



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The report lists Alaska Statutes that will be amended or repealed between February 28, 2016, and March 1, 2017, according to laws enacted before the 2016 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2014, and September 30, 2015,

and

Opinions of the Attorney General that were made available through Internet distribution between October 1, 2014, and September 30, 2015.

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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 2015 Legislature, will be repealed or amended before March 1, 2016, 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.

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taking effect between February 28, 2016, and March 1, 2017, according to
laws enacted before the 2016 legislative session

Laws enacted in 2012

Ch. 36, SLA 2012, secs. 2, 3 and 5 -- Public Transportation Plan

AS 44.42.085(a)	amended January 1, 2017
AS 44.42.090	repealed December 31, 2016
AS 44.42.095	repealed December 31, 2016

Laws enacted in 2013

Ch. 50, SLA 2013, sec. 10 -- Unemployment Compensation

AS 23.20.291	repealed July 1, 2016
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Laws enacted in 2014

Ch. 2, SLA 2014, sec. 21 -- Hair Crab Fishery

AS 44.33.896	repealed July 1, 2016
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Ch. 61, SLA 2014, secs. 12, 13, 14, 20, 21, 25, 30, 34, and 37 -- Tax Credits

AS 43.75.032	repealed December 31, 2016
AS 43.75.035(e)	amended December 31, 2016
AS 43.75.035(h)	amended December 31, 2016
AS 43.75.036	repealed December 31, 2016
AS 43.75.130(b)	repealed December 31, 2016
AS 43.75.130(g)	repealed December 31, 2016
AS 43.77.035	repealed December 31, 2016
AS 43.77.060(e)	amended December 31, 2016

Laws enacted in 2015

Ch. 31, SLA 2015, sec. 1 -- Workers' Compensation Fees

AS 23.30.097	amended December 1, 2016
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Ch. 35, SLA 2015, secs. 2 and 4 -- Film Tax Credit

AS 43.75.130(e)	amended December 31, 2016
AS 43.75.130(f)	amended December 31, 2016

Ch. 2, SSSLA 2015, secs. 15 and 25 -- Sexual Abuse and Assault Awareness

AS 14.03.075(a)	repealed June 30, 2016
AS 14.03.075(b)	repealed June 30, 2016
AS 14.03.075(c)	repealed June 30, 2016
AS 14.03.075(e)(1)	repealed June 30, 2016
AS 14.07.165(a)(5)	repealed June 30, 2016
AS 14.07.165(b)	repealed June 30, 2016
AS 14.30.070(a)	repealed June 30, 2016
AS 14.30.120	repealed June 30, 2016
AS 14.30.362	enacted July 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

Art. I, sec. 8,
Constitution of the
State of Alaska

GRAND JURIES SHOULD NOT BE INSTRUCTED THAT THEY HAVE ABSOLUTE DISCRETION TO REFUSE TO RETURN INDICTMENT, EVEN WHEN THE STATE PRESENTS SUFFICIENT EVIDENCE TO SUPPORT THE ACCUSATION.

A superior court judge ruled that a presiding judge is required to use the word "may" when describing the grand jury's authority to return a true bill because this is the word used in art. I, sec. 8, Constitution of the State of Alaska. This provision provides, in relevant part, that "[t]he grand jury shall consist of at least twelve citizens, a majority of whom concurring *may* return an indictment." (Emphasis added). On appeal, the Alaska Court of Appeals held that "the phrase 'may return an indictment' stands for the concept of 'is authorized to return an indictment.' This phrase does not refer to the legal test for when an indictment is justified, nor does this phrase refer to the grand jury's power to refuse to endorse a proposed indictment." The Court also reasoned that "[t]here is nothing in the language of this sentence, and nothing in the discussions in the Alaska Constitutional Convention pertaining to this sentence to suggest that the purpose of this language was to create or acknowledge a grand jury right of 'nullification'—a right to refuse to indict someone for any reason the grand jurors might see fit."

State v. Leighton, 336 P.3d 713 (Alaska App. 2014).

Legislative review is not recommended.

Art. I, sec. 9,
Constitution of the
State of Alaska

A WITNESS GRANTED IMMUNITY TO TESTIFY IS GRANTED TRANSACTIONAL IMMUNITY FROM PROSECUTION BY THE STATE OF ALASKA, BUT IS ONLY ENTITLED TO USE IMMUNITY FROM PROSECUTION BY OTHER AMERICAN JURISDICTIONS.

After initially agreeing to testify in a state criminal trial, Dickson asserted his privilege against self-incrimination and

refused to testify despite being granted transactional immunity from state prosecution as part of his plea bargain. Dickson argued that state immunity was constitutionally insufficient because the state could not protect him from prosecution by another jurisdiction and therefore he could not be compelled to testify. The transactional immunity protected him completely from in-state prosecution for his role in the crime but only conferred immunity on the direct or derivative use of his testimony by a federal or other state court. The United States Supreme Court held long ago that the federal government and the several states were not required to grant full immunity made by another jurisdiction. The Alaska Court of Appeals held that nothing in the history of our constitutional protection of liberty interests demonstrated the intent to depart from the general rule in place when the Alaska constitution was drafted.

State v. Finley, 337 P.3d 527 (Alaska App. 2014).

Legislative review is not recommended, as the court's interpretation is reasonable.

Art. 1, sec. 11,
Constitution of the
State of Alaska

**A CRIMINAL APPEAL SHOULD NOT BE STAYED IF
THE DEFENDANT BECOMES MENTALLY
INCOMPETENT DURING THE APPEAL.**

Buxton was convicted of first-degree murder and appealed his conviction. A psychiatrist who evaluated Buxton at sentencing testified Buxton had been diagnosed with schizophrenia. Buxton's attorney for the appeal filed a motion to stay his appeal and to remand the case to the superior court for a competency determination. The Court of Appeals determined that in such a situation, the direct appeal of a defendant suspected of being mentally incompetent should move forward to completion despite the suspected incompetency. If the defendant can later show that he was prejudiced by his appeal moving forward despite his mental incompetency, the defendant can obtain appropriate relief through subsequent post-conviction proceedings.

Buxton v. State, 352 P.3d 436 (Alaska App. 2015).

Legislative review is not recommended as the court adopted the ABA model standard and is in line with the majority of courts to decide the issue.

**POLICE MAY NOT DRIVE ONTO A DRIVEWAY AND
OBTAIN A WARRANT BASED ON AN ODOR OF
MARIJUANA.**

Two Alaska state troopers received an anonymous tip that Kelley was growing marijuana. Kelley's home is in a rural area, set back a considerable distance from the highway, with no neighbors nearby. The troopers drove up the driveway late at night and parked their patrol car directly in front of Kelley's house, leaving the engine idling for several minutes. The troopers did not attempt to contact the occupants of the residence. Instead, the troopers rolled down the windows of their patrol car and sniffed the air. According to their search warrant application, they were able to detect the odor of growing or recently harvested marijuana. Investigation revealed that the house did not have an electrical usage that was indicative of a commercial grow operation, but they nevertheless obtained a search warrant and discovered numerous marijuana plants and other evidence of a commercial grow operation. While the Court has previously found an implied license for a police officer to use the normal means of public access to a house to conduct a warrantless search, the Court determined that the manner of conducting the search in this case was more intrusive because it took place after midnight. The Court noted that other jurisdictions have generally prohibited late-night police incursions onto private property because they generally occur outside of the scope of the implied license for public access. The Court also stated that there had been no reason given to justify the troopers' decision to investigate after midnight instead of during the day, when the investigation would have accorded with the conduct of a respectful citizen and well-settled law. The Court also noted that nothing in their decision bars police from approaching a residence late at night when they have good reason to do so.

