# STATE OF ALASKA

# Legislative Affairs Agency

A

# REPORT TO THE

# THIRTY-THIRD STATE LEGISLATURE

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

Prepared by
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# A REPORT TO THE THIRTY-THIRD STATE LEGISLATURE

## Listing Alaska Statutes with Delayed Repeals, Delayed Enactments, and 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The report lists Alaska Statutes that will be amended or repealed between February 28, 2024, and March 1, 2025, according to laws enacted before the 2024 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2022, and September 30, 2023,

and

Opinions of the Attorney General that were made available through Internet distribution between October 1, 2022, and September 30, 2023.

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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 2024 Legislature, will be repealed or amended before March 1, 2025, 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 Margret Bergerud, Conran Gunther, and Claire Radford, Legislative Counsel, and Susie Lemons, Assistant Revisor of Statutes. Linda Bruce, Assistant Revisor of Statutes, prepared the list of delayed repeals, enactments, and amendments.

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# DELAYED REPEALS, ENACTMENTS AND AMENDMENTS

## taking effect between February 28, 2024 and March 1, 2025 according to laws enacted before the 2024 legislative session

**Laws enacted in 2007**

Ch. 1, FSSLA 2007, sec. 4, as amended by ch. 6, SLA 2011, sec. 5, ch. 113, SLA 2014, sec. 1, and ch. 8, SLA 2018, sec. 1 – Senior assistance and benefits

| | |
|---|---|
| AS 09.38.015(a)(10) | Repealed June 30, 2024 |
| AS 47.45.301 | Repealed June 30, 2024 |
| AS 47.45.302 | Repealed June 30, 2024 |
| AS 47.45.304 | Repealed June 30, 2024 |
| AS 47.45.306 | Repealed June 30, 2024 |
| AS 47.45.308 | Repealed June 30, 2024 |
| AS 47.45.309 | Repealed June 30, 2024 |

**Laws enacted in 2014**

Ch. 61, SLA 2014, sec. 37, as amended by ch. 101, SLA 2018, sec. 40 – Tax credits

| | |
|---|---|
| AS 21.66.110(b) | Repealed January 1, 2025 |
| AS 21.96.070 | Repealed January 1, 2025 |
| AS 43.05.010(15) | Repealed January 1, 2025 |
| AS 43.20.014 | Repealed January 1, 2025 |
| AS 43.55.019 | Repealed January 1, 2025 |
| AS 43.56.018 | Repealed January 1, 2025 |
| AS 43.65.018 | Repealed January 1, 2025 |
| AS 43.75.018 | Repealed January 1, 2025 |
| AS 43.75.130(h) | Repealed January 1, 2025 |
| AS 43.77.045 | Repealed January 1, 2025 |
| AS 43.77.060(e) | Repealed January 1, 2025 |

**Laws enacted in 2016**

Ch. 5, 4SSLA 2016, sec. 6, as amended by ch. 46, SLA 2018, sec. 2 – Alaska comprehensive health insurance fund

| | |
|---|---|
| AS 21.55.430 | Repealed June 30, 2024 |

**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

Art. I, sec. 1, Constitution of the State of Alaska
AS 09.55.548(b)

**BAR ON RECOVERING DAMAGES COMPENSATED BY A COLLATERAL SOURCE UNDER AS 09.55.548(b) VIOLATES THE STATE EQUAL PROTECTION CLAUSE WHEN APPLIED TO A PLAINTIFF WHOSE INSURER HAS A CONTRACTUAL RIGHT TO COLLECT FROM THE PLAINTIFF'S RECOVERY.**

A patient filed a medical malpractice complaint after her doctor mistakenly cut the wrong duct while performing her surgery. The patient's health insurance plan included a right to subrogation and reimbursement from any damages she might recover, giving the plan the right to recover 100 percent of the benefits paid, without any deductions and even if recovery was less than damages paid. The patient moved for a ruling on the recoverability of medical expenses paid by her plan, asserting her plan is governed by the federal Employee Retirement Income Security Act (ERISA) and therefore is a "federal program that by law must seek subrogation" which is exempt from AS 09.55.548(b)'s prohibition on recovering damages that have already been paid by a collateral source. The provider opposed, arguing ERISA does not preempt AS 09.55.548. The trial court held ERISA does not preempt AS 09.55.548(b) and that any award would be reduced by the amount the insurer paid, which would then be "set aside" by the court to reimburse the insurer. The provider sought reconsideration of the "set aside" ruling. On reconsideration, the court held that, under AS 09.55.548(b), the patient was prohibited from seeking to recover damages paid by the insurer, but that nothing prevented the insurer from joining the suit to seek those damages. The insurer later assigned the patient its claim, which the provider opposed, arguing the insurer must join the suit itself and later moved for joinder. The trial court vacated its previous orders and clarified that ERISA did not preempt AS 09.55.548, AS 09.55.548(a) applied to the case and did not prevent the patient from recovering medical expenses paid by her insurance because the insurance plan was a federal program and was required to seek subrogation and reimbursement under the terms of the plan contract, and therefore the patient could seek to recover those damages for which the plan already reimbursed her.

On appeal, the Alaska Supreme Court noted that federal sources are not the only collateral sources which seek to recover expenditures against a tortious third party, and that subrogation and reimbursement clauses are common in health insurance plans. The prohibition in AS 09.55.548(b), in those circumstances, can result in the tortious third party paying less than the full cost of their actions because the injured party may not recover those damages, and then must pay the full award to the insurance company if the award is less than reimbursement. The court ruled that AS 09.55.548(b) does not preclude a collateral source from recovering damages directly against the tortfeasor. The court further ruled, based on the statute's plain meaning and legislative history, that AS 09.55.548(b) bars a medical malpractice plaintiff from recovering damages paid by a subrogated insurer who is not the federal government because the existence of the federal exception indicated the legislature considered subrogation issues and did not include other exceptions. Further, health insurance plans administered under ERISA are not the types of federal plans contemplated under AS 09.55.548(b) because they are administered by private companies, not a federal agency. The court also ruled that AS 09.55.548(b) prohibits assignment of the subrogated claim because the statute plainly precludes the insured from recovering the amounts already paid by the insurer, and a claimant cannot use assignment to circumvent this limitation. Finally, the court ruled that AS 09.55.548(b) fails minimum scrutiny and violates the equal protection guarantees of art. I, sec. 1, of the Alaska Constitution, because the statutory language lacks a fair and substantial relationship to the legislative purpose of eliminating double recoveries. The court reasoned that the statute distinguishes those who receive compensation from collateral sources from those who do not and limits damages that may be recovered for the former group while imposing no such limitation on the latter or those whose collateral source is a federal program. The court explained subrogation and reimbursement clauses are commonplace in insurance contracts, and therefore, in most cases, the amount already paid to a claimant would directly flow to the insurer. The court explained windfalls are not more likely to plaintiffs who receive compensation from non-federal collateral sources than to plaintiffs covered by Medicaid, which by law must seek subrogation, or other medical malpractice plaintiffs whose medical expenses were not paid by any collateral source.

*Knolmayer v. McCollum*, 520 P.3d 634 (Alaska 2022).

Legislative review is recommended to amend AS 09.55.548 to remove the unconstitutional provision.

Art. I, sec. 5, Constitution of the State of Alaska
Art. III, sec. 3, Constitution of the State of Alaska
Art. III, sec. 8, Constitution of the State of Alaska
U.S. Const. Amend. I
AS 15.15.030(5)
AS 15.15.030(14)
AS 15.15.060(e)
AS 15.15.350(c)-(e)
AS 15.15.350(g)(2)
AS 15.15.360(a)(1)
AS 15.25.010
AS 15.25.030
AS 15.25.060
AS 15.25.100(a)

**BALLOT INITIATIVE 2 DOES NOT VIOLATE POLITICAL PARTIES' ASSOCIATIONAL RIGHTS; THE CONSTITUTION DOES NOT REQUIRE LIEUTENANT GOVERNOR CANDIDATES TO RUN SOLO IN A PARTISAN PRIMARY OR IN A MANNER IDENTICAL TO OTHER ELECTED OFFICIALS; RANKED-CHOICE VOTING DOES NOT VIOLATE CONSTITUTIONAL REQUIREMENTS FOR ELECTING THE GOVERNOR; VOTER INABILITY TO CHANGE PREFERENCES BETWEEN TABULATION ROUNDS DOES NOT UNCONSTITUTIONALLY BURDEN THE RIGHT TO VOTE.**

In 2020, Alaska voters approved Ballot Initiative 2, replacing political party primary elections with a nonpartisan primary election and adopting a ranked-choice general election voting system. Plaintiffs filed suit against the state challenging the initiative, amici filed briefs supporting plaintiffs, and an initiative sponsor intervened in defense. Plaintiffs and amici argued the initiative: (1) burdens speech under the First Amendment of the United States Constitution and art. I, sec. 5, of the Alaska Constitution by weaking a political party's ability to select candidates for the general election and allowing candidates to identify their party affiliation on a ballot regardless of whether the party nominated or endorsed the candidate; (2) violates art. III, sec. 8, of the Alaska Constitution by pairing governor and lieutenant governor candidates in the primary; (3) violates art. III, sec. 3, of the Alaska Constitution by adopting a ranked-choice voting system for the general election; and (4) burdens the right to vote. The superior court granted summary judgment in favor of the state and initiative sponsor, and the plaintiffs appealed.

