

MINUTES FOR THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

March 14, 1985

The meeting of the Judiciary Committee was called to order by Chairman Tom Hannah on Thursday, March 14, 1985 at 8:30 a.m. in Room 312-3 of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Brown who was previously excused.

CONSIDERATION OF SENATE BILL NO. 235: Senator Joe Mazurek, District #23, chief sponsor of the bill, testified. He informed the committee that SB 235 was introduced at the request of Judge Henry Loble of Helena. Senate Bill 235 does one thing -- at either guardianship or conservatory proceedings it allows a court to designate someone other than a physician for conducting an examination of the protected person. This would be for purposes of determining whether or not they need a conservator or a guardian. This is already being used in the criminal area to the extent of clinical psychologists. It is also allowed in examination cases to determine whether a person can be committed to the state hospital. The bill will allow clinical psychologists who have been certified by the Department of Institutions to conduct these examinations and render their opinions to the court. He further stated that he has found -- Judge Loble will verify this -- that a lot of medical practitioners general practice physicians, simply don't keep up in the mental health area; they don't get involved in it very frequently, and the statute currently limits the court by appointing only people who are physicians for conducting these examinations. He feels this is in the nature of a housekeeping change, and further urged the committee to give SB 235 its serious consideration.

Judge Henry Loble, 1st Judicial District, testified as a proponent. He told the committee that he was surprised to learn that a person could be sent to Warm Springs State Hospital on the testimony of a professional person i.e. a clinical psychologist. But when it came to appointing a conservator -- which is much more serious -- a physician was required. He said that physicians simply do not stay abreast in the areas dealing with mental illnesses but psychiatrists do. Furthermore, it is very difficult to get physicians into court to testify. Also, physicians charge an arm and a leg to testify, whereas clinical psychologists, of which there are many in Helena, do charge reasonable prices.

They also stay abreast of what the current teaching is and the current state of the art. For the above mentioned reasons, Judge Loble supports this bill.

There were no further proponents or opponents; Senator Mazurek closed.

Following a few general questions, hearing closed on SB 235.

ACTION ON SENATE BILL NO. 235: Rep. O'Hara moved that SB 235 BE CONCURRED IN. The motion was seconded by Rep. Krueger and carried with Rep. Montayne dissenting. Rep. Krueger will carry the bill.

CONSIDERATION OF SENATE BILL NO. 186: Senator Matt Himsl, District #3, principal sponsor of SB 186, testified. He said this bill would set up a Judicial Sentencing Guideline Commission of nine members. He told the committee that this is not a new idea. Justice Frank Morrison and a court-appointed committee have started on this idea, but the nature of the volunteer committee and the press of duties without a funded staff has made it impossible to really get the project on the table. A copy of Senator Himsl's written testimony was submitted and marked Exhibit A which is hereto attached. Also submitted by the senator was a copy of the Minnesota Sentencing Guidelines which was marked Exhibit B and attached hereto.

Frank Morrison, Supreme Court Justice for the State of Montana, appeared and offered testimony in support of SB 186. He gave the committee a bit of background concerning sentencing guidelines. He feels that it is important to establish a sentencing guideline to give the courts a further tool in sentencing. He said that the Sentencing Review Commission presently sets forth some of the sentencing guidelines. If a judge sentences within the guidelines, there will be no need for a sentence review commission.

Pat Melby, representing the State Bar of Montana, stated that the State Bar feels that by adopting a Sentencing Guideline Commission some of the disparity of sentencing within the state may be removed.

There being no further proponents or opponents, Senator Himsl closed.

The floor was opened up for questioning.

Rep. Gould said that it appears to him in many of the cases "when a district court judge dons his robe, he becomes above the law" which bothers him considerably. He wonders if the committee couldn't place in SB 186 a portion of the study which gives the judge guidelines in prescribing mandatory minimum sentences. Judge Morrison stated that in the mandatory minimum bases, you don't have to worry. Rep. Gould

pointed out that according to the Highway Patrol statistics, in the first six months in 1984, 80% of the time the court gave out some jail time and 20% of the time they gave absolutely not one day. (This had to do with third conviction of DUI offense where there is a mandatory minimum.) Judge Morrison said that the remedy is to have the county attorney appeal the sentence to the supreme court, and if the sentence is not lawful, that sentence will be reversed. Rep. Gould continued his questioning and asked Judge Morrison if he didn't think that most county attorneys would be a little hesitant about appealing some of the cases when they have to deal with these district court judges on a day-to-day basis. Judge Morrison said he doesn't think that lawyers are worried about decisions that judges make -- that is part of their everyday jobs.

Rep. Hannah said his concerns deal with the duties and responsibilities in setting sentences and whether it is the responsibility of the legislature as opposed to the views of the courts. He has a concern about the courts getting into legislative areas, and asked if they saw this as any kind of infringement having the courts establish this type of commission? Judge Morrison feels that sentencing statutes are the exclusive providence of the legislature. He said he is here to cooperate in any way with the legislature and to lend their expertise which is their only role. It is up to the legislature to develop the policy that has to do with sentencing.

In response to another question asked by Rep. Gould, Judge Morrison said that he is not sure that we should continue with the parole system. He feels there should be an incentive or reform in the behaviour in prison, but good time can do that. He would rather see the sentencing discretion vested in the elected public official, i.e., the district judge, rather than the parole board which he feels is less responsive to the public will.

Rep. Eudaily said that he had a problem with using the Legislative Council staff on something that is basically an interim study involving no legislators. Senator Himsel pointed out that the two public members described in the bill could be legislators. The report of the findings of this committee are to be submitted to the legislature. The reason for that is that this whole proposal, hopefully, will be involuntarily accepted and put into action by the court. If the court does not do it, it can be put into statute.

There being no further questions, hearing closed on SB 186.

CONSIDERATION OF SENATE BILL NO. 185: Senator Les Hirsch, District #13, chief sponsor, testified. He gave the committee a brief overview of what is being attempted. This is an act

allowing reasonable trustees' fees and attorneys' fees on reinstatement of an obligation and trust indenture under the Small Tract Financing Act of Montana. A copy of his written testimony was submitted and marked Exhibit C.

Julie Begler, a real estate loan officer with Norwest Bank and also a member of the Montana Banker's Association Real Estate Finance Committee, testified as a proponent. She pointed out that they do not use the foreclosure process as a means to collect loans that are in default. She gave examples of the costs banks are incurring as a result of reinstatement of an obligation and trust indenture.

John Cadby, representing the Montana Bankers Association, wished to go on record as supporting this legislation.

There being no further proponents or opponents, Senator Hirsch closed.

The floor was opened to questions from the committee.

Rep. Keyser asked Ms. Begler if the larger percentage of her work in the line of foreclosures would fall under \$1,500 expense to the bank. Ms. Begler said yes, they do. Primarily charges of less than \$400 will be seen. The only time it may possibly get higher than that is if a bankruptcy results, the bank's foreclosure is stayed, and the procedure must be started all over again.

Rep. Hannah had a question in regards to reinstatement. He asked if the lender must reinstate a person if they come in with back interest once the proceeding has started. Ms. Begler replied "yes". Rep. Hannah further asked in the examples given by Ms. Begler, if the bank or the lender has no choice but to reinstate if the borrower pays all back payments, interest, attorney fees, insurance and other factors. Ms. Begler said that is correct.

Rep. Mercer asked when they make this late payment, are they also required to pay the fee in order to take care of it? Ms. Begler said yes.

In response to a question asked by Rep. Eudaily, Senator Hirsch stated that the Senate felt the language on lines 20 through 24 was not tight enough and that there might be abuses of that. They were comfortable with the word and wanted to put a cap on it either the 3% or the \$1,500 -- so that is why it was deleted.

