MINUTES OF THE JUDICIARY COMMITTEE
March 14, 1983

The meeting of the House Judiciary Committee was called to order by Chairman Dave Brown in room 224A of the capitol building, Helena, Montana at 8:32 a.m. All members were present as was Brenda Desmond, Staff Attorney for the Legislative Council.

SENATE BILL 391

SENATOR ECK, District 39, explained that this bill was suggested by a local attorney, Mr. Anderson; and that, in the amended form, it merely extends what is considered a felony from a misdemeanor from $150.00 to $500.00, which means cases involving criminal misuse, theft, failure to return rented or leased property and issuances of bad checks and a few other things, if the amount involved is less thatn $500.00 would be considered a misdemeanor and tried in justice court. She stated that this could make a significant impact on our court system as they felt that half or more of the cases would be tried in justice court rather than district court.

She indicated that there are several provisions that she would like them to consider reinserting that the Senate Judiciary had struck out when they intended to strike the restitution language. She thought that the major one is the provision that in a case of a deferred imposition of sentence, the judge could assign a person to the county jail up to 180 days rather than the 90-day limitation now. She commented that this would provide a little flexibility at the early end of sentencing; and the judge could have someone stay in jail nights and weekends, while still maintaining his job. She thought that a 180-day sentence is a significant sentence and is the kind of sentence that might replace a prison sentence; whereas a judge might think that 90 days is not sufficient.

She stated that she was concerned about the costs to the counties and felt that the person should be allowed to work and pay for the costs of his confinement. She noted, at the present time, the cost of confinement is not one of the things that is considered eligible for restitution. She suggested that the committee hold this bill until they hear Senator Halligan's bill on restitution next Monday.

She offered a statement from John Maynard, Staff Attorney General, who was not able to appear before the committee. See EXHIBIT A.

She indicated that Representative Addy will handle the bill on the House floor.

There were no further proponents and no opponents. SENATOR ECK closed.

REPRESENTATIVE EUDAILY noted that the effective date was on passage and approval and wondered about this. SENATOR ECK replied that it was just drafted that way and she did not know what difference it made. She said that knowing that this is one that would effect a lot of attorneys around the state and knowing how late we usually are in getting the additions to the codes printed, that it should be left as July.

REPRESENTATIVE BERGENE said that there was a bill about fraudulent checks; that they are going to try to reinsert the language in that bill in conference committee to say "shall not exceed $500.00". She wondered if there would be an conflict with this bill. SENATOR ECK replied that she did not think so.

There were no further questions and the hearing on this bill was closed.

SENATE BILL 388

SENATOR BLAYLOCK, District 35, said that this bill is a follow-up on SB 326, which is now on its way to the ballot; this will give the judicial canons of ethics as a criteria on which the judge judges. He said the way the bill was drafted was that the commission could act on its own motion and the Senate Judiciary Committee struck that and put in "upon the filing of a written complaint"; he accepted that and felt it was a good addition.

STEVE BROWN, representing the Montana Judges Association, stated that the language in the bill was recommended by Judge Martin, who is the chairman of the Judicial Standards Commission. He thought an interesting feature was the language on page 2, lines 14 through 17, which was the commission's recommendation that if there is an indication there might be a problem, that the judicial officer may file with the commission a letter stating that there will be corrective action taken, and that will end it.

There were no further proponents and no opponents.

SENATOR BLAYLOCK closed.

REPRESENTATIVE SPAETH noted on page 1, lines 14 and 15, the language, "may, upon good cause shown," was striken and he wondered why this was striken. MR. BROWN replied that the biggest problem is that when you get a letter in, you do not know if there is good cause or not; the problem with Shea was that they could not even conduct an investigation to determine if there was any basis for pursuing that; this clarifies that section to allow them at least to call up a judge and say that they have received a complaint about their action and if it turns out that it is a frivolous complaint, that is the end of it right there. He said that in the Shea case, it indicated that they couldn't even do that.

REPRESENTATIVE EUDAILY referred to the corrective action on page 2, line 17 and wondered if a person was in trouble with some action and said that he was going to correct it, but no one tells him how much they want him to correct it or what they want him to correct, if this was not a little open because it is his discretion what the corrective action is rather than the commission's. MR. BROWN responded that the way he felt that that reads is if the corrective action was considered suitable by the commission, that would be all, but the commission would have the opportunity to come back and say that that does not go far enough and he felt that they would have to judge each case on its own facts.

REPRESENTATIVE EUDAILY questioned if he thought it would be necessary to say that he would take corrective action subject to the approval of the commission. MR. BROWN replied that he thought it was understood.

REPRESENTATIVE KEYSER said that he thought that the person should do more than just say that he will take corrective action, he should say what that action is - that he will do this, this and this. He felt that if he stated in his letter what that corrective action would be, the commission could come back and say that this is not what we had in mind - this is what we mean. MR. BROWN said that if they wanted to clarify this, then he would think they could take the language suggested by Representative Eudaily.

There were no further questions and the hearing on this bill was closed. Representative Addy will carry the bill in the House.

EXECUTIVE SESSION

SENATE BILL 388

REPRESENTATIVE KEYSER moved that this bill BE CONCURRED IN. REPRESENTATIVE BERGENE seconded the motion.

REPRESENTATIVE EUDAILY moved that the bill be amended on page 2, line 17, following "action" by inserting "satisfactory to the commission". REPRESENTATIVE SPAETH seconded the motion. The motion carried unanimously.

REPRESENTATIVE KEYSER moved that the bill BE CONCURRED IN AS AMENDED. REPRESENTATIVE BERGENE seconded the motion. The motion carried unanimously.

SENATE BILL 391

The hearing on this bill was reopened.

MAC ANDERSON, an attorney from Bozeman, who served as a part-time public defender, testified that two years ago, Senator Eck introduced something like this bill because of the inflationary pressures. He indicated that in 1907 or thereabouts the difference between a misdemeanor and a felony was $25.00; in 1973, this was raised to $150.00; and he thought that raising this to $500.00 will help the problem in district court. He said that in the last two weeks he had a case where a boy had stolen a car that was worth $200.00 - it was his first offense and he was designated as a felon.

In connection with raising the time in which a judge could sentence from 90 to 180 days in the county jail, he commented that this would give the judge the same sentencing authority that the justice of peace has, as they can sentence to 6 months in jail.

He noted that the other thing that was amended out was restitution and he testified that he was involved in a case, State vs. Morgan, where the judge required a man to pay $75.00 a month to the survivors of an automobile accident; and the Supreme Court found that restitution was proper in this case.

REPRESENTATIVE IVERSON said that last session when they were dealing with Keedy's mandatory sentencing bill, this problem

came up and he wondered when was the last time they raised this. REPRESENTATIVE SPAETH replied that he said in 1973.

MR. ANDERSON said that the original bill he drafted did not have anything about restitution in it; and he thought that when Senator Eck had this drafted by the attorney general's office, the restitution provisions were put in.

REPRESENTATIVE EUDAILY wondered what the sections were that were being repealed. MS. DESMOND replied that 46-8-114 is entitled: Time and method of payment of costs, and says when a defendant is sentenced to pay the costs of court-appointed counsel, the court may order payment to be made within a specified period of time or in specified installments. She said that 46-8-115 is entitled: Effects of nonpayment of costs, which provides for what will happen when a defendant fails to pay the costs that the court ordered him to pay.

REPRESENTATIVE HANNAH asked why the last half of the bill was taken out. CHAIRMAN BROWN replied that the Senate did not like it. REPRESENTATIVE HANNAH wondered why they did not like it. CHAIRMAN BROWN replied that Senator Halligan has a bill coming over Monday that is similar on restitutions and they should be worked on together.

There were no further questions and the hearing on this bill was closed.

SENATE BILL 371

SENATOR FULLER, District 15, Helena, said that this was a bill modifying the child custody law and gives another consideration for modifications when the child reaches 14 years of age.

