

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dave Brown, on March 8, 1989, at 8:09
a.m.

ROLL CALL

Members Present: All members were present.

Members Excused: None.

Members Absent: None.

Staff Present: Julie Emge, Secretary
John MacMaster, Legislative Council

HEARING ON SENATE BILL 45

Presentation and Opening Statement by Sponsor:

Sen. Joe Mazurek, Senate District 23, stated SB 45 deletes Section 40-8-121 (4), MCA, relating to private adoption placements, enacted in 1983 which was based on a desire from the Department of Social and Rehabilitation Services (SRS) to get people to file petitions for adoption as quickly as possible after placement of a child is made with them. This subsection has created a problem in that although adoption agencies do preplacement investigations, postplacement investigations, and then send the necessary paperwork out for the adoption as quickly as possible, all of this may not occur within one year in accordance with the statute. Sen. Mazurek noted adoptive parents want the legal relationship established as quickly as possible, which is hopefully within the one-year provision. He indicated no penalty is provided for not doing so within one year. Concern has been expressed as to whether an adoption may be set aside if this requirement is not met. Sen. Mazurek felt this requirement was a trap for the unwary, was not self-enforcing, and potentially jeopardized an adoptive placement.

Testifying Proponents and Who They Represent:

None.

Proponent Testimony:

None.

Testifying Opponents and Who They Represent:

None.

Opponent Testimony:

None.

Questions from the Committee: In response to a question from Rep. Aafedt as to whether an adoption would ever be filed if the one-year requirement were eliminated, Sen. Mazurek responded the concern is not that the parents would not file the petition for adoption, but if it is not done so within one year, the adoption would be jeopardized at some future time, and, therefore, the arbitrary one-year deadline is unnecessary.

Rep. Brown asked whether there were some time period, say a year or a year and a half, by which it would be rare the petition had not been filed. Sen. Mazurek felt the same problem would be encountered no matter what date were used.

Closing by Sponsor: Sen. Mazurek closed.

DISPOSITION OF SENATE BILL 45

Motion: Rep. Brooke moved SB 45 BE CONCURRED IN. Rep. Addy seconded the motion.

Discussion: Rep. Aafedt expressed concern about the proposed parents not filing the necessary paperwork within the one-year deadline which meant they were breaking the law. With this change, that has been eliminated so they are no longer breaking the law, but there is no requirement that they have to file. Rep. D. Brown responded that in 1981 this was a major piece of controversial legislation which involved a great deal of discussion. There was concern at that time this provision was too stringent and would cause some of the problems which were discussed today. SRS at the time was present trying to clean up the statutes with regard to adoption and attempting to speed up the process with regard to all parties who benefit from the process. Rep. D. Brown indicated he was comfortable with this deletion as he felt

if it were a major problem, SRS would be present in full force, and, therefore, their absence seemed to indicate they had no problem with the deletion.

Amendments, Discussion, and Votes: None.

Recommendation and Vote: The motion SB 45 BE CONCURRED IN CARRIED with Rep. Eudaily voting in opposition.

HEARING ON SENATE BILL 333

Presentation and Opening Statement by Sponsor:

Sen. Joe Mazurek, Senate District 23, stated SB 333 was a bill brought to the legislature by the State Bar of Montana Section on Tax and Probate. This bill is akin to the Code Commissioner bill, represents the efforts on behalf of committees of the State Bar of Montana, and deals with trusts and trustees. For the past three years, the State Bar Section on Tax and Probate has been working on modernizing the trust law which began being incorporated into our statutes prior to statehood. Sen. Mazurek indicated that as a result of a hundred years' action by the legislature, things don't mesh very well and many sections no longer apply. This bill is an effort to review the existing trust statutes, modernize the language, organize it better, eliminate some of the procedural problems, and eliminate some inconsistencies in the trust law. It's a complete rewrite of the trust statutes in the State of Montana.

Testifying Proponents and Who They Represent:

Professor E. Edwin Eck, University of Montana School of Law
Walter S. Murfitt, Helena Attorney
George Goodrich, Missoula Attorney
Howard Vralstad, Trust Division of the Montana Bankers Assoc.
Stewart Luen, Great Falls Attorney

Proponent Testimony:

Professor E. Edwin Eck, University of Montana School of Law, presented written testimony in support of SB 333 (EXHIBIT 1). Prof. Eck indicated the bill has been endorsed by both the State Bar and the Montana Bankers Association. He further indicated the bill began as a result of concern about inconsistencies in the trust statutes. In addition,

SB 333 eliminates some antiquated language, is better organized, eliminates procedural dissimilarities, and is comprehensive.

Walter S. Murfitt, Helena attorney, stood in support of SB 333. Mr. Murfitt was a member of the committee which proposed this law and indicated he felt it would be beneficial to his clients in that it resolves many questions frequently encountered in his profession.

George Goodrich, Missoula attorney, another member of the committee which proposed this legislation, also stood in support of SB 333. He indicated the committee members had been concerned about the sketchy state of existing Montana law and likened it to the Uniform Probate Code and Uniform Commercial Code which are working so well.

Howard Vralstad, representing the Trust Division of the Montana Bankers Association, stated the Montana Bankers Association wholeheartedly supports and endorses the legislation and urged its passage.

Stewart Luen, Great Falls lawyer, supported SB 333 in that it would be particularly valuable to his clients, mostly farmers and ranchers.

