

MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
January 12, 1981

Page 1.

The fourth meeting of the Senate Judiciary Committee was called to order by Jesse O'Hara, VChairman, on the above date in Room 331, at 10:00 a.m.

ROLL CALL:

All members were present with the exceptions of Senators Anderson and B. Brown, who were both excused.

CONSIDERATION OF SENATE BILL NO. 43:

AN ACT TO SHIFT THE BURDEN OF PROOF FOR
SUPPRESSION OF CONFESSIONS OR ADMISSIONS
IN CRIMINAL CASES.

Senator S. Brown, in presenting this bill, said that it would bring Montana's statutes concerning admissibility of confessions into compliance with U. S. Supreme Court decisions. It would make Montana's statute provide that the prosecution must prove that an admission was voluntary. The Blakney case (reference Exhibit B, attached to minutes) arose because the court improperly placed the burden of proving the confession was involuntary upon the defendant.

Chris Tweeten, of the Montana Attorney General's office, said that our statutes should reflect what the rules of law actually are; otherwise, cases will have to be retried.

There were no opponents to this bill, nor were there any questions.

CONSIDERATION OF SENATE BILL No. 75:

AN ACT TO AMEND SECTION 2-9-303, MCA, TO
AUTHORIZE DISTRICT COURTS OTHER THAN COURTS
OF THE FIRST JUDICIAL DISTRICT TO APPROVE
COMPROMISE SETTLEMENTS OF CLAIMS AGAINST THE
STATE OF MONTANA.

In introducing this bill, Senator S. Brown said that under present law when the state agrees to settle a claim against the State of Montana, settlement must be approved by a judge sitting in the First Judicial District, even though the settlement may involve litigation which arose out of a different judicial district. With this bill, the district judge hearing

the lawsuit would have the authority to go ahead with the case.

Mike Young, of the Insurance and Legal Division of the Department of Administration stated that by proposing this bill they were trying to hasten settlements in locations away from Helena, without having to travel to Helena and appear before a judge who had no experience with the facts of the case. He stated that they have settled fifty-three claims to date, and about twenty percent were lawsuits from other jurisdictions. Lewis & Clark district judges will still have to preside over all the claims not under litigation status.

There were no opponents to this bill, and no questions.

CONSIDERATION OF SENATE BILL 38:

AN ACT TO REVISE MONTANA'S PROBATE CODE
WITH RESPECT TO RENUNCIATION OF SUCCESSION,
INTESTATE SUCCESSION, ESTABLISHING THE
PARENT-CHILD RELATIONSHIP, THE AUGMENTED
ESTATE, THE ELECTIVE SHARE OF THE SURVIVING
SPOUSE, STATUTE OF LIMITATIONS, SELF-PROVED
WILLS, AND FOREIGN PERSONAL REPRESENTATIVES
BY GENERALLY ADOPTING THE LANGUAGE OF THE
UNIFORM PROBATE CODE.

Senator Turnage introduced the bill, at the request of the Uniform Probate Code Committee, which functions as a part of the Bar Association of Montana. This bill is intended to bring the Montana Code into line with the national Uniform Probate Code.

Bjarne Johnson, representing the Montana Bar Association, stated that this bill would amend several sections of the Montana Uniform Probate Court. Introduced in the 1973 legislature, it states that if the estate is simple, and there are no problems, it can be settled out of court, rather than through a formal petition and a full hearing. About ninety percent of the probates now are filed informally in the attorney's office, and not made a part of the judicial proceedings. The Montana Uniform Probate Code was recommended to the 1974 legislature for passage and became effective on January 1, 1975. Mr. Johnson then outlined section by section the changes being proposed to update Montana's Codes.

At the end of this presentation, Senator Turnage said that he felt that the term "authentic copies" should be defined for the purpose of this bill, and suggested that this committee's staff person should begin research on this matter. He then offered for the record the letter of Mr. Johnson (Exhibit A, attached to these minutes), dated July 18, 1980, regarding the

amendments being proposed. Senator Turnage then reserved the privilege of objecting to portions of this bill at a later time, if this committee would delay its decision.

