

MONTANA STATE SENATE  
JUDICIARY COMMITTEE  
MINUTES OF THE MEETING

March 19, 1987

The forty-sixth meeting of the Senate Judiciary Committee was called to order on March 19, 1987 at 10:00 a.m. in Room 325 of the state Capitol by the chairman, Senator Joe Mazurek.

ROLL CALL: All committee members were present.

CONSIDERATION OF HOUSE BILL 790: Representative Dennis Rehberg, Billings District 88, introduced HB 790, which amends the law relating to payment of attorney fees and costs in lawsuits. (Exhibit 1) He presented the committee with statistics on states' ballot/policy issues. (Exhibit 2)

PROPONENTS: Riley Johnson, NFIB, supported the bill.

Kay Foster, Billings Chamber of Commerce, supported the bill.

Stuart Doggett, Chamber of Commerce, testified in favor of the bill.

John Maynard, Tort Claims Dept., explained all sections of the bill. (see exhibit 1)

OPPONENTS: Tim Baker, PSC, stated he was just a technical witness for the bill. He said there will be a fiscal impact with this bill.

Frank Crowley, Montana Department of Health, stated his department has only 4 attorneys, so this department does a lot of action. He said his department is 90% federally funded. He expressed he would like to see the sunset provision be set back to the way it was.

George Ochenski, Montana Environmental Information Center opposed the bill. He said Karl Englund told him this was a good bill for lawyers. He explained that when the Department of Health needs a lawyer, the state pays for it,

so if a lawyer wins the case, they get their cut from the defendant, and on top of that, they get a cut from the state. Mr. Ochenski thought it cost the state too much.

DISCUSSION ON HOUSE BILL 790: Senator Mazurek asked if other states pay for attorney fees out of the self-insurance pool. Rep. Rehberg said they do.

Senator Crippen asked if this bill is for non-profit and profit organizations both. Mr. Ochenski said it is for both, in his eyes.

Senator Blaylock called the bill legal socialism.

George Ochenski said his group should have equal legal help to go up against big corporations that are against environmentalists.

Rep. Rehberg responded to Mr. Ochenski's comment on how he felt his non-profit group was entitled to this bill. Rep. Rehberg said he limited his bill to small business so he would not have to deal with non-profit people.

Mr. Johnson stated many times small businesses don't know where to turn to when it comes to paying attorney fees.

Mr. Baker clarified that under the federal law, non-profit groups are included under a similar statute.

Rep. Rehberg closed the hearing on HB 790.

ACTION ON HOUSE BILL 78: Noel Larmie and John McGray gave the committee amendments to the bill and said they support table guidelines on child support. (Exhibit 3)

Senator Halligan asked how this can comply with federal when it takes away so much of a person's lump sum pay. Ms. Lane was not sure how the bill worked into the federal.

Senator Mazurek said the bill will not prevent the parent living with the child from using the child support lump sum on other things.

Senator Beck asked how one calculates the lump sum payments if the supporting parent is currently up to date with payments. Ms. Lane quite sure.

Senator Halligan moved the amendments.

Senator Brown distributed a letter from James Bartlett, an attorney in Kalispell, which stated the bill will allow mothers who are not on welfare to intercept these lump sum payments. (Exhibit 4)

Senator Mazurek did not agree with the idea that all mothers could be under this bill.

Senator Halligan added to his motion, all departments can use this bill, and not just the Dept. of Revenue. The motion carried.

Senator Halligan moved House Bill 78 BE CONCURRED IN AS AMENDED. The motion carried.

ACTION ON HOUSE BILL 495: Written testimony was given to the committee by Linda McNiel and Mike Salvagni. (Exhibit 5) The committee waited on action on HB 495.

ACTION ON HOUSE BILL 679: Valencia Lane explained that HB 740, if passed, would make this bill's percentage of 50% of the funding going to abuse programs, change to 1%. She distributed amendments to the bill. (Exhibit 6) Senator Beck moved the amendments. The motion carried. Senator Beck moved HB 679 BE CONCURRED IN AS AMENDED. The motion carried.

ACTION ON HOUSE BILL 283: John McGray distributed amendments to HB 283. (Exhibit 7) Senator Mazurek wanted to clarify that the bill still makes a parent notify the other if he/she is moving a child's residency to another state, and the parent that receives the notice must give written consent. Senator Mazurek said the bill does say it is for joint custody cases and non-joint custody cases.

Senator Bishop wanted to know where the 30 day notice provision was. Senator Mazurek asked what happens to a parent who doesn't give a 30 day notice.

Senator Beck wanted to wait for action on HB 283 and 284. The committee will wait on action.

ACTION ON HOUSE BILL 344: Chat Smith gave written testimony to the committee. (Exhibit 8)

Senator Mazurek explained how if the committee supports one side of this issue, the committee loses several groups on the other side, and visa versa. Senator Mazurek thought the Neely amendments were too narrow.

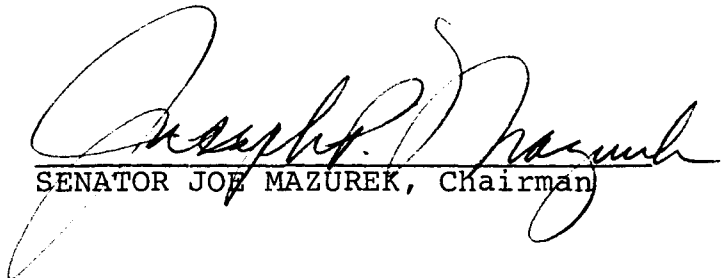
Ms. Lane said if the bill is passed, it will limit the time period to bring a suit by a substantial amount. She said if damage occurred at 4 years of age, by the time the 4 year old has grown to know that he has cause to sue, the statute of limitations has run out. Senator Mazurek stated the law says a parent can't bring a suit against the hospital on behalf of the child.

Senator Halligan moved on page 2, line 12, the statute of limitation provision include that a child's statute of limitation can start when the child turns 8 years of age. (See Standing Committee Report, amendments 2 and 3) The motion carried.