Kelley v. State, 347 P.3d 1012 (Alaska App. 2015).

Legislative review is not recommended.

Art. I, sec. 18,
Constitution of the
State of Alaska
AS 09.50.250
AS 41.15.045

NO RIGHT TO COMPENSATION IF A TAKING RESULTS FROM THE STATE'S FIREFIGHTING ACTIVITIES THAT ARE JUSTIFIED BY THE DOCTRINE OF NECESSITY; AS 41.15.045 CONTROLS WHETHER THE STATE'S FIREFIGHTING ACTIVITIES ARE IMMUNE FROM TORT LIABILITY.

Forest fires swept through areas south of Fairbanks and approached properties owned by the landowner plaintiffs. In an effort to save the landowners' structures, firefighters working under the direction of the State Department of Forestry intentionally set fire to the landowners' vegetation, which ultimately saved the structures. Nevertheless, the landowners sued the state, bringing a takings claim under the eminent domain provision of Article I, section 18 (the Takings Clause), Constitution of the State of Alaska, and tort claims for negligence and intentional misconduct.

The superior court granted summary judgment to the state on grounds that the state's actions did not constitute a taking because the actions were a valid exercise of its police powers. On appeal, the Alaska Supreme Court reversed that decision, holding that it was error to dismiss the landowners' constitutional claims, and that the state's exercise of its police power in conducting the burnouts was sufficient to show a public purpose under the landowners' takings claim. The Supreme Court further held, however, that the landowners have no constitutional right to just compensation if the actions were justified by the doctrine of necessity. The Court reasoned "a taking of private property does not escape application of the Takings Clause simply because it occurs in the course of the state's firefighting activities; to be noncompensable, the taking must be justified by the doctrine of necessity." The case was remanded for further proceedings on this issue.

The Court upheld the superior court's dismissal of the landowners' tort claims, but on different grounds. The superior court conducted a two-step analysis of the state's governmental immunity defense under discretionary immunity provided under AS 09.50.250 and specific firefighting immunity provided by AS 41.15.045. The Alaska Supreme Court held, however, that only AS 41.15.045 controls the state's firefighting activities. The Court reasoned that the two statutes conflicted because AS 09.50.250 immunizes tactical firefighting activities only to the extent they may be categorized as discretionary planning decisions and does not

protect operational activities, while AS 41.15.045 immunizes all firefighting activities regardless of the planning/operation distinction. Accordingly, the Court held that the superior court should have only applied AS 41.15.045, since it was both more specific and enacted later in time.

Brewer v. State, 341 P.3d 1107 (Alaska 2014).

Legislative review is not recommended.

Art. I, sec. 25,
Constitution of the
State of Alaska
AS 25.05.011
AS 25.05.013

**ALASKA LAWS BANNING SAME-SEX MARRIAGE
AND REFUSING TO RECOGNIZE SAME-SEX
MARRIAGES FROM OTHER STATES ARE
UNCONSTITUTIONAL.**

Five same-sex couples living in Alaska filed suit in federal court, wishing to have their commitments legally recognized by the State of Alaska. The Plaintiffs argued that Alaska's laws banning same-sex marriage and refusing to recognize a same-sex marriage lawfully entered in another state violate both the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution - and the United States District Court for the District of Alaska agreed. The District Court noted that Alaska's same-sex marriage laws "specifically identify homosexual couples as a group that is (1) not entitled to the benefits and responsibilities conferred by marriage, and (2) excluded from having lawful out-of-state marriages recognized by the State of Alaska." In holding that Alaska's laws banning same-sex marriage and refusing to recognize a same-sex marriage from another state are unconstitutional, the District Court stated that "[r]efusing the rights and responsibilities afforded by legal marriage sends the public a government-sponsored message that same-sex couples and their familial relationships do not warrant the status, benefits, and dignity given to couples of the opposite sex." The District Court further held that "Alaska's same-sex marriage laws violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment because no state interest provides 'exceedingly persuasive justification' for the significant infringement of rights that they inflict upon homosexual individuals."

Hamby v. Parnell, 56 F. Supp. 3d 1056 (D. Alaska 2014).

Legislative review is recommended to review AS 25.05.011 and AS 25.05.013, in light of both the *Hamby* decision and,

more importantly, the United State Supreme Court's recent decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), where the Court held that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.

13 AAC 02.215

EXISTING STATE TRAFFIC REGULATIONS DO NOT COVER A MOTORIST'S USE OF TURN SIGNALS WHEN NEGOTIATING A ROUNDABOUT.

Noble was stopped after driving through a traffic roundabout for failing to use his turn signal, either upon entering or leaving the roundabout. During the ensuing contact, the police determined Noble had been drinking, and Noble was eventually convicted of felony driving under the influence. The Court of Appeals examined the state traffic regulations, and while there are rules regarding roundabouts, and regulation 13 AAC 02.215, which governs the use of turn signals, these regulations do not contain any provisions that expressly refer to roundabouts. The court noted that the regulation was written before the state had roundabouts, and that it could be difficult or dangerous to apply normal turn signal rules to roundabouts. The court ultimately held that 13 AAC 02.215 does not apply to roundabouts and encouraged either the legislature or the Department of Public Safety to address the issue if they believe it is appropriate to have codified law defining the use of turn signals in roundabouts.

Noble v. State, 357 P.3d 1201 (Alaska App. 2015).

Legislative review is recommended if the legislature wants to clarify the use of turn signals in roundabouts.

Alaska Civil Rule 6
Alaska Civil Rule 60

EXCUSABLE NEGLIGENCE REQUIRES A CAUSAL LINK BETWEEN THE EXCUSABLE NEGLIGENCE AND A PARTY'S FAILURE TO TIMELY ACT.

In a negligence suit, the defendants moved for summary judgment and the plaintiff did not oppose the motion or otherwise respond by the required response date. The plaintiff eventually filed a motion for extension of time to file an opposition to the summary judgment motion and asked that the motion be granted on grounds of "excusable neglect" under Rule 6(b)(1), Alaska Rules of Civil Procedure. The superior

court treated the request as a Rule 60(b)(1) relief from judgment motion based on the grounds of excusable neglect and denied the motion. The Alaska Supreme Court noted that it has never defined excusable neglect. The Court determined that the party must show both neglect and a valid excuse for the neglect, and there must be a causal link between the excusable neglect and the party's failure to timely act; the failure must be the result of the excusable neglect. The Court found that the affidavits submitted by the plaintiff contained a number of explanations for the untimely filing, but that the affidavits made no causal link to the failure to timely request an extension to oppose the summary judgment motion.

