MINUTES OF THE MEETING
JUDICIARY COMMITTEE
50TH LEGISLATIVE SESSION
HOUSE OF REPRESENTATIVES

March 12, 1987

The meeting of the Judiciary Committee was called to order by Chairman Earl Lory on March 12, 1987, at 8:00 a.m. in Room 312 D of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Rapp-Svrcek who was absent.

SENATE BILL NO. 104: Sen. Pinsoneault, District No. 27, stated this bill is simply a repealer eliminating the provision providing that concealment of merchandise does not constitute proof of the commission of theft. He submitted as (Exhibit A) a copy of the current statute, 46-6-504 MCA.

PROPONENTS: FRANK CAPPS, representing the 752 Independent Grocery Stores throughout the State of Montana, stated he owns two grocery stores in Helena, and the year end totals show that out of both grocery stores they averaged $6,000.00 per store in the last year of known theft from shoplifting. He urged support for SB 104.

TOM DAULING, Montana Food Distributors Association, explained this area of concealment has been singled out. It causes confusion, it is not needed and it is in effect another hurdle that the merchant is faced with. He asked that this section be repealed because the general criminal law addresses this adequately.

GEORGE ALLEN, Montana Retail Association, went on record in support of this legislation. He stated this section should be eliminated and the judge be allowed to decide on the evidence.

There were no further proponents testifying and no opponents.

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 104: Rep. Bulger questioned Sen. Pinsoneault on the example he used in his opening remark regarding someone putting a toothbrush in their purse and forgetting to pay for it. He stated the state still has the burden of proof.

Rep. Eudaily asked Sen. Pinsoneault if this section was repealed would it make it any more difficult for someone to go back to the store and return the merchandise. He stated he did not think so.

Sen. Pinsoneault closed the hearing on SB 104.

SENATE BILL NO. 108: Sen. Bishop, District No. 46, sponsor, stated this is an act to submit to the qualified electors of Montana an amendment to article VII, Sections 6, 8, and 9, of the Montana Constitution to provide for the filling of vacancies in offices of Supreme Court Justices and District Court Judges by election rather than by appointment. He pointed out that currently 40% of the judges are not elected but appointed. It is a life time appointment and the people do not get to elect the judges.

There were no proponents to SB 108.

OPPONENTS: MARGARET S. DAVIS, The League of Women Voters of Montana, stated the League compared methods of selecting justices and judges in 1974 and it was the consensus of our membership that an appointed judiciary offered more than an elected judiciary. The main problem with electing judges is having judicial candidates campaign against one another. The costs are high - especially for a statewide campaign. Funds must be raised and virtually all these funds come from attorneys and/or potential or actual litigants who may appear before the courts. The League believes that scrapping the merit selection provisions in the state constitution would be a major step backwards and urges that SB 108 not be concurred in. She submitted written testimony. (Exhibit A).

QUESTIONS (OR DISCUSSION ON SENATE BILL NO. 108: Rep. Miles questioned Sen. Bishop in regard to if an immediate election upon vacancy was to take place. He stated there could be an immediate election or they could wait until election time which comes every two years. If there is a vacancy that needs filling the Supreme Court presently calls in a retired judge to hold office. Rep. Miles asked Sen. Bishop if he was suggesting there would be a special election and he stated there could be. He stated a retired judge could handle the position until an election.

Rep. Cobb asked Ms. Davis about her comment that this would be a step backwards and he questioned why the League of Women Voters were concerned about letting the people decide in an election for judges. Ms. Davis stated the problem is in the difficulty of having adequate campaigns for a judicial office. She further stated that it is too hard for the people to comprehend the judicial leg of government.

Rep. Mercer pointed out the Montana Supreme Court does far more legislating than this body does and he thinks that this is an extremely dangerous position for the League of Women

Voters to take in opposing any kind of elected positions. An election is a check and balance system.

Sen. Bishop closed the hearing on SB 108 by stating this bill was not designed at any person. The strongest argument he can make is in the figures. The last appointment to the District Court bench was not the choice that was the best. He stated he does not think the present process is a good one.

SENATE BILL NO. 114: Sen. Thayer, District No. 19, stated in the last session, SB 129 was presented and passed which provided for centralized filing of liens on agricultural products and we thought all the bases were covered but, unfortunately, we have to come back this session and make an amendment. This bill provides that a voluntary notice by which a lienor acting under the authority of Title 71, could file a notice of an agricultural lien with the office of the Secretary of State after filing the lien with the county. If no such notice is filed a buyer in the ordinary course of business can buy the product free and clear of any lien. The lien would still be effective between the lienor and the producer and would still perfect the interest for purposes of priority. This bill places the burden to act on the lienor but is not mandatory. Currently, no one is certain if Title 71 liens follow the buyer of secured products or not. This bill makes certain of the buyers liability and to facilitates the agricultural lending system without changing the place of filing for these essentially local liens.

