



STATE OF ALASKA
Legislative Affairs Agency

A
REPORT TO THE
THIRTIETH STATE LEGISLATURE

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

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

A REPORT TO THE
THIRTIETH 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The report lists Alaska Statutes that will be amended or repealed between February 28, 2018, and March 1, 2019, according to laws enacted before the 2018 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2016, and September 30, 2017,

and

Opinions of the Attorney General
that were made available through Internet distribution between
October 1, 2016, and September 30, 2017.

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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 2018 Legislature, will be repealed or amended before March 1, 2019, 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, Susie Lemons, and Megan Wallace, Legislative Counsel, and Jean Mischel, Assistant Revisor of Statutes. Susie Lemons, Assistant Revisor of Statutes, prepared the list of delayed repeals and amendments.

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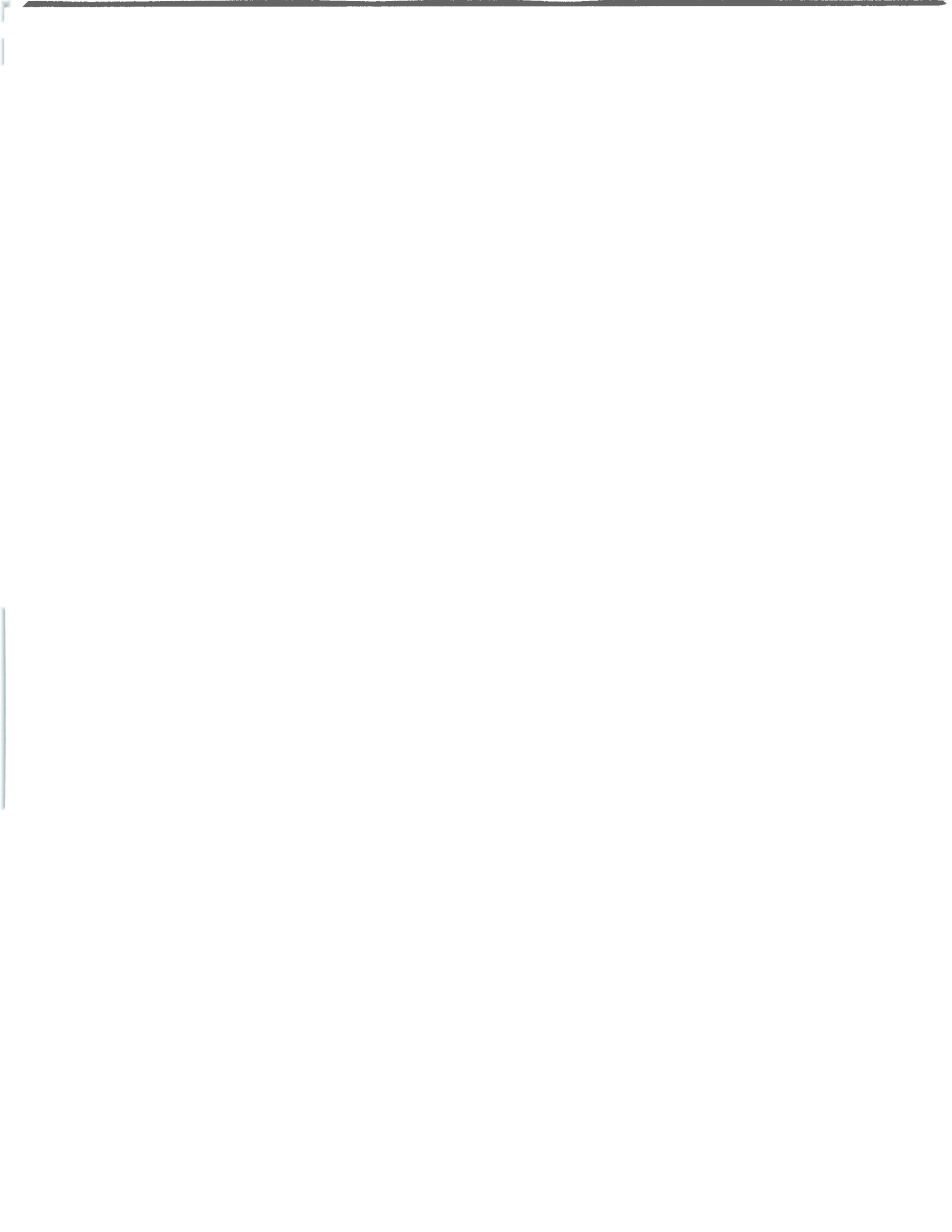


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DELAYED REPEALS, ENACTMENTS OR AMENDMENTS

taking effect between February 28, 2018 and March 1, 2019
according to laws enacted before the 2018 legislative session

Laws enacted in 2007

Ch. 1, FSSLA 2007, sec. 4, as amended by sec. 5, ch. 6, SLA 2011, and sec. 1, ch. 113,
SLA 2014 -- Senior Assistance and Benefits

AS 09.38.015(a)(11)	repealed June 30, 2018
AS 47.45.301	repealed June 30, 2018
AS 47.45.302	repealed June 30, 2018
AS 47.45.304	repealed June 30, 2018
AS 47.45.306	repealed June 30, 2018
AS 47.45.308	repealed June 30, 2018
AS 47.45.309	repealed June 30, 2018

Laws enacted in 2014

Ch. 2, SLA 2014, secs. 2, 6, 8, 10, 12, 14, 16, 18, 20, and 25 -- Limited Entry Fisheries

AS 16.43.010(a)	amended December 30, 2018
AS 16.43.100(a)(21)	repealed December 30, 2018
AS 16.43.451	repealed December 30, 2018
AS 16.43.461	repealed December 30, 2018
AS 16.43.471	repealed December 30, 2018
AS 16.43.481	repealed December 30, 2018
AS 16.43.491	repealed December 30, 2018
AS 16.43.501	repealed December 30, 2018
AS 16.43.511	repealed December 30, 2018
AS 16.43.521	repealed December 30, 2018
AS 16.43.960(a)	amended December 30, 2018
AS 16.43.970(a)	amended December 30, 2018
AS 16.43.970(b)	amended December 30, 2018
AS 16.43.970(d)	amended December 30, 2018
AS 16.43.970(e)	amended December 30, 2018
AS 16.43.970(i)	amended December 30, 2018
AS 16.43.970(j)(1)	amended December 30, 2018

Ch. 61, SLA 2014, secs. 1, 2, 21, and 37 -- Tax Credits

AS 21.06.110(9)	amended December 31, 2018
AS 21.09.210(j)	amended December 31, 2018
AS 21.66.110(b)	repealed December 31, 2018
AS 21.96.070	repealed December 31, 2018
AS 21.96.075(c)(2)	repealed December 31, 2018
AS 43.05.010(15)	repealed December 31, 2018
AS 43.20.014	repealed December 31, 2018
AS 43.55.019	repealed December 31, 2018

AS 43.56.018	repealed December 31, 2018
AS 43.65.018	repealed December 31, 2018
AS 43.75.018	repealed December 31, 2018
AS 43.75.130(g)	repealed December 31, 2018
AS 43.77.045	repealed December 31, 2018
AS 43.77.060(e)	repealed December 31, 2018

Laws enacted in 2016

Ch. 30, SLA 2016, secs. 5 and 8 -- Fishing Licenses

AS 16.05.340(a)(27)	repealed January 1, 2019
AS 16.40.261	repealed January 1, 2019
AS 16.40.271	repealed January 1, 2019
AS 16.40.291	repealed January 1, 2019
AS 16.40.300	repealed January 1, 2019
AS 25.27.244(s)(2)(A)(xviii)	repealed January 1, 2019
AS 25.27.244(s)(2)(A)(xix)	repealed January 1, 2019

