MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

February 15, 1985

The thirtieth meeting of the Senate Judiciary Committee was called to order at 10:07 a.m. on February 15, 1985, by Chairman Joe Mazurek in Rooms 413-415 of the Capitol Building.

ROLL CALL: All committee members were present.

CONSIDERATION OF SB 292: Chairman Mazurek stated that Senator Neuman, chief sponsor of SB 292, was called out of town; and, therefore, Larry Majerus, from the Department of Justice, would be preseting the bill on Senator Neuman's behalf. Mr. Majerus stated this bill came out of the joint interim subcommittee No. 3 which met during the last biennium. He testified this clarifies it is unlawful for any person to operate a motor vehicle without liability insurance. He further testified there is no exemption for out-of-state vehicles.

PROPONENTS: None.

OPPONENTS: None.

QUESTIONS FROM THE COMMITTEE: Senator Mazurek asked Mr. Majerus if he said the definition is similar. He questioned if it were not identical. Mr. Majerus stated it was intended to be identical.

Hearing on SB 292 was closed.

CONSIDERATION OF SB 299: Senator Pete Story, sponsor of SB 299, testified that for all of its length, this bill is intended to do one thing--to transfer from the Department of Natural Resources and Conservation to the district court the power to grant new uses or changes of use for water on streams. This is how the law was prior to 1973. Many of the streams in our area were adjudicated 70-80 years ago. The 1972 constitution stated these existing rights are guaranteed and fully protected. In the 1973 legislature, we were convinced to change the law, and these changes necessitated a painful and expensive process of adjudicating or readjudicating all of the waters in Montana. When it's over, the owners will find their rights are only as good as the date on which the paper was issued. Unless the owners come to Helena to protect their rights, a new order will be issued. This bill reverses the administrative role. What is wrong with this is not simply a quibble over the proper roles of government. The present system places costly and unfair burdens on the

holders of existing rights. The burden of proof under present law is on the wrong party. The owner of an existing right must prove how a junior claimant is affecting his right. It's a burden because instead of being able to go to the courthouse, the holder of the existing right has to go to Helena to argue his case. Instead of a local judge who has to run for re-election from time to time, you are putting these decisions in the hands of someone in Helena who goes by a manual from someone else. The people in Helena do not have the knowledge or the gut information that you get when you work on streams that shift every year and change their flow from day to day. There is wide support for the concept of this bill among the users of water in Park County and across the countryside. It is complex, and it does take time to study. Senator Story stated he doesn't expect the committee to do anything with this bill unless it is willing to work on it. He stated if this bill did not get favorable consideration, he would be back two years from now with the same bill, further refined.

PROPONENTS: Dick Russell, the Park County Attorney, testified representing over 100 ranchers and farmers in the name of Gallatin County Agricultural Protection Association and the Park County Legislative Committee. They favor the concept of the bill. He has studied it and does not understand all of it, but they would prefer these matters in the hands of a district judge over an overburdened state bureau.

OPPONENTS: Gary Fritz, representing the Department of Natural Resources and Conservation, stated they would agree with Senator Story on some accounts. This is complicated and represents a reversal of what the legislature did in passing the Water Use Act. The legislature passed that bill after decades of legislative debate. Senator Story is correct that this is a reversal of what the 1973 legislature thought was important. They ask that this policy change be made carefully. Many sessions since 1973 have continued to make improvements. They would like to point out some of the problems they see with the approach suggested. Although they believe complete overhauls are not necessarily bad, they see some problems with the language in the bill. One of the major problems is that in the existing statute, the department is given a list of criteria or standards it must review before issuing a water right. There is no such criteria in SB 299. The Board of Natural Resources makes decisions on how water is to be reserved for future use. on a basin-wide basis. SB 299 would fractionalize that process. The decisionmaking process would be split between several different districts instead of by one board. They are concerned with the cost of getting a water right now compared to what it would be under a judicial system. Colorado has somewhat of a judicial system. It also has the largest number of water right attorneys per capita. In one-third of the cases that come before the department, the parties do not have an attorney. Under a judicial system, that is not true. Under SB 299, the civil

rules of procedure would be used, and they are much more technical than the rules being used by the department. This bill would transfer the decisionmaking to the district courts. There are 85 basins set up by Judge Lessley to be adjudicated. There are 20 judicial districts and 35 district judges. There are 85 water resource basins. Once the final decrees have been issued, then the water authority is transferred to the district court, but the department would still have authority for those that have not yet had final decrees. Final adjudication will not take place on all of them for a long time. There is an overlap between the districts and the basins that Judge Lessley has set up. If you owned land in two different judicial districts or two different basins, you would be going to different judges for your decisions. SB 299 would allow the water master to decide whether notice were required. The department must give everyone who might be affected notice. There may be a constitutional problem with SB 299 in that the constitution states there must be a centralized system for water adjudication. In addition, they have spent years schooling the public on the existing procedure. Willa Hall, representing the League of Women Voters, stated they feel this bill is regressive. A lot of those earlier rights were not recorded. They believe we need to work under the present water use law, and if there are problems, we should address them through that act.

QUESTIONS FROM THE COMMITTEE: Senator Towe asked Senator Story if he would like to respond to the concerns raised by Mr. Fritz. Senator Story stated the Water Use Act was amended 60 some times since it was passed because we haven't got it right. When the present Water Use Act was adopted, there were three things claimed for the new way of doing business: (1) No central records. (2) Under the old law, there was a state engineer who was to know the law. What he lacked was a bucket of money. What he was mandated to do didn't require a new law, but a bunch of money. (3) You needed the information so the state could more adequately protect the owners from out-of-state users. It contained a proviso for reservations for instream use, but there was no criteria for how we grant these permits. This would cost more. That is intended so people would not willy-nilly on a daily basis ask for uses that would interfere with those with prior rights. There are no constitutional problems. We are still saying they can file the rights and keep records of them in Helena. All we are taking away is this right to change permits or approve uses.

