MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

February 10, 1987

The twenty-fifth meeting of the Senate Judiciary Committee was called to order at 10:00 a.m. on February 10, 1987 by Chairman Joe Mazurek, in Room 325 of the state Capitol.

ROLL CALL: All committee members were present.

CONSIDERATION OF HOUSE BILL 37: Representative Dorothy Bradley, House District 79, Bozeman, introduced HB 37, which amends the law relating to sentencing of criminal defendants. She gave examples of a youth who was convicted of reckless driving. The court asked that he do community service as a fine, and the charge would be dismissed. She said when the youth was asked by an employer if he had ever been convicted of anything, the youth said no, which was technically right, but the employer looked up the youth's records, and the offense had never been taken off his record, and he lost the job.

PROPONENTS: Jim Haynes, Magistrates Association, supports the bill.

OPPONENTS: There were none.

DISCUSSION OF HOUSE BILL 37: Senator Halligan asked if the Magistrates are going to make the extra document for this bill and follow it closely. Rep. Bradley said it is at the magistrates request, so they must agree to it.

Senator Mazurek asked if the record of the arrest would be expunged. Rep. Bradley said she wanted the whole record clean. Jim Haynes said the magistrates wanted the complete record clean on the level of the Dept. of Justice, so if a person wanted to enter the service, his record would be clean. He didn't want to see the arrest expunged from the sheriff's department because the magistrates are not going to tell the sheriff how to handle his files.

Representative Bradley closed the hearing on House Bill 37.

CONSIDERATION OF HOUSE BILL 134: Representative Kelly Addy, House District 94, Billings, introduced HB 134, which amends the laws relating to notice of hearings on petitions to change a name.

PROPONENTS or OPPONENTS: There were neither.

DISCUSSION OF HOUSE BILL 134: Senator Crippen inquired if a minor objects to the parents changing the name of the minor, is the minor present at the court hearing. Rep. Addy said the minor is present. Senator Crippen asked if the term "parent" includes step-parents. Rep. Addy said a step-parent has to adopt a child before the step-parent can change a minor's name. Senator Crippen asked if a natural parent who gave up parental rights could protest in court to the changing of a youth's name. Rep. Addy said the natural parent who gave up parental rights can't protest the name changing. Senator Crippen asked who would oppose a name change of a minor then. Rep. Addy replied he wouldn't know who would object.

Senator Bishop asked what person is defined a "legal guardian". Rep. Addy said a court will appoint a guardian for a child.

Representative Addy closed the hearing on House Bill 134.

CONSIDERATION OF HOUSE BILL 95: Representative Kelly Addy, House District 94, Billings, introduced HB 95, which amends the Uniform Probate Code as it relates to reporting requirements for guardians and conservators. (Exhibit 1) He talked of cases dealing with children or elderly people and how a guardian is assigned to these cases so that the child or elderly person will have someone who will understand the case, handle the claim and settlement for them.

PROPONENTS: There were none.

OPPONENTS: Allen Smith, Board of Visitors, said there is no need for the bill because the law is working fine right now. He said the guardian is checked by the court through the annual report and he agreed with that. (Exhibit 2) He also gave the committee recommendations for guardianship of the elderly. (Exhibit 3)

DISCUSSION OF HOUSE BILL 95: Senator Pinsoneault asked if Rep. Addy polled the judges on this bill. Rep. Addy said the judges in Billings thought it was a good bill.

Senator Crippen inquired if the family really has to take the burden of asking for the annual accounting report if the court doesn't have to ask for it. Rep. Addy asked for an example. Senator Crippen said as an example, Rep. Addy and himself are brothers and they don't like each other, but they have a dying rich father. Senator Crippen asked Rep. Addy if he (Addy) doesn't have the right as an heir to look at an annual financial report. Rep. Addy said he would go to the court to get permission to look at the report. Senator Crippen felt that is a lot of court time, where if the law is left alone, the annual report comes from the guardian without asking the court - the court just does it.

Senator Mazurek asked if the word "exception" could be included if a person over 65 wanted to enter the court and petition it, so a case could be made that an annual accounting report may not be needed in those circumstances. Rep. Addy said he would have reservations about that.

Mr. Herbert George, representing himself, said an elderly person has a difficult time getting out from underneath a guardianship.

Representative Addy closed the hearing on HB 95.

CONSIDERATION OF SENATE BILL 249: Senator Blaylock, Senate District 43, Laurel, introduced SB 249 and said it retains the limitations on governmental liability that were enacted in the June Special Session. (Exhibit 4)

PROPONENTS: John Maynard, Administration Tort Claims, said the committee should look at the actuarial report from the June Special Session minutes from this meeting and this issue. Mr. Maynard pointed out that since last June, the state has had two catastrophic injury cases brought against it. He talked of the Post Case, which the state contributed $860,000. He also discussed another case that had a structured settlement, Hienrick vs. Eastern Montana College, to which the state contributed $647,000. He gave other examples of the state owing a great amount because of a single case. He said most of these claims were reserved by the Tort Claims Administration. He said the 38 million reserve the Tort Claims had has decreased even though these cases were settled with the state with an amount lower than what was reserved for the case. He said the reason the 38 million reserve fund has decreased so much is the fact the state had to pick up the state automobile liability because the state could not find an insurance company to take the policy. He said the property

insurance has 5 million that is self-insured also. He stated there has been talk that the self-insured fund would go into the General Fund, leaving several agencies uninsured. He believed that every victim's right to recover is effected by the ability of the defendant to pay. He said there shouldn't be a feeling of unfairness to the victim if there is a 750,000 limit on liability.