SENATOR MAZUREK, District 16, Helena, said that the title of this bill is a little misleading and this applies only to a modification of an existing decree. He indicated that the court must find (1) that facts have arisen since the original decree was entered and (2) a change has occurred in the circumstances of the child or his custodian and as a result of that, modification of the prior decree is necessary to serve the best interests of the child.

CHUCK SMITH, representing himself, gave testimony in favor of this bill. See EXHIBIT B and C.

FRED EASY, representing himself, offered a statement in support of this bill. See EXHIBITS D and E.

There were no further proponents and no opponents.

SENATOR FULLER closed by saying that he spoke to four different lawyers in Helena that handle divorce cases; and they felt that this was a reasonable thing to do.

REPRESENTATIVE CURTISS wondered how they arrived at the magic age of 14. SENATOR FULLER responded that several statutes use the age of 14. MS. DESMOND thought that age 12 was chosen, as she remembered, because it had some religious significance; but there was a feeling that perhaps with some children that this was too young and age 14 is a commonly used age to break off between young children and youth. REPRESENTATIVE ADDY said that historically it has been divided in multiples of 7 - at the age of 7, they are no longer a child; at the age of 14, they are adolescent; and at the age of 21, they are an adult - that is how they came up with the 21-year-old drinking age.

REPRESENTATIVE SPAETH questioned if the judge has any discretion, as on line 18, it says, "In applying these standards, the court shall retain the custodian appointed pursuant to the prior decree unless:". SENATOR MAZUREK replied that you have to meet the initial requirements (1) the facts have changed, and (2) it is in the best interest of the child.

REPRESENTATIVE SPAETH said, that if that is the case, why is (d) needed then. SENATOR MAZUREK answered that if you have an existing custodian, you first have to prove (c). If the custodian won't agree and the child has not been integrated, they would still have to prove serious physical, mental, moral or emotional endangerment to his health. He indicated that the intention was not to allow the child to chose as a matter of right - that the idea was that this was something that the judge could take into consideration once the child reaches that age.

REPRESENTATIVE HANNAH commented that he had a friend who was involved in a similar situation; he had a daughter who

had reached the age of 12 or 13; he had tried to get a change in the decree; the judge called her in and talked to her for a while and then changed custody. He wondered if he has the option to do that now. SENATOR MAZUREK replied that he does, but he has to meet one of these tests - a, b, or c.

REPRESENTATIVE HANNAH said that he was obviously stretching (c) in order to do that; and wondered if these were the only criteria to do that. SENATOR MAZUREK responded that in terms of modification, yes.

REPRESENTATIVE EUDAILY said that under (d), the rest of these standards are true but if the child does not desire modification, what would happen then. SENATOR MAZUREK responded that he supposed that you would have to look at the other standards; if the court found that the child's environment endangered his physical, mental, moral or emotional health, the court could do it. He explained that if the existing custodian is letting the child run free to do whatever he wants and the other parent comes in and says that this child must be disciplined, even if the child does not want a change, he felt that the court could come in and make a change.

REPRESENTATIVE EUDAILY asked if it was necessary to have the language, "desires the modification" in there if they can change anyway. SENATOR MAZUREK replied that in the situation where a child legitimately desires a change and has very good reasons for wanting the change, he does not think that this would happen unless the child's environment endangers his physical, mental, moral or emotional health. He said that all they are trying to do is get around (c), once the child has reached age 14 and to at least allow the court to consider this.

CHAIRMAN BROWN stated that he thought the language was good the way it is. He contended that it basically says that the court shall not modify a prior custody hearing unless it finds (1) that a change has occurred in the circumstances of the child or his custodian and (2) that the modification is necessary to serve the best interest of the child. He continued that the bill then lists the four exceptions; and he wondered if this did not give the court sufficient criteria. SENATOR MAZUREK replied that, when you go through it like that, he thought that maybe Representative Spaeth may be correct.

REPRESENTATIVE SPAETH commented that it is kind of screwy the way it is written and he was not sure who was right or wrong.

There were no further questions and the hearing was closed.

SENATE BILL 354

SENATOR CHRISTAENS said that this bill would extend the time an agister will have to file a lien from ten days to thirty days. He explained that, as it stands right now, if a wrecking yard receives a wrecked vehicle, they only have ten days to file the agisters' lien. He also stated that the consumer has an additional twenty days to take care of this payment.

BILL ROMINE, representing the Montana Automobile Dismantling and Recycling Association, informed the committee that this bill came up as he was doing some research and found that the agisters have a very short period of time in which to notify the lienholders of a lien. He explained that if you take your automobile down to a mechanic, who performs the work on it, he has a lien now depending upon his possession; he is not required to give it to you until you pay the bill; this is an old, old lien and came about from dealing with horses and cattle. He indicated that the problem with existing law is that if they need to order a part, it may take ten days or two weeks to find a part; and, in the meantime, under present law, the mechanic needs to notify the bank that they are going to claim a lien, which will cut off the bank's lien. He said that before the Senate amended it, it would have provided that you had the time from when the bill was presented, but the Senate felt that was too long a period of time. He emphasized that all this does is extend the time.

There were no further proponents and no opponents.

SENATOR CHRISTAENS closed.

REPRESENTATIVE KEYSER thought we had a lien statute before the legislature this year and he wondered if this was in conflict. SENATOR CHRISTAENS responded that it was not - that was an artisan lien and this is an agisters' lien.

REPRESENTATIVE ADDY questioned if the garageman complies with subsection 1, does that lien take priority over perfected security interests. MR. ROMINE replied that it would under existing law and this is similar to a mechanics' lien, wherein you have performed work on a vehicle where it will improve its value, you are entitled to the return of your money.

REPRESENTATIVE EUDAILY asked what does it mean on line 13, wherein it states, "The lien hereby created shall not take precedence over perfected security interests". MR. ROMINE said to read on down to line 15, wherein it reads, "unless within 10 days from the time of receiving the property, the person desiring to assert a lien thereon shall give notice in writing to said secured party or other lienholder". He contended that that was the problem - if he does not protect his lien by giving notice to the bank, he has a lien that is second; but if he gives notice to the bank, he does have a lien and if they do not redeem the property, then he can have the property sold at a sheriff's sale and from the proceeds of that sale, he would get his money first, and the bank second.

REPRESENTATIVE ADDY asked if he knew of any supreme court case under this statute. MR. ROMINE replied that he was not aware of any.

There were no further questions and the hearing on this bill was closed.

SENATOR CHRISTAENS indicated that REPRESENTATIVE WALLIN would carry this on the floor of the House.

EXECUTIVE SESSION

SENATE BILL 354

REPRESENTATIVE DARKO moved that this bill BE CONCURRED IN. The motion was seconded by REPRESENTATIVE JAN BROWN.

REPRESENTATIVE HANNAH declared that he was not sure there was a problem here and he said on line 14, there was reference to the Uniform Commercial Code and he wondered what would happen if he takes his car in and the bill is $700.00 and they did not call me and say they were going to do the work. REPRESENTATIVE ADDY replied that this deals with the

relationship between the car dealer and the bank - who has the first right to the lien; and it does not affect the situation that he is talking about. He explained that previously the car dealer had to give notice to the bank within ten days, and this would only extend that to thirty days. He advised that you would have to have possession of the object in order to claim a lien.

REPRESENTATIVE HANNAH asked if he could get his hands on the car, could he get this lien. REPRESENTATIVE ADDY relied that if he has possession of the car, yes, but this deals with giving notice to the bank.

REPRESENTATIVE CURTISS wondered if this would apply if someone fed an animal for several days for someone else. REPRESENATIVE ADDY answered that that is an agisters' lien and that it was used for horses before it was used for cars.

REPRESENTATIVE JENSEN wondered about a stray being impounded and maintained if that would come under this statute. REPRESENTATIVE ADDY said that it has to be expressed or implied contract.