CLOSING STATEMENT: Senator Story stated this is a matter that if not given favorable consideration at this time will be back two years from now.

Hearing on SB 299 was closed.

CONSIDERATION OF SB 351: Senator Tom Keating, sponsor of SB 351, stated no group of people has asked him to introduce this bill, but there are

individuals on the street that say when they get hit by an uninsured motorist and the motorist pays only a fine while they have to use their insurance to fix their cars, something in the system is inequitable. This bill is an attempt to hold harmless a victim of an uninsured motorist. Presently, if they have an accident, they are punishable bu up to a $250 fine. The injured party has no recourse. What we are asking for in this measure is to allow the court that imposes the up to $250 fine the ability to also grant a certain amount of compensation to the injured party for whatever difference there is between his insurance coverage and his damages.

PROPONENTS: Roy Martin stated he has had insurance all of his life. He believes in it. He believes this state has gone wrong on insurance. He contends all the guy that gets hit has to do is to carry no-fault insurance. If the man buys insurance, the insurance covers himself. He believes he is stupid not to have insurance. He contends mandatory insurance is illegal and unconstitutional. Up until the legislature passed mandatory insurance, he always had insurance; then he didn't buy it. A friend talked to him about this, and he reinstated his insurance a few months ago. He believes this state is going wrong with this. The only ones that benefit are the courts, the insurance companies, and the lawyers that are trying the suits. He believes what we need to do is get something that helps the people and that would be no-fault insurance. John Covall of Anaconda testified he had an accident in which he was not at fault and his worst enemy was his own lawyer who keeps giving him the run around. He believes something ought to be done to protect the people to put a time limit on these actions or show cause why they can't get them into court.

OPPONENTS: None.

QUESTIONS FROM THE COMMITTEE: Senator Towe asked Senator Keating what he expected to be done with this--what is his intent. Senator Keating stated he would hope that the uninsured motorist who is guilty and is fined, would also be charged some compensation by that same court for whatever inconvenience or minimal amount the victim can't recover under his insurance or any amount too small to get a lawyer to help him get redress for his inconvenience. Senator Towe stated that remedy is available at the present time through a lawsuit. He questioned what the bill would do that you can't do now. Senator Keating stated it would give the victim some opportunity to represent himself before the court asking for some sort of small claims method that the court that imposes the fine can also direct some sort of compensation. Senator Mazurek stated he believes the intent was the court imposing the fine could also give consideration for the deductible. Senator Towe asked about the small claims court that presently exists. Senator Keating stated there is nothing wrong with it if there is that capability. Senator Pinsoneault

stated these cases are the ones that never get any attention. He thinks Senator Keating is trying to combine the civil and the criminal remedies. Senator Towe asked if he is trying to authorize the criminal judge to add an additional amount for the deductible. Senator Keating responded affirmatively.

CLOSING STATEMENT: None.

Hearing on SB 351 was closed.

CONSIDERATION OF SB 328: Senator Bob Brown stated he was the principal sponsor of this bill, along with Senator Daniels. This is an act to amend the law for an act which protects medical people when they withdraw blood for a test. Senator Brown testified this was prompted by the 1984 Montana Supreme Court case of State v. Thompson where blood was drawn involuntarily. Hospitals and medical personnel were concerned this could cause a liability problem for the hospital.

PROPONENTS: Chad Smith, an attorney from Helena, appeared in support of the bill and submitted a copy of the State v. Thompson case into evidence (Exhibit 1). Mr. Smith testified prior to the release of this decision, the practice under the implied consent law was rather straightforward. The requesting officer would bring a person into the hospital for evidence. If he were unconscious or consented, the blood was drawn. If he refused, it was not drawn. Refusal resulted in suspension of his driver's license. The decision held that 61-8-402, MCA, does not apply to suspects in negligent homicide prosecution. After the decision, it was determined that if there were a demand by the arresting officer, blood will be drawn. This presents a problem. It could involve hospital security personnel or orderlies. It could cause injury to the individual. Prior to the application of this Supreme Court decision and the Attorney General's interpretation of it, they were not too concerned about it. Now the insurance companies are wondering what increased risk this will bring about. The Attorney General's office said a flat refusal of the hospital to withdraw the blood could amount to an obstructing justice charge. They find the exculpatory clause is deficient. It does not mention the hospital. It speaks only of the position of physicians and registered nurses. It is the laboratory technician that is called upon to do this. They suggest licensed hospital and employees should be added. They ask that the reference be included to all persons administering in this test. Linda Hamilton, Acting Chief Technologist at St. Peter's Hospital, testified that up until the passage of the Thompson decision, the first thing they asked was if the patient were conscious and, if so, did he consent. Laboratory technicians draw 80-90% of all blood. Many things could happen that could injure a person fighting having his blood drawn.

OPPONENTS: None.

QUESTIONS FROM THE COMMITTEE: Senator Crippen stated let's assume the person you are going to draw blood from is unconscious and the police officer suspects the person has been drinking. Mr. Smith stated they have no problem where the person is unconscious. Senator Crippen stated if the exculpatory clause is there, then the only time you are held liable is in the case of willful injury. He questioned what would happen if there were gross negligence on the part of the hospital and if this bill were giving a blanket exception to this area. He asked if it were their intention to exclude the hospital or person from any liability in that situation. Mr. Smith responded no. That's the word of the law now in cases involving the physician or the registered nurse. All they are trying to insert into that statute is protection from the additional liability from the struggling individual. Senator Crippen stated you struck the word "proper" on line 11. Mr. Smith stated yes, because taking blood from a squirming individual could never be proper. Senator Crippen stated he understood that, but this provision also provides to you when you are taking blood out of a person that is unconscious or has given his permission. The only time you could be held liable is if you were to cause willful injury. Senator Towe asked how they handled the situation where the hospital is grossly negligent. Mr. Smith stated they don't want to be put in a position for having to be found liable for proceeding in an improper case. Senator Towe stated lines 11-13 on page 1 are being changed to say that the hospital and employees that are not already authorized to withdraw blood are immune if they do. Mr. Smith stated we are trying to be sure this particular clause is not negated because of an interpretation of that. Senator Towe stated if other persons are not authorized to draw blood, we should not put in an exculpatory clause to do so. Senator Mazurek stated you have indicated that if we are reworking this to provide a specific exculpatory clause, you would not have any objections. Mr. Smith responded yes. Senator Towe asked that Mr. Smith try to work up an amendment to that effect.