The Alaska Supreme Court affirmed. First, the court held the initiative did not unconstitutionally burden political parties' associational rights under the First Amendment of the United States Constitution and art. I, sec. 5, of the Alaska Constitution. While the court acknowledged political parties' constitutionally protected associational rights, it held political parties do not have a right to control the state's primary elections and the initiative's nonpartisan open primaries place no restrictions on how political parties choose their standard

bearers. The court found a candidate's ability to display party affiliation on a ballot placed merely a scant burden on a political party's associational rights. AS 15.25.030(a)(5) and AS 15.15.030(5) prevent a candidate from appearing as affiliated with a party on a ballot unless registered with that affiliation with the Division of Elections. AS 15.15.030(14) and AS 15.15.060(e) also require that the ballot and polling places include a disclaimer explaining the candidate is only registered as affiliated with that political party. Political parties can also warn voters of "Trojan horse candidates." The court found the initiative's open nonpartisan primary election system could advance important regulatory interests like encouraging more candidates to run and boost voter turnout, and plaintiffs failed to present evidence showing otherwise.

Second, the court held art. III, sec. 8, of the Alaska Constitution, language stating the lieutenant governor candidate must "be nominated in the manner provided by law for nominating candidates for other elective offices" does not require a lieutenant governor candidate to run alone in a partisan primary on the same basis as candidates for other offices before being paired with the gubernational candidate of the same political party on the general election ballot. After reviewing the section's text, history, and relevant legislative practice, the court held the section does not require the nomination process for lieutenant governor to be exactly the same as that for every other elected official. The court noted one amici interpretation raised First Amendment concerns by making political parties sole gatekeepers of elected office. The court held the initiative requirement that a lieutenant governor candidate seek election through a nonpartisan primary like all other state elected officials satisfied art. III, sec. 8.

Third, the court rejected plaintiffs' and amici's claim that the initiative violates the requirement that "[t]he candidate receiving the greatest number of votes shall be governor" under art. III, sec. 3, Constitution of the State of Alaska, by requiring that a governor candidate obtain a majority of votes to win and utilizing runoff elections to deny victory to the candidate receiving the greatest number of votes. The court found a candidate can win an election under the initiative system without a majority of votes. The court considered but was not persuaded by a Maine Supreme Judicial Court ruling that a similar ranked-choice system violated Maine's constitution because the system was akin to a series of separate runoff elections. The Alaska Supreme Court instead agreed with the Ninth Circuit's determination that ranked-choice

voting only involves a single round of voting that is tabulated with a series of calculations.

Lastly, the court held the initiative's system of ranked-choice voting did not burden the fundamental right to vote by failing to allow voters to change their preferences between rounds of tabulation. The court held that the difficulties complained of presented in both single-choice and ranked-choice voting systems, and the state's interest in allowing voters to express more nuanced preferences through their votes and elect candidates with strong plurality support are important and legitimate regulatory interests that justified the minimal burden imposed by ranked-choice voting.

*Kohlhaas v. State*, 518 P.3d 1095 (Alaska 2022).

Legislative review is not recommended.

Art. I, sec. 11, Constitution of the State of Alaska
Alaska Criminal Rule 45

**A COURT MUST TAKE AFFIRMATIVE STEPS TO ENSURE A DEFENDANT RECEIVES TIMELY REPRESENTATION WHEN THE COURT IS INFORMED OF A CONFLICT OF INTEREST WITH APPOINTED COUNSEL.**

A defendant was indicted with eight co-defendants on 83 counts of felony property crimes. The Public Defender Agency was appointed to the defendant's case, as well as several co-defendants' cases but did not assign an attorney to the defendant's case for five months. During that time, the Public Defender Agency, on behalf of the defendant, consented to tolling time under Alaska Criminal Rule 45, which governs a defendant's right to a speedy trial. The Public Defender Agency later moved to withdraw from the defendant's case because of a conflict of interest. An attorney with the Office of Public Advocacy entered an appearance and moved to dismiss the case, asserting that the Public Defender Agency lacked authority to request continuances on behalf of the defendant because of its conflict of interest based on its representation of his co-defendants. The attorney also argued that the Rule 45 tolling was in error as the defendant was effectively unrepresented and the case should be dismissed with prejudice. The trial court denied the motion, which the defendant's attorney appealed.

The Court of Appeals affirmed the trial court's denial of the

defendant's motion to dismiss because Rule 45 was tolled with the defendant's knowledge and consent. The Court of Appeals reviewed the case to ensure that trial courts recognize their duty to act when a defense agency does not act diligently to enter an appearance or resolve potential conflicts of interest. The Court of Appeals held that when a trial court becomes aware a defendant is appointed public counsel and not assigned an individual attorney, the court must take immediate, affirmative steps to ensure the situation is rectified. Additionally, the court held when a trial court is informed of a conflict of interest, the trial court should actively monitor the case to ensure that the conflict is resolved or substitute counsel is appointed within a reasonable amount of time. The court based its opinion on art. I, sec. 11, of the Alaska Constitution and the Sixth Amendment of the United States Constitution. The court also looked at previous rulings from the United States Supreme Court, which previously held that the guarantee of assistance of counsel is not satisfied by the mere appointment of counsel. The Court of Appeals held that the trial court has a duty to appoint counsel and that duty is not discharged if the appointment does not result in an entry of appearance by an individual attorney assigned to the case. In this case, the court found the trial court should have taken immediate action to ensure an individual attorney was assigned and conflict issues were resolved on an expedited bases, but that the remedy for failure to do so was not necessarily dismissal with prejudice. The court recognized that representation of co-defendants is disfavored but that alone does not create an active conflict of interest. However, due to the fact that conflicts are likely to develop, an agency assigned to multiple co-defendants must determine on an expedited basis which defendant to represent and which cases to withdraw from. The court found the Public Defender Agency did not act with reasonable diligence in the defendant's case, but the more significant issue was the absence of any individual attorney assigned to the case. However, the court found the record reflected the defendant willingly and knowingly consented to Rule 45 tolling and therefore affirmed the trial court's denial of the motion to dismiss.

*Perez v. State*, 521 P.3d 592 (Alaska App. 2022).

Legislative review is not recommended unless the legislature would like to address the time by which the appointment of individual counsel must occur.

Art. I, sec. 12, Constitution of the State of Alaska
Art. IV, sec. 2, Constitution of the State of Alaska

**A SENTENCING COURT MUST CONSIDER A JUVENILE OFFENDER'S YOUTH AND ITS ATTENDANT CHARACTERISTICS BEFORE SENTENCING A JUVENILE TRIED AS AN ADULT TO THE FUNCTIONAL EQUIVALENT OF LIFE WITHOUT PAROLE.**

In 1985, the plaintiff pleaded no contest to two counts of first-degree murder committed at age 14 with her 19-year-old boyfriend. Before she entered the adult court system, the court held a hearing to determine whether she would be amenable to treatment by age 20, when the juvenile system would lose jurisdiction over her. After testimony from experts, the plaintiff's mother, and her co-defendant, the court found she would not be amenable to treatment before age 20 and therefore would be prosecuted as an adult, which was affirmed on appeal. A different judge sentenced the plaintiff. At sentencing, the prosecutor argued waiver into adult court meant the court could not give any consideration to her age. The court sentenced her and later modified the sentence to three consecutive 45-year terms for a composite sentence of 135 years with eligibility for discretionary parole at age 60.

In 2005, the United States Supreme Court ruled in *Roper v. Simmons*, that the cruel and unusual punishment clause of the Eighth Amendment of the United States Constitution prohibits imposition of the death penalty on people younger than 18 at the time they committed their crimes. The Court relied on updated scientific research regarding childhood brain development showing (1) juveniles exhibit a "lack of maturity and an underdeveloped sense of responsibility"; (2) juveniles are "more vulnerable or susceptible to negative influences and . . .peer pressure"; and (3) a juvenile's character is "not as well formed as that of an adult" and their personality traits "are more transitory." The Court also found a national consensus against the juvenile death penalty. By that time, the plaintiff's co-defendant had recanted his earlier testimony. The plaintiff based her first petition for post-conviction relief on these developments. The trial court dismissed on the pleadings, ruling she waived any defects by pleading no contest to the adult criminal charges.