REPRESENTATIVE EUDAILY asked where was the protection for the consumer in this case if he goes in and gets an estimate from the garageman that the bill is going to be $300.00; he goes back to pick up the car and the bill comes to $1,000.00. REPRESENTATIVE ADDY replied that there is another statute that states when you get a written estimate from the garageman that it can only be varied by 10 per cent without the consumer's prior approval. He noted that as a practical matter you will be fighting with the garageman who still has your car, so a compromise must be worked out. REPRESENTATIVE JENSEN commented that you can go to small claims court.

CHAIRMAN BROWN said that this bill would not affect this anyway.

The motion carried unanimously.

SENATE BILL 371

REPRESENTATIVE JAN BROWN moved that this bill BE CONCURRED IN. REPRESENTATIVE HANNAH seconded the motion.

REPRESENTATIVE RAMIREZ moved to amend the bill by changing on line 11, "shall not" to "may, in its discretion" and on line 12, change "unless" to "if" and on lines 18 and 19, strike that sentence; strike the period after "child" and insert: "and if further finds that". REPRESENTATIVE SPAETH seconded the motion, and said that this makes the language much more understanable.

REPRESENTATIVE RAMIREZ indicated that if this changes anything, it makes it totally discretionary; the way it reads now the court has to keep it in the current custodian unless these things happen; and he thought it was much more clear.

REPRESENTATIVE ADDY said that in the statute now there is a good strong presumption that the decree will not be modified and the only kind of social policy that would support that kind of language would be the interest of stability for the child.

REPRESENTATIVE RAMIREZ thought that he had really hit on the question - have we emphasized this enough that you keep it with the present custodian - that is the arrangement of choice and he wondered if that was the danger of this amendment.

REPRESENTATIVE SPAETH commented that he thought the bottom line is that you still have to prove what you had to prove previously; that it is in the best interest of the child and that one of the four following would have to be met; that we just changed the burden here from one emphasis to another; and, as far as the evidence as presented and the findings the court has to make, he did not feel they were changing anything.

REPRESENTATIVE ADDY contended that there may be a level of difference, as they may be changing the requirements to show this by clear and convincing evidence to requirements showing this by preponderance and might make out a less clear case.

REPRESENTATIVE SPAETH said he did not think they were changing the burden of proof at all; they are telling the court

that it can go ahead and modify if they find the following; whereas before they said you can't modify unless you find the following. He felt it was a semantical difference that the court would probably overstep anyway.

CHAIRMAN BROWN indicated that he was concerned because it may change the policy emphasis that the appointed custodian should be retained, and it makes it easier for the court to find otherwise.

REPRESENTATIVE RAMIREZ stated that it is still the same, because he has to find that the custodian has agreed to it or one of the four things; if he does not find that, it automatically stays with the custodian; what it adds, he felt, was it favored the custodian on (d), because even if the child desired the modification, the court would not have to make that change.

REPRESENTATIVE KEYSER felt that the way the language is, that you have to find all four. REPRESENTATIVE RAMIREZ replied that it is connected with an "or".

REPRESENTATIVE EUDAILY said that the title is misleading.

REPRESENTATIVE FARRIS mentioned that she thought this amendment increases the chance for mischief; that there are enough problems in cases of custody and divorce where the child reaches 14 years of age, they often say they are going to run away to dad anyway.

REPRESENTATIVE SPAETH said that he seriously felt that, if the bill was not amended, this would raise that more so.

The motion carried with REPRESENTATIVE FARRIS and REPRESENTATIVE ADDY voting no.

REPRESENTATIVE EUDAILY moved that the bill BE CONCURRED IN AS AMENDED, seconded by REPRESENTATIVE FARRIS. The motion carried unanimously.

The committee recessed at 10:04 a.m. and reconvened at 10:15 a.m.

SENATE BILL 373

SENATOR VAN VALKENBURG, District 50, said that this bill was introduced at the request of one of the title companies in Missoula; that section 2 of the bill has been introduced in every session of the legislature that he can look back on and that this validates any improperly executed conveyance for real property for which there is no legal action pending as of October 1, 1983, when this bill will go into effect. He explained that sometimes a person will sign a conveyance and not put their initial in there or there may be some technical defect and for purposes of avoiding any future litigation over that, this legislation has always been introduced.

He continued that in section 1 of the bill that this essentially does the same thing to unacknowledged deeds and that this would also apply only to deeds that were not the subject of any litigation as of October 1, 1983.

There were no proponents and no opponents.

SENATOR VAN VALKENBURG closed.

REPRESENTATIVE SPAETH asked why they do not just make this a blanket thing and not have to keep coming in to keep this updated. SENATOR VAN VALKENBURG replied that you need to look at this on a periodic basis because there may well be individual problems that arise, there may be reasons for opponents to come in and oppose the bill, plus, he felt, that you need that cut-off in there in respect to litigation.

REPRESENTATIVE JENSEN asked what is the cost per bill in the legislature. REPRESENTATIVE KEYSER responded around $1300.00 per bill.

There were no further questions and the hearing on this bill was closed.

EXECUTIVE SESSION

SENATE BILL 373

REPRESENTATIVE RAMIREZ moved that this bill BE CONCURRED IN. The motion was seconded by REPRESENTATIVE BERGENE.

REPRESENTATIVE SPAETH indicated that he has some problems with bills like this coming in very often.

REPRESENTATIVE RAMIREZ stated that title examiners can really be nit-pickers about these things; they find these defects and they create a whole lot of problems that are technical defects and this bill corrects this.

The motion carried with all voting aye with the exception of REPRESENTATIVE JENSEN.

SENATE BILL 114

CHAIRMAN BROWN said that he wanted to go over these amendments before they take action on the bill.

SENATE BILL 170

REPRESENTATIVE BERGENE moved that this bill BE TAKEN OFF THE TABLE. REPRESENTATIVE KEYSER seconded the motion. The motion carried unanimously.

REPRESENTATIVE BERGENE moved that this bill BE CONCURRED IN. REPRESENTATIVE KEYSER seconded the motion.

CHAIRMAN BROWN moved that they reinsert the repealer clause and retain new section 3. REPRESENTATIVE CURTISS seconded the motion.

REPRESENTATIVE HANNAH asked if what he is saying is that if someone comes in and through the power of eminent domain, take a right-of-way and if they are not using it, it reverts back to the owner exclusively and free of charge.

CHAIRMAN BROWN replied that it does what section 3 says, "When an interest other than a fee simple interest in property, which has been acquired for a public purpose by right of eminent domain, is abandoned or the purpose for which it was acquired is terminated, the property reverts to the original owner or his successor in interest."

REPRESENTATIVE RAMIREZ said that he would have to speak in opposition to the amendment as he did not think it would make it through the Senate if we put it back into its original form; it would go into conference committee or be killed; and he felt that they had an opportunity to clarify the law. He made a substitute motion to amend by adding a subsection

4, which says, "This law will be prospective only and applies to any property acquired here after." He felt that this would meet the objections of Mr. Morrow, who was the attorney who came in and testified on it, as he was concerned that this kind of bill would affect the reversion of property that was already condemned, primarily by the railroad. He explained that this property was acquired by condemnation years ago, it has since been abandoned; there may be lawsuits over it; and he did not want a law on the books that might affect what he thinks are the rules that might apply to that, which Representative Ramirez felt was already fixed by what the supreme court says the common law is. He contended that by making this in the future, we solve that problem, but yet we put some definite guidelines that he thought was very fair as to what people are acquiring in the future when they condemn for a public purpose.

CHAIRMAN BROWN asked if the language MS. DESMOND had worked out would be O.K: "Standard savings clause. This act does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before the effective date of this act."

REPRESENTATIVE RAMIREZ replied that was alright with one exception as he thought they should say, "property that was acquired" as that is what they are talking about - property acquired prior to the effective date. He said that if you added that, he felt it would be alright.