Testifying Opponents and Who They Represent:

None.

Opponent Testimony:

None.

Questions from the Committee: Rep. Eudaily questioned the effective date provision in the bill. Sen. Mazurek explained this provision was more an applicability provision than an effective date, in that it states how these provisions will apply to existing trusts and trusts created after the effective date of this bill.

Rep. Hannah asked whether this bill allowed for trust companies to be based in other states than the state of Montana and still handle Montana trusts. Mr. Murfitt indicated that could not be done under this legislation or currently without this legislation. Rep. Hannah asked whether the trust companies then would have to stay in Montana, and Mr. Goodrich confirmed that statement. However, Mr. Goodrich indicated nothing would preclude an individual trustee from

moving out of state and still acting as trustee of an estate.

Rep. Hannah asked whether trustees can close trusts of less than \$24,000. Prof. Eck responded that was true in that section 38 of the bill allows a court to determine when a trust is uneconomically low after giving notice to all beneficiaries or the trustee, unilaterally, if the amount is under \$24,000, can make that decision without going to court. The trust property would then be distributed to the trust beneficiaries.

Rep. Mercer asked questioned the language about the trustee being liable only if the trustee is "personally" at fault. Prof. Eck indicated the sections were based upon provisions of the Uniform Probate Code which were not adopted when Montana adopted the probate code in 1974. Prof. Eck felt this codified what our courts probably would say if they had to face the issue. Mr. Goodrich went on to explain this is an effort to shield a trustee from in effect offering up his or her own assets to pay for the debts of the thing that person is managing or working on. Rep. Mercer asked what the difference was between being at fault and being personally at fault. Mr. Goodrich did not recall that was anything other than placement of words.

Closing Statement: Sen. Mazurek indicated that in addition to the committee's work, the efforts with regard to this bill had had widespread publicity in the State Bar of Montana's newsletter over the past year.

DISPOSITION OF SENATE BILL 333

Motion: Rep. Gould moved SB 333 BE CONCURRED IN, motion was seconded by Rep. Wyatt.

Discussion: None.

Amendments, Discussion, and Votes: None.

Recommendation and Vote: Motion BE CONCURRED IN SB 333 CARRIED unanimously.

HEARING ON SENATE BILL 131

Presentation and Opening Statement by Sponsor:

Sen. Joe Mazurek, Senate District 23, indicated SB 131 is a bill concerned with the rule against perpetuities. He stated it is a rule that has existed since the common law, it is a trap for unwary lawyers, it has outlived its usefulness, and Article XIII, section 6, of the Montana Constitution specifically prohibits perpetuities, except in cases of charitable interests. Sen. Mazurek indicated this bill goes hand in hand with SB 333. He further stated the rule against perpetuities is a rule of law which protects against tying up future interests in property forever and requires a contingent interest to vest within a given time. The problem with the common law rule as it exists across the land is if you violate the rule in drafting, whatever you do is void. This bill modernizes that. It keeps the rule and continues to prevent perpetuities, but it adopts the 90-year wait-and-see approach instead of voiding things at the time of drafting because of an error in drafting. It is a uniform act that has been proposed by the National Conference of Commissioners on Uniform State Laws [NCCUSL] and was considered part of the package with the trust law revisions and probate provisions which will be heard next.

Testifying Proponents and Who They Represent:

Professor E. Edwin Eck, University of Montana School of Law

Proponent Testimony:

Professor E. Edwin Eck, University of Montana School of Law, presented written testimony in support of SB 333 (EXHIBIT 2). He stated the State Bar of Montana Trust Law Revision Committee was also in favor of this bill.

Testifying Opponents and Who They Represent:

None.

Opponent Testimony:

None.

Questions from the Committee: No questions were asked.

Closing By Sponsor: Sen. Mazurek closed the hearing.

DISPOSITION OF SENATE BILL 131

Motion: Rep. Wyatt moved SB 131 BE CONCURRED IN. Rep. Eudaily seconded the motion.

Discussion: None.

Amendments, Discussion, and Votes: None.

Recommendation and Vote: Motion CARRIED unanimously for SB 131 BE CONCURRED IN.

HEARING ON SENATE BILL 331

Presentation and Opening Statement by Sponsor:

Sen. Al Bishop, Senate District 46, stated SB 331 revises the Montana Uniform Probate Code to bring it in line with the NCCUSL recommendations and with the uniform code. A lot of this bill is cleanup language. In addition, the Uniform Transfers to Minors Act presently provides that at 18, they become entitled to that property. This bill amends that to include those who are 18, 19, and 20 years old to make it more desirable for people to put money in to make the transfers under the Uniform Transfers to Minors Act.

Testifying Proponents and Who They Represent:

Professor E. Edwin Eck, University of Montana School of Law

Proponent Testimony:

Professor E. Edwin Eck, University of Montana School of Law, presented written testimony in support of SB 331 (EXHIBIT 3). He indicated this act consists of 30 separate substantive provisions which in one sense are not related at all except they deal with death, dying, and taxes, but there's no overwhelming common theme.

Testifying Opponents and Who They Represent:

Walter S. Murfitt, Helena Attorney

Opponent Testimony:

Walter S. Murfitt, Helena attorney, expressed a concern about a provision in the bill which discusses the witnessing of wills. Mr. Murfitt indicated that currently a beneficiary witnessing the will does not invalidate the will but the beneficiary would lose the benefit and, if the witness would have succeeded to his share, he would get the share he would have been entitled to if the person had died intestate. His concern was about homedrawn and homedrafted wills, as he did not feel lawyers would use beneficiaries as witnesses. He strongly opposed this particular section and this section only as he felt this opened the door to additional and unnecessary litigation over will contests.