Erica G. v. Taylor Taxi, Inc., 357 P.3d 783 (Alaska 2015).

Legislative review is not recommended.

Alaska Rule of
Evidence 801(d)(3)

TRIAL JUDGE MUST AFFIRMATIVELY FIND THAT THE STATE HAS MET ITS BURDEN UNDER EVIDENCE RULE BEFORE ADMITTING A CHILD'S OUT-OF-COURT STATEMENT.

Defendant was convicted of sexually abusing his two granddaughters, and the state's evidence was based almost completely on the out-of-court statements of the two children. Alaska Evidence Rule 801(d)(3) authorizes the admission of certain out-of-court statements made by children who are alleged to be victims of a crime. On appeal, the Court of Appeals held that the trial judge failed to hold the state to its burden of proof under subsection (d)(3)(F), and that the judge failed to fulfill his role as evidentiary gatekeeper under subsection (d)(3)(H). The court acknowledged that subsection (H) was ambiguous, as it could arguably be read to mean that the judge should assess whether the recording itself was "sufficiently reliable and trustworthy," as opposed to the larger question of whether the child's statement was "reliable and trustworthy." After considering the legislative history behind the rule, the court held that the primary goal of subsection (H) is to have the trial judge assess the reliability and credibility of the child's statement, not the accuracy of the recording, and "before the trial judge admits the video recording, the state must prove - *i.e.*, the trial judge must affirmatively find - 'the taking of the statement as a whole was conducted in a manner that would avoid undue influence on the victim', that the out-of-court statement 'is sufficiently reliable and trustworthy', and that 'the interests of justice are best served by admitting the

recording into evidence.'" "

Augustine v. State of Alaska, 355 P.3d. 573 (Alaska App. 2015).

Legislative review is not recommended.

25 U.S.C. § 1912
CINA Rule 18(c)

EXPERT TESTIMONY IS NOT REQUIRED TO PROVE BOTH PRONGS OF "SERIOUS EMOTIONAL OR PHYSICAL DAMAGE TO CHILD" TEST IN ICWA CASES.

The Office of Children's Services (OCS) petitioned to terminate a mother's parental rights to her four daughters, all Native children, under the Indian Child Welfare Act (ICWA). ICWA requires that a trial court find "by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." The Alaska Supreme Court previously adopted a two-prong test to determine whether continued custody by the parent is likely to cause serious harm to the child, which requires evidence that (1) the parent's conduct is likely to harm the child and (2) the parent's conduct is unlikely to change. While ICWA requires that the evidence supporting the overall finding include expert testimony, it does not clarify the scope of the expert testimony required, nor does it require that the expert testimony provide the sole basis for the Court's conclusion. Having not yet established whether expert testimony on its own must directly answer both prongs of the test, the Alaska Supreme Court held that although it may be best practice for expert testimony to address both prongs of the test, "it is not required when the basis for termination of parental rights is culturally neutral: so long as qualified expert testimony directly supports one prong of the substantial harm requirement and inferentially supports the other prong, the statutory requirements will be satisfied." Accordingly, the Court found that it was not legal error under ICWA for the trial court to make a common-sense finding based on lay testimony that reuniting the mother with her children would likely result in serious emotional or physical damage to the children.

Diana P. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs., 355 P.3d 541 (Alaska 2015).

Legislative review is not recommended.

AS 09.17.080

FAULT CANNOT BE ALLOCATED IN A BREACH OF CONTRACT CLAIM UNDER AS 09.17.080.

In a case brought in federal court in Alaska relating to the design and construction of the Port of Anchorage Intermodal Expansion Project, an issue was raised as to whether AS 09.17.080 applies only to the allocation of fault in tort or whether it also applies to an allocation of contract damages. The federal court noted that "the Alaska Supreme Court has described AS 09.17.080 as intended to provide for the allocation of damages among potential tortfeasors, not the allocation of contract damages. The Alaska statute and legislative history refer to 'fault.'" Furthermore, the federal court noted that the Arizona Court of Appeals previously held that damages resulting from a breach of contract may not be allocated according to Arizona's comparative fault statutes. The Arizona Court of Appeals based its holding in part on its conclusion that "ordinary breach of contract is logically not included within the definition of 'fault' . . . because contract law 'operates without regard to fault.'" Accordingly, the federal court held that "AS 09.17.080 similarly allows for the allocation of fault as to tort claims and not contract claims." The court explained that a party to the action may seek to allocate fault to a potentially responsible party only with respect to the tort claims pled against that party.

Anchorage v. Integrated Concepts & Research Corp., 2015 WL 1345252 (D. Alaska Mar. 23, 2015).

No legislative review is recommended.

AS 09.50.010
AS 09.50.020

WHILE PROSECUTORS HAVE THE AUTHORITY TO INITIATE CONTEMPT CHARGES, THE JUDICIAL BRANCH RETAINS THE AUTHORITY TO DECIDE WHETHER A PARTICULAR CONTEMPT CHARGE SHOULD GO FORWARD TO TRIAL.

Williams was subpoenaed to appear and testify before a grand jury. Williams failed to appear and the state obtained a warrant for his arrest. The grand jury went forward, and the state received the indictment it sought so Williams' refusal to testify did not prejudice the case. Williams was later arrested and charged with criminal contempt of court under AS 09.50.010(10) for failing to honor the grand jury subpoena.

The Court of Appeals explained the difference between "criminal" contempt as a public wrong, and "civil" contempt, under AS 09.50.020(a) that calls for a one-time fine, which does not conform to the established law regarding civil contempt. Contrary to the statute, civil contempt requires a continuing violation of a court order that may be enjoined through imprisonment or progressive fines. The court noted that the Alaska Supreme Court previously held that the penalty provisions of AS 09.50.020 are not binding on the superior court. The Court of Appeals determined that a court has the authority to cite a person for contempt, the executive branch can decline to prosecute a contempt charge that a court wishes to pursue, and the court has no authority to order the executive branch to undertake prosecution. However, the legislature cannot confer veto power to the executive branch over a court's authority to pursue, penalize, or decline contempt charges. The Court of Appeals noted that the Alaska Supreme Court has determined that the contempt power remains inherent in the judicial branch and that any statutes that specify procedures for contempt prosecutions, or that specify penalties for those found guilty of contempt are not binding if they impede the courts from the full and proper exercise of the contempt power. Therefore, the Court of Appeals determined that while the executive branch has the authority to initiate contempt charges, the judicial branch has the power to determine whether a particular contempt charge should go forward. The executive branch does not have the authority to require the court to adjudicate a contempt charge if the court believes a contempt prosecution was not warranted.

State v. Williams, 356 P.3d 804 (Alaska App. 2015).

Legislative review is recommended to determine whether AS 09.50.020 should be amended to follow the current common law on contempt.