The motion was seconded by REPRESENTATIVE IVERSON, who said that he agreed with this and explained that this bill came up last session primarily because of the Milwaukee abandonment; they did a lot of work on it last session trying to decide if there was a possibility of putting it together and one of the problems they ran into is that there is no clear way to identify it; sometimes they automatically reverted; sometimes the original owner of the land was very poorly identified and he thought this would create a multitude of lawsuits as it is too unclear - the original ownership and who it may have originally belonged to.

REPRESENTATIVE ADDY said that he would like to offer a compromise by amending on page 2, section 2, line 12, by saying, "the landowner shall have the option to purchase the interest by offering therefor an amount of money equal to the highest

bid received for the interest at a sale provided for in 70-30-321, or an amount equal to the price paid by the condemnor." He said that this way you would not really have a windfall to the landowner whose property was acquired or to the condemnor who is exercising eminent domain. He thought this would be a middle position between the two and one that would give the landowner safeguards that whoever comes in and condemns isn't just taking the property for limited period of time and it would encourage them to take less than fee simple interest.

REPRESENTATIVE SPAETH indicated that he would like to speak against this idea as he thought they had three options - (1) to go back to the bill in its original state, although he did not think the Senate would buy that; (2) they can leave it in its present state and make it prospective; and (3) the third option is Representative Addy's option and he did not think that this option would have any viability at all as he felt the Senate would reject it outright. He commented that their fourth option was to kill the bill. He continued that he thought therewere some good parts to the bill - the amendment making it prospective and he would like to see it prospective rather than retroactive, but he would hate to see it repealed because it does give the landowner, at least in the future, the right of first refusal, which the present law does not and he felt that they should be happy with what they are getting here.

REPRESENTATIVE ADDY thought that this was being stated entirely in political and procedural terms; he felt that this was a fairer way to divide the baby and takes into consideration both the initial negative impact that the landowner suffers, the negative impact while this property has been under use and takes into consideration the investment that the condemnor has made in the property and he thought this would be fairer than what the committee is looking at now,

REPRESENTATIVE RAMIREZ requested that he state again what this does.

REPRESENTATIVE ADDY replied that the landowner has to buy the property back at fair market value and has to pay the same amount that a would-be buyer is willing to pay. He explained that he could buy it for that price or he could buy it for the price that it was bought from them for, whichever is less.

REPRESENTATIVE RAMIREZ stated that he did not think this was in any way reasonable because there is no time limit. He continued that the landowner has had the money and the use of that money for all those years; and it does not take into account any improvement that might be on there or the fact that the landowner has had the use of the money. He suggested that if he gets $10,000.00 for that property and with that money goes out and gets some other property and holds it for ten, twenty or thirty years, he has had the benefit of the appreciation that that money has given him. He declared that he is going to get this other property back for the original price and he did not feel that it was fair.

REPRESENTATIVE KEYSER exclaimed that, first of all, the guy did not want to sell his property to start with - he had no intention of selling and did not want to sell and the sale was forced upon him; the only way they thought they could do this in the name of justice was to put a price on it that they were going to give that landowner for his property; and if he gets it back at the same price, he felt that that was good and the guy who had it deserves it that way.

CHAIRMAN BROWN noted that this land is typically undervalued.

REPRESENTATIVE CURTISS commented that she supported Representative Addy's proposal; whatever amount the person gets in exchange for his property is not going to compensate in an instance where a landowner has to drive a mile down to be able to get across a track and then go back another mile to what may be the only spring on his property; and she felt that it did not seem fair to have to outbid the highest bidder to be able to get that back.

REPRESENTATIVE ADDY moved that the amendment be amended on page 2, line 13, following "to" insert, "either the amount of money for which the real property interest was originally acquired or". REPRESENTATIVE CURTISS seconded the motion.

REPRESENTATIVE HANNAH questioned if current language says that the landowner shall have the option to purchase the interest that he had.

REPRESENTATIVE RAMIREZ said that he knew that people are concerned about the power of condemnation, but, he believes that, in this state, if you think that you have an anti-development climate in this state right now, you are adding to it; the public reaction to these things is that is the way it is in Montana; there would never be any of these things built; there would never be a transmission line; there would never be anything in the way of development of your natural resources if you did not have the power of condemnation. He felt that you substantially alter that power when you put on something like this. He contended that the Senate will never buy this, but he felt that they are creating tremendous problems for any kind of development of natural resources.

CHAIRMAN BROWN declared that he totally agreed with him in terms of eminent domain statutes and he felt it was imperative to maintain some reasonable semblance of the eminent domain statute, but here he does not see where this really affects that. He felt that all they are saying is that that landowner who was abused to begin with can get that property back at the same price as he had it before. He thought that there are going to be a few cases where it is going to amount to a windfall to the landowner but he felt that the bulk of the cases will be a return to the normal situation that existed prior to the eminent domain acquisition; and, in most cases, those acquisitions are a pain-in-the-neck; and he did not see where this was changing eminent domain.

REPRESENTATIVE SPAETH said they were adding a new factor and that is how long is that public use going to be in existence. He felt that this opens the court up to a whole new realm and he explained that most of the time when he is sitting there representing the landowner, he tried to get as much as he can get; when on the other side, he is trying to pay as little as can pay; and he felt that this was going to give him a little more ammunition when he is sitting on the other side of the table and dealing with the landowner, as he can give him a little less than he probably wants, because you may be giving this up in twenty or thirty years and many of those landowners are not going to be around twenty or thirty years from now, so the people

that you are going to hurt more are the people sitting at that condemnation table and the one you will be helping is the person in the future that comes along and is a successor in interest generally through purchase. He said that is the reason he opposes it as it does not help the person whose property is being condemned.

REPRESENTATIVE CURTISS noted that the people who are willing to litigate and more knowledgable are going to get a better deal, but she just watched a procedure whereby 36,000 acres were condemned; these individuals lacked the knowledge of legal process and were the ones who were hurt. She said that their families have the same regard for that land that was condemned as they do; and they actually watch people having to come in and stand on one foot and then another while they dealt with the Corp of Engineers concerning their lifetime accumulation. She felt this was a real injustice.

REPRESENTATIVE KEYSER moved to divide the amendments. CHAIRMAN BROWN responded that this is the amendment to the substitute. REPRESENTATIVE ADDY withdrew his amendment.

REPRESENTATIVE RAMIREZ withdrew his amendment because he would rather vote on Representative Addy's amendment.

REPRESENTATIVE ADDY made a substitute motion to consider his amendment.

REPRESENTATIVE IVERSON replied that he can't vote on this unless something like Representative Ramirez's amendment is on there that makes it prospective.

REPRESENTATIVE ADDY withdrew his amendment and offered Representative Ramirez's amendment. REPRESENTATIVE JENSEN seconded the motion. A vote was taken and all were in favor with the exception of REPRESENTATIVE KEYSER, who voted no.

REPRESENTATIVE ADDY moved that the previous amendment with the language "reverts back to the original owner at the price that was paid or to the highest bidder, whichever was lower." be adopted. REPRESENTATIVE CURTISS seconded the motion. The motion carried with REPRESENTATIVE RAMIREZ, REPRESENTATIVE EUDAILY, REPRESENTATIVE HANNAH, REPRESENTATIVE SPAETH, REPRESENTATIVE BERGENE and REPRESENTATIVE DAVE BROWN voting no.

REPRESENTATIVE JENSEN moved that the bill BE CONCURRED IN AS AMENDED. The motion was seconded by REPRESENTATIVE FARRIS.

REPRESENTATIVE RAMIREZ made a substitute motion that everything be striken after line 15 and lines 13 and 14 be reinserted. He said this would put it back in the form that the sponsor wanted, which was to insert the repealer and add section 3. REPRESENTATIVE SPAETH seconded the motion.