Questions from the Committee: Rep. Eudaily addressed a question to Sen. Bishop about the number of years which has changed (page 3, line 13, and page 39, line 4). Prof. Eck indicated the change on page 3 to five rather than seven years is part of the 1987 national Uniform Probate Code provisions. Prof. Eck indicated the change on page 39 changing it from 18 to 21 years brings our statutes in conformance with the Uniform Transfers to Minors Act. Rep. Eudaily asked if this meant that under no circumstances could the property not be given at age 18. Prof. Eck responded if a person wants to make a gift in a will and does not refer to the Uniform Transfers to Minors Act, the child will receive it at age 18 because under our state law that child is an adult for all purposes. However, if the Uniform Transfers to Minors Act is mentioned in the will, the property will be held until age 21.

Rep. Eudaily asked an additional question regarding a provision of the bill which required 120-hour survivorship to collect insurance proceeds. Sen. Bishop responded that was a new section, section 30, which brings the bill into conformity with the other parts of our probate code that require 120-hour survivorship, indicating the requirement should not be different for insurance proceeds than anything else.

Rep. Mercer addressed a question about section 16 which deleted the \$7,500 provision from the summary probate. He was concerned that in some situations where a person would have less than \$7,500 of net distributable estate but there wasn't a homestead allowance or exempt property, they would be denied the summary procedure that is now available. Prof. Eck indicated this provision would again bring us in compliance with the national code. The went on to explain the problem with this particular provision as it reads now is that distribution, as it is defined in the Uniform

Probate Code, talks about a gratuitous transfer as opposed to a transfer that has to be made by an estate to satisfy a claim. This provision creates an ambiguity--does it mean you don't have to publish notice to creditors--because the only way you can define a distributable estate is to actually have the creditors' claim process go forward. This act does not deal with Sections 72-3-1101 and -1102, MCA, which allows you by affidavit if the amount of the assets does not exceed \$7,500 to distribute those assets without probate, so that is not affected by this.

Closing by Sponsor: Sen. Bishop indicated there were other proponents who appeared before the Senate Committee on Judiciary. Sen. Bishop read the Uniform Probate Code comment relating to Mr. Murfitt's concern about interested witnesses. The comment indicates the purpose of the change was not to foster use of interested witnesses and attorneys who would continue to use disinterested witnesses in execution of wills, but the rare and innocent use of a member of the testator's family on a homedrawn will would no longer be penalized. This change does not increase appreciably the opportunity for fraud and undue influence. The comment went on to state the requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence, and in most cases of undue influence, the influencer is careful not to sign as a witness but uses someone else.

DISPOSITION OF SENATE BILL 331

Motion: Rep. Darko moved SB 331 BE CONCURRED IN. Rep. Strizich seconded the motion.

Discussion: Addressing Mr. Murfitt's concern, Rep. Mercer commented current law states holographic wills are valid but if your two kids sign your holographic will, it is invalid, so he felt they were on the right track, yet any interested party who witnesses a will is subjecting himself to a very strong case of undue influence. He hoped that when this is off the books, lawyers would not start having just anyone witness wills, such as children and spouses, as that would be a bad idea.

Recommendation and Vote: The committee held further action taken on SB 331 so as amendments could be drafted. Final action was taken on March 9, 1989.

HEARING ON SENATE BILL 180

Presentation and Opening Statement by Sponsor: Sen. Joe Mazurek, Senate District 23, stated the Uniform Gifts to Minors Act was a provision whereby people can give gifts of property to their minor children effectively in trust without having to go through the formal legal requirement of creating a trust for their minor children. Many people have bank accounts established for their children in that way. SB 180, the Uniform Custodial Trust Act, proposes to extend that one step further and essentially allows the creation of what is known as a custodial trust--a statutory trust which would allow people to organize the ownership and management of property to preserve it for the benefit of specific individuals. Trusts are used for many reasons--to minimize taxation at the federal and state levels and to keep property together for the benefit of their children. This act is essentially a poor man's trust. It would allow people to transfer their assets into trust using the mechanism set forth entirely within the bill itself. A person would simply make reference to this act to obtain the benefits of its provisions. It differs from the typical trust because this bill would then govern all aspects of the trust relationship, including the trustee's powers. It is different in that it would exist at the will of the beneficiaries. A person might use this if one wanted to put his own property in trust for the benefit of his children or he and his wife but the trust would not arise until some future event, perhaps his incapacity or death. He would retain control as donor and beneficiary, and the trust would not arise until the future event occurred. It allows elderly people, people without significant means, and others such as those who travel frequently to establish a custodial trust to avoid the necessity of a conservator. It is simple and inexpensive. It is not intended for use by people who need specific estate planning and have substantial assets--those people will continue to use the services of attorneys, trust officers, and accountants in their estate planning. Sen. Mazurek stated this is a fairly new act which came from NCCUSL. Sen. Mazurek offered into testimony a letter which he received from Dan McLean, the chairman of the Real Property, Trust, and Probate Section of the State Bar of Montana. Mr. McLean was unable to attend the hearing but raised some concerns in his letter. Sen. Mazurek also presented written testimony expressing concerns from Kristen Juras, Great Falls attorney (EXHIBIT 5).

