 -- Education Funding

AS 14.17.470	amended July 1, 2015
AS 23.15.835(e)	amended July 1, 2015
AS 23.15.835	amended July 1, 2015
AS 23.15.850	amended July 1, 2015

Ch. 83, SLA 2014, sec. 31 -- Offender Screening and Assessment

AS 33.30.011	amended January 1, 2016

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

A BOUNDARY LINE BY ACQUIESCENCE IS ESTABLISHED WHERE ADJOINING LANDOWNERS WHOSE PROPERTY IS SEPARATED BY SOME REASONABLY MARKED BOUNDARY LINE MUTUALLY RECOGNIZE AND ACCEPT THAT BOUNDARY LINE FOR SEVEN YEARS OR MORE.

Lee and Konrad disputed the boundary between their lots in an Anchorage subdivision. Lee had a 1992 survey done, and marked the boundary with fence posts that were accepted by Konrad's predecessor in interest, Lee's former neighbor. After purchasing her lot, Konrad commissioned a 2008 survey and claimed a trespass from Lee's fence posts and fill materials. The Alaska Supreme Court adopted the doctrine of boundary by acquiescence, which is used when estoppel and adverse possession are unavailable. The doctrine is based upon principles of public policy that preclude a party from setting up or insisting on a boundary line in opposition to one which has been steadily adhered to. The Court did not define how a boundary line must be established by physical markers, but held that "a boundary line is established by acquiescence where adjoining landowners (1) whose property is separated by some reasonably marked boundary line (2) mutually recognize and accept that boundary line (3) for seven years or more." The Court stated that the seven-year period was adopted from the statutory prescriptive period for adverse possession but boundary by acquiescence requires the parties to establish the location of a boundary by consent, but without written agreement, while adverse possession allows a party to acquire title to land without the owner's consent.

Lee v. Konrad, 337 P.3d 510 (Alaska 2014).

Legislative review is recommended if the legislature disagrees with the test adopted by the Alaska Supreme Court for boundary by acquiescence.

Art. I, sec. 7,
Constitution of the
State of Alaska
AS 09.19.010

MANDATORY PRISONER LITIGATION FILING FEES CANNOT BE APPLIED TO UNCONSTITUTIONALLY DENY ACCESS TO THE COURTS.

An indigent prisoner appealed two prison disciplinary actions to the superior court. For each appeal the superior court calculated a reduced filing fee pursuant to AS 09.19.010. The indigent prisoner entered prison with over $500 in his account, but it was depleted by the time of filing. The prisoner failed to pay the filing fees and his appeals were dismissed. The prisoner appealed to the Alaska Supreme Court, contending that he had no means of paying the reduced filing fees and argued that the statute unconstitutionally deprived him of access to the courts.

AS 09.19.010 provides that litigation against the state requires prisoners to pay full filing fees or qualify for a partial exemption. Under the exemption, an indigent prisoner's minimum filing fee is "20 percent of the larger of the average monthly deposits made to the prisoner's account . . . or the average balance in that account" over the six months preceding the litigation. The reduced fee is due within 30 days unless the superior court grants an extension. If the prisoner does not pay on time, "the court may not accept any filing in the case or appeal."

The Alaska Supreme Court held that AS 09.19.010, as it applied to the indigent prisoner, violated the Constitution of the State of Alaska's due process provision. The Court reasoned that because the minimum filing fee under AS 09.19.010 is calculated by looking at a prisoner's account over the six months preceding litigation, prisoners whose balances deplete over those six months are required to post a filing fee in excess of their account balance. The Court also held that although the state may have a legitimate interest in reducing frivolous prisoner litigation, due process cannot allow that interest to be furthered by barring an individual prisoner of court access because of an actual inability to pay. As applied to prisoners in such circumstances, the Court found that AS 09.19.010 denies adequate procedural due process.

Barber v. State, 314 P.3d 58 (Alaska 2013).

Legislative review is recommended to address indigent prisoner filing fees that are set in accordance with AS 09.19.010, but are in excess of the prisoner's account balances at the time such filing fees are due.

Art. XI, sec. 7, Constitution of the State of Alaska
AS 15.45.010

RECOMMENDATION TO DENY CERTIFICATION OF AN INITIATIVE RELATING TO SHORE GILL NET AND SET NET FISHING IN NONSUBSISTENCE AREAS.

The Department of Law recommended to Lieutenant Governor Treadwell that he decline to certify the application for an initiative entitled "[a]n Act providing for the protection and conservation of Alaska's fisheries by prohibiting shore gill nets and set nets in nonsubsistence areas" (13PCAF). The Department of Law's recommendation was based on their conclusion that 13PCAF made a prohibited appropriation under art. XI, sec. 7 of the Constitution of the State of Alaska. In reaching this conclusion, the Department of Law (DOL) opined that 13PCAF effectively allocated salmon from the East Side Set Net and Northern District commercial fisheries to non-commercial in-river fisheries, eliminating a major user group while appealing to the self-interests of sport and personal fisheries. The DOL also found that 13PCAF would eliminate the Board of Fisheries' (Board) current allocation to the set net fishery and its ability to allocate to that fishery in the future, which would impinge on the legislature's and Board's ability to make allocation decisions among competing users. Following a 1996 Alaska Supreme Court decision that preferential treatment of certain fisheries is an appropriation, the DOL found that 13PCAF was an appropriation that could not be enacted by initiative.

2014 Op. Alaska Att'y Gen. (January 3, 2014; File No. JU2013200790).

Legislative review is not recommended.

Alaska Civil Rule 82

AN AWARD OF ATTORNEY FEES UNDER RULE 82 SHOULD BE BASED ON LOCAL RATES ABSENT EXTRAORDINARY CIRCUMSTANCES.

Nautilus and Exxon entered into a settlement agreement related to the Exxon Valdez oil spill. After litigation regarding the terms of the settlement agreement, the superior court found in favor of Exxon and awarded attorney fees to Exxon based on the out-of-state hourly billing rates charged by Exxon's Los Angeles attorneys. Civil Rule 82(b)(2) requires that an award of fees be based on "the prevailing party's reasonable actual attorney's fees which were necessarily incurred." The Alaska

Supreme Court held that the attorney fees customarily charged in the locality of the case for similar legal services is the basis on which awards should ordinarily be calculated, and an award based on out-of-state attorney rates should be made only in extraordinary circumstances.

Nautilus Marine Enters., Inc. v. Exxon Mobil Corp., 332 P.3d 554 (Alaska 2014).

Legislative review is recommended only if the legislature wants to allow out-of-state attorneys to recover fees based on their state's rates.

AS 04.16.200

CHANGE IN LOCAL OPTION AFTER OFFENSE DOES NOT ENTITLE DEFENDANT TO HAVE FELONY CONVERTED TO A MISDEMEANOR.

Yako was convicted of selling alcoholic beverages without a license in Bethel. The unlicensed sale of alcoholic beverages is a class A misdemeanor under AS 04.16.200(a), however, the offense is a class C felony if the offense occurred in a local option community. AS 04.16.200(b). At the time of the offense, Bethel had exercised the local option and restricted the sale, importation, and possession of alcoholic beverages. After the offense, but while the case was pending in superior court, Bethel voted to repeal the local ban on the sale of alcohol. Yako argued that the trial court should have vacated his felony conviction and convicted him of a misdemeanor instead. The Alaska Court of Appeals stated that while the underlying ordinance had changed, the state statutes, which prohibited the unlicensed sale of alcoholic beverages and makes the offense a felony if committed in a local option community, were still in effect and had not been repealed by the change in local law. The court noted that AS 04.11.495, which deals with a community's repeal of a local option, states that the repeal takes effect on the first day of the month following the election certification, and not immediately. The court viewed` the existence of AS 04.11.495 as a clear statement by the legislature that a change in the local law would not automatically excuse past infractions.

Yako v. State, 317 P.3d 627 (Alaska App. 2014).

Legislative review is not recommended as the court's decision seems to be reasonable given the existence of AS 04.11.495.

AS 09.10.140(a)

STATUTE OF LIMITATIONS DOES NOT APPLY TO EQUITABLE CLAIMS FOR RESCISSION AND REFORMATION OF A CONTRACT.