While plaintiff awaited appellate review of the dismissal of her first petition for post-conviction relief, the United States Supreme Court ruled in G*raham v. Florida* that life without parole could not be imposed on juveniles convicted of

nonhomicide offenses because, given updated research and community consensus, those sentences do not serve legitimate penological goals. The plaintiff filed a second petition for post-conviction relief based on that ruling, which the state moved to dismiss as time-barred and successive. The court stayed proceedings pending the United States Supreme Court's ruling in *Miller v. Alabama*. In *Miller*, the Court extended the reasoning of *Graham* to juveniles convicted of homicide, noting the difficulty in "distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" The Court required sentencers to consider that differences between children and adults weigh against lifetime juvenile sentences. The plaintiff amended her post-conviction relief petition to incorporate arguments based on *Miller*. The trial court dismissed her application as procedurally barred, and she appealed. Soon after, the United States Supreme Court issued *Montgomery v. Louisiana*, holding *Miller* applied retroactively to cases on collateral review, such as post-conviction relief application; clarifying that, under *Miller*, it is only the "rare" juvenile whose crime reflects "irreparable corruption" who can constitutionally be sentenced to life without parole; and emphasizing that *Miller* requires a sentencing court to specifically consider "youth and its attendant characteristics" when sentencing juvenile offenders to life without parole. The court did not require resentencing in all cases, but noted *Miller* violations could be remedied by allowing juvenile homicide offenders to be considered for parole.

In this case, the Alaska Court of Appeals ruled that the plaintiff was not entitled to federal relief under *Miller* because she was sentenced under Alaska's discretionary sentencing scheme. But, based on Alaska's well-established tradition of requiring on-the-record sentencing explanations that provide for the meaningful appellate review required by art. IV, sec. 2, and art. I, sec. 12, of the Alaska Constitution, the court concluded that art. I, sec. 12, requires a sentencing court to affirmatively consider the juvenile's youth and its attendant characteristics before sentencing a juvenile tried as an adult to life without parole or its functional equivalent, with an on-the-record explanation finding the juvenile is one of the "rare" juvenile offenders whose crime reflects irreparable corruption. The court explained that a vast majority of other states apply the principles in *Miller* to de facto life without parole sentences to juveniles, and the court defined such a sentence as one that does not provide for a meaningful opportunity for

release based on demonstrated maturity and rehabilitation. The court held this means more than just the possibility of geriatric release, and that the majority of states that have amended their statutes based on *Miller* and its progeny require offenders to serve 20-30 years of their sentences before parole eligibility. The court held that a 135-year sentence counts as *de facto* life without parole, even with eligibility for parole after 45 years. It noted that Alaska's parole statutes do not currently mandate extra consideration for juvenile offenders. The court remanded for determination of whether the new rule applies retroactively and whether the plaintiff is therefore entitled to resentencing.

*Fletcher v. State*, 532 P.3d 286 (Alaska App. 2023).

Legislative review is recommended to determine whether the legislature wishes to address juvenile sentencing in light of recent state and federal decisions.

Art. III, sec. 16, Constitution of the State of Alaska
Alaska Civil Rule 82
AS 09.60.010(c)
AS 44.23.020(b)(1)
AS 44.23.020(b)(9)

**SUIT BROUGHT BY THE ATTORNEY GENERAL AGAINST THE LEGISLATIVE AFFAIRS AGENCY TO INFLUENCE LEGISLATIVE ACTS IS BARRED BY THE CONSTITUTION; A QUALIFIED CONSTITUTIONAL CLAIMANT IS PROTECTED UNDER AS 09.60.010(c)(2) FROM ALASKA CIVIL RULE 82 ATTORNEY'S FEES.**

On June 16, 2021, during a special session, the legislature passed a budget bill to fund state government during the 2022 fiscal year. However, the budget bill's effective date did not pass the House of Representatives with a two-thirds super-majority. The budget bill would thus not become effective until 90 days after enactment, and the state faced a government shutdown at the beginning of its fiscal year on July 1. The budget bill included a retroactivity clause that made certain appropriations retroactive to just before the fiscal year's end. The legislature's Director of Legal Services advised the Speaker of the House that the executive branch, knowing that appropriations are retroactive, may choose to give effect to the retroactivity clause in the budget bill and allow state government to continue operating before the bill took effect. The Department of Law, however, advised the governor's office that the retroactivity clause had no effect until the budget bill became law. On June 28, during a second special session, the House of Representatives voted again on the special effective date clause of the existing budget bill and

passed it with a two-thirds super-majority, making the budget bill effective by July 1.

On June 21, before the special effective date clause passed, the attorney general filed suit against the Legislative Affairs Agency (LAA), asserting AS 44.23.020(b)(1) and (9) provide the attorney general's office powers and duties normally ascribed at common law including bringing any action the attorney general thinks necessary to protect the public interest. He sought judgment declaring the expenditure of state funds without an effective appropriation to be unlawful absent expenditures necessary to meet certain constitutional and federal obligations. LAA sought to dismiss, arguing the case was brought "in the name of the State" and "against the legislature" in violation of art. III, sec. 16, of the Alaska Constitution. The superior court agreed, dismissed the lawsuit, and granted attorney fees to LAA under Alaska Civil Rule 82. The superior court declined to grant attorney fees to LAA as a prevailing constitutional claimant under AS 09.60.010(c) because LAA was a defendant, not a claimant.

After the budget bill's special effective date passed and the lawsuit became moot, the Alaska Supreme Court reviewed the case under the public interest exception to the mootness doctrine. The court held that a suit brought by the attorney general to enforce the effective date clause of the Alaska Constitution brought under AS 44.23.020(b)(9) is indistinguishable from a suit brought under the governor's authority to enforce constitutional mandates under art. III, sec. 16. The court also rejected the assertion that, in this context, the attorney general had a common law authority to sue on the state's behalf to enforce constitutional mandates distinct from the governor's constitutional authority to do the same through the attorney general. Citing discussion and rejected amendments from the constitutional convention, the court determined this would violate the founders' goals of a strong executive and held constitutional limitations must be applied as if the suit were brought in the governor's name.

Next, the court addressed whether the suit involved non-legislative acts, including "service-related acts," outside the scope of lawsuits prohibited by art. III, sec. 16. After reviewing the pleadings and public statements by the governor and attorney general, the court found the suit clearly intended to influence budget legislation rather than correct an administrative act.

Last, the court held that a qualified constitutional claimant is entitled to protection under AS 09.60.010(c) against attorney's fees awarded under Rule 82. The court found it was error for the superior court to deny the attorney general protection from attorney fees as a constitutional claimant under AS 09.60.010(c) for the sole reason that the attorney's fees to the LAA were not awarded under AS 09.60.010(c) and remanded on this issue.

*Taylor v. Alaska Legislative Affs. Agency*, 529 P.3d 1146 (Alaska 2023).

Legislative review is not recommended.

U.S. Const. Amend. I
AS 23.40.110(a)(2)
AS 23.40.110(a)(3)
AS 23.40.220

**NEITHER THE U.S. SUPREME COURT DECISION IN *JANUS* NOR THE FIRST AMENDMENT OF THE U.S. CONSTITUTION REQUIRE THE STATE TO OBTAIN ONGOING, CLEAR AND AFFIRMATIVE CONSENT TO UNION DUES DEDUCTIONS UNDER A COLLECTIVE BARGAINING AGREEMENT.**

The Alaska State Employees Association (ASEA) is a public sector union that represents state employees, who may join the union voluntarily. Under a collective bargaining agreement, before 2019, the state deducted member dues on behalf of ASEA from employee paychecks and a mandatory agency fee and transmitted those funds to ASEA. Employees signed an annual agreement allowing deductions for the upcoming year and could revoke authorization during an annual 10-day period. The collective bargaining agreement prohibited the state from interfering between ASEA and its members. In 2018, after the United States Supreme Court ruled in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* that charging nonmembers union agency fees violated the First Amendment, the state and ASEA modified their collective bargaining agreement to comply with *Janus*, and the state stopped collecting nonmember fees. In 2019, the state announced its interpretation that *Janus* also required it to obtain union members' clear and affirmative consent to continue deducting dues from their paychecks, and the governor directed the state to bypass ASEA and directly contact union members to determine whether they wanted to continue or immediately cease deductions. The state then sued ASEA, seeking declaratory judgment that *Janus* mandated these actions. ASEA counterclaimed to enjoin the state's actions and recover damages

for breach of the collective bargaining agreement and statute violations. The superior court entered judgment for defendant.

On appeal, the Alaska Supreme Court found *Janus* did not mandate the state's actions because *Janus* only dealt with charging mandatory fees to non-union members and, to comply with *Janus*, that practice had already been eliminated by 2019. Additionally, the court noted that the state's actions impinged on the First Amendment right of free association exercised by public employees voluntarily choosing to join a union. The court also ruled that the collective bargaining agreement method of due collection does not involve state action because the state is only acting as an intermediatory between two private entities, the parties voluntarily entered into a contractual relationship, and the First Amendment does not provide a right to disregard promises that are otherwise enforceable under state law. The court found the state violated both the collective bargaining agreement and AS 23.40.220 and AS 23.40.110(a)(2) when it unilaterally told members they could stop deducting dues and ceased collecting dues for certain members. The court found the state violated AS 23.40.110(a)(3), which disallows a public employer from either encouraging or discouraging membership in an organization, when it interfered with the dues collection process in a way that singled out and discouraged union membership by misstating their First Amendment rights.

