MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE D. CRIPPEN**, on February 7, 1995, at 10:00 AM

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Council
Judy Keintz, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: SB 286, SB 266, SJR 6
Executive Action: SB 278, SB 218

EXECUTIVE ACTION ON SB 278

Discussion: Amendments requested by the sponsor were handed out at the hearing. The amendments related to firearms. They narrowed the bill to state the police on the scene can seize only the firearm used in the assault.

SENATOR RIC HOLDEN asked **Valencia Lane** if it was her understanding that these amendments referred to only the firearm being used and not any other guns. **Ms. Lane** stated it would limit what the police could seize to any firearm being used in the assault itself.

CHAIRMAN BRUCE CRIPPEN commented that the amendment read "firearm used in the assault". This person could be charged with assault with a deadly weapon.

SENATOR LARRY BAER stated he worked on these amendments and he is satisfied with the amendments negating any infringement on second amendment rights.

SENATOR MIKE HALLIGAN commented his concern is for his clients who own weapons. The court, after the person is picked up, simply requests that the weapons be placed in a safe place. He fears that this may keep people incarcerated if there are other weapons in the home. **John Connor, Department of Justice,** stated that was an aspect he hadn't considered. The concern he has as a prosecutor is if there is more than one weapon in the house there is no guarantee that some other weapon can't be used to continue the assault. He feels that an officer, under terms of an arrest, has the authority to seize whatever he or she thinks is appropriate at the time of the arrest. The whole intent is to protect the victim.

CHAIRMAN CRIPPEN questioned what would prevent the offender from borrowing or buying a gun. The whole point is to get the offender out of the house. If the offender is inclined to do it again, there is no way to keep the family safe. **Mr. Connor** stated he was looking at this from the protection of the victim. When looking at guns in the home, you are talking about something once removed. **CHAIRMAN CRIPPEN** further commented that the offender could use knives, hammers, or any other dangerous weapon. **Mr. Connor** stated that is why they suggested leaving the language at firearm instead of weapon. Anything could be defined as a weapon.

SENATOR BAER stated this is a dead bill unless the amendments are incorporated into it. You can't infringe upon someone's constitutional rights from a prosecutorial standpoint because of your interest in protecting the victim. You may take away the gun and leave the rest alone.

SENATOR SUE BARTLETT stated she understood if the offender had a concealed weapon permit the court may enforce a different statute if a firearm was used in the assault. The other statute has to do with revoking or denying the concealed weapon permit, 45-8-323. In this instance a revocation would occur if circumstances arise that would require the sheriff to refuse to grant the permittee an original license. One of the grounds on which a permittee could be denied an original license is if the individual has been convicted in any state or federal court of a crime punishable by more than one year of incarceration or regardless of the sentence that may be imposed, a crime that includes as an element of the crime an act, attempted act, or threat of intentional homicide, violence, bodily or serious bodily harm, unlawful restraint, sexual abuse, sexual intercourse, or contact without consent. She would want to know

that the crime of domestic violence would fall within that grouping so that there are grounds for irrevocation if the court feels that is warranted.

SENATOR STEVE DOHERTY asked **Mr. Connor** to comment. **Mr. Connor** stated that the draft of the bill had a subsection, which was taken out and that they objected to, which said "can seize any weapons which are in the house." They pointed out that law enforcement could not take something unless it was reasonably related to the offense. They would like to use the language in the law now, if the weapon was used or threatened to be used in the assault, it should be seized. Only the weapon which was threatened to be used or used in the assault would be seized.

SENATOR BARTLETT stated that from a prosecutorial point of view the words "used" or "threatened to be used" in the alleged assault are words **Mr. Connor** would prefer to see remain in the bill and the words "or threatened to be used" are stricken by the amendments.

SENATOR AL BISHOP stated that when dealing with a bank robber they would be dealing with the tools of his trade. He is not sure anything is being accomplished with one gun being taken from a home if there are more weapons in the home.

Mr. Connor commented the best way to handle this would be to take (1) out entirely. The officer can decide under the circumstances whether the weapon was used and, if it was used, if it needs to be taken.

SENATOR BAER commented they were dealing with an alleged assault. If it can be substantiated that he did use the weapon to threaten, the weapon should be taken into custody. There is far too much room for abuse to take the entire gun collection.

CHAIRMAN CRIPPEN stated that if a weapon is threatened to be used, the weapon should be taken.

Motion/Vote: **SENATOR LORENTS GROSFIELD MOVED TO ADOPT ALL SENATOR BROOKE'S AMENDMENTS EXCEPT NO. 6.** The motion **CARRIED UNANIMOUSLY** on oral vote.

Motion: **SENATOR DOHERTY** moved to **AMEND SB 278.**

Discussion: **SENATOR DOHERTY** referred to page 10, lines 20 and 21, and suggested striking the words "with a person of the opposite sex". The sentence would end with the word "relationship". This would mean that same sex relationships would be covered in domestic abuse. He has a letter from the Missoula County Police Department in which the police chief indicated that it is a fact of life that we should acknowledge domestic abuse in same sex relationships. He also had a letter from the Park County Attorney in Livingston in which she recommends the deletion of those words because she has had

complaints made to her office about domestic violence and stalking between partners of the same sex.

SENATOR VIVIAN BROOKE stated same sex relationships should be protected under partner and family assault.

CHAIRMAN CRIPPEN asked **Mr. Connor** what the current law was when there was violence, including a weapon to threaten, between individuals of the same sex. **Mr. Connor** stated there are other statutes from misdemeanor assault to aggravated assault.

SENATOR BARTLETT asked **Mr. Connor** if the other statutes also offered restraining orders and required counseling. **Mr. Connor** stated they did not. The only thing which might be possible is for the court to impose some sort of condition as a bond condition.

CHAIRMAN CRIPPEN clarified the amendment. If there are two individuals of the same sex living together it brings them into the domestic abuse law. He cannot stand by this bill if the amendment is put in because it goes way beyond the intent of the bill as originally drafted.

Vote: The motion **FAILED 3-8** on roll call vote.

Discussion: **SENATOR REINY JABS** questioned why the offender would be able to keep his gun permit if he was convicted of domestic abuse with a weapon. **SENATOR BAER** stated that anyone who possesses a concealed weapon permit does so under privilege and if they violate the law with a firearm, they immediately have their permit revoked.

SENATOR LORENTS GROSFIELD stated 45-8-323 reads that a permit to carry a concealed weapon may be revoked or its renewal denied by the sheriff of the county in which the permittee resides if circumstances arise that would require the sheriff to refuse to grant the permittee an original license.

SENATOR SHARON ESTRADA stated she had a problem with page 10, line 19, "persons who have a child in common". She would like it to read "persons who have a child legally in common".

SENATOR BROOKE commented that there was a case in Missoula where two people had a child in common. They had no relationship at all. The man was stalking the woman. The city attorney was familiar with this case and felt this definition was not broad enough to cover that situation.

Motion/Vote: **SENATOR BARTLETT MOVED SB 278 DO PASS AS AMENDED.**

Discussion: **SENATOR HOLDEN** stated counseling sessions could go on for a long time. Where is the line drawn?

CHAIRMAN CRIPPEN stated the way he read the bill it gave the judge the discretion to look at the financial resources and future ability of the offender.

SENATOR GROSFIELD asked what "counseling costs" would mean.