In response to a question, Mr. Cadby said he believes the concept of a trust indenture and reasonable and customary limits on attorney fees and trust indentures is that there isn't a court to set reasonable and customary fees for the attorneys which are done in a normal foreclosure. That is

why the Senate wanted to keep that \$1,500 cap on to protect the single family dwelling, particularly.

In response to a question asked by Rep. Addy, Ms. Begler said that in most cases, the trustee and the attorney is the same person thereby receiving the whole fee.

There being no further questions or discussion, hearing closed on SB 185.

CONSIDERATION OF SENATE BILL NO. 230: Senator Larry Tveit, District #11, chief sponsor of the bill, testified. This is an act to exempt public agencies from the Montana Human Rights Act and the Governmental Code of Fair Employment Practices to the extent that these laws conflict with the prohibition against nepotism in public agencies.

Chip Erdmann, representing the Montana School Board Association, said this bill restores the original nepotism statute to its original form. This statute was first adopted in 1933 out of public policy. In 1981 the Montana Supreme Court, in a case involving a school district, ruled that the Human Rights Act prohibited that school district from adopting a policy that would not allow both the husband and wife to teach in the same faculty. They said that violated the marital status discrimination clause. A copy of the Attorney General's Opinion No. 40 regarding the nepotism law was submitted and marked Exhibit D. Mr. Erdmann further pointed out that there is very specific language in this bill exempting public agencies from the Montana Human Rights Act.

Tammy Hall, a trustee from Bozeman and also on the Board of Directors for the Montana School Board Association, stated that she supports this change. She feels that a nepotism policy in public schools is really needed in order for them to be effective. She said that "we really do deal with the most precious possession that people have -- and that is their children." We are also one of the major employees in the community. It is very important for the public to believe that the school boards are operating out of an interest for education. It is a fact in public office that perceptions become realities. Even if a person is hired on qualifications, it is just a perception that the person won out of over 300 other applicants. She feels it will make it more difficult for that person to do his job. Also, we have to realize that that particular school board member becomes totally ineffective. The biggest argument she has heard against the bill is that it is not fair to a teacher who wants to work in the system. She feels that we're overlooking where the responsibility lies. She feels the responsibility lies with the school board members.

Mary Jean Marron from Lolo said she supports this bill. She feels it is good public policy to prohibit elected officials from hiring their close relatives. This bill makes the nepotism statute apply to both blood relatives and relatives by marriage. She told the committee that she, too, serves on

the school board.

LeRoy Schramm, legal counsel for the Board of Regents, testified as a proponent. He said that the Attorney General only wiped half the laws out concerning this statute. He feels that we should go the whole way to make it apply to both blood relatives and relatives by marriage.

There were no further proponents nor any opponents. Senator Tveit closed. He pointed out that this nepotism statute does not apply to tenured teachers.

The floor was opened to questions from the committee.

Rep. Rapp-Svrcek asked Mr. Erdmann if this statute would prohibit the spouse of an administrator from entering into employment. Mr. Erdmann said it will not. He said that in particular school districts the school board has the authority to do the hiring, so there is nothing to prohibit the hiring of the spouse of the administrator. Rep. Rapp-Svrcek asked if this in any way prohibits a couple from being employed in the same school district. Mr. Erdmann said no, it does not. Rep. Rapp-Svrcek said that by passing this bill, it just precludes family members of the school board from being employed. Mr. Erdmann said that was correct.

Rep. Hannah pointed out that in Senator Tveit's closing statement he made reference that this would not apply to tenured teachers. Rep. Hannah said that if the reason why we have the bill is valid, then it should apply to all situations. Mr. Erdmann said he didn't know if this bill would be the right vehicle to do that. He referred to the tenure statutes which are not addressed here.

Rep. Krueger wanted to know how many situations throughout the state of Montana occur as a result of this. Mr. Erdmann didn't have any exact numbers. He said that it was his understanding if this bill were to become effective, the next time the school board were to take action on those individual contracts either the person comes off the school board or the employee discontinues working for the district.

Rep. Miles asked if this statute is going beyond the school board. Mr. Erdmann said yes, it does. It applies to all elected officials.

Rep. Mercer asked Mr. Erdmann if we weren't elevating nepotism to be more important than discrimination. He asked if there was anything relating to nepotism in the constitution, and why should nepotism be more of an important public policy than sexism. Mr. Erdmann said there is nothing in the constitution dealing with nepotism. What we are asking the legislature to do is make a policy determination. In 1933, the legislature determined that it was good public policy to have a strong nepotism policy. The impact on discrimination

-- which would exist in relation to the marital status -- is minimal. The Human Rights Act was never intended to overrule a public policy exempting this.

There being no further questions, hearing closed on SB 230.

CONSIDERATION OF SENATE BILL NO. 151: Senator Brown, District #2, chief sponsor of this bill, testified. This is an act to increase the time during which imposition of a sentence may be deferred when the deferral has a condition that imposes any financial obligation. He said this bill broadens the bill that was introduced last session by Senator Halligan.

There being no further proponents or opponents, Senator Brown closed.

There being no questions, hearing closed on SB 151.

EXECUTIVE SESSION

ACTION ON SENATE BILL NO. 151: Rep. Addy moved that SB 151 BE CONCURRED IN. The motion was seconded by Rep. Hammond.

Rep. Mercer moved to amend on page 1, line 25 following "restitution" by striking ", as" through "(2)". The motion was seconded by Rep. Eudaily and carried unanimously.

Rep. Cobb moved that SB 151 BE CONCURRED IN AS AMENDED. The motion was seconded by Rep. Eudaily and carried unanimously. Rep. Cobb will carry the bill on the floor.

ACTION ON SENATE BILL NO. 185: Rep. Cobb moved that SB 185 BE CONCURRED IN. The motion was seconded by Rep. Addy.

Rep. Eudaily moved that the title be amended on line 4 by striking "ALLOWING" and inserting "INCREASING". The motion was seconded by Rep. Hannah and carried unanimously.

Rep. Mercer made a substitute motion that SB 185 BE NOT CONCURRED IN AS AMENDED. The motion was seconded by Rep. Rapp-Svrcek. Rep. Mercer feels this bill was introduced for the benefit of banks. He doesn't agree that banks should be able to recover full attorneys' fees and trustees' fees. Rep. Hannah spoke in favor of the motion to kill the bill. He said this is a classic example of a chipping away process -- the same bill was introduced last session.

Rep. Addy said the reinstatement fees are still bound by the court's determination. They are justified by the amount of work produced, that is developed by the attorney representing the lender. He said that Rep. Gould was right to the extent that if you don't allow the lending institution to recoup their foreclosure costs, you are passing that costs along to other customers. To the extent that it isn't passed along

to other customers, you are discouraging the future extension of credit to people who would like to buy a house. That is exactly what banks look at when they determine how much they are going to lend a person. What is being done by killing this bill is the cost of the delinquency is spread from those who don't pay over onto those who do. This makes it even more difficult for people who have limited access to credit.

The question was called on Rep. Mercer's motion to kill the bill, and it failed 8-9. (See roll call vote.) Without objection, the vote was reversed, and SB 185 was sent out of committee with a BE CONCURRED IN AS AMENDED recommendation. Rep. Addy offered to carry the bill on the floor.

ACTION ON SENATE BILL NO. 230: Rep. Hammond moved that SB 230 BE CONCURRED IN. The motion was seconded by Rep. Grady and discussed. Rep. Grady spoke in favor of the bill but felt it ought to be extended to include tenured teachers. Rep. Darko also spoke in favor of the bill and pointed out that there were plenty of protections provided in the bill. Rep. Bergene said that Cascade County has experienced numerous problems in this area, and she feels this bill is in order. Rep. Eudaily feels that there are only a small number of tenured teachers that need to be worried about.

The question was called, and the motion carried with Rep. Cobb dissenting.

ACTION ON SENATE BILL NO. 186: Rep. Addy moved that SB 186 BE CONCURRED IN. The motion was seconded by Rep. O'Hara and discussed.