*State v. Alaska State Emps. Ass'n/Am. Fed'n of State, Cnty. & Mun. Emps. Loc. 52, AFL-CIO*, 529 P.3d 547 (Alaska 2023).

Legislative review is not recommended.

Alaska Criminal Rule 35.1
AS 12.72.010

**IF AN INMATE'S CLAIMS CAN BE BROUGHT IN A POST-CONVICTION RELIEF APPLICATION, THE INMATE MUST USE THAT AVENUE INSTEAD OF A CIVIL SUIT, AND A TRIAL COURT SHOULD CONVERT A QUALIFYING CIVIL ACTION INTO A POST-CONVICTION RELIEF APPLICATION.**

The Department of Corrections Parole Board denied an inmate's discretionary parole application, and the inmate sought injunctive relief against the Board, the Department of Corrections, and the commissioner of corrections (collectively DOC), asking the court to instruct the Board to consider applicable factors and support its conclusions with substantial evidence. DOC moved to dismiss for failure to state a claim

because the inmate's claim fell within the purview of post-conviction relief under AS 12.72.010(5) and Alaska Criminal Rule 35.1, so the inmate should have brought a post-conviction relief action. The superior court agreed and granted DOC's motion to dismiss.

On appeal, the Alaska Supreme Court concluded the inmate's claims could have been raised in a post-conviction relief application, which the inmate was required to instead pursue because a person can not use a civil suit to circumvent the protections the state receives under the post-conviction relief statutes. The court found that the superior court should have converted the matter to a post-conviction relief application without dismissing the lawsuit.

*McDonald v. Dep't of Corr., Alaska Parole Bd.*, 519 P.3d 345 (Alaska 2022).

Legislative review is not recommended.

Alaska Criminal Rule 45

**A COURT MAY NOT, OVER A DEFENDANT'S OBJECTION, TOLL THE SPEEDY TRIAL CLOCK WHEN THE DEFENDANT'S ATTORNEY REQUESTS A CONTINUANCE UNDER ALASKA RULE OF CRIMINAL PROCEDURE 45(d)(2) AND MAY NOT REQUIRE THAT DEFENDANT TO WAIVE FUTURE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.**

A public defender appointed to represent a criminal defendant moved to continue the defendant's trial and toll the speedy trial clock under Alaska Criminal Rule 45, which generally requires a defendant be brought to trial within 120 days of the date of service of the charging document. The attorney was unprepared for personal and work-related reasons, including the need to review recent discovery. Even if his attorney would be unprepared, the defendant objected to a continuance under Rule 45(d)(2), which excludes from the 120-day limit a delay resulting from a continuance granted "with the consent of the defendant and the defendant's counsel." The trial court refused to toll the speedy trial clock over the defendant's objection, finding Rule 45(d)(2) required consent to continuance by both the defendant and the defendant's attorney. The court told the defendant he would waive his right to raise a post-conviction relief claim alleging ineffective assistance of counsel at trial if he insisted on objecting to a continuance, although the court

struggled to explain the exact claims waived. The public defender filed a petition for review with the Alaska Court of Appeals, which was converted into an original application for relief.

The Court of Appeals ruled that a court may not toll the speedy trial clock under Criminal Rule 45(d)(2) over a defendant's objection, but did not require a defendant's express waiver. The court reasoned the plain language of Rule 45(d)(2) is clear in requiring "the consent of the defendant and the defendant's counsel." Looking to legislative history, the court found the ABA Standard, which the rule largely mirrors, and the first proposed version of the Alaska rule required consent of the defendant *or* his counsel, with "or" changed to "and" before adoption. The court noted that use of "and" persisted despite a 1987 question brought to the Criminal Rules Committee and a 2019 legislative proposal from the governor changing "or" to "and" that was removed in conference committee.

The court found the waiver of ineffective assistance of counsel claims improper because the court could not explain to the defendant exactly what claims he waived and the defendant must understand the risks involved in waiver to knowingly and intelligently waive a right. The court also found waiver unnecessary because the process for determining ineffective assistance of counsel claims already requires assessment of an attorney's performance within the specific context of the case.

*Alaska Pub. Def. Agency v. Superior Ct.*, 530 P.3d 604 (Alaska App. 2023).

Legislative review is not recommended.

AS 08.20.100(b)(1)
AS 08.20.900(1)
AS 08.20.900(3)
AS 08.20.900(6)

**CHIROPRACTOR SCOPE OF PRACTICE STATUTES ARE AMBIGUOUS ON PERFORMING INJECTIONS AND WHICH SUBSTANCES CHIROPRACTORS MAY INJECT; WORKERS' COMPENSATION AGENCIES LACK JURISDICTION TO DETERMINE CHIROPRACTOR SCOPE OF PRACTICE.**

A woman was injured while working for the Alaska Psychiatric Institute (API) in 2018. Her chiropractor submitted bills to API for treatment of her pain, including Sarapin injections into her shoulder muscle. API denied payment on the basis that the injections fell outside the chiropractor's scope

of practice. The chiropractor filed a workers' compensation claim seeking payment for the injections. API responded that the statutes governing chiropractic practice, including AS 08.20.100(b)(1) and 08.20.900(3) and (6), did not permit chiropractors to use prescription drugs, Sarapin was a prescription drug, and the procedure was therefore not reasonable, necessary, or within the chiropractic standard of care under Alaska statutes. The Workers' Compensation Board decided it lacked jurisdiction to determine the scope of practice issue because the chiropractic statute delegates issues regarding scope of chiropractic care to the Chiropractic Board, but found the statute ambiguous and observed a history since 2006 of disputes over whether a chiropractor can perform injections and of what substances. It held the treatment was reasonable and necessary, in part because of a 2018 letter from the Chriproactic Board chair stating the treatment was within the scope of chiropractic practice and praising the chiropractor's training. API appealed to the Alaska Workers' Compensation Appeals Commission.

The Commission affirmed the Workers' Compensation Board, holding it had correctly refused to determine the limits of chiropractic practice, which should be addressed by the Chiropractic Board, and affirming the decision that injection treatment was compensable because when the injections were done it was the Chiropractic Board's position that they fell within the scope of practice. API appealed.

On appeal, the Alaska Supreme Court noted the Chiropractic Board's interpretation of AS 08.20.100(b)(1), which allows chiropractors to "treat the chiropractic condition of a patient by chiropractic core methodology or by ancillary methodology[,]" and AS 08.20.900(1), which defines "ancillary methodology[,]" to be that chiropractors who receive training in specific techniques beyond chiropractic core methodology may use those techniques as ancillary methodology. The court also noted the Department of Law's position that the methods of treatment allowed under "ancillary methodology" are restricted to treatment of the subluxation complex and employment of physiological therapeutic procedures because the definition of "ancillary methodology" uses the phrase "within the scope of chiropractic practice" and because of how "chiropractic" is defined under AS 08.20.900(3). The court found these statutory provisions ambiguous, but declined to construe them under this context.

While it noted that the Workers' Compensation Board was not

limited to applying only the Workers' Compensation Act when adjudicating workers' compensation claims, the court affirmed the Commission's determination that workers' compensation agencies lacked jurisdiction to decide whether the injections exceeded the scope of chiropractic licensure under chiropractic statutes. The court based its decision on the practical problems that could result from the Commission determining the scope of a healthcare provider's practice, the legislature's explicit delegation of regulatory and adjudicatory authority over chiropractors to the Chiropractic Board, and informal endorsement of the treatment by the Chiropractic Board.

*Dep't of Health & Soc. Servs. v. White*, 529 P.3d 534 (Alaska 2023).

Legislative review is recommended to consider amending AS 08.20 to clarify whether chiropractors can perform injections and which substances may be injected as a part of that practice.

AS 09.20.185
AS 09.55.540

**AN EXPERT WITNESS ON THE STANDARD OF CARE FOR A MEDICAL MALPRACTICE CLAIM NEED NOT HAVE THE SAME BOARD CERTIFICATIONS AS THE DEFENDANT; ALASKA LAW DOES NOT RECOGNIZE LOSS OF CHANCE SURVIVAL CLAIMS.**

A woman died of heart failure while hospitalized. Her mother sued the hospital, several doctors, and the doctors' employers for medical malpractice, including a loss of chance of survival claim. The superior court granted defendants' motion to preclude most of plaintiff's proposed expert witnesses because they failed to satisfy AS 09.20.185 as they were not board certified in the same area of medicine as the defendant practitioners. The court denied the plaintiff's motion to substitute expert witnesses. The court granted summary judgment to defendants on the loss of chance of survival claim, finding the claim not allowed under state law, and granted summary judgment to the defendants on the remaining claims as the plaintiff could not produce expert testimony.