Diane Tripp commented there was a required 25 hours of counseling for the abuser. The rest of the counseling is for the victim as the court sees fit if the abuser is able to pay. They are trying to make the abuser accountable for his or her actions.

SENATOR BAER stated it was in the jurisdiction of the court to award restitutionary costs. The terms "counseling costs" would be equitably determined by the judge at the time and limited to those costs which he felt were appropriate for restitution to the victim.

{Tape: 1; Side B}

SENATOR BARTLETT stated that **SENATOR HOLDEN'S** suggested amendment, page 11, line 29, striking all the words "in addition to required counseling and fines" might clarify the matter. The provisions in (5) are in addition to any sentence imposed under (3) and (4). Subsection 3 is the fine and jail time. Subsection 4 is the required counseling. Lines 5 and 6, (4) (a) already says "An offender convicted of partner or family member assault shall be required to pay for and complete a counseling assessment . . . a minimum of 25 hours of counseling." This would limit (5) to payment for costs incurred by the victim. If the court finds the offender able to pay he could be ordered to do so.

Motion\Vote: **SENATOR HOLDEN MOVED TO AMEND SB 278.** On page 11, line 29, after the word cost, he suggested putting a period and striking the rest of the sentence. The motion **CARRIED UNANIMOUSLY** on oral vote.

Discussion: **SENATOR HOLDEN** referring to page 18, line 1, asked if "shall" should be changed to "may". **SENATOR BROOKE** stated that would be no problem. Under federal regulations for Medicare and Medicaid, domestic violence assistance is now being required. On the next line, "any legal rights" the word "any" could be deleted. **Valencia Lane** stated that the notice requirements which start on page 17, Section 20, is a notice requirement that health care providers would give. There is a very similar requirement on page 14 which is a Notice of Rights that peace officers have to give when they arrest a suspected abuser.

Motion\Vote: **SENATOR DOHERTY MOVED TO AMEND SB 278.** Page 18, line 1, the word "shall" would be stricken and the word "may" inserted. The motion **CARRIED** on oral vote with **SENATORS BAER and CHAIRMAN CRIPPEN voting "NO".**

Discussion: **Valencia Lane** clarified the amendments. Page 18, line 1, to change "shall" to "may" in the notice that health care providers have to provide, however, this is mandatory on page 14, in the Notice of Rights to Victims which peace officers have to give.

Motion\Vote: **SENATOR HALLIGAN MOVED SB 278 DO PASS AS AMENDED.** The motion **CARRIED UNANIMOUSLY** on oral vote.

EXECUTIVE ACTION ON SB 218

Motion: **SENATOR HALLIGAN MOVED TO AMEND SB 218.**

Discussion: **CHAIRMAN CRIPPEN** explained the amendments, **EXHIBIT 1**

One of the reasons the landlords brought this bill is that courts have been interpreting that the time involved in all instances was that the tenant had 90 days. **CHAIRMAN CRIPPEN** stated that was not what they agreed upon two years ago. The 90 days was for page 4, (j) which referred to a legitimate business reason. If there is a change in use of land, then the time was extended to 180 days. There are times when nonpayment of rent required a shorter period of time. Page 3, Section 3 was eliminated to handle this. The crux of the matter was on page 4. They went through the bill and stated what the time limitations were. On page 4, line 2, (1) A landlord of a mobile home park may terminate a rental agreement only by the following procedure set forth in 70-24-422 except as specifically provided in this section. That is fourteen days unless stated otherwise. There are exclusions to the 14 day time limit. Nonpayment of rent would allow for 15 days. In the late payment of rent, if this has occurred three or more times within a 12 month period, the landlord gives notice and the tenant has 90 days to terminate. If this section has been violated, they must move immediately. When there has been a violation of a mobile home park rule which creates immediate threat to health and safety, the landlord has the right to demand that situation be remedied within a 24 hour period. Disorderly conduct would be a 14 day time period. Conviction of a state or local ordinance violation which would be detrimental to the health, safety or welfare of other residents would fall into the 14 day time period.

Greg Van Horst, Montana Housing Providers, stated that with respect to 436, the amendment clears up some specific issues with regard to notices of termination. He had some concerns with the amendments. On page 2, with respect to a situation where the trailer is owned by the renter and in fact the renter simply rents space in a mobile home park, he understands that situation. There are certain circumstances where a pet could be causing damage to the real property. He has a problem with the suggestion that only so many people can reside in the trailer, even though the trailer is owned by the tenant. The individual owning the real property, services that trailer with respect to sewage and water. Under those circumstances there are specific

loading concerns that may be exceeded if additional people are moved into the trailer. The trailer park owner is responsible for those violations. **CHAIRMAN CRIPPEN** stated page 4, (c) should cover that. **Mr. Van Horst** stated the Montana Housing Providers are concerned with respect to the amendments suggested on page 4, Section 3, 70-24-436 as follows: Line 9, page 4, it appears that notice periods have changed for late rent, late charges or late common area maintenance fees from 14 days to 90 days. The only concern is that they must wait for the third violation, the third late payment, before an additional 90 days is offered. Should they wait 90 days after this has been violated three times? There could be a cash flow problem with the underlying mortgage. They ask that the time period be shortened. Line 16, page 4, two or more violations of the same rule allowing 90 days termination. The concern is for the community. An example would be a barking dog. If there is a double violation of the same rule, the concern for the community would be 90 days which is too long. He asked that that be changed back to 14 days. Line 20, which allows 30 days for disorderly conduct that results in the disruption of rights, poses the same community concern. To allow another 16 days could significantly infringe upon the law abiding member's ability to enjoy a peaceful surrounding. He asked the committee to consider changing the suggested 30 days back to the 14 days.

SENATOR HALLIGAN asked **CHAIRMAN CRIPPEN** where the 90 day requirements in (b) and (e) came from. **CHAIRMAN CRIPPEN** stated they used the minutes of the meeting two years ago. The 90 day period may be too long. It takes longer to move a mobile home than it would take to move out of an apartment. In (g) we have current language and the only change would be in the time allowed. **SENATOR HALLIGAN** would like to see the bill move out of committee and allow the parties to negotiate before the hearing in the House. We do need to have specific notice provisions in the bill to give guidance.

HEARING ON SB 286

Opening Statement by Sponsor:

SENATOR EVE FRANKLIN, Senate District 21, Great Falls, presented SB 286 in behalf of attorneys practicing in Great Falls who came across some problematic issues in parentage and paternity cases in Great Falls. This will permit a vehicle in the law to allow for collection of costs related to determining paternity.

Proponents' Testimony:

Jim Elshoff stated his purpose in being a witness today was to make an argument in favor of enacting a statute under the Uniform Parentage Act which would provide for attorney fees and court costs to the prevailing party. He submitted his written testimony to the committee, **EXHIBIT 2**. California, Colorado, Hawaii, Minnesota and Wyoming are the only states which have

enacted this section. Montana has omitted this section entirely. By omitting this section and precluding mothers and their children the opportunity to be reimbursed for attorney fees and court costs, tends to create a suspect classification of persons which distinguishes legitimate children from illegitimate children. In the 1990 Sasse case, where the subsection in 40-6-108 was stricken down, the 1991 Legislature made the change but that change was not reflected in the actual document itself in the statute. It was changed in 1993.