In response to a question by Senator Mazurek, Mr. Johnson established that the decision to propose these amendments represented a complete majority of the Bar Association, a fact verified by Ada Harlan. Senator Mazurek asked for clarification of the intended impact in the case of a natural parent whose relationship with the child had been terminated, yet who wanted the child to inherit from him. It was stated that the burden should be on the natural father to see that the child inherits from him, but that it would not be an automatic right of said child to inherit.

Senator Turnage then asked whether, if the adopted child inherits from adoptive parents and then dies, should the natural father then be able to automatically inherit said child's property. He felt that a one-way flow should be in existence -- from father to child, but not necessarily from child to natural father. Mr. Johnson said that this should be reviewed, and the intent established.


Senator O'Hara agreed to delay action on this bill until later so that clarifications could be made.

Senator Turnage said that any amendments to this proposed bill that are presented should be given to the Bar Association through Bjarne Johnson.

The meeting was adjourned at 11:23 a.m.



Senator Anderson
Chairman, Judiciary Committee



Senator O'Hara
Vice Chairman, Judiciary Committee

ROLL CALL

JUDICIARY COMMITTEE

47th LEGISLATIVE SESSION - - 1981

Date 1/12/81

NAME	PRESENT	ABSENT	EXCUSED
Anderson, Mike, Chr. (R)			✓
O'Hara, Jesse A. (R)	✓		
Olson, S. A. (R)	✓		
Brown, Bob (R)			✓
Crippen, Bruce D. (R)	✓		
Tveit, Larry J. (R)	✓		
Brown, Steve (D)	✓		
Berg, Harry K. (D)	✓		
Mazurek, Joseph P. (D)	✓		
Halligan, Michael (D)	✓		

Each day attach to minutes.

NAME: Chris Sweeten DATE: 1-12-81

ADDRESS: Attorney General's Office, Washington

PHONE: 449-0000

REPRESENTING WHOM? As the agent of the Government

APPEARING ON WHICH PROPOSAL:

DO YOU: SUPPORT? AMEND? OPPOSE?

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

NAME: BJARNE JOHNSON DATE: JAN 12-81

ADDRESS: P.O. 1645 Great Falls, Mont

PHONE: 761-3000

REPRESENTING WHOM? Mont Bar Assn

APPEARING ON WHICH PROPOSAL: Ser Bill 38

DO YOU: SUPPORT? ☒ AMEND? ☐ OPPOSE? ☐

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

LAW OFFICES OF
**CHURCH,
HARRIS,
JOHNSON &
WILLIAMS**

I. W. CHURCH (1884-1972)
G. G. HARRIS (1883-1973)
BJARNE JOHNSON
CARTER WILLIAMS
WM. A. REID
DALE FORBES
CRESAP S. MCCracken
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R. KEITH STRONG
W. BJARNE JOHNSON
MICHAEL B. ANDERSON
GREGORY R. SCHWANDT
KENNETH T. JARVI

By Bjarne A

P.O. BOX 1645 • GREAT FALLS, MONTANA 59403 • THIRD FLOOR NORTHWESTERN BANK BUILDING • PHONE (406) 761-3000

July 18, 1980

Mr. Jean Turnage
Attorney at law
Polson, Montana 59860

Dear Jean:

In looking over the changes made by the Montana Legislature Legislature at the time it adopted the Uniform Probate Code, most of the changes seem to have been dictated by local considerations. Since the time the Code was adopted, and certainly this is not unexpected, some problem areas have developed, and also the Joint Editorial Board, which is charged with monitoring the Code in the various states adopting it, have recommended several changes of the version of the Code originally submitted to us. The Montana Bar requested all attorneys finding some problem with the Code to advise the Bar of the problems encountered and to make recommendations for change. I think we will have a continuing committee for updating the Code and that perhaps we ought to improve some of the more troublesome areas first and leave the more minor changes for a future Legislature. It is with this thought in mind that we recommend for your consideration the following changes in the Uniform Probate Code:

(Any further reference to the Uniform Probate Code will be to the Uniform Probate Code Fifth Edition, with the official 1977 text, with comments, as published by West Publishing Company of St. Paul, Minnesota. Rather than retyping the various sections of the UPC referred to, I am simply xeroxing each of the pertinent sections with the Editorial Board comments. Each section will be numbered to correspond to the following numbering of code sections.)