AS 09.60.010

THE PHRASE "SUFFICIENT ECONOMIC INCENTIVE" FOR AN AWARD OF ATTORNEY'S FEES SHOULD BE INTERPRETED ACCORDING TO PRIOR COMMON LAW.

AS 09.60.010 provides that a successful claimant is generally entitled to an award of full reasonable attorney's fees and costs incurred in connection with a constitutional claim, unless the claimant had "sufficient economic incentive" to bring the claim regardless of its constitutional nature. The statute also

protects an unsuccessful claimant from an adverse attorney's fees award if the constitutional claim was not frivolous and the claimant did not have "sufficient economic incentive" to bring the claim regardless of its constitutional nature. In this case, the constitutional claimants were the prevailing party. The Alaska Supreme Court presumed the legislature intended the phrase to have the same historical meaning as the "sufficient economic incentive" language from the common law public interest litigant test. The Court also stated that the legislative history of the bill supported this conclusion. The Court emphasized there must be a direct economic benefit to the plaintiff from the constitutional litigation to be a "sufficient economic incentive," not an indirect benefit.

Alaska Conservation Found. v. Pebble Ltd. P'ship, 350 P.3d 273 (Alaska 2015).

Legislative review is recommended if the legislature intended a different meaning for "sufficient economic incentive" when it adopted AS 09.60.010.

AS 11.41.510

A PERSON COMMITS SECOND-DEGREE ROBBERY WHEN THE PERSON USES FORCE TO PREVENT OR OVERCOME RESISTANCE TO THE RETENTION OF THE PROPERTY AFTER THE TAKING.

A man stole a donation jar from the counter of a coffee shop and got into the back seat of a waiting vehicle, driven by Gibson. The owner and her daughter told Gibson not to leave and Gibson drove away. The owner and her daughter held on to the car, and were dragged a short distance before falling to the ground and sustaining minor injuries. Gibson was convicted of second degree robbery, which requires the defendant to use force in the course of taking property from the immediate presence and control of another with intent to "prevent or overcome resistance to the taking of the property or the retention of the property after taking." Gibson argued that by the time she used the force, the jar had already been successfully taken from the "presence and control of the owner" and that her use of force occurred after the taking. Gibson argued that because first-degree robbery occurs when a defendant uses a dangerous instrument in the course of committing second-degree robbery or in immediate flight thereafter, that it would not be necessary to include the immediate flight provision in first-degree robbery if it was an element of second-degree robbery. The Court of Appeals

determined that the phrase "in the course of taking . . . property from the immediate presence and control of another" includes the offender's immediate flight after seizing the property. While the court acknowledged that first-degree robbery does single out an offender's conduct "in immediate flight thereafter," and that it is unclear why the statute does so, the court determined that the drafters did not intend to narrow the pre-existing definition of robbery so as to exclude any conduct committed during the offender's immediate flight.

Gibson v. State, 346 P.3d 977 (Alaska App. 2015).

Legislative review is recommended to determine whether the crimes of first and second degree robbery should be amended to be consistent.

AS 11.46.100(1)
AS 11.46.990(12)

THEFT OCCURS WHEN A DEFENDANT EXCEEDS THE SCOPE OF POSSESSION GRANTED TO A CUSTOMER, REGARDLESS OF WHETHER THE DEFENDANT HAS EXITED THE STORE PREMISES.

Harold Simon entered a Walmart store in Anchorage. While walking through the store, he took a jacket from a sale rack and put it on, he also took a backpack and started carrying it around. Harold selected several DVDs and placed them in the backpack, along with some food items. Harold paid for the food items, but did not pay for the jacket, DVDs, or backpack. Before Harold reached the exit of the store, he was detained by a Walmart employee. Harold handed over the backpack and the DVDs to the employee but continued wearing the jacket. A short time later, the employee noticed the jacket was also unpaid for. At trial, Harold's attorney argued that Harold had not deprived the store of property because he had not entered the vestibule before the final exit of the store. Under AS 11.46.100(1), a theft occurs if a person "obtains the property of another," acting with intent "to deprive another of property." The word "obtains" is defined in AS 11.46.990(12) as to "exert control over the property of another." The court held that the definition of "obtain" includes a requirement that a defendant exert control over the property in a manner unauthorized by the owner of the property, and that a theft can occur where possession by a customer is inconsistent with possession granted to a typical customer, regardless of whether the thief has exited the store or not.

Simon v. State, 349 P.3d 191 (Alaska App. 2015).

Legislative review is not recommended.

AS 11.56.740(a)(1)
AS 18.66.140(b)
18 U.S.C. § 2265

**FEDERAL VIOLENCE AGAINST WOMEN ACT
PREEMPTS STATE REGISTRATION LAWS
REQUIRING PROTECTION ORDERS TO BE
REGISTERED.**

The Department of Law recommended to Commissioner Folger that the legislature amend conflicting state statutes to bring Alaska into compliance with the Violence Against Women Act, 18 U.S.C. § 2265 (VAWA). The VAWA expressly preempts state registration laws by requiring states to give full faith and credit to protection orders "notwithstanding failure to comply with any requirement that the order be registered or filed." Further, VAWA requires a protection order to be enforced "as if it were the order of the enforcing State." The Department of Law also noted that the analysis relating to enforcement of protective orders applied equally to protection orders issued by Alaska tribes, other states, territories, and non-Alaska tribes.

AS 11.56.740 makes it a crime to violate a protective order. As currently written, however, only violations of a tribal or foreign protective order that has been "filed" (or registered) in state court may be prosecuted. Further, AS 18.66.140(b) requires that foreign and tribal protection orders be filed in state court. The Department of Law advised that "because VAWA reflects express congressional intent to remove state registration requirements as barriers to enforcement, Alaska's statutes requiring registration of tribal and foreign protection orders before enforcement are void without effect." The Department of Law noted, however, that VAWA requires that the state enforce only tribal and foreign protection orders that are "consistent" with VAWA. As such, a tribal order must have been issued by a tribal court with jurisdiction to issue protection orders under federal and tribal law and must provide the respondent reasonable notice and an opportunity to be heard.

Based on the foregoing, the Department of Law recommended that the legislature resolve the conflict between state statutes and VAWA and bring them into compliance with federal law.

2015 Op. Alaska Att'y Gen. (July 30, 2015; File No. AN2013102606).

Legislative action is recommended to address Alaska statutes in conflict with the VAWA, including AS 11.56.740 and AS 18.66.140.

AS 11.81.900

A DRIVER'S LICENSE IS NOT AN "ACCESS DEVICE."

Kankanton was convicted of two counts of second-degree theft for stealing two types of "access devices:" credit cards and a driver's license. Kankanton challenged the conviction for the theft of the driver's license, arguing it was not an "access device" under AS 11.81.900. The definition states "'access device' means a card, credit card, plate, code, account number, algorithm, or identification number, including a social security number, electronic serial number, or password, that is capable of being used, alone or in conjunction with another access device or identification document to obtain property or services, or that can be used to initiate a transfer of property." The definition of "identification document" explicitly includes a driver's license. The court looked at the legislative history of the definition of "access device" and found that it was ambiguous as to whether a driver's license should be considered an access device. The court therefore used the rule of lenity to construe the definition of "access device" against the imposition of criminal liability and vacated the conviction for second-degree theft of the driver's license.