CLOSING STATEMENT: None.

Hearing on SB 328 was closed.

CONSIDERATION OF SB 383: Senator Mike Halligan, sponsor of SB 383, introduced the bill. He stated the In Re Carlson decision (attached as Exhibit 2) established some new factors that should go into determining child support payments. What this bill is is an attempt to codify what the Supreme Court said we should look at when dealing with child support. We are adding to the language the additional factors the court stated we must look at in requiring child support payments. The formula allocates the portion of child support payments among the parties.

PROPONENTS: Leslie Vining, of the University of Montana Women's Law Caucus, appeared in support of SB 383 (see witness sheet and written testimony attached as Exhibit 3). Ms. Vining submitted proposed amendments to SB 383 (Exhibit 4). John McRae, Staff Attorney for the Child Support Enforcement Program of the Department of Revenue, spoke in favor of passage of SB 383. He testified we must establish support orders, as well as enforce them. Everyone is aware of the financial problems created by families headed by women. They are the fastest growing poverty group in the nation. In the economic aftermath of a typical divorce proceeding. 80% of the husbands are maintained at or near their predivorce income, while 70% of the women experienced a substantial decline in their standard of living. SB 383 attempts to correct at least some of this imbalance by requiring additional factors that must be considered. Support must be charged in equal respect to each parent. SB 383 by itself should justify passage because it does correct that imbalance. It requires the court to do this balancing test between them and try to stabilize the situation between the two new households. It also makes it quite clear the children's needs will have priority over pickup trucks, cable televisions, etc. This bill defines what "needs" are of the noncustodial parent. This redefines it as basic living needs. Nonessential living expenses may not be considered in determining child support. The need to pay child support is primary over other living obligations. This will discourage the frivolous expenditures, and we will get a better balance of child support as a whole. It will decrease the welfare payments. SB 383 calls for periodic review of support orders. This helps address the problem of inadequate support orders. We have to comply with the Code of Federal Regulations and that is the reason for the suggested changes.

OPPONENTS: None.

ADDITIONAL TESTIMONY: Anne Brodsky, representing the Women's Lobbyist Fund, appeared neither in support nor in opposition to SB 383. She testified that Representative Wallin has a bill in the request stages that would link a minimum support amount to AFDC payments for a two-person household. That would be about $135 per month. If the payments were tacked to something, they would automatically go up, and the Women's Lobbyist Fund thinks that would be a better idea. They like the idea there would be a periodic review of the child support payments. The bottom of page 3 and top of 4 speak to health insurance as being part of the child support payments. They believe Senator Regan's SB 105 more comprehensively covers that situation.

QUESTIONS FROM THE COMMITTEE: Senator Towe asked Ms. Vining about the formula. She stated people are capable of earning more; and they want the committee to put that issue into the statute before it is addressed by the court. Ms. Vining stated it is based on other statutes that his

high earning capacity is not used instead of net earnings. Senator Galt stated children come cheaper by the dozen. If you have more than one child, do you pay that much for each child. Ms. Vining stated, no, it will be proportionate. Such living expenses as food will not increase with more children. Due to time constraints, Chairman Mazurek asked Senator Halligan if he would be willing to come back to the committee for questions from the committee members and for his closing statement at a later time. Senator Halligan responded he would be so willing.

Hearing on SB 383 was closed.

ACTION ON SB 292: Senator Pinsoneault moved SB 292 be recommended DO PASS. The motion carried unanimously.

ACTION ON SB 351: Senator Daniels moved SB 351 be recommended DO NOT PASS. The motion carried unanimously.

TABLING OF SB 299: Senator Galt moved SB 299 be TABLED. The motion carried with Senator Daniels voting in opposition.

DISPOSITION OF SB 313: Senator Shaw moved SB 313 be recommended DO PASS. The motion failed with Senators Daniels, Galt, Pinsoneault, Shaw, and Yellowtail voting in opposition. Senator Shaw stated our forefathers set up our constitution so you had a check and balance with the Senate and the House, and we don't have it now because all we represent is the people. Chairman Mazurek stated that since the motion to recommend the bill DO PASS failed, he will move on order of business No. 6 that SB 313 be printed and placed on second reading.

ACTION ON SJR 19: Senator Pinsoneault stated they are doing something on the federal level, so what we do here doesn't mean anything. Senator Brown stated it doesn't matter what we do with respect to resolutions anyway, so he moved SJR 19 be recommended DO PASS. The motion carried as evidenced by the roll call vote attached as Exhibit 5.

There being no further business to come before the committee, the meeting was adjourned at 12:18 p.m.