On appeal, the Alaska Supreme Court affirmed dismissal of plaintiff's loss of chance claim as "inconsistent with the express language of Alaska's statutes" because AS 09.55.540 requires medical malpractice plaintiffs to prove by a preponderance of the evidence that injuries suffered would not otherwise have occurred if not for the physician's lack of knowledge or skill or

the failure to exercise the proper degree of care. By contrast, a loss of chance of survival claim asserts a doctor engaged in medical malpractice that, although not resulting in a particular injury, decreased or eliminated the chance of survival or recovery from a preexisting condition the doctor was consulted about. The court found this relaxing of causation facially incompatible with the statutory requirement that the doctor's negligence be the but-for cause of injury. The court also noted the legislative intent of AS 09.55.540 and the legislature's concern with avoiding malpractice insurance increases. The court reasoned this intent and recent amendments narrowing recovery support policy choices precluding loss of chance.

The Alaska Supreme Court reversed the superior court's grant of summary judgment and orders excluding three expert witnesses. The court held the burden of proof under AS 09.55.540 and expert witness qualifications of AS 09.20.185 require that an expert testifying to medical standard of care be qualified by licensing, training, experience, or board certification to testify about the "underlying circumstances of the medical event or treatment giving rise to the medical malpractice action," but need not have board certification in exactly the same field as the defendant. The court cited its 2021 decision *Titus v. Department of Corrections*, which concerned the same misinterpretation of AS 09.20.185 and AS 09.55.540. The court remanded for fact-specific inquiry into witness qualifications.

*Doan v. Banner Health Inc.*, 535 P.3d 537 (Alaska 2023), *reh'g denied* (Sept. 28, 2023).

Legislative review is not recommended unless the legislature wishes to allow loss of chance claims.

AS 11.71.040(a)(12)
AS 11.71.050(a)(4)

**ATTEMPTED DRUG CRIMES DO NOT SATISFY THE ELEMENTS OF THEIR TARGET CRIMES FOR PURPOSES OF THE REPEAT OFFENDER PROVISION REQUIRED FOR AN ENHANCED CONVICTION.**

Fifth degree misconduct involving a controlled substance, AS 11.71.050(a)(4), criminalizes simple possession of the majority of controlled substances. This offense is increased to fourth degree misconduct involving a controlled substance under AS 11.71.040(a)(12) if the defendant was convicted within the previous 10 years under AS 11.71.050(a)(4) or of an offense with elements similar to AS 11.71.050(a)(4).

A defendant was indicted for possession of controlled substances under the repeat offender provision of AS 11.71.040(a)(12) because, within the previous 10 years, he had been convicted of attempted misconduct involving a controlled substance in the fourth degree. The defendant moved to dismiss, arguing AS 11.71.050(a)(4) and the elements of his prior attempt offense are not similar, as required by AS 11.71.040(a)(12). The trial court denied the defendant's motion.

On review to the Alaska Court of Appeals, the state argued the enhanced conviction was appropriate because the conviction for attempted misconduct involving a controlled substance in the fourth degree has similar elements to misconduct involving a controlled substance in the fifth degree. The court held that an attempted misconduct involving a controlled substance in the fourth degree does not qualify as an enhancing conviction for purposes of AS 11.71.040(a)(12) and that the similar elements requirement is not satisfied because the elements of the charges, not the specific facts underlying the prior conviction, must be similar. The court found that while the completed offense of misconduct involving a controlled substance in the fourth degree has elements that are similar to simple possession under AS 11.71.050(a)(4), elements of an attempt do not overlap with elements of the target crime. Instead, to prove attempt, the state must establish that the defendant intended to commit the target crime and took a substantial step to commit the target crime. The court concluded that in terms of elemental similarity, attempted drug misconduct crimes do not have similar elements to their target crimes.

The court considered the plain language of AS 11.71.040(a)(12) and found the legislature did not expressly include attempt in misconduct involving a controlled substance in the fourth degree, which strongly indicates the legislature did not intend for an attempted drug offense to enhance simple drug possession to a felony. The court found the legislative history did not rebut this understanding. The court addressed any lingering ambiguity by applying the rule of lenity to conclude that a conviction for attempted misconduct involving a controlled substance in the fourth or fifth degree is not a prior qualifying offense for purposes of an enhancing conviction under AS 11.71.040(a)(12).

*Bowen v. State*, 533 P.3d 935 (Alaska App. 2023).

Legislative review is not recommended.

AS 12.47.110

**MANDATORY COMMITMENT UNDER AS 12.47.110 DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS EVEN IF EVIDENCE INDICATES COMPETENCY RESTORATION IS UNLIKELY, A COURT IS NOT REQUIRED TO RULE ON RESTORABILITY BEFORE INITIAL COMMITMENT, AND THE COURT MUST ORDER THE COMMISSIONER OF FAMILY AND COMMUNITY SERVICES TO NOTIFY THE COURT IF THE DEFENDANT RETURNS TO COMPETENCY OR CANNOT BE RESTORED.**

After a defendant charged with offenses including felony assault filed a motion for judicial determination of competency, a forensic psychologist determined the defendant was "to a reasonable degree of psychological certainty" unable to be restored to competency. Following a competency hearing, the superior court found the defendant not competent, declined to find the defendant unlikely to be restored to competency within the foreseeable future, and entered an order committing him for a period not to exceed 90 days, until rendered competent or the charges were disposed. The defendant appealed, arguing the court's order violated his state and federal substantive due process rights by requiring commitment despite the unlikelihood of restoration.

On review, the Alaska Court of Appeals rejected defendant's interpretation that AS 12.47.110(a) requires an affirmative judicial finding of restorability before commitment can be ordered and found AS 12.47.110 consistent with the defendant's due process rights. While the court acknowledged there may be rare felony cases when a court should make a restorability finding and commitment would deprive the defendant of due process, such as when a defendant suffers from severe static cognitive deficit or was recently unsuccessfully committed for restoration treatment, the court may decline to make such a finding in the vast majority of cases.

The court considered the United States Supreme Court's holding in *Jackson v. Indiana*, 406 U.S. 715 (1972), that the nature and duration of a defendant's commitment must bear

reasonable relation to the purpose for commitment to satisfy due process and an incompetent defendant may not be held "more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." The court also reviewed its only case discussing that holding, *J.K. v. State*, 469 P.3d 434 (2020), which described *Jackson* as allowing commitment for competency restoration treatment only if there is a good reason to believe treatment will likely succeed in the near future.

The court found *J.K.* did not control in this case and held that the plain language of AS 12.47.110 indicates the purpose of committing a felony defendant is to further evaluate the defendant's competency and provide restoration treatment so the defendant may stand trial. The court reviewed the federal commitment statute, 18 U.S.C. 4241(d), which is similar to AS 12.47.110 in not requiring a court to assess whether a defendant is restorable before ordering commitment, and relevant appellate federal cases and concluded that the duration of commitment under AS 12.47.110 is expressly limited and allows for early release if the defendant is restored to competency or charges are dismissed. Therefore, the court held AS 12.47.110 provides a flexible approach to commitment, keeping it within the "rule of reasonableness" from *Jackson*. Furthermore, the stated purposes of AS 12.47.110 for further evaluation and treatment are closely related to the important governmental interest in bringing an accused to trial and assuring the defendant's trial is fair, comporting with the federal substantive due process principles in *Jackson*. The court held AS 12.47.110 is consistent with the defendant's state and federal due process rights.

The court did take issue with the commitment order's failure to require the commissioner of family and community services to notify the court if the defendant was restored to competency or when it became clear, with a reasonable degree of psychological certainty, the defendant could not be restored to competency within the 90-day period. The court remanded for issuance of an amended commitment order that included notification if either of these conditions occurred.

*R.B. v. State*, 533 P.3d 542 (Alaska App. 2023).

Legislative review is not recommended.

AS 15.25.100(c)
AS 15.40.220

**THE DIVISION OF ELECTIONS MUST APPLY THE 64-DAY WITHDRAWAL DEADLINE UNDER AS 15.25.100(c) TO SPECIAL GENERAL ELECTIONS.**

Following the death of Alaska's United States Representative Don Young in March 2022, Alaska held a special primary election and special general election to select a candidate for the remainder of his term. These were the state's first ranked-choice voting elections, which advanced to the general election the four candidates with the most votes in an open primary. The division of elections released a timeline that set deadlines, including a June 26 withdrawal deadline to allow special primary election candidates to remove their name from the general election ballot. On June 21, which was 56 days before the special general election, the candidate with the third-most votes withdrew. The division determined it would remove that candidate's name from the special general election ballot and not include the candidate with the fifth-most votes on the ballot. Several voters sued the division challenging this decision. The superior court ruled on summary judgment in the division's favor.