PROPONENTS: K. M. KELLY, Lobbyist, Montana Grain Elevator Association, stated the Secretary of State has proven its' ability to effectively handle the volume of filings required in Montana and this remains the most cost effective center at which to record the liens. He recommended a do pass on this bill and submitted written testimony. (Exhibit A).

LARRY AKEY, representing the Secretary of State, stated an important part of this bill is that these filings are voluntary and are not mandatory. He urged support for this legislation.

REP. DAVE BROWN, went on record as a strong proponent for this bill.

There were no opponents to SB 114.

QUESTIONS (OR DISCUSSION) ON SENATE BILL 114: Rep. Meyers pointed out he only sees a reference to crops and wondered if that is all that is included. Sen. Thayer stated it includes seed liens, and sprayer liens. Livestock is excluded.

Rep. Miles asked Mr. Akey how many liens were filed last year. He stated there were about 30,000. She asked how much it would cost to file a lien in the office. Mr. Akey said it costs $7.00 per new filing and $5.00 for any amendments, assignments or partial releases of collateral. He stated there is no fee for a termination statement because that is included in the fee for the initial filing. Rep. Thayer closed the hearing on SB 114 by stating this is an important bill for the people in this industry and he urged support.

SENATE BILL NO. 20: Sen. Halligan, District No. 29, stated this is a product of the interim lien law committee. This act generally revises the laws relating to mechanics' liens. Page 1, line 17, states there are no secret liens unless they are included in this particular provision of the bill. Page 4, relates to who may claim a lien. The mechanics' lien name has been changed to a construction lien to have a broader concept and hopefully a clearer concept, he said. Page 7, line 22, consists of the most important provision of the bill. It deals with the problem of secret liens. The interim committee hopes that this bill can be used for at least two years to see how it manages out.

PROPONENTS: IRVIN E. DELLINGER, Secretary for the Montana Building Materials Dealers Association, and Montana Lien Law Coalition, Chairman, stated the subcommittee on lien law has come up with a bill that will address some of the concerns of the legislators. The bill has a notification that must be sent to the consumer which will alert them of potential liens, and what to do to avoid double jeopardy. It must be filed with the clerk and recorder so that there is a public record of potential liens. There is some concern about the number of days to send and file the notice, but we felt that 20 days was a good intermediate number. He stated he feels this is a major improvement to the existing laws and asked that this be passed. He submitted written testimony. (Exhibit A). Also submitted by Mr. Dellinger is (Exhibit B) a Notice of the Right to Claim a Lien.

NORM SIMPSON, Montana Bankers, First Interstate Bank, Kalispell, stated that the spirit of intent for SB 20 was to eliminate, if possible, down to the greatest degree possible, the secret lien. He recommended an amendment by changing Section 7, subparagraph 3, to read 15 days. That way an effective period of 23 days can be obtained.

RILEY JOHNSON, Montana Home Builders, stated they were part of the interim subcommittee and are supporting this legislation. The main concern they had was to eliminate the secret lien. He stated the 20 days they are asking for is meeting our charge to supply the information to the consumer. He

pointed out that there is one problem that the Home Builders have with the bill as amended and that is the initial 20 days from the time you start. The original bill said you can give the notice at any point and you can file it at any point. If someone lets that 20 days go by they lose their right to a lien. The bill now states that we have a five working day limit on filing all liens. He said that he sees this as a potential problem. He stated they can live with the bill as written for two years. They ask for the additional five working days because it is not the consumer who is being suffered here it is the other people in the lending institutions but our charge was to protect the consumer and we feel that we have done that.

JOHN CADBY, Montana Bankers Association, went on record in support of this legislation. He further stated he is authorized by Chip Erdman, Savings and Loan League to state support of the bill. He introduced members from the real estate committee that are in support of SB 20. Gath Kallevig, Sidney; Snuf Fresbe, Cutbank; Joe Bauer, Helena; Carol House, Billings; George Casilton, Butte; W. Simms, Missoula. Mr. Cadby pointed out that 20 plus 5 days to file is plenty of time. The bottomline of this bill is that it does protect the homeowner.

SUE BARTLETT, Montana Association of Clerks and Recorders, Lewis and Clark County Clerk and Recorder that monitored the subcommittee meetings and is representing the Association, stated the clerks interest in this bill is a narrow interest but SB 20 addresses it well. The procedures outlined in this bill conform well to the procedures currently used in the clerks offices. She further pointed out the clarity of the bill is vital and SB 20 is very easy to understand.

