

ALASKA: CONSERVATIVE STATE, LIBERAL JUDICIARY

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Politically, Alaska is one of the most conservative states in the union. However the "merit selection system" used to appoint judges and justices has resulted in a very liberal judiciary. The Alaska Supreme Court has used a privacy clause within the Alaska State Constitution to impose some very liberal legal interpretations on the state, including laws in the area of rights to abortion. These interpretations go far beyond those of the United States Supreme Court ("USSC") in expanding on the abortion right. The Alaska courts have not gone as far in other areas of pro-life interest.

I. LIFE ISSUES

In the past decade, the Alaska Supreme Court has gone far beyond the United States Supreme Court ("USSC") in making it difficult for the legislature or governor to restrict or limit abortions, using the state constitution as its weapon. The Court has found a hospital that does not wish to allow elective abortions can nonetheless be forced to do so and that the state Medicaid program must pay for abortions for poor women. The Court may be poised to disallow a Parental Consent to Abortion ("PCA") law as well, even though the Act clearly meets federal standards. On end-of-life issues, there is one Alaska Supreme Court decision, which takes a more moderate path, refusing to find a constitutional right to physician-assisted suicide. There have been no opinions on cloning, embryo research, or protection of the unborn from criminal violence.

Abortion

Valley Hospital is a nonprofit association which operates the only hospital in the Matanuska-Susitna Valley north of Anchorage. The association board implemented a new policy on performance of abortions at the hospital, restricting the circumstances under which abortions could be performed there. As a result, there was nowhere in the greater Anchorage area where someone could obtain an elective second trimester abortion. A pro-abortion group

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challenged the new regulations as infringing on the right to privacy of those seeking abortions.

In a unanimous decision (4-0, with one justice not participating), *Valley Hospital Association, Inc. v. Mat-Su Coalition for Choice*,² the Alaska Supreme Court held Valley Hospital was a quasi-public institution, based on a variety of grounds: It had originally been built on land given to it by the government, much of its work was reimbursed by government funds, it had an effective monopoly as a result of the fact hospitals can only be built if they obtain a certificate of need from the state, and it was an open membership organization anyone could join. As a quasi-public institution, the hospital was subject to the same restrictions the government itself had to observe.

The Court went on to find that since it was a quasi-public institution, and since the specific privacy section in the Alaska Constitution³ effectively guaranteed a right to abortion, Valley Hospital could not legitimately have a policy restricting abortions to that extent. In doing so, the Court found a contrary state statute,⁴ which granted hospitals freedom of conscience with regard to abortion, to be unconstitutional.

The Court mentioned, but did not reach, the issue of whether a religiously based hospital, which otherwise qualified as a quasi-public institution, could or could not restrict abortions.

The opinion of the Court was written by Chief Justice Roger Compton, who has since retired. Joining him were Justice Rabinowitz, also retired, and Justices Warren Matthews and Robert Eastaugh, who are both still on the Court. There were no dissents or concurrences. Justice Dana Fabe, the current Chief Justice who was an associate justice at the time, did not participate. She had been the trial judge in the case before being appointed to the Supreme Court.

In *State v. Planned Parenthood of Alaska*,⁵ the Court addressed the issue of parental consent to abortion. The Legislature had enacted a parental consent to abortion law⁶ that was

² 948 P.2d 963 (Alaska 1997).

³ ALASKA CONST. art. I, § 22 (“The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.”).

⁴ ALASKA STAT. § 18.16.010(b) (1997) (“Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.”).

⁵ 35 P.3d 30 (Alaska 2001).

⁶ ALASKA STAT. § 18.16.010(a)(3) (2007); ALASKA STAT. § 18.16.020–.030 (2007).

closely tailored to follow the dictates of the USSC. It affected only girls 16 years old and younger and included judicial bypass and emergency procedures. Planned Parenthood and two abortionists challenged the law on the grounds it violated the state constitution, under either the specific privacy clause of the state constitution or under equal protection. On equal protection grounds, the trial judge granted summary judgment to the plaintiffs.

In a split decision (3-2), the case was remanded to the trial judge to hold evidentiary hearings. The majority found it was possible the state might be able to establish there was a compelling state interest sufficient to infringe on the privacy rights of minor girls. The majority also held that under Alaska's sliding scale approach to equal protection, since this involved a fundamental right, the State would have to prove it had a compelling state interest and that this was the least restrictive means of addressing the problem. The majority made clear the fact the individuals were minors did not mean they did not have full constitutional rights but declared it to be a question of fact whether the State could meet constitutional standards and, therefore, found that summary judgment was inappropriate.