Joseph P. Mazurek
Committee Chairman

ROLL CALL

SENATE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985 Date 021585

NAME	PRESENT	ABSENT	EXCUSED
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Bruce D. Crippen	X		
Senator Jack Galt	X		
Senator R. J. "Dick" Pinsoneault	X		
Senator James Shaw	X		
Senator Thomas E. Towe	X		
Senator William P. Yellowtail, Jr.	X		
Vice Chairman Senator M. K. "Kermit" Daniels	X		
Chairman Senator Joe Mazurek	X		

DATE ____________________

COMMITTEE ON ____________________

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One Support	Check One Oppose
Chad Smith	Mont Hosp Assn	SB 328	✓	
Linda Hamilton	St. Peters Hospital	"	✓	
Roger Martin	insurance Mallory Co	SB 299		✓
John Morrell	—	—		✓
Jack Russell	[illegible]	S299	✓	
John McRAE	DOR/CSED	SB 383	✓	
[illegible]	DOR	SB 383	✓	
Willa Hall	LWV	SB 299		✓
Tom Pouliot	DOR / CSED	SB 383	✓	
Anne Brodsky	WLF	SB 383		

(Please leave prepared statement with Secretary)

No. 83-134

IN THE SUPREME COURT OF THE STATE OF MONTANA

1984

STATE OF MONTANA,

Plaintiff and Respondent,

-vs-

STEVEN T. THOMPSON,

Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District, In and for the County of Missoula, The Honorable Jack L. Green, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Goldman & Goldman; Bernard J. Goldman argued, Missoula, Montana

For Respondent:

Mike Greely, Attorney General, Helena, Montana
Chris Tweeten aruged, Asst. Atty. General, Helena
Robert L. Deschamps, III, County Attorney, Missoula Montana

Submitted: October 24, 1983

Decided: January 12, 1984

Filed: JAN 12 1984

Clerk

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 021585
BILL NO. SB 328

Mr. Justice L.C. Gulbrandson delivered the Opinion of the Court.

Appellant was convicted of negligent homicide after a jury trial held before the Honorable Jack L. Green. From this verdict, appeal is taken.

On March 6, 1982, appellant was driving west on Interstate 90 near East Missoula, Montana, when he was involved in a collision. Appellant's vehicle struck the rear end of a vehicle driven by Noah Hatton in which his wife, Sylvia Hatton, was the passenger. At the scene of the accident, appellant was placed under arrest for driving under the influence of alcohol in violation of Section 61-8-401, MCA. He was then transported to Missoula Community Hospital for treatment of minor injuries suffered in the accident.

While appellant was receiving treatment, a Montana Highway Patrol officer solicited and received permission from the attending physician to talk with appellant. The officer informed appellant of his Miranda rights and his rights under Montana's "implied consent" law, Section 61-8-402, MCA. The officer then requested appellant to allow the medical staff to draw a blood sample, and appellant refused. Section 61-8-402(3), MCA, provides that,

> "If a resident driver under arrest, refuses upon the request of a peace officer to submit to a chemical test designated by the arresting officer as provided in subsection (1) of this section, none shall be given, but the officer shall, on behalf of the division, immediately seize his driver's license." (emphasis supplied)

The officer did not seize appellant's driver's license.

Confronted with this refusal, the officer instead contacted the office of the Missoula County Attorney for advice. He was informed that Sylvia Hatton, who had been taken to another hospital, had died as a result of injuries received in the collision. He was advised that since appellant now was a suspect in a negligent homicide, the implied consent law was inapplicable. The officer returned to appellant's room and informed him that Mrs. Hatton had died, that since he was now a suspect in a negligent homicide, the implied consent law did not apply and that a blood sample was needed. Though appellant apparently did not "consent," a blood sample was drawn and analyzed. Appellant's blood alcohol level was .12%.

On September 10, 1982, appellant moved the District Court to suppress the results of the blood test on the grounds that the blood sample had been drawn against his will in violation of the implied consent law. Briefs were submitted and the motion was argued orally before the Honorable Jack L. Green. The court found that on the facts outlined above the implied consent law did not apply because appellant was a suspect in a negligent homicide. The court further found that the blood sample was taken in compliance with the Fourth and Fourteenth Amendments of the United States Constitution, and Article II, section 11 of the Montana Constitution. Since it was not an unreasonable search and seizure, the motion to suppress was denied.

A jury trial was held, during which the results of the blood test were admitted into evidence. The jury found appellant guilty of negligent homicide. This appeal follows.

The sole issue raised on appeal is whether the prohibition against non consensual extractions of blood samples in Section 61-8-402, MCA, applies to prosecutions for negligent homicide, and this issue is dispositive. Appellant has not challenged the action taken below on constitutional grounds. We have previously held that blood samples drawn in violation of the statute are inadmissable in prosecutions for driving under the influence of intoxicating liquor. State v. Mangels (1975), 166 Mont. 190, 531 P.2d 1313. Therefore if Section 61-8-402 applies to negligent homicide prosecutions, the results of the blood test should not have been admitted into evidence and the motion to suppress should have been granted. The State has graciously conceded this point. It is urged by appellant that Section 61-8-402, MCA, be applied to persons arrested for negligent homicide, despite the operative language of the statute that engages its provisions, "[I]f (the suspect is) arrested by a peace officer for driving or in actual physical control of a motor vehicle while under the influence of alcohol." The District Court relied on this language in holding that the statute did not apply here.

Appellant contends that this Court previously ruled that the statute does apply to negligent homicide prosecutions in State v. Morgan (Mont. 1982), 646 P.2d 1177, 39 St.Rep. 1072. In Morgan, the defendant was involved in an automobile accident where two people died instantly. When the investigating officer interviewed the defendant at the hospital it was his opinion that the defendant was incoherent and could not have communicated a wish that a blood sample not be drawn. The officer concluded that since

the defendant was in such a state, pursuant to Section 61-8-402(2), it was unnecessary to obtain consent before the blood was extracted. The question presented to this court was whether defendant was in such an incoherent state as to be unable to respond to a request for a blood sample, thus engaging the provisions of subsection (2) of the implied consent statute. We did not expressly rule that the implied consent law applied there as that question was not raised by defense counsel. We did rule that its provisions had been complied with.

In spite of appellant's assertions to the contrary, the Morgan case is not dispositive of the case at bar. The issue presented there is not the same as is presented here, even though this Court seemingly presumed that the statute applied. Morgan dealt strictly with the internal workings of the statute, and did not deal with its applicability. "What is not in issue is not decided." Sullivan v. Anselmo Mining Corp. et. al. (1928), 82 Mont. 543 at 555, 268 P. 495 at 500, citing Pue v. Wheeler (1927), 78 Mont. 516, 255 P. 1043. As the issue was not decided, the case is not authority for appellant's position. Martien v. Porter (1923), 68 Mont. 450, 219 P. 817.