WILLIAM L. MCCANLEY, Cut Bank Building Services, and President of the Montana Building Materials Dealer Association, acknowledged that each time the lien problem is addressed we end up with the little old lady and the big contractor comparison. No one wants to pay twice, but never before with the economy the way it is has it ever been so essential to pay only once. He stated this is not a perfect bill but he agreed with the idea of letting it work for two years and then coming back to make corrections. He submitted written testimony. (Exhibit C).

REP. DAVE BROWN, went on record in support of SB 20 and stated this is a very reasonable solution and requests that the bill be left intact. (See attached Visitor's Register for further proponents that did not testify.)

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 20: Rep. Eudaily asked Sen. Halligan if the filing with the county

clerk requires that it be mailed by certified mail and Sen. Halligan stated it could be or it could be delivered personally.

Sen. Halligan closed the hearing on SB 20.

SENATE BILL NO. 229: Sen. Mazurek, District No. 23. The original hearing took place on March 3, 1987 at 8:00 a.m. in Room 312 D with the Judiciary Committee. Sen. Mazurek requested any proponents or opponents wishing to speak on the bill be allowed to proceed. He stated the hearing notice was short on this bill and he asked that anyone who had testimony to appear on this date.

OPPONENTS: FREDERICK SHERWOOD, attorney for the Montana Advocacy Program, stated his main objection is that the bill would remove from the courts and give to an administrative agency the important decision-making power as to where a disabled person should be placed, either in Boulder or in another community facility. Courts are best equipped to make decisions of this magnitude, for a person's rights are best safeguarded when he has the opportunity to have his circumstances weighed under the rules of evidence and cross-examination. Courts are also more accountable for their decisions. He submitted written testimony. (Exhibit A).

ALLEN SMITH JR., Attorney, Mental Disabilities Board of Visitors, stated the proposed changes are inconsistent with other provisions of Title 53, Chapter 20, Part 1. This bill eliminates the district courts' authority to compel these very same persons to undertake treatment. The courts could only refer them to SRS for services. The courts would be prohibited from issuing an order for treatment, even if the state's professional persons determine that a person needs treatment and that treatment would be in the person's best interests and even if the person is unable to protect his life and health or the person is a threat to the life or safety of others. He further stated he does not see why SRS cannot trust in that same integrity, judgement, and discretion that is a hallmark of our judicial system. He submitted written testimony. (Exhibit B).

PROPONENTS: CHRIS VOLINKATY, Lobbyist on behalf of the Developmentally Disabled, stated that the problem is that there is not enough services to go around. Jumping the waiting lists gives unfair advantage to clients whose parents are aware of what can be done and have the resources to do it. Jumping the lists is unfair and could cause a big problem for community programs.

ADJOURNMENT: There being no further business to come before the committee, the hearing was adjourned at 11:20 a.m.

Earl Lory

EARL LORY, Chairman

DAILY ROLL CALL

JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date March 12, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)	✓		
PAUL RAPP-SVRCEK (D)		✓	
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)	✓		
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)	✓		
TOM HANNAH (R)	✓		
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

CS-30

and g[illegible]e victim immediate notice of any legal rights and remedies able. The notice must include furnishing the victim with a copy of the follo[illegible] ing statement:

"IF YOU ARE THE VICTIM OF DOMESTIC ABUSE, the county attorney's office can file criminal charges against your abuser. You have the right to go to court and file a petition requesting any of the following orders for relief:

(1) an order restraining your abuser from abusing you;

(2) an order directing your abuser to leave your household;

(3) an order preventing your abuser from transferring any property except in the usual course of business;

(4) an order awarding you or the other parent custody of or visitation with a minor child or children;

(5) an order restraining your abuser from molesting or interfering with minor children in your custody; or

(6) an order directing the party not granted custody to pay support of minor children or to pay support of the other party if there is a legal obligation to do so".

History: En. Sec. 3, Ch. 700, L. 1985.

Sen Fr. Kimberly

Part 5

Arrest by a Private Person

46-6-501. Definitions. As used in this part, the following definitions apply:

(1) "Concealment" means any act or deception done purposely or knowingly upon or outside the premises of a wholesale or retail store or other mercantile establishment with the intent to deprive the merchant of all or part of the value of the merchandise. The following acts or deceptive conduct shall be prima facie evidence of concealment:

(a) concealing merchandise upon the person or in a container or otherwise removing such merchandise from full view while upon the premises;

(b) removing, changing, or altering any price tag;

(c) transferring or moving any merchandise upon the premises to obtain a lower price than the merchandise was offered for sale by the merchant; or

(d) abandoning or disposing of any merchandise in such a manner that the merchant will be deprived of all or part of the value of the merchandise;

(2) "Shoplifting" means the theft of any goods offered for sale by a wholesale or retail store or other mercantile establishment.