The dissenters argued summary judgment should have been granted to the state, because the PCA clearly met federal constitutional standards, and there were undeniably sufficient grounds for this statute to be upheld, both on privacy and equal protection grounds.

Justice Alex Bryner wrote the majority opinion, remanding for additional findings, and was joined by Justices Robert Eastaugh and Dana Fabe. Justice Warren Matthews wrote the dissent, arguing the PCA statute should be upheld, and he was joined by Justice Walter Carpeneti. All five of these justices are still on the Court.

On remand, the same trial judge held lengthy hearings and declared the State had not met its burden. The case has again been appealed to the Alaska Supreme Court and is awaiting a decision. As of the beginning of February 2007, there is a draft opinion circulating.

The Court has also addressed the issue of Medicaid payment of abortion. An Alaska state regulation⁷ allowed for Medicaid to pay for abortions only when the life of the mother was in

⁷ ALASKA ADMIN. CODE tit. 7, § 43.140(a) (2000) ("Payment for an abortion will, in the department's discretion, be covered under Medicaid if the physician's services invoice is accompanied by certification that the (1)life of the mother would be endangered if the pregnancy were carried to term; (2)pregnancy is the result of an act of rape or incest.").

danger or when the pregnancy was the result of rape or incest. In *Dep't. of Health & Soc. Servs. v. Planned Parenthood of Alaska*,⁸ the Court found (5-0) this violated the state constitution's equal protection clause,⁹ since once the state undertook to pay for medical care for poor people generally, it could not discriminate against those who chose to abort.

The trial court also found the regulation violated the specific privacy clause of the Alaska constitution,¹⁰ but the Supreme Court declined to reach that issue, since the equal protection clause resolved the case. The Court declared abortion a fundamental right, so that the highest level of scrutiny (compelling state interest and most restrictive means to accomplish that interest) was applied. The Court allowed the possibility the State could refuse to pay for "purely elective" abortions, emphasizing this case was about "medically necessary" abortions. Rather than specifically defining the term, the Court gave some examples of "medically necessary," which fell somewhat short of the literal meaning of "necessary." The regulation in question had already made exceptions for rape, incest, and danger to the life of the mother. The Court seemed to include any situation in which the mother's health might be endangered; and the decision includes language suggesting even if all of what it terms "medical necessity" was allowed, it might nonetheless hold the regulation unconstitutional.¹¹

The opinion of the Court was written by Chief Justice Dana Fabe and joined by Justices Warren Matthews, Robert Eastaugh, Alex Bryner, and Walter Carpeneti, all of whom are still on the Court. There were no concurrences or dissents.

Protection of the unborn from criminal violence

The Alaska Supreme Court has not addressed any cases in this area of state law.

Assisted Suicide

In *Sampson v. State*,¹² two plaintiffs challenged the state statutes banning physician-

⁸ 28 P.3d 904 (Alaska 2001).

⁹ ALASKA CONST. art. I, § 1 states in relevant part: "This constitution is dedicated to the principles that ... all persons are equal and entitled to equal rights, opportunities, and protection under the law..."

¹⁰ See ALASKA CONST. art. I, § 22.

¹¹ "Indeed, a woman who carries her pregnancy to term and a woman who terminates her pregnancy exercise the same fundamental right to reproductive choice. Alaska's equal protection clause does not permit governmental discrimination against either woman; both must be granted access to state health care under the same terms as any similarly situated person." *Dept. of Health & Soc. Servs.*, 28 P.3d at 913.

¹² 31 P.3d 88 (Alaska 2001).

assisted suicide.¹³ Looking at the history of the Alaska Constitution, the Court determined (5-0) assisted suicide is not a fundamental right. It then rejected the challenge on both privacy and equal protection grounds, emphasizing the strong state interest in protecting the terminally ill from undue influence based on their vulnerability. The Court accepted the traditional distinction between acts of omission (such as not treating an unwilling terminal patient) and acts of commission (actively assisting suicide), allowing that the former may be a fundamental privacy right, while the latter may not be.

The opinion of the Court was written by Justice Alex Bryner and joined by Justices Dana Fabe, Warren Matthews, Robert Eastaugh, and Walter Carpeneti. All of those justices are still in the Court. There were no concurrences or dissents.

Cloning

The Alaska Supreme Court has not addressed any cases in this area of state law.

Destructive embryo research

The Alaska Supreme Court has not addressed any cases in this area of state law.

