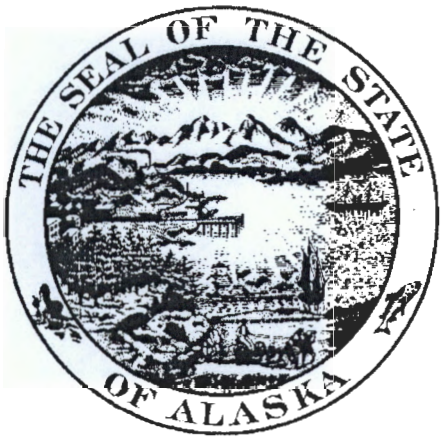

STATE OF ALASKA

Legislative Affairs Agency

A

REPORT TO THE

THIRTY-FIRST 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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Juneau, Alaska 99801-1182

DECEMBER 2020

A REPORT TO THE THIRTY-FIRST 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The report lists Alaska Statutes that will be amended or repealed between February 28, 2021, and March 1, 2022, according to laws enacted before the 2021 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2019, and September 30, 2020,

and

Opinions of the Attorney General that were made available through Internet distribution between October 1, 2019, and September 30, 2020.

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INTRODUCTION

AS 24.20.065(a) requires that the Legislative Council annually examine 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.

This report also includes a list of Alaska Statutes that, absent any action by the 2021 Legislature, will be repealed or amended before March 1, 2022, because of repeals 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 Meera Caouette, Noah Klein, and Sandon Fisher, Legislative Counsel, Linda Bruce, Assistant Revisor of Statutes, and Hilary Martin, Revisor of Statutes. Kathryn Kurtz, Assistant Revisor of Statutes, prepared the list of delayed repeals and amendments.

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DELAYED REPEALS, ENACTMENTS OR AMENDMENTS

taking effect between February 28, 2021, and March 1, 2022, according to laws enacted before the 2021 legislative session

Laws enacted in 2013

Ch. 10, SLA 2013, sec. 34 -- Oil and Gas Competitiveness Review Board

AS 43.98.040	Repealed February 28, 2021
AS 43.98.050	Repealed February 28, 2021
AS 43.98.060	Repealed February 28, 2021
AS 43.98.070	Repealed February 28, 2021

Laws enacted in 2014

Ch. 2, SLA 2014, sec. 21, as amended by ch. 52, SLA 2016, sec. 4 -- Alaska Regional Economic Assistance Program

AS 44.33.896	Repealed July 1, 2021

Ch. 83, SLA 2014, sec. 35, as amended by ch. 36, SLA 2016, sec. 177 -- Criminal Justice Commission Staff

AS 22.20.210	Repealed June 30, 2021

Laws enacted in 2015

Ch. 35, SLA 2015, sec. 8 -- Recovery of Film Production Tax Credit

AS 44.25.135	Repealed July 1, 2021

Laws enacted in 2017

Ch. 1, SLA 2017, sec. 2-- Opioid Overdose Drugs

AS 17.20.085(c)	Repealed June 30, 2021

Ch. 8, SLA 2017, sec. 18 -- Prohibition on Data Sharing by Department of Motor Vehicles

AS 28.05.068(g)	Repealed June 30, 2021

Laws enacted in 2018

Ch. 16, SLA 2018, sec. 2 -- Permanent Fund Income

AS 37.13.140(b)	Amended July 1, 2021

Laws enacted in 2020

Ch. 29, SLA 2020, sec. 21 – Electrical Reliability Organizations, Plans, and Standards

AS 42.05.760	Takes effect July 1, 2021
AS 42.05.762	Takes effect July 1, 2021
AS 42.05.765	Takes effect July 1, 2021
AS 42.05.767	Takes effect July 1, 2021
AS 42.05.770	Takes effect July 1, 2021
AS 42.05.772	Takes effect July 1, 2021
AS 42.05.775	Takes effect July 1, 2021

AS 42.05.780	Takes effect July 1, 2021
AS 42.05.785	Takes effect July 1, 2021
AS 42.05.790	Takes effect July 1, 2021

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

WHEN A PARENT OWES NO ARREARAGES, DUPLICATIVE VOLUNTARY CHILD SUPPORT OVERPAYMENTS ARE CONSIDERED A GRATUITY THAT MAY NOT BE RECOVERED IN THE FUTURE.

A child support obligor father retired and began collecting Social Security. The child thus became eligible for, and the mother began to receive, children's insurance benefit (CIB) payments, which may be credited against a child support obligation. The father also had been paying for the child's health insurance and was entitled under the trial court's child support order to a credit against his child support obligation for the insurance payments. The father, however, did not notify the child support services division (CSSD) about the CIB payments or health insurance for multiple years, overpaying his support obligation by more than $50,000.

The trial court denied the father's requests for reimbursement and the father appealed. Because prior Alaska case law does not clearly establish whether an overpaying child support obligor is entitled to reimbursement of duplicative child support and CIB payments, the Alaska Supreme Court reviewed related cases, decisions from other states, and public policy arguments. Recognizing "valid arguments on both sides," the Court ultimately held that the overpayments were a gratuity that is not reimbursable because "it is more fair to allocate the risk of loss" to "the parent making the overpayments" who "had every opportunity to notify CSSD." The Court also held that the obligor father's continued full payment of child support while paying for the child's health insurance was a voluntary overpayment, which was not subject to reimbursement or credit.

Rosenbaum v. Shaw, 459 P.3d 467 (Alaska 2020).

Legislative review is not recommended unless the legislature would like to mandate that a child support obligor may recover voluntary child support overpayments.

THE STATE WAS REQUIRED TO PROVE THAT A PROBATIONER KNEW OR SHOULD HAVE KNOWN HE WAS IN POSSESSION OF PROHIBITED ITEMS WHEN THE STATE PETITIONED TO REVOKE HIS PROBATION.

A probation officer alleged that a probationer had violated the conditions of his probation by "possessing ammunition, a knife with a blade longer than three inches, an explosive device, and drug paraphernalia." At the probation revocation hearing, a police officer testified that the probationer was in the driver's seat of the vehicle in which the prohibited items were found. The probationer argued that the state was required to prove that the probationer knew he was in possession of the prohibited items, however, the superior court disagreed, explaining that the state need only prove that the probationer had knowledge of the conditions that would result in a probation violation. The superior court found that the probationer violated the terms of his probation because he was in possession of items he knew were prohibited under the conditions of his probation.

On appeal, the Court of Appeals concluded that the conditions of probation prohibited the probationer from *knowingly* possessing the prohibited items and therefore reversed the superior court's order. The Alaska Supreme Court took a different approach in interpreting the conditions of probation. Although the conditions prohibited the probationer from possessing certain items without specifying if knowledge of possession was required for violation, the Court found that "it is not necessary to imply an element of actual knowledge to provide the probationer with fair notice that he must be careful to avoid a violation." The Court reasoned that a probationer "should not be able to rely on willful ignorance to justify a violation" but on the other hand "should not ordinarily be required to take responsibility for circumstances he cannot reasonably avoid." The Court therefore concluded that the probation condition in the present case should be construed similar to careless or negligent misconduct and that in determining whether the condition was violated, the superior court should determine whether the probationer knew or should have known that he was in possession of prohibited items.

State v. Pulusila, 467 P.3d 211 (Alaska 2020).

Legislative review is not recommended.

Art. I, sec. 5, Constitution of the State of Alaska
Art. I, sec. 12, Constitution of the State of Alaska

DENYING AN INMATE ACCESS TO CERTAIN COMPUTER PROGRAMING MATERIALS DOES NOT VIOLATE THE INMATE'S RIGHT TO FREE SPEECH OR REFORMATION.

An inmate in Department of Corrections (DOC) custody challenged a DOC decision to not permit him to have a specific computer programming book. The inmate argued that the DOC decision imposed a de facto blanket prohibition on inmates ordering any computer-related educational literature, and that this content-based restriction violated his state constitutional rights to free speech and reformation.

A. Denying the inmate access to the computer programing book did not violate the free speech provision of the Alaska Constitution.

DOC's regulations provide that an inmate may purchase books or other reading material "subject to inspection for contraband" unless the material is obscene or could "reasonably be expected to (1) aid an escape; (2) incite or encourage any form of violence or other criminal activity; or (3) have an adverse impact on the rehabilitation of the prisoner possessing the material or other prisoners who have access to it."

The Alaska Supreme Court determined that it is appropriate to apply the test set forth by the United States Supreme Court in *Turner v. Safley* for evaluating free speech claims by prisoners who challenge restrictions on incoming publications. Under the Turner approach, a regulation that "impinges on inmates' constitutional rights . . . is valid if it is reasonably related to legitimate penological interests." Turner set forth four factors relevant to evaluating the reasonableness of a prison policy. The first requires "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." Second, courts must consider the existence of "alternative means of exercising the right that remain open to prison inmates." Third, courts must assess "the impact accommodation of the asserted constitutional right will have on guards and other inmates." And fourth, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation," while the existence of such alternatives can indicate that the regulation is "an 'exaggerated response' to prison concerns."