Ch. 36, SLA 2016, secs. 28 and 193 -- Failure to Appear Criminal Prosecution

AS 11.56.730(e)	enacted January 1, 2019
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Ch. 41, SLA 2016, secs. 63 and 72 -- Uninsured and Underinsured Motorists Coverage

AS 28.20.445(i)	enacted January 1, 2019
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Ch. 5, 4SSLA 2016, sec. 6 -- Alaska Comprehensive Health Insurance Fund

AS 21.55.430	repealed June 30, 2018
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Laws enacted in 2017

Ch. 8, SLA 2017, secs. 3, 4, 5, 8 - 15, 16, and 21 -- Disability Training, Identification Cards, and Drivers' Licenses

AS 18.65.310(a)	amended January 1, 2019
AS 18.65.310(b)	amended January 1, 2019
AS 18.65.310(n)	enacted January 1, 2019
AS 18.65.310(o)	enacted January 1, 2019
AS 18.65.310(p)	enacted January 1, 2019
AS 18.65.310(q)	enacted January 1, 2019
AS 18.65.310(r)	enacted January 1, 2019
AS 28.05.068	enacted January 1, 2019
AS 28.15.041(d)	enacted January 1, 2019
AS 28.15.041(e)	enacted January 1, 2019
AS 28.15.041(f)	enacted January 1, 2019
AS 28.15.061(b)(6)	enacted January 1, 2019
AS 28.15.101(a)	amended January 1, 2019
AS 28.15.101(d)	amended January 1, 2019
AS 28.15.111(a)	amended January 1, 2019
AS 28.15.111(e)	enacted January 1, 2019
AS 28.15.111(f)	enacted January 1, 2019
AS 28.15.271(b)	amended January 1, 2019
AS 28.90.990(a)(32)	enacted January 1, 2019

Ch. 2, SSSLA 2017, secs. 2, 3, 7 - 14, 19, 21, 24 - 26, 38, 44, and 58 -- Opioids

AS 08.36.070(a)(7)	amended July 1, 2018
AS 08.36.110(a)	amended July 1, 2018
AS 08.64.107(1)	amended July 1, 2018
AS 08.64.200(a)(5)	enacted July 1, 2018
AS 08.64.205	amended July 1, 2018
AS 08.64.209(a)	amended July 1, 2018
AS 08.64.225(a)	amended July 1, 2018
AS 08.64.250	amended July 1, 2018
AS 08.64.250(b)	enacted July 1, 2018
AS 08.64.312	amended July 1, 2018
AS 08.68.100(a)(1)	amended July 1, 2018
AS 08.68.100(a)(11)	amended July 1, 2018
AS 08.68.276	amended July 1, 2018
AS 08.72.140(5)	amended July 1, 2018
AS 08.72.170(7)	amended July 1, 2018
AS 08.72.170(8)	enacted July 1, 2018
AS 08.72.181(d)	amended July 1, 2018
AS 17.30.200(b)	amended July 1, 2018
AS 17.30.200(r)	amended July 1, 2018

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

INSURER MAY OWE A DUTY TO A THIRD PARTY CLAIMANT FOR CLAIMS HANDLING ACTIONS IF THE INSURER UNDERTAKES A NEW AND INDEPENDENT DUTY.

A driver lost control of his truck and crashed into the plaintiff's cabin, which caused damage to an attached heating oil tank and resulted in fuel spilling onto and under the cabin. The driver's insurer hired a contractor to perform an environmental site assessment and told the plaintiff he should not attempt to clean up the fuel spill because the insurer would do so. After no clean up occurred, the plaintiff filed suit against the driver's insurer.

The driver's insurer argued that the plaintiff could not bring claims against an insurer for allegedly wrongful claims handling practices and that there is no legal duty between an insurer and a third party claimant for any action taken in the insurer's claims management role. The Alaska Supreme Court held, however, that there was "no reason an insurer should be protected from the consequences of affirmatively undertaking a new and independent duty to a third party claimant as part of its claims handling process -- and then wrongfully repudiating or improperly performing that independent duty -- or be allowed to foist onto its insured the entire legal responsibility for its actions when the liability does not stem from the insured's acts." In sum, the Court established that "[a] liability insurer can owe a tort duty to a third party claimant when the insurer's claims handling actions affirmatively create a new and independent duty to the claimant."

Burnett v. Gov't Employees Ins. Co., 389 P.3d 27 (Alaska 2017).

Legislative review is not recommended.

BUSINESS OWNER MAY RECOVER BUSINESS DAMAGES WHEN THE STATE CONDEMNS THE BUSINESS ONLY IF IT IS NOT FEASIBLE FOR THE BUSINESS OWNER TO RELOCATE.

The state and owner of a car wash reached an agreement for the state to acquire the car wash site as part of a highway improvement project. After the state acquired the site, the owner elected not to relocate the car wash, and the owner brought an inverse condemnation suit against the state, alleging business damages from the state's acquisition.

On appeal, the Alaska Supreme Court noted that the Court had not previously "determined whether a feasibility or a reasonableness (mitigation) standard should apply when analyzing a property owner's relocation decision in determining an award of special damages, such as business damages." The Court noted, however, that "[i]n jurisdictions permitting compensation for loss of goodwill, it is generally required that the business owner show relocation to be impossible or at least impracticable." Accordingly, the Court held that "a business owner may recover business damages when the State condemns the business only if it is not feasible for the business owner to relocate; if it is not feasible for a business owner to relocate, the State's taking is reasonably certain to have directly damaged the value of the business, requiring compensation."

State v. Alaska Laser Wash, Inv., 382 P.3d 1143 (Alaska 2016).

Legislative review is not recommended.

ALIENATION OF AFFECTIONS IS NOT A VALID CAUSE OF ACTION.

Steiner began a romantic relationship with a woman, Omadlao, who was still married to Coulson. Coulson learned of his wife's affair and filed for divorce from Omadlao, who was pregnant at the time. She represented that Coulson was the father and sought interim spousal support. One month after Steiner and Omadlao received a paternity test indicating Steiner was the father of Omadlao's child, Coulson's attorney requested a paternity test order, and Omadlao did not mention the test results. Coulson later discovered he was not the father. After the divorce proceedings, Coulson sued Steiner, claiming

alienation of affections, fraud and civil conspiracy, and intentional and negligent infliction of emotional distress. Coulson alleged Steiner caused the divorce and conspired with Omadlao during divorce proceedings to extract child and spousal support from Coulson.

The Alaska Supreme Court noted that neither the Court nor the Alaska legislature had previously explicitly abolished alienation of affections as a cause of action in Alaska, although the Court had previously found that damages caused by the filing of a divorce action are not recoverable. The Alaska Supreme Court therefore explicitly held for the first time that alienation of affections is not a valid cause of action in Alaska.

Coulson v. Steiner, 390 P.3d 1139 (Alaska 2017).

Legislative review is not recommended.

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

**PUNITIVE SEGREGATION DOES NOT CONSTITUTE
CRIMINAL PUNISHMENT FOR DOUBLE JEOPARDY
PURPOSES.**

Johnson assaulted a corrections officer while incarcerated in connection with another criminal case. Johnson was disciplined by the Department of Corrections for the assault and received 60 days' punitive segregation and lost 185 days' good time credit. The district court held that the prison discipline constituted a criminal punishment for purposes of the double jeopardy clause, that it would be unconstitutional for the state to pursue a fourth degree assault prosecution, and dismissed the charge. The Court of Appeals, siding with all other jurisdictions that have decided the issue, held that short-term punitive segregation by prison officials does not bar a subsequent criminal prosecution for the same misconduct.