Opponents' Testimony: None.

Informational Testimony: None.

Questions From Committee Members and Responses: None.

Closing by Sponsor:

SENATOR FRANKLIN offered no further remarks in closing.

HEARING ON SB 266

Opening Statement by Sponsor:

SENATOR BRUCE CRIPPEN, Senate District 10, Billings, presented SB 266. This bill brings parity to the pay scale for district court judges and justices of the Montana Supreme Court. Currently, Montana ranks 50th in pay scale to district judges and justices on the Montana Supreme Court. In some counties, the county attorneys who practice before the bar make more money. The reason for that is an automatic cost of living adjustment to their salaries. This matter has come before the legislature previously. This bill would raise district court judge's salaries from $63,000 to $72,000 a year in four installments over the next two years. The Montana Supreme Court Justices would have the same procedure raising their salaries from $64,452 to $77,492. The bill phases in an increase. In 1998, a judicial survey would be made by the Department of Administration of both district court judges and supreme court justices in our neighboring states. The states would be North Dakota, South Dakota, Wyoming and Idaho. They would determine the average salary and apply that to the rate scale under the bill. **SENATOR CRIPPEN** provided handouts which gave the pay scales of judicial salaries in the states mentioned, **EXHIBIT 3** In 1994 there were approximately 30,000 filings in district court. That is up from 27,000 filings in 1993. A lot of highly qualified attorneys are not in the position to take the drop in pay necessary to serve as a district court judge or supreme court justice. They are the losers as well as the people of Montana. The legislature voted a raise in pay in 1991. This bill will set in law a procedure which will deal with this situation. Former State Senate President Jack Galt was unable to attend but would like to go on the record as supporting SB 266.

{Tape: 2; Side: A}

Proponents' Testimony:

Jean A. Turnage appeared on behalf of the Judiciary of Montana and as Chief Justice of the Supreme Court. He spoke in support of SB 266. This is a vital step that we must be taken if Montana is going to maintain her fine judicial system. Montana deserves a first-rate judicial system. Inadequate pay undermines the judicial system by deterring the best qualified and experienced attorneys from seeking judicial careers. Judicial salaries in Montana are dead last in this country even behind the U.S. territories and neighboring states of Idaho, Wyoming and North Dakota and South Dakota. The average Montana lawyer, the group from which judges are drawn, makes substantially more than judges. Montana judges, unlike any other public servant, are prohibited by Article VI, Section 9 of the Constitution of Montana, from having any outside earned income. They are not allowed to supplement their judicial salaries with outside employment and they cannot practice law. This distinguishes these public officials from any other public official either elected or appointed. The other members of our system of government can have whatever earned income they can work into their position. In addition, in order to draw judicial retirement, the judges must be available to serve as a retired judge when called upon. Their pay for this service is reduced approximately by one half of the amount of their retirement benefits. The judicial system is one of the three constitutional separate and equal branches of government. In this biennium there is a recommendation that the total spending authority granted government in the next biennium will be six billion one hundred seventy one million dollars. The judicial branch of government's portion of that has been authorized at .003 or 3/10 of one percent of government spending. The Constitution and all of the statutes including the bills that you are hearing this session, would not amount to anything other than a reference library if it wasn't for the courts that interpret and uphold those provisions. The courts are an important portion of a part of the lives of all of us in Montana.

Jerome Anderson, an attorney in Helena, represented the Montana Bar Association. The Bar Association strongly supports SB 266 in order to provide a compensation plan for the judiciary that will be consistent with the compensation in our adjoining states and that will continue and increase the level of interest of members of the Bar to seek these positions. The Bar Association has been consistent over the years in support of legislation designed to alleviate the financial sacrifices made by many who choose to enter the public realm to serve at the district and Supreme Court level. He has had an abiding and continuing interest in the judiciary and its operation since his father first sat on this Court 56 years ago. During his 47 years of practice in Montana,

including 8 years in the state legislature, he has had a constant and deep respect for those who having built up and conducted a successful practice and then leave the private sector to serve on the bench generally at considerable personal sacrifice. Once a lawyer moves to the bench, he loses his practice which he has built up and established over the years. When he leaves the bench, he has no practice to return to. In general he is then at an age level where it is difficult to start over again. Thus the desire or the decision to enter the judicial service is significant in the sense of economic stability and the risk of the stability of a person who makes that decision.

District Judge Tom McKittrick stated he is in his 12th year as a judge from Great Falls serving the 8th Judicial District. The Constitution provides for a strong and independent judiciary. He represents the 3rd branch of government. Many times he is asked what judges do? A judge tries to right wrong. There is tremendous potential for good and for harm in the position that he holds. This committee and this legislature, not unlike a judge, is in a position to right a wrong. As you have already heard, Montana judges are the lowest paid judges in the entire nation. This is not right. It will ultimately weaken and cause serious harm to our third branch of government. He is respectfully seeking parity with our neighbors within the region which is made up of North Dakota, South Dakota, Wyoming and Idaho. It is fundamental in this country that a person is paid a salary commensurate and proportionate to the responsibility which that employee is required to bear. It follows, that the more responsibility the employee experiences and exercise, the higher salary he or she is entitled to. Montana judges are not being paid adequate compensation for the responsibility they are required to exercise day in and day out in performing our duties. They are approximately $20,000 below the national average in salaries for judges. Regionally they are approximately $10,000 below the average when comparing the salaries to North Dakota, South Dakota, Wyoming and Idaho. SB 266 is an attempt to achieve parity. In youth court if a child is found to be abused or neglected, judges are called upon to terminate parental rights. In youth cases, the judge may be called upon, when a youth has committed a criminal offense, to place that child in Pine Hills or in some other secure setting or to transfer that youth to adult court to face a prison sentence. Divorce cases can be the toughest and most dreaded type of case that a judge can handle. They are called upon to divide up a marital estate and determine where and with whom children shall live. It is not unusual to be called upon to divide a multimillion dollar farm ranch operation which may have been in the same family for 3 or 4 generations. This division can include livestock, machinery, crops, water rights, CRP payments and the home. The families involved are under great stress during this difficult process. Judges are called upon to determine whether or not a person is a danger to himself or to others. At a sanity hearing a person could be committed to Warm Springs or some other facility if he or she is found to be mentally ill. Judges are called upon to sit on civil

cases and civil trials, situations where there is alleged to be personal injury or property damage due to negligence of another. Automobile accidents, contract disputes, federal employee liability cases, railroad accidents, chronic liability, accountant and medical and legal malpractice cases all involve civil disputes. The stakes are high. They can run into the millions of dollars, not to mention the lives, reputations and careers of those people involved. They are called upon to determine whether or not laws passed by this legislature are constitutional. In the area of criminal law they are called upon to issue search warrants, which is an authorization for the police or sheriff to search a person's home, car, or body and seize evidence. This can include drawing blood, hair or urine samples from a suspect. They issue arrest warrants and set bail for those who are taken into custody. They accept changes of pleas and must determine whether or not the person is properly represented. If a person is found guilty, they must sentence that person. This could involve probation, jail or prison. In extreme cases they may be called upon to sentence someone to death. Judges duties require constant study and attendance at continuing legal education seminars to keep abreast of the changes in the law, the rules of evidence, the rules of procedure, new technology and recent scientific information such as discoveries involving DNA.