Testifying Proponents and Who They Represent:

Fred Patten, vice Chairman, American Assoc. of Retired Persons

Proponent Testimony:

Fred Patten, Vice Chairman of the American Association of Retired Persons State Legislative Committee, presented written testimony in support of SB 180 (EXHIBIT 6).

Testifying Opponents and Who They Represent:

None.

Opponent Testimony:

None.

Questions from the Committee: Rep. Eudaily questioned whether the property referred to included cash assets, stocks, and bonds or only real property. Sen. Mazurek responded it included any type of property you wanted to put in it.

Rep. Eudaily asked if there were a maximum dollar value limit this trust act addressed. Sen. Mazurek responded there was not.

Rep. Eudaily asked if we were giving elderly people the assumption this is a way to do this, cut out the attorneys' fees and do it on their own, when we might be doing them a disservice by not sending them to an attorney. Sen. Mazurek responded he thought that concern was raised in the written testimony he presented earlier. However, Sen. Mazurek hoped those who raised that concern were not doing it because they wanted to make money from doing the trusts. Sen. Mazurek felt the concerns expressed in the letters should be addressed by the committee.

Closing by Sponsor: Sen. Mazurek indicated the Governor's Council on Aging also supported this legislation.

DISPOSITION OF SENATE BILL 180

Discussion: Rep. Eudaily indicated he liked the concept of this bill but felt there were some dangers there and questioned whether it would be appropriate to sunset this bill to force the legislature to look at it in two years. Rep. Stickney also liked the concept and Rep. Eudaily's suggestion that

the bill be sunset.

Rep. Rice also had concerns with the bill. He indicated there is a move in the estate planning world to do a lot more estate planning in the area of living trusts and we would be hearing more about those. He suggested waiting for awhile and studying this further in the interim. Rep. McDonough agreed with Rep. Rice and felt a conservative approach in these things would be very wise. Rep. Addy stated another alternative to a sunset would be a delayed effective date.

Rep. Mercer felt the bill should either go into subcommittee as it needed a lot of work or let it go to the State Bar committees for further review, as he did not feel it should be passed as it is as people might use it and get themselves into more trouble than they might realize.

Motion: Rep. Nelson moved SB 180 be TABLED. Rep. Darko seconded the motion.

Amendments, Discussion, and Votes: None.

Recommendation and Vote: The motion to TABLE SB 180 CARRIED with 7 in support of the motion and 5 in opposition.

HEARING ON SENATE BILL 338

Presentation and Opening Statement by Sponsor: Sen. Joe Mazurek, Senate District 23, stated he introduced SB 338 at the request of Penney Sey, Lewis and Clark County Restitution Officer. Sen. Mazurek and Ms. Sey worked with former District Court Judge Gordon Bennett, Helena, to develop this idea. SB 338 does something to formalize restitution programs that operate in the state. Under the sentencing powers the district courts have, they can and frequently order convicted defendants to make restitution to their victims. This bill authorizes the creation of a county restitution fund and essentially allows in cases where the defendant makes a payment to the restitution fund and the victim cannot be located, instead of that money reverting to the state to go into the unclaimed property and general fund, it would allow that money to be accumulated at the county level. It would then allow defendants who don't have the ability to make payments to victims to do public service work, essentially be paid for that work, and then that money would then go to pay the victim of that indigent defendant. It also authorizes the charging of a handling fee similar to what we do in child support payments, hopefully on a sliding fee scale not to exceed \$5 per payment, that would be

available to help operate these programs. Sen. Mazurek indicated the Senate had amended the bill at the request of the Crime Victims Compensation Fund so if a victim is compensated by the state, the state can subrogate against anything that is obtained from the defendant at the local level to prevent double recovery.

Testifying Proponents and Who They Represent:

None.

Proponent Testimony:

None.

Testifying Opponents and Who They Represent:

None.

Questions from the Committee: Rep. Gould asked of the \$75,000-85,000 recovered in Lewis and Clark County, how much they could not find the victim to give the money to. Sen. Mazurek did not have an exact figure, stated he did not know that it was a significant amount, indicated every little bit would help, and stated equally significant would be the collection fee would allow them to build up some money for the work as well as for the administration of the program.

Closing by Sponsor: Sen. Mazurek closed.

DISPOSITION OF SENATE BILL 338

Discussion: Rep. Gould asked that disposition of SB 338 be postponed so he could attempt to determine whether any money was actually not being given back to the victim. He felt they might be passing a bill that in reality would not be accomplishing anything.

Motion: Rep. Gould moved disposition of SB 338 be POSTPONED.
Motion seconded by Rep. Eudaily.

Recommendation and Vote: None.

Recommendation and Vote: Rep. Gould withdrew his motion to postpone action and Rep. Rice moved the bill BE CONCURRED IN. Motion CARRIED unanimously.

DISPOSITION OF SENATE BILL 322

Discussion: Rep. Brown asked if the committee were satisfied with the amendments which were offered. Rep. Mercer felt this was a very confusing provision and should be fixed. Rep. Brown stated it was pointed out the reason they left it this way and amended all the verbiage that was already there is it has a lengthy court history already, and they didn't want to get into rewriting everything and having to start from scratch again with the court system. Although Rep. Mercer felt that was a valid argument, he questioned how a person could voluntarily offer to produce the source but not at the same time voluntarily disclose the source.

