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3 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
4 THIRD JUDICIAL DISTRICT AT ANCHORAGE

5 KATSUMI KENASTON)
6)
Plaintiff)
7)
v.)
8)
STATE OF ALASKA)
9)
Defendant)
10) No. 3AN-04-3485 CI

LAW OFFICES
FEB 2 3 2004
JAMES B. GOTTSTEIN

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12 **MEMORANDUM AND POINTS OF AUTHORITY IN SUPPORT OF MOTION TO DISMISS**

13 **INTRODUCTION**

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15 Plaintiff requests the court declare that "adequate funding and adequate
16 opportunity" of four boards[1] to perform duties are implied material terms of a settlement
17 of the *Weiss v. State* litigation.[2] The State of Alaska (state) requests the court to dismiss
18 the Complaint for Declaratory Judgement because there is no case or controversy
19 alleged in the Complaint sufficient to meet the requirements of the Alaska Declaratory
20 Judgment Act. In the alternative, the court, under the doctrine of separation of powers,
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23 [1] The Alaska Mental Health Board, the Governor's Council on Disabilities and Special Education, the Advisory Council on Alcohol and Drug Abuse, and the Alaska's
24 Commission on Aging (four boards). *See* AS 44.21.230, AS 44.29.140, AS 47.30.666, and AS 47.80.090.
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[2] 4FA-82-2208 CI
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should not interject itself into these matters until an actual decision is made regarding the budget and executive function issues raised in this Complaint.

BACKGROUND

In 1956, the United States Congress passed the Alaska Mental Health Enabling Act, which transferred to the Territory of Alaska authority to implement a comprehensive, integrated mental health program for Alaska, and granted one million acres to help fund that program.[3] In 1978, the Alaska Legislature passed legislation that redesignated all of the trust land as general grant land.[4] In 1982, a class action lawsuit was filed alleging breaches of trust.[5] The initial litigation resulted in the court finding that the state had breached the trust by redesignating the trust land as general land grant, ordered the land trust be reconstituted, and for lands already sold, granted the state a set-off equal to amounts the state had appropriated to fund mental health programs.[6] Post Weiss I, the parties made several attempts to settle case.[7] In 1994, after the trial court denied preliminary approval to the then most recent attempted settlement, the legislature passed legislation to help settle the then more than a decade

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[3] *State of Alaska v. Weiss*, 706 P.2d 681 (Alaska 1985) (Weiss I).

[4] *Id.*

[5] *Id.*

[6] *Id* at 682-84.

[7] *See* Ch. 48, SLA 1987, Ch. 66, 1991, and *Weiss v. State of Alaska*, 939 P.2d 380, 384-86 (Alaska 1997) (Weiss II).

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old lawsuit.[8] The litigation ended when the settlement was approved by the superior court and the Supreme Court in Weiss II.[9]

The basic terms of the Settlement included the reconstitution of a trust corpus with interests in over 900 million acres of land and $200 million appropriated into a trust fund.[10] One of the more significant aspects of the Settlement was the creation of the Alaska Mental Health Trust Authority ("Trust Authority").[11]

The Trust Authority is the trustee of the mental health trust, and administers the trust.[12] "The purpose of the [Trust Authority] is to ensure an integrated comprehensive mental health program."[13] To accomplish that purpose, the Trust Authority has a significant role the special budgeting process for mental health programs. The Settlement created a special budget process for mental health programs that provides political advantages to mental health program needs.[14] The Trust Authority develops a mental health budget, which is submitted to the Governor and legislature.[15] In addition,

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8 Chapter 5, FSSLA 1994, Chapter 1, SSSLA 1994, Chapter 2, SSSLA 1994.

9 *Weiss v. State of Alaska*, 939 P.2d 380 (Alaska 1997) (Weiss II).

10 *Id* at 386.

11 *Id* at 394-96.

12 AS 37.14.007, AS 47.30.011(c)(11).

13 AS 47.30.011(b).

14 *See* fn. 8 *infra*, AS 37.14.003, AS 37.14.005, and AS 47.30.046.

15 *Id*.

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the Governor creates a mental health budget separate from the state's operating and capital budgets.[16] The legislature considers the budget submitted by the Governor and eventually passes a budget for the Governor's signature or veto, including line-item veto. The Governor and legislature must provide up to three "reports" that explain differences between the Trust Authority recommended budget and the budget (1) the Governor submits to the legislature, (2) the legislature passes, and (3) the Governor signs (i.e., this last report explains line item vetoes). This happens each legislative session.[17] It should be noted that funding for the four boards is made under the separate mental health budget, and therefore is subject to all of these processes.