Senator Brown moved to have the bill be retroactive. The motion carried.

Senator Brown moved HB 344 BE CONCURRED IN AS AMENDED. The motion carried with Senator Halligan voting no.

ADJOURNMENT: The meeting adjourned at 12:10 p.m.

  
SENATOR JOE MAZUREK, Chairman

March 19th

Judiciary

## VISITORS' REGISTER

[illegible]

(Please leave prepared statement with Secretary)

NAME: TIM BAKER DATE: 3/19/87

ADDRESS: 2701 PROSPECT AVE, HELENA

PHONE: 444-6178

REPRESENTING WHOM? PSC

APPEARING ON WHICH PROPOSAL: HB NO. 790

DO YOU: SUPPORT? \_\_\_\_\_ AMEND? \_\_\_\_\_ OPPOSE? \_\_\_\_\_

COMMENTS: TECHNICAL WITNESS

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: FRANK Crenley DATE: 3/19/87

ADDRESS: 807 2nd St Helena

PHONE: 449-7610 (444-2630 work)

REPRESENTING WHOM? DHEJ

APPEARING ON WHICH PROPOSAL: HB 790

DO YOU: SUPPORT?            AMEND? ✓ (Sunset) OPPOSE?           

COMMENTS: Express reservation on impact on  
DHEJ enforcement activities.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

## SUMMARY OF HB790 (REHBERG)

(Prepared by Senate Judiciary Committee staff)

HB790 amends the law relating to payment of attorney fees and costs in lawsuits. Under current law, a person cannot recover attorney fees in a lawsuit unless there is a specific, applicable statutory or contractual provision that allows such recovery. This bill would require the State to pay the attorney fees and expenses of small businesses who prevail against the State in certain court and administrative proceedings. There are currently provisions in state law that allow recovery of costs, but not including attorney fees, in certain cases.

- Section 1. NEW. Findings and purposes. Bill has two purposes: 1) to allow eligible small businesses to recover reasonable litigation expenses from the state; and 2) to promote reasonable regulatory and enforcement activities in the state. Bill states findings that 1) small businesses are deterred from defending against unreasonable state actions because of expenses of litigation; and 2) the standard for the award of attorney fees against the state should be different from the standard applied to a private party because of the greater legal and financial resources of the state.

- Section 2. NEW. Definitions.

- "Administrative hearing" doesn't include proceedings to fix a rate, involving eminent domain or condemnation, or in which the state is only a nominal party, or proceedings not involving the business regulatory function of the state (i.e., it does include proceedings involving the business regulatory function of the state);

- "Business regulatory function of the state";

- "Fees and expenses" includes: reasonable expert witness expenses; reasonable costs of any study analysis, engineering report, test, or project; necessary discovery costs; and reasonable attorney fees;

- "Hearing officer";

- "Position of the state";

- "Prevailing" means obtaining a favorable judgment in a judicial action or administrative hearing or reaching a favorable settlement of a judicial action or administrative hearing;

- "Small business" means a commercial or business entity, including a sole proprietorship or a partnership, with a net worth of less than \$2 million and fewer than 25 employees [amended from 250 employees by the House];

- "State"; and

- "Substantially justified" means reasonable in both law and fact.

- Section 3. NEW. Award of fees and expenses in court cases. A prevailing small business is entitled to an award of reasonable fees and expenses in a) a civil action, unless court finds that

(OVER)

state's position was substantially justified; and b) upon judicial review of an administrative decision, unless the court finds that the position of the state was substantially justified (includes expenses incurred during the administrative hearing). A party can not recover duplicate fees and expenses.

- Section 4. NEW. Award of fees and expenses in administrative hearings. A prevailing small business is to be awarded reasonable fees and expenses incurred by it in an administrative hearing initiated by the state unless the hearing officer finds that the position of the state was substantially justified. A dissatisfied person can appeal to the "proper court". Attorney General's office to adopt model rule establishing procedures for award of fees and expenses. A person can not recover duplicate fees and expenses.

- Section 5. NEW. Judge or hearing officer can reduce or deny award upon finding that the small business: 1) unreasonably protracted the final resolution of the matter; or 2) refused a settlement offer by the state that was at least as favorable to the small business as the relief ultimately obtained.

- Section 6. NEW. Payments by a state agency, commission, board, or department must be paid out of its liability insurance or out of a self-insured pool maintained by it. If no insurance is available to the award, it must be paid by an appropriation made at the next regular session of the legislature. Each agency paying such an award must report to the next regular session of the legislature.

- Section 7. NEW. Applicability.

- Section 8. NEW. Act terminates June 30, 1991 (amended form 1989 by House).

COMMENTS: 1. All state agencies are insured (for liability) through the state's self insurance pool (the Tort Claims fund). I don't know if this kind of liability is, or would be, covered by the Tort Claims fund. If it is, each agency's premium rate would undoubtedly go up to cover this new liability. If it does not, each agency would be required to go to the legislature for supplemental funding to cover any awards. QUESTION: Since the bill requires payment but does not provide funding therefor, could the obligation of future legislatures to provide the funding be considered an impermissible action of this legislature binding future legislatures? (At this writing I do not know the answer to this question).

2. Please see the comments on the Fiscal Note on pages 2 and 3 under LONG-RANGE EFFECTS OF PROPOSED LEGISLATION AND TECHNICAL OR MECHANICAL DEFECTS IN PROPOSED LEGISLATION OR CONFLICTS WITH EXISTING LEGISLATION.

C:\LANE\WP\SUMHB790.

