IN THE SUPREME COURT OF THE STATE OF ALASKA

KATSUMI KENASTON, Appellant, v. STATE OF ALASKA, Appellee.	)	Supreme Court No.: S-11600 Trial Court No.: 3AN-04-3485 CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE JOHN REESE, PRESIDING

BRIEF OF APPELLEE, STATE OF ALASKA

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AS 22.05.010

Sec. 22.05.010. Jurisdiction. (a) The Supreme Court has final appellate jurisdiction in all actions and proceedings. However, a party has only one appeal as a matter of right from an action or proceeding commenced in either the district court or the superior court.

(b) Appeal to the Supreme Court is a matter of right only in those actions and proceedings from which there is no right of appeal to the court of appeals under AS 22.07.020 or to the superior court under AS 22.10.020 or AS 22.15.240.

(c) A decision of the superior court on an appeal from an administrative agency decision may be appealed to the Supreme Court as a matter of right.

(d) The Supreme Court may in its discretion review a final decision of the court of appeals on application of a party under AS 22.07.030. The Supreme Court may in its discretion review a final decision of the superior court on an appeal of a civil case commenced in the district court. In this subsection "final decision" means a decision or order, other than a dismissal by consent of all parties, that closes a matter in the court of appeals or the superior court, as applicable.

(e) The Supreme Court may issue injunctions, writs, and all other process necessary to the complete exercise of its jurisdiction.

AS 22.10.020(g)

(g) 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.

AS 37.14.003

Sec. 37.14.003. Responsibilities of the governor. (a) The governor shall, at the time the governor submits the proposed comprehensive operating and capital improvements program and financial plan under AS 37.07.060(b), submit to the legislature a separate appropriation bill limited to appropriations for the state's integrated comprehensive mental health program.

(b) If the appropriations in the bill submitted by the governor under (a) of this section differ from those proposed by the authority, the bill must be accompanied by a report explaining the reasons for the differences between the proposed appropriations in

the governor's bill and the authority's recommendations for expenditures from the general fund for the state's integrated comprehensive mental health program.

(c) If the governor vetoes all or a part of an appropriation for the integrated comprehensive mental health program, the governor's veto message must explain the vetoes in light of the authority's recommendations for expenditures from the general fund for the state's integrated comprehensive mental health program.

AS 37.14.005.

Sec. 37.14.005. Responsibilities of the legislature. (a) The legislature shall annually pass and transmit to the governor a bill making appropriations of money for the state's integrated comprehensive mental health program.

(b) The legislature shall make appropriations for the state's integrated comprehensive mental health program in a separate appropriation bill limited to appropriations for the state's integrated comprehensive mental health program.

(c) If the appropriations in the bill passed by the legislature differ from those proposed by the authority, the bill must be accompanied by a report explaining the reasons for the differences between the appropriations in the bill and the authority's recommendations for expenditures from the general fund for the state's integrated comprehensive mental health program.

AS 44.21.230

Sec. 44.21.230. Powers, duties, and limitations. (a) The commission shall

(1) approve a comprehensive statewide plan that identifies the concerns and needs of older Alaskans and, with reference to the approved plan, prepare and submit to the governor and legislature an annual analysis and evaluation of the services that are provided to older Alaskans;

(2) make recommendations directly to the governor and the legislature with respect to legislation, regulations, and appropriations for programs or services that benefit older Alaskans;

(3) encourage the development of municipal commissions serving older Alaskans and community-oriented programs and services for the benefit of older Alaskans;

(4) employ an executive director who serves at the pleasure of the commission;

(5) help older Alaskans lead dignified, independent, and useful lives;

(6) request and receive reports and audits from state agencies and local institutions concerned with the conditions and needs of older Alaskans;

(7) with the approval of the commissioner of administration, set policy for the administration of federal programs subject to state control as provided under 42 U.S.C. 3001 - 3058ee (Older Americans Act), as amended, and evaluate grant applicants and make grant awards under those programs;

(8) with the approval of the commissioner of administration, set policy for the administration of state programs as provided under AS 47.65 and evaluate grant applicants and award grants under those programs;

(9) give assistance, on request, to the senior housing office in the Alaska Housing Finance Corporation in administration of the senior housing loan program under AS 18.56.710 - 18.56.799 and in the performance of the office's other duties under AS 18.56.700; and

(10) provide to the Alaska Mental Health Trust Authority, for its review and consideration, recommendations concerning the integrated comprehensive mental health program for persons who are described in (d) of this section and the use of the money in the mental health trust settlement income account in a manner consistent with regulations adopted under AS 47.30.031.