As part of this budget process, the four boards provide recommendations for the Trust Authority to review and consider regarding mental health beneficiary budget needs.[18] It is this duty by each of the four boards that apparently gives rise to Plaintiff's question whether the Settlement includes implied material terms that the four boards receive "adequate funding and adequate opportunity" to perform.[19]

It was contemplated under the Settlement that the Trust Authority would advocate on behalf of the trust beneficiaries to protect their interests. For example, the

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[16] *Id.*

[17] *Id.*

[18] AS 44.21.230(a)(10), AS 44.29.140(2), AS 47.30.666(6), and AS 47.80.090(13).

[19] *See* Exhibit A.

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Settlement provides that if the legislature materially alters or repeals any of the settlement legislation that constitute material terms of the settlement, that "the plaintiffs' sole remedy is a new action alleging that the mental health trust has not been adequately reconstituted and to seek such relief as may be appropriate in light of the plaintiffs' claims."[20] The Alaska Supreme Court noted:

> The [trial] court stated that, in the event of such legislative action, the class can move for relief from judgment under Civil Rule 60(b)(6). The trial court also relied on the expectation that the Trust Authority, as an advocate for the trust, will actively oppose any attempt by the legislature to make a material change in the terms of the settlement and remind the legislature of the possibility of another long and costly lawsuit against the State. The Trust Authority may also be in a position to influence the governor to veto any legislation, which makes a material change in this settlement.[21]

Thus, in addition to taking action to prevent a breach of the Settlement, the Trust Authority is an appropriate entity to help evaluate whether a proposed reorganization is a material change to the Settlement that is likely to improve the delivery of mental health services to beneficiaries. At present the Trust Authority, in accord with its duties, is engaging in a significant public review of the structure and function of the four boards.[22]

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[20] *See* Exhibit B at sec. VI, para 5, at p. 15.

[21] Weiss II, 939 P.2d 380, 396-97.

[22] *See* Exhibit C, Board Structure Scoping Document Dated January 9, 2004.

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In 2003, the Department of Health and Social Services undertook a massive reorganization.[23] One part of that reorganization was to create a new integrated Division of Behavioral Health – this division works on both substance abuse and mental health issues. This reorganization reportedly mirrors federal treatment of mental health programs, including federal funding provided through grants. Prior to the department's reorganization these functions were divided between two divisions for which there were two boards to perform "Settlement duties."[24]

The Trust Authority, consistent with the mandates of Executive Order 108, has broached the concept of combining the Alaska Mental Health Board and the Council on Alcohol and Drug Abuse.[25] These efforts are purely theoretical at this time, and no change has occurred with respect to the structure or function of either board. In fact, each board is still fully constituted and is currently carrying out their statutory duties. As each board is created by statute, changes to either board would require legislative action, which would include public comment and process. Again, no such proposals have been forwarded to the legislature with respect to FY05 or any future year.

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[23] *See* Executive Order 108.

[24] *Id.*

[25] *See* Exhibit C.

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ARGUMENT

I. THE DECLARATORY JUDGMENT ACT REQUIRES AN ACTUAL CASE OR CONTROVERSY IN ORDER TO OBTAIN RELIEF

Under AS 22.10.020(g) the superior court has the following jurisdiction:

> In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought. The declaration has the force and effect of a final judgment or decree and is reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment.

This statute explicitly requires that there be an actual controversy before the court can issue any declaratory relief.[26] The requirement of an actual controversy has been interpreted by the courts as encompassing a number of issues including standing, mootness, and lack of ripeness.[27] Here, this matter does not meet the actual controversy standard under the declaratory judgment action because the issue presented is not ripe for judicial intervention; therefore, the court should dismiss this action.

The question that is raised is not ripe for a judicial determination, because it is hypothetical. The relief sought is a determination that the funding and the operation of the boards are "implied" material terms to the Alaska Mental Health Settlement that was

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26 *Brause v. State of Alaska, et al.*, 21 P.3d 357, 358 (Alaska 2001).

27 *Id.*

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approved by the superior and Supreme Court in *Weiss v. State*. The complaint squarely fails to raise a justifiable controversy. Therefore, the complaint does not raise allegations sufficient to withstand a motion to dismiss under Alaska's Declaratory Judgment Act.