Current Status of Equal Access Legislation in the States

<u>State</u>	<u>Ballot or Policy Position?</u>	<u>Legislation Introduced (Year) and/or Pending</u>	<u>Legislation Enacted or Executive Order (Year)</u>
Alabama	No	1984	1984(vetoed)
Alaska	Yes	No	None
Arizona	Yes	1981	1981
Arkansas	Yes	1981, 1985	1985
California	Yes	1981	1981
Colorado	Yes	1977, 1982, 1983	1977, 1984
Connecticut	Yes	1983	1983
Delaware	Unknown	1983, 1984	None
Florida	Yes	1982	1984
Georgia	Yes	1983	No
Hawaii	Yes	1982, 1983	No
Idaho	Yes	No	No
Illinois	Yes	1981	1981
Indiana	Yes	1981	<del>1986</del>
Iowa	Yes	1981, 1983	1983
Kansas	Yes	1980, 1981, 1982	1982
Kentucky	Yes	1982	1982
Louisiana	Yes	1981, 1982	1982
Maine	Yes	1982, 1983	1983
Maryland	Yes	1982, 1983	1983
Massachusetts	Yes	1982, 1983	None

<u>State</u>	<u>Ballot or Policy Position?</u>	<u>Legislation Introduced (Year) and/or Pending</u>	<u>Legislation Enacted or Executive Order (Year)</u>
Michigan	1979	1981, 1983, 1984	1984
Minnesota	Yes	1981, 1983	<del>No</del> 1986
Mississippi	Yes	No	No
Missouri	Yes	1981, 1983	None
Montana	Yes	No	None
Nebraska	Yes	1982	1982
Nevada	Yes	No	No
New Hampshire	Yes	No	None
New Jersey	Yes	1982, 1983	None
New Mexico	Yes	1981, 1982, 1983	None
New York	Yes	1982, 1983	1984 (vetoed)
North Carolina	Yes	1981, 1983	1983
North Dakota	No	1985	1985
Ohio	Yes	Pending	No
Oklahoma	Yes	1982	1982
Oregon	Yes	1979, 1981	1981
Pennsylvania	Yes	1982	1983
Rhode Island	Yes	Yes	1984(vetoed)
South Carolina	Yes	Yes	1984
South Dakota	Yes	Pending	No
Tennessee	Yes	1983	1984
Texas	Yes	1981, 1983	None
Utah	Yes	1983	1983

SENATE JUDICIARY

EXHIBIT NO. 2

DATE 3-19-87

BILL NO. H.B. 790

<u>State</u>	<u>Ballot or Policy Position?</u>	<u>Legislation Introduced (Year) and/or Pending</u>	<u>Legislation Enacted or Executive Order (Year)</u>
Vermont	Yes	1982	None
Virginia	Yes	1979, 1980, 1981	1981
Washington	Yes	No	None
West Virginia	Yes	1983	None
Wisconsin	Yes	1981, 1982, 1983	<del>None</del> 1985
Wyoming	Yes	1983	Vetoed 1983

0002s

SENATE JUDICIARY

EXHIBIT NO. 2

DATE 3-19-87

BILL NO. H.B. 790

Proposed amendments to HB78, third reading copy (blue)

1. Title, line 6.

Following: "COMPENSATION"

Strike: "LUMP-SUM"

2. Page 1, line 17.

Following: "(b)"

Strike: "to defray"

Insert: "a portion of any lump-sum award or periodic payment to pay"

3. Page 2, line 1.

Following: "Payments"

Strike: "A LUMP-SUM PAYMENT"

Insert: "Payments"

4. Page 2, line 2.

Following: "CHAPTER"

Strike: "IS"

Insert: "are"

5. Page 2, line 3.

Following: "follows:"

Insert: "as follows:"

6. Page 2, lines 11 through 14.

Following: "payment" on line 11

Strike: the remainder of line 11 through "SUPPORT" on line 14

Insert: "(a) for any periodic payment, an amount up to the percentage amount established in the guidelines promulgated in supreme court Order No. 86-223, dated January 13, 1987;  
or

(b) for any lump-sum award, an amount up to that portion of the award that is designated for the payment of current or past-due child support"

C:\LANE\WP\AMDHB78.

## HOUSE BILL NO. 78

INTRODUCED BY J. BROWN

BY REQUEST OF THE DEPARTMENT OF REVENUE

A BILL FOR AN ACT ENTITLED: "AN ACT TO PERMIT THE ATTACHMENT OR GARNISHMENT OF WORKERS' COMPENSATION ~~COMPENSATION~~ BENEFITS FOR THE PAYMENT OF CERTAIN CHILD SUPPORT OBLIGATIONS; AND AMENDING SECTION 39-71-743, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 39-71-743, MCA, is amended to read:

"39-71-743. Assignment or attachment of payments. (1)

No payments under this chapter shall be assignable, subject to attachment or garnishment, or be held liable in any way for debts, except:

(a) as provided in 71-3-1118; or  
(b) ~~to satisfy~~ <sup>a portion of any lump-sum award or periodic payment</sup> a monetary obligation for current or to pay

past-due child support, subject to the limitations in subsection (2), whenever:

(i) the support obligation is established by order of a court of competent jurisdiction or by order rendered in an administrative process authorized by state law; and

(ii) the order is being enforced by the department of revenue or other public agency pursuant to Title IV-D of the federal Social Security Act.

SENATE JUDICIARY  
EXHIBIT NO. 325

DATE 3-19-87

BILL NO. H.B. 78

## Payments

(2) Payments ~~of lump-sum payment~~ <sup>or</sup> under this section are CHAPTER 19 subject to assignment, attachment, or garnishment

for child support as follows: as follows:

(a) the compensation recipient is entitled to the first \$110 of every weekly payment;

(b) the title IV-D agency under the federal Social

Security Act is entitled to the remainder of each weekly payment up to a maximum of 50% of the total payment;

(c) the title IV-D agency under the federal Social Security Act is entitled to a maximum of 50% of any lump-sum settlement payment by the title IV-D AGENCY UNDER THE

FEDERAL SOCIAL SECURITY ACT IN THE AMOUNT THAT PART OF A LUMP-SUM IS SPECIFICALLY GRANTED FOR THE PAYMENT OF PAST-DUE CHILD SUPPORT;

(2)(3) After determination that the claim is covered under the Workers' Compensation Act or Occupational Disease Act of Montana, the liability for payment of the claim is the responsibility of the appropriate workers' compensation insurer. No fee or charge shall be payable by the injured worker for treatment of injuries sustained if liability is accepted by the insurer."