History: En. 95-611.1 by Sec. 1, Ch. 274, L. 1974; R.C.M. 1947, 95-611.1.

Cross-References

Control of shoplifting, 7-32-4303.

46-6-502. When arrest by private person authorized. A private person may arrest another when:

(1) he believes on reasonable grounds that an offense is being committed or attempted in his presence;

(2) [illegible]elony is in fact committed and he believes on reasonable grounds that the person arrested has committed it; or

(3) he is a merchant, as defined in 30-11-301, and has probable cause to believe the other is shoplifting in the merchant's store.

History: En. 95-611 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 274, L. 1974; R.C.M. 1947, 95-611(part).

EXHIBIT 47
DATE 3-13-87
SB 144

Cross-References

Limitation on arrest authority of auxiliary officer, 7-32-233.

46-6-503. Restrictions on arrest by merchant — liability. (1) A merchant acting under 46-6-502 may stop and temporarily detain the suspected shoplifter. The merchant in such event:

(a) shall promptly inform the person that the stop is for investigation of shoplifting and that upon completion of the investigation the person will be released or turned over to the custody of a peace officer;

(b) may demand of the person his name and his present or last address and may question the person in a reasonable manner for the purpose of ascertaining whether or not such person is guilty of shoplifting;

(c) may take into possession any merchandise for which the purchase price has not been paid and which is in the possession of the person or has been concealed from full view; and

(d) may place the person under arrest or request the person to remain on the premises until a peace officer arrives.

(2) Any stop, detention, questioning, or recovery of merchandise under 46-6-502(3) and this section shall be done in a reasonable manner and time. Unless evidence of concealment is obvious and apparent to the merchant, 46-6-502 and this section shall not authorize a search of the detained person other than a search of his coat or other outer garments and any package, briefcase, or other container, unless the search is done by a peace officer under proper legal authority. After the purpose of a stop has been accomplished or 30 minutes have elapsed, whichever occurs first, the merchant shall allow the person to go unless the person is arrested and turned over to the custody of a police officer.

(3) Such stop and temporary detention, with or without questioning or removal of merchandise, when done by a merchant in compliance with the law, shall not constitute an unlawful arrest or search. A merchant stopping, detaining, or arresting a person on the belief that such person is shoplifting is not liable for damages to such person unless the merchant acts with malice, either actual or implied, or contrary to the provisions of this law.

History: En. 95-611 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 274, L. 1974; R.C.M. 1947, 95-611(part).

Cross-References

Limitation on arrest authority of auxiliary officer, 7-32-233.

Opposes this 2

46-6-504. Concealment not proof of theft. Concealment of merchandise shall not constitute proof of the commission of the offense of theft.

History: En. 95-611.2 by Sec. 2, Ch. 274, L. 1974; R.C.M. 1947, 95-611.2.

The League of Women Voters of Montana

EXHIBIT 1
DATE 3-13-07
HB 108

12 March 07 House Judiciary Committee
SB 108 - Sen. Bishop, sponsor. An act to submit to the qualified electors of Montana an amendment to Article VII, Sections 6, 8, and 9, of the Montana Constitution to provide for the filling of vacancies in offices of Supreme Court Justices and District Court Judges by election rather than appointment.

The League of Women Voters of Montana opposes SB 108.

The League compared methods of selecting justices and judges in 1974 and it was the consensus of our membership that an appointed judiciary offered more than an elected judiciary. The main problem with electing judges is having judicial candidates campaign against one another. The costs are high - especially for a statewide campaign. Funds must be raised and virtually all these funds come from attorneys and/or potential or actual litigants who may appear before the courts.

Judicial campaigns are not very informative for the voting public. Judicial candidates are loath to speak their minds on judicial philosphy or court administration issues. On the other hand they are not permitted by the Canons of Ethics to discuss particular cases or the specifics of how they might rule from the bench. As the candidates do not run on partisan slates, the voters have very little to guide them when such an election is contested. In an election where a candidate is not opposed , only a write-in campaign could prevent the filed candidate from winning the office. This proposed amendment to the state constitution would not require that a first time, unopposed candidate for judicial office face a retain or reject vote.

The races for Supreme and district court seats do not very often receive much attention from the voters or the press, and yet it is often difficult to attract the more qualified attorneys to the bench because of the campaigning involved with such offices. The League believes that scrapping the merit selection provisions in the state constitution would be a major step backward and urges that SB 108 not be concurred in.