II. JUDICIAL RESTRAINT

The Alaska Supreme Court has long been one of the most radically activist in the nation. Typically, the Court relies on the Alaska Constitution for its activism and, in particular, on the vague privacy clause added to the Constitution in 1972.¹⁴

For example, the Court has found the Alaska Constitution protects nude dancing as protected speech, *Mickens v. Kodiak*;¹⁵ that it prevents the State from prosecuting possession of small amounts of marijuana in the home, *Ravin v. State*;¹⁶ and that state and local governments must offer the same employment benefits to same-sex couples they offer to married couples, *Alaska Civil Liberties Union v. State*.¹⁷ And, of course, there are *Valley Hospital*,¹⁸ discussed

¹³ ALASKA STAT. § 11.41.120(a)(2) (2007) (“A person commits the crime of manslaughter if the person...intentionally aids another person to commit suicide...”).

¹⁴ “The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section”. Alaska const. Art. I, section 22.

¹⁵ 640 P.2d 818 (Alaska 1982).

¹⁶ 537 P.2d 494 (Alaska 1975).

¹⁷ 122 P.3d 781 (Alaska 2005).

above and one of the few judicial decisions in the U.S. forcing an unwilling entity to participate in abortions, and *Planned Parenthood (Medicaid)*,¹⁹ forcing the State to pay for abortions, both of which take the abortion right far beyond what the USSC has required.

In *Fardig v. Anchorage*,²⁰ an Alaska Court of Appeals case involving abortion clinic free speech, appellant was a pro-life activist handing out leaflets in the parking lot of an abortion facility. She was asked by the clinic coordinator and the facility director to leave, and she refused. She pled to trespass charges, based on violation of a local ordinance,²¹ while reserving her right to appeal on the law.

Appellant argued the First Amendment (or the state constitution's equivalent)²² preserved her right to free speech in the parking lot. She argued the clinic was a quasi-public facility and, therefore, state action was implicated. However, the Alaska Court of Appeals, which is the first level appeals court for criminal cases, found there was insufficient support for this, noting three-fourths of the facility's funding came from patient's private payments or insurance. Alternatively, appellant argued that even if the parking lot was private property, the Alaska Constitution's free speech clause should be found to apply to private property. The court found the fact that there had been shopping center and university free-speech cases in which private property was found to be subject to free-speech requirements did not overcome the autonomy of a small proprietor in the conduct of its business.

Though this case was before the Court of Appeals, two of the judges are now on the Supreme Court. Justice Bryner was at the time the chief judge of the Court of Appeals, and Justice Fabe, who at the time was a Superior Court judge, was sitting on the court temporarily to fill a vacancy. The third member of the court was Judge Robert G. Coats, who wrote the opinion, and he continues to sit on the Alaska Court of Appeals. The decision was 3-0, with no concurrences or dissents.

¹⁸ 948 P.2d 963 (Alaska 1997).

¹⁹ 28 P.3d 904 (Alaska 2001).

²⁰ 785 P.2d 911 (Alaska Ct. App. 1990).

²¹ ANCHORAGE MUN. CODE § 9.36.240 (1996) ("It is unlawful for any driver, passenger, pedestrian or other person to enter or remain within a public or private parking lot in violation of a clearly visible sign posted by the owner or operator of such lot, which sign sets forth rules of occupation of the said lot during specified times.").

²² ALASKA CONST. art. I, § 5 states in relevant part: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

The Court has assumed very broad powers for itself. For instance, the Court does not feel bound by USSC interpretations of identical federal constitutional clauses when interpreting the Alaska constitution, *Swanner v. Anchorage Equal Rights Comm'n*,²³ and feels free to interpret the state constitution to find rights and privileges “within the intention and spirit of our local constitutional language... necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.” *Baker v. Fairbanks*.²⁴

III. THE COURT

To an outside observer, it must seem curious Alaska, a solidly red state, has produced a state Supreme Court that has taken some of the most radically liberal positions of any state on social issues. After all, the last time a Democrat won the state’s three electoral votes was Lyndon Johnson in 1966, and in the last nine presidential elections, the Democratic nominee has never even reached 37%. Since 1980, all three of the members of Alaska’s congressional delegation have been Republicans, and both chambers of the Alaska Legislature are solidly Republican (The state senate is now run by a bipartisan coalition, but the majority is Republican.). The answer to this puzzle lies partly in Alaska’s system for selecting judges and partly in several odd quirks of happenstance that gave Alaska a liberal Democratic Governor for eight years during the 1990s.