In *Jefferson v. Apslund*,[28] the court quoted with approval Chief Justice Hughes discussion of the actual controversy requirements of both the Alaska and the federal act as a prerequisite for declaratory relief:

> A 'controversy' in this sense must be one that is appropriate for judicial determination. . . . A justifiable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. . . . And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required.[29]

Under this analysis, declaratory relief is not available for hypothetical or advisory questions; any question raised must be real and constitute a substantial controversy. This premise was further refined in *Brause v. State, et al.* In that case, the court discussed the factors that should be looked at to determine whether the issues were

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28 458 P.2d 995 (Alaska 1969).

29 300 U.S. 227, 240-241, 57 S. Ct. 461, 464, 81 L. Ed. 617, 621-622 (1937).

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3 hypothetical and therefore not ripe for judicial determination.[30] Those factors include
4 "whether the case involves uncertain or contingent future events that may not occur as
5 anticipated, or indeed may not occur at all."[31] The *Brause* court discussed ripeness
6 further:
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> The central perception is that courts should not render decisions absent a genuine need to resolve a real dispute. Unnecessary decisions dissipate judicial energies better conserved for litigants who have a real need for official assistance. . . . Defendants, moreover, should not be forced to bear the burdens of litigation without substantial justification, and in any event may find themselves unable to litigate intelligently if they are forced to grapple with hypothetical possibilities rather than immediate facts. . . . .

13 In this case, the Complaint seeks the court to declare that adequate funding and
14 adequate opportunity for the four boards to perform and fulfill their settlement
15 mandated functions are "implied material terms" of the Settlement.[32] However, there is
16 nothing in the Complaint that alleges that this is a current controversy or a real dispute
17 that necessitates judicial intervention. In fact, the premise upon which this Complaint is
18 based is that "a question is raised" on whether terms of the Settlement are implied
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23 30 *Brause,* 21 P.2d 357, 359.

24 31 *Id.*

25 32 Complaint at 3, paras 14-16.

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material terms.[33] The suggestion that changes are being contemplated to the boards' structure or functions is not enough to create an actual controversy. Rather, the speculation that things may change is nothing more than a hypothetical premise that is prematurely before this court.

In addition, because of the speculative, hypothetical nature of the allegations, the state will be forced to litigate and bear the cost and burden of this litigation without any concrete facts to address the issues raised. This is precisely the type of case *Brause* indicated was improper for declaratory judgment.

This court cannot properly answer this hypothetical question, because the answer will depend upon other facts, questions, or issues. Whether a specific proposal to reduce funding to a board will result in "inadequate funding" should depend upon how it impacts the board's ability to function, and in the concept of the settlement, how it impacts the special budgetary process and ultimately beneficiary lives. These facts are not before the court, nor can they be, because no such proposal with respect to the boards is being implemented at this time.

Moreover, the level of funding provided to each of the four boards will always be determined under the special mental health budget process. Each board may recommend an amount of funding for the Trust Authority to review and consider. The Trust Authority then must recommend a funding level for each board. This

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[33] *Id.* at para 16.

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recommended amount must necessarily balance the benefits that would be derived from funding the bureaucratic needs of the boards versus the benefits that would be derived from funding mental health beneficiary programs. The Governor and legislature must undertake this same balancing approach in fulfilling their responsibilities in the enactment of the separate mental health budget.

It should be noted that even the Trust Authority, the entity with the primary responsibility to the mental health beneficiaries under the Settlement, must subject its administrative budget to oversight by the Governor and legislature. The Trust Authority's operating budget was made subject to the Executive Budget Act (AS 37.07), as Attachment D to the Settlement Agreement clarified:

> The potential for trust income to be expended primarily on a large bureaucracy was a major concern of Senators Rieger and Kelly, and that oversight was the "price" of their support for the bill.[34]

There is no basis for suggesting that the Settlement requires greater protection for the administrative expenses of the four boards.

Unless and until there is a change in the Board structure, function, or organization, the concept of full funding and opportunity to perform are vague, hypothetical questions which should not be addressed by this court. The decision of this court, based upon the allegations in the Complaint, must wait for future and

34 Exhibit A, Settlement Agreement, Attachment D at p. 4, question 9.

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contingencies to occur before it could determine whether the boards were adequately funded or that they were not given the opportunity to perform their functions.

Finally, if this court were to answer the hypothetical question raised, the answer would more likely than not be used to improperly manipulate what should be political and legislative discussions regarding the appropriate level of appropriations or balancing mental health program needs as part of a reorganization. In either event, a court ought to wait for actual facts and circumstances occur before interjecting itself in these issues. Since there is no actual case or controversy alleged in the complaint, this court should dismiss this action.