Rep. Eudaily again pointed out that he has a real problem with section 7 of the bill in that he doesn't feel we should mandate the Legislative Council's services to the outside commission. He suggested that perhaps the services of the Legislative Council may be requested by the commission instead of mandated.

Rep. Addy moved to amend page 6, line 13 by striking "under the direction of the commission" and inserting "as directed by the Legislative Council" thus leaving the discretion with the Legislative Council. Furthermore, on page 6, line 11, strike "to" and insert "may". The motion was seconded by Rep. O'Hara, and the motion carried on a voice vote.

Rep. Addy further moved that SB 186 BE CONCURRED IN AS AMENDED. The motion was seconded by Rep. O'Hara and further discussed.

It was Rep. Gould's opinion that this bill won't do a bit of good. He doesn't feel that the judges will comply a bit. He feels it is a waste of money to fool around with the project,

and if the supreme court wants to go ahead with it, they should do it on their own.

The question was called on the BE CONCURRED IN AS AMENDED, and the motion failed on a voice vote.

Rep. Gould moved that SB 186 BE NOT CONCURRED IN. The motion was seconded by Rep. Rapp-Svrcek.

Rep. Addy defended the bill by saying the present task force is not working. No one is looking at the sentencing guidelines. He feels there is a definite need for uniform sentencing guidelines, and the problem needs to be addressed now.

Rep. Mercer stated that he agrees with Rep. Gould. He doesn't believe this is the right way to solve the problem. He said this bill would only establish another commission, which, he believes, won't address the problem of establishing sentencing guidelines.

The question was called, and the motion failed on the BE NOT CONCURRED IN. Due to a tie vote, the bill will go out WITHOUT RECOMMENDATION. (See roll call vote.)

Rep. Eudaily moved to reconsider action on SB 186. The motion was seconded by Rep. Gould and carried 11-4. (See roll call vote.)

Rep. Eudaily further moved to delete section 7 of the bill in its entirety. The motion was seconded by Rep. Montayne. There being no discussion, the question was called, and the motion carried unanimously.

Rep. Hammond further moved that SB 186 BE CONCURRED IN AS AMENDED. The motion was seconded by Rep. Darko, and it carried 12-6. (See roll call vote.) Rep. Addy volunteered to carry the bill.

ADJOURN: A motion having been made and seconded, the meeting adjourned at 10:30 a.m.


TOM HANNAH, Chairman

DAILY ROLL CALL

HOUSE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 3/14/85

NAME	PRESENT	ABSENT	EXCUSED
Tom Hannah (Chairman)	✓		
Dave Brown (Vice Chairman)			✓
Kelly Addy	✓		
Toni Bergene	✓		
John Cobb	✓		
Paula Darko	✓		
Ralph Eudaily	✓		
Budd Gould	✓		
Edward Grady	✓		
Joe Hammond	✓		
Kerry Keyser	✓		
Kurt Krueger	✓		
John Mercer	✓		
Joan Miles	✓		
John Montayne	✓		
Jesse O'Hara	✓		
Bing Poff	✓		
Paul Rapp-Svrcek	✓		

STANDING COMMITTEE REPORT

March 14 19 85

MR. Speaker

We, your committee on Judiciary

having had under consideration Senate Bill No. 151

Third reading copy (Blue)
color

**INCREASE SENTENCE DEFERRAL PERIOD IF A FINANCIAL
OBLIGATION IS IMPOSED**

Respectfully report as follows: That Senate Bill No. 151

be amended as follows:

1. Page 1, line 25.
Following: "restitution"
Strike: ", as" through "(2)"

**AND AS AMENDED,
BE CONCURRED IN
TO PASS**

STANDING COMMITTEE REPORT

March 14 1935

MR. Speaker

We, your committee on Judiciary

having had under consideration Senate Bill No. 135

Third reading copy (Blue)
color

REVISE FEE ALLOWANCE ON DISCONTINUANCE OF FORECLOSURE -
SM TRACT FINANCE ACT

Respectfully report as follows: That Senate Bill No. 135

be amended as follows:

1. Page 1, line 4.
Strike: "ALLOWING"
Insert: "INCREASING"

AND AS AMENDED,
BE CONCURRED IN
~~ADOPTED~~

ROLL CALL VOTE

HOUSE COMMITTEE JUDICIARY

DATE March 14, 1985

BILL NO. SB 185

TIME 10:00

NAME	AYE	NAY
Kelly Addy		✓
Toni Bergene		✓
John Cobb		✓
Paula Darko		✓
Ralph Eudaily	✓	
Budd Gould		✓
Edward Grady	✓	
Joe Hammond		✓
Kerry Keyser		✓
Kurt Krueger	✓	
John Mercer	✓	
Joan Miles		
John Montayne		✓
Jesse O'Hara	✓	
Bing Poff		✓
Paul Rapp-Svrcek	✓	
Dave Brown (Vice Chairman)	✓	
Tom Hannah (Chairman)	✓	

Marcene Lynn
Secretary

Tom Hannah
Chairman

Motion: Rep. Mercer made a substitute motion that SB 185 BE NOT
CONCURRED IN AS AMENDED. The motion was seconded by Rep. Rapp-
Svrcek, and the motion failed 8-9. Without objection, the vote
was reversed, and SB 185 was sent out of committee with a
be concurred in as amended recommendation.

STANDING COMMITTEE REPORT

March 14

19 85

MR. Speaker

We, your committee on Judiciary

having had under consideration Senate Bill No. 186

Third reading copy (Blue)
color

SENTENCING GUIDELINES COMMISSION ACT

Respectfully report as follows: That Senate Bill No. 186

be amended as follows:

1. Page 1, line 12.

Strike: "9"

Insert: "8"

2. Page 1, line 16.

Strike: "9"

Insert: "3"

3. Page 6, following line 10.

Strike Section 7 in its entirety.

Renumber subsequent sections

4. Page 6, line 24.

Strike: "9"

Insert: "8"

DONPASSK

AND AS AMENDED,
BE CONCURRED IN

ROLL CALL VOTE

HOUSE COMMITTEE JUDICIARY

DATE March 14, 1985 BILL NO. SB 186 TIME 10:25

NAME	AYE	NAY
Kelly Addy		✓
Toni Bergene		✓
John Cobb		✓
Paula Darko		✓
Ralph Eudaily	✓	
Budd Gould	✓	
Edward Grady		✓
Joe Hammond		✓
Kerry Keyser	✓	
Kurt Krueger		✓
John Mercer	✓	
Joan Miles		✓
John Montayne	✓	
Jesse O'Hara	✓	
Bing Poff	✓	
Paul Rapp-Svrcek	✓	
Dave Brown (Vice Chairman)		✓
Tom Hannah (Chairman)	✓	

Marcene Lynn
Secretary

Tom Hannah
Chairman

Motion: Rep. Gould moved that SB 186 BE NOT CONCURRED IN.

The motion was seconded by Rep. Rapp-Svrcek. The question
was called, and the motion failed due to a tie vote.

ROLL CALL VOTE

HOUSE COMMITTEE JUDICIARY

DATE March 14, 1985 BILL NO. SB 186 TIME 10:30

NAME	AYE	NAY
Kelly Addy		✓
Toni Bergene	✓	
John Cobb	✓	
Paula Darko		✓
Ralph Eudaily	✓	
Budd Gould	✓	
Edward Grady		✓
Joe Hammond	✓	
Kerry Keyser		
Kurt Krueger		✓
John Mercer	✓	
Joan Miles		
John Montayne	✓	
Jesse O'Hara	✓	
Bing Poff	✓	
Paul Rapp-Svrcek	✓	
Dave Brown (Vice Chairman)		
Tom Hannah (Chairman)	✓	

Marcene Lynn
Secretary

Tom Hannah
Chairman

Motion: Rep. Eudaily moved to reconsider action on SB 186.