The Alaska Supreme Court concluded that DOC's interest in maintaining the security of its computer systems is clearly

legitimate, and that the challenged restriction need only have a rational connection to the asserted interest. Based on the Turner factors, the Court held that denying inmate access to the computer programming book did not violate the Alaska Constitution's free speech provision.

B. Denying inmate access to certain computer programing materials does not violate the inmate's constitutional right to reformation.

Article I, sec. 12 of the Alaska Constitution provides that "[c]riminal administration shall be based upon," among other interests, "the principle of reformation." This provision confers on prisoners a constitutionally protected right to rehabilitation that must be made "a reality and not simply something to which lip service is being paid."

The Alaska Supreme Court noted that the inmate had access to some electronics and computer education at his place of incarnation: he attempted to purchase the computer programing book after completing a DOC electronics class that included the study of microcontrollers. The Court stated that therefore the inmate clearly had access to at least some material that served the rehabilitation interests he identified and DOC provided educational opportunities. The Alaska Supreme Court held that denying the inmate access to one specific book did not violate his Alaska constitutional right to reformation.

Antenor v. State, 462 P.3d 1 (Alaska 2020).

Legislative review is not recommended.

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

KEEPING AN INCOMPETENT DEFENDANT IN JAIL FOR 173 DAYS WHILE AWAITING TRANSFER TO ALASKA PSYCHIATRIC INSTITUTE FOR COMPETENCY RESTORATION TREATMENT VIOLATES THE DEFENDANT'S RIGHT TO SUBSTANTIVE DUE PROCESS.

A district court judge found a criminal defendant arrested for misdemeanor assault incompetent to stand trial and ordered him committed to the Alaska Psychiatric Institute (API) for competency restoration treatment. API informed the court that due to capacity constraints it was likely the defendant would

not be admitted for most of the 90-day restoration period and he would remain in jail until he could be admitted. The defendant then moved to dismiss under Alaska Criminal Rule 43(c), arguing that he had been in custody for almost six months, the maximum penalty for the charged offense was one year, and with the further anticipated delay he would likely have served one full year before admission to API. The court denied the motion to dismiss. At this point, J.K. had been in jail for 243 days, more than 90 days had passed since the commitment order, and J.K. and had not yet been admitted to API.

Ten days later, J.K. again moved to dismiss, arguing that his continued detention violated his constitutional right to substantive due process. While this motion was pending, the court issued a second 90-day competency restoration commitment order. Shortly thereafter, the court, after J.K. had been in custody for 317 days without competency restoration treatment, denied the motion to dismiss. J.K. petitioned the Court of Appeals and sought expedited consideration.

After the Court of Appeals granted expedited consideration, the state dismissed the criminal charges against J.K. and instead initiated civil commitment proceedings. Recognizing that the state's dismissal mooted J.K.'s appeal, the court nonetheless considered the case under the public interest exception to the mootness doctrine. The court explained that when committed for competency restoration, "defendants are entitled to a 'reasonably timely' transfer to the facility that provides competency restoration treatment." Refusing to set a presumptive deadline, the court nonetheless concluded that J.K.'s delay of over 100 days was far too long to satisfy due process requirements and "urge[d] trial courts to be vigilant in ensuring that defendants who have been found to be incompetent are not left languishing in jail and that the nature and duration of their commitment bear a reasonable relationship to the purpose for which the defendant is committed."

J.K. v. State, 469 P.3d 434 (Alaska App. 2020).

Legislative review is recommended to evaluate ongoing litigation responding to this issue.

Art. I, sec. 9, Constitution of the State of Alaska
U.S. Const. Amend. V

IT IS A STRUCTURAL ERROR REQUIRING AUTOMATIC REVERSAL AND A NEW TRIAL TO COMPEL A CRIMINAL DEFENDANT TO TAKE THE STAND.

The Court of Appeals determined that Alvarez-Perdomo was coerced to take the stand at his criminal trial. The court concluded that while this violated Alvarez-Perdomo's privilege against self-incrimination, the error was not a structural error requiring reversal but a harmless error. The Alaska Supreme Court granted a petition for hearing to decide an issue of first impression: whether the violation of a criminal defendant's right not to take the stand is a structural error.

The United States Supreme Court has established two categories of constitutional errors: structural errors and trial errors. The Supreme Court has held that most constitutional errors are trial errors, which are subject to harmless-error analysis. These harmless errors require a new trial unless the errors are "harmless beyond a reasonable doubt." The Court has also recognized a special structural constitutional error category for "structural defects in the constitution of the trial mechanism," which are "intrinsically harmful . . . without regard to their effect on the outcome." These structural errors require automatic reversal and a new trial.

The Alaska Supreme Court adopted the reasoning of the United States Supreme Court, concluding that compelling a criminal defendant to take the stand is a structural error because it implicates personal interests more fundamental than the ordinary risk of a wrongful conviction, and reversed the Court of Appeals' decision and remanded to the superior court for a new trial.

Alvarez-Perdomo v. State, 454 P.3d 998 (Alaska 2019).

Legislative review is not recommended.

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

COURTS SHOULD APPLY A BALANCING TEST TO DETERMINE WHETHER THERE IS GOOD CAUSE TO DENY A DEFENDANT'S DUE PROCESS RIGHT TO CONFRONT A WITNESS DURING A PROBATION REVOCATION PROCEEDING.

McDaniels was on probation for first-degree sexual abuse of a minor. The state petitioned to revoke McDaniels's probation based on an allegation that he violated a domestic violence protective order by contacting the person protected by the order, L.G. The only evidence presented by the state in support of the alleged violation was the testimony of the investigating police officer, who summarized statements made by L.G. L.G. did not testify at the hearing and the superior court revoked McDaniels's probation. McDaniels objected to admission of the officer's testimony and renewed the objection in a motion for reconsideration. The superior court denied the motion, stating that the rules of evidence do not apply to probation revocation hearings. McDaniels appealed to the Court of Appeals, arguing that the superior court's admission of and reliance on L.G.'s statements through the officer's testimony violated McDaniels's due process right to confront an adverse witness.

The Court of Appeals noted that the United States Supreme Court clearly recognizes that a defendant has a due process right to confront an adverse witness in a probation revocation hearing unless the court finds good cause to deny confrontation. The Court of Appeals found that all federal circuit courts currently use a balancing test to analyze the existence of "good cause," which requires the court to weigh the probationer's right to confront the adverse witness against the state's reasons for failing to produce the witness. Concluding that Alaska courts should apply the balancing test to determine whether good cause exists to deny confrontation in a probation revocation hearing, the Court of Appeals vacated the revocation of McDaniels's probation and remanded the case to the superior court.

McDaniels v. State, 451 P.3d 403 (Alaska App. 2019).

Legislative review is not recommended.

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

ABSENT AN APPLICABLE EXCEPTION TO THE WARRANT REQUIREMENT, THE POLICE MUST OBTAIN A SEARCH WARRANT BEFORE CONDUCTING TARGETED AERIAL SURVEILLANCE.

A state trooper obtained a search warrant based on evidence obtained from the state trooper's photographs of the inside of defendant's greenhouse, taken with a telephoto lens while flying at least 600 feet overhead. The state trooper did not have a warrant to conduct the targeted aerial surveillance. Defendant moved to suppress evidence seized during execution of the search warrant because the search warrant was based on the warrantless search of the greenhouse. The superior court denied defendant's motion and convicted defendant of second-degree weapons misconduct and possession of methamphetamine with intent to distribute. Defendant appealed.

The Alaska Court of Appeals stated that both the Fourth Amendment to the United States Constitution and art. I, sec. 14 of the Alaska Constitution prohibit unreasonable searches by the government. This includes both physical intrusions into constitutionally protected spaces and non-physical intrusions made possible through the use of technology.

The court used a two-part analysis to determine whether the state trooper's action constituted a search: did the person manifest a subjective expectation of privacy in the property and if so, is society willing to recognize that person's expectation of privacy as objectively reasonable. If both prongs are met — i.e., if the government's action intruded upon an individual's reasonable expectation of privacy — then the government's action constitutes a search for constitutional purposes and it must be supported by a warrant or by a recognized exception to the warrant requirement.

The court stated that in this case, the first prong of the test was undisputed because the greenhouse was in the backyard, surrounded by trees, and was not visible from the ground by anyone approaching the house through normal means. The court also determined that for the second prong, the explicit constitutional protection of privacy in Alaska's Constitution, the plaintiff could reasonably expect that his home and backyard would not be subject to the type of aerial surveillance that occurred in this case.

The court concluded that use of the telephoto lens to enhance view of defendant's greenhouse during surveillance from airplane was a "search" under the Alaska Constitution's search and seizure clause that required a search warrant.

McKelvey v. State, 2020 WL 5269194 (Alaska App. Sept. 4, 2020).