We find that Section 61-8-402 does not apply to negligent homicide prosecutions. This conclusion is based on three considerations. First we consider the legislative intent. "Legislative intent must first be determined from the plain meaning of the words used; and if the language is plain, unambiguous, direct and certain, the statute speaks for itself." Crist v. Segna (Mont. 1981), 622 P.2d 1028 at 1029, 38 St.Rep. 150 at 152, citing Dunphy v. Anaconda Co.

(1968), 151 Mont. 76, 438 P.2d 660. The language of the statute and an examination of the statutory scheme of Title 61, Chapter 8, part 4 plainly show that application of the implied consent law to negligent homicide cases was not within the legislature's contemplation. The operative language of Section 61-8-402 reads,

> "Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent, subject to the provisions of 61-8-401, to a chemical test of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if arrested by a peace officer for driving or in actual physical control of a motor vehicle while under the influence of alcohol." (emphasis supplied)

The underlined passage above makes it clear that the protections afforded there are not engaged until there is an arrest for driving under the influence. (But, see State v. Campbell (Mont. 1980), 615 P.2d 190, 37 St.Rep. 1337, where we held that an arrest is not always a prerequisite to administration of a blood alcohol test.) Not only is the section specifically premised on such an arrest, but it is made subject to the section of the code which outlines the offense of driving under the influence of alcohol or drugs. Appellant has characterized this language as extra verbage which this Court could ignore should it choose to apply the statutory protections to appellant. However, "All provisions of a statute shall be given effect, if possible." Crist, supra, 622 P.2d at 1029 38 St.Rep. at 152, citing Corwin v. Bieswanger (1952), 126 Mont. 337, 251 P.2d 252. This Court does not have the power to remove or ignore language in a statute.

The second consideration is how similar implied

consent laws have been interpreted in other jurisdictions. The implied consent laws of several jurisdictions expressly state that they apply to persons arrested for "any offense" arising out of operating a motor vehicle under the influence, and their courts have applied the statute to negligent homicide cases. See State v. Riggins (Fla.App. 1977), 348 So.2d 1209. However among the jurisdictions which have interpreted implied consent laws with operative language similar to Montana's, there has been a split of opinion. Some jurisdictions hold that their statutes do apply to negligent homicide prosecutions. See State v. Hitchens (Iowa 1980), 294 N.W.2d 686; and State v. Annen (1973), 12 Or.App. 1203, 504 P.2d 1400. However we feel the better reasoned cases hold that the statute does not apply to negligent homicide cases. See People v. Sanchez (1970), 173 Colo. 188, 476 P.2d 980; Van Order v. State (Wyo. 1979), 600 P.2d 1056; and State v. Robarge (1977), 35 Conn.Supp. 511, 391 A.2d 184. Relying on the plain wording of the statute, these cases held that applying the implied consent laws to negligent homicide prosecutions was not what the legislature had intended.

The third consideration also weighed heavily on the courts deciding the cases cited immediately above; suspension of the driver's license is simply an insufficient penalty for refusing to submit to a chemical analysis when there has been a death caused by the drinking driver. The gravity of the crime heightens the importance of the blood sample, and it appears the legislature felt this administrative remedy was simply inappropriate. The decision to modify the scope of the implied consent law

properly rests within the legislature's power. It is not within our power to read into a statute more than is found there, as appellant would have us do. Therefore we hold that Section 61-8-402 does not apply to suspects in negligent homicide prosecutions.

The District Court's judgment is affirmed.

Justice

We concur:

Chief Justice

Justices

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 021585
BILL NO. SB 328

No. 84-254

IN THE SUPREME COURT OF THE STATE OF MONTANA

1984

IN RE THE MARRIAGE OF
KENNETH RAY CARLSON,

Petitioner and Respondent,

and

VICKIE LYNN CARLSON,

Respondent and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District, In and for the County of Yellowstone, The Honorable William J. Speare, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Steven J. Shapiro, Helena, Montana

For Respondent:

Wright, Tolliver & Guthals, Billings, Montana

Submitted on Briefs: Oct. 11, 1984

Decided: December 27, 1984

Filed:

Ethel M. Harrison

Clerk

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 021585
BILL NO. SB 383

Mr. Justice John C. Sheehy delivered the Opinion of the Court.

Vickie Carlson Shapiro appeals from a post-judgment order of the Thirteenth Judicial District, Yellowstone County, reducing the child support monies to be paid by Kenneth Ray Carlson. The order of the District Court is reversed and remanded.

Kenneth and Vickie Carlson married in 1970 and divorced on July 5, 1979. They have three children, two eleven-year-olds and a eight-year-old, who live with their mother. The District Court incorporated in the marital dissolution decree a contractual agreement between the parties that the father would pay to the mother $150 per month for each child for their support. The mother received no maintenance under the agreement.

The father is a high school graduate with vocational training in bookkeeping and extensive work experience in retail store management. The mother has no job-market skills. She currently works at home providing temporary child care.

Both parties remarried after the dissolution. At the time of the hearing the father was unemployed, but at the time of the divorce he earned $36,000 per year as a store manager. His annual earnings later increased to $47,000. He voluntarily transferred to California then quit his job as a store manager due to job stress. He has had several jobs since returning to Montana, but because of health and financial reasons he has been unable to obtain regular employment. The District Court found that it is unlikely he will earn a salary comparable to what he earned at the time of the

decree. The mother is currently earning approximately $400 per month from her child care work.

On October 25, 1983, the father petitioned the District Court to reduce his child support payments. Before petitioning, the father permitted his children's medical insurance to expire and did not pay child support for them during July, August, and September of 1983. After September he did not pay his full obligation monthly, and made late payments.