State v. Johnson, 389 P.3d 72 (Alaska App. 2017).

Legislative review is not recommended.

Art. I, sec. 9,
Constitution of the
State of Alaska,
AS 12.55.085

**A COURT CAN RESCIND A PRIOR COURT ORDER
ERRONEOUSLY DISCHARGING A DEFENDANT
FROM PROBATION AND SETTING ASIDE THE
CONVICTION WITHOUT VIOLATING DOUBLE
JEOPARDY.**

Starkey was convicted of fourth-degree misconduct involving a controlled substance and was granted a suspended imposition of sentence and placed on supervised probation for two years. Starkey appealed his conviction, which automatically stayed his probation under Rule 206(a)(3), Alaska Rules of Appellate Procedure. Two years into Starkey's appeal, while Starkey's appeal remained stayed, the superior court issued a notice to the parties under the mistaken belief that Starkey had continued to serve his probation during the pendency of his appeal that his probationary term was close to expiring. Neither the District Attorney's Office nor the Department of Corrections responded to the court's erroneous notice. The superior court eventually issued an order mistakenly discharging Starkey from his probation and setting aside his conviction. About a month later, Starkey was arrested for an unrelated misdemeanor charge. Following Starkey's arrest, the state filed a petition to revoke Starkey's probation, arguing that the court's discharge and set-aside order was issued erroneously and was therefore without any legal effect.

The Court of Appeals concluded that jeopardy did not attach to the plainly erroneous discharge and set-aside order issued in Starkey's case. The Court of Appeals concluded that the trial court had the authority to correct its earlier mistake and to reinstate the original terms of Starkey's suspended sentence without violating the constitutional prohibitions against double jeopardy.

Starkey v. State, 382 P.3d 1209 (Alaska App. 2016).

Legislative review is not recommended.

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

**THE TIME PERIOD FOR A SPEEDY TRIAL BEGINS
TO RUN FROM THE FILING OF AN INFORMATION,
NOT WHEN THE DEFENDANT IS ARRESTED OR
INDICTED.**

In November 1999, the state filed a felony information charge against Wright. Wright was not arrested or indicted on these charges until almost five years later. Wright moved to have

the charges dismissed claiming that his right to a speedy trial had been violated. The Alaska Supreme Court determined that a defendant becomes formally accused for speedy trial purposes under the Alaska Constitution not just upon indictment or arrest but also when the state files an information charging the defendant with a crime. The Court stated that the filing of an information marks the beginning of litigation against the defendant. The Court also determined that using the filing of an information serves the goals of the speedy trial provision, especially given the public nature of an information.

State v. Wright, 2017 WL 4185705 (Alaska 2017).

Legislative review is not recommended.

Art. I, sec. 16,
Constitution of the
State of Alaska,
Alaska Civil Rules 38
and 39

**RIGHT TO A JURY TRIAL DOES NOT INCLUDE A
RIGHT TO HAVE A JURY DETERMINE DAMAGES
FOLLOWING THE ENTRY OF DEFAULT.**

An elderly woman hired an in-home care company to assist her with day-to-day living. It was later discovered that the woman's assistant stole the woman's jewelry and prescription medication. The woman sued both the company and the assistant. The assistant did not appear in court and eventually the woman applied for entry of default against the assistant "on the condition that once default is entered, damages are to be determined by the jury." The superior court granted a default but ruled that trial on damages would take place without a jury. The woman appealed.

The Constitution of the State of Alaska guarantees the right to a trial by jury "in civil cases where the amount in controversy exceeds two hundred fifty dollars . . . to the same extent as it existed at common law." Because the parties did not consent to proceed without a jury, the Court had to address whether the woman had a right to a jury trial on damages following default "under the state constitution or statutes of the state" with the constitutional inquiry focusing on whether the right "existed at common law." The Court observed that at the time of the adoption of the Constitution of the State of Alaska, federal courts had largely agreed that while a court may order a jury trial in a default situation if it seems to be the best means of assessing damages, "neither side has a right to a jury trial on damages." The Court noted that this continues to be generally accepted "and most courts therefore reject demands that a jury trial on damages follow entry of default as a matter of right."

Consequently, the Court held that "the right to a jury trial 'as it existed at common law' at the time of our constitution's adoption did not include a right to have a jury determine damages following entry of default."

Nevertheless, the Court concluded by holding that a party who applies for default, while reserving the right to a jury trial on damages, does not automatically forfeit the right to a jury trial. The Court found it an abuse of discretion for the superior court to grant default without giving effect to the express condition upon which the application was made. "The Court explained that the superior court was not bound to accept the condition; it could have denied the conditional application for default and required the entire case to proceed to trial."

Haines v. Comfort Keepers, Inc., 393 P.3d 422 (Alaska 2017).

Legislative review is not recommended.

Art. IX, secs. 7 and 15,
Constitution of the
State of Alaska,
AS 37.13.145

THE LEGISLATURE'S USE OF PERMANENT FUND INCOME IS SUBJECT TO THE NORMAL APPROPRIATION AND VETO BUDGETARY PROCESS AND THE GOVERNOR'S PARTIAL VETO OF THE DIVIDEND TRANSFER WAS CONSTITUTIONAL.

In May 2016 the legislature passed an appropriation bill that included an estimated \$1.362 billion transfer from the earnings reserve account to the dividend fund consistent with the statutory formula in AS 37.13.145. Governor Walker then exercised his line-item veto power to reduce the transfer to \$695.65 million. The legislature met in July but did not override the governor's veto. This resulted in 2016 permanent fund dividend payments of \$1,022, about half of what had been expected under the legislature's appropriation. A current state senator and two former state legislators brought suit arguing the dividend program was a constitutionally permissible revenue dedication automatically transferring prescribed revenues from the earnings reserve to the dividend fund without need for legislative appropriation and not subject to the governor's veto. The Supreme Court examined the framers' intent and voters' understanding of the permanent fund constitutional amendment at the time of adoption, along with the plain reading of the language of the anti-dedication and permanent fund clauses of the Constitution of the State of

Alaska, and determined that the permanent fund amendment does not allow the dedication of permanent fund income.

The legislators also challenged the manner in which the governor exercised his veto, arguing that he improperly struck descriptive language, resulting in an unconstitutional infringement on legislative power. The Supreme Court concluded that the governor validly exercised his constitutional veto authority when reducing the transfer amount from the earnings reserve to the dividend fund. Unlike the vetoes in question in *Alaska Legislative Council v. Knowles*, the vetoed language included only the language concerning the legislature's estimated 2016 transfer amount; the veto did not alter the legislature's purpose for the appropriation. The Supreme Court held this was a valid veto, despite a seemingly mandatory statute. The Supreme Court therefore upheld the governor's veto.

Wielechowski v. State, 403 P.3d 1141 (Alaska 2017).

Legislative review is not recommended.

Alaska Civil Rule
12(b)(1)

TRIBAL SOVEREIGN IMMUNITY IS A JURISDICTIONAL BAR THAT MAY BE INVOKED BY A SOVEREIGN DEFENDANT IN A RULE 12(b)(1) MOTION TO DISMISS.

Douglas Indian Association filed a complaint against Central Council and two Central Council officials. The superior court dismissed the complaint on sovereign immunity grounds, and Douglas Indian Association appealed, arguing that sovereign immunity is an affirmative defense that should be resolved following discovery. Under the doctrine of tribal sovereign immunity, an Indian tribe is immune from suit unless Congress has authorized the suit or the tribe has waived its immunity. While the Alaska Supreme Court has previously held that federally recognized tribes are entitled to sovereign immunity in Alaska state court, the Court had not previously determined whether a tribe's sovereign immunity is an affirmative defense or a bar to jurisdiction. The Court noted that tribal sovereign immunity is not waivable and can be raised at a very late stage of litigation, and when a tribal defendant properly invokes sovereign immunity, the state courts may not exercise jurisdiction. Therefore, the Court concluded that a Rule 12(b)(1) motion to dismiss for lack of subject matter

jurisdiction is a proper vehicle for invoking sovereign immunity from suit.