Judges and justices in Alaska are chosen through a “merit selection” system in which the top candidates for a vacancy are chosen by the Judicial Council, which forwards a few names to the governor, who then makes the final choice. The Judicial Council is composed of three lawyers chosen by the Alaska Bar Association, three non-lawyers chosen by the governor, and the Alaska chief justice as the tiebreaker. Before considering candidates, the Council conducts a “bar poll,” in which Alaska’s lawyers rate the candidates. The bar poll is historically the most important factor in deciding who makes the final cut. Typically, only two or three candidates are forwarded to the governor, whose options are thereby limited. Since Alaska’s lawyers, like lawyers in most of the United States, tend to the left, very few conservatives are able to get their

²³ 874 P.2d 274, 280-1 (Alaska 1994).

²⁴ 471 P.2d 386, 402 n.26 (Alaska 1970).

names to the governor to have a chance of making it to the bench.

There is also a system for judicial retention elections. A judge or justice, once selected, must stand for retention at the first general election more than three years after his appointment, and then every so often after that. In the case of Court justices, it is only once every 10 years after that first election. However, the elections are up-or-down affairs with no opponent. The Judicial Council rates the incumbents before the election, almost invariably recommending they all be retained, and then advertises in favor of a 'yes' vote on all candidates. As a result, it had been many years since any judge or justice was voted out of office when, in 2006, the Council recommended a lower court judge, David Landry, not be retained because of questionable conduct on the bench (He was voted out.). The unusual circumstances of that case do not suggest a change in the Council's attitude, and it is expected it will return to its previous pattern of blanket recommendations that all judges be retained.

Adding to the difficulty is that during a period of significant growth in Alaska, during which the size of the bench grew, the state had a liberal Democratic governor. In 1994, as a result of crossover voting in the open primary system, a pro-abortion, moderate/liberal candidate won the Republican primary election for governor. Many conservative voters abandoned the state Republican Party in the general election and instead voted for a conservative independent, allowing Democrat Tony Knowles to win the election with a plurality. Four years later, it appeared likely Knowles would go down to defeat, until just after the primary when it was revealed the Republican nominee had possible organized crime links. The state Republican Party attempted to persuade their candidate to withdraw from the ticket. He refused, and the party endorsed a write-in candidate. Again, Knowles won the election against divided opposition. Three of the five justices of the Alaska Supreme Court were appointed by Governor Knowles, accounting in part for its leftward direction.

The prognosis is guarded. It is likely most future governors will be on the conservative side, as the state GOP has now successfully forced limitations on crossover voting. However, voters do not seem interested in voting out judges or justices and generally have no idea which judges to vote against anyway (The state Republican Party and state pro-life organizations have been largely absent from judicial retention elections). The Judicial Council system will ensure

conservative candidates will rarely have their names forwarded to the Governor.

On the positive side, in November 2006, a new Republican governor, Sarah Palin, was elected. In campaign statements, Ms. Palin periodically mentioned her concern over the judiciary and her desire to appoint more conservative judges. She has a number of experienced socially conservative attorneys advising her who may be in her kitchen cabinet on judicial appointments.

She will necessarily have the opportunity to appoint at least one Alaska Supreme Court Justice, because the Alaska Constitution requires Supreme Court Justices to retire at age 70, and Justice Matthews will reach that age in 2009.

The following table provides information on the current justices of the Alaska Supreme Court:

Member	Governor appointed by/Year	Term expiration	Miscellaneous
Warren Matthews	Hammond (R)/1977	2009 (Mandatory retirement at age 70)	<ul style="list-style-type: none"> - Biographical Information: Harvard J.D. 1964; private practice until named directly to the Court in 1977; no prior judicial experience - Judicial Evaluation: Amiable of disposition, his questioning is polite and to the point. Despite his age and longevity on the Court, he shows no sign of slowing down or slipping. - Noteworthy Opinions: Sided with the unanimous Court on <i>Valley Hospital</i> and <i>Planned Parenthood (Medicaid)</i>, the most radical of the abortion decisions to date. On the other hand, he wrote a dissent in <i>Planned Parenthood (PCA)</i> on the ground that the State

			clearly had a sufficient basis for the PCA. He joined the unanimous Court in <i>Sampson</i> , the assisted suicide decision.
Robert Eastaugh	Hickel (Independent)/ 1994	2008 (Next retention election)	<p>- Biographical Information: U. Michigan J.D. 1968, then served as Army captain; Assistant AG and DA for 4 years, then into commercial/civil litigation practice for 21 years; appointed directly to Supreme Court with no prior judicial experience; attends a Roman Catholic church (no other Justice lists any religious affiliation in their judicial application or official biographical materials).</p> <p>- Judicial Evaluation: Patrician and with a dry wit, his questioning is spare but pointed. He often inquires whether a party raised a particular issue below; he has said in CLE panels that he considers this quite important.</p> <p>- Noteworthy Opinions: He sided with the pro-abortion majorities in <i>Valley Hospital</i>, <i>Planned Parenthood (Medicaid)</i>, and <i>Planned Parenthood (PCA)</i>, and with the majority in <i>Sampson</i>, which rejected assisted suicide. As the only justice appointed by a conservative governor, he has been a disappointment to social conservatives.</p>
Dana	Knowles (D)/	2010 (Next	- Biographical Information: Northeastern J.D.

