

MINUTES

**MONTANA SENATE
53rd LEGISLATURE - REGULAR SESSION**

CONFERENCE COMMITTEE ON SENATE BILL 023

Call to Order: By Senator Halligan, on April 16, 1993, at 7:31 a.m.

ROLL CALL

Members Present:

Sen. Halligan, Chair (D)
Sen. Bartlett, (D)
Sen. Aklestad (R)
Rep. Fagg, Chair (R)
Rep. S. Rice (D)
Rep. L. Smith (R)

Members Excused: None

Members Absent: None

Staff Present: John MacMaster, Legislative Council
David Martin, Committee

Discussion:

Sen. Halligan asked the House conferees to explain their reasons for striking the language on page 5.

Rep. Fagg said the House concern was the provision requiring a third person to be in the room when a child is going through an interview which would be very detrimental to a child. He said testimony showed that during the interview a child was scared anyway. He said it was the House's opinion that the more people in the room, the less likely the child will faithfully tell his or her story.

Rep. Fagg said amendment number 3 was a separate amendment which was a coordinating clause with another bill.

Sen. Halligan said from his experience in dealing with child abuse and neglect issues in Missoula, the cases which involve a possible criminal charge would obviously not involve the perpetrator. He said there would often be a trusted caretaker present so that the child would talk. He said although not required the presence of a trusted third person has been helpful in getting children to talk. He said law enforcement people usually try to have a therapist there during the interview. He said once the interview is finished it can not be repeated since the child would be traumatized. He said current language says "in any case", and the Senate did not feel it was an obstacle.

He said there may be cases in which it was difficult to find a caretaker, who was a comforting sort of person.

Rep. Smith asked if a third person would "always" have to be present. She asked what would happen if that trusting person could not be found, and would it be possible to include a definition of a trusted guardian which would clarify what type of third party was acceptable.

Sen. Halligan said at the hearing the court would examine who the third person was and how they related to the child.

Sen. Aklestad said his prime concern was to make sure that both sides, the child and the system, had equal opportunity. He said the system had not always worked with audio and video tapings where there has not been a third person there. He referred to a guardian ad litem, a professional person, a "level minded" person. He said the interview cannot be redone. He said the review of audio and video tapes are an "in house" situation, next a judge, and then at some point in time the accused gets to look at the tape. He said if the child has been "led" during questioning the damage would already be done and the reviewers might accept this leading evidence. Sen Aklestad said he wanted the third person present in the interview to be able to say, "perhaps the questioning is not going in a proper manner". He said it would be nice if the third person was someone the child knew but this may not always be the case. He said it should not be someone directly involved with the case. He said even if the person is not known to the child, for example a psychologist, it would not put the child in a burdensome position. He said there are many benefits to having a third person present to see that things are proper. He said the third person was one of the main features of the bill, and referred to correspondence he had received. He said the presence of a third person has so much potential to help and very little to hurt.

Rep. Fagg said he respected Sen. Aklestad's point of view. He said he also received correspondence in which the DFS, Department of Family Services, worker was not trusted. Sen. Aklestad said it was not always the DFS. He said it could be a school psychologist or counselor. Rep. Fagg said he was impressed with the DFS worker's in Yellowstone County. He said he had not seen the abuses that was brought out in testimony, and he said he believed these were isolated cases. He said this solution might be a "too broad brush of a stroke". Rep. Fagg said a guardian ad litem would be perfect for the interview. He said the problem was that it was often difficult to find guardians ad litem in the smaller counties due to financial considerations. He said logistically it would be difficult. He asked how a third person would be found, would someone from the street be asked to be the third person. He said he did not understand how the logistics of finding the third person would work.

Sen. Aklestad said a person would not be "grabbed" off the street. He said if a guardian ad litem was not appointed then another professional person such as a law enforcement person, or clergy could be appointed. He said there are probably others he was not mentioning.

Rep. Fagg asked if a specific member of the clergy would be called in for many different situations and perform this service frequently. He asked if that would be acceptable to Sen. Aklestad. Sen. Aklestad he did not think he would call one clergy all the time. He said there are many clergy in each town. He said if you wanted to focus on the clergy that you would call on different ones in different cases. He said he did not know the specifics and asked Senator Halligan for specifics.

Sen. Halligan said the clergy were the most available, but were often difficult to have testify in court because it would disrupt the relationship the clergy has with family. He said the clergy preferred to be the mediators and do the confidential counseling, but were reluctant to testify.

Rep. Fagg asked if the interview could include a social worker and a peace officer. Sen. Aklestad said yes. Rep. Fagg asked if it could include a social worker and a deputy county attorney. Sen. Aklestad said yes. Rep. Fagg asked if there just needed to be an additional third person present and if it did not matter who that person was. Sen. Aklestad said the person should be a professional, level-headed, well respected person. He said he included the guardian ad litem after talking with county attorneys and different professional people. He said a guardian ad litem was involved 95% of the time in these cases. He said that way other persons were not being asked to become involved. He said this might be more costly and an imposition on another person.