On appeal, the Alaska Supreme Court addressed whether the 64-day replacement deadline for a candidate under AS 15.25.100(c) applies to special general elections. AS 15.25.100(c) provides "if a candidate nominated at the primary election . . . withdraws . . . after the primary election and 64 or more days before the general election, the vacancy shall be filed by the director by replacing the withdrawn candidate with the candidate who received the fifth most votes in the primary election." While AS 15.25.100(c) does not reference special general elections, AS 15.40.220 provides that "[u]nless specifically provided otherwise, all provisions regarding the conduct of the primary election and general election shall govern the conduct of the special primary election and special election of the . . . United States representative, including . . . . provisions regarding the duties, powers, rights, and obligations of the director, of other election officials, and of municipalities[.]" The court used its independent judgment to review the division's interpretation and, using a sliding scale approach, reviewed the language of each statute. The court determined that AS 15.25.100 both explicitly, under AS 15.40.220, and implicitly applies to special elections, so the director of the division of elections must follow both statutes because of the legal significance of the word "duties" in AS 15.40.220 and "shall" in AS 15.25.100(a) and (c).

The court rejected plaintiffs' argument that the inclusion of a special election timeline in AS 15.40.140 prevents the application of the 64-day replacement deadline in AS 15.25.100(c). Under AS 15.40.220, the general rules apply "[u]nless specifically provided otherwise." The court ruled that both AS 15.40.140 and AS 15.25.100(c) apply absent substantial confusion or impossibility. While in some cases candidates may be unable to withdraw or be replaced after the special primary election, the court determined this was a policy decision by the legislature and did not make the 64-day deadline impossible to comply with, inherently inapplicable, or otherwise provided for. The court further held AS 15.40.140 provides no alternative to the 64-day deadline in AS 15.25.100(c) and no other statute specifically sets another deadline.

The court analyzed the intent behind the ballot measure, noting that other provisions in the ballot measure suggested that the 64-day deadline would apply to special elections. As a result, the court held that the superior court correctly applied the 64-day replacement deadline.

The court also addressed whether application of the 64-day deadline violated voters' rights to select their chosen candidate. The court found that any injury to voters' rights was slight given that voters had a full opportunity to associate with and vote for their candidate of choice and was justified by the state's important regulatory interests in the orderly, timely performance of the duty to run elections.

*Guerin v. State*, 2023 WL 3141377 (Alaska Apr. 28, 2023), *reh'g granted in part* (Nov. 6, 2023).

Legislative review is not recommended unless the legislature wishes to address instances when candidates may be unable to withdraw or be replaced after the special primary election.

AS 16.43

**ALASKA'S LIMITED ENTRY PROGRAM IS INCOMPATIBLE WITH THE METLAKATLA INDIAN COMMUNITY'S OFF-RESERVATION FISHING RIGHTS.**

The Metlakatla Indian Community moved to the Annette Islands in Southeast Alaska in 1887. Congress passed a federal statute recognizing the Community and establishing the Annette Islands as a reservation in 1891. In 1973, Alaska enacted a limited entry program to regulate commercial fishing under art. VIII, sec. 15, of the Alaska Constitution. In 2020, following changing conditions threatening fish stocks availability, the Community sued Alaska officials in federal court alleging that the state's limited entry program illegally restricts their right to fish outside reservation boundaries. The defendants moved to dismiss the action, and the federal district court held in their favor on the grounds that the 1891 Act did not reserve off-reservation fishing rights for the Community and its members.

On appeal, the Ninth Circuit Court of Appeals acknowledged the implied fishing rights of the Community established under prior precedent interpreting the 1891 Act. It determined the scope of that right by analyzing the history of the Community and Congress's intent in enacting the 1891 Act. The court held that the 1891 Act preserved for the Community and its members an implied right to nonexclusive off-reservation fishing in their traditional fishing grounds for personal consumption, ceremonial, and commercial purposes. The court remanded for further proceedings on the issue of whether the Community's traditional off-reservation fishing grounds included the waters within Alaska's Districts 1 and 2. Nevertheless, the court held that the current administration of the state's limited entry program is incompatible with the Community's off-reservation fishing rights and any regulation by the state of off-reservation fishing by the Community must be consistent with those right.

In reaching its holding, the court rejected several state arguments premised on distinguishing features of the Community's reservation, which the state argued required the court to analyze the Community's rights differently from the rights of other tribes. The court declined to distinguish based on the type of legal instrument used to establish the reservation; the state's rejected assertion that the Community had no aboriginal claims to preserve; the provision of Annette Islands to the Community by gift, rather than forced exchange;

and the state's rejected argument that the 1891 Act showed a lack of intent to convey off-reservation fishing rights.

*Metlakatla Indian Cmty. v. Dunleavy*, 58 F.4th 1034 (9th Cir. 2023).

Legislative review is not recommended unless the legislature wishes to address the incompatible regulations in statute.

AS 22.15.120(a)(6)

**STATUTORY REQUIREMENT THAT A DEFENDANT CONSENT IN WRITING BEFORE A MISDEMEANOR CASE IS TRIED BY A MAGISTRATE MAY NOT BE WAIVED OR FORFEITED BY COUNSEL'S ACTIONS; FAILURE TO COMPLY REQUIRES REVERSAL.**

A defendant was convicted of two misdemeanors following a jury trial presided over by a magistrate judge. AS 22.15.120(a)(6) authorizes a magistrate to "hear, try, and enter judgments" in a misdemeanor case only "if the defendant consents in writing that the magistrate may try the case." The defendant was not informed that the case could not be tried before a magistrate without the defendant's consent, the defendant did not provide written consent as required by AS 22.15.120(a)(6), and the record did not indicate that the defendant provided oral consent. On appeal, the defendant argued lack of consent required reversal of her convictions and that this could be raised for the first time on appeal because absence of consent deprived the trial court of subject matter jurisdiction. The state countered that because the defendant's lack of consent was procedural error, she must show plain error to raise it for the first time on appeal.

The Alaska Court of Appeals looked at an analogous federal provision, 18 U.S.C. 3401, as construed by federal cases that reversed convictions where the defendant's express consent was lacking. Instead of addressing whether defendant's lack of consent deprived the magistrate of jurisdiction, the court examined whether the defendant's right to be tried before a district court can be waived and whether the waiver must be express. The court held that AS 22.15.120(a)(6) requires express waiver by the defendant, which cannot be waived or forfeited by counsel's failure to raise the issue before the trial court. The court held that the defendant could raise the issue for the first time on appeal and was not required to show plain error. Noting the legislature's policy reasons for limiting

magistrate authority based on magistrates' lesser qualifications and experience as compared to district court judges, the court reasoned that allowing waiver by mere inaction of counsel would frustrate the legislature's clear intent. The court therefore concluded that failure to comply with AS 22.15.120(a)(6) required reversal of the defendant's convictions and remanded the case to the trial court.

*Tommy v. State*, 531 P.3d 365 (Alaska App. 2023).

Legislative review is not recommended.

AS 25.25.205(a)

**ALASKA COURTS MAY MODIFY A LAPSED CHILD SUPPORT ORDER FOR A DISABLED ADULT CHILD THAT IS REQUESTED AFTER THE CHILD REACHES 18 YEARS OF AGE PROVIDED THE LAPSED ORDER IS NOT SUPERSEDED AND THE COURT OTHERWISE RETAINS JURISDICTION.**

A married couple with one son separated, and the mother moved out of state with the son. At age seven, the son was diagnosed with Asperger's, and at age 18, he was diagnosed with autism spectrum disorder, attention deficit hyperactivity disorder, and oppositional defiance disorder. The father paid child support under an order issued by Alaska's Child Support Services Division (CSSD) until the son turned 19. The father filed for divorce when the son was 22; the trial court found the son so disabled he was not reasonably able to support himself and ordered the husband to pay post-majority child support. The father appealed, arguing that the trial court lost jurisdiction when the son turned 19 and the original CSSD child support order expired and that the amount he was ordered to pay constituted an abuse of discretion by the court.

On review, the Alaska Supreme Court affirmed the trial court's jurisdiction but remanded to the trial court for reconsideration of the support amount owed and why contributions made by the child for his own living expenses should not reduce the father's obligation dollar-for-dollar. The court held that, under AS 25.25.205(a) and 28 U.S.C. 1738B9(d), Alaska had continuing, exclusive jurisdiction over child support in the matter because CSSD qualifies as an Alaska tribunal, the original child support order was issued under Alaska law, the superior court has authority to modify orders issued by CSSD, the original order was never superseded, and the father was an

Alaska resident at the time of modification.

The court found the request for post-majority child support was a modification to the original child support order rather than a request for a new order because federal law defines "modification" in the child support context as a change "that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order" and the requested change affected the order's duration. The court found Alaska courts may order post-majority child support for a disabled adult child that is requested after a child turns 18. The court cited its previous decision, which held that evidence that an adult child is incapable of supporting themselves may overcome emancipation and that statutory authority to issue child support orders is not limited to claims involving minor children, and affirmed the superior court's finding that the presumption of emancipation was overcome in this case.

*Daum v. Daum*, 518 P.3d 718 (Alaska 2022).