Motion: Rep. Gould moved SB 322 BE CONCURRED IN, motion seconded by Rep. Nelson.

Amendments Offered: Rep. Gould moved Rep. Ramirez's amendments be adopted.

The motion to amend SB 322 CARRIED.

Recommendation and Vote: Rep. Gould moved SB 322 BE CONCURRED IN AS AMENDED. Motion CARRIED with a unanimous vote.

ADJOURNMENT

Adjournment: 11:10 a.m.



REP. DAVE BROWN, Chairman

DB/je

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DAILY ROLL CALL

JUDICIARY

COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date MARCH 8, 1989

NAME	PRESENT	ABSENT	EXCUSED
REP. KELLY ADDY, VICE-CHAIRMAN	X		
REP. OLE AAFEDT	X		
REP. WILLIAM BOHARSKI	X		
REP. VIVIAN BROOKE	X		
REP. FRITZ DAILY	X		
REP. PAULA DARKO	X		
REP. RALPH EUDAILY	X		
REP. BUDD GOULD	X		
REP. TOM HANNAH	X		
REP. ROGER KNAPP	X		
REP. MARY McDONOUGH	X		
REP. JOHN MERCER	X		
REP. LINDA NELSON	X		
REP. JIM RICE	X		
REP. JESSICA STICKNEY	X		
REP. BILL STRIZICH	X		
REP. DIANA WYATT	X		
REP. DAVE BROWN, CHAIRMAN	X		

STANDING COMMITTEE REPORT

March 8, 1989

Page 1 of 1

Mr. Speaker: We, the committee on Judiciary report that
SENATE BILL 45 (third reading copy -- blue) be concurred in .

Signed: _____
Dave Brown, Chairman

[REP. RICE WILL CARRY THIS BILL ON THE HOUSE FLOOR]

STANDING COMMITTEE REPORT

March 8, 1989

Page 1 of 1

Mr. Speaker: We, the committee on Judiciary report that
SENATE BILL 333 (third reading copy -- blue) be concurred in .

Signed: _____
Dave Brown, Chairman

[REP. MERCER WILL CARRY THIS BILL ON THE HOUSE FLOOR]

STANDING COMMITTEE REPORT

March 8, 1989

Page 1 of 1

Mr. Speaker: We, the committee on Judiciary report that
SENATE BILL 131 (third reading copy -- blue) be concurred in .

Signed: _____
Dave Brown, Chairman

[REP. McDONOUGH WILL CARRY THIS BILL ON THE HOUSE FLOOR]

3-8-89



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

REPRESENTATIVE DAVE BROWN

HOUSE DISTRICT 72

HELENA ADDRESS:
CAPITOL STATION
HELENA, MONTANA 59620

HOME ADDRESS:
3040 OTTAWA
BUTTE, MONTANA 59701
PHONE: (406) 782-3604

COMMITTEES:
JUDICIARY, CHAIRMAN
LOCAL GOVERNMENT
RULES

TO: John Vincent, Speaker of the House
FROM: Dave Brown, Chairman, House Judiciary Committee *JB*
DATE: March 8, 1989
SUBJECT: Senate Bill 180

The House Judiciary Committee has TABLED Senate Bill 180.


DB/je

STANDING COMMITTEE REPORT

March 8, 1989

Page 1 of 1

Mr. Speaker: We, the committee on Judiciary report that
SENATE BILL 338 (third reading copy -- blue) be concurred in.

Signed: 
Dave Brown, Chairman


[REP. RICE WILL CARRY THIS BILL ON THE HOUSE FLOOR]

STANDING COMMITTEE REPORT

March 8, 1989

Page 1 of 1

Mr. Speaker: We, the committee on Judiciary report that Senate Bill 322 (third reading copy -- blue) be concurred in as amended .

Signed: 
Dave Brown, Chairman

[REP. RAMIREZ WILL CARRY THIS BILL ON THE HOUSE FLOOR]

And, that such amendments read:

1. Title, line 5.

Strike: "PROVIDING"

Insert: "CLARIFYING"

2. Title, lines 6 and 7.

Strike: "AGAINST" on line 6 through "PRIVILEGE" on line 7

Insert: "MAY WAIVE THE JOURNALIST SOURCE PRIVILEGE ONLY BY VOLUNTARILY DISCLOSING THE SOURCE"

3. Page 1, lines 11 and 12.

Following: "(1)" on line 11

Strike: "Dissemination, except"

Insert: "Except"

4. Page 1, line 12.

Following: "(2),"

Insert: "dissemination"

5. Page 1, line 19.

Strike: "waives"

Insert: "does not waive"

6. Page 1, line 20.

Following: "26-1-902"

Insert: "unless the person voluntarily discloses the source"

7. Page 1, lines 22 through 25.

Strike: subsection (3) in its entirety

Professor E. Edwin Eck
University of Montana
School of Law

Rationale in Support of S.B. 333

Montana adopted a large part of its trust statutes from California in 1895. These California statutes in turn represent an 1872 version of the Field Code from the state of New York. For the most part, the Montana legislature has not amended these statutes during the 94 years since their adoption.

Additionally, the legislature has adopted various uniform acts which form another body of law to be read in conjunction with the Field Code. While those acts (see, for example, the Montana Uniform Trustees' Powers Act and the Revised Uniform Principal and Income Act) are excellent, provisions which are inconsistent still exist in the Field Code. Other inconsistencies are replete within the current trust law.