REPRESENTATIVE SCHYE asked if putting back in the repealer and putting in section 3, is this like Senator Boylan wanted it. REPRESENTATIVE KEYSER said just like the white bill with section 3 added.

REPRESENTATIVE RAMIREZ stated that this is a great way to try and please Senator Boylan and put it back as the sponsor intended.

REPRESENTATIVE ADDY said that he thought this was a good way to kill the bill. REPRESENTATIVE SPAETH said that he did not think Representative Ramirez made this motion to kill the bill and did not think this was in order.

REPRESENTATIVE KEYSER commented that in Senator Boylan's testimony and in Senator Boylan's attorney's testimony that that was what they wanted to do and he affirmed that if that could not be done, Senator Boylan would rather that the bill be killed - that is exactly what his testimony was. He felt that this is probably a very reasonable approach.

REPRESENTATIVE RAMIREZ indicated that this was his second choice and his third choice is how the bill is presently written and he just cannot support it. He stated that he can support it this way, but he would prefer it another way.

CHAIRMAN BROWN asked if they pass the bill in the form of my amendment and your amendment, won't it apply prospectively. REPRESENTATIVE RAMIREZ replied that he thought it would, but he would not mind adding a prospective clause on section 3.

REPRESENTATIVE JENSEN wondered if this was part of Senator Boylan's interest. CHAIRMAN BROWN replied that he did not think it was mentioned.

REPRESENTATIVE CURTISS questioned that as amended, it will apply only to easements and not deeded property. REPRESENATIVE JENSEN responded that that is what new section 3 does; it will not affect the taking of real property.

A vote was taken and the motion carried with 13 voting yes and 5 voting no. See ROLL CALL VOTE.

REPRESENTATIVE KEYSER moved that the bill BE CONCURRED IN AS AMENDED. The motion was seconded by REPRESENTATIVE HANNAH. The motion carried with REPRESENTATIVE JENSEN and REPRESENTATIVE FARRIS voting no.

SENATE BILL 347

MS. DESMOND handed out copies of HB 888 and copies of the case Oates vs. Knutson. See EXHIBIT F. She stated that in section 6 of SB 347, the reference to prescriptive easement was deleted and they felt that it wasn't necessary to define it as it is already defined in case law; then in HB 888, they have inserted in subsection 2, line 18, language stating "for navigation upon a stream, river, or lake". She said that she did not think that was in conflict with SB 347, but just more restrictive. She indicated that they added on page 5, line 22, the language, "or occurred without objection but with the knowledge of the landowner or his agent." and she said this is to cover the situations where people are using the landowner's land; but he has not given them express permission to do this.

REPRESENTATIVE SPAETH moved that SB 347 BE CONCURRED IN. The motion was seconded by REPRESENTATIVE ADDY.

REPRESENTATIVE RAMIREZ said that he thought HB 888 is in trouble; he did not think it is likely to pass; and he felt this was important as to how we handle this bill. He also felt that the change in HB 888 does give away a little of something by the sportsman to the landowner, but he said they were in an area where he does not know if the courts have even considered a prescriptive easement for floating a stream. He contended that if the sportsman gets something in HB 888, he gets the right to float that stream. He said he would hate to see them pass one side of the compromise and not the other. He also felt that this bill is giving

up more than the law provides. He noted in the case that was just passed out, you will see that it doesn't say that you can't get an easement by prescription - what it says is that it doesn't raise a presumption - not sufficient to raise the presumption of adverse use or a claim of right. He explained that those are just two of the elements of prescriptive use, but it is a factor that could be considered in establishing some of the other elements of prescriptive use. He felt that they should not amend SB 347 to make it the same as HB 888 and then pass it out, because they would be giving up something for one side without something in return. He also felt that they should not pass SB 347 as written, because they would be doing the same thing and he would like them to amend SB 347 so it accurately states the law and then table it.

REPRESENTATIVE IVERSON said that he completely agreed with that; he did not know if they needed to amend it first; HB 888 is in a very sensitive state in the Senate right now; hopefully they will pass this to prevent some lawsuits and possibly a shooting or two; and if it is going to pass, it is going to be subject to several more days of negotiation. He continued because that negotiation could be sensitive, he felt it was ill-advised to muddy the waters by passing this bill right now and he would certainly support a motion to table.

REPRESENTATIVE RAMIREZ said that he thought they should amend this, because it should be in the form, if someone blasted it out of here, that they could live with.

REPRESENTATIVE RAMIREZ moved that the bill be amended on page 1, lines 18 through 20, by inserting, "Use of or entry upon land or water for recreational purposes is not sufficient, in itself, to raise the presumption of adverse use or a claim of right for the purpose of establishing a prescriptive easement."

REPRESENTATIVE JENSEN questioned what does it mean "or water". REPRESENTATIVE IVERSON replied that one application of that would be if water were not included, a guy could find a tributary and go down the middle of a stream, even if it were not navigable.

REPRESENTATIVE RAMIREZ noted that they should change the title - it should be something to the effect that it should say, "Effect of recreational use on establishment of prescriptive easement." and the subtitle on lines 13 and 14 should be something similar.

REPRESENTATIVE SCHYE stated that this is a pretty important bill and if we are going to table it anyway, couldn't they wait a day and get the amendments all written out.

REPRESENTATIVE RAMIREZ asserted that the only thing he wanted to avoid was someone taking a run on this bill on the floor and getting it out on the floor in the form it is in now and he would like to have it in the amended form.

REPRESENTATIVE BROWN suggested that they go ahead and pass the amendments, table the bill and Ms Desmond can work on the amendments and circulate them tomorrow. He reassured them that if there were any problems, they could take it off the table and discuss them.

REPRESENTATIVE CURTISS seconded the motion to amend.

REPRESENTATIVE KEYSER said that we have talked about the court decisions that are here before us, but there are previous court decisions on prescriptive easements that we do not have before us - there have been all kinds of them that have been taken to court, even those that cross different lands. He contended that it was his understanding that in at least three cases, where they have been using this road for a period of five years to get into a hunting area and the right to use that road to get in there is legal. He wondered if this basically changes what the courts have already said.

REPRESENTATIVE RAMIREZ said that no, it does not and what it is trying to do is say exactly what the courts have said as opposed to saying something that they have never said - they have never said that you cannot acquire a prescriptive easement for recreational purposes. He thought that if they have a bill at all, they should have one that says what the supreme court says and not make it broader than what the supreme court says.

A vote was taken on Representative Ramirez's amendment and it was adopted unanimously.

REPRESENTATIVE RAMIREZ moved that the bill be TABLED. REPRESENTATIVE IVERSON seconded the motion.

REPRESENTATIVE SPAETH asked if the reason for tabling this was not to hold HB 888 hostage in the Senate, because if it is, he is very much opposed to HB 888 and he did like some of the aspects of SB 347 and he did not want to have SB 347 held in hostage.

CHAIRMAN BROWN said that this is not the intent.

REPRESENTATIVE IVERSON commented that the way the politics are over there now, that they couldn't hold it hostage with this - that there are other forces and bigger chips being played.

REPRESENTATIVE SPAETH stated that he was very much in support of SB 347, and he thought that they have to do something to reassure the landowners out there not to lock their places up. He said that HB 888 is a navagability question and unrelated to prescriptive easements. He emphasized that he would like to see this one go and HB 888 die.

The motion carried unanimously.

REPRESENTATIVE KEYSER moved that the meeting be adjourned. The meeting adjourned at 11:18 a.m.

Dave Brown
DAVE BROWN, Chairman

Alice Omang
Alice Omang, Secretary

STANDING COMMITTEE REPORT

March 14, 1983

MR. SPEAKER

We, your committee on JUDICIARY

having had under consideration SENATE Bill No. 354

third reading copy (blue) color

"AN ACT REVISING THE LAWS RELATING TO PRIORITY OF AGISTERS' LIENS AND LIENS OF SERVICE OVER PERFECTED SECURITY INTERESTS AND OTHER RECORDED LIENS; AMENDING SECTION 71-3-1202, MCA."