The motion was seconded by Rep. Gould and carried 11-4.

ROLL CALL VOTE

HOUSE COMMITTEE JUDICIARY

DATE March 14, 1985

BILL NO. SB 186

TIME 10:30

NAME	AYE	NAY
Kelly Addy	✓	
Toni Bergene	✓	
John Cobb	✓	
Paula Darko	✓	
Ralph Eudaily		✓
Budd Gould		✓
Edward Grady	✓	
Joe Hammond	✓	
Kerry Keyser	✓	
Kurt Krueger	✓	
John Mercer		✓
Joan Miles	✓	
John Montayne	✓	
Jesse O'Hara	✓	
Bing Poff		✓
Paul Rapp-Svrcek		✓
Dave Brown (Vice Chairman)	✓	
Tom Hannah (Chairman)		✓

Marcene Lynn
Secretary

Tom Hannah
Chairman

Motion: Rep. Hammond moved that SB 186 BE CONCURRED IN AS

AMENDED. The motion was seconded by Rep. Darko and carried

12-6.

STANDING COMMITTEE REPORT

March 14 19 85

Speaker

MR.

Judiciary

We, your committee on

Senate

230

having had under consideration Bill No.

Third

reading copy (Blue)
color

MARITAL STATUS A LEGITIMATE CRITERION WHEN REQUIRED BY NEPOTISM
LAW

Senate

230

Respectfully report as follows: That..... Bill No.

BE CONCURRED IN

NOT PASS:

STANDING COMMITTEE REPORT

March 14 1925

Speaker

MR.

We, your committee on judiciary

having had under consideration Senate Bill No. 235

Third reading copy (Blue)
color

PROFESSIONAL PERSON MAY EXAMINE PROTECTED PERSON BEFORE
CONSERVATOR APPOINTMENT

Respectfully report as follows: That Senate Bill No. 235

BE CONCURRED IN
DO PASS



The Big Sky Country

MONTANA STATE SENATE

SENATOR MATT HIMSL
DISTRICT NO. 9, FLATHEAD COUNTY
305 4TH AVE. E.
KALISPELL, MONTANA 59901

SB 186 Sentencing Guideline Commission

Himsl

Senate Bill 186 proposes to set up a Judicial Sentencing Guideline Commission of 9 members: one supreme court justice, two district court judges, these to be appointed by the supreme court, one county prosecuting attorney, one public defender, one city or county chief law enforcement officer, two public members not involved in the process these to be appointed by the Governor and the director of the Dept. of Institutions. It is proposed that technical and clerical services be provided by the legislative council and that the commission be sunset by May 1, 1987.

The mission of the commission is to draw upon the expertise of those working in the system to collect information, prepare, analyze, research other guideline systems and to develop a system as well as make recommendations to the court for the administration of more equal forms of justice.

The guidelines developed by the commission are to be submitted to the supreme court, each judge having criminal jurisdiction, the speaker of the house and the president of the senate and the chairmen of the judiciary committees of the legislature. If the court should ignore the guideline recommendations of the commission, the legislative branch could put the guidelines into statute---as is done in some states. (Pa.

Guideline projects are being initiated in several states and have been enacted in Minnesota and Pennsylvania, Washington and Florida.

In Minn. the commission was set up in 1978 as a permanent commission and its findings became effective in 1980.

Independent reviews of that operation indicate a significant increase in uniformity of justices. Some high light points of that system: multiple sentencing goals, deterrence, rehabilitation, incapacitation, and punishment with punishment proportional to the crime, eliminate parole, a regard for correctional resources, a shift from incarceration for crimes against property to crimes against persons and appellate review of sentences.

It would be up to your commission to develop the guidelines and structure the elements of justice as they reviewed Montana law, practices, institutions, court systems and social customs.

This is not a new idea in Montana. Justice Frank Morrison and a court appointed committee have started on this idea but the nature of the volunteer committee and the press of duties without a funded staff *Re* has not been able to really get the project on the table.

This bill would give the commission two years to come forth with guidelines and possibly other recommendations. There is a real public concern about the delivery of justice in our criminal court system and this might be a long step toward re-establishing a more wholesome public perception and confidence in the difficult task of pursuing justice.

This is innovative legislation. I believe its time has come. If we, in the legislature have the power to designate crimes, set the minimum and maximum terms of sentencing, it would seem to follow that we have the authority to set the limits within the limits, but to do this properly we need the guidelines established by those who work in the trenches of the system, and hopefully they will accept their findings and not require the legislature to lock the guidelines in statute.

84
1010
2594
1010

I respectfully urge your favorable consideration of Senate Bill 186.

Minnesota Guidelines

Presumptive Sentence Lengths in Months

SEVERITY LEVELS OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE					
		0	1	2	3	4	5 or more
I	Unauthorized Use of Motor Vehicle; Possession of Marijuana	12*	12*	12*	15	18	21
II	Theft-Related Crimes (\$150-\$2500); Sale of Marijuana	12*	12*	14	17	20	23
III	Theft Crimes (\$150-\$2500)	12*	13	16	19	22	27
IV	Burglary-Felony Intent Receiving Stolen Goods (\$150-\$2500)	12*	15	18	21	25	32
V	Simple Robbery	18	23	27	30	38	46
VI	Assault, 2nd Degree	21	26	30	34	44	54
VII	Aggravated Robbery	24	32	41	49	65	81
VIII	Assault, 1st Degree, Criminal Sexual Conduct, 1st Degree	43	54	65	76	95	113
IX	Murder, 3rd Degree	97	119	127	149	176	205
X	Murder, 2nd Degree	116	140	162	203	243	284

Bold face numbers denote the range within which a judge may sentence without the sentence being deemed a departure.

1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

*one year and one day.

be exercised—essentially by the courts within the constraints of the sentencing guidelines, with parole eliminated. Issues that were transferred to the Commission for resolution, subject to legislative review, included the relative weight to accord past sentencing practices and current correctional resources, the primary purpose of sentencing, and the extent to which uniformity in sentencing is desirable.

The Minnesota Sentencing Guidelines Commission determined that sanctions should be based on the seriousness of the offense of conviction and the offender's prior criminal history. The presumptive sentences embodied in the sentencing guidelines are summarized here in the accompanying two-dimensional grid. The vertical dimension of the

grid indicates the level of severity for the convicted offense. The offenses listed in each category are the most frequently occurring offense(s) at each severity level. A measure of an offender's criminal history is provided with the horizontal dimension of the grid. The shading across the grid is the dispositional line—all cases that fall in cells below the dispositional line receive presumptive imprisonment sentences, and cases that fall in cells above the dispositional line receive presumptive nonimprisonment, unless a mandatory minimum sentence applies. The single number at the top of each cell is the presumptive duration of the sentence, in months, that should be stayed or executed. Any sentence within the ranges shown in cells below the dispositional line

can be imposed without deeming the sentence a departure from the sentencing guidelines.

The Commission was instructed to submit sentencing guidelines to the legislature in January 1980 for review. The legislature did not reject them and they went into effect for crimes committed on or after May 1, 1980.

Prescriptive Approach in Guidelines Development

The most common approach to the development of sentencing guidelines is a descriptive approach. Guidelines construction is viewed primarily as a technical matter with the principal task to calculate equations that best capture current sentencing decisions. The solutions that

continued

SB 185

SENATOR LES HIRSCH

House Judiciary
8:00 a.m.Thursday
Mar. 14, 1985

The small tract financing act allows trust indentures as an alternative to real estate mortgages as security for loans. It may be used as the security vehicle for tracts of land not exceeding 15 acres. There is no limit on the size of a loan which may be secured by a trust indenture.

In fact, entire housing projects, shopping centers and other large commercial ventures are financed in the millions of dollars with the security being trust indentures. Any limit on attorney's and trustee's fees when a loan is reinstated by payment before the actual sale under foreclosure of a trust indenture is unrealistic under any circumstances, but particularly when large projects involving millions of dollars are involved.