Douglas Indian Ass'n. v. Cent. Council of Tlingit and Haida Indian Tribes of Alaska, 403 P.3d 1172 (Alaska 2017).

Legislative review is not recommended.

Alaska Civil Rule 68

AN OFFER OF JUDGMENT TO ONE OF SEVERAL OPPOSING PARTIES IS VALID IF IT WOULD END THE ENTIRE LITIGATION TO THE PARTIES TO THE OFFER.

A mother and daughter were involved in a car accident and sued the employer of the other vehicle's driver. The employer made separate offers of judgment under Alaska Civil Rule 68 to the mother and daughter, which they rejected. At trial, each of the plaintiffs were awarded damages, but the superior court awarded partial attorney's fees to the employer under Rule 68, because the mother's award was less than 95 percent of the offer of judgment. The mother appealed, arguing that the offer of judgment was invalid and that the superior court wrongly excluded certain costs, which would have led to an award of more than 95 percent of the offer of judgment.

Alaska Rule 68 allows for an offer of judgment before trial to an opposing party "in complete satisfaction of the claim . . . with costs then incurred." If the offer is not accepted and the judgment rendered "is at least five percent less favorable to the offeree than the offer," the offeree must pay all costs allowed and a percentage of reasonable attorney's fees incurred by the offeror from the date the offer was made. The mother argued that the employer's offer of judgment to her did not satisfy Rule 68, because it would not have ended the entire litigation. The Alaska Supreme Court clarified, however, that "[a]n offer of judgment to one of several parties that would end the entire litigation between the parties to the offer triggers Rule 68 cost penalties against the offeree, regardless of whether other plaintiffs have outstanding claims that may go to trial."

Next, the mother argued that all costs, not just "costs allowable under Rule 79" should be included in an offer of judgment. The Court disagreed, reasoning that, in a civil case, cost awards are generally governed under Rule 79 and therefore, in an offer of judgment, the offer should be interpreted to include "only Rule 79 costs."

Whittenton v. Peter Pan Seafoods, Inc., 2017 WL 4211497.

Legislative review is not recommended.

Alaska Civil
Rule 82(b)(2)

**RULE 82, ALASKA RULES OF CIVIL PROCEDURE,
DOES NOT ALLOW SALES TAXES TO BE INCLUDED
IN AN AWARD OF ATTORNEY'S FEES.**

The superior court awarded Arnold attorney's fees under Rule 82(b)(2), Alaska Rules of Civil Procedure. Included in this award was \$375 of City and Borough of Juneau sales tax on attorney services the superior court found to be "an unavoidable charge, which mandatorily attaches to attorney services and is an inseparable part of the attorney fees cost to the client." The Supreme Court reversed the attorney's fees award, finding that Rule 82(b)(2) does not expressly permit including sales tax on attorney services in an attorney's fee award. The rule allows for "actual attorney's fees." Because sales taxes on attorney's fees are not actual attorney's fees, and because Rule 82 does not otherwise explicitly include sales taxes on attorney's fees, the Supreme Court found it was an error to include those taxes in the attorney's fees award.

Long v. Arnold, 386 P.3d 1217 (Alaska 2016).

Legislative review is not recommended unless the legislature wishes to allow sales tax to be awarded in attorney's fees.

AK Criminal Rule 43(a)

**CRIMINAL RULE 43(a)(1) DOES NOT REQUIRE A
DEFENDANT'S CONSENT TO THE STATE'S
DISMISSAL OF A CHARGE WITH PREJUDICE.**

A defendant was charged with various counts of assault and controlled substance misconduct. At trial, the prosecutor announced the state wished to dismiss an assault charge with prejudice. The defendant's attorney did not oppose dismissal, and the charge was dismissed. After conviction of all the remaining charges, the man argued that Alaska Criminal Rule 43(a)(1) made it plain error for the judge to allow dismissal of the charge without his personal consent and this prejudiced him by affecting jury deliberation on the remaining charges.

The Court of Appeals concluded that a defendant's personal consent is not required when the state dismisses a charge with prejudice. The Court held that although Criminal Rule 43(a)(1), which is based on the corresponding federal rule,

appears to apply to any dismissal, it only addresses a dismissal *without* prejudice, not one *with* prejudice. The Court reasoned that, like the federal rule, the purpose of the rule is to protect defendants from double jeopardy.

Jordan v. State, 2017 WL 4322728 (Alaska App. Sept. 29, 2017).

Legislative review is not recommended.

AS 01.10.050(b),
AS 12.55.135(a)

A DEFENDANT CAN RECEIVE A HIGHER SENTENCE FOR PREVIOUS CONVICTIONS EVEN IF THE DEFENDANT HAS ONLY ONE PREVIOUS CONVICTION.

Under ch. 36, SLA 2016 (known as Senate Bill 91), the sentence for a class A misdemeanor has a maximum penalty of 30 days' imprisonment unless the defendant meets one or more of the criteria listed in AS 12.55.135(a)(1). Under AS 12.55.135(a)(1)(C), a defendant can receive up to one year imprisonment if "the defendant has past criminal convictions for conduct violative of criminal laws . . . similar in nature to the offense for which the defendant is being sentenced." Brooks was convicted of operating a vehicle under the influence and had one prior conviction for the same offense. The district court ruled that Brooks is not covered by AS 12.55.135(a)(1)(C) because the subparagraph speaks of "convictions" in the plural. The court determined that the defendant had failed to show that AS 12.55.135(a)(1)(C) should be interpreted differently than the rule of statutory construction in AS 01.10.050(b) that "words in the plural number include the singular." Therefore, the court held that AS 12.55.135(a)(1)(C) was intended to apply to defendants who have one or more prior convictions.

Municipality of Anchorage v. Brooks, 397 P.3d 346 (Alaska App. 2017).

Legislative review is not recommended.

AS 01.10.060(7),
AS 28.35.182

**AN ALASKA RAILROAD SPECIAL AGENT IS A
PEACE OFFICER FOR THE PURPOSE OF
AS 28.35.182.**

An Alaska Railroad Special Agent attempted to make contact with a driver in a railroad parking lot. The driver, Forsythe, drove away even though the agent activated her patrol car's lights and siren. The agent pulled alongside Forsythe, motioning for him to stop, but he shook his head and continued driving. Forsythe was charged under AS 28.35.182(b) with failing to stop at the direction of a peace officer and for failing to pull over when directed to do so by the railroad agent.

Forsythe argued an Alaska Railroad Special Agent is not a "peace officer" for the purposes of AS 28.35.182. Based on a recent opinion, *Sapp v. State*, that found the definition of "peace officer" for the purpose of AS 28.35.182 is controlled by AS 01.10.060(7), the Alaska Court of Appeals looked to AS 01.10.060(7)(F), which states a "peace officer" includes "[any] officer whose duty it is to enforce and preserve the public peace." In *Sapp*, the Court of Appeals interpreted this subsection as encompassing only "publicly employed law enforcement officers who have full police responsibility and who spend substantially all of their working hours performing these police functions."

The Alaska Railroad Special Agent argued her primary duty is law enforcement and her job is similar to that of a police officer's except that her physical jurisdiction is railroad property. Forsythe argued that a railroad agent is more similar to a private security guard who does not "enforce and preserve the *public* peace."