Margaret S. Davis
316 Flowerree
Helena, Montana 59601 443-3487

WITNESS STATEMENT

4
3-12-87

NAME K. M. Kelly BILL NO. [illegible]

ADDRESS 4605 Glass DRive - Helena, 59601 DATE [illegible]

WHOM DO YOU REPRESENT? Montana Grain Elevator Assn

SUPPORT ✓ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

See Statement Attached

General Mills, Inc.
Procurement Division

202 Central Avenue
Post Office Box 5022
Great Falls, Montana 59403
(406) 761-6252

A
3-10-87
SB # 114

March 5, 1987

Ken Kelly
4605 Glass Drive
Helena, Mt 59601

Re: Senate Bill 114

Mr. Chairman, members of the committee. On behalf of the Montana Grain Elevator Association I would support passage of S.B. 1140. The last session of the Montana Legislature enacted a bill that provided for central filing of agriculture leins with the Secretary of State. Since then, National Legislation has passed requiring either central filing or lender notification to protect purchasers of agricultural commodities. In keeping with the intent behind both of these laws, Title 71 agricultural leins should also be filed centrally to allow accurate searches prior to payment. The Secretary of State has proven its ability to effectively handle the volume of filings required in Montana and this remains the most cost effective center at which to record the leins. We hope you will recommend a "do-pass" on this bill.

If you have any quesions please call.

Sincerely,

Kerry Schaefer
Assistant Manager

KS/djh

A
3-12-87
SB # 20

House Judiciary Committee
S.B. 20 "Revisions To Mechanics Lien Law"
March 12, 1987

During the last session of the Legislature, we appeared before you and asked you to table some proposed lien law changes as they just were not workable for the industry. We asked that a Joint Interim Subcommittee be appointed and we would work with this committee to make necessary changes which you felt were needed in our lien law. I would like at this time to thank you for your vote of confidence in helping to set up this committee. I would also like to thank Senator Halligan who was chairman of this committee and Rep. John Mercer who acted as Co-chairman. Member of the House serving on this committee were Rep. Baichini, Kurt Kruger and Bob Ellerd. Senators serving on committee were Senators Hager, Christeans and Thayer.

We formed a coalition made up of:

Montana Home Builders Assoc.
Montana Contractors Assoc
Montana Redimix Assoc.
National Electrical Contractors Assoc.
Sheetmetal & Air Conditioners Assoc.
NFIB
Masonary Contractor Frank Gruber
MBMDA

Others involved who met with the Subcommittee were, Mont. Bankers Assoc., representatives for the Clerk & Recorders, Title Companies.

We met with the Joint Interim Subcommittee 7 or 8 times, making suggestions here, compromising there. We feel that the subcommittee has come up with a bill that will address some of the concerns of you Legislators. The bill has a notification that must be sent to the consumer which will alert them of potential liens, and what to do to avoid double jeoprady. It must be filed with the clerk & recorder so that there is a public record of potential liens. I might add that we are one of two or three states that will require that the notice must be filed with clerk & recorder along with sending notice to consumer. All the other states just require that the notice be sent to the consumer.

These notifications are going to make extra work and added costs for the materialmen and subcontractors, but I feel that it is something that we can implement.

There is some concern about the number of days tosend and file the notice. The number of days varies over a broad range from state to state, some require 10, 14, 20, 21, 30, 45, 60. In talking with dealers in other state they mentioned that to get as many days as possible. We felt that 20 days was a good intermediate number. Minnesota recently raised theirs from 30 to 45. Where the materialmen have bookkeepers to help them with filing we do have some concern for the subcontractor, the plumber, the electician the one man operation that will have a more difficult time in sending and filing the notice. If they get busy and fail to send the notice and file it within the proper number of days there is a potential for someone losing there lien rights.

I feel that Senator Hal[illegible]gans Joint Interim Subcommittee did an excellent job on these revisions. I know that it is a major improvement to our current law. I asked that you concur and give a DO Pass on S. B. 20. Thank you...

Irvin E Dellinger
Montana Lien Law Coalition
Chairman

EXHIBIT B
DATE 3-11-87
HB 28 #30

NOTICE OF THE RIGHT TO CLAIM A LIEN

WARNING: READ THIS NOTICE. PROTECT YOURSELF FROM PAYING ANY CONTRACTOR OR SUPPLIER TWICE FOR THE SAME SERVICE.

To: _____ Date of mailing: _____

Owner _____

Owner's address _____

This is to inform you that _____ has begun to provide _____ (description of services or materials) ordered by _____ for improvements to property you own. The property is located at _____.

A lien may be claimed for all services and materials furnished to you, if this notice is given to you within 20 days after the services or materials described are first furnished to you. If the notice is not given within that time a lien is enforceable only for the services or materials furnished within 20 days before the notice is given.