Alex Hanson, League of Cities and Towns, said cities and towns services are all subject to potential lawsuits. He explained if a city is sued and has no liability insurance it becomes a tax burden. He said a million dollar lawsuit would double the taxes in Deer Lodge for three years if the city was uninsured. He explained the cities and towns created an insurance pool that is self-insured, by bond sellings. He felt the limits in the bill were reasonable.

Nathan Lubergen, Montana Municipal Authority, supported the bill. He explained 83 towns are involved in the self-insured program.

Bruce Moerer, Montana School Board Assn., favored the bill because schools are a high risk contender for suits.

Chris Miller, Family Physicians Clinic, talked about malpractice liability. She said there will be a 30% increase in malpractice premiums in December 1987. She said the doctors will have to become more choosy with their patients if they can't pay the increased medical costs, which are increased because of premium increases. She said many small hospitals will have to close because of the liability problem. She said it will not help the small communities who need medical health.

Alan Tandy, City of Billings, supported the bill. (Exhibit 5)

Chuck Stearns, Missoula, presented testimony from Jim Nugent, City Attorney for Montana League of Cities and Towns. (Exhibit 6)

Brooks Morin, City of Helena, favored the bill.

Gordon Morris, Montana Association of Counties favored the bill. (Exhibit 7)

OPPONENTS: Karl Englund, Montana Trial Lawyers, opposed the bill because of the limits. He said any liability limits will set someone outside of the limits, and therefore they will not be fully compensated. He wanted to

see the bill sunsetted in a year of a legislative session, so the legislature can check the progress of the bill.

DISCUSSION ON SENATE BILL 249: There was none.

Senator Blaylock closed the hearing on SB 249.

CONSIDERATION OF SENATE BILL 229: Senator Joe Mazurek, District 23, Helena, introduced Senate Bill 229. (Exhibit 8)

PROPONENTS: Dennis Taylor, Development Disabilities Division, supported the bill. (Exhibit 9)

Chris Volinkaty, Developmentally Disabled, said there are not enough services for the community. She said if the law is not changed, parents that have means and can go to court, will be placing their children in community service in front of other children on the waiting list.

OPPONENTS: Fredrick Sherwood, Montana Advocacy Program, opposed the bill. (Exhibit 10)

Allen Smith, Mental Disabilities Board of Visitors, opposed SB 229. (Exhibit 11)

DISCUSSION ON SENATE BILL 229: There was none.

Senator Mazurek closed the hearing on SB 229.

ADJOURNMENT: The meeting adjourned at 11:55 a.m.

SENATOR JOE MAZUREK, Chairman

mh

ROLL CALL

Judiciary COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date Feb 10th

NAME	PRESENT	ABSENT	EXCUSED
Senator Joe Mazurek, Chairman	X		
Senator Bruce Crippen, Vice Chairman	X		
Senator Tom Beck	X		
Senator Al Bishop	X		
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Jack Galt	X		
Senator Mike Halligan	X		
Senator Dick Pinsoneault	X		
Senator Bill Yellowtail	X		

Each day attach to minutes.

DATE Feb. 10th

COMMITTEE ON Judiciary

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One Support	Check One Oppose
Herbert H. George	myself	95	X	
Hank Hudson	Senior Office	95		
Kris Bekkedal	Mt Advocacy Program	229		X
Frederick F. Sherwood	attorney, Mt Advocacy Program	229		X
[illegible]	attorney, Board of Visitors	229+95		X
[illegible]	Mt. Mgr [illegible]	SB37	X	
[illegible]	DD Council	SB229	X	
Bruce W. Moerer	MSBA	SB 249	X	
Chuck Stearns	City of Missoula	SB 249	X	
Brookes Morin	City of Helena	SB 249	X	
Dennis M. Taylor	DDD/SRS	SB 229	X	
John Maynard	Admin / Tort Claims	SB 249	X	
Kay Foster	Billings Chamber	SB 249	X	
[illegible]	City of Billings	SB 249	X	
Nathan Tubergen	Montana Municipal [illegible]	SB 249	X	
Alec Hansen	League of Cities	SB 249		

(Please leave prepared statement with Secretary)

NAME: DENNIS M. TAYLOR DATE: 2/10/87

ADDRESS: DDD / SRS HELENA

PHONE: 444-2985

REPRESENTING WHOM? DDD / SRS

APPEARING ON WHICH PROPOSAL: SB 229

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: See attached testimony

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: CRISTINE MILLER DATE: 2/10/87

ADDRESS: 230 DEER TRAIL, WHITEFISH, MT 599

PHONE: 862-6075

REPRESENTING WHOM? Family Physicians Clinic

APPEARING ON WHICH PROPOSAL: #249

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? ~~X~~

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY
EXHIBIT NO. 1
DATE Feb. 10th, 1987
BILL NO. HB 95

SUMMARY OF HB95 (ADDY)
(Prepared by Senate Judiciary Committee staff)

HB95 amends the Uniform Probate Code as it relates to reporting requirements for guardians and conservators. Under current law, guardians and conservators of wards and protected persons must file annual accountings with the court. This bill eliminates the requirement of an annual accounting, except when the ward or protected person is 65 years of age or older, and provides that the accounting must be made as required by court or court rule. Annual accountings will still be required if the ward or protected person is 65 or older.