Linda R. Moffitt, who was appointed her mother's guardian and conservator, filed a lawsuit seeking to rescind or reform a deed her parents executed in 1995 and a contract they signed in 1998. The superior court dismissed the claims, reasoning the statute of limitations had run before Ms. Moffitt filed her suit. The Alaska Supreme Court reversed the decision, holding that the doctrine of laches, not the statute of limitations, controlled the time limit for asserting equitable claims for rescission or reformation of a contract. Laches requires a determination of whether delay in filing a claim for equitable relief was reasonable under the circumstances. In addition, the Court noted that there were substantial questions raised about the operation of AS 09.10.140(a), the tolling statute, but the issues were not adequately addressed in the briefing. Accordingly, the Court could not decide whether cases applying AS 09.10.140(a) to a minor's claims, when the minor has competent parents, also apply to toll an incompetent plaintiff's claims after appointment of a guardian.

Moffitt v. Moffitt, __ P.3d. __, 2014 WL 3883426.

Legislative review is not recommended unless the legislature wishes to further define a reasonable period for equitable challenges or to address whether the tolling statute will apply to toll an incompetent plaintiff's claims after appointment of a guardian.

AS 10.06.430

SHAREHOLDER OF A CORPORATION IS ENTITLED TO ELECTRONICALLY MAINTAINED BOOKS AND RECORDS OF ACCOUNT, MONTHLY FINANCIAL STATEMENTS, AND OTHER FINANCIAL ACCOUNTING DOCUMENTS.

A corporate shareholder sent three letters to the corporation seeking to exercise his shareholder inspection rights under AS 10.06.430. The corporation demanded that the shareholder sign a confidentiality agreement prior to release of any documents, but the shareholder rejected any confidentiality agreement. In deciding several issues of first impression, the Alaska Supreme Court held that the phrase "books and records of account" used in AS 10.06.430 includes electronic records and extends beyond mere annual reports in order to give meaning to the statutory language and to avoid statutory surplusage. Specifically, the Court held that the statutory phrase "books and records of account" encompasses monthly financial statements, records of receipts, disbursements and payments, accounting ledgers, and other financial accounting documents, including records of individual executive compensation and transfers of corporate assets or interests to executives. The Court also held that the statutory category "minutes" merely requires a record of the subjects discussed and actions taken at the meeting, which must be faithfully recorded. Finally, the Court held that a corporation may demand that a shareholder sign a confidentiality agreement prior to release of confidential records, but that the agreement must (1) reasonably define the scope of what is confidential information subject to the agreement, and (2) contain confidentiality provisions that are not unreasonably restrictive in light of the shareholder's proper purpose and the corporation's legitimate confidentiality concerns.

Pederson v. Arctic Slope Regional Corp., 331 P.3d 384 (Alaska 2014).

Legislative review is not recommended unless the legislature intended the phrases "books and records of account" and "minutes" to have different meanings than determined by the Alaska Supreme Court in the context of shareholders inspections rights.

AS 11.51.100(a)

WHAT IT MEANS TO "LEAVE" A CHILD WITH ANOTHER PERSON REMAINS UNCLEAR UNDER CHILD ENDANGERMENT STATUTE.

The defendant appealed his convictions on two counts of first-degree child endangerment under AS 11.51.100(a)(2)(A), which prohibits a parent or guardian of a child under the age of 16 to "leave" the child with another person if the parent or guardian knows that the person is under a duty to register as a sex offender. Evidence at trial showed that the defendant left his children with a man the defendant knew to be a sex offender while he went to the store, but the evidence also showed that two other adults were present in another part of the residence (the back bedroom). The prosecutor argued to the jury that if the defendant entrusted his children to the sex offender, he was guilty of violating the child endangerment statute even if other adults were present in the residence. The defense attorney argued to the jury that the statute required proof that the defendant left his children *solely* with the sex offender -- and that the presence of the other two adults in the house meant that, as a matter of law, the jury should find the defendant not guilty. The jurors were never told which of these interpretations of the statute was correct. Even when the jurors (during deliberations) asked the court to clarify the meaning of the statute, the trial judge told the jurors that they would have to interpret the statute for themselves.

The Alaska Court of Appeals found that the trial judge's response to the jury's question was plain error. However, the court held that because the defendant's attorney actively encouraged the trial judge to commit that error, the defendant was not entitled to pursue his jury instruction argument as a claim of plain error. The Alaska Court of Appeals did not reach a conclusion as to which interpretation of the statute was correct.

Roth v. State, 329 P.3d 1023 (Alaska App. 2014).

Legislative review is recommended to decide what it means to "leave" a child with another person under the child endangerment statute.

AS 11.56.840
AS 12.63.010

REQUIREMENT FOR SEX OFFENDERS TO REGISTER E-MAIL ADDRESSES APPLIES TO OFFENDERS WHO FILED INITIAL REGISTRATION PRIOR TO ENACTMENT OF REQUIREMENT.

Patterson is a convicted sex offender who is required to register for life. After his conviction, on January 1, 2009, AS 12.63.010 was amended requiring sex offenders to disclose in the initial registration report all e-mail addresses used and report any changes to the information previously provided in the initial registration to the Department of Public Safety. Patterson was convicted of failing to register as a sex offender under AS 11.56.840, for failing to disclose all of his e-mail addresses. Patterson argued that AS 11.56.840 only required him to disclose newly established e-mail addresses or changes to existing addresses. The Alaska Court of Appeals stated that this argument ignored the uncodified applicability section of the 2008 session law that created the e-mail disclosure requirement. The language clearly required convicted sex offenders who filed their initial registration on or before December 31, 2008, to report all of their e-mail addresses when their next report was due. The Alaska Court of Appeals noted in the case that the uncodified nature of the session law could potentially create due process concerns, but that the notice concerns did not exist in this particular case because the state's registration forms contained the e-mail requirement.

Patterson v. State, 323 P.3d 65 (Alaska App. 2014).

Legislative review is not recommended because the court did not find a due process violation in this case and the interpretation of the uncodified applicability clause in the amended statute was correctly applied.

AS 11.61.190(a)(2)

THE ACT OF DISCHARGING A GUN FROM A MOTOR VEHICLE IS A SINGLE CRIME UNDER AS 11.61.190(a)(2), REGARDLESS OF THE NUMBER OF PEOPLE ENDANGERED.

On the afternoon of August 15, 2008, Arron Young fired shots from a silver SUV at a green sedan carrying members of a rival gang. Young and his accomplices chased the sedan for over two miles through Fairbanks. Bullets hit the sedan, leaving it full of holes and the back window shattered. Shots from the same event also hit two other cars, carrying a total of 4 passengers, and endangered a passing bicyclist. Young was ultimately convicted of five counts of weapons misconduct under AS 11.61.190(a)(2). AS 11.61.190(a)(2) criminalizes shooting a firearm from a motor vehicle under circumstances where there is a substantial and unjustifiable risk of injury to people or property. The five counts included one count for each of the five bystanders endangered. The Alaska Supreme Court concluded that the legislature did not intend AS 11.61.190(a)(2) to support multiple convictions. Rather, the Court held that under AS 11.61.190(a)(2), the crime was the act of a drive-by shooting itself, regardless of how many people are endangered by the shooting; that assumption also preserves the criminalization of a drive-by shooting under AS 11.61.190(a)(2) even if there is no victim. The Court noted that Young could have been charged with a separate count of assault for each bystander endangered, thus other charges were available to cover the crimes against each bystander.

Young v. State, 331 P.3d 1276 (Alaska 2014).

Legislative review is not recommended unless the legislature would like to amend AS 11.61.190(a)(2) to allow multiple counts of weapons misconduct for each person or piece of property endangered in a single drive-by shooting.

AS 12.47.060
AS 12.47.050(b)

POST-2012 GUILTY BUT MENTALLY ILL FINDING CONSTITUTIONAL BUT COULD BENEFIT FROM CLARIFICATION.