Even if you or your mortgage lender have made full payment to the contractor who ordered these services or materials, your property may still be subject to a lien unless the subcontractor or material supplier providing this notice is paid. THIS IS NOT A LIEN. It is a notice sent to you for your protection in compliance with the construction lien laws of the State of Montana.

This notice has been sent to you by:

NAME: _____
ADDRESS: _____
TELEPHONE: _____

IF YOU HAVE ANY QUESTIONS ABOUT THIS NOTICE, CALL US

IMPORTANT INFORMATION ON REVERSE SIDE

EXHIBIT ___

See Microfilm copy

what we ...

IMPORTANT INFORMATION FOR YOUR PROTECTION

Under Montana's laws, those who work on your property or provide materials and are not paid have a right to enforce their claim for payment against your property. This claim is known as a construction lien.

If your contractor fails to pay subcontractors or material suppliers or neglects to make other legally required payments, the people who are owed money can look to your property for payment, even if you have paid your contractor in full.

The law states that all people hired by a contractor to provide you with services or materials must give you a notice of the right to lien to let you know what they have provided.

WAYS TO PROTECT YOURSELF ARE:

-- RECOGNIZE that this notice of delivery of services or materials may result in a lien against your property unless all those supplying a notice of the right to lien have been paid.

-- LEARN more about the construction lien laws and the meaning of this notice by contacting an attorney, or the firm sending this notice.

-- WHEN PAYING your contractor for services or materials, you may make checks payable jointly to the contractor and the firm furnishing services or materials for which you have received a notice of the right to lien.

-- GET EVIDENCE that all firms from whom you have received a notice of the right to lien have been paid or have waived the right to claim a lien against your property.

-- CONSULT an attorney, a professional escrow company, or your mortgage lender."

MONTANA ADVOCACY PROGRAM, Inc.

1410 8th Ave...
Helena, Mont... 59601

(406) 444-3889
1-800-245-4743

March 12, 1987

Hon. Earl Lory, Chairman
Committee on Judiciary
House of Representatives
Montana State Legislature
State Capitol
Helena, MT 59620

Mr. Chairman, Members of the Committee:

My name is Frederick Sherwood, and I am an attorney for the Montana Advocacy Program. I have been and am the lawyer for a number of developmentally disabled persons, including persons committed to the Montana Developmental Center at Boulder, or whose committment is currently being sought. I believe that SB 229 is a bad idea.

My main objection is that the bill would remove from the courts and give to an administrative agency the important decision-making power as to where a disabled person should be placed, either in Boulder or in a community facility. Courts are best equipped to make decisions of this magnitude, for a person's rights are best safeguarded when he has the opportunity to have his circumstances weighed under the rules of evidence and cross-examination. Courts are also more accountable for their decisions.

SRS may assert that there should be a distinction between the situation of persons who need placement with the Department of Institutions, i.e., the Montana Developmental Center, and persons who should receive community services from SRS. This is not so.

I have a client right now, D.T., whom the court has not committed to Boulder because he is not "seriously developmentally disabled" within the meaning of Chapter 20 of Title 53. On the other hand, he is developmentally disabled and does need services. The court has ordered that he receive a community placement. I know of other persons in similar situations. They need help, yet they do not need placement at an institution. Because of their disability many of these persons will not voluntarily seek placement in the community.

Indeed, by the time a petition is filed in court concerning a developmentally disabled person, the county attorney's office and social service agencies are well aware that the person has needs. Directing the court to refer the person back to SRS would be a fruitless exercise in telling the agency what it already knows. Such a procedure would be a waste of judicial resources, using them as nothing more than a referral service.

SB 229 might also lead to a greater inefficiency and costs in the placement mechanism. A person referred to SRS for community placement might seek to challenge the agency placement decision under the administrative review process. Thus the case, referred out of the judicial system at one point, could wind up back in court.

My comments have been directed primarily toward the proposed changes in §§53-20-124 and 125, concerning initial placements.

The same principles, however, apply to the proposed changes in §53-20-128, concerning extension of a Boulder commitment. Al Smith of the Board of Visitors will be discussing that issue in more detail. I agree with his comments.

Respectfully submitted,

Frederick F. Sherwood

Frederick F. Sherwood

B
3/2-81
SB#229

House Judiciary Committee: Hearing on Senate Bill No. 229

Testimony in Opposition

Allen Smith Jr., Attorney, Mental Disabilities Board of Visitors

Mr. Chairman, committee members, my name is Allen Smith Jr. I am an attorney employed by the Board of Visitors to represent the patients at the Montana State Hospital and also the residents at the Montana Developmental Center (MDC) at Boulder. I am here today to speak in opposition to the changes of the current statutes as proposed by Senate Bill 229.