The Alaska Court of Appeals rejected Forsythe's argument. The court reasoned that the Alaska Railroad is not a normal business corporation but instead an instrumentality of the state, and AS 42.40.250(2) envisions the railroad's security force will operate as a police force, which includes enforcement of municipal ordinances and state laws on railroad property. The court held that special agents of the Alaska Railroad's security force are therefore "peace officers" within the meaning of AS 01.10.060(7)(F), and that Forsythe violated AS 28.35.182(b) when he knowingly failed to stop at the railroad agent's direction.

Forsythe v. State, 391 P.3d 643 (Alaska App. 2017).

Legislative review is not recommended unless the legislature intends to exclude an Alaska Railroad special agent from "peace officer" for the purpose of AS 28.35.182.

AS 04.11.499,
AS 04.16.200,
AS 04.16.220

VIOLATION OF AS 04.11.499 AND FORFEITURE UNDER AS 04.16.220 DO NOT REQUIRE SUCCESSFUL IMPORTATION OF ALCOHOL.

Jouppi and the air carrier he and his wife owned were convicted of importation of alcoholic beverages in violation of AS 04.11.499 after officers intercepted Jouppi before he flew to a local option community with alcoholic beverages. At sentencing, the district court denied the state's request to order forfeiture of the airplane involved, holding that even when an airplane is used to facilitate unlawful transportation of alcohol, because of the phrase "imported into" in AS 04.16.220, forfeiture of the airplane is only allowed if the beverages actually arrive in the community.

The Alaska Court of Appeals reversed, finding AS 04.16.220 should not be read so narrowly and that the statute instead *mandates* forfeiture of any aircraft that is knowingly used to facilitate a violation of AS 04.11.499, regardless of whether the alcoholic beverages ever arrive in the community. The court found that it was necessary to deviate from the dictionary definition of "imported" when reading this statute in the context of AS 04.11.499 and AS 04.16.200, which sets forth the penalties for violating AS 04.11.499 and does not differentiate between cases where delivery is completed or intercepted.

Aside from the catchline of AS 04.11.499(a), the statute itself does not reference importation. Instead, it is a crime to "knowingly send, transport, or bring" or attempt to send or convey alcoholic beverages into a community that has banned the importation of alcoholic beverages.

The court reasoned that because AS 04.11.499 demonstrates the legislature's intent to criminalize all aspects of any endeavor to bring alcoholic beverages into a local option community, regardless of its success, the phrase "imported" in AS 04.16.220 should not be interpreted in the narrow sense of "physically deliver" but instead read as a shorthand for the crime in AS 04.11.499.

State v. Jouppi, 397 P.3d 1026 (Alaska App. 2017).

Legislative review is not recommended unless the legislature intends to limit the forfeiture statute, AS 04.16.220, to instances of successful importation.

AS 09.10.065(a)

STATUTE OF LIMITATIONS FOR NEGLIGENCE LAWSUIT AGAINST OCS COULD NOT BE TOLLED ON GROUNDS THAT IT WAS FOR CONDUCT THAT AMOUNTED TO FELONY SEX ABUSE OF A MINOR.

The plaintiff suffered years of sexual abuse while in foster care and after the Office of Children's Services ("OCS") approved her adoption. Years later, the plaintiff sued OCS after discovering that OCS might have played a role in allowing the abuse. The superior court concluded the plaintiff's claims were untimely. The plaintiff appealed.

The plaintiff argued that her claims were timely under AS 09.10.065(a), which allows a person to bring a suit at any time "for conduct" that would have, at the time the conduct occurred, violated provisions of certain offenses, including felony sexual abuse of a minor. The Alaska Supreme Court held, however, that the plaintiff's suit fell outside the plain language of AS 09.10.065(a). While the plaintiff argued that her suit against OCS was "for conduct" that amounted to "felony sexual abuse of a minor", the court reasoned that the plaintiff was not actually alleging that OCS committed felony sexual abuse of a minor; rather, she was arguing that OCS was negligent in failing to protect her from the conduct. Because nothing in the legislative history suggested that the legislature intended to broaden the application of AS 09.10.065(a) to include negligence suits, the Alaska Supreme Court interpreted the statute according to its plain meaning and held that AS 09.10.065(a) did not apply to the plaintiff's action against OCS.

Reasner v. State Dep't of Health & Soc. Servs., 394 P.3d 610 (Alaska 2017).

Legislative review is not recommended as the Court's decision is reasonable given the language of AS 09.10.065(a).

AS 11.56.770

LYING TO THE POLICE DOES NOT VIOLATE THE HINDERING PROSECUTION STATUTE.

The defendant was convicted of first-degree hindering prosecution under AS 11.56.770, after telling police that she, not her live-in boyfriend, had been caring for a child he abused. The Alaska Court of Appeals reversed the conviction on grounds that her actions did not constitute the crime of hindering prosecution and that the prosecution against her was based on a misinterpretation of the hindering prosecution statute.

Under AS 11.56.770, a person commits first-degree hindering prosecution if they "render assistance" to another person who has committed a felony. The court explained, however, that Alaska's definition of "renders assistance" refers only to "*tangible assistance* to a lawbreaker - *i.e.*, physical or material assistance - and not assistance by deceptive words." The court further explained that the legislative history of AS 11.56.770 appears to show that the statute was drawn from the Model Penal Code, and the "Model Penal Code version of this offense was expressly drafted to ensure that the act of lying to the police during a police-initiated interview would *not* constitute the offense of hindering prosecution."

Silook v. State, 397 P.3d 352 (Alaska App. 2017).

Legislative review is not recommended unless the legislature wants to expand the meaning of "rendering assistance" in this context.

AS 11.61.210

A PERSON DOES NOT POSSESS AN ITEM OF PROPERTY THAT BELONGS TO SOMEONE ELSE MERELY BECAUSE THE OWNER OF THE PROPERTY HAS BROUGHT THE PROPERTY TO THE PERSON'S VEHICLE, HAS PLACED THE PROPERTY WITHIN THE DEFENDANT'S REACH, AND THE DEFENDANT IS AWARE THAT THE PROPERTY IS THERE.

Dirks was convicted of fourth-degree weapons misconduct for possessing a holstered handgun in the backseat of his car while he was impaired by alcohol. The handgun did not belong to Dirks but to his friend who was a passenger in the car. The

state argued that even though the gun belonged to someone else, Dirks "possessed" the gun because Dirks knew that the gun was in the interior of the vehicle. The Court of Appeals reversed the conviction, and held that a person may not be found guilty of possessing an item of property that belongs to someone else merely because the owner of the property has brought the property to the defendant's residence, vehicle, or place of business, and has placed the property within the defendant's reach, and the defendant is aware that the property is there.

Dirks v. State, 386 P.3d 1269 (Alaska App. 2017).

Legislative review is not recommended unless the legislature disagrees with the holding as a matter of public policy.

AS 12.55.120

WHEN A DEFENDANT WHO IS ON PROBATION COMMITS A NEW CRIME AND RECEIVES A SENTENCE FOR THE NEW CRIME PLUS PROBATION REVOCATION SENTENCES BASED ON THE PRIOR CRIME, THE SENTENCES CAN BE APPEALED INDIVIDUALLY.

Jeter committed a new crime while he was on probation in two previous criminal cases. Jeter received one sentence in the new criminal case and separate sentences in the probation revocation proceedings held in the earlier criminal cases. Jeter appealed some of the sentences, but not all of them. The Court of Appeals had previously held that it would only review a defendant's total sentence as one combined whole, and would not consider individual sentences unless the defendant furnished the court with the pertinent record in all of the related cases. The court does not allow a defendant who is sentenced for two or more crimes to appeal the sentences individually because the sentence must be considered as a whole. However, this rule does not apply when a probationer commits a new crime and then receives a sentence for the new crime plus one or more probation revocation sentences. One of the reasons for this is because a probation revocation proceeding is heard by the same judge who originally sentenced the defendant. The sentence for the new crime and the probation revocation proceedings may not be heard by the same judge and the defendant thus receives no composite sentence. The Court of Appeals therefore held that when a defendant who is on probation commits a new crime and receives a sentence for the new crime plus probation

revocation sentences based on the same crime, the sentences can be appealed individually.