Both parties submitted affidavits of their necessary monthly expenses to the District Court. The husband's affidavit shows:

House Payment	$ 500.00
Heat	65.00
Light	35.00
Phone	40.00+
Paper	7.50
Car Insurance	25.00
Car Payment/'83 Buick	289.00
Gas	104.00
Groceries	450.00
Medical	25.00
Dental	15.00
Note - Bank	35.00
Visa	96.00
MasterCard	70.00
Montgomery Wards	32.00
Child Support	225.00
Clothing	25.00
Total	$2,036.00

The foregoing are the expenses of the father, his present wife, and her two children. His wife receives child support but the District Court refused to allow testimony as to its amount.

The mother's affidavit shows:

House Payment	$ 470.00
Utilities	100.00
Gasoline and car maintenance	48.00
Life insurance	50.00
Car insurance	28.00
House insurance	40.00
Groceries	280.00

Clothing	40.00
Telephone	16.00
Newspaper	10.00
Household maintenance	24.00
Entertainment	16.00
Medical, dental, optical	32.00
Total	$1,154.00

The mother's figures are for herself and the three children. She excluded her present husband's expenses from her affidavit.

The District Court stated its findings that the cost for providing the children's needs have increased, not diminished, since the decree of dissolution. Nevertheless the District Court reduced the child support payment that was to be made by the father to the sum of $75 per month per child, or a total of $225 per month.

The wife raises five issues on appeal:

(1) The father was not entitled to equitable relief because he came to the court with "unclean hands" in that he had not made all of his child support payments.

(2) It was error for the District Court to conclude that the husband's circumstances had substantially changed, and that the sum of $450.00 per month for child support was unconscionable.

(3) The father's contractual obligations for child support precluded modification by the District Court.

(4) The District Court abused its discretion in reducing the father's child support obligation.

(5) The District Court erred in failing to award the attorney fees and costs.

In determining whether child support should be modified the District Court is governed by section 40-4-208(2)(b), MCA, which states:

"(b) Whenever the decree proposed for modification contains provisions relating to maintenance or support, modification under subsection (1) may only be made:

"(i) upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable; or

"(ii) upon written consent of the parties."

The standard for this Court in reviewing the District Court's determination is to give deference to the lower court's discretion. "This Court will reverse the District Court on this issue only if the District Court's findings are clearly erroneous in light of the evidence in the record." Hughes v. Hughes (Mont. 1983), 666 P.2d 739, 741, 40 St.Rep. 1102, 1105. A presumption exists in favor of the District Court judgment. To bring about a reversal of the District Court the appellant must demonstrate that there was a clear abuse of discretion or an error in the District Court's findings. Reynolds v. Reynolds (Mont. 1983), 660 P.2d 90, 93, 40 St.Rep. 321, 324.

ISSUE NO. 1 Did the father's "unclean hands" preclude the District Court from reducing the child support to be paid by him?

This Court has held that when child support comes due under a decree it becomes a judgment debt similiar to any other judgment for money and cannot be retroactively modified. Williams v. Budke (1980), 186 Mont. 71, 77, 606 P.2d 515, 518. We recognize that one seeking equity must do equity and that the nonpayment of child support is inequitable, and in some cases reprehensible. However, holding that a petitioner cannot seek modification until all past due child support is paid would be an unworkable solution, deny access to the courts, and ignore a long series of

cases that have allowed modification of future support payments. Williams v. Budke, supra; Knowlton v. Knowlton (Mont. 1981), 632 P.2d 336, 38 St.Rep. 1304. The law, as stated in section 40-4-208(1), continues to be that a motion for modification may only alter support payments accruing subsequent to the order for modification.

ISSUE NO. 2 Had the father's circumstances changed so substantially and continuingly as to make the payment of $450 per month for child support unconscionable?

The record substantiates that the father is currently unemployed there is no evidence supporting a conclusion that this substantial change in the father's circumstances is continuing. In Hughes v. Hughes (Mont. 1983), 666 P.2d 739, 741, 40 St.Rep. 1102, 1105, the District Court findings were held to be clearly erroneous because no evidence was presented to prove that the husband's change in circumstances was continuous. The District Court correctly identified the question involved: "Can he go to work?" The father's evidence failed to show that his unemployment was permanent or that earning capacity had been substantially reduced.

The amount to which the child support payments was reduced is an amount less than welfare would allow the mother to receive under Aid to Dependent Children. The effect of the District Court's decision is to transfer to the wife, who has a far lesser earning capacity, more than half of the cost of supporting the children.

It appears to us that the effect of an inadequate child support award is that the adverse economic impact of divorce is absorbed by the custodial parent and the children. In fact the children become the unwitting victims of inadequate child support. The difficult task facing District Courts in

properly awarding child support payments to the custodial parent is a matter of concern for all.

We offer, as a guideline for consideration in determining child support, the formula set out in an article "How to Calculate Child Support" by Maurice Franks, appearing in Case and Comment, January-February, 1981. The theory of the formula is that the financial needs of the child should be paid by both parents in proportion to their earning capacity. "N" equals the total needs of the child and should include adequate daycare costs if needed. "N" will vary according to the parents but should never be lower then AFDC payments. "C" equals the earning capacity of the custodial parent. "V" equals the earning capacity of the visitation parent. The total needs of the child, N, is met by both parents in proportion to their ability to contribute. Expressed algebraically:

$$N = N_C + N_V.$$

$$N_V = \frac{N \times V}{V + C} \qquad \text{and} \qquad N_C = \frac{N \times C}{V + C}$$

As an example, if a child has monthly needs for food, clothing, shelter, recreation and daycare amounting to $400, then N = $400. If the visitation parent earns $30,000 and the custodial parent earns $10,000, the child support award is:

$$\frac{400 \times 30{,}000}{30{,}000 + 10{,}000} = \$300 \qquad \frac{400 \times 10{,}000}{30{,}000 + 10{,}000} = \$100$$

The visitational parent will contribute $300; the custodial parent will contribute $100 in kind.