Sen. Halligan said the problem encountered in the past was the potential for coaching of children of tender years and of teenagers. He said the most difficult cases were those involving no physical evidence. Sen. Halligan said Sen. Burnett's bill was killed because it was too extreme. He said 97% of the time DFS does a great job. He said SB 23 would provide a check and balance system for the 3% of the time it did not work. He said the neutral third party was middle ground to try and remedy this situation. Sen. Halligan said perhaps the language for the third person needed to be worked on. He gave an example of how the system would work. He asked Senator Aklestad if he had concerns with the pre-hearing situation, the hearing situation, or could he differentiate between the two.

Sen. Aklestad said he could not differentiate. He said during these times people are upset at being accused, and the child is right in the middle of it. He said he could not tell if the first conversations were the problem. He said the letters he

received expressed resentment from people because they had been accused in the first place, but that was natural whether they were guilty or not. He said the social workers are not wrong the majority of the time.

Sen. Aklestad said the interview, plus the others features of SB 23 such as parental notification in timely manner were important. He said interviews were described to him where the psychologist used language that parents would not use in front of children. He said the interviewer, in a sexual abuse case for example, was doing this to try and make a dramatic point. He said sexual abuse cases usually cause the problem. He said a third party may have prevented that.

Sen. Halligan said the present language makes the third person's presence mandatory. He asked if inserting "whenever possible" into the language would help. He said this would place the burden on officials to explain why there was not a third person present and would at least allow the defense attorneys to point this out. He said the DFS social worker could also take this information into account.

Sen. Aklestad asked if the conferees were unwilling to restore the original Senate language to SB 28.

Rep. Fagg asked if a social worker was doing the interview, could a fellow social worker be the third party and if that would be acceptable.

Sen. Aklestad said that would not be acceptable for two reasons. He said: 1) There is a tendency to defend "our own peers", and 2) it would put the other social worker in the difficult position of having to judge a fellow social worker.

Sen. Bartlett asked for clarification if the second social worker would be from DFS.

Rep. Fagg replied affirmatively, and asked if the second social worker could be from another agency. He said there were many other available agencies that work with child abuse.

Sen. Aklestad said that could be possible. He said that was of the professionals which he had mentioned before, and the guardian ad litem which was used the vast majority of the time. He said there was some flexibility as to who the third person could be.

Sen. Halligan explained the procedure in Missoula for conducting interviews. He said in potential criminal cases there is often a third person from a law enforcement agency present who is trained in conducting interviews and related matters.

Rep. Smith said if the language for a third person was added some flexibility would be needed. She said the appropriate person would be the guardian. She asked if the language "or some other

appropriate person" would be acceptable. She said that would allow some latitude in obtaining a third person whether it be a trained law enforcement officer or whoever it might be. She said selecting the "third" person would provide a check and balance due to their qualifications. She asked if that definition would be too vague.

Sen. Aklestad said the language said "maybe the guardian ad litem", that the third person did not have to be the guardian.

Rep. Fagg asked Rep. Rice for her opinion since she was not a member of the Judiciary Committee. Rep. Rice said she like Sen. Halligan's proposal for a compromise language. She said she could see a circumstance where a third party was not available and the interview had to be conducted immediately. She said there are two different viewpoints on what type of person it should be. She said one favored a person the child trusts, the other would be objective to make sure the interview is conducted properly. She said she supported Sen. Halligan's idea to include "if possible" or something like that. She said this would indicate that a third party should be sought out but would allow flexibility to allow the system to work.

Sen. Aklestad asked Sen. Halligan for suggestions for terminology to amend SB 23. Sen. Halligan said the insertion of "whenever possible" might solve the situation.

The Committee discussed possible language to address the concerns of the Committee.

Rep. Fagg said a possibility would be to add the language that if there were not third party present then the interviewer would have to explain why there was no third party present.

Sen. Aklestad said the "third party" was the "guts" of SB 23. He said he wanted assurance that a genuine effort would be made to find a third party for the interview. He said an interviewer that would conduct an interview in less of a forthright manner could easily find an excuse to not have a third party present. Sen. Aklestad said he would like to see stronger language, but he did not know what it would be.

Rep. Fagg asked John MacMaster, Legislative Council, for possible language suggestions. Mr. MacMaster said he thought other language would be difficult since he thought it would be difficult to find a situation where a third person could not be found. He said if he was a defense attorney and there was not a third person present, he would ask that the tape and the interview be thrown out. He asked if there would be sanctions involved for not having a third person present, and said the sanction should be that the tape would be disallowed. He said the language "if possible" would not add very much since it would always be possible to have a third person there.

Sen. Halligan said he felt the initial language was strong which is why he proposed it. He said in a very rare case there may not be a third party.