COMMENTS: None.

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SENATE JUDICIARY
EXHIBIT NO. 2
DATE FEB 10, 1987
BILL NO. HB 95

House Bill No. 95

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. In my position as legal counsel for patients at the Montana State Hospital, I frequently come in contact with mentally incapacitated persons who have had conservators or guardians appointed to manage their affairs.

My objections to this bill are two-fold: First, I do not see the need for these amendments. The present statutes provide that a waiver of the reporting requirements may be obtained from the court. I believe that this is a reasonable procedure that allows a conservator or guardian to obtain a waiver and at the same time affords the incapacitated person protection in that the guardian or conservator must explain to the court why an annual reporting is not necessary.

This bill seeks to achieve what can be achieved under the current statutes merely by requesting a waiver from the court and justifying that request.

Second, this bill would eliminate an important protection for incapacitated persons, namely that a guardian or conservator is accountable to the court on a yearly basis. A yearly accounting assures that the incapacitated person's interests were appropriately managed in that guardians or conservators are on notice that they are accountable not only to the protected persons but also to the court.

The benefits the current statutes offer protected persons outweigh any inconvenience that annual reporting or requesting a waiver places upon guardians or conservator. It is unfortunate that protected persons need to be protected from their protectors, but if only one protected person benefits from this, that benefit far outweights the benefits these amendments would grant guardians and conservators.

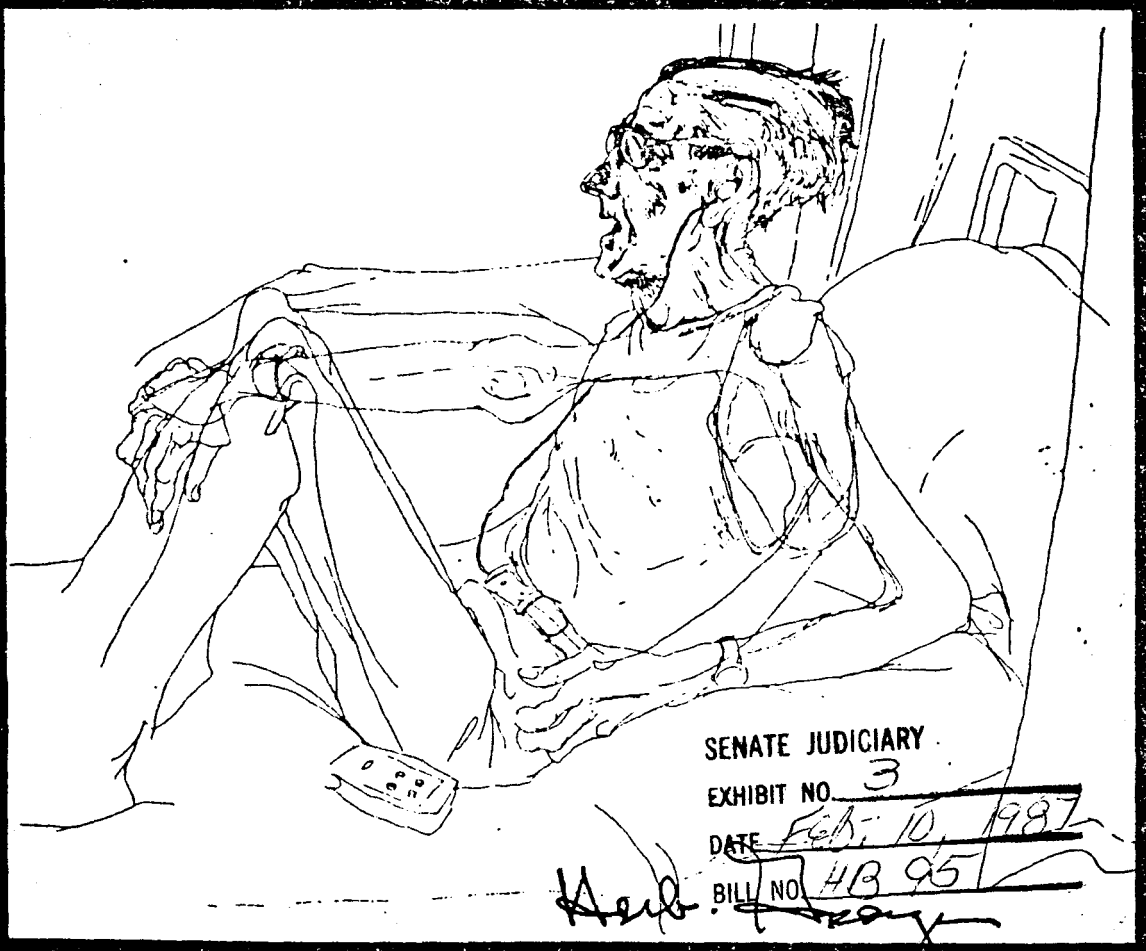
SENATE JUDICIARY
EXHIBIT NO. 2
DATE 2-10-87
BILL NO. H.B. 95