NEW SECTION. Section 2. Extension of authority. Any

existing authority of the department of revenue or the department of labor to make rules on the subject of the provisions of this act is extended to the provisions of this

(a) for any periodic payment, an amount up to the percentage amount established in the guidelines promulgated in supreme court Order No. 86-223, dated January 13, 1987;

(b) for any lump-sum award, an amount up to that portion of the award that is designated for the payment of current or past-due child support."

Montana Legislative Council

# SUPPORT GUIDELINES TABLE

	\$0 - \$4,499	\$4,500- \$8,499	\$ 8,500- 12,249	\$12,250- 16,499	\$16,500- 19,999	\$20,000- 27,999	\$28,000- 39,499	\$39,500+
One Child								
0-11	21.8	21.8	21.4	19.7	18.0	17.4	16.3	13.6
12-17	27.0	27.0	26.5	24.4	22.3	21.5	20.2	16.8
Two Children								
0-11	33.8	33.8	33.2	30.7	28.0	27.1	25.3	21.1
12-17	41.8	41.8	41.0	38.0	34.6	33.5	31.3	26.1
Three Children								
0-11	42.4	42.4	41.5	38.4	35.1	33.8	31.7	26.5
12-17	52.4	52.4	51.3	47.5	43.4	41.8	39.2	32.8
Four Children								
0-11	47.7	47.7	46.8	43.4	39.6	38.2	35.7	29.8
12-17	59.0	59.0	57.9	53.6	48.9	47.2	44.1	36.9
Five Children								
0-11	52.1	52.1	51.1	47.3	43.2	41.6	38.9	32.6
12-17	64.4	64.4	63.1	58.4	53.4	51.4	48.1	40.3
Six Children								
0-11	55.7	55.7	54.6	50.5	46.2	44.5	41.6	34.9
12-17	68.9	68.9	67.5	62.4	57.1	55.0	51.4	43.1

For children in different age categories, pro-rate based on total number of children. Example: for one child age 7, one age 14, annual income of \$18,000; use percentages for two children, divided by two --  $(28.0 / 2) + (34.6 / 2) = 31.3$ .

SENATE JUDICIARY

EXHIBIT NO. 3

DATE 3-19-87

COPIES  
HAND DELIVERED TO  
JAN BROWN 1/29

HASH, O'BRIEN & BARTLETT  
ATTORNEYS AT LAW  
PLAZA WEST - 138 FIRST AVENUE WEST  
P.O. BOX 1178  
KALISPELL, MONTANA 59903-1178  
—  
406-755-6919

SENATE JUDICIARY,  
EXHIBIT NO. 4  
DATE March 19, 1987  
BILL NO. HB 78

CHARLES L. HASH  
KENNETH E. O'BRIEN  
JAMES C. BARTLETT

C. MARK HASH

January 14, 1987

Senator Bob Brown  
Montana State Senate  
Capitol Station  
Helena, MT 59620

Dear Bob:

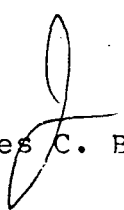
Thank you for your letter of January 6, 1987 in which you enclosed the proposed bill to allow a portion of Workers' Compensation benefits to be intercepted to pay child support. The bill allows the interception of benefits for child support, to a limited amount, but under subsection (b), it is in the conjunctive, which would require that the mother seek relief through the Department of Revenue or other public agency in order to intercept the payment. This usually means that the mother be on welfare. As I read the bill, this would not permit a mother who is not on welfare to intercept the payment.

I do not feel this is fair treatment of mothers who do not need to receive benefits from welfare. I would ask you to remedy this, perhaps by simply changing the bill to the disjunctive so the word "or" is substituted for the word "and" as I have circled on the bill which is enclosed herewith.

Thank you for your consideration on this topic.

Sincerely,

HASH, O'BRIEN & BARTLETT

  
James C. Bartlett

JCB:af  
Enclosure

H. B. 78

SENATE JUDICIARY

EXHIBIT NO. 4

DATE 3-19-87

BILL NO. H.B. 78

1 \_\_\_\_\_ BILL NO. \_\_\_\_\_  
2 INTRODUCED BY \_\_\_\_\_  
3 BY REQUEST OF THE DEPARTMENT OF REVENUE  
4

5 A BILL FOR AN ACT ENTITLED: "AN ACT TO PERMIT THE  
6 ATTACHMENT OR GARNISHMENT OF WORKERS' COMPENSATION BENEFITS  
7 FOR THE PAYMENT OF CERTAIN CHILD SUPPORT OBLIGATIONS; AND  
8 AMENDING SECTION 39-71-743, MCA."  
9

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11 Section 1. Section 39-71-743, MCA, is amended to read:

12 "39-71-743. Assignment or attachment of payments. (1)  
13 No payments under this chapter shall be assignable, subject  
14 to attachment or garnishment, or be held liable in any way  
15 for debts, except:

16 (a) as provided in 71-3-1118; or

17 (b) to defray a monetary obligation for current or  
18 past-due child support whenever:

19 (i) the support obligation is established by order of  
20 a court of competent jurisdiction or by order rendered in an  
21 administrative process authorized by state law; and

22 (ii) the order is being enforced by the department of  
23 revenue or other public agency pursuant to Title IV-D of the  
24 federal Social Security Act.

25 (c) Payments under this section are subject to

1 assignment, attachment, or garnishment for child support as  
2 follows:

3 (i) The compensation recipient is entitled to the  
4 first \$110 of every weekly payment.

5 (ii) The Title IV-D agency under the federal Social  
6 Security Act is entitled to the remainder of each weekly  
7 payment up to a maximum of 50% of the total payment.

8 (iii) The Title IV-D agency under the federal Social  
9 Security Act is entitled to a maximum of 50% of any lump-sum  
10 settlement payment.