Kankanton v. State, 342 P.3d 840 (Alaska App. 2015).

Legislative review is recommended to determine whether the definition of "access device" should include a driver's license.

AS 11.81.900(a)(4)
AS 47.12.030(a)

WHEN A JUVENILE IS PROSECUTED AS AN ADULT, THE NORMAL ADULT STANDARD OF CARE SHOULD BE APPLIED.

Waterman was found guilty of criminally negligent homicide, which requires a gross deviation from the standard of care that a reasonable person would observe in the situation. Waterman, who was 16 at the time of the crime, argued that the standard of care should be that of a person of similar age,

intelligence, and experience, rather than that of an adult. The court noted that Alaska's criminal law has traditionally required all people 18 years or older to adhere to an adult standard of care, and when the legislature enacted AS 47.12.030(a), that threshold age was lowered to 16 years in certain circumstances. The court stated that while scientific research suggests there might be good reason to raise that threshold age to as high as 25 years, that change would have significant consequences for the operation of criminal law as a societal tool. Therefore, the court held that the definition of criminal negligence was constitutional as applied to a 16-year-old offender.

Waterman v. State, 342 P.3d 1261 (Alaska App. 2015).

Legislative review is not recommended unless the Legislature wishes to change the standard of care for offenders under a certain age.

AS 12.45.045

RAPE SHIELD LAW CONTAINS A GENERAL GOOD CAUSE EXCEPTION.

Defendant was charged with sexual assault and tampering with physical evidence following that assault. The state filed a motion under Alaska's rape shield statute, AS 12.45.045, to preclude the defendant from offering evidence of the victim's past sexual conduct at trial, unless the defendant made a prior application to the court. AS 12.45.045 provides that a criminal defendant charged with a sexual offense who wishes to present evidence of the complaining witness's sexual history must ask the court for permission to present that evidence at least five days before trial—unless the defendant shows "good cause" to make the application at a later date. The Alaska Court of Appeals found that the statute was ambiguous on its face, as the first reference to "good cause" appears to create a general good cause exception to the pretrial deadline for making a request to offer evidence of the complaining witness's sexual history, but goes on to state that a request may be made during trial if the information is "learned after the deadline or during the trial." The court reasoned that this language could be construed to narrow the general good cause exception by limiting any mid-trial application to information discovered after the statutory deadline had passed. Alternatively, the court noted that the clause could be read as a subset of the general good cause exception, or one particular circumstance establishing good cause. Based on its legislative history, the

Court of Appeals held that AS 12.45.045 contains a general good cause exception to the pretrial application deadline for introducing information on a complaining witness's sexual conduct, and that the reference to newly discovered information is just one example of good cause.

State v. Stidston, 343 P.3d 911 (Alaska App. 2015).

Legislative review is not recommended unless the legislature intended for a more narrow good cause exception to apply to the rape shield statute.

AS 12.63.010

A HOMELESS SEX OFFENDER MUST REPORT A CHANGE OF RESIDENCE EVEN WHEN THE NEW LOCATION IS NOT A TRADITIONAL ADDRESS.

Shayen was convicted of failing to register as a sex offender when he moved from a homeless shelter to an outdoor camping area. Shayen argued that AS 12.63.010(c) was unconstitutionally vague when applied to homeless sex offenders because homeless people, by definition, have no fixed abode, and that therefore the statute fails to give homeless sex offenders adequate notice of when they must report a change of residence. The Alaska Court of Appeals noted that AS 12.63, the relevant chapter of the Alaska Statutes, and 13 AAC 09, the related regulations, do not contain a definition of "residence," which raises significant legal problems when applied to homeless sex offenders. However, in Shayen's specific case, the Court of Appeals noted that the Department of Public Safety had previously allowed homeless offenders wide latitude in describing the residence, and that Shayen was aware of the requirement to report a change of residence and had previously adequately described where he was living. While noting that the Department should codify this policy, the Court of Appeals ultimately concluded that Shayen was not personally affected or prejudiced in any manner by the potential difficulties in defining "residence" as applied to homeless sex offenders.

Shayen III v. State, ___ P.3d ___, 2015 WL 5167188.

Legislative review is recommended to determine whether a definition of "residence" should be included in AS 12.63.

AS 16.05.940(19)
5 AAC 92.029(d)(2)
5 AAC 85.010(a)(1)

ALASKA BOARD OF GAME'S AMENDMENTS TO REGULATIONS RELATING TO HUNT OF "FERAL" BISON INVALID.

The Alaska Board of Game made several amendments to regulations intended to address the movement of bison that stray outside the boundaries of two game ranches on Kodiak Island. The Board has statutory authority to determine when a domestic animal becomes "feral," and thus legally characterized as "game." The board made two regulatory amendments, one providing that lawfully owned bison would become classified as feral if not "on a state or federal grazing lease," and another amendment announcing a public hunt of bison in Unit 8, which includes Kodiak. The Alaska Supreme Court found that the Board's action effectively confiscated lawfully owned domestic animals, unreasonably transforming them from "domestic" to "game" solely by reference to a property boundary line. In addition, the Court held that the Board's amendments to the regulations were not consistent with or reasonably necessary to implement the statutes authorizing adoption of regulations, and therefore were invalid.

Ellingson v. Lloyd, 342 P.3d 825 (Alaska 2014).

No legislative action is recommended, unless the legislature would like to expand the authority of the Board of Game, statutorily define the term "feral," or otherwise address any action that may be taken with respect to lawfully owned bison that stray outside the boundaries of federal or state designated game ranches.

AS 18.23.020

TO BE IMMUNE, PARTICIPANTS IN MEDICAL REVIEW PROCEEDINGS MUST CONDUCT A FACTUAL INVESTIGATION THAT IS REASONABLE UNDER THE CIRCUMSTANCES.

Plaintiff's hospital privileges were terminated after he violated hospital policy by failing to disclose an order from the Alaska State Medical Board that he undergo an evaluation of his fitness to practice medicine. A hearing was held before the hospital's Fair Hearing Panel, which agreed with the decision to terminate the plaintiff's hospital privileges. The plaintiff then appealed that decision to the hospital's Appellate Review Committee, composed of five hospital physicians. After losing the appeal, the plaintiff filed suit in superior court against the

hospital and members of the Appellate Review Committee, alleging breach of contract and denial of due process. The defendant physicians moved for summary judgment on grounds that they were immune from suit under AS 18.23.020, which grants immunity to members of a hospital review organization so long as the members acted reasonably and without malice. The Alaska Supreme Court examined AS 18.23.020 for the first time and, after analyzing interpretations of a similar federal provision, held that a hospital is not required to carry out an investigation in any particular manner. Instead, "it is only required to conduct a factual investigation that is reasonable under the circumstances," and "a plaintiff is entitled to a reasonable investigation . . . not a perfect investigation." The Alaska Supreme Court ultimately upheld the summary judgement decision in favor of the defendant physicians on grounds they were immune from suit.