Much of Montana trust law is antiquated, especially that from the Field Code. For the most part, this antiquity is a matter of terminology. The Field Code simply does not use twentieth century English. Further, occasionally a current Montana trust statute takes a position contrary to modern trust law.

A simple listing of the chapters of Title 72 Mont. Code Ann. provides the reader with a good clue that our existing statutes are disorganized. Chapter 20 is entitled "Trusts in General" and Chapter 31 is entitled "Miscellaneous Provisions Relating to Fiduciaries." Between those chapters are located most of the provisions relating to trust law. Also sandwiched between chapters 20 and 31 are chapters which simply are not components of trust law, including the Uniform Transfers to Minors Act, codified as chapter 26, and chapter 30, dealing with the management of institutional endowment funds.

The current Montana trust statutes have not taken advantage of the work of the first or second Restatement of Trusts or of other jurisdictions' statutes. The proposed trust code codifies most of the relevant rules relating to modern trusts, making the law more accessible and understandable to the courts, lawyers, and other interested persons.

Many of the Montana statutes relating to trust law include different procedural provisions that are unnecessarily dissimilar. The proposed code unifies procedural rules.

The draft is well-organized, simplified, and comprehensive, and should serve Montana well into the 21st century. It eliminates inconsistencies and antiquated terms, clarifies administration, and is specific yet succinct. We urge your support of S.B. 333.

E. Edwin Eck
University of Montana
School of law

UNIFORM STATUTORY RULE AGAINST PERPETUITIES
Senate Bill No. 131

English Common Law Rule: "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest."

Purpose: Prevent property from being tied up for too long a time in trusts.

Example 1. A will has a clause which reads: "To those of my issue alive when the probate of my estate is complete."

Example 2. A trust reads: "Income to my aged Aunt Mabel for her lifetime, then income to Mabel's children, and upon the death of the surviving child, the trust is to terminate and the trust be distributed equally to Mabel's then living grandchildren." Mabel is 80 years of age and has two children in their 50's.

Both examples have provisions which violate the traditional English common law rule because of some very remote contingencies.

Criticisms:

1. Traditional English common law rule voids certain interests in property because of very remote possibilities.

2. Traditional English common law rule is very complex in its application. Even many professionals cannot apply the rule successfully.

Professor Gray:

"There are few lawyers of any practice in drawing wills. . . who have not at some time either fallen into the net which the rule [against perpetuities] spreads for the unwary, or at least shuddered to think how narrowly they have escaped it."¹

Professor Leach described the rule as a "technicality-ridden legal nightmare" and a "dangerous instrumentality in the hands of

1. Gray, The Rule Against Perpetuities p. xi (4th ed. 1942).

EXHIBIT 2
DATE 3-8-89
88 131

most members of the bar."²

Solution: Uniform Statutory Rule Against Perpetuities

1. Is the interest valid under the traditional English common law rule? If so, the interest is still valid.

2. If the interest is not valid under the traditional English common law rule, wait and see if valid within 90 year waiting period.

3. In the rare circumstance that the interest is still not valid, the district court can reform the disposition in a manner that most closely approximates the transferor's intention.

2. Leach, Perpetuities Legislation 67 Harv. L.Rev. 1349 (1954).

E. Edwin Eck
University of Montana
School of law

AN ACT TO GENERALLY REVISE THE UNIFORM PROBATE CODE
AND RELATED LAW
Senate Bill No. 331

Sources:

1. Amendments made by the Uniform Commissioners to the Uniform Probate Code in 1987.

Example: Section 11 of the Bill would require personal representatives of estates to notify interested parties that a probate proceeding is not supervised by a court and that an interested party may petition the court on matters concerning the estate.

2. The national Uniform Probate Code.

Example: Section 13 of the Bill would make Montana section 72-3-805 conform with the national Uniform Probate Code. 72-3-805(1) reads, in part:

Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than 60 days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar. Failure of the personal representative to mail notice to a claimant of action on his claim for 60 days after the time for original presentation of the claim has expired has the effect of a notice of disallowance [emphasis added].

3. A few of the changes are the result of my teaching estate planning at the Law School.

Example: Section 1 of the Bill would eliminate an inconsistency between the family law provisions (40-8-125) and the probate code provisions (72-2-213) as they affect inheritance and adopted children.

Endorsement:

Unanimously endorsed by the Tax & Probate Section of the State Bar Association.

CROWLEY, HAUGHEY, HANSON, TOOLE & DIETRICH

BRUCE R. TOOLE
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TERRY G. SPEAR
LAURA A. MITCHELL
SHERRY SCHEEL MATTEUCCI
CHRISTOPHER MANGEN, JR.
MICHAEL E. WEBSTER

ATTORNEYS AT LAW
500 TRANSWESTERN PLAZA II
490 NORTH 31ST STREET
P. O. BOX 2529
BILLINGS, MONTANA 59103-2529
TELEPHONE (406) 252-3441
FAX (406) 256-8526

OF COUNSEL
CALE CROWLEY
JAMES M. HAUGHEY
NORMAN HANSON
STUART W. CONNER

DANIEL N. McLEAN
ROBERT G. MICHELOTTI, JR.
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March 1, 1989

Senator Joe Mazurek
Montana State Capitol
Helena, MT 59601

Re: Senate Bill 180: Uniform Custodial Trust Act

Dear Joe:

I am belatedly responding after gathering comments from members of the Tax and Probate Council, and some trust officers, concerning the Uniform Custodial Trust Act. I hope that it is not too late for input.