STATEMENT OF

RECOMMENDED JUDICIAL PRACTICES

Adopted by the National Conference of the Judiciary on Guardianship Proceedings for the Elderly

Compiled by Erica F. Wood



Sponsored by
The Commission on Legal Problems of the Elderly
American Bar Association
and
The National Judicial College

June, 1986

PREFACE

June 15-18, 1986, twenty-eight participants (including 24 probate and general jurisdiction trial judges) from across the country assembled at the National Judicial College in Reno, Nevada for a National Conference of the Judiciary on Guardianship Proceedings for the Elderly. Their objectives were to recognize and discuss the special concerns of older alleged incompetents and wards—for procedural due process, thorough and functional evaluation of medical/social evidence, decisions affording maximum autonomy, and sound, periodic guardianship review.

The conference was sponsored by the American Bar Association Commission on Legal Problems of the Elderly, in conjunction with the National Judicial College. It was funded by the Administration on Aging, U.S. Department of Health and Human Services, with supplemental monies from the Marie Walsh Sharpe Endowment. The participants were selected from states with the highest population and percentage of elderly. They were chosen as judicial leaders, and they brought to the session extensive knowledge, yet a willingness to learn and to change long-standing attitudes and procedures. This they coupled with a sense of excitement in attempting to constructively resolve the complex dilemmas facing judges in guardianship proceedings.

The conference was a beginning rather than an end. After two and one-half days of lectures, panels, discussion groups, films, plenary session debates and informal conversations, the participants voted to adopt the Statement of Recommended Judicial Practices which follows. It provides for the first time some national guidance to judges in confronting the problems of the growing number of elderly who may need assistance in managing their property, personal affairs or both.

Hopefully, the conference and its recommendations will spur judicial educators and associations to sponsor similar sessions at the state level; encourage necessary changes in statutes or court rules; foster closer coordination between the judicial and aging systems; and urge judges to test the tenets in their own courtrooms.

John H. Pickering
Chairman
ABA Commission on Legal Problems of the Elderly

Commission Members

John J. Regan, Vice-Chair
Jacqueline Allee
Sara-Ann Determan
Arthur S. Flemming
Burton Fretz
Rodney N. Houghton
Edward F. Howard
Harold R. Johnson
Joanne Lynn, M.D.
Robert S. Mucklestone
Douglas W. Nelson
Samuel Sadin
James M. Shannon
Daniel Skoler

IV. SUPERVISION: ENSURING THE EFFECTIVENESS OF GUARDIANSHIP SERVICES

A. Submission and Review of Guardian Reports

Guardians should be required to make a periodic report as to the ward's present condition and the continuing need for a guardian, either limited or plenary. Courts should review such reports and take appropriate action with regard thereto. A system of calendaring such reports should be established to ensure prompt filing, with sanctions provided for failure to comply.

B. Training of Guardians

The court should encourage orientation, training and ongoing technical assistance for guardians, including an outline of a guardian's duties and information concerning the availability of community resources, including the aging network, and information about the aging process.

C. Use of Guardianship Agencies

When there is no suitable person to act as guardian, the court may utilize any public, private or volunteer office or agency to so act. Such guardians should be expected to observe the same standards of performance required of private guardians, and should not be an employee of the court.**

ALTERNATIVE POSITIONS:

* An alternative view, adopted by a minority of the conference, was that the following paragraph should be added to section 1(C)1:

A guardian ad litem, who is an attorney, should be appointed initially in all incompetency proceedings. The guardian ad litem's duty is to explain to the respondent the rights of the respondent and the meaning of the proposed hearing. The guardian ad litem must report back to the court, in writing, the results of the interview with the respondent with respect to the respondent's physical, mental and financial condition. The report should also state whether a guardian should or should not be appointed.

** An alternative view, adopted by a minority of the conference was that section IV(C) should read as follows:

Use of Guardianship Agencies

When there is no suitable person to act as guardian, the court may utilize any public, private or volunteer office or agency to so act. Such guardians should be expected to observe the same standards of performance required of private guardians, and should operate independently of the court and other social service agencies.

Issue IV.A.

Submission and Review of Guardian Reports

Issue IV. A.(1)

What information should be included in guardian reports?

Background

Most states provide for some type of continued court supervision after the appointment of a guardian. Often this means an annual inventory and accounting of the ward's estate. (Parry, p. 385 and Table 7.4; Connecticut, pp. 7-8) The Uniform Probate Code requires conservators of property to account to the court only upon their resignation or removal (Sec. 5-418), and does not include any kind of a review for a guardian of the person.

Given the loss of liberties involved, the vulnerability of elderly wards, and the need to ensure the least restrictive alternative, it seems essential that the court receive and review information about the status and well-being of the ward, and actions the guardian has taken. The Pre-conference Survey indicated that almost all respondents require periodic reporting; but that 68% require the reports to include quality of life information about the ward, while 32% do not.