Legislative review is not recommended.

AS 28.35.182(a)(1)
AS 28.35.400

**FIRST-DEGREE FAILURE TO STOP UNDER AS 28.35.182(a)(1) REQUIRES FAILURE TO STOP AND RECKLESS DRIVING, WHICH IS "A GROSS DEVIATION" FROM THE STANDARD OF CARE A REASONABLE DRIVER WOULD OBSERVE.**

After exceeding the speed limit by up to 25 miles per hour on a clear, dry day and partially straying into the other lane of traffic, a defendant was found guilty of failure to stop at the direction of a peace officer and reckless driving, which the trial court merged into a single first-degree failure to stop conviction. The defendant appealed, arguing there was insufficient evidence to establish the offense of reckless driving, which increased failure to stop to a felony. In order to be charged and convicted of first-degree failure to stop, under AS 28.35.182(a)(1), a defendant must simultaneously commit second-degree failure to stop and the offense of reckless driving. The offense of reckless driving under AS 28.35.400(a) requires driving "in a manner that creates a substantial and unjustifiable risk of harm to a person or to property[,]" with "substantial and unjustifiable risk" defined as "a risk of such a nature and degree that the conscious disregard of it or a failure

to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

On appeal, the defendant argued the evidence failed to show his driving created a "substantial and unjustifiable risk of harm" that was a "gross deviation" from the standard a reasonable driver would employ. The Alaska Court of Appeals reviewed the record, its precedent that a person need not endanger anyone to commit the crime of reckless driving, and the legislative history behind first-degree failure to stop. During the 2002 amendment narrowing the circumstances of AS 28.35.182(a), the legislative history included statements that felony failure to stop "requires something above and beyond a basic traffic violation" and is "intended for the most egregious circumstances." The court held defendant's conduct, in context, did not rise to a "gross deviation" and reversed his conviction for failure to stop at the direction of a peace officer in the first degree, but remanded for entry of conviction and resentencing on failure to stop in the second degree, which does not require proof of reckless driving.

*Ambacher v. State*, 521 P.3d 604 (Alaska App. 2022).

Legislative review is not recommended.

AS 34.03.160(b)
AS 34.03.350

**UNIFORM RESIDENTIAL LANDLORD TENANT ACT PERMITS NON-ECONOMIC DAMAGES FOR HABITABILITY VIOLATIONS, BUT PERSONAL INJURY CLAIMS ARE NOT COVERED; COURT CANNOT REDUCE ATTORNEY'S FEES BASED ON DISPARITY BETWEEN FEE AND DAMAGES AWARDS.**

A landlord tried to evict a tenant for nonpayment of rent, and the tenant counterclaimed under Alaska's Uniform Residential Landlord Tenant Act (URLTA). Litigation resulted in mixed success for both parties. Eviction was denied, the court entered summary judgment against the tenant's personal injury claim, and a jury found in favor of the landlord on the tenant's retaliatory eviction and security deposit claims and found in favor of the tenant on her misrepresentation and emotional distress for mold exposure claims, awarding modest damages. The superior court held URLTA's provision authorizing full reasonable fees to the prevailing party did not apply to all the

tenant's claims and awarded the tenant partial attorney's fees under a "blended analysis" applying Civil Rule 82 and URLTA's attorney's fee provision, depending on the claim. The court deducted the portion of the tenant's attorney's fees incurred for the unsuccessful personal injury claim and then, under Alaska Civil Rule 82, deducted 80 percent of the landlord's attorney's fees incurred defending against it. The court halved the tenant's remaining fees due to the disparity between the fees and actual award, reasoning URLTA's attorney's fee provision "should not be applied as if it were a guarantee of full employment for lawyers."

On appeal, the landlord argued the superior court erred in awarding damages for emotional distress under AS 34.03.160(b), which allows a tenant to recover damages for a landlord's noncompliance with AS 34.03.100(a)'s warranty of habitability. The tenant argued the trial court should have only applied URLTA's fee provision to award her full reasonable attorney's fees instead of crediting the landlord for fees incurred defending the personal injury claim. While describing the issue as a "close call," the Alaska Supreme Court held URLTA permits recovery of non-economic damages for habitability violations. The court analyzed the lack of legislative intent, common harms caused by habitability violations, and the text and structure of the URLTA statutes. The court declined to adopt Oregon Supreme Court precedent requiring deliberate conduct before awarding damages for psychological harm because of the differences in Alaska's version of URLTA and the implied legislative intent behind it.

The court upheld the trial court's application of Civil Rule 82 to the tenant's personal injury claim because URLTA's fee-shifting provision, AS 34.03.350, only applies to claims arising out of URLTA. The court reasoned a suit for personal injury is not one of the "rights and remedies" granted to tenants and therefore does not trigger URLTA's anti-retaliation provision. The court differentiated URLTA claims from common law tort actions, including personal injury claims based on premises conditions.

The court, however, found the superior court erred in reducing the tenant's attorney's fee award because of the disparity between the fees incurred and her damages recovery. Noting the generally modest awards for URLTA violations and how expensive an attorney's time is, the court held it would undermine the policy behind URLTA's full fee provision to discount attorney's fees solely because of a tenant's modest

monetary recovery.

*Guilford v. Weidner Inv. Servs., Inc.*, 522 P.3d 1085 (Alaska 2023).

Legislative review is not recommended unless the legislature does not intend URLTA to allow non-economic damages for habitability violations or the legislature wants to address attorney's fees awarded under URLTA.

AS 38.05.265(b)

**A MINING CLAIM MAY BE CURED AFTER A SUBSEQUENT CLAIMANT CLAIMS AND ABANDONS THE CLAIM.**

In 1994, a mining company located and recorded a number of mining claims. The mining company abandoned its mining claims in 2008 by failing to file statements of labor as required by AS 38.05.265(a), and a second mining company located and recorded the claims in 2011. The second mining company's successor abandoned the claims in 2016. In 2017, the first company attempted to cure its earlier abandonment under AS 38.05.265(b), and two months later, a third mining company attempted to locate and record some of the claims. The Department of Natural Resources (DNR) refused to issue permits for the claims to the third company. It reasoned that the first company validly cured its claims before the third company located them and, at the time of first company's attempt to cure, the second company had abandoned its claims so there were no active intervening claims preventing the cure. DNR also held the two-year statement of labor amendment deadline under AS 38.05.210(c) did not control the deadline to cure, and AS 38.05.265(b) did not place a time limit on a party's ability to cure its abandonment. The third company appealed, and the superior court reversed DNR's decision.

The superior court applied independent review to DNR's interpretation of AS 38.05.265(b) instead of the reasonable basis standard. AS 38.05.265(b) provides a person may cure an abandoned mining claim "[u]nless another person has located a mining claim . . . that includes all or part of the mining claim or leasehold location abandoned." The superior court interpreted the word "location" to mean physical staking of the claim with markers, which prevented the first mining company from curing abandonment once its stakes were replaced. The superior court also found the attempt to cure a decade after

abandonment fell outside the legislative purpose of the statute.

On appeal, the Alaska Supreme Court clarified that a reasonable basis standard is the proper standard to review DNR's interpretation of AS 38.05.265(b) given DNR's expertise in administering mining claims and that the question is not a purely legal one. While the court acknowledged the plain language of AS 38.05.265(b) was consistent with DNR's interpretation, it found AS 38.05.265(b) was ambiguous because, as DNR conceded, the use of "has located" in the statute was open-ended and undefined. The court found the legislative history and purpose of AS 38.05.265(b) was to prevent a prior owner from using the cure provision to displace rights acquired by a party who located a claim after abandonment, but this was not dispositive because the area at issue had no claims when the right to cure was exercised. The court rejected the argument that AS 38.05.265(b) requires a company to re-stake and place monuments and found DNR's interpretation of AS 38.05.265(b) accorded with the Alaska Land Act's purpose of maximizing revenue for the state and was therefore reasonable.

The court held DNR reasonably concluded the first mining company abandoned its claims in 2008, rather than 2001, because its failure as a foreign corporation to amend its certificate of authority did not constitute abandonment under AS 38.05.265(a). Finally, the court upheld as reasonable DNR's interpretation that the two-year statement of labor amendment deadline under AS 38.05.210(c) was irrelevant to the ability to cure under AS 38.05.265(b). A statement that fails to set out essential facts is void and could not be amended, so the only remedy for the void statement and resulting abandonment was curing under AS 38.05.265(b), which has no time limit.

*Teck Am. Inc. v. Valhalla Mining, LLC*, 528 P.3d 30 (Alaska 2023).

Legislative review is not recommended unless the legislature wishes to prohibit the curing of an abandoned mining claim following location and subsequent abandonment by an intervening party.