Fabe	1996	retention election)	<p>1976; joined public defender agency in 1977 and was appointed chief public defender for the state in 1981; named to Superior Court (upper-level trial court) in 1988; only woman ever to serve on Alaska Supreme Court.</p> <p>- Fabe's personal charm and influence are legendary. She was chosen for a 3-year term as Chief Justice by her colleagues after only 4 years on the Court; then after sitting out one term (because consecutive terms as CJ are not allowed) she was re-elected in the summer of 2006.</p> <p>- Noteworthy Opinions: She did not participate in <i>Valley Hospital</i>, because she had been the trial judge on the case; however her decision below was consistent with the Supreme Court's eventual decision forcing the hospital to allow abortions. There were rumors at the time that the unanimous decision in <i>Valley Hospital</i> was the result of the other justices not wanting to embarrass Fabe. She joined the majority in both <i>Planned Parenthood</i> cases, and <i>Sampson</i>, and she wrote the opinion in the <i>Planned Parenthood (Medicaid)</i> case. She served temporarily on the Court of Appeals, where she rejected the pro-life activist's free speech challenge in <i>Fardig</i>.</p> <p>- Other: She is active on panels related to gender</p>
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			equality in the court system, and is generally considered a feminist.
Alex Bryner	Knowles (D)/ 1997	2010 (Next retention election)	<p>- Biographical Information: Born in Russia and naturalized as a child; Stanford J.D. 1969; worked for public defender a few years, then in private general practice; 2 years on state District Court (lower court) bench before serving as U.S. Attorney under Pres. Carter; then served 17 years on Alaska Court of Appeals (hearing only criminal cases).</p> <p>- Judicial Evaluation: Known for aggressive questioning at oral argument, often on unexpected side issues, such as jurisdiction even when it hasn't been raised. Decisions are much more likely to be on technical grounds than the other justices. Not above using up a goodly portion of oral argument on a side issue. He also has a distinct historical bent, which shows in his <i>Sampson</i> opinion and which he has recently discussed in a CLE. He is particularly fond of the idea that the Alaska constitution has a historical basis which can serve in interpreting it.</p> <p>- Noteworthy Opinions: He was not yet on the Court for <i>Valley Hospital</i>. He wrote the majority opinion, remanding for factual findings, in <i>Planned Parenthood (PCA)</i>, as well as <i>Sampson</i> and joined the unanimous Court in <i>Planned</i></p>

			<i>Parenthood (Medicaid)</i> . He was on the Court of Appeals panel which decided <i>Fardig</i> against the pro-life activist.
Walter Carpeneti	Knowles (D)/ 1998	2012 (Next retention election)	<p>- Biographical Information: U.C. Berkeley J.D. 1970; worked at a variety of private practice jobs in Alaska and California before settling in as an assistant public defender 1974-78; went back into private civil practice before being named to Superior Court in 1981. He is the only commuting Justice; he lives in Juneau and flies up to Anchorage for oral arguments (the Alaska Supreme Court sits mainly in Anchorage, the largest city and commercial center, rather than in Juneau which is the capitol).</p> <p>- Judicial Evaluation: J. Carpeneti is cautious in questioning at oral argument, often waiting until later in the argument before chiming in.</p> <p>- Noteworthy Opinions: He was not on the Court until after <i>Valley Hospital</i>, and joined the dissent in <i>Planned Parenthood (PCA)</i> on the grounds that no evidentiary hearing was needed because the State clearly had sufficient basis for the PCA. He joined the unanimous Court in <i>Planned Parenthood (Medicaid)</i>, and in <i>Sampson</i>.</p>

CONCLUSION

Alaska is a politically conservative state, but the so-called “merit selection” system for appointment of judges and justices has provided this state with a liberal judiciary, including a state Supreme Court that has taken some of the most radically liberal positions in the nation. This has extended to the area of abortion, where the Court has found openings to go beyond what the United States Supreme Court has required in terms of abortion jurisprudence. So far, the Court’s liberalism has not led to remarkable or radical decisions in the area of end-of-life determinations. While there is some hope for a future move to the right that could presumably result in decisions somewhat more moderate, it is unlikely, at any time in the immediate future, there will be any meaningful restrictions on abortion-by-demand in Alaska.