Karen Clifton shoved the barrel of a loaded semi-automatic pistol into the ribs of a co-worker and pulled the trigger. Fortunately, Clifton had neglected to rack the pistol, so no bullet fired. A jury found Clifton guilty of attempted murder and assault. While there was substantial reason to believe that Clifton suffered from a mental disease, Clifton declined to rely on a defense of insanity or diminished capacity based on a mental disease or defect. A pre-2012 version of AS 12.47.060 allowed a post-verdict procedure for the prosecutor or the court to raise the issue of whether the defendant should be found "guilty but mentally ill." Under that procedure, if the issue were raised the trial court judge was required to make a post-verdict finding as to whether the defendant was guilty but mentally ill using the preponderance of evidence standard. The consequence of a verdict of "guilty but mentally ill" was that a defendant became entitled to mental health treatment during the service of their sentence, however, the defendant was also ineligible for parole and furlough release as long as the mental health treatment was required. The defendant could also face a petition for involuntary commitment at the end of their sentence. The superior court found the pre-2012 procedure in the "guilty but mentally ill" statute to unconstitutionally deprive a criminal defendant the right to trial by jury because, if found guilty, denied the defendant the right to parole, and applied the preponderance of evidence standard, rather than the constitutionally required proof beyond a reasonable doubt. The Alaska Supreme Court noted that in 2012, the legislature amended AS 12.47.060 to make its procedures comply with the Sixth Amendment of the United States Constitution, leaving no constitutional impediment. The Court noted that, because the change in law was retroactive, the unconstitutional version of AS 12.47.060 no longer applied in Clifton's case.

Importantly, the Court described two outstanding unresolved issues in the statute, although they were not ripe for review. First, the provisions of AS 12.47 do not include any procedures by which the defendant can show - either at sentencing or later, during the service of their sentence - that they no longer suffer from a mental disease or defect that renders them dangerous. Second, it is unclear whether, under AS 12.47.050(b) a defendant found guilty but mentally ill is subject to compulsory mental health treatment or whether the defendant may reject the mental health treatment.

State v. Clifton, 315 P.3d 694 (Alaska App. 2013).

Legislative review is recommended to clarify (1) whether the mental health treatment described in AS 12.47.050(b) is compulsory; and (2) the procedures by which the defendant can show that they no longer suffer from a mental disease or defect.

AS 12.55.045(a)
AS 12.55.100(a)(2)

RESTITUTION IN CRIMINAL CASES IS LIMITED TO ACTUAL DAMAGES.

The defendant was convicted of third-degree theft for stealing pain pills from the veterinary clinic where she worked. As part of her sentence, the district court ordered her to pay restitution to the clinic for the retail value of the pills. On appeal, the defendant argued that the district court should have ordered her to pay restitution for the wholesale value of the pills.

AS 12.55.100(a)(2) governs restitution as a condition of probation and specifies that the restitution should be "for actual damages or loss caused by the crime for which [the] conviction was had." AS 12.55.045(a) governs restitution as a direct provision of a sentence, but does not explicitly declare that the restitution should be for "actual damages or loss." The Alaska Court of Appeals noted, however, that AS 12.55.045(a) specifies that the restitution should be paid "to the victim or other person *injured* by the offense" and that, when the sentencing court determines the amount of restitution, the court "shall take into account the . . . public policy that favors requiring criminals to *compensate for damages and injury* to their victims," as well as "[the] *financial burden* placed on the victim . . . and other persons injured by the offense" (emphasis added).

The Alaska Court of Appeals held that the two statutes should be construed the same and that restitution under either statute should be assessed according to the damages or loss arising from the defendant's crime, and not the amount of the defendant's unjust gain.

Welsh v. State, 314 P.3d 566 (Alaska App. 2013).

Legislative review is not recommended unless the legislature wants to change how restitution is calculated in criminal matters.

AS 12.55.115
AS 33.16.090
AS 33.16.100

NO LEGAL PRESUMPTION AGAINST IMPOSING A DISCRETIONARY PAROLE RESTRICTION BEYOND THE STATUTORY MINIMUM RESTRICTION.

Jimmy Jack Korkow was convicted of first-degree murder after stabbing his wife to death in front of his young children. The sentencing judge, after considering the severity of the case and Korkow's lack of remorse, restricted Korkow's eligibility for discretionary parole beyond the 33-year statutory minimum to 50 years, noting the need to protect Korkow's children and the public at large. AS 12.55.115 expressly empowers a sentencing court to restrict eligibility for discretionary parole beyond that required by AS 33.16.090 and AS 33.16.100, which, in relevant part, bar release on discretionary parole until one-third of the prisoner's term has been served. The Alaska Supreme Court reasoned that although sentencing courts may take into consideration the Parole Board's expertise in assessing an individual's likelihood for a successful parole, sentencing courts are expressly permitted to restrict eligibility for discretionary parole beyond the one-third of the term minimum. Broadly, the Court held that there is no legal presumption against a parole restriction beyond the statutory minimum.

State v. Korkow, 314 P.3d 560 (Alaska 2013).

Legislative review is not recommended.

AS 12.55.120(e)
Appellate Rule 215

FELONY DEFENDANTS RETAIN THE RIGHT TO APPEAL A SENTENCE UNDER THE APPELLATE RULES DESPITE CONTRARY STATUTORY LANGUAGE.

A defendant who was convicted of several crimes filed an appeal claiming that his composite sentence of 20 years, which fell within the presumptive range, was excessive. The Alaska Court of Appeals accepted jurisdiction to hear the appeal despite a 2005 statute that attempted to limit the court's jurisdiction when the sentence was within the applicable presumptive range. Although the legislature may limit the court's jurisdiction, in doing so, the legislature failed to reconcile a conflicting procedural court rule.

AS 12.55.120(a) declares that felony defendants who receive more than two years to serve have the right to appeal their sentence unless that term of imprisonment was an agreed-upon provision of a plea bargain. In 2005, the legislature enacted AS 12.55.120(e), which limits this right of appeal. Subsection (e) declares that "[if a] sentence [is] within an applicable presumptive range [, the sentence] may not be appealed to the court of appeals . . . on the ground that the sentence is excessive." AS 22.07.020(b) declares that the Court of Appeals has the authority to review felony sentences exceeding two years to serve "except as limited in AS 12.55.120."

By contrast, Appellate Rule 215(a)(1) tracks the language of AS 12.55.120(a). Rule 215(a)(1) declares that felony defendants have the right to appeal any sentence longer than two years to serve (unless the defendant's term of imprisonment was an agreed-upon provision of a plea bargain). Unlike AS 12.55.120(e), this right of appeal applies even when a defendant's sentence is within the applicable presumptive range. Thus, there is a conflict between AS 12.55.120(e) and Appellate Rule 215.

In resolving the conflict, the Alaska Court of Appeals invalidated the restriction on sentence appeals in AS 12.55.120(e). Thus, felony defendants who have the right to appeal their sentence under the provisions of Appellate Rule 215(a)(1) remain eligible to pursue their appeal even though their sentence is within the applicable presumptive range, and the Alaska Court of Appeals retains its jurisdiction to hear those appeals.

Mund v. State, 325 P.3d 535 (Alaska App. 2014).

Legislative review is recommended in light of the Alaska Court of Appeals' decision to invalidate AS 12.55.120(e) based on a failure of the legislature to reconcile the appellate procedure with its jurisdictional limits.

AS 12.55.155

A DEFENDANT WHO HAS PREVIOUSLY BEEN CONVICTED OF A FELONY IS NOT PROHIBITED FROM PROVING A SENTENCING MITIGATOR FOR THE OFFENSE AND ANY PREVIOUS OFFENSES COMMITTED BY THE DEFENDANT.

Simants was convicted of one count of second-degree sexual abuse of a minor. Simants had previously been convicted of a felony for marijuana possession 17 years earlier, at age 18.

When sentencing Simants for the current offense, the superior court rejected mitigator AS 12.55.155(d)(12), that "the facts surrounding the commission of the offense and any previous offenses by the defendant establish that the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment" because of Simants' prior felony offense. The superior court held that as a matter of law, a defendant who has been convicted of a felony cannot prove the (d)(12) mitigator. The Alaska Court of Appeals disagreed, stating that it was reasonable to infer from the statutory scheme that the legislature intended sentencing courts to assess the harm caused by a defendant's criminal conduct for each offense, rather than on a mechanical assessment of whether the defendant's conduct is punishable as a misdemeanor or felony offense.