Jeter v. State, 393 P.3d 438 (Alaska App. 2017).

Legislative review is not recommended unless the Legislature wishes to require a person to appeal all sentences together.

AS 12.55.120(a)

A DEFENDANT CAN APPEAL A NON-TERM-OF-IMPRISONMENT SENTENCE FOR EXCESSIVE PROBATION.

A man appealed a suspended sentence of 240 days and five years of probation, arguing the probation term was excessive.

Under AS 12.55.120(a) and Alaska Appellate Rule 215(a)(1), a defendant cannot appeal a misdemeanor sentence as excessive unless the sentence exceeds 120 days to serve, but may file a petition for discretionary review to the Alaska Supreme Court if the term of imprisonment is unsuspended. However, the defendant argued he could appeal his probation term as excessive under the 2007 case *Allen v. Anchorage*. In *Allen*, the Court of Appeals held that the statutory bar against excessive sentence appeals involving misdemeanor sentences of less than 120 days to serve is inapplicable to "non-term-of-imprisonment sentence appeals (e.g., appeals challenging probation conditions, fines, forfeitures, and license revocations) regardless of the term of imprisonment."

The court noted that in recent years, it had issued unpublished decisions that are arguably inconsistent with *Allen*. The court invited briefing on whether it should overturn *Allen* and adopt the dissent of that case, which concluded the court has no jurisdiction to hear any aspect of a misdemeanor sentence appeal unless the active imprisonment portion of the sentence exceeds 120 days. However, the court abided by stare decisis and held it had jurisdiction over the man's claim. The court reasoned that the legislature and Alaska Supreme Court have not taken action to suggest disagreement with *Allen*, the court's published decisions consistently applied *Allen*, overruling the case would unnecessarily confuse litigants and lawyers, and written decisions on challenges of fine, forfeiture, and probation terms promotes criminal justice transparency. The court affirmed the sentencing, finding the man's probationary term to be well-supported by the sentencing record.

Maguire v. State, 390 P.3d 1175 (Alaska App. 2017).

Legislative review is not recommended unless the legislature intends for misdemeanor appeals to be unavailable for excessive probation terms.

AS 13.12.114,
AS 25.20.050

PATERNITY DETERMINATIONS MAY BE MADE IN ESTATE PROCEEDINGS.

A decedent left a will saying he had no children, but during the probate proceedings a man claimed to be the decedent's son. The superior court ruled that laches barred the man's efforts to establish paternity, and because paternity had not been established, the man did not have standing to pursue a claim in the estate proceedings. The superior court ruling was based on the probate master's reasoning that paternity determinations may not be made in estate proceedings.

The Alaska Supreme Court, however, held that "[i]t is clear AS 13.12.114 contemplates that the probate court may enter a judgment regarding the parent and child relationship." The Court reasoned that AS 13.12.114(a) provides that "for purposes of intestate succession by, through, or from a person, an individual is the child of the individual's natural parents, regardless of their marital status, and the parent and child relationship may be established as indicated under AS 25.20.050." In relevant part AS 25.20.050(a) states that "[a] child born out of wedlock is legitimated and considered the heir of the putative parent when . . . the putative parent is determined by a superior court without jury or by another tribunal, upon sufficient evidence, to be a parent of the child." AS 13.12.114(d) further provides that "[t]o the extent there is a conflict between this section and . . . AS 25.20.050 . . . , [AS 13.12.114] controls." The Court also noted that AS 13.12.114 is based on a Uniform Probate Code provision, and "[i]t is evident that both the current and former probate statutes addressing paternity were adopted from Uniform Probate Code provisions contemplating that paternity determinations could be made *after* the putative father's death." The Court further held that since the man's claims were legal (not equitable) in nature, the superior court did not have the power to employ laches to the legal claims.

Estate of James V. Seward, 410 P.3d 976 (Alaska 2017).

Legislative review is not recommended.

AS 13.12.502(b)

A TESTATOR'S HANDWRITTEN NAME IN THE INTRODUCTION OF A HOLOGRAPHIC WILL IS SUFFICIENT TO SATISFY THE SIGNATURE REQUIREMENT.

The sole question presented to the Alaska Supreme Court on appeal in a probate matter was whether the decedent's handwritten name at the beginning of a purported holographic will was a "signature" as required under AS 13.12.502(b). This was an issue of first impression in this state.

In concluding that a testator's handwritten name in the exordium clause of a purported holographic will is sufficient to satisfy the signature requirement under AS 13.12.502(b), the Court reasoned that in states with statutes like AS 13.12.502(b) that do not specify the location of the signature, courts have nearly unanimously declined to read the signature requirement as implicitly requiring a terminal signature. The Court also held that "Alaska law permits courts to determine from an inspection of the instrument's language, form, and the relative position of its parts whether or not there is a positive and satisfactory inference that the decedent's name was placed in that location with the intention of executing the instrument."

Matter of Estate of Baker, 386 P.3d 1228 (Alaska 2016).

No legislative review is recommended, unless the legislature wishes to require a signature at the end of a holographic will or place other signatory requirements on holographic wills.

AS 13.26.045
[renumbered as
AS 13.26.132]

"RIGHTS OF CUSTODY" HAVE BEEN SUSPENDED FOR PURPOSES OF GUARDIANSHIP WHEN THE OFFICE OF CHILDREN'S SERVICES ASSUMES CUSTODY.

A father appealed a superior court's appointment of a long-term guardian for a minor child. Specifically, he alleged that the superior court lacked authority to establish a guardianship under AS 13.26.045 (renumbered as AS 13.26.132), because his rights had not been terminated or "suspended." AS 13.26.045 authorizes the superior court to "appoint a guardian for an unmarried minor if all parental rights of

custody have been terminated or suspended by circumstances or prior court order." On appeal, the father argued that since he retained "residual rights" of parenting, his parental rights had not been suspended, despite the Office of Children's Services' (OCS) physical custody of the minor.

Because the term "suspended" was not defined by statute, the Alaska Supreme Court considered the meaning of the term *de novo*. The Court held that a parent of a child in OCS custody retains "residual rights" unless and until all parental rights are terminated, "but the rights of custody are not included in those residual rights." Therefore, the Court concluded that the true question is whether "custodial rights" were suspended while the child was in OCS custody. Because the father was prevented from exercising his "parental rights of custody" once OCS took custody of the minor, the Court determined that his "rights of custody" had been "suspended" as that term is used in AS 13.26.045.

Jude M. v. State, 394 P.3d 543 (Alaska 2017).

Legislative review is not recommended, unless the legislature intended the phrases "suspended" or "parental rights of custody" to have a different meaning under AS 13.26.045 than determined by the Alaska Supreme Court.

AS 18.85.100(a)
Admin. Rule 12(e)

AS 18.85.100(a) DOES NOT AUTHORIZE PUBLICLY FUNDED ANCILLARY LEGAL SERVICES FOR INDIGENT DEFENDANTS WHO WAIVE THEIR RIGHT TO REPRESENTATION AT PUBLIC EXPENSE.

A defendant charged with murder waived his right to court-appointed counsel and chose to represent himself. The superior court denied his requests for public funds to hire expert witnesses, finding that a reasonable attorney would not spend money for DNA testing and that he failed to provide case-specific rationale for the experts or explain how they would constitute a significant component of his defense. The defendant argued the denial violated due process.