Legislative review is not recommended.

Art. I, sec. 21, Constitution of the State of Alaska
AS 47.30

A RESPONDENT IN AN INVOLUNTARY COMMITMENT PROCEEDING HAS AN IMPLIED STATUTORY RIGHT TO SELF-REPRESENTATION, ALTHOUGH THAT RIGHT IS NOT ABSOLUTE.

Respondent appealed a 30-day involuntary commitment order entered after the superior court determined he was mentally ill, posed a risk of harm, and was gravely disabled. He contended the superior court erred by refusing to allow him to represent himself at the commitment hearing.

The Alaska Supreme Court found that the right to self-representation was implicit in the involuntary commitment statutory framework. The Court then determined that the standard that should be used in determining whether a person can self-represent in an involuntary commitment proceeding is the three-part test outlined in *McCracken*.

The *McCracken* case set out a three-step test to determine whether a post-conviction relief petitioner may be self-represented. First, the trial court must determine whether the person is capable of presenting the case in a rational and coherent manner; second, the court must find that the person understands precisely what the person is giving up by declining the assistance of counsel; third, the court must find that the person is able to present evidence and arguments with at least a modicum of courtroom decorum. The Court therefore vacated the involuntary commitment order because of the failure to conduct a *McCracken* analysis on the self-representation request.

In re Arthur A., 457 P.3d 540 (Alaska 2020).

Legislative review is not recommended.

Art. II, sec. 13, Constitution of the State of Alaska
Art. XI, sec. 1, Constitution of the State of Alaska
Art. XI, sec. 7, Constitution of the State of Alaska
Art. XII, sec. 11, Constitution of the State of Alaska

THE SAME ONE-SUBJECT RULE APPLIES TO BALLOT INITIATIVES AND LEGISLATION; AN INITIATIVE MAKING THREE SUBSTANTIVE CHANGES SATISFIED THE ONE-SUBJECT RULE BECAUSE THE SUBSTANTIVE CHANGES ALL RELATED TO A SINGLE SUBJECT MATTER, ELECTIONS.

Alaskans for Better Elections submitted an initiative to the lieutenant governor for certification. The initiative proposed three substantive changes in Title 15 of the Alaska Statutes, which relates to elections. The lieutenant governor concluded that the three substantive changes violated the Alaska Constitution's requirement that initiatives be confined to one subject and denied certification. Alaskans for Better Elections challenged the certification denial and the superior court concluded that the initiative satisfied the one-subject rule because the entire initiative addressed election reform. The lieutenant governor appealed.

The Alaska Supreme Court explained that it has historically applied the same test when evaluating one-subject rule challenges to legislation and initiatives. The Court declined to impose a stricter test on initiatives. Finally, the Court explained that when an initiative "could be split into separate measures," it will, nonetheless, survive a one-subject rule challenge if "the various provisions 'embrace some one general subject.'" The Court then held that the initiative satisfies the one-subject rule because the "initiative's provisions are properly classified under 'election reform' as a matter of both logic and common sense."

Meyer v. Alaskans for Better Elections, 465 P.3d 477 (Alaska 2020).

Legislative review is not recommended.

Art. VIII, sec. 10, Constitution of the State of Alaska

CONVERTING A STATEHOOD ACT SELECTION OF A PARCEL OF LAND TO A MENTAL HEALTH ACT SELECTION WAS A DISPOSAL OF STATE LAND REQUIRING PUBLIC NOTICE UNDER THE ALASKA CONSTITUTION.

As part of the mental health trust settlement, the Department of Natural Resources (DNR) was required to manage No Name Bay (Bay) as a wildlife habitat. In 2009 the state and the federal government executed an agreement finalizing the Mental Health Act selections. One of the terms of the agreement was that the Bay would be converted to a Mental Health Act selection. The Bay was conveyed by the federal government to the state and the state subsequently conveyed the parcel to the mental health trust. SEACC sued, arguing, among other claims, that the state violated the constitutional public notice requirement for disposing of an interest in state land. The superior court ruled for the state and SEACC appealed.

Article VIII, sec. 10 of the Alaska Constitution provides: "No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law." The Alaska Supreme Court considered whether it is a disposal of state land under the public notice clause if the state selected a parcel of land under the Statehood Act and then later agrees to accept the same land under the Mental Health Act. In order to determine if there is a disposal, the court examines whether the interest in land is "functionally irrevocable." The court looks "beyond how the State characterizes an interest, and instead consider[s] what, in practice, is the long-term effect on the State's interest in land." Finding that the state made a functionally irrevocable change to the state's interest by converting it from a Statehood Act selection to a Mental Health Act selection, the Court reversed the decision of the superior court.

Se. AK Conservation Council, Inc. v. Dep't of Nat. Res., 470 P.3d 129 (Alaska 2020).

Legislative review is not recommended.

Art. IX, sec. 8, Constitution of the State of Alaska
Art. IX, sec. 10, Constitution of the State of Alaska
Art. IX, sec. 11, Constitution of the State of Alaska

BILL ESTABLISHING A PUBLIC CORPORATION AND EMPOWERING THE CORPORATION TO ISSUE SUBJECT-TO-APPROPRIATION BONDS TO PURCHASE OUTSTANDING OIL AND GAS TAX CREDITS VIOLATED THE ALASKA CONSTITUTION'S GENERAL PROHIBITION OF STATE DEBT.

The 30th Legislature passed HB 331 to address the state's oil and gas tax credit obligations. The act created a public corporation empowered to issue and sell bonds. Proceeds from the bond sales would be used to purchase outstanding tax credits at a discount and the corporation would repay bondholders with funds appropriated by the legislature. Under the act all bond repayment obligations are "subject-to-appropriation."

Forrer sued, arguing in part that the act violated art. IX, sec. 8 of the Alaska Constitution because it authorized the state to contract for debt without voter approval. The state asserted that HB 331 did not violate art. IX, sec. 8 because the subject-to-appropriation bonds did not create a legally enforceable debt, or because the bonds fell under art. IX, sec. 11 exceptions for revenue bonds or refunding debt. The superior court dismissed the complaint, holding that although the bonds under HB 331 were not allowable revenue bonds or indebtedness refunds, they were constitutional because the subject-to-appropriation bonds did not create a legally enforceable debt.

The Alaska Supreme Court reversed the superior court's decision, holding that the subject-to-appropriation bonds created unconstitutional debt under art. IX, sec. 8. The Court explained that when determining if the state has incurred debt, "[w]hether the State's 'full faith and credit' is pledged is not an express consideration." The Court noted that subject-to-appropriation bonds were not exempt under art. IX, sec. 10 and were not revenue bonds or "non-volitional obligations [that] are not 'debt'" under art. IX, sec. 11. Finally, the Court clarified the test established in *Carr-Gottstein Properties v. State*, 899 P.2d 136 (Alaska 1995), emphasizing that there is a long-term obligation on the legislature because the public corporation was created "to create a long-term obligation" and the potential adverse consequence of a credit downgrade for failure to appropriate funds to satisfy the bond obligations.

Forrer v. State, 471 P.3d 569 (Alaska 2020).

Legislative review is recommended if the legislature intends to explore further options to address outstanding tax credits.

Rule 12(b)(6), Alaska Rules of Civil Procedure

IN DECIDING WHETHER TO GRANT A MOTION TO DISMISS, THE COURT MAY CONSIDER A DOCUMENT THAT IS REFERRED TO IN THE COMPLAINT, EVEN IF NOT ATTACHED TO THE COMPLAINT, IF ALL PARTIES CONCEDE TO THE DOCUMENT'S AUTHENTICITY.

The Allevas owned commercial property in downtown Anchorage located near a charitable soup kitchen and a homeless shelter, both of which operated on property leased from the Municipality of Anchorage. In 2012, the Allevas filed a lawsuit against the Municipality of Anchorage, the soup kitchen, and the homeless shelter (defendants) alleging claims of trespass and nuisance based on the actions of the patrons of the soup kitchen and homeless shelter. The parties settled the lawsuit and executed a settlement agreement that released the defendants from any and all claims related to defendants' use of the leased property and any future claims arising from the conduct of the defendants' patrons. In 2018, the Allevas again filed suit against the defendants alleging trespass and nuisance claims. While the 2012 settlement agreement was not attached to the complaint, the complaint referenced the settlement agreement and the claims settled therein but asserted that the new lawsuit was based on conduct that occurred after the agreement was executed and was not barred by the agreement. The Municipality of Anchorage moved to dismiss the new lawsuit pursuant to Alaska Civil Rule 12(b)(6), arguing that the claims were barred by the 2012 settlement agreement. During oral argument, the superior court inquired about the settlement agreement and the Allevas acknowledged the agreement's authenticity. The superior court ultimately found that the settlement agreement clearly barred the Allevas' claims and granted the municipality's motion to dismiss.