Simants v. State, 329 P.3d 1033 (Alaska App. 2014).

Legislative review is recommended to determine whether the Alaska Court of Appeals correctly interpreted legislative intent when it required a review of the harm caused by each offense, past and present, to apply the sentencing mitigator.

AS 12.55.155(d)

A DEFENDANT DOES NOT HAVE TO PROVE THAT THE CONDUCT WAS AMONG THE LEAST SERIOUS WITHIN THE DEFINITION OF THE OFFENSE TO CLAIM THAT THE HARM CAUSED HAS BEEN CONSISTENTLY MINOR AND INCONSISTENT WITH A SUBSTANTIAL TERM OF IMPRISONMENT.

Serena Joseph received a traffic ticket for speeding. At her trial, she testified that she had not been driving the vehicle at the time. Joseph was later charged with, and convicted of, perjury for giving this testimony. Joseph appealed her perjury sentence, arguing that the sentencing judge relied on an improper legal rationale when he rejected her proposed mitigating factor, AS 12.55.155(d)(9), that her conduct was among the least serious within the definition of the offense. The Court of Appeals agreed, overturning *Jordan v. State*, 895 P.2d 994 (Alaska App. 1995), which held that a defendant is not entitled to claim the benefit of mitigator (d)(12), that the harm caused, both in the present offense and in the past, has been consistently minor and inconsistent with a substantial term of imprisonment, unless the defendant also proves mitigator (d)(9). The Alaska Court of Appeals stated that the

1995 reasoning improperly turned mitigator (d)(9) into a lesser component of mitigator (d)(12), even though proof of any single mitigating factor triggers a sentencing judge's authority to impose a sentence below the presumptive range. The Alaska Court of Appeals also noted the difference in wording between mitigators (d)(9) and (d)(12), with (d)(9) focusing on the defendant's mental state and motive along with the consequences of the defendant's conduct, while (d)(12) focuses solely on the consequences of the defendant's criminal conduct.

Joseph v. State, 315 P.3d 678 (Alaska App. 2013).

Legislative review is recommended as the court's decision has changed with respect to mitigating factors applied in sentencing determinations.

AS 12.55.175(e)
AS 33.16.090(b)

STATEWIDE THREE-JUDGE SENTENCING PANEL HAS AUTHORITY TO GRANT EXPANDED PAROLE ELIGIBILITY EVEN ABSENT A FINDING OF EXCEPTIONAL POTENTIAL FOR REHABILITATION.

The defendant was convicted of attempted first-degree sexual assault. The sentencing judge referred his case to the statewide three-judge sentencing panel because she concluded it would be manifestly unjust to sentence the defendant within the presumptive sentencing range of 25 to 35 years. The three-judge panel considered the case and concluded that it had no authority to grant the defendant expanded eligibility for discretionary parole unless the court applied AS 12.55.175(e) after finding that the defendant had an exceptional potential for rehabilitation; since that finding wasn't made in this case, the three-judge panel sentenced the defendant to a term of imprisonment well below the presumptive range. The defendant appealed this sentence, arguing that the panel had the authority to expand his eligibility for discretionary parole.

The Alaska Court of Appeals held that when the three-judge panel sentences a defendant who is subject to one of the presumptive sentencing ranges, it does not alter the defendant's eligibility for discretionary parole, under AS 33.16.090(b), even absent express language. The court reviewed the legislative history of the three-judge panel's authority under AS 12.55.175(e), which expressly provides for expanded discretionary parole, and held that it did not limit the three-judge panel's authority to cases involving an exceptional potential for rehabilitation. The case was remanded for the three-judge panel to consider whether to grant the defendant expanded eligibility for discretionary parole.

Luckart v. State, 314 P.3d 1226 (Alaska Ct. App. 2013).

Legislative review is not recommended unless the legislature did not intend for the statewide three-judge sentencing panel to have the authority to grant expanded parole eligibility to defendants who were not found to have an exceptional potential for rehabilitation.

AS 12.63.010

NEW CONSTITUTIONAL RULES APPLY RETROACTIVELY TO CASES PENDING ON DIRECT REVIEW.

Charles was convicted of a sex offense in the 1980s. In 2006, Charles was convicted for misdemeanor failure to register as a sex offender. In 2008, the Alaska Supreme Court issued *Doe v. State*, 189 P.3d 999, (Alaska 2008), which held that applying the Alaska Sex Offender Registration Act (ASORA) to a person who had committed a qualifying crime prior to the enactment of ASORA violated the ex post facto clause. Charles then filed a petition arguing that his failure-to-register conviction based on the *Doe* holding, violated the ex post facto clause. The Alaska Supreme Court adopted the federal standard for direct review retroactivity (the *Griffith* standard): new constitutional rules must be applied retroactively to cases pending on direct review or that are not yet final, not just to cases at the trial level, to any case not yet charged, or to crimes committed after the date of the decision. Since the holding in *Doe* was announced while Charles could still file a timely petition for hearing, and he filed his petition within that time period, the Court reversed Charles's conviction.

Charles v. State, 326 P.3d 978 (Alaska 2014).

Legislative review is not recommended as the Court's decision seems reasonable.

AS 12.72.020(a)

AN APPLICATION FOR POST-CONVICTION RELIEF ON A CRIMINAL CONVICTION OR SENTENCE MUST BE FILED BEFORE ONE YEAR FROM THE DATE OF THE APPEAL DECISION.

Geisinger was convicted of several crimes after he caused a fatal motor vehicle collision, then left the scene. After the conclusion of his criminal trial and the appeal of the length of his sentence, Geisinger filed an application for post-conviction relief, claiming that the attorney who represented him was incompetent. Under AS 12.72.010, a proceeding for post-conviction relief must be filed within the time limits codified in AS 12.72.020. AS 12.72.020(a)(3)(A) provides that a post-conviction relief action is untimely when, "if *the conviction* was appealed, one year after the court's decision is final under the Alaska Rules of Appellate Procedure." [Italics added for evidence]. The Court of Appeals held that the term "conviction" in AS 12.72.020(a)(3)(A) includes "conviction, revocation, decision, . . . or penalty imposed." Therefore, a defendant, like Geisinger who appealed his sentence, has one year from the date of the decision on appeal to file his application for post conviction relief.

Geisinger v. State, 334 P.3d 1241 (Alaska 2014).

Legislative review is recommended to determine whether expansion of the meaning of the term "conviction" in AS 12.72.020(a)(3)(A) to include revocation, decision, and sentence, is consistent with legislative intent.

AS 13.26.131
Alaska Civil Rule 82

COSTS AND FEES OF PRIVATELY RETAINED COUNSEL OR EXPERT CAN BE SHIFTED IN GUARDIANSHIP PROCEEDINGS.

An adult son initiated guardianship and conservatorship proceedings over his father. The son later terminated the protective proceedings following an evaluation by the father's expert that concluded the father did not need a guardian. The father moved for full attorney's fees and for costs related to the expert report under both AS 13.26.131(d) and Alaska Civil Rule 82. AS 13.26.131(a) and (b) allocate to the state, respondent, and petitioner costs of court-appointed visitors, experts, and attorneys in guardianship proceedings. AS 13.26.131(d) allows the court to shift those costs to the petitioner if the court finds that the petitioner initiated a proceeding that was malicious, frivolous, or without just cause. Nothing in AS 13.26.131 expressly addresses the fees and costs of a respondent's privately retained counsel or experts. The Alaska Supreme Court determined that these fees qualify for fee shifting pursuant to AS 13.26.131(d) if the other requirements of the subsection are also satisfied. The Court also determined that AS 13.26.131(d) entirely displaces Alaska Civil Rule 82, which allows a prevailing party in a civil case to be awarded attorney's fees, in guardianship and conservatorship proceedings.

In re Vernon H., 332 P.3d 565 (Alaska 2014).

Legislative review is recommended if the legislature did not intend for fees and costs of a respondent's privately retained counsel or expert to be shifted to the petitioner under AS 13.26.131(d).