AS 18.85.100(a) guarantees indigent defendants representation "by an attorney to the same extent as a person retaining an attorney is entitled" and "the necessary services and facilities of this representation, including investigation and other preparation." The Court of Appeals noted indigent defendants have a right to obtain experts at public expense, but must

satisfy a fact-specific showing that an expert's evaluation will be a significant component of the defense case. Here, the court found the defendant failed to make this showing and upheld the denial of his request for expert witness funding. Although the question of whether the Alaska Public Defender Agency would have been required under AS 18.85.100(a) to fund experts was therefore moot, the court addressed it.

The court found AS 18.85.100(a) does not authorize clerical support, expert consultations, and investigative services for indigent defendants who reject the assistance of a publicly funded attorney. The court acknowledged that courts of other states are split, but based its holding on the history behind the Public Defender Agency and the legislative purpose behind the Public Defender Act, which was to satisfy the state's obligation to provide indigent defendants with representation. The court found that the phrase "this representation" in AS 18.85.100(a)(2) ("the necessary services and facilities of this representation") means the representation by counsel guaranteed by AS 18.85.100(a)(1), because the text suggests the legislature viewed the support services in AS 18.85.100(a)(2) as ancillary. The court noted that Alaska Criminal Rule 39.1, under which a court assesses whether a defendant is indigent, directs upward adjustment to private representation costs if expert witnesses, special investigations, or tests will be needed. The court found it unlikely that the legislature intended to allow a defendant to retain private counsel and require the Public Defender Agency to reimburse a retained private attorney for these expenses. Interpreting the statute that way would require revealing attorney-client confidences to the agency so it could assess the necessity of requested services and facilities, and a defendant would need to immediately challenge an unfavorable agency decision.

The court also concluded that Alaska Administrative Rule 12(e) does not authorize a court to directly appoint investigators or experts for criminal defendants. Rule 12(e) authorizes a court to appoint "counsel, or a guardian ad litem, or other representative" for an indigent person if the appointment is not authorized by AS 18.85.100(a) but is required by law or rule. The court found the rule's context and legislative history do not suggest that it independently authorizes a trial court to hire investigators and experts for indigent defendants who waive court-appointed counsel.

Crawford v. State, 2017 WL 3928698 (Alaska App. 2017), reh'g denied (Oct. 20, 2017).

Legislative review is recommended to determine whether the court's interpretation of AS 18.85.100(a) is consistent with the legislature's intent or if the legislature intends to authorize clerical support, expert consultations, and investigative services for indigent defendants who reject the assistance of a publicly funded attorney.

AS 22.15.120

A MAGISTRATE JUDGE DOES NOT HAVE THE POWER TO CONDUCT A PROBATION REVOCATION PROCEEDING OVER THE OBJECTION OF A DEFENDANT.

Akers was convicted of driving under the influence. She was later charged with a probation violation for consuming alcoholic beverages. The district court judge assigned the proceeding to a magistrate, over the objection of Akers. AS 22.15.120 defines the authority of magistrate judges. While no provision directly addresses whether a magistrate judge can hear a probation revocation proceeding, AS 22.15.120(a)(6) allows a magistrate judge to "hear, try, and enter judgments" in misdemeanor cases "if the defendant consents in writing that the magistrate may try the case." The Court of Appeals noted that (1) a probation revocation proceeding is a continuation of the original criminal prosecution; (2) a magistrate judge's authority to conduct revocation proceedings would have to stem from the fact that the probation is a component of the defendant's sentence; and (3) a probation revocation proceeding is not a new court case but a continuation of the original criminal proceeding. Because Akers was sentenced by a district judge, the Court of Appeals determined that Akers was entitled to have her probation revocation proceeding conducted by a district court judge. The Court of Appeals did not rule on whether a magistrate could hear a probation revocation proceeding if the magistrate had heard and sentenced the defendant in the original proceeding.

Akers v. State, 389 P.3d 65 (Alaska App. 2016).

Legislative review is recommended to determine whether the legislature wishes to give magistrate judges the power to preside over probation revocation proceedings.

AS 23.30.180(a),
AS 23.30.220,
AS 23.30.225

CALCULATING AN OFFSET FOR PERMANENT TOTAL DISABILITY (PTD) BENEFITS BASED ON RECEIPT OF SOCIAL SECURITY DISABILITY AND PRIOR PERMANENT PARTIAL IMPAIRMENT PAYMENTS CLARIFIED.

An employee worked for over ten years with a job-related knee injury. Over time, the employer made several permanent partial impairment (PPI) payments, but the employee was eventually determined to be permanently and totally disabled because of the work injury. Once the employee began to receive Social Security disability benefits, the employer sought an offset to its permanent total disability (PTD) compensation related to the employee's Social Security disability benefits and the amount previously paid for PPI.

With regards to the offset for Social Security disability benefits, AS 23.30.225(b) states that an offset depends on the calculation of several items, including "the employee's average weekly wages at the time of the injury." The employer had argued that the phrase required use of a figure that represented the employee's actual wages in 1996, the time of her injury. The employee, however, argued that a higher figure representing her adjusted weekly wage, as calculated under AS 23.30.220(a)(10), should be used instead. The Alaska Supreme Court agreed with the employee and held that "the average weekly wage at the time of injury could be calculated under *any* subsection of AS 23.30.220, including AS 23.30.220(a)(10)."

With regards to the offset for PPI, the Workers' Compensation Appeals Commission had allowed the employer to recover the amount it previously paid as PPI as an overpayment of PTD benefits, "without regard to AS 23.30.180 and without regard to 8 AAC 45.134." The employee argued, however, that AS 23.30.180(a) requires an offset when "a permanent partial *disability* award has been made before a permanent total disability determination - not a permanent partial *impairment* award." The Court agreed and held that "Alaska Statute 23.30.180(a) authorizes recovery of previously paid permanent partial *disability*, not *impairment*, benefits."

Alaska Airlines, Inc. v. Darrow, 403 P.3d 1116 (Alaska 2017).

No legislative action is recommended, unless the legislature wishes for offsets to permanent total disability compensation be calculated differently.

"DOMESTIC LIVING PARTNER" IS NARROWER THAN "HOUSEHOLD MEMBER" FOR THE PURPOSE OF APPLYING A PRESUMPTION AGAINST CUSTODY AND VISITATION FOR A HISTORY OF DOMESTIC VIOLENCE.

Timothy, a father in a custody, support, and visitation dispute challenged a trial court's finding that he had a history of domestic violence against a "domestic living partner." Based on the testimony of his romantic partner, Jackie, the trial court ruled Timothy had committed three acts of domestic violence against her and applied the AS 25.24.150(j) presumption against unsupervised visitation.