11 (2) After determination that the claim is covered  
12 under the Workers' Compensation Act or Occupational Disease  
13 Act of Montana, the liability for payment of the claim is  
14 the responsibility of the appropriate workers' compensation  
15 insurer. No fee or charge shall be payable by the injured  
16 worker for treatment of injuries sustained if liability is  
17 accepted by the insurer."

18 NEW SECTION. Section 2. Extension of authority. Any  
19 existing authority of the department of revenue or the  
20 department of labor to make rules on the subject of the  
21 provisions of this act is extended to the provisions of this  
22 act.

-End-

SENATE JUDICIARY  
EXHIBIT NO. 4  
DATE 3-19-87  
BILL NO. H.B. 78

*Linda McNiel*  
ATTORNEY AT LAW  
403 W. MENDENHALL  
BOZEMAN, MONTANA 59715  
(406) 586-1617

SENATE JUDICIARY

EXHIBIT NO. 5

DATE March 19, 1987

BILL NO. HR 78

March 18, 1987

Dick Corne  
Montana House of Representatives  
Helena, MT 59620

RE: House Bill 495

Dear Dick:

House Bill 495 addresses extremely important issues faced by parents, attorneys and judges on a regular basis. Let me first address the proposed 1c):

"If two persons have joint custody of a child under a court order, the offense of custodial interference is committed if one of them takes, entices or withholds the child from the other where this action manifests a purpose to substantially deprive that parent of parental rights."

We can only charge someone with custodial interference now if there is a full custody award to one parent and the other parent interferes. Since joint custody must now be ordered by our courts, barring extenuating circumstances, we see an alarming increase in the number of custodial interference cases for which there is no remedy.

This section is a necessary addition to the present custodial interference law because we now have no way to charge someone with custodial interference if there is an outstanding joint custody order. In short, if laws are a reflection of the current needs of society, the proposed change is necessary and proper.

Secondly, let me refer to the proposed 1b):

"Prior to the entry of a court order determining custodial rights one parent takes, entices, or withholds the child from the other parent where the action manifests a purpose to substantially deprive that parent of parental rights;"

This section strengthens our existing custodial interference law in situations where neither parent has a court order. Such situations occur, for example, when one parent asks the other for a divorce, and the other then flees with the child. A civil court order can be obtained by the non-offending parent but this is useless to someone who cannot locate the parent to serve civil papers. With the help of law enforcement the chances of locating the offending parent and the child are substantially increased.

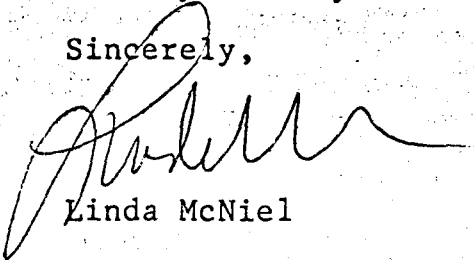
Dick Corne  
March 18, 1987  
Page 2

In any event, does not this situation fall within a reasonable definition of custodial interference? Does not the child in this situation deserve the same protection as one in which there is a court order?

Dick, please refer to my previous letter wherein I include a note from Mike Salvagni, Gallatin County Attorney.

Thank you for your help in pursuing this important measure.

Sincerely,



Linda McNiel

LM:TS  
Enclosure

SENATE JUDICIARY  
EXHIBIT NO. 5  
DATE 3-19-87  
BILL NO. H.B. 78

# GALLATIN COUNTY

## OFFICE OF THE ATTORNEY

615 SOUTH 16th AVENUE  
LAW AND JUSTICE CENTER  
BOZEMAN, MONTANA 59715  
TELEPHONE: (406) 585-1410

MIKE SALVAGNI  
COUNTY ATTORNEY



November 28, 1986

Detective Paul Erickson  
Bozeman City Police  
P.O. Box 640  
Bozeman, Montana 59715

Re: Request for Prosecution of Lisa Sue Pearson,  
a/k/a Lisa Sue Anderson, a/k/a Lisa Sue Eldridge

Dear Detective Erickson:

I have reviewed your Request for Prosecution of Lisa Sue Pearson, the statement of Russell Eldridge, and the Separation Agreement concerning the custody of Jennifer Lee Eldridge.

A person commits the offense of Custodial Interference if having no legal right to do so, the person takes, entices, or withholds from lawful custody any child entrusted by authority of law to the custody of another person. (Section 45-5-304(1), MCA). In this particular case Russell Eldridge and Lisa Sue Pearson equally share the physical custody of Jennifer Eldridge. The time and duration of the physical custody is determined by Lisa Sue Pearson and Russell Eldridge by mutual agreement. The last time that Russell Eldridge saw Jennifer Eldridge was on December 1, 1985, when he took Jennifer to Lisa for a week of visitation. Lisa has apparently left the State of Montana with Jennifer.

I am declining to prosecute Lisa Sue Pearson for Custodial Interference for two reasons. First, the physical custody of Jennifer Eldridge is determined by mutual agreement of Lisa Sue Pearson and Russell Eldridge. I cannot allege that Lisa Sue Pearson took Jennifer from the lawful custody of Russell Eldridge. Jennifer was lawfully in the custody of Lisa. Second, even though Lisa Sue Pearson may be withholding Jennifer from the custody of Russell Eldridge, unless Lisa Sue Pearson and Jennifer are in Gallatin County I cannot charge that the offense of withholding Jennifer has occurred in Gallatin County. The crime of Custodial Interference as defined in Montana may be occurring in another state. If Mr. Eldridge knows where Lisa might be, we could refer the matter to the other state for investigation and possible prosecution depending upon the laws of the other state.

Thank you for your assistance and cooperation in the investigation of this case.

Sincerely,

SENATE JUDICIARY

EXHIBIT NO. 5

Mike Salvagni  
County Attorney

DATE 3-19-87

BILL NO. H.B. 78

chm

cc: Capt. Dick Boyer, Bozeman Police Department  
Linda McNiell, 403 W. Mendenhall, Suite A, Bozeman, MT

*Linda McNiel*

ATTORNEY AT LAW  
403 W. MENDENHALL  
BOZEMAN, MONTANA 59715  
(406) 586-1617

January 9, 1987

Representative John Vincent  
Office of the Minority Leader  
Capitol Station  
Helena, MT 59620

RE: Proposed change in Custodial Interference Statute  
(45-5-304 M.C.A.)