Ward Shannahan, an attorney and past president of the Montana Law Foundation, spoke on behalf of the Board of the Montana Law Foundation. The Montana Law Foundation was set up by members of the State Bar of Montana to teach high school and grade school students about the law and raise money for grants for that purpose. He decided not to run for the Supreme Court in Montana. He is finishing his 37th year in practice. Serving on the Supreme Court would have involved a 35-40% pay. His main concern was the $100,000 to $150,000 it would take to run for office on a state-wide basis. Those are things that we have to keep in mind. We do not have an appointed judiciary in Montana. It is an elected judiciary and in the case of the Supreme Court, the judges have to run on a state-wide basis. That is something which needs to be considered when you have family obligations, and children in college. He would appreciate the opportunity to be on the Supreme Court of Montana or to serve as a district judge. He added that Mr. Russ Hill of the Montana Trial Lawyers Association asked him to pass on his endorsement for the bill.

District Judge Ted Lympus testified in support of SB 266. He spent 13 years as a Flathead County attorney before being appointed by Governor Stephens to the district court bench in 1992. As a former county attorney he expressed his observations with respect to the extremely varying and different responsibilities of those two respective positions. The parity, with respect to county attorney's, is almost identical to that of district judges and in some instances it may be higher because of the effect upon the part time county attorneys' ability to earn additional income in their private practice. If things do not

change, in a couple of years the county attorneys will have a salary which exceeds that of the district court judge. He does not suggest that county attorneys ought to be paid less. There was a considerable change in the responsibilities that he had to assume when he left the county attorneys office which had five deputies and a number of people as a support staff, to become a district court judge without any deputies. The responsibilities, as Judge McKittrick has mentioned, are great. Most of the people in this state see judges merely as presiders over criminal hearings, the most difficult responsibility of district judges is to preside as an arbitrator involving disputes between people who were once in love and had children who are going through a divorce. The Flathead County had more domestic relations cases filed in 1992 and 1993 than any other type of case. There have been very few nights since he became a district court judge that he has had a good night's sleep. One of the purposes of the proposed legislation is to make the position of district court judge and supreme court justice more competitive so that people who are most uniquely qualified by age, experience and station in life can realistically apply or run for those positions and assume them without undergoing a drastic financial catastrophe. It was not difficult for him to become a district court judge and assume the responsibilities and restrictions with respect to income because he was a county attorney. He worked for the government and did not have a private practice in which he had invested that he would have to walk away from. It is not healthy for the judiciary of any state to be made up entirely of former prosecutors or government lawyers, those who are most able to assume the position. It is not healthy for this judiciary to be made up of people who have been in the private practice but are approaching or nearing retirement. The passage of SB 266 is a great stride towards strengthening the judiciary.

Chris Tweeten, Chief Deputy Attorney General for the State of Montana, expressed their support for SB 266. They do think it's significant that Montana in recent years has established a system of market based compensation for public employees. One of the groups that has been excluded from that has been the judiciary. They view this bill as moving in the direction of a market based concept for establishing the salaries and compensation for district court judges and supreme court justices which would be very welcome and appropriate move to make. Those who serve in one of the three branches of government have a variety of different opportunities and obligations to express their respect for those who serve in the other branches of government. That is the essence of a government of separated powers. There is no better way for you to express your respect for the judicial branch of government than to remove the setting of judicial salaries from the political scene and to establish, as this bill does, a mechanism for insuring that their salaries are set fairly and that they reflect the salary levels that are paid for comparable service in surrounding states.

Bob Gilbert, Montana Magistrates Association, spoke in support of this bill.

Jacqueline Lenmark appeared as a pro bono lobbyist for the State Bar of Montana and as a lawyer who has had the privilege of practicing before all of the judges who are here supporting the bill today. The judicial system in the United States is the one by which all other judicial systems are measured and the position of judge or justice within that system is the one that requires the greatest responsibility and the most extraordinary personal wisdom and discretion that is demanded from any individual or institution. The men and women who serve in those positions deserve to be compensated in a manner that honors that responsibility and wisdom.

David Owen, Montana Chamber and Montana Liability Coalition, stated their support of SB 266.

Joe Roberts, Montana County Attorneys Association, stated they supported a strong and independent judiciary through SB 266.

Opponents' Testimony: None.

Informational Testimony: None.

Questions From Committee Members and Responses:

SENATOR HALLIGAN asked if this was a general fund expenditure which would occur after July 1 of each year?

SENATOR CRIPPEN stated it was.

SENATOR HALLIGAN asked **SENATOR CRIPPEN** if he had talked with his leadership in terms of the contingent voidance rule and determine how that will affect this legislation?

SENATOR CRIPPEN stated he had interpreted the contingent voidance rule as decrease in revenue. This is not a decrease in revenue.

SENATOR JABS referring to an average salary, asked if there was any other formula which could be used.

SENATOR CRIPPEN answered that all four of these surrounding states have a different method by which they determine the salary of their district court judges or supreme court justices. They are essentially incorporating a portion of all of those and taking an average.

SENATOR JABS asked if judges have to completely separate themselves from any business or corporation.

SENATOR CRIPPEN stated they could be stockholders in publicly held companies and maybe, for that matter, even private held companies. I think there are some ethics problems that arise in

that area. But as far as attaining a personal remuneration for practice of law, counseling, things of that nature, they are precluded from doing that.

SENATOR ESTRADA asked why may a justice's salary not be reduced.

SENATOR CRIPPEN answered that the salary of a constitutional officer, whether that be a judge or the governor, cannot be reduced.

SENATOR DOHERTY stated that the average salary in Montana is about $15-16,000. He asked how he should explain to his constituents why it's a good idea to pay judges a princely sum when they are making not as much?

Judge McKittrick stated they were talking about responsibilities. and duties. If you ever look down the barrel of a gun, you might get the sensation of what we feel when we take children away from their parents or we divide up the farm. He felt it was unfair to separate judges or to include them in a bureaucracy or in the average population.

Closing by Sponsor:

SENATOR CRIPPEN stated there were a lot of proponents for a good reason. Most of them have been through the process and they have come to the same conclusion that it's time to set this issue at rest. We are dealing with an equal and separate branch of government. We have the responsibility, under the law, under the Constitution, to do what we're doing.