Of course, C and V must realistically reflect what the parents are capable of earning using their actual earnings as a guideline. Use of the formula rejects romantic notions

of women being supported by their ex-husbands, or fathers refusing employment they do not like. Married parents have no such luxury, and it should not be a luxury afforded divorced parents.

In the present case, the District Court found that the children's needs have increased, but ignored the testimony regarding the mother's earning capacity and the fact that if she works the children need day care. The court apparently assumed that the father's unemployment is permanent. By reducing the child support to $75 per month per child, the District Court shifted the greater financial burden of supporting the children to the mother. In reality, the effect of the District Court decree is to shift some of the burden of supporting the children to the mother's current husband.

The father came into District Court asking that the child support be equitably adjusted. As this Court said in Barbour v. Barbour (1958), 134 Mont. 317, 326, 330 P.2d 1093, 1098. "However, the law, the children must eat. He who seeks equity must do equity."

ISSUE NO. 3 Did the contractual obligation for child support preclude modification by the District Court?

In all divorce matters relating to children, the best interests of the children control. While terms of a contract may be introduced as evidence in some instances, the custody and support of children are never left to contract between the parties.

The mother relies on Winters v. Winters (Mont. 1980), 610 P.2d 1165, 37 St.Rep. 840, for support of the proposition that some areas of divorce can be governed by contractual agreement between the parties. This remains true, but as we stated in Winters at page 1168:

"What we hold here has no bearing on the power of the court to modify agreements of the parties regarding child support in later applications (citation omitted). The question before the court [in Winters] did not involve the welfare of the children, in which event the court could modify any agreement of the parties to achieve their protection (citations omitted)."

ISSUE NO. 4 Did the District Court abuse its discretion in reducing the child support obligation?

The mother argues that the equities of this case are such that the judge abused his discretion in reducing the father's child support payments. We are remanding this cause for error in the finding that the father's current changed circumstances are permanent. We also determine that the District Court abused its discretion in reducing the amount of child support which the District Court ordered to be paid by the father on the ground that it was improperly measured.

The affidavit of the mother shows expenses of $1,154 per month for herself and the children. The District Court's findings are that the children's expenses are greater than $450 a month. It is not the duty of the new husband of the mother's new husband to provide support. As we said in Reynolds v. Reynolds (Mont. 1983), 660 P.2d 90, 94, 40 St.Rep. 321, 325, a new spouse's income can be considered in determining a parent's ability to pay child support, but it cannot be determinative nor does it relieve the other parent of the obligation to support his or her children.

There was testimony in this case that the father's new wife received child support from her former husband. We agree with the District Court that the new wife had no obligation to support these children, but the information should have been admitted for a different purpose. The father has claimed expenses of $2,036 for himself, his new wife, and her

children. He is not, however, responsible for supporting those children. By not deducting what the new wife received in child support from the father's claimed expenses, the father's affidavit overstated his expenses per month.

As stated above, on review this Court gives deference to the District Court in child support matters. Appellant must demonstrate there is clear abuse of discretion or erroneous findings to reverse the District Court. Reynolds v. Reynolds (Mont. 1983), 660 P.2d 90, 93, 40 St.Rep. 321, 324. We are remanding this cause for error in finding that the child support payments should be reduced to the figures here without supporting cases of the father's present earning capacity.

ISSUE NO. 5 Should the wife have been awarded attorney fees?

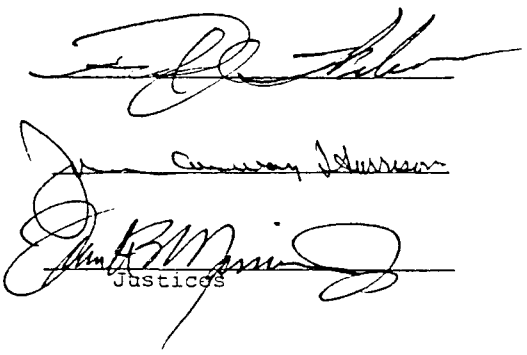
The award of attorney fees under section 40-4-110, MCA, is not mandatory upon the District Court. Since the cause is being remanded for other reasons, we leave open to the District Court whether in light of the further record in this case the wife would be entitled to attorney fees.

Reverse and remand for further proceedings.

John C. Sheehy
Justice

We Concur:

Chief Justice



Justices

Mr. Chief Justice Frank I. Haswell, specially concurring:

I concur in the result but I do not believe that determination of the proper amount of child support can be reduced to an algebraic formula.

Chief Justice

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 021585
BILL NO. SB 383

(This sheet to be used by those testifying on a bill.)

NAME: Leslie Vining DATE: 2/15/85

ADDRESS: 208 Pattee Creek Drive, Missoula, MT

PHONE: 728-5061 home; work 243-6491

REPRESENTING WHOM? University of Montana Womens Law Caucus

APPEARING ON WHICH PROPOSAL: Senate Bill 383

DO YOU: SUPPORT? ✓ at AMEND? ✓ OPPOSE? _____

COMMENT: Womens Law Caucus is responsible for the child support bill. The group urges passage with (attached) amendments. The amendments resolve conflicts with existing federal regulations imposed upon the state child support division.

Please refer to the attached statement.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 021585
BILL NO. SB 383

Womens Law Caucus at the University of Montana Law School drafted Senate Bill 383 to provide a more equitable means of dividing child support between the parents and to eliminate the common practice of setting the child support amount on the basis of the "going rate." In the last year, Congress and the Montana Supreme court have also taken steps to address the problems associated with child support. Congressional passage of Public Law 98-378, the Child Support Enforcement Amendments of 1984, mandate each state to establish guidelines for child support award amounts by October 1, 1987. The Montana Supreme Court in the decision of In Re Carlson, suggested the use of a formula to determine the amount of child support. That formula is incorporated into Senate Bill 383. Further, after review of existing statutes and various publications, additional criteria used to adjust the child support amount were added to the present factors enbraced in the Montana statute.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 021585
BILL NO. SB 383

TO BRIEFLY EXPLAIN THE PROPOSED CHANGES:

Section 1, redefines several factors to include the needs and ~~financial resources~~ of the child and both parents; adds provisions to assist a custodial parents efforts to become self-supporting and to include consideration of day care costs if applicable or the value of the custodial parent's services if he or she remains in the home to care for the children. If previous support and maintenance orders are being paid, these could reduce the support payments.