AS 16.05.251
AS 16.05.258
AS 16.05.330

THE BOARD OF FISHERIES MAY ENACT REGULATIONS DELEGATING AUTHORITY TO THE DEPARTMENT OF FISH AND GAME TO SPECIFY LIMITATIONS ON FISHING THROUGH THE ISSUANCE OF FISHING PERMITS.

Under AS 16.05.251, the Board of Fisheries (Board) is authorized to adopt regulations for the conservation, development, and utilization of fisheries. The Board adopted regulations that require a person to obtain a permit from the Department of Fish and Game (Department) before participating in a fishery. The regulations also require the Department to set permit conditions, including the catch limits. When the Department discovered that the escapement of sockeye salmon into Kanalku Lake had fallen dangerously low, it reduced the annual catch limit for sockeye salmon. Estrada and two other fishermen were charged with violating terms of their fishing permits by exceeding this limit. The fishermen argued that the Board could not legally delegate its authority to the Department; that the only lawful way to establish a catch limit was for the Board to enact an administrative regulation that directly codified the limit. The Alaska Supreme Court disagreed, reasoning the Board's interpretation must prevail since similar delegations of authority had been exercised for decades without intervention from the legislature, and the legislature has never taken action to prohibit or restrict the Board's practice.

State v. Estrada, 315 P.3d 688 (Alaska App. 2013).

Legislative review is not recommended unless the legislature would like to prevent the Board of Fisheries from delegating the ability to issue fishing permits and set catch limits to the Department of Fish and Game.

AS 21.96.020

A SNOWMACHINE IS AN UNINSURED MOTOR VEHICLE UNDER AS 21.96.020(c).

A.M. was a passenger on a snowmachine that was traveling adjacent to the Mitchell Expressway (Expressway) in Fairbanks. The snowmachine entered the Expressway directly in front of a vehicle and collided with it, causing severe injuries to A.M. The insurer of the truck driver paid the policy limits, and the parents of A.M. tried to recover from their own insurance company under the uninsured and underinsured motorist coverage. The federal district court noted that the Alaska Mandatory Automobile Insurance Act (AS 21.96.020) does not contain a definition of "uninsured motor vehicle." The district court stated that as the snowmachine was being driven on a highway, AS 28.10.011 required the involved snowmachine to be registered and to carry liability insurance when it was driven beside and on the Expressway. Therefore, even though the snowmachine was not licensed for highway use, it was an "uninsured motor vehicle" under AS 21.96.020 at the time it was struck by the vehicle and qualified under the policy.

21st Century Premier Ins. Co. v. Smith, 998 F. Supp. 2d 884 (D. Alaska 2014).

Legislative review is not recommended unless the legislature intended that snowmachines be exempt from uninsured motor vehicle coverage.

AS 22.15.195

AS 22.15.195 IS CONSTITUTIONAL AND DOES NOT BAR THE ALASKA JUDICIAL COUNCIL FROM DISSEMINATING NEW INFORMATION IN THE 60 DAYS PRIOR TO AN ELECTION.

In 2010 the Alaska Judicial Council (Council) recommended that the electorate not retain a sitting district court judge. After the recommendation stirred a media controversy, the Council also published an opinion piece in the Anchorage Daily News, sat for radio interviews, and hired a spokesperson to explain its recommendation. AS 22.15.195 allows the Council to make recommendations about the retention of judges. The statute also states that the "information and the recommendation" provided by the Council "shall be made public at least 60 days before the election." The Alaska Supreme Court found AS 22.15.195 does not limit the method or timing of recommendations and therefore that (1) the Council did not exceed its statutory authority when it disseminated new information about the retention recommendation in the 60 days prior to the election and (2) the Council did not exceed its statutory authority when it took steps to publicize its recommendation. The Court found AS 22.15.195 to be constitutional.

Alaska Judicial Council v. Kruse, 331 P.3d 375 (Alaska 2014).

Legislative review is recommended only if the legislature would like to limit the method or timing of judicial retention recommendations by the Council.

AS 23.30.121

PRESUMPTION THAT LISTED DISEASES, INCLUDING PROSTATE CANCER, ARE WORK-RELATED FOR WORKERS' COMPENSATION OF FIREFIGHTERS DOES NOT REQUIRE EXPERT TESTIMONY OR STRICT COMPLIANCE WITH REGULATIONS.

A firefighter developed prostate cancer after working for nearly 30 years in his occupation. He filed a workers' compensation claim under AS 23.30.121, which creates a presumption that certain diseases in firefighters, including prostate cancer, are work-related when specific conditions are met. The employer contended that the firefighter could not meet the presumption of compensability because he had not strictly complied with statutory and regulatory requirements.

The Alaska Supreme Court held that the firefighter met the presumption of compensability under AS 23.30.121, noting that the firefighter only needed to show substantial compliance with statutory requirements. The Court also emphasized that the legislative history behind AS 23.30.121 did not indicate that the firefighter must strictly comply with any regulatory requirements the Alaska Workers' Compensation Board later adopted. In regards to the requirement in AS 23.30.121 that a firefighter show exposure to a known carcinogen, the Court held that the statute does not require that a firefighter show exposure to a carcinogen that is known to cause a specific cancer. Rather, a firefighter must show exposure to a known carcinogen and then provide some evidence linking the carcinogen to the cancer. The Alaska Supreme Court also declined to adopt a general rule requiring a firefighter to present expert testimony in cases involving AS 23.30.121, and held that an employer could not rebut the presumption in AS 23.30.121 through expert testimony that there is no known carcinogen for prostate cancer, as evidence used to rebut the legislatively created presumption must be personal to the claimant.

Adamson v. Municipality of Anchorage, 333 P.3d 5 (Alaska 2014).

Legislative review is not recommended unless the legislature wishes to reconsider use of expert testimony in cases involving AS 23.30.121.

AS 23.30.155

COMPENSATION IS "DUE" FOR THE PURPOSES OF WORKERS' COMPENSATION CLAIMS WHEN A MEDICAL BENEFIT HAS BEEN PRESCRIBED BUT NOT YET PAID.

A workers' compensation claimant suffered a spinal cord injury in a work-related motor vehicle accident and developed numerous medical complications related to his injury. The claimant had been receiving workers' compensation benefits for over 30 years when the employer opposed by controversion some aspects of the claimant's medical care as being unreasonable or unnecessary. The employer unilaterally stopped making payments on the controverted benefits before a decision on the claims. The employer later withdrew some of the controversions and resumed payments on those but claimed that others were not yet billed for and therefore not "due" after the employer filed the notice of controversion. The claimant filed a formal claim seeking full coverage for the controverted benefits. The Workers' Compensation Board found that some of the employer's controversions were made frivolously or in bad faith and imposed statutory penalties for employment of benefits.

AS 23.30.155(e) requires imposition of a penalty when compensation is not paid within seven days after it becomes "due." The Alaska Supreme Court held on appeal that under

Alaska's workers' compensation system, payments "due" are construed according to the term's plain meaning and are "payable immediately or on demand." The Alaska Supreme Court also construed the statute as allowing imposition of a penalty on a medical benefit that has been prescribed but not yet billed for or paid when a benefit is denied in bad faith. The Court reasoned that a controversion in bad faith would result in no bill if the claimant couldn't otherwise afford the benefit as in this case.

Harris v. M-K Rivers, 325 P.3d 510 (Alaska 2014).

Legislative review is not recommended unless the legislature wishes to clarify the circumstances in which a workers' compensation benefit must be paid, whether controverted or not.

AS 23.30.175(a)

WORKERS' COMPENSATION RATES ARE CALCULATED BASED ON THE STATUTE IN EFFECT ON THE DATE OF INJURY.

A claimant filed a workers' compensation claim, seeking a compensation rate adjustment and permanent total disability (PTD) benefits. The rate adjustment was based on an amendment to the maximum benefit limits in the applicable statute that became effective five months after the claimant's injury. The Workers' Compensation Board decided that the version of the workers' compensation statute in effect at the time of the injury was the applicable statute and capped the claimant's benefits according to the lower limit. The Workers' Compensation Appeals Commission affirmed the Board's decision, and the claimant appealed.