{Tape: 2; Side: B}

HEARING ON SJR 6

Opening Statement by Sponsor:

SENATOR BROWN, Senate District 40, presented SJR 6, which is a joint resolution of the Senate and House of Representatives of the State of Montana pledging Montana's support for and intent to participate in the Conference of the States. The bill states that the Constitution of the United States establishes a balanced compound system of governance and through the 10th amendment reserves all non-delegated and non-prohibitive powers to the states and to the people. The second paragraph states that over many years the federal government has dramatically expanded the scope of its power and preempted state government authority. When the Constitutional Convention, which resulted in the drafting of our Federal Constitution, convened in 1789 there were a couple of compromises that are important in understanding how our system of government came into being. One of them is sometimes referred to as the Connecticut Compromise or the Grey

Compromise and that settled the conflict between the states with large populations and the states with small populations. That resulted in the Senate which represents the states as separate entities regardless of population so that the large states and the small states have equal representation. The legislatures elected the Senators to represent the states and then the people were represented in the House of Representatives which was elected directly by the people. The state with the larger populations had more representatives than the states with smaller populations. The idea was that we balanced the interests of the states as separate political entities with the interest of population, or the people at large. The second compromise resulted in what we generally understand is the compound system of governance. That is what it was referred to by Madison. And the compound system of governance was designed to create a system that would work, evolving out of the Confederation that existed prior to the establishment of this Constitution. The criticism of the Confederation was that it was too weak. It didn't have any central power to tax, to regulate trade between the states, to coin currency, to establish a system for delivering the mail, etc. There was a concern that the foreign powers would come in and pick off the states one at a time and that we would lose our newly won freedom. So, a Constitutional Convention was convened to work out the solution to this problem. The compound system of governance was the second great compromise that emerged from that Constitutional Convention. The people who wrote the Constitution decided to give the new federal government significant power that the Articles of Confederation have not given to the Confederation which was the first American government. They didn't want to concentrate all that power in one place. Washington was the one who said that government powers are like fire, they can be very useful when controlled. Uncontrolled, it can be very dangerous. They then divided the power in this new federal government into three branches. Each one of them presumably co-equal in terms of their power. You had the Legislative Branch, the Executive Branch and the Judicial Branch. Combined they have great power. Separately they have almost no power so they have checks and balances on each other. The problem was these states were brought voluntarily from the Confederation into this new union of government. There were two levels of government, or layers of government. The federal government had enumerated powers. The power to make war and make treaties, the power to deliver the mail, the power to regulate commerce. The 10th Amendment was added on to the Constitution to make it clear that anything not specifically enumerated to the federal government in the Constitution, or prohibited from the federal government was a power of the states or of the people. Beginning then we had a more pro-active, more aggressive, more assertive federal government. During the New Deal Period, the Great Depression, and in response to the Second World War, the government further expanded it's powers into the alphabet agencies which controlled. Most of this was done with the acquiescence of the states. The third big wave of federal encroachment into the states part of the balance of powers occurred during the Great Society Period

when the federal government declared war on poverty. The states were recipients of federal dollars. The state governments rather eagerly participated in these federal programs in order to get money. But the result was that they agreed to abide by the federal strings and the federal conditions which were attached to the money that they received. In this third period in American history, the federal government moved into the domain that should probably have been reserved to the states if the 10th Amendment were interpreted literally. That brings us to where we are today and the resolution we have before us is a response to this. It's the brainchild of two governors, Governor Michael Levitt of Utah who is a Republican and Governor Ben Nelson of Nebraska who is a Democrat. They were able to get a resolution passed by the Governor's Conference. It passed unanimously in support of the concept of having this Conference of the States. The Conference of the States is what's called for in SJR 6.

The bailments which have been lost, especially since the Great Society Period, are to be restored by the Conference of States. Balance will only be restored in the way intended by Madison, Jefferson and Hamilton, by the original founders of the federal system, when the states take the initiative. In this quest, state and local leaders face what can best be described as a dilemma of extremes. At one extreme is the effort currently underway consisting mostly of complaining, hoping and waiting for more flexibility. Congress has paid lip service, but little has changed. At the other extreme, some activists are calling for states to convene a Constitutional Convention, a politically unlikely event where that is fraught with danger and opposition. The purpose of this paper is to offer a middle ground between the two extremes. This plan must be more forceful and assertive than hoping and complaining and waiting, but not so radical as a Constitutional Convention. That's what the Conference of States would try to be. There's concern that the language in the proposed resolution might not be clear as far as the Conference is concerned and that there is still some concern that the Conference might be an attempt to be a Constitutional Convention. I don't think that's the intention of anyone who came up with this idea, Governor Levitt or Governor Nelson. This same matter came before the Colorado Senate a few days ago. The Colorado Senate proposed an amendment to the resolution, identical to this one, before their legislature which is designed to dispel this problem. It would just read as follows. Adoption of this resolution does not constitute an application by the Legislature of Colorado for the calling of the Federal Constitutional Convention within the meaning of Article V of the Constitution of the United States. Article V is the part of the Constitution that spells out the mechanisms for amending the Constitution. **SENATOR BROWN** presented the amendment to the committee **EXHIBIT 4.** The Conference would meet after 26 states have passed this resolution or a resolution extremely similar to this, confirming the idea of wanting to become involved in the Conference of the States. After the 26th state has adopted this resolution, the Conference would convene and that's anticipated to be some time

late this summer or early this fall. How would the Conference of States attempt to restore the balance of federalism in our system? They would focus on the process of our government to clarify the relationship between the state and national levels of government within the federal system. He further presented examples of process amendments that have already been suggested for the Conference of States, **EXHIBIT 5.** For example, adding a clause to Article V that would put states on equal footing with the Congress in proposing Constitutional Amendments. It would provide a more direct method for states to propose Constitutional Amendments than the unworkable and never used Constitutional Convention Process. The form clearly intends states to be able to initiate constitutional reform as well as ratify amendments proposed by Congress. Under this amendment, if it were proposed, 3/4 of the state legislatures could propose an amendment to the Constitution that would become valid unless within a two year period Congress rejected the amendment by 2/3 of the votes of both Houses of Congress. In Article V, the only way the Constitu tion has ever been amended by 2/3 of the members of the House of Representatives and 2/3 of the members of the Senate was proposing an amendment to the states. After 3/4 or 38 states have ratified an amendment, then it becomes part of the Constitution. This is the only way our Constitution has ever been amended. Congress is in the position to initiate the amendment. If you were to try to bring the states into more equal footing in terms of the process of amending the Constitution, you could do so by asking Congress if they would pass on to the states an amendment to Article V of the Constitution that would say that the states could initiate a Constitutional Amendment in a procedure such as the one outlined here. If 3/4 of the states asked for an amendment to the Constitution, then it would put Congress in the position of deciding within two years whether to ratify it or not. And it would become valid unless within the two year period it was rejected by 2/3 of the members of both Houses of Congress. This is the kind of processing and procedural amendment that would give the states greater strength in the federal system and the kind of thing that might be proposed by this Conference of the States. The process amendment is one proposed by former Arizona Governor Bruce Babbitt at a National Governor's Association meeting back in the 1980's. It would give states, by petition of 2/3 of the legislatures, the power to sunset any federal law except those dealing with defense and foreign affairs. They also bring suggestions that perhaps would add a sentence to the 10th Amendment clearing stating that the courts have responsibility to adjudicate the boundaries between national and state authority. There have been a couple of U.S. Supreme Court cases handed down in the last three or four years that seem to say that the states have no real protection by the 10th Amendment. If a state feels that it's powers are being encroached upon by the federal government, then it is the obligation of the states to lobby Congress to get them to change the law. You can clarify the 10th Amendment to say that the states are equal partners in the federal system and that the judges should be able to decide when