Gerald Allen, an estate planning attorney in Butte, assisted me in surveying the comments of the Tax and Probate Council, which is the governing board of the State Bar Tax and Probate Section. I also spoke with David Servies, of First Trust Company of Montana, and other trust officers at Norwest Capital Management & Trust Co. I urged everyone I spoke to to write to you directly if they had specific comments regarding the bill. I was asked to respond on behalf of the Tax and Probate Section.

It is fair to say that no one I spoke to had very strong objections to the bill. What was interesting, however, was the almost uniform response that the Act is not needed, and would not likely be used much, if at all. The goals it seeks to accomplish can be attained through the use of durable powers of attorney and living wills under existing law.

Gerald Allen and Gregory Schwandt, of Great Falls, raised specific concerns about a couple of sections, particularly Sections 12 and 13, relating to liabilities of and to third persons. These sections should be closely examined to determine their effect, and amended accordingly, if the bill is to become law. Another question was raised concerning the involvement of brokerage firms in handling trust accounts. In many instances, stock brokers will be called upon to make judgments or give advice concerning the creation of the accounts, which will put them in the position of rendering legal

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advice. This is not a speculative position. My father is a stock broker in Butte, and when some of his clients have created gifts under the Uniform Transfers to Minors Act, he has been requested to explain what happens upon death of a custodian, death of a beneficiary prior to attaining the age of majority, and similar questions which should be answered only by an attorney. In the most recent example, my father was called by an attorney in general practice to explain those situations, so that the information could be passed along to the attorney's client. If this happens with gifts to minors, I would think that even more questions would be raised concerning custodial trusts.

We also have grave concern about inconsistency of this statute with the statute of wills. We all recognize that living trusts under existing law are already an exception to the statute of wills, but at least a person will seek advice from a qualified estate planning advisor concerning the use of a revocable living trust. One apparent intent of the Uniform Custodial Trust Act is to enable people to effectively have the benefit of a living trust without seeking advice. It appears to me that uniform custodial trusts under this Act increase potential for exercise of undue influence over incapacitated persons, particularly the elderly. The Act is somewhat inconsistent with the more restrictive guidelines enacted for guardianships and conservatorships which were in the news just a few years ago.

As I stated to you by telephone, we attorneys, trust officers, and others in the estate planning field, would have liked to have some opportunity to study this bill in greater detail, and to debate among ourselves the merits of the legislation. While no one is very strongly opposed against the bill, neither do they see a need for it. My greatest fear is that individuals will establish uniform custodial trusts without fully understanding the import of their actions, just as people now do with joint tenancy and other similar transfers without the benefit of competent advice. As a probate lawyer, I find myself frequently unravelling the unknowing but well-intentioned acts of decedents and their families, often at much greater expense than would have been incurred to seek competent advice in the first place.

I'm sure that you understand that the questions we raise are not in an effort to protect business for lawyers or other estate planners. Rather, these concerns are raised out of a genuine concern for what our clients may do without knowledge and advice.

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I appreciate your willingness to consider these comments. If you need further information, I would be happy to attempt to respond in greater detail, or to put you in touch with individuals who have raised some of these specific concerns.

Very truly yours,



DANIEL N. McLEAN
Chairman, State Bar of Montana
Tax and Probate Section

DNM/cr

LAW OFFICES OF
**CHURCH,
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GLENN TREMPER
MILTON O. WORDAL
JEANNIE YOUNG

OF COUNSEL:
BJARNE JOHNSON
WM. A. REID
CARTER WILLIAMS

*Admitted in Oklahoma

P.O. BOX 1645 • GREAT FALLS, MONTANA 59403 • THIRD FLOOR NORWEST BANK BUILDING • PHONE (406) 761-3000 • FAX (406) 453-2313

February 17, 1989

EXHIBIT 5
DATE 3-8-89
SB 180

Senator Joe Mazurek
Montana State Capital
Helena, MT 59620

RE: Senate Bill 180 - Uniform Custodial Trust Act

Dear Senator Mazurek:

I am an attorney with 7 years of experience in the area of wills, trusts, and estate planning. I have received and reviewed a copy of Senate Bill 180 proposing adoption of the Uniform Custodial Trust Act.

I have many concerns about the Uniform Custodial Trust Act. Unfortunately, the area of estate planning has become very complicated, and the Uniform Custodial Trust Act does not take into account many of these complications. It appears that the purpose of this bill is to help people avoid the necessity for probate and guardianship proceedings, and the concurrent attorney's fees and Court costs. I do not think that the Act is going to accomplish those purposes.

For example, suppose that John Smith has two children, Ann and Joe. He transfers \$100,000.00 worth of securities to Ann as custodial trustee for himself as beneficiary and to Ann and Joe as distributees on termination of the trust. Mr. Smith intends for the custodial trust to come into effect only upon his disability, but if he uses the standard forms as set out in Section 19 of the Act, it will become effective immediately. He won't be able to sell the securities without Ann's signature. I believe that people are going to use the Section 19 standard form, because to do otherwise would require going to an attorney, and after all, one of the purposes of the Act is to avoid attorney's fees, so they are going to resort to the least expensive method.