On appeal, the Allevas argued that the superior court should not have considered the settlement agreement in ruling on the motion to dismiss because the settlement agreement was not attached to the complaint and was therefore "outside the pleadings." In determining whether the superior court erred, the Alaska Supreme Court relied on the decisions of federal courts in similar cases, particularly a decision by the Ninth Circuit Court of Appeals "that a document is not 'outside' the

complaint if the complaint specifically refers to the document and if its authenticity is not questioned." The Alaska Supreme Court ultimately adopted the Ninth Circuit's rule, holding that a court may consider a document referenced in a complaint, even if not attached to the complaint, if all parties concede the document's authenticity. The Alaska Supreme Court therefore upheld the superior court's dismissal of the lawsuit, finding that the court could properly rely on the settlement agreement referenced in the complaint and that the settlement agreement barred the Allevas' claims.

Alleva v. Municipality of Anchorage, 467 P.3d 1083 (Alaska 2020).

Legislative review is not recommended.

Rule 72(k)(5), Alaska Rules of Civil Procedure

A LANDOWNER IS NOT ENTITLED TO ATTORNEY'S FEES UNDER ALASKA R. CIV. P. 72 IF THE LANDOWNER FAILS TO ESTABLISH A TAKING IN AN INVERSE CONDEMNATION CASE.

The owner of Alaska Laser Wash brought an inverse condemnation action against the state, claiming business damages resulting from the state's acquisition of a car wash site as part of highway improvement project. After a remand from the Alaska Supreme Court on the takings claim, the superior court awarded attorney's fees to the state as the prevailing party, pursuant to pretrial offer of judgment, and Alaska Laser Wash appealed.

Alaska Laser Wash argued that it is entitled to an attorney's fee award under Rule 72(k)(5). Rule 72 provides specific rules for award of attorney's fees for eminent domain cases, and Rule 72(k)(5) dictates that a defendant's costs and fees must be assessed against a plaintiff if allowance of costs and attorney's fees appears necessary to achieve a just and adequate compensation of the defendant.

Full attorney's fees under Rule 72 are normally awarded to a landowner who prevails on an inverse condemnation claim as long as the fees are both reasonable and necessarily incurred to achieve just and adequate compensation for the landowner.

In prior cases, the Alaska Supreme Court held that when a landowner does not prevail on an inverse condemnation claim

the landowner loses the protection of Rule 72. The Alaska Supreme Court held that when a landowner fails to establish a taking in an inverse condemnation case, attorney's fees are awarded under Rules 68 or 82 and not under Rule 72.

Alaska Laser Wash, Inc. v. Dep't of Transportation & Pub. Facilities, 463 P.3d 176 (Alaska 2020).

Legislative review is not recommended.

Alaska Child in Need of Aid Rule 2
Alaska Child in Need of Aid Rule 12

IN A CHILD IN NEED OF AID PROCEEDING, THE SUPERIOR COURT MAY APPOINT COUNSEL FOR A PERSON DETERMINED TO BE A PARENT BASED ON SUFFICIENT EVIDENCE, EVEN ABSENT SCIENTIFIC EVIDENCE.

Jan K. gave birth to Ada K. and, within days, the Office of Children's Services (OCS) took emergency custody of Ada and filed an emergency petition to adjudicate Ada as a child in need of aid (CINA). The petition identified Ada's father as Ralph W. based on Jan's statement that Ralph was the biological father even though he was not present at the birth and was not listed as the father on Ada's birth certificate. While waiting for the results of a paternity test, Jan and Ralph each testified under oath that Ralph was Ada's father and the superior court therefore ordered the Office of Public Advocacy (OPA) to represent Ralph in the CINA proceeding pursuant to CINA Rule 12(b). OPA argued that appointment of counsel for a putative father is not authorized absent paternity test results but nonetheless represented Ralph pursuant to the court's order. OPA then petitioned the Alaska Supreme Court for review of the superior court's appointment order.

On review, the Alaska Supreme Court noted that the CINA Rule 2(k) defines "parent" to include a "biological parent," but the term "biological parent" is not defined. The Court looked to Alaska's legitimation statute, which gives the superior court discretion to adjudicate parentage upon "sufficient evidence" without the need for genetic testing, and Alaska's birth registration statute, which allows a father to be listed on a birth certificate without scientific evidence. The Court therefore found that the term "biological parent" as used in the CINA rules does not require scientific evidence of a genetic relationship. The Court concluded that appointment of counsel for a putative father in a CINA proceeding is authorized when

the court determines the putative father to be a parent based on sufficient evidence, even absent scientific evidence establishing paternity, and affirmed the superior court's decision.

Office of Pub. Advocacy v. Superior Court, 462 P.3d 1000 (Alaska 2020).

Legislative review is not recommended.

Alaska Rule of Evidence 404(a)(2)

TO PROTECT A DEFENDANT'S RIGHT TO DUE PROCESS, A COURT MUST ACTIVELY WEIGH THE PROBATIVE FORCE OF CHARACTER WITNESS EVIDENCE OFFERED TO ESTABLISH DEFENDANT'S VIOLENT PERSONALITY AGAINST THE POTENTIAL FOR UNFAIR PREJUDICE.

A criminal defendant charged with assault in the third degree claimed that he acted in self-defense. Pursuant to Alaska Evidence Rule 404(a)(2), the state sought to introduce character witnesses testimony establishing the defendant's character for violence. A municipal police officer and a municipal safety patrol employee testified at an evidentiary hearing. The character witnesses testified that each of their opinions of the defendant's violent character were based on single separate incidents that respectively occurred approximately one year and 18 months before the alleged assault. The court allowed the state to present this character testimony to the jury and the jury convicted the defendant.

The defendant appealed, arguing that the trial court improperly admitted the character evidence. The Court of Appeals explained that before allowing evidence of the defendant's violent character, a trial court must weigh the probative value of character witness testimony against the potential that this testimony will unfairly prejudice a defendant. This weighing requires a determination whether a foundational showing for the proposed character evidence establishes that the witness "knows the other person well enough to have formed a reliable opinion concerning the particular character trait at issue." The court emphasized factors a court should analyze when considering foundation: "(1) the nature of the relationship between the witness and the other person; (2) the length and recency of that relationship; and (3) the frequency and nature of their contacts." Because the trial court did not actively

weigh these factors, creating a substantial risk of unfair prejudice, the Court of Appeals reversed the conviction.

Komakhuk v. State, 460 P.3d 797 (Alaska 2020).

Legislative review is not recommended.

Alaska Rule of Evidence 801(d)(3)

ALASKA RULE OF EVIDENCE 801(d)(3) REQUIRES A CHILD VICTIM TO BE LESS THAN 16 YEARS OF AGE AT THE TIME THE VICTIM'S STATEMENT IS RECORDED AND NOT AT THE TIME OF TRIAL; THE FACT THAT THE PERSON INTERVIEWING THE CHILD VICTIM IS AN INVESTIGATING OFFICER DOES NOT *PER SE* BAR ADMISSION OF THE RECORDED STATEMENT.

Hayes was indicted on several counts of sexual abuse of a minor based on allegations that he had repeatedly sexually abused his girlfriend's minor daughters. Prior to the indictment, the victims were brought to a child advocacy center where two detectives conducted forensic interviews, including taking videotaped statements of the victims. One of the victims, N.E., was 13 years old at the time the statements were taken but was 18 years old by the time the trial occurred. Under Rule 801(d)(3), Alaska Rules of Evidence, a videotaped statement taken before trial is not hearsay if the statement is made by a victim of a crime who is younger than 16 years old and certain foundational requirements are met. At trial, Hayes objected to admission of N.E.'s statement because she was over 16 at the time of trial. The state argued that Rule 801(d)(3) requires the victim to be under the age of 16 at the time the statement is made. The superior court agreed with the state and admitted N.E.'s statement under Rule 801(d)(3).

The Alaska Court of Appeals found the state's interpretation of Rule 801(d)(3) to be the more natural interpretation and consistent with the interpretations of similar rules in other jurisdictions. The court noted that the legislative history of Rule 801(d)(3) further supports that the rule refers to the age of the victim at the time the statement is taken rather than at the time of trial and therefore affirmed the ruling of the superior court.

Hayes also argued on appeal that under Rule 801(d)(3)(C) and (F), N.E.'s statement should not have been admitted because

the interview was conducted by the same police detectives who investigated Hayes's offenses. "Subsection (C) precludes the prosecutor and defense attorney from being present when a victim's statement is taken, and subsection (F) requires the court to determine that 'the taking of the statement as a whole was conducted in a manner that would avoid undue influence of the victim.'" The Court of Appeals concluded that "interviews conducted by police investigators involved with the case are not *per se* inadmissible under Rule 801(d)(3)" based on the legislative history of the rule and because the trial court, in determining whether the statement meets the foundational requirements for admission under Rule 801(d)(3), should consider and weigh the risk of undue influence. The court found that the superior court properly considered those risks and therefore found that the superior court did not abuse its discretion in admitting N.E.'s statement.