The claimant argued to the Alaska Supreme Court that the statute in effect at the time of his permanent total disability, rather than his date of injury, should govern his rate of compensation. The Alaska Supreme Court held that generally, the statute in effect on the date of injury applies to a workers' compensation claim. The Court found no express or implied legislative intent to the contrary.

Louie v. BP Exploration (Alaska), Inc., 327 P.3d 204 (Alaska 2014).

Legislative review is recommended if the legislature intended for the amended statute to apply retroactively.

AS 23.30.215
AS 23.30.395(40)
AS 23.30.395(41)

SAME-SEX PARTNERS ARE ENTITLED TO WORKERS' COMPENSATION DEATH BENEFITS.

The Alaska Workers' Compensation Board denied a death benefit claim filed by the decedent's same-sex partner on grounds that the death benefit statute only grants benefits to a worker's "widow or widower" as defined by statute. The Board construed these terms by applying the Marriage Amendment to the Constitution of the State of Alaska, which defines marriage as "only between one man and one woman" and prohibits the recognition of out-of-state marriages of same-sex couples, thus excluding the decedent's same-sex partner. The decedent's same-sex partner appealed.

The Alaska Supreme Court held that the restriction on the statutory definition of "widow" or "widower" violated the decedent's same-sex partner's right to equal protection under the Constitution of the State of Alaska. The Court found that the workers' compensation statute and the Marriage Amendment to the Constitution of the State of Alaska together prevented same-sex couples from obtaining workers' compensation benefits to the same extent as married couples. Thus, the Court held that the workers' compensation statute facially discriminated between same-sex and opposite-sex couples.

Harris v. Millennium Hotel, 330 P.3d 330 (Alaska 2014).

Legislative review is recommended to amend workers' compensation statutes consistent with the Alaska Supreme Court's holding.

AS 28.35.028

A THERAPEUTIC COURT JUDGE DOES NOT HAVE THE POWER TO UNILATERALLY ALTER A PLEA AGREEMENT.

Gou-Leonhardt pleaded guilty to felony driving under the influence pursuant to a plea agreement that granted him admission to the Fairbanks Wellness Court. The plea agreement specified that if Gou-Leonhardt successfully completed the therapeutic court program, he would receive a sentence of 24 months' imprisonment with all 24 months suspended, and 3 years of unsupervised probation. After successfully completing the therapeutic court program, Gou-Leonhardt asked the superior court to grant him a suspended imposition of sentence so he could have his conviction set aside if he successfully completed probation. Gou-Leonhardt argued that AS 28.35.028(b) allows the therapeutic court judge to impose any sentence when a defendant successfully completes the wellness court program, including a sentence other than one negotiated by a plea agreement. AS 28.35.028(b) states in relevant part: "However, notwithstanding Rule 35, Alaska Rules of Criminal Procedure, and any other provision of law, the court, at any time after the period when a reduction of sentence is normally available, may consider and reduce the defendant's sentence based on the defendant's compliance with the treatment plan . . . . "

The Alaska Court of Appeals held that the statute only applies to a therapeutic court judge's authority to modify a defendant's sentence outside the time limits otherwise imposed by Alaska law and does not allow a court to unilaterally alter a plea agreement. The court stated that the legislative history and remaining provisions of the statute also support this conclusion, noting that the statute expressly grants the therapeutic court the authority to depart from otherwise mandatory minimum sentences and applicable presumptive sentence ranges under certain circumstances.

Gou-Leonhardt v. State, 323 P.3d 700 (Alaska App. 2014).

Legislative review is not recommended since the decision is a reasonable interpretation of legislative intent.

AS 28.35.030

PREVIOUS CONVICTION IN ANOTHER STATE FOR DRIVING UNDER THE INFLUENCE SUFFICIENTLY SIMILAR TO ALASKA LAW TO QUALIFY AS A PRIOR CONVICTION.

Phillips was convicted of felony driving under the influence; the offense was a felony because of two prior out-of-state convictions from Texas and California for driving under the influence. Under AS 28.35.030(u)(4)(A), "previously convicted" is defined to include a driving under the influence or refusal conviction from another jurisdiction if the offense has "similar elements" to the Alaska statute defining the offense. Phillips argued that the Texas statute was not similar because in Texas a person can be convicted of driving while intoxicated by "any substance," while in Alaska a person must be under the influence of specific substances: alcohol and controlled substances. The Alaska Court of Appeals stated that while the Texas statute reaches a broader range of conduct than the Alaska statute, the difference was not significant enough to place it outside the Alaska statute's definition of "similar elements" of an offense.

Phillips v. State, 330 P.3d 941 (Alaska App. 2014).

Legislative review is recommended to determine whether the Alaska Court of Appeals correctly interpreted "similar elements" under AS 28.35.030.

AS 28.90.030

REQUIREMENT OF DOUBLE FINES IN TRAFFIC SAFETY CORRIDORS DOES NOT APPLY TO FELONY DRIVING UNDER THE INFLUENCE.

Fyfe was charged with felony driving under the influence, and along with a prison sentence, the court also imposed a fine that was double the mandatory minimum fine for felony driving under the influence based on the state's allegation that the offense took place in a traffic safety corridor. AS 28.90.030(a) states that a person is subject to a double fine if the person violates a provision of Title 28 or a regulation adopted under the authority of Title 28 within a traffic safety corridor. While the Alaska Court of Appeals stated that the plain language of the statute would seem to mandate a double fine for driving under the influence in a traffic safety corridor, the court then went on to say that the legislative history of the statute did not support that interpretation. The court stated that the legislative history shows that the double fine requirement was to apply to non-criminal traffic offenses, and therefore a double fine was not appropriate for felony driving under the influence.

Fyfe v. State, 334 P.3d 183 (Alaska App. 2014).

Legislative review is recommended to determine whether the Alaska Court of Appeals correctly interpreted legislative intent to impose double fines regarding driving under the influence in a traffic safety corridor or to otherwise clarify the applicability of the double fines.

AS 29.45.030(e)
AS 29.45.030(g)

PROPERTY TAX EXEMPTION CANNOT EXCLUDE SAME-SEX COUPLES.

An Anchorage ordinance exempts $150,000 of the assessed value of a home from municipal property tax for an owner who is a senior citizen or disabled veteran. An implementing regulation limited the exemption to the portion of the property occupied by the qualified owner and the owner's spouse, regardless of who holds the title. The Anchorage ordinance mirrored the language of the implementing regulation, 3 AAC 135.085. The Alaska Supreme Court found that the regulatory requirement that another resident be a legal spouse to qualify for the full tax exemption violated the equal protection clause of the Constitution of the State of Alaska because it treated same-sex couples less favorably than it treated opposite-sex couples, even though the two classes are similarly situated. The Alaska Supreme Court noted that the Marriage Amendment (art. I, sec. 25 of the Constitution of the State of Alaska), which states that a marriage in the state must be between one man and one woman, does not preclude the equal protection claims of the same-sex couples because it does not explicitly or implicitly prohibit the state from offering the same property tax exemption to an eligible applicant who has a same-sex domestic partner.

State v. Schmidt, 323 P.3d 647 (Alaska 2014).

Legislative review is not recommended unless the legislature would like to amend the property tax exemption to exclude spousal property interests altogether; ultimately the legislature likely cannot change the outcome of this case because the holding rests on constitutional footing.

AS 33.30.028(a)

WHEN A PRISONER RECOVERS A MEDICAL MALPRACTICE JUDGMENT, THE DEPARTMENT OF CORRECTIONS MAY SEEK REIMBURSEMENT FOR THE COSTS OF OUTSIDE MEDICAL CARE.