On page 2, line 21 a minimum amount of support is set at $125 each month. The present law allows the amount received by children under the AFDC program to be a factor in determining child support, but this minimal amount is not binding on the parent. Further, there is confusion as to the amount of AFDC that is to be included. It was felt by us, and others that the minimum amount was easier to determine and necessary.

ON page 3 the Supreme Court's suggested formula is set forth. It divides the needs of the child according to a proportion of each parents annual earning capacity. Similar provisions exist in Deleware, Mississippi, Nebraska, Virginia,

West Virginia and Wisconsin. This encourages a parent to retain positions in which he or she is qualified and not to avoid work to avoid child support payments. It is important to note that an Oregon decision, interpreting this clause, has allowed parents flexibility to take a lower salaried position which is more satisfying to the parent and pays less child support. The test used by the Oregon court states that change is appropriate if the hardship to the parent from remaining in present employment outweighs the hardship to the children of the reduced support. [Nelson, 255 Or. 257, 357 P.2d 536 (1960)]

The amendments in Section 2 on page 4 provide for redetermination of the support award by the parties every 4 years according to the criteria in 40-5-204, as amended. It is widely recognized that modification is necessary to cope with costs of inflation, higher costs that accrue with older children and the possibility of changes in parents incomes. The 4-yr modification attempts to take these facts into consideration and place the burden equally upon both parents. Further, it provides a mechanism for the parties to redetermine the amount without incurring legal or court costs. If the parties are unable to redetermine the amount, the proposal entitles one or both of the parties to move the court for redetermination.

Section 4 on page 6 codifies the schedules presently used, which conform to federal guidelines--the amended form. This will inform the public and legal profession as to the distribution of those amounts.

After discovering that amendments to Section 40-5-223 and 40-5-226 conflicted with federal regulations, and would subject Montana to monetary fines, we submitted the amendments to the bill. The same conflict appears in Section 9 of the bill which proposed to repeal 40-5-214. So please disregard Sections 6, 7 and 9 of Senate Bill 383 when you discuss its merits.

Please feel free to ask me any questions on the bill. I thank you for you time and urge you to consider passage of Senate Bill 383, as amended.

AMENDMENTS TO SENATE BILL NO. 383

1. Title, lines 9-10.
   Following: "40-5-212,"
   Strike: "40-5-223, 40-5-226,"
   Following: "40-6-211, MCA;"
   Strike: "Repealing Section 40-5-214, MCA;"

2. Page 1, line 16.
   Following: "legal separation,"
   Insert: "joint custody,"

3. Page 4, line 10.
   Following: "using the"
   Strike: "formula"
   Insert: "criteria"

4. Page 4, line 11.
   Following: "in"
   Strike: remainder of line 11.
   Insert: "40-4-204."

5. Page 4, line 15.
   Following: "with the"
   Strike: "formula"
   Insert: "criteria"
   Following: "of"
   Strike: remainder of lines 15 and 16.
   Insert:"40-4-204."

6. Page 6, line 13 through 16.
   Following: "revenue." on line 13
   Strike: remainder of line 13 through 16
   Insert: "Distribution of support money shall be in accordance with 45 CFR 302.51, as amended."

7. Page 7, line 4 through line 11, page 11.
   Strike: sections 6 and 7 in their entirety
   Renumber: subsequent sections

8. Page 11, line 25.
   Strike: section 9 in its entirety
   Renumber: subsequent sections

9. Page 4, line 16.
   Insert: "Any redetermination must be recorded with the Court to be effective."

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 021585
BILL NO. SB 383

(Type in committee name, committee members' names, and names secretary and chairman. Have at least 50 printed to start.)

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 021585 SJR ~~Bill~~ **No.** 19 **Time** 12:15

NAME	YES	NO
Senator Chet Blaylock	X	
Senator Bob Brown	X	
Senator Bruce D. Crippen		X
Senator Jack Galt		X
Senator R. J. "Dick" Pinsoneault		X
Senator James Shaw		X
Senator Thomas E. Towe	X	
Senator William P. Yellowtail, Jr.	X	
Vice Chairman Senator M. K. "Kermit" Daniels	X	
Chairman Senator Joe Mazurek	X	
	(6)	(4)

Cindy Staley
Secretary

Chairman

Motion: SJR 19 Do Pass

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 5
DATE 021585
BILL NO. SJR 19

STANDING COMMITTEE REPORT

February 15 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration SENATE BILL No. 351

first reading copy (white color)

RESTITUTION TO VICTIMS OF ACCIDENTS CAUSED BY UNINSURED MOTORISTS.

Respectfully report as follows: That SENATE BILL No. 351

XXXPASS

DO NOT PASS

Senator Joe Mazurek Chairman.

STANDING COMMITTEE REPORT

February 15 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration SENATE JOINT RESOLUTION No. 19

first reading copy (white color)

URGING REPEAL OF FEDERAL LAW THAT LIMITS POLITICAL ACTIVITY FED. WORKERS.

Respectfully report as follows: That SENATE JOINT RESOLUTION No. 19

DO PASS

~~DO NOT PASS~~

Senator Joe Mazurek Chairman.

STANDING COMMITTEE REPORT

February 15 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration SENATE BILL No. 292

first reading copy (white color)

REVISE & CLARIFY MANDATORY LIABILITY INSURANCE LAW.

Respectfully report as follows: That SENATE BILL No. 292

DO PASS

~~DO NOT PASS~~

Senator Joe Mazurek Chairman.