Hayes v. State, 2020 WL 5587279 (Alaska App. Sept. 18, 2020).

Legislative review is not recommended.

Alaska Rule of Evidence 801(d)(3)

ALASKA RULE OF EVIDENCE 801(d)(3) DOES NOT REQUIRE A VIDEOTAPED STATEMENT OF A VICTIM'S INTERVIEW TO IDENTIFY PEOPLE OUTSIDE THE INTERVIEW ROOM WHO ARE CONSULTED BEFORE OR DURING THE INTERVIEW.

Cole was charged with sexual abuse of a minor based on allegations made by a 12 year old girl, L.P., in a videotaped statement. The videotaped statement made by L.P. identified L.P. and the interviewer, but did not identify other individuals who observed the recording from a separate room and suggested questions to the interviewer during a break in the interview. The identities of the other individuals were, however, provided in the transcript of the recording. Under Alaska Rule of Evidence 801(d)(3), a videotaped statement taken before trial is not hearsay if the statement is made by a victim of a crime who is younger than 16 years old and certain foundational requirements are met, including identification of the interview participants on the recording. The superior court found that all foundational requirements were met and admitted the videotaped statement on the condition that L.P. testify at trial. Cole was convicted and subsequently appealed

to the Court of Appeals.

On appeal, Cole argued that the individuals became "participants" under Rule 801(d)(3)(E) when they were consulted by the interviewer and that their participation required the interviewer to directly identify these individuals on the recording. The Court of Appeals found that no other states with similar rules require a recording to identify people consulted off-record in order for the recording to be admitted. The court ultimately concluded that the failure to identify individuals outside the interview room who are consulted off-record on the recording itself did not preclude admission of the recording under Alaska Rule of Evidence 801(d)(3).

Cole v. State, 452 P.3d 704 (Alaska App. 2019).

Legislative review is not recommended unless it is the intent of the legislature that Alaska Rule of Evidence 801(d)(3) require a recording to identify individuals located outside the interview room who are consulted off-record.

AS 11.56.540

ATTEMPTING TO TELL A WITNESS TO AVOID CALLS FROM THE DISTRICT ATTORNEY AND THE COURT DOES NOT CONSTITUTE THE CRIME OF WITNESS TAMPERING.

Luke was convicted of third-degree assault and first-degree witness tampering. The conviction for witness tampering was based on a letter Luke sent to his girlfriend while he was in jail in which he asked his girlfriend to tell the assault victim to ignore calls from the district attorney and the court. Luke appealed, arguing that there was insufficient evidence to support the witness tampering conviction.

Referring to prior case law, the Court of Appeals noted that the witness tampering statute prohibits an attempt to induce a witness to *unlawfully* withhold testimony. The court noted several acts suggested by a defendant that the court previously held to be lawful attempts to induce a witness to withhold testimony, including "not testifying unless subpoenaed, asking prosecutors not to pursue the charges, and providing short (but truthful) answers." The court also looked to the legislative commentary of AS 11.56.540, which provides that an attempt to induce a prospective witness to avoid process is not a violation of the witness tampering statute. The court ultimately

concluded that attempting to tell a prospective witness to avoid calls from the district attorney and the court does not constitute the crime of witness tampering and therefore reversed Luke's conviction.

Luke v. State, 469 P.3d 445 (Alaska App. 2020).

Legislative review is not recommended.

AS 11.61.120(a)(5)

A DEFENDANT CAN ONLY BE CONVICTED OF THE CRIME OF HARASSMENT BY OFFENSIVE PHYSICAL CONTACT IF THE PERSON WHO IS SUBJECTED TO THE OFFENSIVE PHYSICAL CONTACT IS THE SAME PERSON THAT THE DEFENDANT INTENDED TO HARASS OR ANNOY.

While incarcerated, Martusheff threw a container of urine and feces at a corrections nurse after the nurse informed him that he would not be receiving any medication. The nurse was hit with the waste along with two other nearby corrections employees. Martusheff was subsequently charged with three counts of first-degree harassment, one count for each of the people hit with the waste. At trial, Martusheff conceded only that he intended to harass or annoy the nurse and therefore argued that he could not be convicted of the two counts of harassment related to the other corrections employees. The state, on the other hand, argued that the harassment statute applies to both intended and unintended victims and that it therefore applies to all three people hit with the waste. The trial court partially agreed with the state, instructing the jury that Martusheff could be convicted of a separate count of harassment for each person he hit with the waste if Martusheff intended to harass or annoy any person and if the state proved that he was reckless as to the possibility that the waste could hit others.

On appeal, the Alaska Court of Appeals noted that the harassment statute is ambiguous and subject to multiple logical interpretations. The court further noted that while the legislative history of the statute does not resolve the ambiguity, it suggests that the defendant's intent to harass or annoy must be directed at the same person who is subject to the offensive contact. The court also found this interpretation to be consistent with the interpretations of similar statutes in other jurisdictions on which Alaska's harassment statute was based.

The court found that the state and trial court's interpretations of the harassment statute were doubtful in light of the legislative history and concluded that the statute must be construed against the government because of the ambiguity. The court therefore held that harassment statute requires the state to prove that the person the defendant intended to harass or annoy is the same person subjected to the offensive physical contact and reversed the two harassment convictions related to the other corrections employees.

Martusheff v. State, 2020 WL 5268864 (Alaska App. Sept. 4, 2020).

Legislative review is recommend to clarify whether the harassment statute criminalizes offensive physical contact to a person who was not the intended target of the defendant's harassment.

AS 12.55.090(f)

IT IS NOT CLEAR WHETHER A DEFENDANT WHO RECEIVED A SPECIFIC PERIOD OF PROBATION UNDER A PLEA AGREEMENT HAS A STATUTORY RIGHT TO REFUSE FURTHER PROBATION.

In December of 2013, Ray pleaded guilty to theft in the second degree pursuant to a plea agreement that required three years of probation following a 24 month term of imprisonment with 20 months suspended. In 2014, Ray violated several conditions of his probation and stated at his probation revocation disposition hearing that he rejected further probation. The Alaska Supreme Court has previously held that Alaska's probation statutes give criminal defendants the right to refuse probation at the time of initial sentencing or to later refuse further probation. Despite Ray's request to reject further probation, the superior court imposed a sentence that included Ray's suspended jail time and extended Ray's probation term from three to five years.

Ray subsequently appealed the superior court's decision to the Court of Appeals, arguing that he had a constitutional right to refuse further probation. The state argued that under AS 12.55.090(f), a defendant who received a specific period of probation as part of a plea agreement is precluded from rejecting further probation. The Court of Appeals found that a defendant's right to refuse probation is not a constitutional right but a statutory right provided under Alaska's probation

statutes. However, the court could not agree on the correct interpretation of AS 12.55.090(f), specifically, "whether, under this statute, defendants in Ray's position still have a statutory right to reject probation — and, if they still have this right, what rules govern the sentencing court's authority or duty with respect to the defendant's final sentence of imprisonment." Because the court was unable to reach a majority decision regarding the interpretation of AS 12.55.090(f), the court certified the issue to the Alaska Supreme Court.

Ray v. State, 452 P.3d 688 (Alaska App. 2019).

Legislative review is recommended to consider whether AS 12.55.090(f) precludes a defendant who received a specific period of probation as part of a plea agreement from rejecting further probation.

AS 12.55.125(j)

A DEFENDANT WHO RECEIVES TWO OR MORE CONSECUTIVE 99-YEAR SENTENCES IS ELIGIBLE TO APPLY FOR A REDUCTION OR MODIFICATION OF THEIR COMPOSITE SENTENCE AFTER THEY HAVE SERVED 49 1/2 CHRONOLOGICAL YEARS.

Kangas killed two peace officers while they were performing their duties and was subsequently convicted of two counts of first-degree murder. By statute, the superior court was required to sentence Kangas to a mandatory 99-year term for each count and impose the two terms consecutively for a composite term of 198 years. Under AS 12.55.125(j), a defendant who receives a mandatory 99-year term is eligible to apply for a reduction or modification of their sentence after they have served one-half of the 99-year term, or 49 1/2 chronological years. The superior court concluded that under AS 12.55.125(j), Kangas would be eligible to apply for a reduction or modification of his sentence only after he had served one-half of his 198-year composite sentence, or 99 years. Kangas appealed the superior court's decision to the Court of Appeals.

In considering how AS 12.55.125(j) applies to Kangas's sentence, the Court of Appeals noted that the legislative history of the statute was silent with respect to how the provision would apply to a defendant who received more than one 99-year sentence. Because ambiguities in penal statutes must be construed against the government, the court held that under AS 12.55.125(j), a defendant, such as Kangas, who

receives two or more consecutive mandatory 99-year sentences is eligible to apply for a reduction or modification of their composite sentence after they have served 49 1/2 chronological years.

Kangas v. State, 463 P.3d 189 (Alaska App. 2020).