(b) To accomplish its duties, the commission may

(1) review, evaluate, and comment upon state programs concerned with the problems and the needs of older Alaskans;

(2) collect facts and statistics, and make studies of conditions and problems pertaining to the employment, health, housing, financial security, social welfare, and other concerns that bear upon the well-being of older Alaskans;

(3) provide information about public programs that would be of interest or benefit to older Alaskans;

(4) appoint special committees, which may include persons who are not members of the commission, to complete necessary studies;

(5) promote community education efforts regarding the problems and concerns of older Alaskans;

(6) contract for necessary services;

(7) consult and cooperate with persons, organizations, and groups interested in or concerned with programs of assistance to older Alaskans;

(8) advocate improved programs of benefit to older Alaskans;

(9) set standards for levels of services for older Alaskans for programs administered by the commission; and

(10) adopt regulations necessary for the administration of AS 44.21.200 - 44.21.240 and to comply with federal law.

(c) The commission may not investigate, review, or undertake any responsibility for the longevity bonus program under AS 47.45 or the Alaska Pioneers' Homes under AS 47.55.

(d) When the commission formulates a comprehensive statewide plan under (a) of this section, it shall include within the plan specific reference to the concerns and needs of older Alaskans who have a disorder described in AS 47.30.056(b)(4).

AS 44.29.140

Sec. 44.29.140. Duties. (a) The board shall

(1) act in an advisory capacity to the legislature, the governor, and state agencies in the following matters:

(A) special problems affecting mental health that alcoholism or drug abuse may present;

(B) educational research and public informational activities in respect to the problems presented by alcoholism or drug abuse;

(C) social problems that affect rehabilitation of alcoholics and drug abusers;

(D) legal processes that affect the treatment and rehabilitation of alcoholics and drug abusers;

(E) development of programs of prevention, treatment, and rehabilitation for alcoholics and drug abusers; and

(F) evaluation of effectiveness of alcoholism and drug abuse programs in the state;

(2) provide to the Alaska Mental Health Trust Authority for its review and consideration recommendations concerning the integrated comprehensive mental health program for the people who are described in AS 47.30.056(b)(3), and concerning the use of money in the mental health trust settlement income account in a manner consistent with regulations adopted under AS 47.30.031.

(b) The board is the planning and coordinating body for purposes of federal and state laws relating to alcohol, drug, and other substance abuse prevention and treatment services.

(c) The board shall prepare and maintain a comprehensive plan of services

(1) for the prevention and treatment of alcohol, drug, and other substance abuse; and

(2) for persons described in AS 47.30.056(b)(3).

AS 47.30.046

Sec. 47.30.046. Budget recommendations; reports. (a) The board shall annually, not later than September 15, submit to the governor and the Legislative Budget and Audit Committee a budget for the next fiscal year and a proposed plan of implementation based on the integrated comprehensive mental health program plan prepared under AS 47.30.660(a)(1). The budget must include the authority's determination of the amount

(1) recommended for expenditure from the general fund during the next fiscal year to meet the operating and capital expenses of the integrated comprehensive mental health program;

(2) in the mental health trust settlement income account, if any, that is not reasonably necessary to meet the projected operating and capital expenses of the

integrated comprehensive mental health program that may be transferred into the general fund; and

(3) of the expenditures the authority intends to make under AS 37.14.041 and 37.14.045, including the specific purposes and amounts of any grants or contracts as part of the state's integrated comprehensive mental health program.

(b) When the authority submits its proposed budget under (a) of this section, the authority shall also provide a report to the Legislative Budget and Audit Committee, the governor, the Office of Management and Budget, the commissioner of health and social services, and all entities providing services with money in the mental health trust settlement income account, and shall make it available to the public. The report must describe at least the following:

(1) the assets, earnings, and expenditures of the trust as of the end of the preceding fiscal year;

(2) comparisons of the trust's assets, earnings, and expenditures with the prior five fiscal years;

(3) projections of the trust's assets, earnings, and expenditures for the next five fiscal years;

(4) the authority's budget recommendations submitted under (a) of this section, and its reasons for making those recommendations;

(5) the authority's guidelines for the establishment of services; the provision of services shall be based on the principle that services paid for from the trust are provided to recipients as close to the recipient's home and family as practical with due consideration of demographics, mental health service requirements, use of mental health services, economic feasibility, and capital expenditures required for provision of minimum levels of service;

(6) forecasts of the number of persons needing services;

(7) projections of the resources required to provide the necessary services and facilities; and

(8) reviews of the status of the integrated comprehensive mental health program, including evaluation of program goals, objectives, targets and timelines, and overall effectiveness.