Sen. Bartlett asked Ann Gilkey, DFS, to comment on the departments experience in this situation. Ms. Gilkey said she agreed with Sen. Halligan. She said there was usually a law enforcement officer and a social worker present. She said in the rare case an acceptable third party could not be found, someone could be "gotten from the street". She said her concern was the person should be qualified. She said if the third person has no knowledge in the case, listens to the interview and then is asked to testify in court, it could put that person in a very awkward situation.

Sen. Halligan asked if Ms. Gilkey agreed that the third party should be a professional person. Ms. Gilkey said the third person should be a professional and if possible associated with the case. She said the third person should be able to follow the case and not just be involved with the interview.

Sen. Aklestad asked if "extenuating" circumstances would apply to this situation.

Sen. Aklestad said he had mentioned a professional person. He said he wanted to clarify that could be a person that was "level-headed", who did not have to be a lawyer, doctor or professional person. He said he was trying to avoid the involvement of other people. He said he was not trying to dictate to the department and would be satisfied with open language to allow for flexibility. He said he did not think the department would have an unqualified person come in to be the third person.

Sen. Halligan said a "professional person" was already defined somewhere else in code and that list could be used.

Sen. Aklestad said that such a list could make it cumbersome to find a third person.

Rep. Fagg said the definition of professional person could place limitations on the DFS. He said Sen. Aklestad's concern was that a third person be there, for example, a rancher who has some common sense and could insure the interview was conducted properly. Rep. Fagg said he was not sure that a professional person was absolutely necessary. He said he would like to allow DFS as much authority as possible to find a third person.

Sen. Aklestad said he felt that the language "extenuating" circumstances would ensure that an effort was made to find a third person whenever possible. He said that "whenever" would not be strong enough. He said he wanted to ensure a third person was present in the interview. He said he wanted strong language that would still allow the DFS latitude.

Rep. Smith suggested the language "appropriate person if available".

Sen. Aklestad said he did not think language specifying the third person would be necessary. He said a third person would not need to be necessary 100% of the time, but if the third person was not present there needed to be a good reason.

John MacMaster said he did not have a problem in using "extenuating". He said he could not think of a synonym for "extenuating". He said perhaps "unless there are extenuating circumstances stated in the recording".

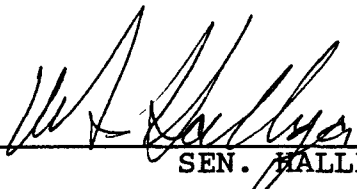
Rep. Fagg said providing an "out" along the line of extenuating circumstances would be sufficient.

Sen. Aklestad said he would agree with that as long as it worked legally, and that he preferred the language "extenuating circumstances".

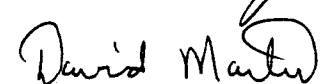
The Committee discussed the final language, unanimously agreed on the final language, and asked John MacMaster to draft the language. (Exhibit #1)

ADJOURNMENT

Adjournment: Meeting adjourned at 8:23 a.m.



SEN. HALLIGAN, Chair



DAVID MARTIN, Secretary

MH/dm

Conference Committee
on Senate Bill No. 23
Report No. 1, April 20, 1993

Page 1 of 1

Mr. President and Mr. Speaker:

We, your Conference Committee on Senate Bill No. 23, met and considered: House amendments to Senate Bill No. 23. We recommend that Senate Bill No. 23 (reference copy - salmon) be amended as follows:

1. Page 5, line .

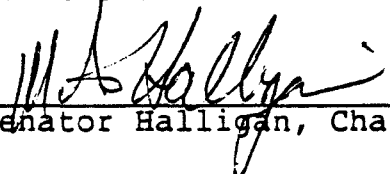
Following: line 24

Insert: "(c) If an interview with the child is recorded, either by means of videotape or audiotape, unless there are extenuating circumstances that prevent the presence of a third party, a third party, in addition to the social worker, county attorney, or peace officer conducting the interview, must be present during the interview. The third party may be the child's guardian ad litem if one has been appointed."

Renumber: subsequent subsection

And that this Conference Committee report be adopted.

For the Senate:



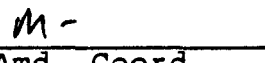
Senator Halligan, Chair




Senator Aklestad



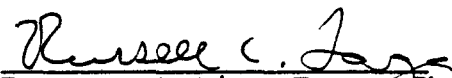
Senator Bartlett



M-
Amd. Coord.


Sec. of Senate

For the House:



Representative Fagg, Chair



Representative S. Rice



Representative Smith

ADOPT

REJECT

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Amendments to Senate Bill No. 23

Reference (salmon-colored) Copy

Requested by the First Conference Committee

Prepared by John MacMaster
April 16, 1993

1. Page 5, line .

Following: line 24

Insert: "(c) If an interview with the child is recorded, either by means of videotape or audiotape, unless there are extenuating circumstances that prevent the presence of a third party, a third party, in addition to the social worker, county attorney, or peace officer conducting the interview, must be present during the interview. The third party may be the child's guardian ad litem if one has been appointed."

Renumber: subsequent subsection

Exhibit # 1

SB 23

4-16-93