Legislative review is recommended if the legislature does not intend for AS 12.55.125(j) to allow a defendant who receives two or more consecutive mandatory 99-year sentences to apply for a reduction or modification of their sentence after serving 49 1/2 years.

Former AS 12.55.125(o)

COURTS HAD NO DISCRETION TO REDUCE A SEX OFFENDER'S PROBATION BELOW STATUTORY MINIMUMS UNDER FORMER AS 12.55.125(o), AND THE REPEAL OF AS 12.55.125(o) DOES NOT APPLY RETROACTIVELY.

Petitioners in this case are sex offenders who received prison sentences with some time suspended and probation imposed pursuant to AS 12.55.125(o), which mandated suspended imprisonment and probation as part of their initial sentences. The statute provided that the probationary term could not be suspended or reduced. After being released from prison, repeatedly violating the conditions of probation, and having all of their formerly suspended time reinstated, the petitioners moved for discharge from probation. Their motions were denied because the statute mandating probation required the petitioners to serve the entire probationary term, even if they no longer had suspended time remaining as an incentive to comply with probation. While their cases were pending before the Court of Appeals, the statute was repealed. The Court of Appeals held the statute's repeal was not retroactive and it affirmed the denial of their motions. The Alaska Supreme Court granted a petition for hearing.

Alaska law generally permits a court to impose probation only in lieu of some other punishment. A central question in this case concerns whether former AS 12.55.125(o) abrogated this usual probationary rule for sex offenders punished under AS 12.55.125(i).

Former AS 12.55.125(o) provided in part that "[t]he period of probation is in addition to any sentence received under (i) of

this section and may not be suspended or reduced." The Alaska Supreme Court held that "reduced" refers to the "period of probation," and is the most natural reading of the sentence. The Alaska Supreme Court also found that the term "suspended" applied to a period of probation stating that "a sex offender receives a "sentence" comprised of an incarceration period conforming to the guidelines contained in AS 12.55.125(i) accompanied by the probation described in AS 12.55.125(o). The Alaska Supreme Court also noted that the legislative history of the statute supported the court's interpretation. The Court therefore concluded that the statute did not give courts discretion to reduce a sex offender's probation below statutory minimums.

The Alaska Supreme Court further concluded that Alaska's saving statute, AS 01.10.100, did not allow for retroactive application of the repeal of AS 12.55.125(o) and therefore the statute's repeal did not retroactively apply to the petitioners. The Alaska Supreme Court stated that the language of AS 01.10.100 is clear; the statute states that a law's repeal or amendment "does not release or extinguish any penalty . . . incurred . . . under that law." After repeal or amendment "[t]he law shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of the . . . penalty."

Chinuhuk v. State, 472 P.3d 511 (Alaska 2020).

Legislative review is not recommended.

AS 13.26.720
AS 13.26.740
AS 09.60.030

NEXT FRIEND OF AN INCOMPETENT PLAINTIFF IS NOT LIABLE FOR ADVERSE ATTORNEY'S FEE AWARD.

The mother of an incapacitated Office of Public Advocacy (OPA) ward filed a class action lawsuit as the ward's next friend against OPA, alleging that OPA failed to conduct mandatory quarterly visits. The superior court found that although "OPA had not complied with its visitation requirements on its own," it satisfied the requirement through visits from contracted service providers. The court awarded OPA attorney's fees and held the mother personally liable to pay those fees.

On appeal, the Alaska Supreme Court affirmed the decision

that OPA may fulfill its visitation duty using contracted service providers. The Court also considered the attorney's fees award imposed against the mother as next friend. AS 09.60.030 directs trial courts to hold "the guardian by whom the plaintiff appeared in the action" liable for attorney's fees. Recognizing that "guardian ad litem" and "next friend" are often used interchangeably, the Court nonetheless refused to "add language to the statute" and reversed the attorney's fees award because AS 09.60.030 does not expressly mention the plaintiff's next friend.

M.M. v. State, 462 P.3d 539 (Alaska 2020).

Legislative review is recommended to confirm whether the legislature agrees with the Court's conclusion that a next friend is not liable for attorney's fees.

AS 16.05.340(a)(15)

A NONRESIDENT BIG GAME HUNTER WHO, BEFORE HUNTING, FILLS OUT TAG PAPERWORK, RECEIVES THE TAG, AND MAKES A BINDING PROMISE TO PAY FOR THE TAG SATISFIES THE REQUIREMENT TO "PREVIOUSLY PURCHAS[E]" A TAG.

Under AS 16.05.340(a)(15), "[a] nonresident may not take a big game animal without previously purchasing a numbered, nontransferable, appropriate tag . . . ." A licensed big game guide was charged with multiple misdemeanor offenses based on allegations that he knowingly aided clients in taking big game without "previously purchasing" tags and that he knowingly falsified hunt and tag records to indicate that clients had "previously purchas[ed]" tags. During trial the undisputed testimony addressing four of the charges indicated that clients filled out paperwork in the field before hunting but paid for the tags after completing the hunts. The guide argued that "previously purchasing" does not require guides to collect payment before issuing tags. The trial court disagreed, concluding that under AS 16.05.340(a)(15) a purchase "did not take place until money changed hands." The guide was convicted on all charges and appealed.

The Court of Appeals reviewed dictionary definitions of "purchase" and other states' statutes and determined that the phrase "previously purchased" is unresolvably ambiguous. Thus, the court applied the rule of lenity, which requires that

the statute be construed in the defendant's favor, and held that "delivery of the tag with a binding promise to pay is sufficient to qualify as a 'previous purchas[e]' under [AS 16.05.340(a)(15)]."

Kinmon v. State, 451 P.3d 392 (Alaska App. 2019).

Legislative review is recommended to clarify whether "previously purchasing" a big game tag under AS 16.05.340(a)(15) requires an exchange of money before the tag is issued.

AS 18.80.112(5)

DUE PROCESS DOES NOT REQUIRE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS TO EXPLICITLY CONNECT A DECISION NOT TO PROSECUTE TO EVIDENCE IN THE RECORD WHEN THE COURT CAN INFER LEGITIMATE REASONS FOR THE COMMISSION DECISION; STATUTE GRANTING COMMISSION PROSECUTORIAL DISCRETION SATISFIES DUE PROCESS.

An employer terminated a pilot's employment for improperly collecting relocation expenses. The employer conditioned married pilots' relocation expenses on spousal relocation, and the pilot's spouse had not relocated. The pilot filed a complaint with the Alaska State Commission for Human Rights, alleging that the employer discriminated based on marital status when conditioning relocation eligibility for married pilots on spousal relocation. The commission found substantial evidence of discrimination, but exercised its discretion under AS 18.80.112(b)(5) and chose not to prosecute the pilot's complaint because prosecution "would not represent the best use of Commission resources." The Commission did not explain why it concluded that further prosecution was not "the best use of its resources."

On appeal, the Alaska Supreme Court considered whether the Commission's decision not to prosecute was so arbitrary and capricious that it violated the pilot's right to due process. The Court explained that both AS 18.80.112 and due process do not require that the Commission explicitly link its decision to evidence in the record. Rather, recognizing the deference owed the Commission, the Court inferred that the Commission's decision was based on a subsequent change to the employer's policy, the availability of an internal grievance procedure, the

pilot's representation by counsel, decision to decline a settlement offer, and availability of a private cause of action, and findings that the pilot had intentionally deceived the employer. The Court held that under these circumstances the Commission's decision not to prosecute satisfied due process. Finally, the Court reaffirmed that the legislature may grant agencies "significant prosecutorial discretion" and held that the prosecutorial discretion in AS 18.80.112 "meet[s] constitutional due process requirements."

Baker v. Alaska State Comm'n for Human Rights, 2020 WL 5587313 (Alaska 2020).

Legislative review is not recommended.

AS 18.85.100
AS 47.12.120(e)

ALASKA STATUTES DO NOT REQUIRE THE PUBLIC DEFENDER AGENCY OR THE DIVISION OF JUVENILE JUSTICE TO PAY FOR AN INDIGENT JUVENILE DEFENDANT TO TRAVEL FROM A COMMUNITY OFF THE ROAD SYSTEM TO THEIR TRIAL LOCATION.

A juvenile defendant's family was indigent. The juvenile lived in a small village off the road system and needed to travel for trial. The juvenile's public defender agency (agency) lawyer moved for a court order requiring that the division of juvenile justice (DJJ) pay travel expenses for the juvenile and a parent. The trial court concluded that travel expenses are not a "court cost" that DJJ is required to pay under AS 47.12.120(e). Instead, the court held that the agency must pay the travel costs because of the agency's statutory mandate to pay "the cost of representation," which the court analogized to an office of public advocacy (OPA) regulation.