In larger transactions the advertisement for sale does not happen until substantial problems have been encountered and proper preparations in anticipation of a contest are made by the lender's attorney.

All loan documents must be reviewed. There may be questions of law to be researched. A title report must be ordered and analyzed. When any questions or problems arise, research is necessary, because there are substantial amounts of money involved.

The payment record of the borrower is carefully reviewed to avoid any inaccuracies in the foreclosure sale proceedings. Interest may have to be recalculated. Taxes, penalty and interest on county advalorem taxes must be determined and allowed for in virtually all foreclosures.

Hazard insurance premiums may have been paid by the lender for his protection, although they are the obligation of the borrower. These matters have to be investigated and sometimes require communicating with people out of state.

Arrangements must be made for a place of sale and for someone to post notices of the sale. A drafting of the notice can take a considerable amount of time if there has been a long series of delinquencies and catch-up payments are involved, or due to other problems.

Publication arrangements must be made for the notice of sale. All of these responsibilities, and often many others, include constant negotiations with the borrowers attorney and sometimes other attorneys, such as attorney for a purchaser of the property, are responsibilities of the lender's attorney whether or not he may be the trustee.

The lender's attorney can put in several thousand dollars of time getting to the date of sale. It is not fair, reasonable or realistic to require that the lender rather than the defaulting borrower, who caused the problem, be limited to recovering attorney's fees if the borrower reinstates the loan by making payments up-to-date at some point in the four month period before sale.

Typically, the borrower incurs a number of defaults during a year, two, or three years period to the commencing of foreclosure proceedings. The fault clearly lies with the borrower and he should have to pay whatever reasonable and customary attorney fees are charged to commence foreclosure proceedings.

Any expense incurred by a lender must be passed on to the consumer. Why should other borrowers who pay their payments promptly each month, or when due, be required to subsidize those few individuals who fail to make their payments on time?

The Senate amended this bill to limit attorneys fees to \$1,500 or 3% of the amount due whichever is less. This is better than current law of \$1,000 or 1%. It, however, does not resolve large commercial ventures where attorney fees usually exceed \$1,500.

If the ceiling would effectively limit attorney's fees we would support them. However, the attorneys are going to bill out their time and the bank or saving & loan is going to absorb the amount not recoverable from the borrower. The ceiling, therefore, is ineffective.

Attached are copies of the Small Tract Financing Act.

Part 3

Small Tract Financing

71-1-301. Short title. This part may be cited as the "Small Tract Financing Act of Montana".

History: En. Sec. 1, Ch. 177, L. 1963; R.C.M. 1947, 52-401.

71-1-302. Policy. Because the financing of homes and business expansion is essential to the development of the state of Montana and because such financing, usually involving areas of real estate of not more than 15 acres, has been restricted by the laws relating to mortgages of real property and because more such financing of homes and business expansion is available if the parties can use security instruments and procedures not subject to all the provisions of the mortgage laws, it is hereby declared to be the public policy of the state of Montana to permit the use of trust indentures for estates in real property of not more than 15 acres as hereinafter provided.

History: En. Sec. 2, Ch. 177, L. 1963; and, Sec. 1, Ch. 337, L. 1974; R.C.M. 1947, 52-402.

71-1-303. Definitions. As used in this part, unless the context requires otherwise the following definitions apply:

(1) "Beneficiary" means the person named or otherwise designated in a trust indenture as the person for whose benefit a trust indenture is given or his successor in interest, and who shall not be the trustee.

(2) "Fifteen acres" means 15 acres of land.

(3) "Grantor" means the person conveying real property by a trust indenture as security for the performance of an obligation.

(4) "Trust indenture" means an indenture executed in conformity with this part and conveying real property to a trustee in trust to secure the performance of an obligation of the grantor or other person named in the indenture to a beneficiary.

(5) "Trustee" means a person to whom the legal title to real property is conveyed by a trust indenture or his successor in interest.

History: En. Sec. 3, Ch. 177, L. 1963; and, Sec. 2, Ch. 337, L. 1974; R.C.M. 1947, 52-403(part).

71-1-304. Trust indentures authorized — power of sale for breach in trustee. (1) Transfers in trust of any interest in real property of an area not exceeding 15 acres may be made to secure the performance of an obligation of a grantor or any other person named in the indenture to a beneficiary provided that it shall be unlawful to substitute a trust indenture for any mortgage in existence on March 5, 1963.

(2) Where any transfer in trust of any interest in real property is hereafter made to secure the performance of such an obligation, a power of sale is hereby conferred upon the trustee to be exercised after a breach of the obligation for which such transfer is security.

(3) A trust indenture executed in conformity with this part may be foreclosed by advertisement and sale in the manner hereinafter provided or, at the option of the beneficiary, by judicial procedure as provided by law for the foreclosure of mortgages on real property. The power of sale may be exercised by the trustee without express provision therefor in the trust indenture.

(4) Where the trust indenture states that the real property involved does not exceed 15 acres, such statement shall be binding upon all parties and conclusive as to compliance with the provisions of this part relative to the power to make a transfer, trust, and power of sale.

History: (1) *ibid.* (3) En. Sec. 4, Ch. 177, L. 1963; and, Sec. 3, Ch. 337, L. 1974; Sec. 52-404, R.C.M. 1947; (4) En. Sec. 3, Ch. 177, L. 1963; and, Sec. 2, Ch. 337, L. 1974; Sec. 52-403, R.C.M. 1947; R.C.M. 1947, 52-403(part), 52-404.

71-1-305. Trust indenture considered to be mortgage on real property. A trust indenture is deemed to be a mortgage on real property and is subject to all laws relating to mortgages on real property except to the extent that such laws are inconsistent with the provisions of this part, in which event the provisions of this part shall control. For the purpose of applying the mortgage laws, the grantor in a trust indenture is deemed the mortgagor and the beneficiary is deemed the mortgagee.

History: En. Sec. 17, Ch. 177, L. 1963; R.C.M. 1947, 52-417.

71-1-306. Qualifications of trustee — successor trustee. (1) The trustee of a trust indenture under this part shall be:

(a) an attorney who is licensed to practice law in Montana;

(b) a bank, trust company, or savings and loan association authorized to do business in Montana under the laws of Montana or the United States; or

(c) a title insurance or abstract company authorized to do business in Montana under the laws of Montana.

(2) The beneficiary may appoint a successor trustee at any time by filing for record, in the office of the clerk and recorder of each county in which the trust property or some part thereof is situated, a substitution of trustee. The substitution shall identify the trust indenture by stating the names of the original parties thereto and the date of recordation and the book and page where the same is recorded, shall state the name and mailing address of the new trustee, and shall be executed and acknowledged by all of the beneficiaries designated in the trust indenture or their successors in interest. From the time the substitution is filed for record, the new trustee shall be vested with all the power, duties, authority, and title of the trustee named in the trust indenture and of any successor trustee.

History: En. Sec. 5, Ch. 177, L. 1963; R.C.M. 1947, 52-405.

71-1-307. Reconveyance upon performance — liability for failure to reconvey. Upon performance of the obligation secured by the trust indenture, the trustee, upon written request of the beneficiary, shall reconvey the interest in real property described in the trust indenture to the grantor. In the event the obligation is performed and the beneficiary refuses to request reconveyance or the trustee refuses to reconvey the property, the beneficiary or trustee so refusing shall be liable as provided by law in the case of refusal to execute a discharge or satisfaction of a mortgage on real property.

History: En. Sec. 4, Ch. 177, L. 1963; R.C.M. 1947, 52-406.

71-1-308 through 71-1-310 reserved.

71-1-311. Time for foreclosure same as mortgage. The foreclosure of a trust indenture by advertisement and sale shall be subject to the same provisions as the foreclosure of a mortgage.

shall be commenced within the time, including extensions, provided by law for the foreclosure of a mortgage on real property.