A prisoner recovered a medical malpractice judgment against the State of Alaska Department of Corrections (DOC). When DOC paid the judgment, it deducted the expenses it had incurred for unrelated medical care provided to the prisoner by outside providers. DOC then brought an action seeking a declaratory judgment that DOC had the statutory right to reimbursement from the prisoner for medical expenses incurred on his behalf. The Alaska Supreme Court was asked to decide (1) whether AS 33.30.028 entitles the state to reimbursement for the cost of outside medical care from a prisoner without the funding sources identified in AS 33.30.028(a); and (2) whether the state's recovery, if allowed, was subject to a claim for attorney's fees and costs under the common fund doctrine. The Alaska Supreme Court held that a prisoner is liable for medical costs rendered both in-house and outside the prison, whether or not he has collateral resources identified in AS 33.30.028(a). The Court found that the legislative record reflected an intent to take advantage of any financial resources to which a prisoner might have access and observed that "[t]his rule will certainly deter prisoners from overuse of medical services more than a rule relieving a prisoner of all responsibility." The Court also held that the common fund doctrine does not apply to the state's reimbursement claim. The Court reasoned that the prisoner's attorneys did not create any special fund that benefitted the state, so the common fund doctrine did not apply to this recovery.

Hendricks-Pearce v. State, 323 P.3d 30 (Alaska 2014).

Legislative review is not recommended, unless the legislature disagrees with the Court's decision to allow the state reimbursement for the cost of outside medical care from a prisoner with a funding source other than those specifically identified in AS 33.30.028(a).

AS 34.20.070(b)
AS 45.50.561(a)(9)

REINSTATEMENT AMOUNTS MAY INCLUDE ALL REASONABLE COSTS INCURRED IN PURSUING A FORECLOSURE REGARDLESS OF WHETHER THE DEED OF TRUST SPECIFICALLY PROVIDES FOR INCLUSION OF SUCH COSTS; AND THE UNFAIR TRADE PRACTICES ACT DOES NOT APPLY TO NONJUDICIAL DEED OF TRUST FORECLOSURES.

Elizabeth B. Bachmeier executed a note and deed of trust in favor of Richard Waner to secure the balance on her purchase of a residential condominium. When Bachmeier defaulted on her payment obligations, Alaska Trustee, at Waner's request, began a nonjudicial deed of trust foreclosure. Bachmeier requested a reinstatement quote from Alaska Trustee, which responded with a quote that included all the costs it had incurred in pursuing the nonjudicial foreclosure. Bachmeier paid the sum under protest and then sued Alaska Trustee because the promissory note and the deed of trust did not provide for repayment of foreclosure costs to reinstate her loan. The Alaska Supreme Court held that AS 34.20.070(b) allows for the inclusion of all reasonable foreclosure costs in the reinstatement amount, regardless of whether the deed of trust specifically provides for inclusion of such costs. The Alaska Supreme Court also held that the Unfair Trade Practices and Consumer Protection Act (UTPA) does not apply to nonjudicial deed of trust foreclosures. In reaching that conclusion, the Court reiterated prior decisions finding that the UTPA does not cover real estate transactions even after amendments to the UTPA that included recovery of "goods and services" provided in connection with a transaction involving the borrower's residence. The amendments, the Court reasoned, did not alter the meaning of "goods and services" that excludes real estate transactions.

Alaska Trustee, LLC v. Bachmeier, 332 P.3d 1 (Alaska 2014).

Legislative review is not recommended unless the legislature intended the UTPA to include protections for nonjudicial foreclosures on real estate or to require loan documents to expressly provide for foreclosure costs to reinstate the loan.

AS 36.30.690

PROCUREMENT REMEDY FOR ASSERTING CLAIMS AGAINST AN AGENCY ALSO COVERS CLAIMS AGAINST INDIVIDUAL PROCUREMENT OFFICERS.

Bachner Company, Inc. and Bowers Investment Company (Bachner and Bower) were unsuccessful bidders on a state contract. Bachner and Bower filed a protest under the state procurement statutes that alleged irregularities in the bid scoring process. Bachner and Bower also filed a lawsuit against the four procurement committee members as individuals. AS 36.30.690 states that the procurement statutes and regulations are the sole procedure for "asserting a claim against a state agency" arising out of a state procurement. In other words, the state procurement appeal procedures, found in AS 36.30.550 - AS 36.30.699 are the exclusive remedy for a procurement protest "against a state agency." The Alaska Supreme Court held that a suit against individual procurement officers who are acting within the scope of their duties is, for purposes of AS 36.30.690, a "claim against an agency" that must be resolved under the protest procedures in AS 36.30.550 - AS 36.30.690. Therefore, Bachner and Bower's lawsuit against the individual procurement officers was barred.

Bachner Company, Inc. v. Weed, 315 P.3d 1184 (Alaska 2013).

Legislative review is not recommended unless the legislature would like to preserve the ability of bid protesters to bring a lawsuit directly against an individual procurement officer outside of the state procurement code.

AS 43.19.010
AS 43.20.144

APPORTIONMENT OF MULTISTATE INCOME UNDER AS 43.20.144 IS REASONABLE AS REQUIRED BY AS 43.19.010.

AS 43.19.010, the codification of the Multistate Tax Compact, apportions a business' total national and international income to the state by using sales, payroll, and property tax factors. AS 43.19.010 also allows the Department of Revenue (Department) to adjust a taxpayer's burden by applying an alternative formula if the statutorily mandated apportionment does not "fairly represent" the taxpayer's business activity in the state. An alternative formula adopted under AS 43.19.010 must be "reasonable." Between 1969 and 1994, Tesoro's operations in Alaska were taxed solely under AS 43.19.010. In 1995, Tesoro purchased a pipeline company making Tesoro "engaged in the transportation of oil or gas by pipeline," thus subjecting it to additional taxation under AS 43.20.144. Tesoro argued that the income taxes assessed to it by the Department from 1994 to 1998 had been unreasonably distorted under AS 43.20.144. The Alaska Supreme Court rejected the argument that the apportionment of income under AS 43.20.144 was unreasonable and therefore that, in this instance, the apportionment method under AS 43.20.144 met the "reasonableness" standard in AS 43.19.010.

Tesoro Corporation v. State, 312 P.3d 830 (Alaska 2013).

Legislative review is not recommended.

AS 43.20.021
AS 43.20.145

STATE INCOME TAX LIABILITY ON INCOME FROM AFFILIATED FOREIGN CORPORATION DIVIDENDS CALCULATED UNDER THE ALASKA NET INCOME TAX ACT NOT THE INTERNAL REVENUE CODE.

The Alaska Net Income Tax Act (ANITA) incorporates the Internal Revenue Code (IRC), except provisions of the IRC that are "excepted to or modified by other provisions" of

ANITA. ANITA and the Multistate Tax Compact require a corporation to apportion its income and income of certain affiliates by excluding "80 percent of dividend income received from foreign corporations." The IRC has a different formula that does not apportion foreign dividend income and requires a foreign corporation to report only income "effectively connected with the conduct of trade or business within the United States." Because it is inconsistent with the formula in ANITA, the Alaska Supreme Court concluded that the IRC provision has not been adopted by reference into the state income tax laws and that state income tax liability for income from affiliated foreign corporation dividend should be calculated under ANITA.

Sclumberger Technology v. State, 331 P.3d 334 (Alaska 2014).

Legislative review is not recommended unless the legislature disagrees with the Court's reconciliation of the conflicting tax provisions calculating income taxes on foreign corporation dividend income.

AS 43.23.008

SIX-MONTH RESIDENCY REQUIREMENT FOR PERMANENT FUND DIVIDEND CONSTITUTIONAL.

Heller was a member of the military who was posted in Alaska in June 2005. Two months later he was deployed to Iraq. He returned to Alaska in December of 2006 and applied for the 2007 permanent fund dividend (PFD), which is based on eligibility during 2006. The Department of Revenue denied the application after an informal and formal appeal based on AS 43.23.008(b), which requires a person to reside in Alaska for six months before claiming an allowable absence for military service. The superior court upheld the denial of the PFD. Heller argued that while AS 43.23.008(a)(3) requires a prior residency of six months, former AS 43.23.008(a)(16) (renumbered as AS 43.23.008(a)(17)) does not require prior residency of six months, but allows an additional 180 days out of the state "for any reason consistent with the individual's intent to remain a state resident." Heller argued that he should be able to apply the 180-day allowable absence for the period following his deployment, and claim residency for over six months, making him eligible for the (a)(3) allowable absence. The Alaska Supreme Court held that the plain language of the statute prohibits a person from claiming an allowable absence if the person did not reside in the state for at least six consecutive months immediately before leaving the state. The

Alaska Supreme Court also determined that the six-month residency requirement did not violate the equal protection provisions of the US and Alaska Constitutions.