I would like to make a couple of general comments on these proposed changes, and then follow those comments with a specific case to illustrate my objections to this bill.

General Comments

1. The proposed changes are inconsistent with other provisions of Title 53, Chapter 20, Part 1.

   a. The purpose of Part 1 is set out in Section 53-20-101, and the purpose is to (1) secure treatment and habilitation suited to individual needs for Montana's developmentally disabled residents, (2) accomplish this goal in community settings whenever possible, (3) accomplish this goal in an institution only when less restrictive alternatives are unavailable or inadequate and only when a person is so severely disabled as to require institutionalized care, and (4) to assure that developmentally disabled persons are accorded due process of law.

   This legislative purpose is effectively thwarted by these

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changes in that an impartial factfinder, a district court judge, is prohibited from ordering placement in services that may not only be in the best interest of a developmentally disabled person, but are also the services that the legislature has proclaimed to be preferable.

b. Residents in residential facilities, pursuant to Section 53-20-148(2), have the right to the least restrictive conditions necessary to achieve the purposes of habilitation, including the right to move from being segregated from the community in an institution to being integrated into community living.

The proposed changes would bar an institutional resident from securing the district court's assistance in enforcing this right to habilitation in the least restrictive conditions necessary.

c. Section 53-20-111 provides that the only persons who may be compelled to undertake treatment are those persons who are developmentally disabled and as a result of their disabilities they are unable to protect their lives and health or to protect the life or safety of others.

This bill eliminates the district courts' authority to compel these very same persons to undertake treatment. The courts could only "refer" them to S.R.S. for services. The courts would be prohibited

from issuing an order for treatment, even if the state's professional persons determine that a person needs treatment and that treatment would be in the person's best interests and even if the person is unable to protect his life and health or the person is a threat to the life or safety of others.

I agree with Mr. Sherwood's comments on the effects of these proposed changes upon developmentally disabled persons with regards to sections 124 and 125. I would reiterate that these statutes are to protect developmentally disabled persons and to help these persons become as independent as possible through treatment and habilitation. These proposed changes would eliminate a very important aspect of this purpose, namely a district court would be prohibited from issuing an order for services that are in the best interests of a developmentally disabled person. This prohibition would not only prevent advocates and developmentally disabled persons from seeking the assistance of the courts, but it would also prevent SRS from being able to provide needed services to individuals because an unscrupulous guardian, an over protective parent, or a reluctant individual refuses services.

I would now like to comment on the proposed changes to Section 125 and their effect upon an actual developmentally disabled person.

I represent a developmentally disabled person, C.P., who currently resides at the Montana Developmental Center (M.D.C.) in Boulder. C.P. is developmentally disabled, but he is much more high-functioning than the vast majority of residents at M.D.C., and he is representative of the growing number of high functioning persons that we now see at M.D.C.

When C.P.'s one year commitment expired he requested to have a hearing before the district court to contest M.D.C.'s recommendation that his commitment be extended for another year. The state's professional persons, from both S.R.S. and M.D.C., agreed that C.P. was inappropriately placed at Boulder and that receipt of community services would be in his best interests. As C.P.'s legal counsel, I therefore sought to have S.R.S. joined as a party, so that the agency responsible for community services would be before the court. It was this legal action together with Mr. Sherwood's case that was the impetus for the bill before you today.

The district court denied my motion to join S.R.S. as a party, and it indicated in its memorandum that it would exercise its judicial discretion and extend C.P.'s admission for one year, or until such time as a suitable community placement is obtained. The court, exercising its authority under the present statute, will not order S.R.S. to place C.P. in a particular community program, and C.P. will remain at M.D.C. awaiting a placement while receiving some of the services he needs.

The changes to section 128 proposed by this bill would yeild a much different result in the case of C.P. Under these proposed changes, the court would find C.P. to be in need of developmental disabilities services, and that community-based services would be adequate and appropriate for C.P., just as the court would under the current statutes. Under the current statutes, the court is free to exercise its authority and discretion and C.P. remains at M.D.C. The proposed changes, however, would require that C.P. be referred to S.R.S., and they strip the court of any authority to order C.P.

to remain at M.D.C. pending his placement or to undertake treatment in the community.

C.P. would therefore be under no legal compulsion to stay at M.D.C. or to receive community services, and he would therefore have to be discharged. Now, C.P. thinks he can take care of himself without any help from M.D.C. or S.R.S., but the truth, based upon his history and the judgements of the state's professional persons, is that C.P. cannot function in the community on his own. Surely it is not in C.P.'s or our society's best interests to discharge C.P. to the streets, yet that would be the result under these proposed changes to Section 128.