Brandner v. Bateman, et al., 349 P.3d 1068 (Alaska 2015).

No legislative action is recommended.

AS 18.85.100

THE ALASKA PUBLIC DEFENDER AGENCY MAY NOT BE APPOINTED TO SERVE AS STANDBY COUNSEL IN CRIMINAL CASES IN WHICH DEFENDANTS HAVE CHOSEN TO REPRESENT THEMSELVES.

The Public Defender Agency (Agency) was appointed to "act in a consultative capacity" for a defendant who qualified for the appointment of counsel at public expense, but who had chosen to waive his constitutional right to counsel and represent himself. The Agency objected, arguing it was beyond the scope of representation permitted by the Agency's enabling statute, AS 18.85.100. AS 18.85.100(a) states that an indigent criminal defendant is "entitled . . . to be represented, in connection with the crime or proceeding, by an attorney to the same extent as a person retaining an attorney is entitled." The Alaska Court of Appeals determined that AS 18.85.100(a) does not authorize the appointment of the Agency to serve as standby counsel, because in that situation, the Agency does not "represent" the defendant.

Alaska Pub. Defender Agency v. Superior Court, 343 P.3d 914 (Alaska App. 2015).

Legislative review is not recommended unless the Legislature would like to authorize appointing the Agency as standby counsel.

AS 23.10.060
AS 23.10.055

PILOTS ARE NOT EXEMPT FROM THE OVERTIME REQUIREMENT.

A pilot who worked at a remote fishing lodge filed a claim under the Alaska Wage and Hour Act (AWHA) for unpaid overtime wages. The superior court concluded that the pilot was a "professional employee" and was exempt from overtime. In 2005, however, the legislature amended the AWHA to adopt the federal definition of "professional employee." The federal definition defines a professional employee as one whose "primary duty is the performance of work . . . [r]equiring knowledge of an advanced type in a field of science or learning," and clarifies that this knowledge must be "customarily acquired by a prolonged course of specialized intellectual instruction." In holding that the pilot was not exempt from the overtime requirement, the Court reasoned that "every federal court considering whether pilots fall within the professional exemption has concluded that they do not, because commercial piloting does not require specialized academic training as a standard prerequisite."

Moody v. Royal Wolf Lodge, et al., 339 P.3d 636 (Alaska 2014).

Legislative review is recommended to determine whether the Court's application of the federal definition for "professional employee" is contrary to the legislature's intent and if the legislature wishes to amend the AWHA to make certain professional employees who do not require specialized academic training as a standard prerequisite exempt from the overtime requirement.

AS 23.30.008(d)

LITIGANTS OTHER THAN CLAIMANTS ARE ENTITLED TO ATTORNEY'S FEES AND COSTS IN WORKERS' COMPENSATION APPEALS.

The Alaska Workers' Compensation Board fined an uninsured employer a substantial amount because the employer failed to carry statutorily required workers' compensation insurance. On appeal, the Alaska Workers' Compensation Appeals Commission affirmed the Board's decision, but reversed the

amount of the fine and remanded the case to the Board. The employer then asked the Commission for an award of attorney's fees as a successful party on appeal. The Division of Workers' Compensation, which had initiated the Board proceedings, opposed the award on the basis that it, too, had been successful on a significant issue. AS 23.30.008(d) provides, in part, "[i]n an appeal, the commission shall award a successful party reasonable costs and, if the party is represented by an attorney, attorney fees that the commission determines to be fully compensatory and reasonable." Subsection (d) shields injured workers from having to pay fees unless their appeals are frivolous, unreasonable, or brought in bad faith. While the Court had previously construed AS 23.30.008(d) on other grounds, the Alaska Supreme Court considered for the first time whether a litigant who is not a claimant can be awarded attorney's fees and costs for an appeal to the Commission. In construing AS 23.30.008(d) according to its plain language, the Court held that non-claimants are entitled to fees that are fully compensatory and reasonable when they are a successful party in an appeal to the Commission, with the exception that non-claimants are not entitled to an award of fees against an injured worker unless the worker's position on appeal "was frivolous or unreasonable or the appeal was taken in bad faith." The Court noted that it does not "rewrite statutes even when the legislative history suggests that the legislature may have made a mistake in drafting, but here, there is no indication the legislature made such a mistake. Even if the Division is correct that the legislature did not envision the possibility of an attorney's fee award to an employer who is subject to a fine for failing to insure, the Division's remedy lies with the legislature, not this court."

State, Div. of Workers' Comp. v. Titan Enterprises, LLC, 338 P.3d 316 (Alaska 2014).

Legislative review is recommended if the legislature did not intend for non-claimants, including employers who may be subject to a fine for failing to carry workers' compensation insurance, to be entitled to attorney's fees and costs in a Commission appeal.

AS 28.35.033(e)

A POLICE OFFICER'S OFFER OF A BLOOD TEST WITHOUT THE OPTION OF ANOTHER TYPE OF CHEMICAL TEST SATISFIES THE RIGHT TO AN INDEPENDENT CHEMICAL TEST IN A DRIVING UNDER THE INFLUENCE CASE.

Velarde was convicted of felony driving under the influence. After Velarde was arrested, he was read a notice of his right to an independent chemical test. Velarde claimed that his right to an independent chemical test was interfered with because he was not offered an independent test other than a blood test. The Alaska Court of Appeals examined the legislative history of AS 28.35.033(e), as amended by the legislature in response to the Alaska Supreme Court case *Gundersen v. Anchorage*. *Gunderson* determined that the offer of a blood test at government expense, without the option of another type of chemical test, satisfied the constitutional right to an independent chemical test. Velarde based his claim on the statutory right in AS 28.35.033(e). Consistent with the constitutional right, the court held that the statute permits the government to offer either an independent breath test or an independent blood test. The Court of Appeals determined that offering the blood test without reference to a breath test in this case complied with AS 28.35.033(e).

Velarde v. State, 353 P.3d 355 (Alaska App. 2015).

Legislative review is not recommended because the decision is a reasonable interpretation of the statute.

AS 29.35.450(c)(4)

AS 29.35.450(c)(4) DOES NOT REQUIRE BOROUGH TO EXCLUDE PROPERTY FROM THE ROAD SERVICE AREA.

A property owner had property within a road service area but he did not use the roads built and maintained with the road service taxes levied on all real property within the service area. The owner alleged that Alaska law required that his property be excluded from the service area and that the road service tax was invalid absent a special benefit to his property.