History: *En. Sec. 7, Ch. 177, L. 1963; R.C.M. 1947, 52-407.*

Cross-References

Period of mortgage — renewal, 71-1-210.

71-1-312. Discontinuance of foreclosure proceedings when entire amount of default paid. (1) Whenever all or a portion of any obligation secured by a trust indenture has, prior to the maturity date fixed in such obligation, become due or been declared due by reason of a breach or default in the performance of any obligation secured by the trust indenture, including a default in the payment of interest or of any installment of principal or by reason of failure of the grantor to pay, in accordance with the terms of such trust indenture, taxes, assessments, premiums for insurance, or advances made by the beneficiary in accordance with the terms of such obligation or of such trust indenture, the grantor or his successor in interest in the trust property or any part thereof or any other person having a subordinate lien or encumbrance of record thereon or any beneficiary under a subordinate trust indenture, at any time prior to the time fixed by the trustee for the trustee's sale if the power of sale is to be exercised, may pay to the beneficiary or his successor in interest the entire amount then due under the terms of such trust indenture and the obligation secured thereby (including costs and expenses actually incurred and reasonable trustee's and attorney's fees) other than such portion of the principal as would not then be due had no default occurred and thereby cure the default theretofore existing.

(2) Thereupon all proceedings theretofore had or instituted to foreclose the trust indenture shall be canceled and the obligation and the trust indenture shall be reinstated and shall be and remain in force and effect the same as if no such acceleration had occurred.

(3) If the default is cured and the obligation and the trust indenture reinstated in the manner hereinabove provided, the beneficiary or his assignee shall, on demand of any person having an interest in the trust property, execute, acknowledge, and deliver to him a request that the trustee execute, acknowledge, and deliver a cancellation of the recorded notice of sale under such trust indenture.

(4) Any beneficiary under a trust indenture or his assignee who, for a period of 30 days after such demand, refuses to request the trustee to execute, acknowledge, and deliver such cancellation shall be liable to the person entitled to such request for all damages resulting from such refusal.

(5) A cancellation of a recorded notice of sale shall, when executed and acknowledged, be entitled to be recorded and shall be sufficient if it sets forth a reference to the trust indenture and the book and page where the same is recorded, a reference to the notice of sale and to the book and page where the same is recorded, and a statement that such notice of sale is canceled.

History: *En. Sec. 12, Ch. 177, L. 1963; R.C.M. 1947, 52-412.*

71-1-313. Conditions for foreclosure by advertisement and sale. The trustee may foreclose a trust indenture by advertisement and sale under this part if:

(1) the trust indenture, any assignments of the trust indenture by the trustee or the beneficiary, and any appointment of a successor trustee are recorded in the office of the clerk and recorder of each county in which the property described in the trust indenture or some part thereof is situated;

(2) there is a default by the grantor or other person owing an obligation or by their successors in interest, the performance of which is secured by the trust indenture, with respect to any provision in the indenture which authorizes sale in the event of default of such provision; and

(3) the trustee or beneficiary shall have filed for record in the office of the clerk and recorder in each county where the property described in the indenture or some part thereof is situated a notice of sale, duly executed and acknowledged by such trustee or beneficiary, setting forth:

(a) the names of the grantor, trustee, and beneficiary in the trust indenture and the name of any successor trustee;

(b) a description of the property covered by the trust indenture;

(c) the book and page of the mortgage records where the trust indenture is recorded;

(d) the default for which the foreclosure is made;

(e) the sum owing on the obligation secured by the trust indenture;

(f) the trustee's or beneficiary's election to sell the property to satisfy the obligation;

(g) the date of sale, which shall not be less than 120 days subsequent to the date on which the notice of sale is filed for record, and the time of sale, which shall be between the hours of 9 a.m. and 4 p.m., mountain standard time;

(h) the place of sale which shall be at the courthouse of the county or one of the counties where the property is situated or at the location of the property or at the trustee's usual place of business if within the county or one of the counties where the property is situated.

History: *En. Sec. 3, Ch. 177, L. 1963; R.C.M. 1947, 52-408(1).*

71-1-314. Requests for copies of notice of sale. At any time subsequent to the recordation of a trust indenture and prior to the recordation of notice of sale under the indenture, any person desiring a copy of any notice of sale under a trust indenture as provided in 71-1-315(1) may cause to be filed for record in the office of the county clerk and recorder of the county or counties in which any part or parcel of the real property is situated, a duly acknowledged request for a copy of any notice of sale, showing service upon the trustee. The request shall contain the name and address of the person requesting a copy of the notice and shall identify the trust indenture by stating the names of the parties to the indenture, the date of recordation of the indenture, and the book and page where the indenture is recorded. The county clerk and recorder shall immediately make a cross-reference of the request to the trust indenture either on the margin of the page where the trust indenture is recorded or in some other suitable place. No request, statement, or notation placed on the record pursuant to this section shall affect title to the property or be deemed notice to any person that any person so recording the request has any right, title, interest in, lien, or charge upon the property referred to in the trust indenture.

History: *En. Sec. 15, Ch. 177, L. 1963; R.C.M. 1947, 52-415.*

71-1-315. Notice — sale — payment. A trust deed may be foreclosed by advertisement and sale in the manner hereinafter provided:

(1) The trustee shall give notice of the sale in the following manner:

(a) At least 120 days before the date fixed for the trustee's sale, a copy of the recorded notice of sale shall be mailed by registered or certified mail to:

(i) the grantor, at the grantor's address as set forth in the trust indenture or (in the event no address of the grantor is set forth in the trust indenture) at the grantor's last known address;

(ii) each person designated in the trust indenture to receive notice of sale whose address is set forth therein, at such address;

(iii) each person who has filed for record a request for a copy of notice of sale within the time and in the manner hereinafter provided, at the address of such person as set forth in such request;

(iv) any successor in interest to the grantor whose interest and address appear of record at the filing date and time of the notice of sale, at such address;

(v) any person having a lien or interest subsequent to the interest of the trustee and whose lien or interest and address appear of record at the filing date and time of the notice of sale, at such address.

(b) At least 20 days before the date fixed for the trustee's sale, a copy of the recorded notice of sale shall be posted in some conspicuous place on the property to be sold. Upon request of the trustee, the notice of sale shall be posted by a sheriff or constable of the county wherein the property to be sold is located.

(c) A copy of the notice of sale shall be published in a newspaper of general circulation published in any county in which the property or some part thereof is situated, at least once each week for 3 successive weeks. If there is no such newspaper, then copies of the notice of sale shall be posted in at least three public places in each county in which the property or some part thereof is situated. The posting or the last publication shall be made at least 20 days before the date fixed for the trustee's sale.

(2) On or before the date of sale, there shall be recorded in the office of the clerk and recorder of each county where the property or some part thereof is situated, affidavits of mailing, posting, and publication showing compliance with the requirements of this section.

(3) On the date and at the time and place designated in the notice of sale, the trustee or his attorney shall sell the property at public auction to the highest bidder. The property may be sold in one parcel or in separate parcels, and any person, including the beneficiary under the trust indenture but excluding the trustee, may bid at the sale. The person making the sale may, for any cause he deems expedient, postpone the sale for a period not exceeding 15 days by public proclamation at the time and place fixed in the notice of sale. No other notice of the postponed sale need be given.