1. Amend 72-2-101, MCA, by adopting Section 2-801 of the UPC, with the following two changes:
 - a. After the word "person" in sub-section (a), the words "or his personal representative".

I am advised that the National Conference of Commissioners were in substantial disagreement whether a personal representative should have the ability to disclaim. It seems to me there are circumstances where a death occurs within nine months of the first death, that substantial tax benefits could be obtained by the ability to disclaim. The current Montana statute permits a personal representative to disclaim.

- b. The second change proposed in the UPC statute would be changing the time of filing from six months to nine months. The current Montana statute requires filing within six months, the federal gift tax statute enacted as part of the Tax Reform Act of 1976 requires filing within nine months from date of death. The time limits should be the same.

2. 72-2-203 MCA should be amended by adopting Section 2-103 of the UPC. The proposed amendment would limit intestate succession to tracing through a common grandparent. The comments by the Joint Editorial Board state the proposal better than I can. I think tracing through a common grandparent removes some of the liability we now have on trying to find heirs tracing through great grandparents or perhaps more remote ancestors. The amendment, if adopted, would substantially limit the exposure of the personal representative, as well as his attorney, and certainly if any testator were unhappy with the distribution of property under our intestate laws, he could change the devolution of property by a proper will.

3. 72-2-213 MCA should be amended by Section 2-109 of the UPC, and Section 2-114 of the UPC.

4. 72-2-705 MCA should be amended by Section 2-202 of the UPC. The change is recommended by the Joint Editorial Board and apparently removes some problems that have appeared in other states. I think that portion of the proposed UPC, sub-paragraph (3), should be modified by leaving out those words which I have lined out.

5. 72-2-706 MCA should be amended by adopting Section 2-207 of the UPC. The changes are recommended by the Joint Editorial Board.

6. 72-2-707 MCA should be amended by Section 2-205 of the UPC, which again is a recommendation made by the Joint Editorial Board.

7. 72-3-122 MCA should be amended by adopting Section 3-108 of the UPC. You will remember we struggled for some time on what to do with this particular statute. It is essentially a statute of limitations, and by the change we

made we may have eliminated the statute of limitations, and in any event we have created a lot of uncertainty in the Bar on the meaning of the statute as it now stands in Montana. I wonder if it wouldn't be advisable as a matter of policy to adopt the UPC version and give some finality to the period within which a will can be offered for probate. It may be that some people would consider three years too short. On the other hand, if a will does not appear within a three-year period, perhaps it shouldn't be permitted to be offered for probate. Other than wills from other states where we have an ancillary proceeding in Montana, I have never had a will produced after a three-year period from the date of death of the Montana resident, nor do I know of any case where a will was found after a three-year period. I think we should adopt the official UPC provision.

8. 72-3-608 MCA should be repealed. There is no corresponding UPC statute. We would, of course, defer to Tom Stoll's judgment. However, I do not see where the requirement for filing an inventory with the Department of Revenue gives the state any additional protection in collecting its revenues. It seems to me with the proviso that the personal representative is personally responsible for payment of tax, together with the right of the state to follow the property in anybody's hands, gives the State of Montana all of the security it can get for the payment of taxes and that the requirement of filing an inventory does not improve the state's position. I find the statute troublesome when we have perishable property that should be sold promptly, or cattle that should be disposed of quickly simply because there isn't anyone capable of taking care of them, and the requirement for disposal will not wait for a complete inventory of the assets of the estate. Simply advising the Department of Revenue that you have perishable property or cattle does not improve the Department's position as far as securing payment of the tax is concerned.

9. 72-2-304 should be amended by adopting Section 2-504 of the UPC. From correspondence with Judge Allen it appeared that some attorneys in the Billings area had failed to include an attestation and had simply used the statutory language for a self-proved will in the place of a proper attestation. On appeal to the Supreme Court, the Supreme Court held the will to be invalid without a proper attestation clause. In any event the Joint Editorial Board recognized some problems with the self-proved provisions as originally drafted by the UPC editors and have recommended the adoption of a new and different provision. I think with this amendment to the existing MCA the problem noted by Judge Allen would be eliminated, as the new provisions for a self-proved will also include statutory provisions for an attestation.