Dear John:

Thank you very much for taking time to respond to my letter of December 5, 1986.

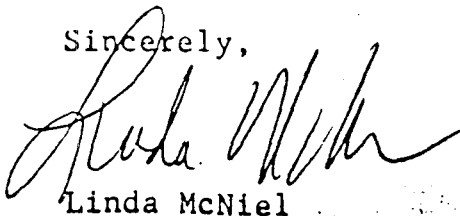
Pursuant to our phone conversation of December 29 I have drafted a proposed amended custodial interference statute.

As you are aware, the present wording of our statute does not cover a joint child custody arrangement. In other words, we cannot charge a parent with custodial interference if the parents have joint custody. The reason we cannot charge that parent is because he/she is not interfering with the "lawful custody" of another.

Since, according to our statutes, an award of joint custody is presumptively in a child's best interest, we find an increasing number of joint custody awards. More and more children are therefore subjected to child snatching with no remedy to the non-offending parent. My December 5 letter is one unhappy example.

John, I hope you can help. Please let me know what I can do.

Sincerely,



Linda McNiel

LM:TS

cc: Dorothy Bradley  
Dorothy Eck  
Women's Lobbyist Fund

SENATE JUDICIARY

EXHIBIT NO. 5

DATE 3-19-87

BILL NO. H.B. 78

Proposed amendments to HB679, third reading copy (blue)

1. Title, line 4.

Following: "ALLOCATE"

Strike: "50 PERCENT"

Insert: "A PORTION"

2. Title, line 6.

Following: "ABUSE"

Insert: "AND OTHER CRIMES"

3. Page 2, line 4.

Following: "collected"

Insert: " [, except for fines collected by a justice court and distributed pursuant to 3-10-601, ] "

4. Page 2, line 20.

Following: line 19

Insert: "NEW SECTION. Section 3. Coordination instruction. If House Bill 740, including the section of that bill amending 3-10-601 to provide a percentage of fines to be allocated to the battered spouses and domestic violence grant program, is not passed and approved, the bracketed language in Section 1(3) is void."

Renumber: subsequent section

C:\LANE\WP\AMDHB679.

[, except for fines collected by a justice court and distributed pursuant to 3-10-601,]

1 House BILL NO. 1679  
 2 INTRODUCED BY Keenan Miller, Jeff Meridian  
 3 STRATFORD Dave Brown Bradley NATHAN Winslow A PORTION  
 4 A BILL FOR AN ACT ENTITLED: "AN ACT TO ALLOCATE ~~50~~ PERCENT  
 5 OF THE REVENUE FROM FINES FOR THE COMMISSION OF THE CRIMINAL  
 6 OFFENSE OF DOMESTIC ABUSE AND OTHER CRIMES TO THE BATTERED SPOUSES AND  
 7 DOMESTIC VIOLENCE GRANT PROGRAM; AMENDING SECTIONS 40-2-405  
 8 AND 46-18-235, MCA; AND PROVIDING AN EFFECTIVE DATE."

9  
 10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11 Section 1. Section 46-18-235, MCA, is amended to read:

12 "46-18-235. Disposition of money collected as fines  
 13 and costs. The money collected by a court as a result of the  
 14 imposition of fines or assessment of costs under the  
 15 provisions of 46-18-231 and 46-18-232 shall be paid to the  
 16 county general fund of the county in which the court is  
 17 held, except that:

18 (1) if the costs assessed include any district court  
 19 expense listed in 3-5-901, the money collected from  
 20 assessment of these costs must be paid to the department of  
 21 commerce for deposit into the state general fund to the  
 22 extent the expenses were paid by the state; and

23 (2) if the fine was imposed for a violation of Title  
 24 45, chapter 9, the court may order the money paid into the  
 25 drug forfeiture fund maintained under 44-12-206 for the law

1 enforcement agency which made the arrest from which the  
 2 conviction and fine arose; and

3 (3) if the fine was imposed for a violation of  
 4 45-5-206, 50% of the amount collected must be deposited in  
 5 the state special revenue fund for use of the department of  
 6 social and rehabilitation services in the battered spouses  
 7 and domestic violence grant program created by 40-2-401."

8 Section 2. Section 40-2-405, MCA, is amended to read:

9 "40-2-405. Funding. (1) Revenue from the marriage  
 10 license fee, and the fee collected for filing a declaration  
 11 of marriage without solemnization, and the portion of fines  
 12 allocated to this program by 46-18-235 is the primary source  
 13 of funding for the battered spouses and domestic violence  
 14 program. The disposition of the marriage license fee is as  
 15 established in 25-1-201.

16 (2) Twenty percent of the operational costs of a  
 17 battered spouses and domestic violence program must come  
 18 from the local community served by the program. The local  
 19 contribution may include in-kind contributions."

20 NEW SECTION. Section 3. Effective date. This act is  
 21 effective July 1, 1987.

-End-

SENATE JUDICIARY  
 EXHIBIT NO. 6  
 DATE 3-19-87  
 BILL NO. H.B. 78



NEW SECTION. Section 3. Coordination instruction. If House Bill 740, including the section of that bill amending 3-10-601 to provide a percentage of fines to be allocated to the battered spouses and domestic violence grant program, is not passed and approved, the bracketed language in Section 1(3) is void.

## Proposed amendments to HB283 (Darko):

1. Title, lines 5 and 6.

Following: "TO" on line 5

Strike: the remainder of line 5 through "FOR" on line 6

Insert: "LIMIT WHEN"

2. Title, line 6.

Following: "PARENT"

Strike: "TO"

Insert: "MAY"

3. Page 2, line 11.

Following: "parent"

Insert: ":"

(a)"

4. Page 2, lines 12 through 19.

Following: "consent" on line 12

Strike: the remainder of line 12 through line 19

Insert: ";

(b) has not contributed, if able, to the support of the child during a period of 1 year preceding the change; or

(c) has been given written notice, as provided in subsection (5), and opportunity to seek a modification of the decree or order to provide a new visitation schedule and to apportion transportation costs between the parents.