I may disagree with the district court's disposition in C.P.'s case under the present statutes, but I respect the court's authority and the exercise of its discretion. The proposed changes, however, would deprive district courts of all authority to consider the facts before them and make decisions that take into account the needs and limitations of both developmentally disabled persons, and the needs and limitations of our society.

The present statutes afford developmentally disabled persons due process of law. They provide for the review of a person's needs, such as C.P.'s, before impartial fact finders, the district courts. They grant the district courts the authority to order appropriate treatment and habilitation services, and with that authority comes a responsibility to make reasonable and prudent decisions, based upon the facts before them, taking into account the needs of the individual and the limitations of society. The district courts have exercised this authority intelligently and with restraint, just as the court in C.P.'s case exercised its authority. Contrary to

S.R.S.'s position, district courts do not issue orders requiring that a particular individual be placed in a particular program to receive particular services on their own personal whims. Courts base their decisions upon the expert opinions presented by professional persons and the opinions of the state's professionals are always before the courts.

There are four reasons for the Legislature not to adopt these proposed changes. First, they are inconsistent with the intent and provisions of the statutes. Second, they mandate results, discharge to the community without authority to compel the receipt of needed services, that are contrary to the best interests of developmentally disabled persons and the best interests of our state and its citizens. Third, it is contrary to all our notions of fairness, justice and due process of law. Fourth, if it ain't broke, don't fix it.

This bill seeks to eliminate impartial review by the courts, leaving courts with the authority to place individuals in institutions and the honorary position of a social services referral agency when it comes to community services. This is not in the best interests of developmentally disabled persons such as C.P., and it is not in the best interest of our state.

The present statutes grant developmentally disabled persons rights, one of those rights is due process of law. The individuals that Mr. Sherwood and I have spoken of are very aware of their rights, and they are very aware of who protects their rights, the disctict court judge. Over the past few months, C.P. has asked me many times "when will the judge let me leave Boulder?

I can explain to C.P. why the judge may say that he can't leave

yet, but I can't explain to C.P. why the legislature may say that the judge can't make that decision, and I can't explain to concerned professional persons, relatives and Montana citizens why C.P. will be discharged to the streets without the services he needs to protect his health and safety. C.P. and other developmentally disabled individuals place their trust and respect in the integrity and judgement of the courts. I do not see why S.R.S. cannot trust in that same integrity, judgement, and discretion that is a hallmark of our judicial system.

I respectfully urge this committee to vote no on this ill-conceived and unwarranted bill. Thank you.

VISITORS' REGISTER

JUDICIARY COMMITTEE

SENATE BILL NO. 229 DATE March 12, 1987

SPONSOR

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Frederick F Sherwood	MT Advocacy Program		✓
Allen Smith Jr.	Board of Visitors		✓
Chris Tweeden	DD	✓	
Dennis M. Taylor	DSD/SRS	✓	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

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VISITORS' REGISTER

JUDICIARY COMMITTEE

SENATE BILL NO. 20 DATE March 12, 1987

SPONSOR

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Sue Bartlett	Assoc of Clerks & Recorders	X	
[illegible]	MT Bankers Assn	X	
[illegible]	Norwest - Butte	X	
[illegible]	[illegible]	[illegible]	
[illegible]	[illegible] MT	X	
[illegible]	First Bank Helena	X	
John [illegible]	MT Bankers Assn	X	
[illegible]	[illegible]	X	
William [illegible]	[illegible]	X	
[illegible]	[illegible]	X	
[illegible]	[illegible] Butte	V	
[illegible]	MT Bankers, First Interstate Bank [illegible]	X	
Tom Simkins	[illegible] Lumber Bozeman	V	
[illegible]	Mt. Home Builders	X	
Bob Correa	Boz. Chamber of Comm	X	

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VISITORS' REGISTER

JUDICIARY COMMITTEE

SENATE BILL NO. 114 DATE March 13, 1987

SPONSOR

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
K M. Kelly	Mont. Grain Elevator Assn	X	
LARRY AKEY	SEC OF STATE	X	
		X	

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VISITORS' REGISTER

JUDICIARY COMMITTEE

SENATE BILL NO. 108 DATE March 12, 1987

SPONSOR

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Margaret S Davis	League of Women Voters		X

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VISITORS' REGISTER

JUDICIARY COMMITTEE

SENATE BILL NO. 104 DATE March 12, 1987

SPONSOR

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
George Allen	MT Retail Assn.	X	
Tom Davis	Fort Food Distr. 3	X	
ERIK GAGE	MFDA THRIFTWAY	X	
Jeff Heaver	MT. Food Dist Assn	X	
[illegible]	[illegible]	X	

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