AS 47.30.660

Sec. 47.30.660. Powers and duties of department. (a) The department shall

(1) prepare, and periodically revise and amend, a plan for an integrated comprehensive mental health program, as that term is defined by AS 47.30.056(i); the preparation of the plan and any revision or amendment of it shall

(A) be made in conjunction with the Alaska Mental Health Trust Authority;

(B) be coordinated with federal, state, regional, local, and private entities involved in mental health services;

(2) in planning expenditures from the mental health trust settlement income account, conform to the regulations adopted by the Alaska Mental Health Trust Authority under AS 47.30.031(b)(6); and

(3) implement an integrated comprehensive system of care that, within the limits of money appropriated for that purpose and using grants and contracts that are to be paid for from the mental health trust settlement income account, meets the service needs of the beneficiaries of the trust established under the Alaska Mental Health Enabling Act of 1956, as determined by the plan.

(b) The department, in fulfilling its duties under this section and through its division of mental health and developmental disabilities, shall

(1) administer a comprehensive program of services for persons with mental disorders, for the prevention of mental illness, and for the care and treatment of persons with mental disorders, including inpatient and outpatient care and treatment and the procurement of services of specialists or other persons on a contractual or other basis;

(2) take the actions and undertake the obligations that are necessary to participate in federal grants-in-aid programs and accept federal or other financial aid from whatever sources for the study, prevention, examination, care, and treatment of persons with mental disorders;

(3) administer AS 47.30.660 - 47.30.915;

(4) designate, operate, and maintain treatment facilities equipped and qualified to provide inpatient and outpatient care and treatment for persons with mental disorders;

(5) provide for the placement of patients with mental disorders in designated treatment facilities;

(6) enter into arrangements with governmental agencies for the care or treatment of persons with mental disorders in facilities of the governmental agencies in the state or in another state;

(7) enter into contracts with treatment facilities for the custody and care or treatment of persons with mental disorders; contracts under this paragraph are governed by AS 36.30 (State Procurement Code);

(8) enter into contracts, which incorporate safeguards consistent with AS 47.30.660 - 47.30.915 and the preservation of the civil rights of the patients with another state for the custody and care or treatment of patients previously committed from this state under 48 U.S.C. 46 et seq., and P.L. 84-830, 70 Stat. 709;

(9) prescribe the form of applications, records, reports, request for release, and consents to medical or psychological treatment required by AS 47.30.660 -47.30.915;

(10) require reports from the head of a treatment facility concerning the care of patients;

(11) visit each treatment facility at least annually to review methods of care or treatment for patients;

(12) investigate complaints made by a patient or an interested party on behalf of a patient;

(13) delegate upon mutual agreement to another officer or agency of it, or a political subdivision of the state, or a treatment facility designated, any of the duties and powers imposed upon it by AS 47.30.660 - 47.30.915;

(14) after consultation with the Alaska Mental Health Trust Authority, adopt regulations to implement the provisions of AS 47.30.660 - 47.30.915;

(15) provide technical assistance and training to providers of mental health services; and

(16) set standards under which each designated treatment facility shall provide programs to meet patients' medical, psychological, social, vocational, educational, and recreational needs.

AS 47.80.090

Sec. 47.80.090. Responsibilities. The council shall

(1) serve as a forum by which issues and benefits regarding current and potential services to disabled and gifted persons may be discussed by consumer, public, private, professional, and lay interests;

(2) advocate the needs of disabled and gifted persons before the executive and legislative branches of the state government and before the public;

(3) advise the executive and legislative branches of the state government and the private sector on programs and policies pertaining to current and potential services to disabled or gifted persons and their families;

(4) submit periodic reports to the commissioner of health and social services, the commissioner of education and early development, and to other appropriate departments, on the effects of current federal and state programs regarding services to disabled or gifted persons; these reports must include program performance reports to the governor, the federal government, and to state agencies as required under 20 U.S.C. 1482 and 42 U.S.C. 6024;

(5) in conjunction with the Departments of Health and Social Services and Education, develop, prepare, adopt, periodically review, and revise as necessary an annual state plan prescribing programs that meet the needs of persons with developmental disabilities as required under 42 U.S.C. 6022;

(6) review and comment to commissioners of state departments on all state plans and proposed regulations relating to programs for persons who are experiencing disabilities before the adoption of a plan or regulation; for this purpose, the appropriate departments shall submit the plans and proposed regulations to the council;

(7) recommend the priorities and specifications for the use of funds received by the state under 20 U.S.C. 1471 - 1485 and 42 U.S.C. 6000 - 6083;

(8) submit annually to the commissioner of health and social services, the commissioner of education and early development, and the commissioner of commerce, community, and economic development a proposed interdepartmental program budget for services to disabled or gifted persons that includes, insofar as possible, projected revenues and expenditures for programs implemented by state agencies, local

governmental agencies, and private organizations; the interdepartmental program budget is an informational supplement to the regular annual budgetary submissions of the departments to the Office of the Governor;