(5) The written notice required by subsection (4) must be served personally or by certified mail not less than 30 days before the proposed change in residence. If a motion to modify is not filed within the 30-day period, the custodial parent may change the child's residence without hearing or further notice. This subsection does not affect or otherwise limit any subsequent motion for modification."

1 HOUSE BILL NO. 283

2 INTRODUCED BY DARKO, J. BROWN

3 BY REQUEST OF THE CHILD SUPPORT ADVISORY COUNCIL

4 *LIMIT WHEN*  
5 A BILL FOR AN ACT ENTITLED: "AN ACT TO ~~REQUIRE A WRITTEN~~  
6 ~~AGREEMENT OR COURT ORDER FOR A CUSTODIAL PARENT TO MOVE A~~ *MAY*

7 CHILD'S RESIDENCE OUTSIDE THE STATE; TO MAKE A CUSTODIAL  
8 PARENT'S ATTEMPTS TO PREVENT CONTACT OR VISITATION BETWEEN  
9 THE CHILD AND THE NONCUSTODIAL PARENT A BASIS FOR  
10 MODIFICATION OF THE CUSTODY DECREE; AND AMENDING SECTIONS  
11 40-4-217 AND 40-4-219, MCA."

12  
13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

14 Section 1. Section 40-4-217, MCA, is amended to read:  
15 "40-4-217. Visitation. (1) A parent not granted  
16 custody of the child is entitled to reasonable visitation  
17 rights unless the court finds, after a hearing, that  
18 visitation would endanger seriously the child's physical,  
19 mental, moral, or emotional health.

20 (2) In a proceeding for dissolution of marriage or  
21 legal separation, the court may, upon the petition of a  
22 grandparent, grant reasonable visitation rights to the  
23 grandparent of the child if the court finds, after a  
24 hearing, that the visitation would be in the best interest  
25 of the child.

1 (3) The court may modify an order granting or denying  
2 visitation rights whenever modification would serve the best  
3 interest of the child; but the court shall not restrict a  
4 parent's visitation rights unless it finds that the  
5 visitation would endanger seriously the child's physical,  
6 mental, moral, or emotional health.

7 (4) So long as a noncustodial parent who has been  
8 granted visitation rights by the court or by a custody  
9 agreement remains a resident of this state, a RESIDENT  
10 custodial parent may SHALL not change the child's residence  
11 to another state before UNLESS the noncustodial parent *(a)*  
12 given written consent or has been given notice and an  
13 opportunity to be heard upon the change is allowed by an order of  
14 the court after notice to the noncustodial parent and a  
15 hearing. The purpose of the hearing is to allow the  
16 noncustodial parent to seek a modification of his visitation  
17 schedule. The court may modify the prior decree to provide a  
18 new visitation schedule and to apportion transportation  
19 costs between the parents. *(b) --- o); (c) (5)*

20 Section 2. Section 40-4-219, MCA, is amended to read:  
21 "40-4-219. Modification. (1) The court may in its  
22 discretion modify a prior custody decree if it finds, upon  
23 the basis of facts that have arisen since the prior decree  
24 or that were unknown to the court at the time of entry of  
25 the prior decree, that a change has occurred in the



SENATE JUDICIARY

EXHIBIT NO. 7

DATE 3-19-87

1 circumstances of the child or his custodian and that the  
 2 modification is necessary to serve the best interest of the  
 3 child and if it further finds that:

4 (a) the custodian agrees to the modification;

5 (b) the child has been integrated into the family of  
 6 the petitioner with consent of the custodian;

7 (c) the child's present environment endangers  
 8 seriously his physical, mental, moral, or emotional health  
 9 and the harm likely to be caused by a change of environment  
 10 is outweighed by its advantages to him; or

11 (d) the child is 14 years of age or older and desires  
 12 the modification; or

13 (e) the custodian willfully and consistently:

14 (i) refuses to allow the child to have any contact  
 15 with the noncustodial parent; OR

16 ~~(ii) attempts to--alienate--the--child--from--the~~  
 17 ~~noncustodial parent; or~~

18 ~~(iii) (1) attempts to frustrate or deny the~~  
 19 ~~noncustodial parent's exercise of visitation rights.~~

20 (2) The court shall presume the custodian is not  
 21 acting in the child's best interest if the custodian does  
 22 any of the acts specified in subsection (1)(e).

23 ~~(3)~~ Attorney fees and costs shall be assessed  
 24 against a party seeking modification if the court finds that  
 25 the modification action is vexatious and constitutes

1 harassment.

2 ~~(3)(4)~~ A custody decree may be modified upon the death  
 3 of the custodial parent pursuant to 40-4-221."

-End-

SENATE JUDICIARY

EXHIBIT NO. 8

DATE March 19, 1987

BILL NO. HB 344

SUPPLEMENTAL STATEMENT IN SUPPORT OF  
AMENDMENTS TO HOUSE BILL 344  
-----

TO SENATE JUDICIARY COMMITTEE

FROM CHADWICK H. SMITH

DATE MARCH 19, 1987

In the course of the hearing on House Bill 344 before the Senate Judiciary Committee on March 18, 1987, an amendment providing for application of the bill to all incidents or causes of action not yet filed in court was discussed. The Chairman invited further information expressing the attitude of insurance underwriters regarding the language of the bill and the language of the proposed amendment insofar as impact on insurance premiums is concerned.