the states are intruding on federal powers and when the federal government is intruding on state powers. Just another possible idea that might come out of the Conference of States. How would the Conference of States advance its recommendations? When the majority of states have passed resolutions of participation, a unity called the Conference of States would be formed by the delegates from each state. The Conference of States would then be held, perhaps in a city of historical constitutional significance such as Philadelphia or Annapolis. At the Conference delegates would consider refining and voting on ways of correcting the imbalance in the federal system. Any item receiving the support of state delegations, would become a part of a new instrument of American democracy called a States Petition. The States Petition will be the action plan emerging from the Conference of the States. It will constitute the highest form of formal communication between the states and Congress. A States Petition gains its authority from the sheer power of the process the states follow to initiate it. It is a procedure outside the traditional constitutional process and has no force or law or binding authority. They bring the petition, a signal to the states of intolerable arrogance, on the part of Congress. The States Petition then would be taken back to the states for approval of each states legislature. Any Constitutional Amendments included in the Petition, or proposed Constitutional Amendments included in the Petition, would require approval of the majority of state legislatures to continue this part of the States Petition. Armed with the final States Petition, the representatives of each state then would gather in Washington, D.C. to present the Petition formally to Congress. Twenty-six or more states ask to become members of the Conference of States. It meets. It makes certain recommendations. These recommendations are combined in the States Petition. The delegates then go back to their home states again and they attempt to get their home states' legislatures to approve of what the Conference of the States has recommended. Once the majority of the states have recommend that these are good ideas, they would go back to Washington, D.C. and present this Petition of the States to Congress. Some of the proposals for Constitutional Amendments would be passed by a 2/3 majority to refer them back to the states where they could be made part of the Constitution, assuming they were approved of by 3/4 of states, by the system that exists now. The recommendations might not all be for Constitutional Amendments. They may be for some statutory changes as well. This Petition might also memorialize Congress to change certain statutes that might help to improve the relationship between the federal government and the states.

How would each state be represented? A delegation of 5 voting persons from the state of Montana will be appointed to represent the State of Montana at the Conference of the States. The delegation consists of 5 voting members as follows: the Governor, or if the Governor does not wish to be a member of the delegation, a constitutional officer selected by the Governor; two members of the Senate appointed by the President of the

Senate; and two members of the House appointed by the Speaker of the House. No more than two of the legislators may be from the same political party. The President and Speaker will each designate two legislators as alternate delegates, not more than one from each political party or from each house who have voting privileges in the absence of the primary delegates. You might want to add an amendment which clarifies that this wouldn't be a call for a Constitutional Convention in the state. You may also wish to include an amendment which would expand membership to include six legislators instead of four. That's been done by some of the states. If we chose to have a seven person delegation instead of a five person delegation, we could do that in keeping with what's being proposed here. Arkansas, Delaware, Iowa, Kentucky, Missouri, Utah and Virginia have passed this resolution in both Houses. The states where it has passed in one House are: Colorado Senate, Idaho Senate, Indiana Senate, New York Senate, North Dakota House, Ohio Senate, South Dakota House, and Wyoming House. It has been introduced in numerous other states including Montana. The fiscal note would cover the cost of a five member delegation. It's for about $12,000 and it would cover the cost of the five member delegation meeting as a part of the Conference of the States.

Proponents' Testimony:

Leo Giacometto, representing the Governor's Office, spoke in support of the bill. If this resolution should pass, the Governor plans on being involved in it. We feel that it would give a more uniform approach on how to respond to some of the changes that are going on at the federal government level. we are in support of the concept and any of the different amendments.

Lorna Frank, Montana Farm Bureau, is in support of this Conference and is urging all state legislatures to call for this conference. The Montana Farm Bureau feels that this conference would give the states an equal playing field with the federal government and it'll be a more balanced system than what we have at the present time.

SENATOR STEVE BENEDICT, Senate District 30, announced his support of this bill.

Chris Tweeten, Chief Deputy Attorney General for the State of Montana, spoke in support of SJR 6. There's been a lot of debate and various approaches proposed during this legislative session to deal with the relationship between the state and federal governments. The Attorney General believes that this resolution and the Conference of States which it proposes provide the opportunity for thoughtful and constructive debate with respect to these issues which may very well produce solutions to problems which would address various state's concerns and be presented to Congress and to the country in a unified way and avoid the divisive rhetoric that has surrounded some of these

issues within this legislature. When solutions to these problems are produced, they can be implemented without unnecessary and unproductive litigation.

Gary Marbet, rose in support of the bill with one serious reservation. He liked the expressed intent of the bill. He has spoken with an eminent constitutional attorney from California who assured him that the methodology and structure of this process could be construed to authorize Congress to call for a Constitutional Convention or could in some other way be construed to lead to a Constitutional Convention. He is persuaded that there is a potential for that to happen. When the Continental Congress convened their original intent was to make some surgical changes in the Articles of Confederation and make the federal government more able to control interstate commerce. They zapped the Articles of Confederation and adopted the Constitution. That was far beyond the call of their mission. There are people in America who are circulating what they call the New States Constitution which is a constitution which does not have a Bill of Rights in it. One of the fears in the past that had been expressed is that something that could be on the block for consideration under those circumstances would be this new State's Constitution that would not have a Bill of Rights in it. He was convinced that there is at least a potential for some mischief the way this measure is currently written and he encouraged adoption of amendments that would specify that the franchise granted may in no way be construed to authorize or support the calling of a Constitutional Convention.

Opponents' Testimony:

Betty L. Babcock, former Legislator, Constitutional Delegate, and President of the Montana Eagle Forum, spoke in opposition to SJR 6. She presented her written testimony, **EXHIBIT 6.**

Informational Testimony: None.

Questions From Committee Members and Responses:

SENATOR DOHERTY, referring to page two, lines 22-25, which mentions avoiding any identification with special interest groups, asked if money would be accepted from special interest groups.

SENATOR BROWN stated each state is asked to come up with enough money to cover the expenses of their own delegation to the Conference plus a small additional amount to pay for the expenses of the Conference.

SENATOR DOHERTY further asked if it would be wise for the Council of States to reject any money that would be donated by any corporate sponsors?

SENATOR BROWN stated he did.

SENATOR DOHERTY asked what the time frame was as to the Conference of the States debating and then coming back to their state legislatures. He asked if he saw this as issue in the 1996 presidential campaigns.

SENATOR BROWN stated he did see it as a possible problem for Montana because we don't meet annually and the concern is that the Montana delegation, assuming this resolution is approved by our legislature, could participate with the other delegations from the other states in the Conference of the States which presumably will occur sometime late this summer or early this fall and come up with some ideas for proposals to take to Congress after they first have been approved by our legislatures. The assumption is that the legislatures will then consider them in the 1996 annual sessions and if the majority of the legislature is approved then sometime after that in '96 or '97 they'd go before Congress. The problem in Montana is that we don't have a regularly scheduled session in 1996. I think it's possible that some of this could become an issue in the 1996 election campaign.

SENATOR DOHERTY stated that the Conference of the States has not been called a Constitutional Convention, but if it walks like a duck and it quacks like a duck and it's getting everybody together to talk about the Constitution, how can we be assured that it isn't, in fact, a Constitutional Convention or cannot be used as a Constitutional Convention? Once a majority of those people who may not be from Montana or may not be from Colorado decide that they want to have a Con, how do we prevent that?
SENATOR BROWN stated he called the people in Colorado and found out that this same problem had surfaced down there. Senator Duke has been pretty vocal about his concerns in the Colorado Legislature. They amended the resolution in the Colorado legislature with the language that I provided to the committee to make it clear that it's not the position of the Colorado Legislature for this to be a Constitutional Convention or to bring one about. That's the same language I've offered to the committee if it wants to add to this resolutions. I think that's one safeguard. The original Constitutional Convention was instigated by the Annapolis Convention. The idea was for the states to get together and talk over some maritime disagreement between Virginia and Maryland and what that resulted in was the Constitutional Convention that gave us the Constitution we have today. He felt the difference is that now Article V of the Constitution clearly spells out how the Constitution can be amended. It seems extremely unlikely that it could happen or that anyone would attempt to try to make it happen.