The model statute drafted by the ABA Commission on Mental Disability sets out specific information to be included in guardian reports, extending the requirement for a periodic financial accounting to personal guardianship. The report is closely linked to the idea of judicial review of continuing need for the guardianship (see Issue III.A.(3) above). It contains information on: significant changes in the capacity of the disabled person, the services being provided, actions taken by the guardian, problems relating to the guardianship, reasons why the guardianship should not be terminated or why no less restrictive alternative would suffice. (Sales, Powell, Van Duizend and Associates, pp. 566-567) For a conservator, the report would also include a complete financial statement of resources under his/her control. (p. 572)

In addition, the model statute mandates a guardian to develop and submit to the court an "individual guardianship plan." The plan is to be developed with the participation of the ward "to the maximum extent possible." It is to specify necessary services, means for obtaining these services, and the manner in which the guardian will exercise and share his/her decision-making authority. Similarly, an "individual conservatorship plan" is to specify the services necessary to manage the financial resources involved, means of providing those services, manner in which the conservator will exercise and share decision-making authority, and policies and

SENATE JUDICIARY
EXHIBIT NO. 3
DATE 2-10-

procedures governing the expenditure of funds. An updated plan is to be submitted with each annual report. Such a plan is a useful assessment tool, in that it "provides a reference against which the performance of the [guardian or conservator] and the delivery of assistance and services can be compared." (Sales, Powell, Van Duizend and Associates, pp. 562-563 and 568)

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EXHIBIT NO. 3
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Issue IV.A.(2)

Should the court establish a procedure for complete and systematic review of guardian reports?

Background

Detailed information in guardian reports will be of no value if it is not thoroughly reviewed by the court, with two objectives: (1) to assure the least restrictive arrangement is being used to protect the health, welfare and safety of the ward; and (2) to assure guardians and conservators are not abusing the ward and/or ward's assets they are charged with protecting.

Guardianship/conservatorship abuse has recently been spotlighted by the national press (See "Ripping Off Estates -- An Epidemic of Abuse," U.S. News and World Report, Feb. 25, 1985, pp. 53-54; and "Courts See More Estates Misused By Those Assigned to Guard Them," Wall Street Journal, July 15, 1985) These articles claim the problem "has become far more common than people realize," and that there is "a rise in the misuse of estate money by conservators [partly because] there are more and more elderly people" who need these services. The U.S. News and World Report article notes that many probate judges who handle guardianships "have little time to devote to them in addition to their main duty of deciding disputes over wills," and states that

> "Some urge more intense efforts by courts to study the annual reports that guardians and conservators must file in most states." (p. 54)

Additionally, deficiencies in the filing and reviewing of annual reports were noted by a grand jury investigation in Miami, Florida. The Dade County Grand Jury for the 1982 spring term supervised a review of 200 random guardianship cases opened between 1979 and 1981. It found that the great majority of guardianship files were incomplete in annual reports. "Of the 200 random cases, 87% were not up to date in annual reports concerning the ward's personal status, 75% of the cases were not timely in financial reports and 91% of the cases were incomplete in physical examination reports." (Schmidt, "The Evolution of a Public Guardianship Program," p. 356) The Grand Jury attributed this "substantial shortfall in annual reports" as follows:

> Most guardians either do not know about their report responsibilities, or they are not fulfilling their report responsibilities. Most attorneys for guardians either do not know about the report responsibilities of their guardian clients, or they are not effectively

> communicating those responsibilities to their clients. The clerk's office has either been unable to inform or remind guardians of their report responsibilities, or has not effectively recognized the significance of such reports sufficiently to remedy the problem. (Final Report of the Grand Jury, Dade County, Fla. (Nov. 9, 1982, p. 32, as quoted in Schmidt, "The Evolution. . .," p. 357))

In response to the Grand Jury, the probate division in Dade County advanced its timetable for computerization of filings.

The recommendation of the 1985 report produced for the Connecticut Probate Administration is as follows:

> "If the judges do not have time to make a complete review of all accountings, the system should be designed so that someone does. A number of states have at least one person or [office] whose sole responsibility is the auditing of accounts. The form of review need not differ from that which would be given by a judge, but its completeness would be assured. After the complete review is given, the trouble cases could be sent to the judges. In essence, the reviewer would be responsible for preliminary determinations. The District of Columbia has been very successful with this procedure as have a number of other states. If the system is to work, more than a cursory glance must be given to the accounts." (p. 12)

Thus, it would seem that designation of a person/office to review reports, systematic communication by the reviewer to the judge, and computerization or some type of workable tickler system are all elements in the efficient monitoring of guardian reports.

the state and the public school system to meet the constitutional mandate for quality public education in Montana. As part of this recognition, the legislature desires information and plans concerning potential cost savings, particularly cost savings related to the reorganization of school administration and school districts.

(2) The legislature requests the board of public education and the superintendent of public instruction to:

(a) formulate plans and options for reorganization of the public school system that would result in cost savings; and

(b) report such plans and any required legislation to the 50th legislature.

Section 2. **Effective date.** This act is effective on passage and approval.

Approved July 10, 1986.

CHAPTER NO. 22

[SB 22]

AN ACT REVISING LIMITS OF RECOVERY IN TORT SUITS AGAINST THE STATE AND LOCAL GOVERNMENTS; AMENDING SECTION 2-9-101, MCA; REPEALING SECTIONS 2-9-106 AND 2-9-107, MCA; PROVIDING AN APPLICABILITY DATE; AND PROVIDING EFFECTIVE DATES AND A TERMINATION DATE.