(9) provide information and guidance for the development of appropriate special educational programs and services for a child with a disability as defined in AS 14.30.350;

(10) monitor and evaluate budgets or other implementation plans and programs for disabled and gifted persons to assure nonduplication of services and encourage efficient and coordinated use of federal, state, and private resources in the provision of services; members of the council, with the approval of the council, have access to information in the possession of state agencies subject to disclosure restrictions imposed by state or federal confidentiality or privacy laws;

(11) perform other duties required under applicable federal laws or AS 14.30.231 and as the governor may assign;

(12) govern the special education service agency and may hire personnel necessary to operate the agency; and

(13) provide to the Alaska Mental Health Trust Authority for its review and consideration recommendations concerning the integrated comprehensive mental health program for the people of the state who are described in AS 47.30.056(b)(2) and the use of the money in the mental health trust settlement income account in a manner consistent with regulations adopted under AS 47.30.031.

COURT RULES

Civil Rule 60(b)

(b) **Mistakes – Inadvertence – Excusable Neglect – Newly Discovered Evidence – Fraud – Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the date of notice of the judgment or orders as defined in Civil Rule 58.1(c). A motion under this subdivision (b) does not affect the finality of a

judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not personally served, or to set aside a judgment for fraud upon the court. Writs of *coram nobis*, *coram vobis* and *audita querela* are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

JURISDICTION

This is an appeal from a final order of the superior court, Judge Reese, granting the State of Alaska's Motion to Dismiss, dated July 7, 2004.[1] This Court has legal authority to consider this appeal pursuant to AS 22.05.010.

PARTIES

Katsumi Kenaston ("Kenaston") is the Appellant.

The State of Alaska ("State") is the Appellee.

ISSUES PRESENTED

The Appellee agrees with the issues presented in the Appellant's brief.

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[1] [Exc. 350]. The Appellant submitted the entire record before the superior court; therefore, the Appellee will rely upon Appellant's excerpt of record.

STATEMENT OF THE CASE

In 1982, beneficiaries of the Alaska Mental Health Enabling Act filed a class action lawsuit against the State of Alaska ("State"), arising from the State's administration of mental health trust lands.[2] This lengthy and contentious litigation entailed numerous hearings and court opinions. In 1994, the Alaska legislature attempted to resolve the litigation through special session, enacting what is commonly referred to as the Alaska Mental Health Trust Settlement Act ("Settlement").[3] This legislation, approved by the parties and the Alaska Supreme Court,[4] established four Boards: (1) the Alaska Mental Health Board; (2) the Advisory Board on Alcohol and Drug Abuse; (3) the Governor's Council on Disabilities and Special Education; and (4) the Alaska Commission on Aging.[5] Each Board is specifically set forth in statute.[6]

Appellant, Katsumi Kenaston, filed the instant lawsuit in January 2004 seeking declaratory judgment that "adequate funding and an opportunity to perform" are implied material terms of the Settlement. Paragraph 16 of the complaint contains the crux of the litigation, alleging:

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2 *Weiss, et al., v. State of Alaska*, 706 P.2d 681 (Alaska 1985). A comprehensive discussion of *Weiss's* background is set forth in the Background section of the State's Memorandum and Points of Authority in Support of Motion to Dismiss. [Exc. 6-10].

3 Chapter 5, FSSLA 1994; Chapter 6, FSSLA 1994; Chapter 1, SSSLA 1994; Chapter 2, SSSLA 1994.

4 *Weiss v. State*, 939 P.2d 380 (Alaska 1997).

5 *See* n.2, *infra*; AS 44.21.230, 44.29.140, 47.30.660, and 47.80.090.

6 *Id.*

> The question has arisen whether adequate funding and adequate opportunity for the Four Boards to perform and fulfill their Settlement mandated functions and duties are implied material terms of the Settlement.[7]

No other allegations in the complaint further define this "question."[8] In addition, the complaint does not allege that any of the four Boards are not currently receiving adequate funding to perform their Settlement mandated functions, or will receive insufficient funding in the future.[9] Notwithstanding the lack of dispute, Ms. Kenaston filed suit to seek a declaration related to the funding requirement.

The State moved to dismiss the complaint for lack of a case or controversy, arguing that the issue was not ripe for adjudication and that any decision would be advisory in nature and therefore impermissible.[10] In addition, the State asserted that the Board's funding is a political question best left to the executive and legislative branches of government, thus any decision would violate the separation of powers doctrine.[11] The superior court granted the State's motion to dismiss in its entirety, agreeing that the complaint presents no justiciable issues.[12] This appeal follows.