<u>Closing by Sponsor</u>: **SENATOR BROWN** asked for consideration of both of the amendments when the resolution was considered.

ADJOURNMENT

Adjournment: The meeting adjourned at 12:00 p.m.

BRUCE D. CRIPPEN, Chairman

JUDY J. KEINTZ, Secretary

BC/jjk

1

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE

ROLL CALL DATE 2/2/95

NAME	PRESENT	ABSENT	EXCUSED
BRUCE CRIPPEN, CHAIRMAN	✓		
LARRY BAER	✓		
SUE BARTLETT	✓		
AL BISHOP, VICE CHAIRMAN	✓		
STEVE DOHERTY	✓		
SHARON ESTRADA	✓		
LORENTS GROSFIELD	✓		
MIKE HALLIGAN	✓		
RIC HOLDEN	✓		
REINY JABS	✓		
LINDA NELSON	✓		

SEN:1995
wp.rollcall.man

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 2/7/95 BILL NO. 228 NUMBER 1

MOTION: Doherty - amend

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN		✓
LARRY BAER		✓
SUE BARTLETT	✓	
AL BISHOP, VICE CHAIRMAN		✓
STEVE DOHERTY	✓	
SHARON ESTRADA		✓
LORENTS GROSFIELD		✓
MIKE HALLIGAN	✓	
RIC HOLDEN		✓
REINY JABS		✓
LINDA NELSON		✓

SEN:1995
wp:rlclvote.man

3 8

SENATE STANDING COMMITTEE REPORT

February 7, 1995

MR. PRESIDENT:
We, your committee on Judiciary having had under consideration SB 278 (first reading copy -- white), respectfully report that SB 278 be amended as follows and as so amended do pass.

Signed: _____
Senator Bruce Crippen, Chair

That such amendments read:

1. Page 11, line 29.
Following: "costs"
Strike: "in addition to required counseling and fines"

2. Page 12, line 2.
Following: "offender"
Strike: "charged or"

3. Page 12, line 3.
Following: "of"
Strike: "a"
Insert: "the"
Following: "firearm"
Insert: "used in the assault"

4. Page 12, lines 3 and 4.
Following: "The court may" on line 3
Strike: remainder of line 3 through "sentence" on line 4
Insert: "enforce 45-8-323 if a firearm was used in the assault"

5. Page 15, line 9.
Following: "using"
Strike: "any"
Insert: "the"
Following: "firearm"
Insert: "used in the assault"

6. Page 17, line 17.
Following: "seize"
Strike: "any"
Insert: "the"

7. Page 17, line 20.
Following: "take"
Strike: "any"
Insert: "reasonable"

Amd. Coord.
Sec. of Senate

8. Page 17, line 25.
Following: "until"
Insert: "acquittal or until"

9. Page 18, line 1.
Strike: "shall"
Insert: "may"

10. Page 18, line 17.
Following: "using"
Strike: "any"
Insert: "the"
Following: "firearm"
Insert: "used in the assault"

11. Page 21, line 2.
Following: "using"
Strike: "a"
Insert: "the"
Following: "firearm"
Insert: "used in the assault"

-END-

JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 2/2/95
BILL NO. SB 218

Amendments to Senate Bill No. 218
First Reading Copy

For the Committee on Judiciary

Prepared by Valencia Lane
February 8, 1995

1. Title, lines 6 and 7.
Following: "TENANT;" on line 6
Strike: remainder of line 6 through "SPACE;" on line 7

2. Title, line 7.
Following: "REVISING"
Strike: "GROUNDS"
Insert: "NOTICE REQUIREMENTS"

3. Title, line 9.
Strike: "70-24-427,"

4. Page 2, lines 19 and 22.
Following: "time."
Insert: "This subsection does not apply to a rental agreement involving a tenant who rents space to park a mobile home but who does not rent the mobile home."

5. Page 3, line 1.
Following: "home,"
Strike: "if rent remains unpaid 3 days after the tenant has received"
Following: "~~period~~"
Insert: "period"

6. Page 3, line 2.
Following: "~~is~~"
Strike: ", the landlord may terminate the rental agreement"
Insert: "is"

7. Page 3, lines 2 and 3.
Following: "days" on line 2
Strike: remainder of line 2 through "notice" on line 3

8. Page 3, lines 15 through 29.
Strike: section 3 in its entirety
Renumber: subsequent sections

9. Page 4, line 4.
Following: "70-24-422"
Insert: ", except as specifically provided in this section,"

10. Page 4, line 9.
Following: "70-24-422"
Strike: ";"
Insert: ". For this subsection (1)(b), the notice period

referred to in 70-24-422(1) is 30 days."

11. Page 4, line 16.
Following: "rule"
Strike: ";"
Insert: ". For this subsection (1)(e), the notice period referred to in 70-24-422(1) is 60 days."

12. Page 4, line 20.
Following: "premises"
Strike: ","
Insert: ". For this subsection (1)(g), the notice period referred to in 70-24-422(1) is 30 days.
(h)"

13. Page 4, line 22.
Strike: "(h)"
Insert: "(i)"

14. Page 4, line 26.
Strike: "(i)"
Insert: "(j)"
Following: "met"
Strike: "; or"
Insert: ". For this subsection (1)(j), the notice period referred to in 70-24-422(1) is 180 days."

15. Page 4, line 27.
Strike: "(j)"
Insert: "(k)"

16. Page 4, lines 27 and 28.
Following: "~~business~~" on line 27
Strike: remainder of line 27 through "other" on line 28
Insert: "a legitimate business"~~reason~~" → delete reason per Mary Ellen

General Practice
Emphasizing Family Law

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286

EXHIBIT NO. 2
DATE 2/7/95
BILL NO. SB286

February 7, 1995

Senate Judiciary Committee
Room 235, Montana Senate
Capitol Bldg., Helena, MT 59620

Hon. Senators:

Section 40-4-110, MCA (1993), provides for attorney fees in proceedings for dissolution of marriage, legal separation, division of property, child custody, visitation, child support, and health insurance.

However, Montana's Uniform Parentage Act, §§ 40-6-101 through 40-6-303, MCA (1993), contains no provision for attorney fees or court costs. This point was stressed recently in In re the Paternity of W.L. (1993), 259 Mont. 187, 855 P.2d 521, 50 St. Rep. 751.

ARGUMENT IN FAVOR OF ENACTING A STATUTE FOR ATTORNEY FEES AND COURT COSTS:

Women who are pregnant and must retain an attorney to prosecute a paternity action in order to receive child support, are thus treated differently than married women; this may create a suspect classification of persons, violative of the equal protection clause of the U.S. Constitution.

- blood tests cost approx. $150.00 per person for all three persons--child, mother, and alleged father.
- the mother must pay these costs up front, since no presumption of paternity exists as with married women.
- as an infant's blood cannot be drawn until the infant is at least six (6) months of age, the mother is put to a substantial period of non-support, eventually creating arrearages.
- the current filing fee for a paternity action is $90.00.
- the current decree fee for a paternity action is $45.00.
- an average contested paternity case consumes at least five (5) hours of attorney time.
- average attorney fees are approx. $90.00 per hour.