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 2-9-101, MCA, is amended to read:

"2-9-101. Definitions. As used in parts 1 through 3 of this chapter, the following definitions apply:

(1) "Claim" means any claim against a governmental entity, for money damages only, which any person is legally entitled to recover as damages because of personal injury or property damage caused by a negligent or wrongful act or omission committed by any employee of the governmental entity while acting within the scope of his employment, under circumstances where the governmental entity, if a private person, would be liable to the claimant for such damages under the laws of the state. For purposes of this section and the limit of liability contained in *[section 2]*, all claims which arise or derive from personal injury to or death of a single person, or damage to property of a person, regardless of the number of persons or entities claiming damages thereby, are considered one claim.

(2) "Employee" means an officer, employee, or servant of a governmental entity, including elected or appointed officials, and persons acting on behalf of the governmental entity in any official capacity temporarily or permanently in the service of the governmental entity whether with or

without compensation, but the term employee shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the governmental entity to which parts 1 through 3 apply in the event of a claim.

(3) "Governmental entity" means and includes the state and political subdivisions as herein defined.

(4) "Personal injury" means any injury resulting from libel, slander, malicious prosecution, or false arrest, any bodily injury, sickness, disease, or death sustained by any person and caused by an occurrence for which the state may be held liable.

(5) "Political subdivision" means any county, city, municipal corporation, school district, special improvement or taxing district, or any other political subdivision or public corporation.

(6) "Property damage" means injury or destruction to tangible property, including loss of use thereof, caused by an occurrence for which the state may be held liable.

(7) "State" means the state of Montana or any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality thereof."

Section 2. **Limitation on governmental liability for damages in tort.** (1) Neither the state, a county, municipality, taxing district, nor any other political subdivision of the state is liable in tort action for damages suffered as a result of an act or omission of an officer, agent, or employee of that entity in excess of $750,000 for each claim and $1.5 million for each occurrence.

(2) No insurer is liable for excess damages unless such insurer specifically agrees by written endorsement to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section, in which case the insurer may not claim the benefits of the limitation specifically waived.

Section 3. Section 2-9-101, MCA, is amended to read:

"2-9-101. Definitions. As used in parts 1 through 3 of this chapter, the following definitions apply:

(1) "Claim" means any claim against a governmental entity, for money damages only, which any person is legally entitled to recover as damages because of personal injury or property damage caused by a negligent or wrongful act or omission committed by any employee of the governmental entity while acting within the scope of his employment, under circumstances where the governmental entity, if a private person, would be liable to the claimant for such damages under the laws of the state. For purposes of this section, all claims which arise or derive from personal injury to or death of a single person, or damage to property of a person, regardless of the number of persons or entities claiming damages thereby, are considered one claim.

(2) "Employee" means an officer, employee, or servant of a governmental entity, including elected or appointed officials, and persons acting on

behalf of the governmental entity in any official capacity temporarily or permanently in the service of the governmental entity whether with or without compensation, but the term employee shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the governmental entity to which parts 1 through 3 apply in the event of a claim.

(3) "Governmental entity" means and includes the state and political subdivisions as herein defined.

(4) "Personal injury" means any injury resulting from libel, slander, malicious prosecution, or false arrest, any bodily injury, sickness, disease, or death sustained by any person and caused by an occurrence for which the state may be held liable.

(5) "Political subdivision" means any county, city, municipal corporation, school district, special improvement or taxing district, or any other political subdivision or public corporation.

(6) "Property damage" means injury or destruction to tangible property, including loss of use thereof, caused by an occurrence for which the state may be held liable.

(7) "State" means the state of Montana or any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality thereof."

Section 4. **Repealer.** Sections 2-9-106 and 2-9-107, MCA, are repealed.

Section 5. **Codification instruction.** Section 2 is intended to be codified as an integral part of Title 2, chapter 9, parts 1 through 3, and the provisions of Title 2, chapter 9, parts 1 through 3, apply to section 2.

Section 6. **Severability.** If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 7. **Applicability.** This act, except section 3, applies to all claims, lawsuits, and causes of action arising after the effective date of sections 1, 2, and 4 through 9 of this act.

Section 8. **Two-thirds vote.** Since this act imposes limited immunity on governmental entities, Article II, section 18, of the Montana Constitution requires a vote of two-thirds of the members of each house of the legislature to be effective.

Section 9. **Effective dates — termination date.** This act is effective on passage and approval, except that section 3 is effective July 1, 1987. Sections 1 and 2 of this act terminate on June 30, 1987.

Approved July 10, 1986.

SENATE JUDICIARY
EXHIBIT NO. 4
DATE 2-10-87
BILL NO. S.B. 249

SENATE JUDICIARY
EXHIBIT NO. 5
DATE FEB 10, 1987
BILL NO. # SB 249

Mr Chairman & Committee members - my name is Alan Tandy

City had extended period of time with no insurance. Legislative action during the Special Session allowed issuance of bonds to fund a self ins program. Having the second action restoring liability limits ~~allowed us obtain ins.~~

Thank both sponsors & leg.