(4) The purchaser at the sale shall pay the price bid in cash, and upon receipt of payment, the trustee shall execute and deliver a trustee's deed to the purchaser. In the event the purchaser refuses to pay the purchase price, the person conducting the sale shall have the right to resell the property at any time to the highest bidder. The party refusing to pay shall be liable for

Any loss occasioned thereby, and the person making the sale may also, in his discretion, thereafter reject any other bid of such person. (1) (4) E.A. Sec. 9, C. History: Ap. P. Sec. 3, Ch. 177, L. 1963; Sec. 52-408, R.C.M. 1947; (1) (4) E.A. Sec. 9, C. History: Ap. P. Sec. 3, Ch. 177, L. 1963; Sec. 52-408, R.C.M. 1947; R.C.M. 1947, 52-408(2) 52-409; and Sec. 1, Ch. 53, L. 1977; Sec. 52-409, R.C.M. 1947, 52-408(2) 52-409; and Sec. 1, Ch. 53, L. 1983.

Compiler's Comments
1983 Amendment: In (2), substituted "recorded" for "filed for record".

71-1-316. Disposition of proceeds of sale. The trustee shall apply the proceeds of the trustee's sale as follows:

(1) to the costs and expenses of exercising the power of sale and of the sale, including reasonable trustee's fees and attorney's fees; and

(2) to the obligation secured by the trust indenture;

(3) the surplus, if any, to the person or persons legally entitled thereto or the trustee, in his discretion, may deposit such surplus with the clerk and recorder of the county in which the sale took place. Upon depositing such surplus, the trustee shall be discharged from all further responsibility therefor and the clerk and recorder shall deposit the same with the county treasurer subject to the order of the district court of such county.

History: E.A. Sec. 13, Ch. 177, L. 1963; R.C.M. 1947, 52-413.

71-1-317. Deficiency judgment not allowed. When a trust indenture executed in conformity with this part is foreclosed by advertisement and sale, no other or further action, suit, or proceedings shall be taken or judgment entered for any deficiency against the grantor or his surety, guarantor or successor in interest, if any, on the note, bond, or other obligation secured by the trust indenture or against any other person obligated on such note, bond, or other obligation.

History: E.A. Sec. 14, Ch. 177, L. 1963; R.C.M. 1947, 52-414.

71-1-318. Trustee's deed. (1) The trustee's deed to the purchaser a the trustee's sale may contain, in addition to a description of the property conveyed, recitals of compliance with the requirements of this part relating to the exercise of the power of sale and the sale, including recitals of the facts concerning the default, the notice given, the conduct of the sale, and the receipt of the purchase money from the purchaser.

(2) When the trustee's deed is recorded in the deed records of the county or counties where the property described in the deed is situated, the recital contained in the deed and in the affidavits required under 71-1-315(2) shall be prima facie evidence in any court of the truth of the matters set forth therein, except that the same shall be conclusive evidence in favor of subsequent bona fide purchasers and encumbrancers for value and without notice.

(3) The trustee's deed shall operate to convey to the purchaser, without right of redemption, the trustee's title and all right, title, interest, and claim of the grantor and his successors in interest and of all persons claiming by through, or under them in and to the property sold, including all such right, title, interest, and claim in and to such property acquired by the grantor or his successors in interest subsequent to the execution of the trust indenture.

History: E.A. Sec. 10, Ch. 177, L. 1963; R.C.M. 1947, 52-410.

71-1-319. Possession. The purchaser at the trustee's sale shall be entitled to possession of the property on the 10th day following the sale, and any persons remaining in possession after that date under any interest, except one prior to the trust indenture, shall be deemed to be tenants at will.

History: *Ex. Sec. 11, Ch. 177, L. 1963, R.C.M. 1947, 52-411.*

71-1-320. Trustees' fees and attorneys' fees. Reasonable trustees' fees and attorneys' fees to be charged to the grantor in the event of foreclosure by advertisement and sale shall not exceed, in the aggregate, 5% of the amount due on the obligation, both principal and interest, at the time of the trustee's sale. If prior to the trustee's sale the obligation and the trust indenture shall be reinstated in accordance with provisions of 71-1-312, the reasonable trustees' fees and attorneys' fees to be charged to the grantor shall not exceed the lesser of \$1,000 or 1% of the amount due on the obligation, both principal and interest, at the time of default. In no event shall trustees' fees and attorneys' fees be charged to a grantor on account of any services rendered prior to the commencement of foreclosure.

History: *Ex. Sec. 16, Ch. 177, L. 1963, R.C.M. 1947, 52-416; and Sec. 2, Ch. 55, L. 1983.*

Compiler's Comments

1983 Amendment: At end of next to last sentence, after "shall not exceed" substituted the rest of sentence referring to fees for "\$150".

71-1-321. Deeds of trust and trust deeds not invalidated. The Small Tract Financing Act of Montana does not invalidate or preclude the use in this state of instruments, sometimes denominated deeds of trust, trust deeds, or trust indentures, which are not executed in conformity with this part, but in which a conveyance for security purposes is made to a trustee or trustees for the benefit of one or more lenders. Such instruments are considered to be mortgages and are subject to all laws relating to mortgages on real property. Every such instrument, recorded as prescribed by law, from the time it is filed for record is constructive notice of its contents to subsequent purchasers and encumbrancers.

History: *Ex. Sec. 1, Ch. 362, L. 1979.*

CHAPTER 2

PLEDGES

Part 1 — Pledges in General

Section

71-2-101. Definitions.

71-2-102. When contract considered a pledge.

71-2-103. Delivery required.

71-2-104. Pledgee or pledge holder for reward.

71-2-105. Gratuitous pledge holder.

71-2-106. Obligations of pledge holder.

71-2-107. Property pledged to extent of lien.

71-2-108. When pledge may not be withdrawn.

71-2-109. When real owner cannot defeat pledge.

71-2-110. Debtor's misrepresentation of value of pledge.

Part 1 — Pledges in General

71-2-101. Definitions. (1) "Pledge" is a deposit of personal property by way of security for the performance of another's act.

(2) A pledgor and pledgee may agree upon a third person with whom to deposit the property pledged, who, if he accepts the deposit, is called a "pledge holder".

History: (1) *Ex. Sec. 3890, Ch. C. 1895; re-en. Sec. 5774, Rev. C. 1907; re-en. Sec. 8292, R.C.M. 1921; Cal. Civ. C. Sec. 2986; Field Civ. C. Sec. 1647; re-en. Sec. 8292, R.C.M. 1935; Sec. 65-101, R.C.M. 1947; (2) *Ex. Sec. 3897, Ch. C. 1895; re-en. Sec. 5781, Rev. C. 1907; re-en. Sec. 8299, R.C.M. 1921; Cal. Civ. C. Sec. 2993; Field Civ. C. Sec. 1654; re-en. Sec. 8299, R.C.M. 1935; Sec. 65-101, R.C.M. 1947; R.C.M. 1947, 65-101, 65-108.**

71-2-102. When contract considered a pledge. Every contract by which the possession of personal property is transferred as security only is to be deemed a pledge.

History: *Ex. Sec. 3891, Ch. C. 1895; re-en. Sec. 5775, Rev. C. 1907; re-en. Sec. 8293, R.C.M. 1921; Cal. Civ. C. Sec. 2987; Field Civ. C. Sec. 1648; re-en. Sec. 8293, R.C.M. 1935; R.C.M. 1947, 65-102.*

71-2-103. Delivery required. The lien of a pledge is dependent on possession, and no pledge is valid until the property pledged is delivered to the pledgee or to a pledge holder, as hereafter prescribed.

History: *Ex. Sec. 3892, Ch. C. 1895; re-en. Sec. 5776, Rev. C. 1907; re-en. Sec. 8294, R.C.M. 1921; Cal. Civ. C. Sec. 2988; Field Civ. C. Sec. 1649; re-en. Sec. 8294, R.C.M. 1935; R.C.M. 1947, 65-103.*

71-2-104. Pledgee or pledge holder for reward. A pledgee or a pledge holder for reward assumes the duties and liabilities of a depositary for reward.