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7 [Exc. 3].

8 [Exc. 1-4].

9 *Id.*

10 [Exc. 5-83].

11 *Id.*

12 [Exc. 350].

REQUIRED FINDINGS, BURDEN OF PROOF, AND STANDARD OF REVIEW

The court reviews a dismissal of a declaratory judgment action for abuse of discretion.[13] The court reviews grants and denials of motions for summary judgment *de novo*.[14]

ARGUMENT

A. The Declaratory Judgment Act Requires An Actual Case Or Controversy In Order To Obtain Relief. The Complaint In This Matter Did Not Establish An Actual Case Or Controversy; Therefore, The Superior Court's Decision To Grant The Motion To Dismiss Should Be Affirmed.

1. Alaska case law supports the superior court's determination that there is no case or controversy.

The superior court's jurisdiction to render a declaratory judgment is defined in AS 22.10.020(g), which provides in pertinent part:

> 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.

(Emphasis added). As a prerequisite to obtaining relief, the declaratory judgment statute specifically requires that there be an actual controversy.[15] The case and controversy

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

14 *Tracey v. Municipality of Anchorage*, 91 P.3d 252 (Alaska 2004).

15 *Brause v. State*, 21 P.3d at 358.

requirement has been interpreted by the Alaska Supreme Court as encompassing a number of issues including standing, mootness, and ripeness.[16] In dismissing Ms. Kenaston's complaint, the superior court agreed with the State's position that the hypothetical funding issue is not ripe for adjudication.

Ripeness requires a "plaintiff to claim either a legal injury has been suffered or that one will be suffered in the future."[17] As such, ripeness absolutely requires that there exist a real, identifiable dispute that requires judicial intervention to establish the rights of the parties.[18] As reinforced by Appellant's counsel at oral argument, this matter is devoid of any actual or potential allegation of harm, injury, or breach giving rise to a cause of action.[19] Interpreting similar abstract questions in *Brause v. State*, this court instructed that "many of the considerations on which the doctrine of ripeness is based counsel in factor of dismissal."[20]

Alaska case law squarely addresses the availability of declaratory relief for a cause of action that is not ripe. In *Jefferson v. Asplund*,[21] this court held that declaratory relief is not available for hypothetical or advisory questions like the one presented here. Rather, a plaintiff must raise a real question constituting a substantial

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16 *Id.*

17 *Id.* at 359.

18 *Id.*

19 [Tr. 18-19].

20 *Brause*, 21 P.3d at 359.

21 458 P.2d 995 (Alaska 1969).

controversy before the court will grant declaratory relief. In discussing the case and controversy requirement, this court held in *Brause* that the trial court should inquire as to "whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all."[22] Thus if the issue presented in a complaint is hypothetical, declaratory judgment is not appropriate.

Nothing in the complaint or the Appellant's brief alleges any question that is ripe for judicial declaration. As stated previously, the sole allegation in the complaint is found in paragraph 16, where Appellant states that "a question has arisen whether adequate funding and adequate opportunity for the four Boards to perform and fulfill their Settlement mandated functions and duties are implied material terms of the Settlement."[23] Further, the Appellant makes no additional assertions in her brief that there is any concrete question that needed to be declared. All of the premises upon which Appellant argues are based upon future events, contingencies or possibilities that assume without rhyme or reason that the State will breach the settlement, *e.g.*, "*if* the legislature decides to breach the Settlement . . ." or "[h]owever, it is respectfully suggested here it is worthwhile for the court to rule the state has obligations under the Settlement to adequately fund the four Boards."[24] Such statements do not meet the ripeness component of the case and controversy requirements of the Alaska Declaratory Judgement Act. If

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22 *Brause*, 21 P.3d at 359 (citing to 13A Charles Alan Wright, *et al., Federal Practice and Procedure* § 3532, at 112 (2d ed. 1984)).

23 [Exc. 3].

24 Appellee's Brief at 15-16 at n.9, respectively.

they did, then any party to a settlement could simply file a complaint and obtain a judicial declaration of undisputed terms. The Declaratory Judgement Act should not allow this absurd result.