Due to the actions of the leg we are now insured & our taxpayers are protected. Premiums high but affordable.

~~Over 75~~ Approx 60 cases of active litigation against City - Several of those are of a nature which could exceed limits of our ins. On a Friday about a month ago 9 new suits.

It is essential that we maintain a solid ins ~~program~~ to protect our taxpayers. It is the leg. Extension of these limits

SENATE JUDICIARY
EXHIBIT NO. 6
DATE FEB 10, 1987
BILL NO SB 249

MISSOULA

OFFICE OF THE CITY ATTORNEY

201 W. SPRUCE • MISSOULA, MT 59802-4297 • (406) 721-4700

February 9, 1987 87-095

Senator Chet Blaylock
Montana State Senate
Montana State Capitol
Helena, Montana 59620

Senator Joe Mazurek, Chairperson
Senate Judiciary Committee
Montana State Capitol
Helena, Montana, 59620

Re: Support for SB 249 removing the termination date for limitation on governmental liability for damages

Honorable Senators Blaylock and Mazurek:

On behalf of the Montana League of Cities and Towns and the City of Missoula I would like to express support for Senate Bill 249 removing the termination (sunset) date for limitation on governmental liability for damages. It is important that statutory governmental liability limits for damages be retained.

Friday, September 19, 1986 the Montana League of Cities and Towns at its annual meeting adopted a resolution expressing its commitment to maintaining the statutory limits on liability judgments against state and local governments that were adopted during 1986 at a special session of the Montana State Legislature.

It is my understanding that nearly all states in the United States have statutorily established governmental liability limits for damages and that most of those state statutorily established limits have lower maximum ceiling levels than Montana's current limits of $750,000 per person and $1.5 million per occurrence.

State and local governments have an important interest in preserving their respective public treasuries. This state and local government interest in preserving their respective public treasuries is closely related to and promoted by statutory classification establishing government liability damage limitations. Further, such a statutory classification also protects the public taxpayers from excessive damage claims.

The Montana League of Cities and Towns also believes that this statutory classification is both important and essential to the success of the Montana League of Cities and Towns Municipal liability insurance program that was established after private insurers began in large numbers to cancel liability insurance coverages for cities and towns.

Montana's joint and several liability law in Section 27-1-703 M.C.A. as well as the statewide voter expression of concern about property taxes as evidenced by voter passage of I-105 and strong support for CI-27 are additional factors or reasons establishing an important need for establishing a statutory classification establishing government liability damage limitations.

Jim Nugent
City Attorney
President, Montana League of Cities and Towns

JN:mr

cc: William Farrell
Mike Halligan
Bill Norman
Fred Van Valkenburg
Jack Haffey
Dick Pinsoneault
George McCallum
Alec Hansen, Montana League of Cities and Towns
Chuck Stearns, Fiscal Analyst, City of Missoula

SENATE JUDICIARY
EXHIBIT NO. 7
DATE Feb 10, 1987
BILL NO. ~~HB~~ SB 249

MONTANA ASSOCIATION OF COUNTIES

1802 11th Avenue
Helena, Montana 59601
(406) 442-5209

TO: Senator Joe Mazurek, Chairman
Members, Senate Judiciary Committee
Senator Blaylock, Sponsor

FROM: Gordon Morris, Executive Director

RE: SB 249 - Remove termination of governmental tort liability limits

DATE: February 9, 1987

On behalf of the Montana Association of Counties I wish to indicate support for Senator Blaylock's Senate Bill 249.

Since the passage of SB 184 in the 85 Legislation Session insurance problems for local governments have continued. MACo has organized a "self-insurance fund" which currently is providing an insurance alternative for counties.

Nevertheless, local elected officials serve with the ever present fear of tort actions against them both personally and professionally. The overall climate is changing, but the failure to remove the "sunset provision" would send the wrong message to the public, the elected officials, and the insurance industry.

I therefore, urge your favorable consideration of SB 249 in the interest of local government in Montana.

GM/mrp

SENATE JUDICIARY
EXHIBIT NO. 8
DATE Feb. 10, 1987
BILL NO. SB 229

SUMMARY OF SB229 (MAZUREK)
(Prepared by Senate Judiciary Committee staff)

SB229 is by request of the Department of Social and Rehabilitation Services and deals with the authority for placement of developmentally disabled persons in community-based services (only). Under current law, district courts have authority to order developmentally disabled persons placed in community-based services, such as Helena Industries or community homes. Under this bill, district courts would be prohibited from ordering developmentally disabled persons to be placed in community-based services. A district court would be required to turn over to the Department of Social and Rehabilitation Services the placement of developmentally disabled persons who are eligible for placement in community-based services. The district courts would still have authority for placement of developmentally disabled persons in other types of placements, such as residential facilities.

COMMENTS: None.

C:\LANE\WP\SUMSB229.

DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES

TED SCHWINDEN, GOVERNOR

P.O. BOX 4210

STATE OF MONTANA

HELENA, MONTANA 59604

SENATE JUDICIARY
EXHIBIT NO. 9
DATE Feb 10, 1987
BILL NO. HB 229

February 3, 1987

TO: Senator Joe Mazurek

FROM: Dennis M. Taylor DMT
Administrator
Developmental Disabilities Division

RE: SB 229 - By request of the Department of Social and Rehabilitation Services - To clarify that Part 1, Chapter 20, Title 53 of the Montana Codes Annotated may not be used as authority for district courts to order placement of persons with developmental disabilities in community-based services.