The agency appealed and the parties agreed that a "government entity should be responsible for paying [these transportation costs]," but continued to dispute which entity is responsible. The Court of Appeals reviewed statutory text, the OPA regulation, and attorney general opinions, concluded that travel costs are plausibly considered a necessary "service" or "facility" of representation which the agency must provide under AS 18.85.100, and affirmed the trial court. The agency appealed to the Alaska Supreme Court.

The Alaska Supreme Court reversed the Court of Appeals

decision. After reviewing the text of AS 18.85.100, legislative history, the attorney general opinions, and the OPA regulation, the Court concluded AS 18.85.100 does not impose a duty on the agency to pay travel costs for an indigent juvenile. The Court then reviewed AS 47.12.120(e) and similarly concluded that DJJ is not required to pay the travel costs. Because neither agency is mandated to pay the costs, the Court held that "[t]he task of pinpointing a source of payment is for the executive or legislative branch."

Alaska Pub. Defender Agency v. Superior Court, 450 P.3d 246 (Alaska 2019).

Legislative review is recommended to determine which government entity should pay for an indigent juvenile defendant's travel to trial.

AS 23.30.045(a)
AS 23.30.045(f)
AS 23.30.055

A "PROJECT OWNER," FOR PURPOSES OF THE ALASKA WORKERS' COMPENSATION ACT, IS SOMEONE WHO ACTUALLY CONTRACTS WITH A PERSON TO PERFORM SPECIFIC WORK AND ENJOYS THE BENEFICIAL USE OF THAT WORK.

Under AS 23.30.055, workers' compensation payments are an injured employee's exclusive remedy against "a person who . . . is liable for or potentially liable for securing payment of compensation." Under AS 23.30.045(a), if an employer who is a contractor fails to secure workers' compensation payments for employees, the "project owner," defined under AS 23.30.045(f) as "a person who, in the course of the person's business, engages the services of a contractor and who enjoys the beneficial use of the work," is liable for the compensation payments. Thus, a "project owner" is protected from third party liability by the exclusive remedy provision.

Three workers employed by a construction contractor were injured at work. The workers sued three corporations, "the one that had entered into the construction contract with their employer, that corporation's parent corporation, and an affiliated corporation that operated the facility under construction," alleging negligence. The corporations moved for summary judgment, asserting that they were project owners. The trial court, relying on contractual indemnification provisions that required the contractor to indemnify all three corporations, concluded that all three corporations "engage[d]

the services of" and "enjoy[ed] the beneficial use of the [contractor's] work." The workers appealed.

The Alaska Supreme Court reversed, holding that "a project owner is someone who engages the services of — that is, *contracts with* — a person to perform specific work and enjoys the beneficial use of that work." (Emphasis in original.) Because only one of the three corporations directly contracted with the employer, the Court remanded the case to the trial court to address factual disputes regarding whether the corporations were "project owner[s]" as defined in AS 23.30.045(f). Finally, the Court noted that the contract's indemnity provisions protected against, rather than established, potential liability for the corporations, and the Court explained that regardless of contract language, a corporation's status as a "project owner" is determined under AS 23.30.045.

Lovely v. Baker Hughes, Inc., 459 P.3d 1162 (Alaska 2020).

Legislative review is not recommended.

AS 23.30.107
AS 23.30.108

ALASKA'S WORKERS' COMPENSATION LAWS PERMIT AN EMPLOYER TO ACCESS AN EMPLOYEE'S MENTAL HEALTH RECORDS WHEN IT IS RELEVANT TO THE CLAIM, EVEN IF THE EMPLOYEE'S CLAIM IS NOT RELATED TO A MENTAL HEALTH CONDITION.

Leigh was working for Alaska Children's Services (ACS) when she slipped on ice and broke her ankle in a parking lot at work. Leigh received workers' compensation benefits and underwent several ankle surgeries over the following years as a result of the injury. ACS eventually asked Leigh to sign a release to allow ACS to access Leigh's mental health records based on ACS's belief that Leigh's mental health issues were related to her pain complaints. Leigh petitioned for a protective order, arguing that she was not seeking mental health benefits and the Alaska Workers' Compensation Board (Board) designee granted the protective order. ACS petitioned the Board to overturn the protective order and the Board agreed, determining that Leigh was required to allow ACS access to her mental health records because several doctors indicated that Leigh's pain complaints were related to her mental health condition. The Alaska Workers' Compensation Appeals Commission denied Leigh's petition for review of the Board's

decision and Leigh subsequently petitioned the Alaska Supreme Court for review.

On review, the Alaska Supreme Court noted that "[t]he current causation standard in workers' compensation cases requires the Board to consider the relative contribution of different causes to determine whether a claim is compensable." The Court ultimately concluded that Leigh's mental health records were potentially relevant to ACS's defense because Leigh's medical records contained multiple indications that Leigh's mental health issues may have impacted her treatment and pain complaints. The Court therefore affirmed the Board's decision and held that an employer may access an employee's mental health records when such records are relevant to the employee's claim, even if the claim is not related to a mental health condition.

Leigh v. Alaska Children's Services, 467 P.3d 222 (Alaska 2020).

Legislative review it not recommended unless the legislature does not intend to authorize an employer to access an employee's mental health records when the employee has not made a claim for a mental health condition.

AS 23.30.145(a)
AS 23.30.145(b)

A CLAIMANT IN A WORKERS' COMPENSATION SETTLEMENT IS THE PREVAILING PARTY ON A CLAIM FOR PURPOSES OF CALCULATING ATTORNEY'S FEES UNDER AS 23.30.145 IF THE EMPLOYER IS UNABLE TO SHOW THAT THE CLAIM LACKED MERIT AND EXPLAIN WHY IT NONETHELESS GAVE THE CLAIMANT THE REQUESTED RELIEF.

Two claimants in separate workers' compensation cases against the same employer settled their multiple claims through mediation and received substantial compensation. The parties were unable to resolve the question of attorney's fees through mediation, so the claimants sought attorney's fees under AS 23.30.145, which requires the Workers' Compensation Board (Board) to award successful claimants reasonable attorney's fees. In both cases, the employer argued that the claimants were not successful on certain claims and thus should not be awarded attorney's fees for related work. The Board held hearings on that issue and ultimately awarded

significantly reduced attorney's fees in both cases. The Alaska Workers' Compensation Appeals Commission affirmed the Board's decisions.

On appeal, the claimants argued that because their cases ended in settlements, they should be awarded attorney's fees for all of their claims unless the issue bargained away "lacked merit or was without legal or factual basis." The Alaska Supreme Court agreed with the claimants and held that "in a workers' compensation settlement where the parties dispute the issues on which a claimant prevailed for purposes of attorney's fees, the employer who contends that its conduct was a wholly gratuitous response to a claim that lacked colorable merit, must demonstrate the worthlessness of the claim and explain why it nonetheless voluntarily gave the claimant the requested relief." (Internal quotations omitted).

Rusch v. Southeast Alaska Reg'l Health Consortium, 453 P.3d 784 (Alaska 2019).

Legislative review is not recommended.

AS 25.30.310(a)(2)

A COURT HAS CONTINUING, EXCLUSIVE JURISDICTION OVER A CHILD CUSTODY ORDER IF A CHILD OR A PARENT MAINTAINS "RESIDENCY" IN ALASKA.

A mother filed a motion for clarification, arguing that Alaska no longer had exclusive, continuing jurisdiction over a child custody order under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) after she, her ex-husband, and their two children lived in South Carolina for over a year. The father objected, arguing that he was still a resident of Alaska and he intended to return to Alaska after his service in the Air Force. Under AS 25.30.310(a)(2), a court maintains exclusive, continuing jurisdiction over a custody determination until a court "determines that neither the child nor a parent . . . presently resides in this state." The superior court interpreted "presently resides" to mean living in the state and found that it did not have exclusive, continuing jurisdiction over its initial custody order because neither the parents nor the children presently resided in Alaska.

On appeal, the father argued that he "presently resides" in the state through his continued Alaska residency. Under AS 01.10.055(c), a person remains a resident of the state

during an absence from the state unless the person establishes residency elsewhere or is absent under circumstances that do not demonstrate an intent to remain in the state indefinitely and to make a home in the state. The Alaska Supreme Court agreed with the father and held that the term "presently resides" should be interpreted consistently with "residency" under Alaska law. Therefore, the Alaska Supreme Court concluded that it was an error for the superior court to find that it no longer had exclusive, continuing jurisdiction under the UCCJEA based on the parties' physical presence in South Carolina. The Alaska Supreme Court vacated the superior court's orders on jurisdiction and remanded the case to the superior court for further proceedings.

Mouritsen v. Mouritsen, 459 P.3d 476 (Alaska 2020).

Legislative review is not recommended.

AS 36.10.150

ATTORNEY GENERAL CONCLUDES THAT STATUTORY RESIDENT HIRING PREFERENCE VIOLATES THE UNITED STATES CONSTITUTION'S PRIVILEGES AND IMMUNITIES CLAUSE AND THE ALASKA CONSTITUTION'S EQUAL PROTECTION CLAUSE.