In dismissing this action, the superior court noted that "the striking thing about this case is that, for all the briefing, we can't figure out what the breach is, what the controversy is, what the big fight is about."[25] The court further provided:

> It takes a pretty extreme level of arbitrary conduct in Juneau before the court can step in. Now, I've done that once before on the rural school stuff, but I certainly didn't say any numbers, and I couldn't. We're not dealing with that kind of an issue here. I mean, we certainly had a controversy in that case, but nobody has screwed up yet. And if and when a decision is made – I'm sure they will make a decision, and if, at that point, the boards or one of the boards thinks that it is – the political decision-making that goes into that decision is sufficiently arbitrary or sufficiently out to lunch, or destroys the function of the settlement, then you can come back down to court. But as it stands now, I think the complaint needs to be dismissed for lack of a case in controversy.[26]

Therefore, unless and until there is an affirmative act such as a change in the Board structure, function, or organization, the concept of full funding and opportunity to perform are vague, hypothetical questions that should not be addressed by this court. This "dispute" is not ripe. The superior court agreed by granting the State's motion to dismiss and this court should affirm.

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25 [Tr. 26].

26 [Tr. 28].

2. The court should decline from issuing advisory opinions.

In the context of the Declaratory Judgment Act, this court has cautioned many times against the issuing of advisory opinions. In *Kodiak Seafood Processing Ass'n v. State*,[27] this court held, *inter alia*, that a declaratory judgment action may be dismissed for mootness because of the "added risk that the party is seeking an advisory opinion."[28] Similarly, in *Brause v. State*, this court discussed the factors that should be looked at to determine whether the issues are hypothetical, and therefore not ripe for judicial determination.[29] In *Earth Movers of Fairbanks, Inc. v. State*, the court emphatically stated that where there is no actual case or controversy, "advisory opinions are to be avoided."[30] In *Jefferson v. Asplund*, this court noted that "declaratory relief will be withheld when declarations are sought concerning hypothetical or advisory questions or moot questions."[31] The superior court recognized the well-established prohibition in this case in granting the State's motion to dismiss.

The limited evidentiary record and the statements of Appellee's attorney at oral argument support the superior court's holding. During oral argument, Appellant's attorney stated in pertinent part:

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27 900 P.2d 1191 (Alaska 1995).

28 *Id.* at 1195.

29 *Brause v. State,* 21 P.2d at 359.

30 824 P.2d 715, 718 (Alaska 1992) citing to *Gieffels v. State*, 552 P.2d 661, 664-65 (Alaska 1976).

31 *Jefferson v. Asplund*, 458 P.2d at 999.

> The question is, you know, whether failing to adequately fund is a breach. And really, if the court feels it's a waste of its time to decide – may – perhaps has indicated it feels it's a waste of its time to address this issue, but I would suggest that preventing the State – you know, *giving the State clear indication that it's treading on thin water here* and preventing the reopening of the whole case is a very useful thing to do. And I think if the court disagrees, it can disagree with that. But I certainly think that it is a very useful thing for the court to do, and will potentially avoid huge problems and huge court resources down the road.[32]

(Emphasis added). To paraphrase the court below, if and when a decision is made related to funding, and if that decision is arbitrary or breaches the Settlement then there will be something for a superior court of this court to declare.[33] Until then, any decision is advisory in nature and not properly before the court.[34] The superior court correctly refrained from issuing an advisory opinion, and this court should affirm that decision.

3. The superior court did not abuse its discretion in determining there was no case or controversy and granting the motion to dismiss.

Although no Alaska case law defines the standard in the context of a declaratory judgment action, this court has applied the abuse of discretion standard in a variety of different cases.[35] Thus, the State submits that this court does not need to look to the federal courts for guidance in determining that the superior court in this matter did not abuse its discretion in granting the motion to dismiss. Applying the lenient abuse of

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32 [Tr. 23].

33 [Tr 27].

34 *Id.*

35 *Ruckle v. Anchorage School District*, 85 P.3d 1030, 1033-34 (Alaska 2004) citing to *DeSalvo v. Bryant*, 42 P.3d 525, 527-28 (Alaska 2002).

discretion standard, this court has held that the superior court's judgment should only be overturned if this court is "left with a definite and firm conviction after reviewing the whole record that the trial court erred in its ruling."[36]

The decision to grant the motion to dismiss was based upon a lack of ripeness as set forth in section A 1, *infra*, as well as a determination that issuing any such decision would result in an advisory opinion as set forth in section A 2, *infra*. Reviewing the entire record plainly demonstrates that the complaint does not meet the case and controversy requirement of the Alaska Declaratory Judgment Act. As noted by the superior court, if and when, a decision is made related to the funding of the boards and there is a firm conviction that the decision made was arbitrary or without merit, then a dispute exists that the court can address. No such dispute exists at this time. There was no mistake or error on the part of the superior court in determining that this matter was before the court prematurely and this court should affirm the superior court's decision.