AS 29.35.450 grants boroughs and unified municipalities the ability to establish, operate, alter, and abolish service areas. AS 29.35.450(c) restricts the power that subsection (a) grants a borough or unified municipality to establish, operate, alter, or abolish a service area by requiring that certain changes be

approved by voters. AS 29.35.450(c)(4) states that subsection (c) does not apply "to a change in the boundaries of a road service area to exclude a subdivision or parcel that does not rely on the use of roads maintained by the service area"

The Alaska Supreme Court upheld the tax, holding that Alaska law neither requires boroughs and municipalities to exclude properties that do not make use of roads financed by road service taxes, nor ties the validity of a tax to each taxpayer's receipt of a special benefit. The Court reasoned that "[w]hen (c)(4) makes that restriction inapplicable, the Borough retains all of the power and discretion granted in (a), an entirely permissive subsection. The inapplicability of (c) does not mandate any action." Further, the Court, in construing the plain meaning of the statute, found that property like that at issue was part of the motivation behind (c)(4), but that the "statutory relief offered was an exception from subsection (c)'s voting requirements, not a mandatory exclusion from the service area for such property." Instead, the Borough retains the ability to exercise its judgment to exclude property through a service area boundary change, without having to seek voter approval.

DeVilbiss v. Matanuska-Susitna Borough, 356 P.3d 290 (Alaska 2015).

Legislative action is not recommended, unless the legislature wishes to mandate that boroughs and municipalities exclude properties that do not use roads financed by road service taxes.

AS 45.03.302

ALASKA LAW IS SILENT ON WHETHER INCAPACITY RENDERS A CONTRACT VOID OR MERELY VOIDABLE.

After a borrower defaulted on a loan that was sold to a new lender and foreclosure proceedings were initiated, the borrower filed suit against the foreclosure trustee and the current holder of the loan, alleging that he was incapacitated when he entered into the original loan contract as a result of medication he was taking.

Under Alaska law, a holder in due course is insulated from an incapacity defense only if the incapacity makes the original contract voidable at the election of the borrower and the holder purchased the loan without knowledge of the incapacity. If incapacity is a condition that voids the contract, the holder in

due course is not insulated from an incapacity defense. AS 45.03.302, which is modeled on the Uniform Commercial Code, explains that the "existence and effect of incapacity is left to the law of each state." Thus, when state law renders an obligation of an instrument entirely null and void, the defense may be asserted against a holder in due course. If the effect is merely to render the obligation voidable at the election of the borrower, the defense is unavailable. The Alaska Supreme Court noted that Alaska's version of the Uniform Commercial Code is silent as to whether incapacity results in a void or voidable contract.

While the Alaska Supreme Court had not previously considered whether incapacity renders a contract void or merely voidable, and no provision of the Alaska Statutes is on point, the Restatement (Second) of Contracts § 15 explains when a contract is voidable due to the contracting party's incompetence. It states that "[a] person incurs only *voidable* contractual duties by entering into a transaction if by reason of mental illness or defect (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition." The Court also noted that the Restatement is in accordance with the majority rule among other jurisdictions. As such, the Court reasoned that "[a]dopting a rule that obligations arising during one party's incapacity may be voidable by the incapacitated party will best account for the varying levels of incapacity that courts encounter." Consequently, the Court held that a party's incapacity during formation of a contract may result in a voidable—not void—obligation."

Erkins v. Alaska Tr., LLC, 355 P.3d 516 (Alaska 2015).

Legislative review is not recommended, unless the legislature wishes to statutorily address whether incapacity renders a contract void or merely voidable, or if it disagrees with the rule established by the Alaska Supreme Court.

AS 47.10.011

A COURT MUST FIND EVIDENCE OF AN OVERT EMOTIONAL OR BEHAVIORAL PROBLEM TO TERMINATE PARENTAL RIGHTS FOR MENTAL INJURY TO A CHILD.

Theresa had her parental rights terminated to two of her

children, based on AS 47.10.011(8)(A), which requires a showing that the children suffered a "mental injury" due to the conduct of the parent. The Court was faced with the question of what level of impairment was needed to find a child in need of aid for mental injury caused by a parent. "Mental injury" is statutorily defined as "a serious injury to the child as evidenced by an observable and substantial impairment in the child's ability to function in a developmentally appropriate manner and the existence of that impairment is supported by the opinion of a qualified expert witness." The Alaska Supreme Court interpreted this standard by reviewing the legislative history and found that a mental injury of the nature required to confer child in need of aid jurisdiction must be significant and noticeably impact the child's functioning. The legislative history demonstrated that the legislature rejected an "emotional harm" standard and that the use of the "mental injury" standard was based on the legislature's understanding that the standard applied to a narrower set of circumstances under which a court could find a child in need of aid. Applying that narrower standard to the facts in this case, the Court found there was insufficient evidence of an overt emotional or behavioral problem for either child and therefore the children had not suffered mental injury due to Theresa's conduct. The Court reversed the order of termination of parental rights.

Theresa L. v. State, Dep't of Health & Soc. Servs., 353 P.3d 831 (Alaska 2015).

Legislative review is not recommended because the opinion appears to be consistent with legislative intent.

AS 47.10.142
CINA Rule 4(b)

THE CHILD IN NEED OF AID RULES ALLOW A MASTER'S ORDER TO REMOVE CHILDREN FROM A HOME BUT REQUIRES SUPERIOR COURT REVIEW TO RETURN THE CHILDREN TO THE PARENTS.

The Office of Children's Services (OCS) took three children into emergency custody, then sought a court order granting OCS temporary custody. A standing master determined that no probable cause existed and recommended the children be returned to their mother's custody. The state objected to the master's recommendation and, over three weeks later, the superior court reviewed and rejected the master's recommendation, finding there was probable cause to find the children in need of aid. The mother appealed, asking the Court to hold that masters have the authority to return children to

their homes without judicial review. The Alaska Supreme Court noted that there is an anomaly in the Child in Need of Aid (CINA) rules' treatment of orders for removal of children from their home and orders for their return. CINA Rule 4(b) allows for emergency or temporary custody hearings to be referred to a master, and that a master's order of removal from the home is effective pending superior court review. However, a master's order returning the children does not receive similar treatment in the CINA rules; an order returning children is not binding until approved by a superior court judge under CINA rule 4(b)(4). The Court noted, however, that it was displeased with the procedural delays in the case, and that the CINA statutes as a whole contemplate an especially expeditious process. The Court therefore referred the matter to the CINA Rules Committee to consider changes to the CINA rules in this type of situation. The Court also stated that superior courts should exercise their authority to include in their orders referring CINA matters to masters, a requirement of expedited review for any order returning a child to the parents' custody.

Jennifer L. v. State, Dep't of Health & Soc. Servs., 357 P.3d 110 (Alaska 2015).

Legislative review is recommend if the legislature wishes to make a change to the CINA process when returning children to their parents to allow masters' orders to be effective prior to judicial review.

AS 47.12.160
AS 47.12.120

A SUPERIOR COURT HAD CONTINUING SUBJECT-MATTER JURISDICTION TO ADJUDICATE A PARENT'S RESTITUTION OBLIGATION AFTER A JUVENILE'S PROBATION ENDED AND THE JUVENILE COURT NO LONGER HAD JURISDICTION OVER THE JUVENILE.