Now, suppose that Ann dies. Although Mr. Smith could designate a successor custodian, your standard form does not have that language. Now we have the problem of a custodial trust without a trustee. Mr. Smith could appoint a custodial trustee, but will he know that he has to do that? I doubt it. Also, assume that at the time of Ann's

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death, Mr. Smith is incompetent. He could not name a successor trustee at that point even if he wanted to. So, the persons are going to have to go into Court to have a custodial trustee appointed. That, in my opinion, will probably cost more than if Mr. Smith had gone to an attorney in the first place and had a proper trust instrument executed.

Now, assume that Mr. Smith dies. What does the custodial trustee do with the property? Let's assume that Ann left two minor children. It has been my experience that Mr. Smith would have intended for these two grandchildren to receive Ann's share, now that she is dead. However, the custodial trust form is silent in that regard. Ann has died, and Joe is the only remaining named distributee, and I believe that the custodial trustee will distribute the property to Joe to the exclusion of Ann's children.

Let me point out one other problem. Suppose that the \$100,000.00 worth of securities that have been placed into the custodial trust take a nose dive in price. The trustee decides to sell the stock and purchase new shares which are doing better. The trustee, not being advised by an attorney, buys the new shares in the name of John Smith. She should have bought them in the name of the trust, but she really does not know much about these matters, and she puts them in the name of Mr. Smith. The purpose of the custodial trust has now been defeated. I think it will be common that persons will put family members as trustees of these trusts, and that these family members really won't understand how the trust acts, and that mistakes like this will be made.

As the above scenario points out, there are many problems that the Uniform Custodial Trust Act does not address. Unsuspecting persons will attempt to use the trust without really understanding all of the consequences of their acts. In particular, the standard forms that are set out in the act will give rise to many of these problems because they are not detailed enough.

I believe that if a person wants to avoid the expense and delay of a probate, they should by all means use a trust. I, personally, am an avid fan of trusts. However, I think that only an attorney with experience in these areas can

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properly prepare a trust which will take into account all of the possible problems that may arise. A properly drafted trust will provide for successor trustees and for contingencies such as the death of a named beneficiary. The attorney will also see that assets are properly placed into the trust.

In conclusion, I don't think that many people will understand how to properly use the Uniform Custodial Trust Act, and as a result many problems will arise. Even if a person uses it correctly, it simply is not sophisticated enough to handle the many contingencies which might arise.

I would be happy to discuss this matter with you in more detail if you have any questions.

Sincerely,

CHURCH, HARRIS, JOHNSON & WILLIAMS

BY Kristen G. Juras
KRISTEN G. JURAS

KGJ/fmp

cc: Daniel McLean
P. O. Box 2529
Billings, MT 59103-2529



EXHIBIT 6
DATE 3-8-89
SB 180

1988-1989
MONTANA STATE LEGISLATIVE COMMITTEE

CHAIRMAN
Mrs. Molly L. Munro
4022 6th Avenue South
Great Falls, MT 59405
(406) 727-5604

VICE CHAIRMAN
Mr. Fred Patten
1700 Knight
Helena, MT 59601
(406) 443-3696

SECRETARY
Mr. John C. Bower
1405 West Story Street
Bozeman, MT 59715
(406) 587-7535

March 7, 1989

TO: House Judiciary Committee

FROM: Fred Patten, Vice Chairman, American Association of Retired Persons

RE: In support of SB 180 - Uniform Custodial Trust Act.

American Association of Retired Persons supports this act for the following reasons:

Problem: No simple way exists to establish a trust for the benefit of one's self or a third person. Benefits of trusts are not available to persons without extensive financial assets.

Solution: The Uniform Custodial Trust Act provides an informal means for seniors to manage and protect their property without losing control of that property.

Proposal: The Uniform Custodial Trust Act provides that any person may in writing:

1. Transfer any property for the benefit of himself or any other persons;
2. Name himself or any other person as trustee or as a beneficiary;
3. Instruct the trustee as to benefits;
4. Provide reimbursement for the trustee.

The trust may terminate upon written notice from the beneficiary or at the death of the beneficiary.

Position: The Montana State Legislative Committee of AARP believes that this act would be particularly beneficial to Montana's older citizens who want to provide for the management of assets in the event of future incapacity.

VISITORS' REGISTER

JUDICIARY

COMMITTEE

BILL NO. SENATE BILL 333

DATE MARCH 8, 1989

SPONSOR SEN. MAZUREK

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
<i>Lizileen Mazurek</i>	<i>VosM School of Law</i>	✓	
<i>Joan Mazurek</i>	<i>Trust Section - State Bar</i>	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.
PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

JUDICIARY

COMMITTEE

BILL NO. SENATE BILL 131

DATE MARCH 8, 1989

SPONSOR SENATOR MAZUREK

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Kathleen Macone	U of M - school of law	✓	
R. De De	Top Section - Steen Ben	✓	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

JUDICIARY

COMMITTEE

BILL NO. SENATE BILL 331

DATE MARCH 8, 1989

SPONSOR SEN. BISHOP

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Kathleen Magone	self / U of M Law School	✓	
Howard KRAVETZ	TRUST DIVISION MONTANA Bankers ASSN	✓	
Pete	Tax Section of Fed Bn	✓	

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COMMITTEE

BILL NO. SENATE BILL 180

DATE MARCH 8, 1989

SPONSOR SEN. MAZUREK

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Fred Patten	AARP	✓	

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