4. Appellant's status as a beneficiary of the settlement does not create case or controversy.

Appellant's assertion that dismissal should be reversed because the superior court failed to recognize her contractual rights ignores Judge Reese's statements at oral argument and obfuscates the issue before this court: whether the superior court reasonably dismissed the complaint for lack of case or controversy. Appellant's contractual rights are undisputed, as are the terms of the settlement, which are set forth in the session laws of the State of Alaska. Accordingly, this court should disregard

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36 *Id.*

Appellant's lengthy and irrelevant discussion of her contractual rights, absent any analysis of their implication to the case or controversy requirement enunciated in AS 22.10.020(g).

Notwithstanding statements and allegations to the contrary, the superior court clearly recognized the contractual relationship between the parties. The court repeatedly implored Appellant's counsel to describe the nature of any alleged breach of the settlement. The following exchanges demonstrate the court's recognition, as well as Appellant's inability to delineate any cognizable issue before the court:

> THE COURT: So, what's the breach?
>
> MR. GOTTSTEIN: We're not alleging a breach . . .
>
> THE COURT: Then why do you need to sue them?
>
> MR. GOTTSTEIN: Hmm?
>
> THE COURT: If there's not a dispute about it, why do you need to sue?
>
> MR. GOTTSTEIN: Well, the reason is that we think it's important that if the State is going to breach the Trust, that it really ought to know that it's doing it on purpose . . .[37]

The court's questioning, in conjunction with the recognition that Appellant maintains a future cause of action to enforce the settlement terms, plainly demonstrates that the superior court recognized Appellant's contractual rights. Because Appellant's counsel

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37 [Tr. 18-19].

failed to elucidate a breach, the court dismissed the action, noting that Appellant could enforce the settlement in the future if the legislature fails to properly fund the Boards.[38]

The superior court clearly recognized Appellant's contractual rights under the Settlement. However, recognition of those rights does not negate the case and controversy requirements under the Alaska Declaratory Judgment Act. Appellant's argument that this court should reverse the trial court's decision because of a "mistake of law" related to these rights is unsupported by the record, and more importantly fails to demonstrate an actual dispute between the parties. This court, like the superior court, should recognize that recognizing Appellant's status as a Settlement beneficiary does not exempt her from the case or controversy requirement of the Alaska Declaratory Judgment Act.

Even a party to a contract must demonstrate an actual controversy to maintain a cause of action. Although the Alaska Supreme Court has not specifically addressed whether contractual rights would overcome the case or controversy requirement, in interpreting the parallel federal Declaratory Judgment Act,[39] the Ninth Circuit Court of Appeals recently applied traditional ripeness standards to a private party

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38 [Tr. 27].

39 *Jefferson v. Asplund*, 458 P.2d at 996 (noting that the legislature intended to parallel the text of the federal Declaratory Judgment Act in authorizing the superior court to render declaratory judgments). *National Chiropractic Mutual Ins. Co. v. Doe*, 23 F.Supp. 2d 1109, 1116 (D. Alaska 1998) (Stating that the Alaska Supreme Court will utilize federal precedent regarding the Federal Declaratory Judgment Act to interpret the analogous state provisions.).

contract action in *Principal Life Insurance Co. v. Robinson*.[40] The Ninth Circuit found that there must be "a substantial controversy between the parties having adverse legal interests, or sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[41] As stated previously, absolutely no controversy exists between the parties; there is no dispute regarding the terms of the settlement,[42] and Appellant's counsel acknowledges that there is no current or impending breach. The failure to present a case that is ripe for judicial declaration is fatal to the Appellant's position regardless of her status as a beneficiary. Accordingly, the motion to dismiss was properly granted and should be affirmed.

5. Appellant's public policy argument is not enough to survive the motion to dismiss

Appellant also argues that the superior court abused its discretion in granting the motion to dismiss because this action raises issues of great public importance. However, the brief fails to identify any issues of public importance or discuss how a declaration will resolve any such "issues." Appellant states only that it is "worthwhile for the court to rule that the State has obligations under the Settlement to

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40 394 F.3d 665 (9th Cir. 2005).

41 *Id.* at 671, citations omitted.

42 The State acknowledges the importance of appropriate funding to perform the functions mandated in the settlement. [Tr. 11-12].

adequately fund the four Boards,"[43] and indicates in a footnote that the litigation was crafted to avoid invoking *en terroram* remedy under Civil Rule 60(b)(6).[44]

Appellant misconstrues the purpose and intent of the Rule 60(b) remedy as applying to any breach of a material term.[45] In fact, the remedy only applies if the *Legislature* materially alters or repeals a statute that the Settlement identifies as being a "material term" of the Settlement.[46] This special remedy provision addressed a "major concern" of whether the Settlement was enforceable due to the fact that the Legislature might later pass legislation that would materially change the Settlement.[47] Accordingly, based upon the allegations in the complaint, the 60(b) provision could not be invoked in this case.