Mr. Jim Ahrens, President of the Montana Hospital Association, contacted the Pennsylvania Hospital Insurance Company (PHICO), because it is one of the principal malpractice insurers of hospitals in Montana, and asked the head actuary, Mr. Peter Henning, how the insurance company would apply the language in each case. The response was that the present language of the bill would not afford a basis for actuarial recomputation because there would be no substantial change in risk factors for several years. He further mentioned that the company would have to recognize the change in potential liability if the proposed amendment were adopted because it would have an immediate application to risk. The extent of the application would depend on the volume of cases affected, the potential liability assessed, and the language of other provisions in the new law. The new law may require a test case to learn the Montana Supreme Court's opinion on the language before it is relied upon. The actuary was joined by Arthur Becker, the General Counsel of the company, in the conference call. Although written commitment could not be obtained without time for research, we invite the Senate Judiciary Committee to telephone these officers to confirm this information, if desired, by calling 717-766-1122.

The language offered in the proposed amendment on applicability is supported by Montana case law as shown in the legal brief submitted at hearing. The application provision has been enacted in other states with success. There is no point in enacting a law which does not operate to solve the insurance problem facing Montana hospitals now. Without immediate application, premiums will continue to escalate. In any event, the worst that could happen would be for the Montana courts to rule that the new law cannot apply to incidents which have already occurred and, of course, that is the present language of the bill anyway. We have everything to gain and nothing to lose by enacting language that addresses the problem!

Your favorable consideration of the amendments is respectfully requested.

# STANDING COMMITTEE REPORT

March 19

87

19.....

MR. PRESIDENT

We, your committee on SENATE JUDICIARY

having had under consideration..... HOUSE BILL No. 78

Third reading copy ( blue )  
color

**Permit attachment or garnishment of workers' comp. to pay child support.  
Brown (Malligan)**

HOUSE BILL

78

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

1. Title, line 6.

Following: "COMPENSATION"

Strike: "LUMP-SUM"

2. Page 1, line 17.

Following: "(b)"

Strike: "to defray"

Insert: "a portion of any lump-sum award or periodic payment to  
pay"

3. Page 1, lines 19 and 20.

Following: "whenever" on line 19

Strike: the remainder of line 19 through "(1)" on line 20

4. Page 1, lines 22 through 25.

Following: "law" on line 22

Strike: the remainder of line 22 through "Act" on line 25

5. Page 2, line 1.

Following: "Payments"

Strike: "A LUMP-SUM PAYMENT"

Insert: "Payments"

~~XXXXX~~  
DO PASS

~~XXXXXXXXXX~~  
DO NOT PASS

CONTINUED

.....  
Senator Mazurk

.....  
Chairman.

SENATE JUDICIARY

HB 78

Page 2,

March 19 19 87

6. Page 2, line 2.  
Following: "CHAPTER"  
Strike: "IS"  
Insert: "are"

7. Page 2, line 3.  
Following: "follower"  
Insert: "as follower"

8. Page 2, lines 11 through 14.  
Following: "payment" on line 11  
Strike: the remainder of line 11 through "SUPPORT" on line 14  
Insert: "(a) for any periodic payment, an amount up to the  
percentage amount established in the guidelines promulgated  
in supreme court Order No. 86-223, dated January 13, 1987;  
or  
(b) for any lump-sum award, an amount up to that portion  
of the award that is approved for payment on the basis of a  
past-due child support obligation"

C:\LANE\WP\AMDSB78.

AND AS AMENDED  
BE CONCURRED IN

Senator Mazurek

# STANDING COMMITTEE REPORT

March 19

1937

MR. PRESIDENT

We, your committee on SENATE JUDICIARY

having had under consideration HOUSE BILL No. 344

Third ~~Third~~ reading copy ( blue )  
color

Revise time limits for medical malpractice actions.  
Asay (Mazurek)

Respectfully report as follows: That HOUSE BILL No. 344

be amended as followed:

1. Title, line 7.

Strike: "AN"

Following: "EFFECTIVE"

Insert: "FOR RETROACTIVE"

Following: "APPLICABILITY"

Strike: "DATE"

2. Page 2, lines 12 through 18.

Strike: subsection (2) in its entirety

Insert: " (2) The time limitations in subsection (1) are applicable to a minor who was under the age of 4 on the date of his injury or death notwithstanding the provisions of 27-2-401, except that such time limitations are tolled for a minor:

(a) until the minor becomes 3 years of age, or dies, whichever occurs first; and

(b) during any period that the minor does not reside with a parent or guardian.

3. Page 2, line 19 through 21.

Following: "Applicability."

Strike: the remainder of line 19 through line 21

Insert: "(1) An action referred to in 27-2-205(2) for injury or death occurring prior to October 1, 1937, must be commenced within 2 years after the effective date of this act or within the time limits in 27-2-205(2), whichever expires last.

(2) This act applies retroactively, within the meaning of 1-2-109, to causes of action that arose prior to October 1, 1937."

XXXXXX  
DO PASS

AND AS AMENDED

XXXXXX  
DO NOT PASS

BE CONCURRED IN

Senator Mazurek

Chairman.

# STANDING COMMITTEE REPORT

March 19

1957

MR. PRESIDENT

We, your committee on SENATE JUDICIARY

having had under consideration..... HOUSE BILL No. 679

Third reading copy ( blue )  
color

Allocate domestic abuse fines to fund battered spouses program.  
Keenan (Deck)

Respectfully report as follows: That..... HOUSE BILL No. 679

1. Title, line 4.  
Following: "ALLOCATE"  
Strike: "50 PERCENT"  
Insert: "A PORTION"

2. Title, line 6.  
Following: "ABUSE"  
Insert: "AND OTHER CRIMES"

3. Page 2, line 4.  
Following: "collected"  
Insert: " [, except for fines collected by a justice court and distributed pursuant to 3-10-601,] "

4. Page 2, line 20.  
Following: line 19  
Insert: "NEW SECTION. Section 3. Coordination instruction. If House Bill 740, including the section of that bill amending 3-10-601 to provide a percentage of fines to be allocated to the battered spouses and domestic violence grant program, is not passed and approved, the bracketed language in Section 1(3) is void."  
Renumber: subsequent section

AND AS AMENDED

~~DO NOT PASS~~ BE CONCURRED IN

~~DO NOT PASS~~ CONTINUED

Senator Mazurek

Chairman.