10. 72-3-1006 MCA, which has no counterpart in the UPC, should be amended by adding the following language immediately following the word "revenue" in subparagraph (1):

....or an agreement with the Department of Revenue for extension of time for payment of inheritance taxes.

The UPC has permitted us to do a lot more tax planning than we were able to do under the earlier Code. The timing of the closing of an estate can have very important tax consequences to the estate and the beneficiaries in distributing through either profits or part of the profits or net operating loss to the heirs. If you have a net operating loss in the business, you can only increase the net operating loss for personal representative fees and attorney fees in the final return for the estate. As I understand it, the only way this net operating loss can be passed through is in the final return of the fiduciary, and of course if Montana statutes will not permit closing of an estate without payment of state inheritance taxes in full, we are in the position of either trying to take advantage of some advantageous income tax planning or taking advantage of recent Montana statutes permitting the extension of time for payment of state inheritance taxes. Under Code Section 72-3-1006 we cannot now do both and the statute should be amended to give us the additional alternative.

11. Chapter 4 of Title 72 MCA pertaining to foreign personal representatives and ancillary administration should be amended to conform in all particulars to the UPC. I know there was concern for tax revenues at the time Chapter 4 was being considered by the Legislature; however, I do not think the changes we made are of any help as far as the Department of Revenue is concerned. The changes have created a lot of confusion in the minds of the Montana Bar on what to do with an ancillary administration, and I do not think there is much agreement among the attorneys on what the procedure should be. I have simply followed the practice of having the foreign personal representative appointed in Montana and then following through with the usual probate procedures on an informal probate. I think in almost all instances the only property we are concerned with in an ancillary probate is real property located in Montana, and the State, of course, has its lien for taxes until paid. I think we ought to adopt the UPC in its entirety without change.

Professor J. Martin Burke, of the University of Montana Law School, is working with me on this project. By a copy of this letter I am asking Martin to submit any additional changes or corrections that he thinks should be made, and also comment on the suggestions that I have made.

In preparing this matter I have tried to use the format that we recently discussed by phone, and of course it is

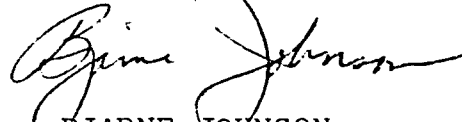
clearly understood by all of us in the Probate Section of the Bar that you will sponsor only such portions of the proposed changes as you deem appropriate.

Many thanks for the assistance, and with kindest regards I remain

Yours truly,

CHURCH, HARRIS, JOHNSON & WILLIAMS

BY:


BJARNE JOHNSON

BJlb

Encls.

cc: J. Martin Burke
Associate Professor of Law
James Thompson
Prof. Lester Rusoff
Tom Stoll

Exhibit B

TO: SENATOR STEVE BROWN
FROM: CHRIS TWEETEN
RE: SENATE BILL 43

This bill arose from the Montana Supreme Court's decision in State v. Blakney, _____ Mont. _____, 605 P.2d 1093 (1980) (copy attached), in which the Court invalidated the portion of section 46-13-301, MCA, which placed on the defendant the burden of proving his confession involuntary. The Court had held that due process required the State to prove the voluntariness of a confession as early as 1974, See State v. Smith, 104 Mont. 334, 338, 523 P.2d 1395 (1974), but had never explicitly ruled on the constitutionality of section 46-13-301. Blakney was the first case to rule the statute unconstitutional.

In light of Smith, Blakney, and the United States Supreme Court's decision in Lego v. Twomey, 404 U.S. 477 (1972), there is no doubt that the constitution requires the State to shoulder the burden of proof as to the voluntariness of a confession. We proposed this legislation to avoid the situation which occurred in Blakney, where the district court, apparently unaware of the holding in Smith, followed the statute and placed the burden on the defendant. 605 P.2d at 1099. If the statute is amended to conform to Blakney, judges and attorneys will be able to refer to and rely on the statute to find the proper rule.

The amendment also adds a standard of proof, in addition to specifying which party bears the burden. The old statute left the reader in the dark as to whether the confession must be proved voluntary by a preponderance of the evidence or beyond a reasonable doubt. Blakney and Twomey hold that a preponderance of the evidence is the proper standard. The amendment codifies those holdings.