The Alaska Attorney General advised the governor that the resident hiring preference established in AS 36.10.150 (Alaska Hire) violates the Federal Constitution's Privileges and Immunities Clause and the Alaska Constitution's Equal Protection Clause. Under Alaska Hire, if the commissioner of labor and workforce development determines that an area is a "zone of underemployment" then local hiring preferences apply to public contracts within the zone. Contractors must hire a designated percentage of qualified residents of the zone.

The federal Privileges and Immunities Clause prohibits discrimination against out-of-state residents absent a "substantial reason" justifying the discrimination. Protectionism is not a valid reason for discrimination against out-of-state residents. The attorney general explained that Alaska Hire unconstitutionally violates nonresidents' privileges and immunities after concluding that Alaska Hire's primary purpose is to protect Alaska residents at the expense of nonresidents.

Alaska's Equal Protection Clause requires equal treatment of similarly situated individuals. Explaining that Alaska's sliding scale equal protection test evaluates the individual right involved, the state's interest, and the nexus between state action and the state's interest, the attorney general noted that disparate treatment of unemployed workers in different regions of the state is an illegitimate state interest. The attorney general further concluded that the criteria for declaring a "zone of underemployment" were too broad; i.e., the attorney general concluded that Alaska Hire violated the Equal Protection Clause because there is an insufficient nexus between declaring a zone of underemployment and providing relief from nonresident employment.

2019 Op. Alaska Att'y Gen. (Oct. 3).

Legislative review is recommended if the legislature would like to pursue a local hiring preference.

AS 39.25.080

IN GENERAL, STATE EMPLOYEE DISCIPLINARY RECORDS ARE CONFIDENTIAL PERSONNEL RECORDS UNDER THE STATE PERSONNEL ACT AND ARE NOT SUBJECT TO DISCLOSURE UNDER THE ALASKA PUBLIC RECORDS ACT.

Basey filed a federal civil rights lawsuit against several state troopers based on the investigation and arrest that led to his federal conviction. During the course of litigation, Basey moved to compel production of records he had requested, including the disciplinary records of two of the troopers. The state agreed to produce certain records but asserted that the disciplinary records were exempt from disclosure under AS 39.25.080 of the State Personnel Act. The superior court opined that disclosure from a public employee's personnel records is limited to the information listed in AS 39.25.080(b) and concluded that the troopers' disciplinary records could not be disclosed because general disciplinary records are not listed in AS 39.25.080(b).

On appeal, the Alaska Supreme Court noted that the plain language of AS 39.25.080, the statutory text as a whole, and the legislative history indicate "that 'personnel records' is meant to be interpreted broadly to include disciplinary records." The Court further noted that the plain language of the statute indicates that the only types of personnel records that

may be disclosed are those listed under AS 39.25.080(b), which includes a specific type of disciplinary record. Because the specific type of disciplinary record listed under AS 39.25.080(b) may be disclosed, the Court reasoned that the term "personnel records" must include all disciplinary records. The Court therefore concluded that all disciplinary records other than the type subject to disclosure under AS 39.25.080(b) are confidential personnel records that may not be disclosed and affirmed the superior court's decision.

Basey v. State, 462 P.3d 529 (Alaska 2020).

Legislative review is not recommended.

AS 47.10.011(8)
AS 47.17.290(10)

A COURT MAY FIND A CHILD IN NEED OF AID DUE TO MENTAL INJURY ONLY AFTER THE MENTAL INJURY IS ESTABLISHED BY AN EXPERT WITNESS OFFERED AND ACCEPTED AS A QUALIFIED EXPERT.

The Office of Children's Services petitioned to terminate a mother's and father's parental rights to their child. The superior court terminated their parental rights, finding that the child was in need of aid under AS 47.10.011(8) because as a result of "the parents' conduct or conditions created by the parents" the child suffered "substantial mental injury."

On appeal, the parents argued that the superior court failed to qualify an expert witness to support the finding that the child suffered mental injury. The Alaska Supreme Court agreed, first explaining that the applicable definition of mental injury in AS 47.17.290(10), requiring that mental injury is supported by the opinion of a qualified expert witness, is ambiguous. The Court considered whether "qualified" refers only to a witness's background or "does 'qualified' describe an express formal application of the evidence rules' process for the trial court's affirmative determination that the expert has the necessary background and experience to testify on a particular issue." After reviewing legislative history and relevant case law, the Court concluded that in the limited matter of a judge-tried child in need of aid case, it is legal error for a trial court to find that a child suffered mental injury unless the Court first applies the evidence rules, expressly qualifies an expert witness, and resolves any evidentiary concerns. The Court further explained that "[a] parent does not need to object in the trial court to raise

this issue on appeal."

Cora G. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs., 461 P.3d 1265 (Alaska 2020).

Legislative review is not recommended unless the legislature does not want to require that the statutory required qualified expert witnesses be offered and accepted as a qualified expert.

AS 47.12.100(c)(2)

THE TESTIMONY OF A MINOR AT A HEARING TO DETERMINE WHETHER TO WAIVE JUVENILE JURISDICTION CANNOT BE USED AS SUBSTANTIVE EVIDENCE OVER THE MINOR'S OBJECTION AT ANY SUBSEQUENT JUVENILE ADJUDICATION OR ADULT CRIMINAL PROCEEDINGS.

A minor was charged with first-degree murder. The state petitioned the trial court to waive juvenile jurisdiction. To succeed on a waiver petition, the state typically bears the burden of demonstrating probable cause that the minor is delinquent and that the minor is not amenable to treatment. However, under AS 47.12.100(c)(2), a minor who allegedly has committed an unclassified felony or class A felony that is a crime against a person is presumed unamenable to treatment and has the burden of rebutting that presumption. The trial court held that the minor did not present sufficient evidence to rebut the presumption and granted the state's petition. The minor appealed, arguing that AS 47.12.100(c)(2) violated his constitutional right against self-incrimination by forcing him to present evidence about the probable cause of his actions and his due process rights by forcing him to choose between his right to defend himself and his privilege against self-incrimination.

The Alaska Supreme Court determined that fundamental fairness requires adopting an exclusionary rule to balance a minor's right to present a defense at a waiver proceeding against the minor's privilege against self-incrimination. Therefore, the Court exercised its "inherent supervisory powers" to create an exclusionary rule preventing the state from using a minor's testimonial evidence at a waiver hearing as substantive evidence over the minor's objection at any subsequent juvenile adjudication or adult criminal proceeding. The Court also held that minors in such hearings must be advised in advance that the minor's testimony may not be

admitted against them at a subsequent trial on the underlying offense. Because the Court held that an exclusionary rule was necessary, the Court declined to decide whether AS 47.12.100(c)(2) violates the privilege against self-incrimination or the right to due process.

C.D. v. State, 458 P.3d 81 (Alaska 2020).

Legislative review is not recommended.

AS 47.30.735(c)
AS 47.30.915(12)(B)

WHEN DETERMINING WHETHER A PERSON SHOULD BE INVOLUNTARILY COMMITTED TO A TREATMENT FACILITY, A COURT MAY FIND THAT THE PERSON IS LIKELY TO CAUSE HARM TO THEMSELVES OR OTHERS BASED ON THE PERSON'S NONVERBAL CONDUCT.

The respondent was taken into emergency custody after acting erratically while checking into an airport. Loaded firearms and ammunition were subsequently found in the respondent's luggage. Under AS 47.30.735(c), a court "may commit the respondent to a treatment facility if it finds, by clear and convincing evidence, that the respondent is mentally ill and as a result is likely to cause harm to the respondent or others." Under AS 47.30.915(12)(B), a respondent is "likely to cause harm" if the respondent "poses a substantial risk of harm to others as manifested by recent behavior causing, attempting, or threatening harm, and is likely in the near future to cause physical injury, physical abuse, or substantial property damage to another person." At a hearing to address the Alaska Psychiatric Institute's petition to commit the respondent for 30 days, the magistrate stated that although she had not heard testimony of verbal threats, both the airport police officer and a psychiatrist who examined the respondent testified they found the respondent's nonverbal behavior threatening. The superior court subsequently signed the 30-day commitment order, adopting the magistrate's proposed written findings that the respondent was likely to cause harm to others as defined by statute.

On appeal to the Alaska Supreme Court, the respondent argued that the evidence was not sufficient to support a finding that he was likely to cause harm to himself or others because there was no evidence that he made any verbal threats. The Court noted that AS 47.30.915(12)(B) does not use the word "verbal"

and that "the plain language of the statute does not foreclose the superior court from considering and drawing inferences from nonverbal conduct seen as threatening rather than from just words." The Court also stated that the common usage of the word "threat" includes more than verbal threats. After concluding that threats can include nonverbal conduct, the Court held that the evidence in this case was sufficient to find that the respondent was likely to cause harm to himself or others.

In re Luciano G., 450 P.3d 1258 (Alaska 2019).

Legislative review is not recommended.

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