However, the special remedy provision does not preclude class members from seeking other appropriate relief if the State breached the Settlement: "Nothing in this section [which includes the special remedy provision] shall limit any party's right to enforce this agreement or applicable state statutes."[48] If the State breaches the Settlement, a class member may bring a standard breach of contract action. In addressing

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43 Appellant's Brief at p. 16.

44 Appellant's Brief at p. 16, n.9.

45 For a discussion of the Rule 60(b) relief, *see* Exc. 302; *see also* Exc. 42. (Section VI of the Settlement Agreement).

46 *Id.* (emphasis added).

47 *See Weiss v. State*, 939 P.2d 380, 396-97 (Alaska 1997); [Exc. 158-295, *see specifically* Exc. 282-284].

48 *Id.*

legislative modification to one of the statutes that constitutes a "material term" of the Settlement, the superior court, in *Weiss v. State*,[49] recognized that standard remedies are available for breach, and not every breach action would result in re-opening the litigation.[50] Accordingly, appropriate remedies will be available to Ms. Kenaston, and other class members, if the State does breach the Settlement.

Finally, the Settlement created the Mental Health Trust Authority ("Trust Authority"), with a special, and statutorily protected, funding and appropriation scheme.[51] Under this scheme, the four Boards make recommendations regarding appropriations to the Trust Authority, which then submits a budget to the legislature.[52] To the extent that there are differences between the Trust Authority's proposed budget and the Governor's proposed budget, a report must be generated to reconcile these differences.[53] However, there is nothing in the Settlement, or the statutes enacted as a result of the Settlement, that mandates a certain level of funding. There is a process by which beneficiaries can operate within the appropriation/budgetary process to advocate for more funding and opportunity. Since adequate protections exist in the special budgetary and appropriation

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49 4FA-82-2208 CI, [Exc. 311-328].

50 [Exc. 324-326].

51 Chapter 5, FSSLA 1994; Chapter 6, FSSLA 1994; Chapter 1, SSSLA 1994; Chapter 2, SSSLA 1994; AS 37.14.003, 37.14.005, and 47.30.046.

52 *Id.*

53 *Id.*

scheme, the superior court appropriately refrained from addressing the level of funding absent any evidence that there has been a failure in the budgetary process.

If the purpose of this lawsuit, as gleaned from the complaint, Appellant's briefs filed in superior court, and statements at oral argument, is to present information that would help the State to avoid re-opening the mental health trust litigation, such an argument rests on a faulty premise related to the Settlement itself. Public policy considerations in avoiding future lawsuits do not necessitate that this court overlook the fatal flaw in the present litigation. The superior court understood the limitations of Ms. Kenaston's remedy as a beneficiary – she needed to show some sort of breach or violation to the Settlement in order to have her case go forward. Her inability to do so, even after considerable prodding, led to the dismissal of her complaint. Appellant's misplaced public policy argument does not alter the propriety of the superior court's ruling. The court clearly understood the ramifications of the Settlement, realizing that as beneficiary, Ms. Kenaston did not have the ability to seek the *en terroram* remedy absent concrete legislative action.

B. If This Court Determines That The Motion To Dismiss Was Improperly Granted, This Court Should Grant The State's Cross-Motion For Summary Judgment For The Reasons Set Forth Above.

The court cannot address the cross motions for summary judgment unless it finds that the motion to dismiss was improperly granted. Assuming for purposes of this brief only that the court finds for the Appellant and determines that the motion to dismiss should not have been granted – this court can and should grant the Appellee's cross-motion for summary judgment for the same reasons as set forth above: The question is

not ripe for a judicial determination, issuing a decision would be advisory in nature, and any query by the judiciary into the question presented would necessarily invade the province of the executive and legislative branches of government. As Appellant asserts, there are no factual disputes, and if the motion to dismiss is not dispositive, then summary judgment is proper.

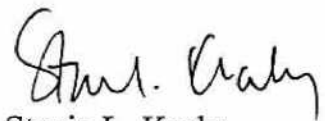
Whether brought as a motion to dismiss or a motion for summary judgment, the complaint is not ripe for adjudication and decision and would result in an advisory opinion. Simply stated, there is no factual dispute. The legal premises are set forth and establish there is no dispute to litigate. This fact militates in favor of granting the State's cross-motion for summary judgment.

CONCLUSION

The superior court did not error in concluding there was no case or controversy present in Ms. Kenaston's complaint. Therefore, the court appropriately granted the State's motion to dismiss. The trial court's decision should be affirmed. In the alternative, the court should grant the State's cross-motion for summary judgment.

DATED at Juneau, Alaska this 5 day of May, 2005.

DAVID W. MÁRQUEZ
ATTORNEY GENERAL

By: 
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