Heller v. State, 314 P.3d 69 (Alaska 2013).

Legislative review is not recommended unless the legislature intended for active duty military members to receive a PFD without first residing in the state for at least six consecutive months.

AS 43.56.060

DEPARTMENT OF REVENUE AND THE STATE ASSESSMENT REVIEW BOARD MAY USE THE "USE VALUE" OF THE TRANS-ALASKA PIPELINE FOR PROPERTY TAX ASSESSMENT.

BP Pipelines (Alaska) Inc., Conocophillips Transportation Alaska, Inc., Exxonmobil Pipeline Company, Koch Alaska Pipeline Company, Unocal Pipeline Company, and Alyeska Pipeline Service Company (Owners) appealed the Department of Revenue (Department) and State Assessment Review Board (SARB) assessment of the value of the Trans-Alaska Pipeline System (TAPS) for property tax purposes. AS 43.56.060 requires the Department to assess the pipeline property at "its full and true value." The Department and SARB assessed the value of TAPS using the "use value," defined as the value that TAPS has for its specific use in the integrated system for transporting oil from the North Slope to market. The Owners argued that the Department should have instead used the "fair market value," defined as the most probable price for which the property would sell, and deducted the costs of tariff regulation. The superior court rejected the Owners' argument; the Alaska Supreme Court affirmed. The Alaska Supreme Court noted that there is no legislative prohibition of employing the "use value" standard; the Court noted that the legislature did not intend for "fair market value" to be the only allowable standard for the assessment of pipeline property. The Alaska Supreme Court found that the "fair market value" including valuing the pipeline by using its tariff income and deducting costs of tariff regulation, would not likely result in a "full and true value" of TAPS. The Alaska Supreme Court also accepted the superior court's calculation of adjustments to the value of TAPS, holding that the superior court (1) was not required to deduct tariff obligations from the value of the pipeline; (2) did not improperly consider unproven reserves of oil when calculating the economic life of the pipeline; and

(3) did not err when it reduced the assessed value of the pipeline to account for excess capacity. Finally, the Court found that interest on the supplemental taxes began accruing from the date of the original tax assessment, rather than the date of reassessment.

BP Pipelines (Alaska) Inc. v. State, 325 P.3d 478 (Alaska 2014).

Legislative review is not recommended unless the legislature would like to further define "full and true value" in AS 43.56.060 by specifying standards for pipeline valuation.

AS 45.50.471

UNIFORM TRADE PRACTICES AND CONSUMER PROTECTION ACT DOES NOT APPLY TO PERSONAL INJURY CLAIMS.

Claire Donahue broke her leg during a class at the Alaska Rock Gym after dropping from a climbing wall onto a floor mat. Donahue brought a suit against the rock gym claiming violations of the Uniform Trade Practices and Consumer Protection Act (UTPA). Under UTPA a person who suffers "an ascertainable loss of money or property as a result of another person's act or practice declared unlawful by AS 45.50.471" may recover three times the actual damages. Donahue asserted she had seen ads giving the impression that the gym was safe and therefore the gym had engaged in "unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce" in violation of AS 45.50.471. The Alaska Supreme Court held that a personal injury claim, such as Donahue's, was not a "loss of money or property" covered under UTPA. The Court noted that UTPA was designed to protect consumers from unfair or deceptive trade practices, including deceptive sales and advertising practices. However, the Court found nothing in the legislative history that supported the contention that the phrase "loss of money or property" in UTPA was intended to cover personal injury or wrongful death claims.

Donahue v. Legends, Inc., 331 P.3d 342 (Alaska 2014).

Legislative review is not recommended unless the legislature would like to extend UTPA to cover personal injury claims.

AS 45.55.930(g)

SECURITY LAW BASE-NO-SUIT PROVISION DOES NOT BAR LAWSUITS BASED ON PREMISE THAT CONTRACT IS ILLEGAL.

The Girdwood Mining Company contracted with Comsult LLC, a consulting company. Girdwood Mining later brought suit against the consultant seeking that the contract be invalidated because it violated Alaska securities law. The Alaska Supreme Court held that AS 45.55.930(g), which states that "[a] person who makes or engages in the performance of a contract in violation of [Alaska securities law] . . . may not base a suit on the contract," did not bar the suit from being brought. Interpreting the statute and legislative intent, the Court held that to "base" a suit on a contract is to seek to vindicate legal rights established in and by the contract. In this case, however, Girdwood Mining's claim to invalidate its contract as illegal was not "base[d]" on the contract; therefore, AS 45.55.930(g) did not apply. Broadly, the Court held that AS 45.55.930(g)'s base-no-suit provision bars lawsuits that seek to enforce the terms of an illegal contract under Alaska securities law; it does not bar lawsuits that seek relief on the premise that a contract is illegal, and thereby unenforceable, under Alaska's securities law.

Girdwood Mining Co. v. Comsult LLC, 329 P.3d 194 (Alaska 2014).

Legislative review is not recommended.

AS 47.10.011(7)

ABUSE OF ONE CHILD IN THE HOUSEHOLD IS SUBSTANTIAL EVIDENCE THAT OTHER CHILDREN ARE AT RISK OF ABUSE IN CHILD IN NEED OF AID CASES.

Two of Rowan's sons and one of his daughters lived with him when the Office of Children's Services (OCS) began investigating his family in a child in need of aid adjudication. OCS demonstrated that Rowan had a long history of sexual and physical abuse against his daughter, but did not demonstrate any sexual or physical abuse against his sons. OCS asked the court to find that Rowan's sons were children in need of aid based on the "risk of sexual abuse" provision of AS 47.10.011(7). AS 47.10.011(7) allows a court to find a child to be in need of aid where "there is a substantial risk that the child will suffer sexual abuse, as a result of conduct by or conditions created by the child's parent." The statute also provides that a parent's leaving a child with a person under investigation for sexual abuse is prima facie evidence of a risk of abuse. Interpreting the intent of the legislature in AS 47.10.011(7), the Alaska Supreme Court found that a parent's abuse of one child in the household is substantial evidence that the other children are at risk of sexual abuse and that, if Rowan was still under investigation or subject to a criminal charge for sexual abuse of a minor, the trial court may apply the statutory presumption that his sons are at substantial risk of being sexually abused.

Rowan B. v. State, 320 P.3d 1152 (Alaska 2014).

Legislative review is not recommended unless the legislature disagrees that a parent's abuse of one child in the household constitutes substantial evidence that other children in the household are at risk of sexual abuse.

AS 47.30.715

72-HOUR EVALUATION PERIOD STARTS AT A PERSON'S ARRIVAL AT THE FACILITY IF THE COURT ORDER AUTHORIZES TRANSPORT TO ANOTHER FACILITY.

Gabriel C. was taken into protective custody on February 20, 2011, and transported to Central Peninsula Hospital where a licensed clinical social worker conducted an emergency examination and prepared a petition for involuntary commitment. That same day, an Anchorage committing magistrate signed an ex parte order authorizing Gabriel to be transported to Alaska Psychiatric Institute (API) for evaluation. The order required the evaluation to be conducted within 72 hours of Gabriel's arrival at the evaluating facility. Because February 21, 2011, was a judicial holiday, the master's order was not approved by the superior court until February 22, 2011. Gabriel was not transferred to API until late the next day, arriving at about 1:30 a.m. on Thursday, February 24, 2011. On Monday, February 28, 2011, API filed a petition for a 30-day commitment. Gabriel C. argued that the evaluation was not done within the required 72 hours because the time period should begin to run when the court issues the order, even when the order authorizes transportation to another facility. The Alaska Supreme Court determined that AS 47.30.715 and AS 47.30.725(b) requires that if the ex parte order authorizes the person's transportation to another facility for evaluation, the 72-hour period begins upon the respondent's arrival at that facility. The Court also noted that the commitment statutes suggest that a person must be transported to an evaluation facility without delay.

In re Gabriel C., 324 P.3d 835 (Alaska 2014).

Legislative review is not recommended as the interpretation of the commitment statutes seems reasonable when transportation is required.

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