W.P. was adjudicated a delinquent minor. As part of W.P.'s plea bargain, W.P., and his mother, A.P. were ordered to pay restitution in an amount to be determined later. Due to numerous procedural delays, the amount of restitution to be paid by A.P. was never determined, and A.P. moved to dismiss the case after W.P.'s juvenile probation ended, which is when the court no longer had jurisdiction over W.P. under AS 47.12.160. The Court of Appeals determined that the superior court retained jurisdiction to adjudicate the amount of the restitution obligation and to issue a final restitution order.

State v. W.P., 349 P.3d 181 (Alaska App. 2015).

Legislative review is not recommended because the court's decision is well-reasoned.

AS 47.14.100(e)

UNCLEAR WHETHER GREAT-GRANDPARENTS ARE ENTITLED TO PREFERENTIAL RELATIVE PLACEMENT.

The mother appealed termination of her parental rights to her minor child and placement of the child with her foster parents, not her great-grandmother. In holding that the Office of Children's Services (OCS) presented clear and convincing evidence supporting the trial court's determination to deny placement of the child with her great-grandmother, the Alaska Supreme Court noted that before the legislature adopted the current language in AS 47.14.100(e), former AS 47.14.100(e) provided a preference for any "relative by blood or marriage" who requested placement of the child, which would have included a great-grandparent. However, when the legislature amended AS 47.14.100(e), it gave placement preference to "an adult family member," which is defined more specifically as "the child's grandparent, aunt, uncle, sibling," or sibling's legal guardian or parent. The Court advised that OCS's position that "grandparent" does not include "great-grandparent" under the current version of AS 47.14.100(e) "seems plausible," but left the issue open for a future case.

Shirley M. v. State, 342 P.3d 1233 (Alaska 2015).

Legislative review is recommended to determine if the legislature wants to expressly provide preferential relative placement to great-grandparents under AS 47.14.100(e), by including "great-grandparent" in the definition of an "adult family member." If the legislature takes no action, it is possible that a court may find that the term "grandparent," as part of the definition of "adult family member" does not include "great-grandparent."

AS 47.25.455
7 AAC 40.180

DEPARTMENT INCORRECTLY INTERPRETED REGULATION GOVERNING ELIGIBILITY OF INTERIM DISABILITY BENEFITS.

An applicant for federal disability benefits applied for state benefits that are intended to provide basic assistance while the

federal application is pending. The Division of Public Assistance, a division of the Alaska Department of Health and Social Services (Department), denied the interim benefits and this suit followed. In determining whether an applicant is "disabled" and therefore entitled to benefits, the federal Social Security Administration uses a five-part test. Alaska's interim assistance program is governed by AS 47.25.455. In turn, a regulation, 7 AAC 40.180, provides that the Department will determine whether an applicant is eligible for interim assistance based on whether the applicant meets the Social Security Administration disability criteria. On appeal, the Department argued that neither AS 47.25.455 nor 7 AAC 40.180 required it to undertake the full five-step federal analysis in evaluating eligibility for state interim assistance. However, the Alaska Supreme Court held that the Department's interpretation of 7 AAC 40.180 to include only steps one, two, and three of the Social Security Administration five-part test would render an entire category of persons who are eligible for benefits - those deemed disabled at step five - ineligible for interim assistance. Accordingly, the Court held that while the Department need not exactly replicate the entire set of procedures the Social Security Administration employs to determine eligibility for the federal program, the Department may not exclude from eligibility an entire category of persons eligible for federal benefits under step five.

State of Alaska, Dep't of Health & Soc. Servs., Div. of Pub. Assistance v. Gross, 347 P.3d 116 (Alaska 2015).

Legislative review is not recommended unless the legislature disagrees with the Court's reconciliation of the federal and state eligibility criteria for interim assistance.

AS 47.30.765

A RESPONDENT HAS THE BURDEN OF PROVING NO PRIOR INVOLUNTARY COMMITMENTS.

Dakota K. appealed a 30-day involuntary psychiatric commitment, challenging the sufficiency of the evidence. The Alaska Supreme Court has previously held that while appeals of commitment orders based on insufficient evidence are generally moot after the commitment period has passed, there is a collateral consequences exception to the mootness doctrine because of the consequences that flow from involuntary commitment. The Court held that the collateral consequences could be presumed to flow only from the first involuntary commitment, because prior involuntary commitments would

reduce the possibility of additional collateral consequences. Dakota argued that the state should have the burden of establishing whether a person's involuntary commitment is the first involuntary commitment. The Court held that the person appealing the involuntary commitment, has the burden of showing that the commitment was the first to give rise to the presumption of collateral consequences.

In re Dakota K., 354 P.3d 1068 (Alaska 2015).

Legislative review is not recommended.

AS 47.37.170
AS 47.37.235(b)(4)

ORDINARY NEGLIGENCE STANDARD APPLIES TO ACTION ALLEGING VIOLATION OF THE DUTY TO PROTECT A DETAINEE FROM HARM, INCLUDING SELF-HARM.

A 21-year-old intoxicated Hooper Bay resident committed suicide while he was detained in a holding cell by the City of Hooper Bay (City). His mother filed a wrongful death action, alleging the City's negligence led to her son's death. The case went to trial, and a jury returned a judgment against the City. The City appealed.

On appeal, the City argued that the Superior Court erred in giving an ordinary negligence instruction to the jury, rather than requiring gross negligence to establish liability. Specifically, the City cited AS 47.37.170(b) for the mandate that "[a] person who appears to be incapacitated by alcohol or drugs in a public place shall be taken into protective custody by a peace officer," and AS 47.37.170(g), which provides that "[a] person may not bring an action for damages based on the decision under this section to take or not to take an intoxicated person or a person incapacitated by alcohol or drugs into protective custody, unless the action is for damages caused by gross negligence or intentional misconduct."

The City also argued that a gross negligence standard, not an ordinary negligence standard, applied to the liability for its officers' conduct under AS 47.37.235(b)(4), which provides that "a peace officer or other person responsible for detaining or transporting a person under AS 47.37.170–47.37.270 may not be held civilly or criminally liable for detaining or failing to detain a person . . . if the persons have performed their duties in good faith and without gross negligence."

The Alaska Supreme Court held that AS 47.37.170(g) and AS 47.37.235(b)(4) did not immunize the City from liability or create a gross negligence standard of care. The Court explained that, based on the statute's plain text and legislative history, AS 47.37.170(g) and AS 47.37.235(b)(4) only applied to the decision to take an individual into custody, not the duty of care to protect detainees from harm, including self-harm. Consequently, the Court held that because the claim of negligence concerned the City's actions once the individual was taken into custody, rather than the decision to take him into custody in the first place, the jury instruction stated the appropriate duty of care owed by the City under an ordinary negligence standard.

City of Hooper Bay v. Bunyan, 359 P.3d 972 (Alaska 2015).

Legislative review is recommended if the legislature wishes to modify the standard of care applied for liability of a municipality for injuries to detainees that occur while in custody.

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