II. THE COURT SHOULD REFRAIN FROM RENDING A DECISION IN THIS MATTER UNDER THE DOCTRINE OF SEPARATION OF POWERS

Although not specifically stated in Alaska's constitution, the concept of the separation of power doctrine has been recognized in Alaska for some time.[35] Under this doctrine, the legislative branch is mandated to make the laws, the executive branch shall implement them, and the judicial branch interprets those laws.[36] As stated infra, the Settlement created a separate budget process for the comprehensive integrated mental health program, including funding for the Trust Authority and the four boards. The process requires that the Trust Authority submit a proposed budget to the Governor; the

[35] *Public Defender Agency v. Superior Court*, 534 P.2d 947 (Alaska 1975).

[36] *Id.*

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Governor also submits a budget, and the legislature passes a budget for the Governor's signature or veto. The Governor must, as part of this process, generate a report that outlines why the Governor's budget is different than that proposed by the Trust Authority. The Legislature must also generate such a report. Finally, the Governor must outline in a separate report the reasons for any vetoes to the budget once it is submitted for signature. This is a very laborious process and one that is squarely committed to the expertise of the legislature and subject to the approval of the Governor. Nothing in this process is subject, nor should it be, to judicial oversight or interpretation.

For FY05, the Mental Health Operating Budget has been submitted to the legislature under SB 258 and HB 377. Those budgets have each been referred to the Senate and House finance committees for deliberation and discussion. The Budget Reports have been prepared and submitted as required under Title 37. At this time, neither bill has passed out of committee, been voted on by the legislature, or submitted to the Governor for approval or veto. Thus, the issues of adequate funding for the "Four Boards" is not a judicial controversy but a political question that this court should refrain from entertaining at this time.

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The Alaska Supreme Court has consistently held that the judiciary should refrain from adjudicating political questions.[37] In determining whether a question posed is a political question, the court has employed the following approach:

> We explained in *Malone* that the Supreme Court in *Baker* had identified various elements, one or more of which is "[p]rominent on the surface of any case held to involve a political question..." These elements included: (1) a textually demonstrable commitment of the issue to a coordinate political department; [and] (2) the impossibility of a court's undertaking an independent resolution of the case without expressing lack of respect due coordinate branches of government. . . . Germane to this, one commentator has observed "the [political question] doctrine is justified when the Court cannot be assured of full clarification of the relevant questions because of difficulties of access to information." (internal citations omitted).[38]

Taking the two-prong approach articulated above, the question presented here is clearly a political question. First, any budget issues regarding whether the boards are adequately funded is squarely within the province of the Executive and Legislative Branch. Any effort on the part of the court to second-guess or inquire into that process would necessarily result in a lack of respect to those branches with respect to budget issues.

Finally, there is no way for the court to determine whether the budget proposals are adequate. Even then, the courts should not be delving into the adequacy of funding

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37 *State of Alaska, Dep't of Natural Resources v. Tongass Conservation Society*, 931 P.2d 1016, 1018 (Alaska 1997) *citing to Abood v. League of Women Voters*, 743 P.2d 333, 336 (Alaska 1987), *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982).

38 *Id.*

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of any state function. The budget process is clearly within the province and expertise of the legislature and the executive branch.

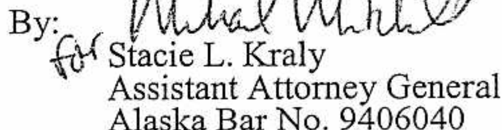
Unless and until there is an actual lack of opportunity to fulfill the settlement mandated functions, through a budget that has been passed by the legislature and signed by the Governor, the question presented is a political question that precludes judicial intervention. The separation of power doctrine mandates that this Complaint be dismissed in its entirety.

CONCLUSION

The Complaint filed in this matter raised a hypothetical question that is not ripe for decision. Under the declaratory judgment act, a controversy must exist in order to survive a motion to dismiss. Since there is no case or controversy, this action should be dismissed. In addition, even if the complaint met the threshold determination of a case and controversy, the issue raised is a political question that is squarely before the legislature and the Governor, and thus is precluded from judicial determination under the doctrine of separation of power.

DATED this 23rd day of February, 2004.

GREGG D. RENKES
ATTORNEY GENERAL



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CERTIFICATION

This is to certify that on February 23, 2004, a true and correct copy of the foregoing document was mailed to the following attorney of record:

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