Respectfully report as follows: That SENATE Bill No. 354

BE CONCURRED IN

XXXXX
DO PASS

DAVE BROWN
Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

STANDING COMMITTEE REPORT

March 14 19 83

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration SENATE Bill No. 371

third reading copy (blue color)

"AN ACT PROVIDING THAT IF IT IS IN THE BEST INTEREST OF THE CHILD, A CHILD CUSTODY DECREE MAY BE MODIFIED WHEN A CHILD AGED 14 YEARS OR OLDER DESIRES THAT IT BE MODIFIED; AMENDING SECTION 40-4-219, MCA."

Respectfully report as follows: That SENATE Bill No. 371

BE AMENDED AS FOLLOWS:

1. Title, line 4.
Following: "THAT"
Strike: "IF"
Insert: "WHEN THE CIRCUMSTANCES OF A CHILD'S CUSTODIAL SITUATION HAVE CHANGED AND WHEN"

2. Title, line 5.
Following: "IN THE"
Insert: "CHILD'S"
Strike: "OF THE CHILD"

3. Title, line 6.
Strike: "WHEN A"
Insert: "IF THE"
Following: "CHILD"
Strike: "AGED"
Insert: "IS"

Following: "YEARS"
Insert: "OF AGE"
Following: "OLDER"
Insert: "AND"

DAVE BROWN Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

March 14, 19 83

4. Page 1, line 11.
Strike: "shall not"
Insert: "may, in its discretion"

5. Page 1, line 12.
Strike: "unless"
Insert: "if"

6.. Page 1, line 18.
Following: "child"
Strike: ". In" through "unless" on line 19.
Insert: "and if it further finds that"

AND AS AMENDED
BE CONCURRED IN

DAVE BROWN, Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

March 14, 19 83

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration SENATE Bill No. 373

third reading copy (blue color)

A BILL FOR AN ACT ENTITLED: "AN ACT VALIDATING UNACKNOWLEDGED DEEDS EXECUTED PRIOR TO JANUARY 1, 1983; VALIDATING, AND MAKING SUFFICIENT AS LEGAL NOTICE OF THE INTEREST CONTAINED THEREIN, ALL INSTRUMENTS AFFECTING REAL PROPERTY RECORDED PRIOR TO JANUARY 1, 1983, REGARDLESS OF TECHNICAL DEFECTS; AMENDING SECTIONS 70-20-315 AND 70-21-309, MCA."

Respectfully report as follows: That SENATE Bill No. 373

BE CONCURRED IN

~~DO PASS~~

DAVE BROWN, Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

STANDING COMMITTEE REPORT

March 14, 1983

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration SENATE Bill No. 170

third reading copy (blue color)

A BILL FOR AN ACT ENTITLED: "AN ACT ~~RELATING~~ TO PROVIDE FOR REVERSION TO THE FORMER OWNER OF CERTAIN INTERESTS IN REAL PROPERTY ACQUIRED FOR A PUBLIC USE AND LATER ABANDONED; LIMITING THE RIGHT OF FIRST REFUSAL OF THE FORMER OWNER OF A REAL PROPERTY INTEREST ACQUIRED FOR A PUBLIC USE AND LATER ABANDONED; REPEALING TO PURCHASE CERTAIN ABANDONED INTERESTS; AMENDING SECTIONS 70-30-321 AND 70-30-322, MCA."

Respectfully report as follows: That SENATE Bill No. 170

BE AMENDED AS FOLLOWS:

1. Title, line 7.
Strike: "LIMITING"
Insert: "ELIMINATING"

2. Title, line 9.
Strike: "TO PURCHASE CERTAIN ABANDONED INTERESTS; AMENDING"
Insert: "OF A REAL PROPERTY INTEREST ACQUIRED FOR A PUBLIC USE AND LATER ABANDONED; REPEALING"

~~BE AS AS~~

DAVE BROWN, Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

March 14, 1983

3. Page 1, line 15.
Strike: Sections 1 and 2 in their entirety.
Insert: "Section 1. Repealer. Sections 70-30-321 and 70-30-322, MCA, are repealed."

Renumber subsequent sections.

AND AS AMENDED
BE CONCURRED IN

DAVE BROWN, Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

March 14, 19 83

MR. SPEAKER;

We, your committee on JUDICIARY

having had under consideration SENATE Bill No. 388

third reading copy (blue color)

"AN ACT TO AMEND THE COMPLAINT AND INTIAL INVESTIGATION PROVISIONS OF THE LAWS RELATING TO MISCONDUCT BY JUDICIAL OFFICERS; PROVIDING FOR NOTICE; AMENDING SECTION 3-1-1106, MCA."

Respectfully report as follows: That SENATE Bill No. 388

BE AMENDED AS FOLLOWS:

1. Page 2, line 17.
Following: "action"
Insert: "satisfactory to the commission"

AND AS AMENDED
BE CONCURRED IN

~~XXXXX~~
~~DO PASS~~

DAVE BROWN
Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

ROLL CALL VOTE ------ HOUSE JUDICIARY COMMITTEE

	Date: 3/14 No: SB 170 Ramirez Amendment	Date: No:	Date: No:	Date: No:	Date No:	Date No:	Date: No:
BROWN, Dave	yes						
ADDY, Kelly	no						
BERGENE, Toni	yes						
BROWN, Jan	yes						
CURTISS, Aubyn	no						
DAILY, Fritz	no						
DARKO, Paula	yes						
EUDAILY, Ralph	yes						
FARRIS, Carol	no						
HANNAH, Tom	yes						
IVERSON, Dennis	—						
JENSEN, James	no						
KENNERLY, Roland	yes						
KEYSER, Kerry	yes						
RAMIREZ, Jack	yes						
SCHYE, Ted	yes						
SEIFERT, Carl	yes						
SPAETH, Gary	yes						
VELEBER, Dennis	yes						

13-5

Exhibit A
SB 391
3-14-83

I had to go to Missoula last night to try a federal habeas corpus action in federal district court. As a result I will not be able to make it to the hearing on SB 391 in the House Judiciary Committee. I apologize for that; the trial came up at the last minute.

I have taken another look at Section 15 of the bill, dealing with reimbursement of costs of confinement. As you are aware, the provision on page 12, line 13, extending from 90 to 180 days, the jail time that could be included as a condition was struck as well. Were that reinserted along with Section 15, I believe some further clarification that the reimbursement from the state would apply to the second 90 days and not the first. Otherwise, I think the fiscal note might have to be altered.

If, on the other hand, you wanted the state to pay the county reimbursement for 90 days, my guess is that counties would not utilize the 180 days because their jails are overcrowded anyway and simply use 90 days to get some money from the state.

The provision on page 15, line 1, requiring the defendant to repay the state is a good idea, but because of its priority under Section 11, p. 15-16, lines 24-25 and 1-5, I would think that in practice, judges would impose fines — which go to the county general fund — before they would require costs of confinement — which go to the dept. of administration.

Those are some of my thoughts at any rate. Again, I apologize for not having the opportunity to talk with you about this before the hearing.

John Maynard

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL SENATE BILL 371 DATE March 14, 1983

SPONSOR SENATOR FULLER

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
C. Thomas Smith	1326 Grant Helena	—	X	
Fred Easy	PO Box 34 Helena, MT	self	X	
Sen Dan Fuller	Box 4124 - Helena	Self - Sen Dist #15	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33

Exhibit B
SB 371
3/14/83

In my own case my daughters are punched and on occassion knocked down and kicked by their mother as a form of punishment.

When I confronted her with this she denied it, however the children related later that they were disciplined for telling me this. On the chance that the girls were fabricating the stories about the punching & the kicking I took them to a local psychologist who confirmed that the girls in fact were telling the truth and these unfortunate incidents had in fact occured.