AS 46.03.710
AS 46.03.760
AS 46.03.780
AS 46.03.822
AS 46.03.826(5)

**SULFOLANE IS A HAZARDOUS SUBSTANCE UNDER AS 46.03.826(5).**

Beginning in 1977, Williams owned and operated a North Pole refinery on land leased from the state. In 1985, Williams began using sulfolane, a highly water-soluble solvent, in its refining. The sulfolane migrated into groundwater through means such as leaks and spills and was found in the refinery's groundwater in 1996. Williams did not report this to the Alaska Department of Environmental Conservation (DEC) until 2001. At that time, DEC did not regulate sulfolane as a hazardous substance, although DEC advised Williams it was potentially toxic and highly mobile. DEC instructed Williams to sample groundwater until it found the contamination source, but could stop if data remained unchanged and the source unidentified. Williams stopped sampling in 2002. Williams used foams containing per- and polyfluoroalkyl substances (PFAS), which were later found in the site's groundwater and soil. Williams sold the refinery to Flint Hills in 2004 under an agreement governed by Texas law under which Williams retained most environmental liabilities. The agreement capped future indemnification and listed exclusive remedies. Williams bought an environmental liability insurance policy. The agreement identified Flint Hills as responsible for future sulfolane releases as of April 1, 2004. In October 2004, DEC informed Flint Hills sulfolane was a regulated contaminant for which cleanup standards were forthcoming. By April 2019, the sulfolane extended into the City of North Pole's groundwater. Flint Hills and the state took steps to mitigate damages, including expanding the City's piped water system.

In March 2014, the state sued Williams and Flint Hills, seeking declaratory and injunctive relief and damages, alleging sulfolane is a hazardous substance under AS 46.03.826(5). Williams claimed the responsible landowner was the state, who could not transfer liability, and DEC was negligent during Flint Hill's ownership by allowing sulfolane to migrate off property. Flint Hills denied liability, claiming Williams and the state were responsible under AS 46.03.822(a), and counterclaimed against the state under AS 46.03.822(j), and against Williams under AS 46.03.822(j) and for indemnification under the purchase agreement. Williams crossclaimed against Flint Hills, alleging breach of their agreement, unjust enrichment under the environmental insurance policy, and negligence in allowing sulfolane contamination. Williams sought indemnification, contribution under AS 46.03.822(j), and application of the liability cap.

After finding onsite PFAS contamination, Flint Hills and the state filed additional claims against Williams. In 2016, the Alaska Supreme Court upheld the superior court's dismissal of Flint Hills' claims against Williams for contractual indemnification and contribution under AS 46.03.288(j) with respect to onsite, but not offsite, sulfolane contamination. In 2017, Flint Hills settled with the state and the City, agreeing to partially fund a piped water extension, and claims between the state and Flint Hills were dismissed. The trial court found sulfolane is a hazardous substance and Williams was strictly, jointly, and severally liable for its release and onsite PFAS and oil releases, allocating 75 percent responsibility for offsite sulfolane remediation costs to Williams and ordering damages for that portion of the state's response and oversight and damages for groundwater contamination. The court found Williams responsible for 75 percent of future state costs for the piped water system, held the state could recover that portion of DEC's future oversight costs, and ordered Williams to abide by Alaska law regarding monitoring, reporting, and cleanup of offsite sulfolane and onsite PFAS. The court found Flint Hills not responsible for onsite PFAS contamination and held Williams retained liability for offsite sulfolane contamination existing at transfer and Flint Hills was entitled to contribution. The court granted Flint Hills recovery from Williams for its equitable share of past offsite sulfolane response costs and future offsite remediation costs. The court ordered Williams to indemnify, defend, hold harmless, and reimburse Flint Hills for all onsite PFAS future claims and costs. The court dismissed Williams's claims against the state and Flint Hills.

The Alaska Supreme Court affirmed the trial court ruling that sulfolane is a hazardous substance under AS 46.03.826(5), which relied on testimony by officials and scientists about the public health and welfare danger and drew on federal circuit court decisions in interpreting "imminent and substantial danger to the public health" under AS 46.03.826(5)(A) to mean the threat of harm must be present although potential impacts may never develop or take time to develop, as well as Williams's admissions that sulfolane was a hazardous substance. The court found many releases were mixed with oil, and sulfolane wastewater was a petroleum-related byproduct under AS 46.03.826(5)(B) and AS 46.03.826(7). The court held sulfolane is a hazardous substance under AS 46.03.826(5)(C), which covers substances defined as hazardous under the federal Comprehensive Environmental Response, Compensation, and Liability Act, because the federal Environmental Protection Agency treated sulfolane as

hazardous when released in Puerto Rico. The court upheld the interpretation of "imminent" as comporting with the term's plain definition and aligning with federal case law on like terms. The court affirmed Williams's liability for response costs relating to the piped water system as reasonable resolutions to groundwater contamination and affirmed costs to the state and Flint Hills under AS 46.03.822. The court upheld Williams's responsibility under AS 46.03.760(a) because AS 46.03.822 imposes strict liability so that polluters, not the public, bear costs.

The court remanded for injunctive relief relating to PFAS claims as lacking enough specificity to satisfy Civil Rule 65(d) requirements for an injunction, although it found the court did not err in granting declaratory relief because Williams released the PFAS during its tenure and presented no evidence to establish Flint Hills used PFAS during its time or was a responsible party under AS 46.03.822. The court rejected Williams's due process claim, finding it possible that the hazardous substance provisions of AS 46.03.822 and statutory definition of "hazardous substance" in AS 46.03.826(5) could be vague in some instances, but sulfolane falls within the "hard core" of the definition of hazardous substance and Williams itself treated it as hazardous. Finally, the court analyzed the contractual indemnification provisions under Texas law and upheld the superior court's rulings regarding the parties' allocation of liabilities and remedies based on contract language and extrinsic evidence.

*Williams Alaska Petroleum, Inc. v. State*, 529 P.3d 1160 (Alaska 2023).

Legislative review is not recommended.

AS 47.10.080(s)
AS 47.14.100(e)

**THE CLEAR AND CONVINCING EVIDENCE STANDARD OF REVIEW APPLIES TO ALL PLACEMENT TRANSFERS BY THE OFFICE OF CHILDREN'S SERVICES.**

The Office of Children's Services (OCS) removed a child, Gene, from his parents and placed him with Robert and Vivian, the grandparents of his half-siblings. Because they were not related to Gene, Robert and Vivian had to obtain a foster care license. Timothy, the father of Gene's half-siblings, lived with Robert and Vivian, but had a criminal history of

barrier crimes barring him from living in Gene's foster home without a variance. Timothy agreed to live elsewhere, which allowed Robert and Vivian to obtain an emergency foster care license. OCS later removed Gene from Vivian and Robert and transferred him to live with Gene's cousin by marriage after discovering Timothy had been having unsupervised contact with Gene and living on the property in violation of foster care rules. One of Gene's parents challenged the transfer, and the court affirmed OCS's decision.

On appeal, Gene's parent argued the superior court erred by applying abuse of discretion review to OCS's decision, rather than "clear and convincing evidence that the transfer would be contrary to the best interests of the child" as described in AS 47.10.080(s) and Child in Need of Aid Rule 19.1(b). OCS argued that the superior court applied the clear and convincing evidence standard. OCS also argued that the clear and convincing evidence standard is not controlling in all situations, such as when OCS seeks to transfer a child to a placement with higher priority under AS 47.14.100(e) or when the existing placement's conduct violates foster care licensing requirements. In those situations, OCS argued a party challenging the transfer must make an additional showing that the proposed transfer is an abuse of OCS's discretion.

The Alaska Supreme Court held the superior court improperly applied AS 47.10.080(s) in two ways. First, it did not apply the clear and convincing evidence standard required. Second, it focused on whether Gene staying with his cousin by marriage and whether moving him back to Robert and Vivian would be in his best interest, rather than whether the initial transfer from Robert and Vivian itself was in his best interest. After reviewing the text and legislative history, the court determined that the legislature intended to apply the clear and convincing evidence standard to all placement transfers under AS 47.10.080(s). The court determined that, while the text of AS 47.14.100 does not require abuse of discretion review, judicial precedent adopted that standard of review for placement decisions generally. However, in enacting AS 47.10.080(s), the legislature changed the standard of review specifically for placement decisions that involve placement transfers. The court also noted that requiring abuse of discretion review for a proposed transfer to a higher-priority placement would subordinate AS 47.10.080(s)'s policy of limiting a child's placements to AS 47.14.100(e)'s policy of placement with family and friends. The court rejected OCS's argument that the legislature only intended the clear and

convincing evidence standard of AS 47.10.080(s) to apply when a child is transferred from one nonrelative foster family to another or when the department continues to approve the existing placement. Instead, a party challenging a proposed transfer to a higher priority placement need only show clear and convincing evidence that the proposed transfer is contrary to the child's best interests, not an abuse of discretion.

*Blythe P. v. Dep't of Health & Soc. Servs., Off. of Children's Servs.*, 524 P.3d 238 (Alaska 2023).

Legislative review is not recommended unless the legislature does not intend for the clear and convincing evidence standard of review to apply to all placement transfers by OCS.

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