SB 229 simply seeks to clarify the original legislative intent that Part 1 of Title 53, Chapter 20, MCA, providing the legal process for commitment of developmentally disabled persons to the Montana Developmental Center and Eastmont Human Services Center, does not apply to community services. Commitment to state institutions unlike placement in the community-based service system, involves significant restrictions on the rights of the resident. The community-based service system serves to protect and promote to the greatest extent possible the rights of the participants.

On behalf of individuals in need of services, attorneys are seeking to use Part 1 of Title 53, Chapter 20, MCA, as authority by which district courts could order SRS to serve a particular individual with services and placement specified in a court order. Currently, there are two legal actions for commitment of individuals to the Montana Developmental Center wherein attorneys are seeking such results. By these legal actions the individuals petitioning can circumvent the SRS placement system to "hop over" individuals on the long waiting lists and attempt to reduce the delays in placement caused by a system with greater demand than available resources.

SRS has developed a fair and rational system for eligibility and priority placement of individuals with developmental disabilities in available community-based services. That placement process, instituted on a statewide basis, is based on the systematic application of common criteria (such as, availability of placements, individuals in need of services, and availability of appropriate services for individuals in need) to determine the individual who most needs the available placement. This selection process has been used by SRS since the community-based service system was developed in the

mid-1970's and was statutorily mandated by the Legislature in 1985. SB 229, amending the commitment process language, will clarify that the commitment process may not be used to commit persons to community services.

The community-based service system for individuals with developmental disabilities is predicated on the philosophy that individuals voluntarily or with the consent of their guardian participate in the program. The placement process is likewise predicated on this voluntary philosophy. Where the authority of the courts is imposed on individuals in settings that are designed and maintained to respect the rights and privileges of the recipients of services, the administration of the system becomes difficult, if not impossible. The courts are dictating the daily routines of recipients and directing SRS to impose the court's restrictions upon recipients. The community-based services system for individuals with developmental disabilities is composed of a comprehensive array of residential, day and support services serving over 2,100 individuals in 32 communities in Montana. Competition for placement in the community-based system is keen with over 740 individuals on the community waiting list and approximately 40 individuals in state institutions who have been jointly identified by SRS and the Department of Institutions as "priority for placement" in the community. People on the waiting list must wait up to 2 or 3 years for an opening in the community.

The threat in the past of court ordered placement in community-based services has caused SRS to treat the complaining individuals as if they were of the highest priority for placement when they may not have been so. Manipulation of the placement system by the courts disrupts the existing placement processes and gives unfair advantage to any potential recipient of services who has legal counsel. With available placements limited, any court interventions may threaten the placement goals developed by the Legislature and the Executive.

If adopted as proposed, SB 229 will ensure that Montana's commitment laws will not apply to placement in the community-based system.

MONTANA ADVOCACY PROGRAM, Inc.

1410 8th Avenue
Helena, Montana 59601

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

February 10, 1987

SENATE JUDICIARY
EXHIBIT NO. 10
DATE FEB 10, 1987
BILL NO. SB 229

Committee on Judiciary
Montana State Senate
State Capitol
Helena, Montana

Hon. Joe Mazurek, Chairman

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 woudl 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 siutations. 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 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 the extension of a Boulder committment. 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

SENATE JUDICIARY
EXHIBIT NO. 10
DATE 2-10-87
BILL NO. S.B. 229

SENATE JUDICIARY
EXHIBIT NO. 11
DATE FEB 10, 1987
BILL NO. HB SB 229

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

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 had 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.

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 persons. This prohibition would not only prevent advocates and developmentall 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 even a reluctant individual refuses services.

I would now like to comment on the proposed changes to Section 128 and their effect upon an actual developmentally disabled persons.

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, such as D.T., 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. I suspect that 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 the community, and C.P. will remain at M.D.C. awaiting a placement while receiving needed services and protection.

The changes to section 128 proposed by this bill would yield 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.D. remains at M.D.C. The proposed changes, however, strip the court of that authority and discretion, and requires that the petition be dismissed.

C.P. would therefore be under no legal compulsion to stay at M.D.C. 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. The 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.

There are two reasons to kill this bill. First, it is ill-conceived and it mandates results, placements in the community without needed services, that are contrary to the best interests of developmentally disabled persons and our great state. Second, it is contrary to all our notions of fairness, justice and due process of law.

The state has chosen to exercise its powers to provide treatment and habilitation for its developmentally disabled citizens in order to provide for the best interests of these citizens and our state. In exercising that power the state has granted district courts the power to deprive individuals of their liberty and place them in institutions. It is only fair and just

that these same courts should retain the power and authority to review the needs of these individuals and order appropriate services.

This bill seeks to eliminate this impartial review, 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 at D.T. and 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 district 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. C.P. and other developmentally disabled individuals place their trust and respect in the hands of the court's integrity and judgement, 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 to kill this ill-conceived and unwarranted bill. Thank you.