Under current law ~~however~~ just knowing that the punching and kicking is going on is not enough. In order to take the evidence into court you must have witnesses who are willing to testify that they saw cuts and bruises on the children and that they are sure they were caused by being punched or kicked. This is a very difficult type of thing to prove. Consider also that the damage done to the childs body may be mild when compared to the damage done to the childs mental and emotional well being by such occurences.

As parents I'm sure none of you would want to give up the chance to raise

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL SENATE BILL 354 DATE MARCH 14, 1983

SPONSOR SENATOR CHRISTIAENS

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Bill Romine	Helena	wrecking Yards	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33

Exhibit D
SB 371
3-14-83

~~[illegible] amendment to~~

~~[illegible]~~, I urge you to ~~[illegible]~~ believe our young people have a right to input their desires ~~upon a court~~ requesting a custody modification upon a court. The existing statue ∧ restricts changes in custody. pg 1 (c)

Sec. 1 (c) disenfranchises a child from expressing his desires unless the petitioner and child under oath ~~alled~~ alleges and proves the childs "present environment endangers seriously his physical, mental or emotional health." This requirement completely ignores the wishes & desires of a young child who has attained an age of reason.

D

Opposed custody changes can at present be made only pursuant to the petitioner proving that section 1(c) exists.

The result is that this section has set in concrete that the first custody situation is for all practical intents & purposes unalterable.

Prior to 1975 allmost ALL divorces decreed that children of tender age regardless of sex were awarded to the mother unless she were shown unfit.

In 1979 sec 1(c) was codified. This 1979 law affects all divorces. The young children of pre 1979 divorces are now reaching an age of reason or are 14 yrs of age or older. At the time of these children's

original custody ~~decision~~ award their input and opinions were not considered in most cases due to their tender ages. I believe these young people should be given an opportunity to be loved and nurtured under the influence of both their parents. However, section 1 (c) puts a protected individual who desires a change in custody in a position when the change is opposed of advocateing the existance of the adverse conditions described in the section.

Prior to the 1979 codification of 1 (c) the courts historically modified custody based upon the best interests of the minor child. The courts often listened to

the protected persons request and set an unwritten but fairly well documented, accepted and adhered to rule that it would listen to the testimoney of a child who had reached the age of 14. reasoning that the child had reached the age of reason and had the ability to input and question what his custodial relationships should be.

The courts also historically have looked to legal precedents that had been established in the appointment of a guardian for a minor.

Why 14!

In Montana

We protect a young persons legal right to appoint or remove a guardian. Under guardian and ward laws a protected person 14 yrs of age or older can.

i.e. sec 72-5-410 MCA

Nominate their own guardian/conservator of ~~this~~ assets when both ~~of his~~ parents are dead.

They can also petition to remove an appointed guardian conservator i.e. sec 72-5-234 MCA, and

They can object to a testamentary guardian appointed in a will. i.e. 72-5-234 MCA

These statues establish a precedent acknowledging that upon reaching the age of 14 a protected persons opinions and desires

can be heard and considered in property matters. As such, 14 yrs of age is recognized as an appropriate age establishing when a youth has reached an age of reason. It could just as well be 12 years of age or younger as other historical, legal and cleric ~~plaed~~ practices recognize i.e. that a youth age 7 ~~*~~ can be held court cases of responsible ~~in cases~~ in ~~establishing~~ contributory negligence, and i.e. that a youth age 12 can be ~~confired~~ confirmed in his religion of ~~chose~~ choice.

1. Age Statues

Constitution statues have always existed & addressed age criteria regarding when citizens can assume legislated rights. Citizens cannot be denied the right to vote if they are 18 yrs of age or older. Prior to the adoption of the 1972 MT. constitution the age of majority for girls was 18 and 21 for boys. The 72 constitution reduced the age of majority for all citizens to 18. Age statues in effect codify when a citizen has reached an age of reason. i.e. ~~18 for voteing~~, 35 for president of the U.S., and 30 to become a US Senator, 18 for voteing, 14 for nominating guardian.

Rebuttal to Opposition

on opinions where 1(c) establishes stability.

1. Section 1 still requires that the court serve the best interest of the child.

2. The child has the right to be loved, raised & nurtured by living with both his parents during his formative years.

3. An age of reason is best codified by historically accepted guardian and ward laws for protected persons. 14!

Exhibit E
SB371
3-14-83

WITNESS STATEMENT

Name Fred Easy Committee On

Address PO Box 34 Helena MT. Date 14 MAR 83

Representing Self Support Yes.

Bill No. SB 371 Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: attached.

1. I.e. sec 72-5-410 MCA
2. allows a young person 14 yrs of age or older
to nominate or object to a court appointed
guardian conservator. This section recognizes
3. that a 14 yr old has attained an age of reason.

I support SB 371 as it will allow a
4. young person an opportunity to be loved,
raised & nurtured ~~by~~ living with both his
parents during their formative years, without
requiring that the child ~~of~~ petitioner ~~is~~
prove the custodial parent is unfit
and that the childs "present environment endangers
his physical, mental or emotional health as
presently required.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

Exhibit F
3-14-83

WARREN MERCER OATES, PLAINTIFF AND RESPONDENT, v. ROGERICK KNUTSON ET AL., DEFENDANTS AND APPELLANTS.

No. 14159.
Submitted on Briefs Oct. 3, 1978.
Decided June 5, 1979.
595 P.2d 1181.

EVIDENCE — HIGHWAYS

1. **Evidence**
Recommendation of "viewers," persons appointed to view and mark out roads, that laying out of road be postponed to designated date in the future did not give rise to official duty, within statutory presumption that official duty has been regularly performed; thus court, in quiet title action, could not assume on basis of the recommendation that the road had been viewed and marked out at later date. R.C.M.1947, § 93-1301-7(15).
2. **Evidence**
Even if statutory presumption that official duty has been regularly performed had, applied to recommendation of viewers that laying out of part of road be postponed until stated later date, absence of any record that recommendation was followed clearly rebutted the presumption. R.C.M.1947, § 93-1301-7(15).
3. **Highways**
Seasonal use of road by hunters, fishermen and campers, either on foot, horseback or, if possible, by four-wheel drive vehicles did not raise presumption of adverse use sufficient for public prescriptive easement to be acquired over the road.
4. **Highways**
County records to effect that road was county road were not sufficient to initiate acquisition of prescriptive rights.

Appeal from the District Court of Park County.

Sixth Judicial District.

Hon. C.B. Sande, Judge presiding.

See C.J.S., Highways, § 23.

Quiet title action was brought to clarify status of unimproved road which passed over plaintiff's property. The District Court decreed that public road had not been established and the county and its Board of County Commissioners appealed. The Supreme Court, Shea, J., held that (1) even if statutory presumption that official duties have been regularly performed applied to recommendation of viewers that laying out of part of road be postponed until stated later date, absence of any record that recommendation was followed clearly rebutted the presumption, and (2) that seasonal use of road by hunters, fishermen, and campers, either on foot, horseback or, if possible, by four-wheel drive vehicles did not raise

presumption of adverse use sufficient for public prescriptive easements to be acquired over the road.

Affirmed.

David W. Depuy, Livingston, for defendants and appellants.

Huppert & Swindlehurst, Livingston, for plaintiff and respondent.

MR. JUSTICE SHEA delivered the opinion of the Court.

Defendants, Park County and its Board of County Commissioners, appeal from judgment of the Park County District Court in a quiet title action. The judgment decreed that a public road had not been established over plaintiff's property either by statutory procedure or by prescription.

Plaintiff Oates brought this quiet title action to clarify the status of an unimproved road which passes over his property in Six Mile Gulch, on Six Mile Creek, Park County, Montana. The road is approximately three to four miles long. It begins on plaintiffs property, travels in a southeasterly direction up Six Mile Creek, traversing a narrow canyon, and terminates roughly at the end of plaintiff's property.