History: *Ex. Sec. 3901, Ch. C. 1895; re-en. Sec. 5785, Rev. C. 1907; re-en. Sec. 8303, R.C.M. 1921; Cal. Civ. C. Sec. 2997; Field Civ. C. Sec. 1658; re-en. Sec. 8303, R.C.M. 1935; R.C.M. 1947, 65-112.*

71-2-105. Gratuitous pledge holder. A gratuitous pledge holder assumes the duties and liabilities of a gratuitous depositary.

History: *Ex. Sec. 3902, Ch. C. 1895; re-en. Sec. 5786, Rev. C. 1907; re-en. Sec. 8304, R.C.M. 1921; Cal. Civ. C. Sec. 2998; Field Civ. C. Sec. 1659; re-en. Sec. 8304, R.C.M. 1935; R.C.M. 1947, 65-113.*

71-2-106. Obligations of pledge holder. (1) A pledge holder for reward cannot exonerate himself from his undertaking; and a gratuitous pledge holder can do so only by giving reasonable notice to the pledgor and pledgee to appoint a new pledge holder and, in case of their failure to agree, by depositing the property pledged with some impartial person, who will then be entitled to a reasonable compensation for his care of the same.

(2) A pledge holder must enforce all the rights of the pledgee unless authorized by him to waive them.

History: (1) *Ex. Sec. 3899, Ch. C. 1895; re-en. Sec. 5783, Rev. C. 1907; re-en. Sec. 8301, R.C.M. 1921; Cal. Civ. C. Sec. 2995; Field Civ. C. Sec. 1656; re-en. Sec. 8301, R.C.M. 1935; Sec. 65-104, R.C.M. 1947; (2) *Ex. Sec. 3900, Ch. C. 1895; re-en. Sec. 5784, Rev. C. 1907; re-en. Sec. 8302, R.C.M. 1921; Cal. Civ. C. Sec. 2996; Field Civ. C. Sec. 1657; re-en. Sec. 8302, R.C.M. 1935; Sec. 65-111, R.C.M. 1947; R.C.M. 1947, 65-110, 65-111.**

VOLUME NO. 40

OPINION NO. 40

EMPLOYEES, PUBLIC - Application of nepotism laws, Human Rights Act and Governmental Code of Fair Practices to employment involving relationships by marriage;

EMPLOYMENT DISCRIMINATION - Application of nepotism laws, Human Rights Act and Governmental Code of Fair Practices to employment involving relationships by marriage;

NEPOTISM - Implied repeal of nepotism provision by Human Rights Act and Governmental Code of Fair Practices;

MONTANA CODE ANNOTATED - Sections 1-2-207, 2-2-302, 2-2-303, 49-2-303(1)(a), 49-2-303(1)(b), 49-3-103(1), 49-2-101 to 49-2-601, 49-3-101 to 49-3-312;

OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 67 (1982).

HELD: The 1983 amendments to the Montana Human Rights Act, §§ 49-2-101 to 49-2-601, MCA, and the Governmental Code of Fair Practices, §§ 49-3-101 to 49-3-312, MCA, did not revive the impliedly repealed portion of section 2-2-302, MCA, restricting employment on the basis of affinity.

13 March 1984

Donald Ranstrom, Esq.
Blaine County Attorney
Blaine County Courthouse
Chinook MT 59523

Dear Mr. Ranstrom:

You have requested my opinion concerning the following question:

What is the effect of House Bill 501 on the holding in Thompson v. Board of Trustees and 39 Op. Att'y Gen. No. 67 as it regards "marital status" in the Human Rights Act and section 2-2-302, MCA?

During the 1983 session the Legislature amended sections 49-2-303(1)(a) and 49-2-303(1)(b), MCA, of the Montana Human Rights Act and section 49-3-103(1), MCA, of the

Governmental Code of Fair Practices. The amended provisions read:

49-2-303. Discrimination in employment.

(1) It is an unlawful discriminatory practice for:

(a) an employer to refuse employment to a person, to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his race, creed, religion, color, or national origin or because of his age, physical or mental handicap, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental handicap, marital status, or sex distinction;

(b) a labor organization or joint labor management committee controlling apprenticeship to exclude or expel any person from its membership or from an apprenticeship or training program or to discriminate in any way against a member of or an applicant to the labor organization or an employer or employee because of race, creed, religion, color, or national origin or because of his age, physical or mental handicap, marital status, or sex when the reasonable demands of the program do not require an age, physical or mental handicap, marital status, or sex distinction; [Emphasis added.]

49-3-103. Permitted distinctions. Nothing in this chapter shall prohibit any public or private employer:

(1) from enforcing a differentiation based on marital status, age, or physical or mental handicap when based on a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or where the differentiation is based on reasonable factors other than age; [Emphasis added.]

The underlined portions of these statutes indicate the 1983 amendatory additions. These amendments permit assertion of the "reasonable demands" or "bona fide occupational qualification" defense to marital status discrimination; prior to the amendments such defense was not available. See Thompson v. Board of Trustees, 38 St. Rptr. 706, 708-09, 627 P.2d 1229, 1231-32 (1981).

In 39 Op. Att'y Gen. No. 67 (1982), I held that the affinity nepotism provision in section 2-2-302, MCA, was impliedly repealed by the enactment of the Human Rights Act and the Governmental Code of Fair Practices. Senate Bill 179 was introduced during the 1983 legislative session in an apparent attempt to eliminate any arguable conflict between those statutes' broad prohibition against marital status discrimination and the nepotism provisions in sections 2-2-302 and 2-2-303, MCA, by amending sections 49-2-303 and 49-3-201, MCA, to provide expressly that such sections were not intended to affect

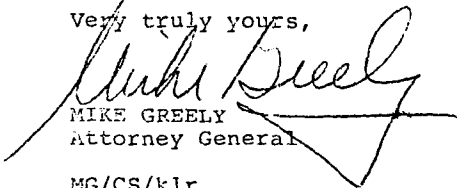
the nepotism prohibitions. In hearings before the Senate Committee on Judiciary, the sponsor of Senate Bill 179 explained "that it was requested by the Montana University System because of problems they were having with conflicts between the antidiscrimination and nepotism laws. He advised the Committee that HB501 was being introduced in the House which deals essentially with the same problem and requested that consideration of SB179 be deferred until passage of H9501...." (January 27, 1983 Senate Committee on Judiciary Minutes.) Senate Bill 179 was never reported out of committee, presumably because House Bill 501 was favorably acted upon by the Committee. House Bill 501 contained those amendments to sections 49-2-303(1)(a), 49-2-303(1)(b), and 49-3-103(1), MCA, quoted above.

For those reasons stated in 39 Op. Att'y Gen. No. 57 (1982), it is my opinion that section 2-2-302, MCA, has been impliedly repealed, to the extent it imposes employment prohibitions on the basis of affinity, by the Human Rights Act and the Governmental Code of Fair Practices. Even if it is assumed arguendo that the amendments to the Human Rights Act and the Governmental Code of Fair Practices effected by House Bill 501 were intended to revive the repealed aspects of section 2-2-302, MCA, the required specificity for revival was not present and, therefore, no revival has occurred. See § 1-2-207, MCA; State ex rel. Jenkins v. Carisch Theatres, Inc., 172 Mont. 453, 460, 564 P.2d 1316, 1326 (1977).

THEREFORE, IT IS MY OPINION:

The 1983 amendments to the Montana Human Rights Act, §§ 49-2-101 to 49-2-601, MCA, and the Governmental Code of Fair Practices, §§ 49-3-101 to 49-3-312, MCA, did not revive the impliedly repealed portion of section 2-2-302, MCA, restricting employment on the basis of affinity.

Very truly yours,


MIKE GREELY
Attorney General

MG/CS/klr

HOUSE JUDICIARY

	SB 151 (Sen. Brown) ;
BILL NO.	SB 185 (Sen. Hirsch);
	SB 186 (Sen. Himsl);
SPONSOR	SB 230 (Sen. Tveit);
	SB 235 (Sen. Mazurek)

DATE March 14, 1985

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

CS-33