AS 25.24.150(g) creates a rebuttable presumption "that a parent who has a history of perpetrating domestic violence against [. . .] a domestic living partner may not be awarded sole legal custody, sole physical custody, joint legal custody, or joint physical custody of a child." Under AS 25.24.150(h), "a history of perpetrating domestic violence" under AS 25.24.150(g) exists if "the court finds that the parent has engaged in more than one incident of domestic violence." Under Title 25, "domestic violence" has the meaning given in AS 18.66.990: one of a number of offenses or attempts "by a household member against another household member." The Alaska Supreme Court upheld the trial court's findings that Jackie and Timothy were "household members" and that Timothy committed two counts of criminal trespass and one count of coercion against Jackie. However, the Court found insufficient evidence that Timothy's history of domestic violence took place at the time he was "a domestic living partner" with the victim. The Court noted that the term "domestic living partner" is not defined in statute and has not been defined by the Court. The Court found the statute and its context do not include all acts of domestic violence because if that were the legislature's intent, it would be superfluous to require that the domestic violence be perpetrated "against the other parent, a child, or a domestic living partner" since "household member" would include the other parent or a child. The Court concluded "domestic living partner" is narrower than "household member" and found that the legislative history to the contrary is insufficient to overcome the statute's clear meaning. Instead, based on the plain reading of the term "domestic living partner" and the common public definitions of "domestic," "living," and "partner," the Court held that a "domestic living partner" for the purpose of AS 25.24.150 applies only to a perpetrator and victim whose relationship is

more than casual, and who reside in the same household "on a basis that entails some commitment." The Court reasoned, in part, that requiring more would allow domestic violence against a partner with an unconventional housing arrangement to "slip through the cracks." The Court held "domestic living partner" is not limited to spouses and ex-spouses, and there is no requirement that the perpetrator and victim have a child together. The Court noted that although Timothy and Jackie maintained separate residences, their lives were intertwined when they lived and slept in the same home and spent significant time in a "shared, marriage-like, domestic environment." The Court therefore upheld the trial court's general finding that Jackie and Timothy were "domestic living partners" under AS 25.24.150(g), but vacated the visitation order and remanded for further findings on whether the domestic violence occurred while a domestic living partnership was in effect, specifically whether Timothy and Jackie were "domestic living partners" when a trespass occurred, noting the tension between being domestic living partners and lacking privilege to enter the home. The Court opined domestic living partnerships can disintegrate despite the continuation of shared living arrangements.

Timothy W. v. Julia M., 403 P.3d 1095 (Alaska 2017).

Legislative review is recommended if the legislature intends a different meaning for the term "domestic living partner."

AS 34.35.125
AS 34.35.140
AS 34.35.170

FEDERAL COURT REFUSES TO EXTEND ALASKA'S DUMP LIEN TO INCLUDE NATURAL GAS ACCESSED THROUGH A WELL.

Cook Inlet Energy, LLC ("Cook Inlet") operates oil and gas wells in southcentral Alaska, including the North Fork wells. After refinancing its existing credit facility with Apollo Investment Corporation ("Apollo"), Cook Inlet granted Apollo security interests in substantially all of its assets, including the North Fork wells. In this suit, while plaintiff All American Oilfield, LLC ("All American") did not challenge the validity of Apollo's secured interests in the North Fork wells but asserted a priority for its lien over any interest held by Apollo under Alaska's "dump lien" statute, AS 34.35.140.

It was undisputed that All American held a valid mining lien against the North Fork wells, and the natural gas located therein, under AS 34.35.125. That lien, however, was

subordinate to Apollo's secured interests. Nevertheless, All American asserted a claim of a priority of its dump lien under AS 34.35.140(a), alleging that the statutory definition of a "dump" in AS 34.35.170 was sufficiently broad to include natural gas accessed through a well, even when that gas is left within its native gas reservoir. The United States Bankruptcy Court for the District of Alaska disagreed, holding that All American's request to extend Alaska's dump lien to natural gas left in place would do "too much violence to the statutory scheme." Instead, the court found that "Alaska's statutory scheme expressly provides that minerals left in place, including gas, are subject to the mining lien under AS 34.35.125" - not the dump lien statute under AS 34.35.140.

In re Cook Inlet Energy, LLC, 2017 WL 1082217 (D. Alaska March 21, 2017).

Legislative review is not recommended, unless the legislature wishes to revisit the dump lien provisions and reconsider whether minerals left in their natural place might be subject to AS 34.35.140.

AS 43.55.013(j)

DEPARTMENT OF REVENUE DECISION TO AGGREGATE SEPARATE OIL AND GAS FIELDS WAS NOT A REGULATION.

Four oil producers challenged a Department of Revenue (department) decision that treated separate oil and gas fields as a single entity when calculating the producers' production tax obligations under AS 43.55.013(j).

AS 43.55.013(j), which was repealed in 2006, permitted the department to aggregate two or more oil or gas fields for the purposes of calculating the economic limit factor, which was used to determine the tax rate. The statute allowed for aggregation of fields "when economically interdependent oil or gas production operations are not confined to a single lease or property." The department adopted 15 AAC 55.027(b), which permitted producers to petition for assurance that specific fields would not be aggregated. Neither AS 43.55.013(j) nor 15 AAC 55.027(b) defined "economically interdependent." After producers sought rulings from the department that it would not aggregate several participating areas, the department produced internal memoranda and a White Paper acknowledging confusion over the meaning of "economic interdependence." The department decided the participating

areas were economically interdependent and aggregated them, which resulted in a higher tax rate. The department explained its prior decisions provided "only limited guidance" and found that if fields "are so integrated as to be reasonably treated as an economically unitary activity," they are economically interdependent. The department found the areas in question satisfied even a demanding standard of interdependence because they shared production facilities, the working interest owners made production decisions across participating areas, and the comingling of produced fluids required estimation of volumes from different participating areas. The producers argued that the department should have implemented any change to its interpretation of statute by rulemaking under AS 44.62, the Administrative Procedure Act.

The Alaska Supreme Court found the department's decision was not a regulation requiring rulemaking procedures because it was a commonsense interpretation of statute. The Court reasoned the department's decision clarified the scope of AS 43.55.013(j) by indicating the degree of interdependence that warranted aggregation, within the facts of the case before it, but the department did not add specific criteria to the term "economically interdependent" beyond existing language. The Court noted that the departments' interpretation was consistent with dictionary definitions. The Court held that the White Paper and other documents did not represent the official policy, but were internal and clearly drafts. Thus, an official decision that differed from the White Paper or memoranda was not an official policy requiring rulemaking.

Chevron U.S.A., Inc. v. State Dep't of Revenue, 387 P.3d 25 (Alaska 2016).

Legislative review is not recommended.

AS 44.21.410

STATE-APPOINTED COUNSEL NOT REQUIRED FOR ALL INDIGENT PARENTS IN A CHILD CUSTODY CASE WHERE THE OTHER PARENT HIRES PRIVATE COUNSEL.

In a child custody modification proceeding, a mother hired a private attorney but the court denied the father's request for court-appointed counsel. The father claimed this violated his due process and equal protection rights. The Alaska Supreme Court rejected this argument, declining to mandate court-appointed counsel for all indigent parents in a custody case when the other parent hires private counsel.

The Court held that although due process requires appointing counsel to an indigent parent if the proceeding could lead to a criminal charge or deprivation of liberty, a parent's private interests in a custody case does not rise to this level. The Court explained it has extended the right to counsel for an indigent parent in three cases: (1) in a private child custody proceeding when a state agency opposes the parent, (2) in a Child in Need of Aid proceeding brought by the state to terminate parental rights, and (3) in a nonconsensual adoption. However, the Court found that custody, while a significant private interest, does not reach the magnitude of the risk of termination. The Court noted that procedural safeguards, including the Family Law Self-Help Center, resolution programs, and the judge's experience providing procedural assistance to self-represented parties reduce the risk of erroneous deprivation of the parent's rights. The Court reasoned that the state's interest in avoiding increased conflict between parents and the cost of appointed counsel weighs against appointment.

The Court also rejected the father's claim that AS 44.21.410 violates equal protection. The Court held that AS 44.21.410 codified an earlier decision that parents facing state opposition in custody cases have a due process right to appointed counsel, but found that due process does not require appointment of counsel to all indigent parents in a custody case where the other parent hires private counsel.

Dennis O. v. Stephanie O., 393 P.3d 401 (Alaska 2017).

Legislative review is not recommended unless the legislature wants to expand the circumstances in which court-appointed counsel is available.

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