The road was originally built in 1908 by plaintiff's predecessors in interest, the McGuires. Although the McGuires maintained the road in the past, it has fallen into a state of disrepair and is considered by some to be too dangerous for travel. At the entrance of the road stands a metal gate which was erected in 1973 and which, on occasion, has been locked. Further along, there are at least two wire gates which have been standing for a long time. Even so, the road has been used by hunters, fishermen and campers, primarily when the weather permitted.

The dispute began in 1975 when an employee of the U.S. Forest Service, commissioned to research the county records, classified Six Mile Road as a public road. Shortly thereafter, the lock on the metal gate was shot off, and in 1976, members of a local sportsmen's club, with authorization from the County Commissioners,

drove a bulldozer over the road for repair work. Plaintiff then brought this quiet title action to clarify the status of the road naming the County and members of the Board of County Commissioners as defendants.

The action was tried on July 27, 1977, without a jury. The County alleged that Six Mile Road was established as a public road in 1888 by substantial compliance with the statute then governing the establishment of county roads. The County also contended that the public had acquired a prescriptive easement over Six Mile Road.

At the outset of trial, county records of the statutory procedures conducted in 1888 were admitted by stipulation. The documents included copies of the original petition for a road which would "loop" around Emigrant Gulch and Six Mile Gulch. The proposed route was to begin at the old town of Chico, travel south along Emigrant Creek about ten miles, then west across the mountains to Six Mile Gulch, then north along Six Mile Creek, and ultimately back to Chico. Also admitted into evidence was a copy of the report of the "viewers" (those persons appointed to view and mark out the road) which read:

"It raining all day we, after starting out, returned to Chico and proceeded from there the next day, May 22, 1888, up Emigrant as far as the east fork of said Emigrant but on account of snow on the ground, found it impracticable to lay out a road further up Emigrant than the Great Eastern about four miles south of Chico, and we do recommend that the road as laid out by us and marked on the annexed map be accepted, as a county road . . ."

"On the following day, May 23rd 1888, we started from Chico up Six Mile as far as the McGuire camp about twelve miles *and found it equally impracticable on account of snow on the ground to view out a road and we recommend to postpone the laying out of this part of the prayed for road* to the same date, viz. the 18th of August, 1888 . . . ." (Emphasis added.)

Finally, a copy of the County Commissioners' journal entry of June 5, 1888 stated:

"Report of Viewers on Road Petitioned for by W.D. Cameron, et

al, in *Emigrant Gulch*, was read and it was ordered that *the road described in the report* be and the same is hereby opened for travel." (Emphasis added.)

As to use of the road, testimony was heard from a variety of sources. Blakeslee, one of the County Commissioners who has lived adjacent to the road since the 1920's, testified that until the present controversy started, he did not know the road was a county road and that he had not observed "a great deal" of traffic on the road. Nelson, another adjacent landowner for about 50 years, testified that use was generally on horseback and that the road led "to nowhere". Counts, a local resident familiar with the road for the past 60 years, had not seen much activity on the road except for a few hunters. Several other witnesses stated that the road was used either by themselves or others for travel to remote hunting, fishing or camping areas. This traffic was concededly seasonal in nature and, in several cases, with the permission of the landowner.

There was also substantial testimony on maintenance of the road. Blakeslee knew of only one time that the County had worked on the road—when it was graded to aid in transport of emergency equipment to where a plane crashed. McGuire, plaintiff's predecessor in interest, testified that the County told him the road was private and therefore refused to do work on the road or to remove an abandoned vehicle from it. Receipts of payment for this bulldozing and hauling work were admitted into evidence. Other witnesses believed that the road is probably unsafe and often impassible.

The District Court determined that the statutory procedure for establishing Six Mile Road as a public road was not followed, and; further, that no public road was established by prescription. The County appeals and presents two issues for our consideration:

(1) Whether the District Court erred in finding that applicable statutory procedures were not followed in establishing Six Mile Road as a public road.

(2) Whther the District Court erred in finding that Six Mile Road is not a public road by prescription.

The County contends there was substantial compliance with the

applicable statutory procedures for establishing a county road on Six Mile Road.

The statute, section 1809-1818, Compiled Statutes of Montana (5th Division—General Laws, 1887), prescribed the requirements for laying out and opening county roads for public use. In essence, there were three steps. First, local residents petitioned the Board of County Commissioners for the proposed road. Section 1809. Second, three "viewers" were appointed to "view and mark out" the road and report back to the Board with written recommendations. Section 1810-1815. Third, the Board either accepted or rejected the recommendation and, if accepted, ordered the road open for public travel. Sections 1816-1818.

The county records indicate that a petition for a "loop" road was filed, and that viewers marked out at least part of the Emigrant Gulch portion of the loop. However, the viewers report specifically postponed marking out and recommending a county road in Six Mile Gulch due to inclement weather. When the Board of County Commissioners ruled on the petition, it ordered opening of the road "in Emigrant Gulch" as "described in the report". It appears the Board only approved opening a county road in Emigrant Gulch.

[1,2] The County argues that we must "assume" the Six Mile Gulch road was viewed and marked out at a later date under the statutory presumption that official duties have been regularly performed. Section 93-1301-7(15), R.C.M.1947, now section 26-1-602(15) MCA. The viewers' recommendation can hardly be viewed as giving rise to an official duty. Moreover, even if the disputable presumption embodied in section 93-1301-7(15) was applicable, the absence of any record of such further proceedings as were recommended clearly rebuts the presumption.

In construing the 1887 statute on establishing county roads, this Court stated:

"While it may be true that, in such proceedings, technical strictness in complying with the statutes is not always required, yet we think a substantial compliance with the law is and should be required before private property is condemned for public use." *Pagel v. Fergus Co. Commr's.* (1896), 17 Mont. 586, 589, 44 P. 86, 87.

The Court held that uncertainty concerning the precise location and terminus of the road ordered opened by the County Commissioners rendered the proceedings void. See also, *State v. Auchard* (1898), 22 Mont. 14, 15, 55 P. 361, 362; 39 Am.Jur.2d *Highways, Streets and Bridges* § 34. Here, the required statutory procedure simply was not undertaken with respect to Six Mile Road. The viewers expressly did not view and mark out Six Mile Road, and the County Commissioners only accepted the road they recommended for opening, namely, a road in Emigrant Gulch.

[3] The County next contends that the evidence was insufficient to support the court's finding that no public prescriptive easement was acquired over Six Mile Road. This Court's standard of review is to determine if substantial evidence supported the findings of the District Court. *Hayden v. Snowden* (1978), 176 Mont. 169, 576 P.2d 1115, 1117. The evidence was that Six Mile Road was built and largely maintained by plaintiff's predecessor in interest, the McGuires. The road apparently provided limited access up Six Mile Creek and to remote parts of the National Forest. Public use was generally seasonal and enjoyed by hunters, fishermen and campers, either on foot, horseback or, (if possible), by four-wheel drive vehicles. Such recreational use is insufficient to raise the presumption of adverse use. *Harland v. Anderson* (1976), 169 Mont. 447, 451-52, 548 P.2d 613, 615. As stated in *Ewan v. Stenberg* (1975), 168 Mont. 63, 68, 541 P.2d 60, 63: "Occasional use by hunters, by sightseeing friends and by neighbors visiting neighbors falls short of the extent and type of usage necessary to result in the accrual of a public right." See also, *Taylor v. Petranek* (1977), 173 Mont. 433, 568, P.2d 120, 123.

[4] The County argues that the fact of county records to the effect that Six Mile Road was a county road was sufficient to initiate acquisition of a prescriptive right. Prescriptive easements are acquired by adverse use, not by keeping records. If claimant's use was not of the requisite character, a prescriptive easement was not acquired.

The judgment of the District Court is affirmed.

MR. CHIEF JUSTICE HASWELL and JUSTICES DALY, HARRISON and SHEEHY concur.