Thus, an unmarried woman in an average paternity case is likely to incur the following costs:

attorney fees:	$ 450.00
filing fee:	90.00
service of process:	20.00
blood test costs:	450.00
decree fee:	45.00
Total:	$ 1,055.00

In State of Arizona v. Sasse (1990), 245 Mont. 340, 801 P.2d 598, 47 St. Rep. 2171, the Montana Supreme Court held unconstitutional, § 40-6-108(1)(b), MCA, which placed a 5-year limit on actions to declare the non-existence of the father-child relationship. The Court's reasoning was that such a bar created a classification distinguishing children with presumed fathers from children without presumed fathers.

The current version of Montana's Uniform Parentage Act, as can be seen by the result in W.L., supra, establishes that same suspect classification, by depriving children of non-marital relationships of the support to which they are entitled. The duty of support begins at conception, and necessarily includes regular medical checkups, birthing expenses, delivery, and post-natal care.

The discrimination here, however, further extends to the mothers. They are the ones who must front the monies to prosecute a paternity action. If they are unable to bring their action with a view to being reimbursed for attorney fees and court costs, they may likely be relegated to the welfare rolls.

In two (2) cases, the Montana Supreme Court held that if the effect of denying maintenance to a spouse in need would render (her) a ward of the State, then the trial court should award maintenance. In re the Marriage of D.C. v. M.C. (1981), 195 Mont. 505, 636 P.2d 857, 38 St. Rep. 2027; Stenberg v. Stenberg (1973), 161 Mont. 164, 505 P.2d 110.

I believe D.C. and Stenberg can be analogized here: if the effect of denying attorney fees and court costs is to relegate mothers to the welfare rolls, then fees and costs ought to be recoverable.

EXHIBIT 2
DATE 2-7-95
SB 286

PROPOSED LANGUAGE:

Section 40-6-___, MCA:

> "**Attorney fees -- costs.** (1) In any action or proceeding brought pursuant to this chapter, the district court shall award reasonable attorney fees to the prevailing party, for maintaining or defending such action or proceeding, including sums for legal services rendered and guardian ad litem fees, incurred, and costs incurred prior to the commencement of the proceeding or after entry of judgment. The Court may order that the amount be paid directly to the attorney, who may enforce the order in his or her own name.
>
> (2) In any action or proceeding brought pursuant to this chapter, the district court shall award costs of the action, including reasonable costs for blood tests and for service of process; for lost wages, and for reasonable medical expenses incurred incident to the pregnancy."

CURRENT LANGUAGE OF § 16, UNIFORM PARENTAGE ACT:

> "The court may order reasonable fees of counsel, experts, and the child's guardian ad litem, and other costs of the action and pre-trial proceedings, including blood tests, to be paid by the parties in proportions and at times determined by the court. The court may order the proportion of any indigent party to be paid by [appropriate public authority]."

As can be seen by the attached copy of § 16 of the Uniform Parentage Act, the several states which adopted that section did not do so uniformly, but omitted certain phrases, or modified them.

Montana has not adopted that section at all, and such non-adoption has left a gaping hole in the remedies which would restore the aggrieved party to whole.

Further, as a policy issue, the requirement to pay attorney fees and costs might discourage more responsibility on the part of would-be parents, and lower relegation to the welfare rolls.

Respectfully submitted,

James D. Elshoff

IN RE THE PATERNITY OF W.L., a Minor: ELIZABETH LAMDIN, Petitioner and Appellant, v. ANGELO FERRARA, Respondent and Respondent.

No. 93-013.
Submitted on Briefs May 13, 1993.
Decided June 23, 1993.
50 St.Rep. 751.
___Mont.___.
___P.2d___

PARENT AND CHILD — JURISDICTION — ATTORNEY AND CLIENT, Appeal by mother from the findings, conclusions, and order entered in paternity action. The Supreme Court held:

1. PARENT AND CHILD, A district court can depart from the child support guidelines, but only if it finds "by clear and convincing evidence that the application of the standards and guidelines is unjust to the child or to any of the parties or is inappropriate in that particular case." Section 40-6-116(6)(a), MCA. In such a situation, a district court is required to "state its reasons for finding that the application of such standards and guidelines is unjust to the child or a party or is inappropriate in that particular case." Section 40-6-116(6)(b), MCA.

2. PARENT AND CHILD, Section 40-6-116(3)(c), MCA, cannot be interpreted to include lost wages as a reasonable expense of the mother's pregnancy and confinement. The District Court did not err in failing to award the mother those lost wages.

3. PARENT AND CHILD - JURISDICTION, Under Section 40-6-118, MCA, the District Court retains jurisdiction to modify its initial support order to provide for the educational needs of the child.

4. PARENT AND CHILD, The District Court met its obligation to state the determining factors upon which it based its decision on child custody in the best interest of the child and did not err in failing to grant the mother sole custody.

5. PARENT AND CHILD, Best interest as defined at Section 40-4-212, MCA, is used to determine the type of custody arrangement for a child, not to determine the employment status of the parents. The court did not err in finding that the best interest of the child does not require the mother to stay home to raise him.

6. PARENT AND CHILD - ATTORNEY AND CLIENT, Montana statutes do not provide for the award of attorney fees in a paternity action. The District Court did not err in failing to award the mother her attorney fees in this action.

Affirmed in part; reversed and remanded in part.

Appeal from District Court of Yellowstone County.
Thirteenth Judicial District.
Honorable William J. Speare, Judge.

For Appellant: Donald L. Harris, Crowley Haughey, Hanson, Toole and Dietrich, Billings.

For Respondent: Mark D. Parker, Parker Law Firm, Billings.

CHIEF JUSTICE TURNAGE delivered the Opinion of the Court.

The mother appeals from the findings, conclusions, and order entered in this paternity action in the District Court for the Thirteenth Judicial District, Yellowstone County. We affirm in part and reverse and remand in part.

The issues are:

1. Did the District Court err by not applying the uniform child support guidelines to determine child support?

2. Did the court err by failing to award the mother past child support?

3. Did the court err by failing to award the mother her lost wages during the period of her confinement?

4. Did the court err by failing to order the father to pay child support for W.L.'s college education?

5. Did the court err by failing to grant the mother sole custody of W.L.?

6. Did the court err by finding that the best interest of W.L. does not require that the mother remain home to raise him?

7. Did the court err by failing to award the mother her attorney fees and costs?

W.L. was sixteen months old at the time of trial. His mother, a registered nurse, and his father, a cardiologist, never married. As is indicated by the issues on appeal, the focus of this action is on child support, not on paternity, which has been conceded.

W.L.'s father, who now lives in another state, has an annual income of nearly $280,000. During the first year of W.L.'s life, the father voluntarily paid the costs of W.L.'s birth and $2,000 per month in child support. This allowed W.L.'s mother to stay home and raise him during that time. After W.L.'s first birthday, the

EXHIBIT 2
DATE 2-7-95
SB 286

him during that time. After W.L.'s first birthday, the father reduced his child support from $2,000 per month to $1,000 per month. W.L.'s mother returned to work and placed W.L. in day-care. Then she brought this action.

After a hearing, the District Court granted the parties joint legal custody of W.L. with the mother as residential custodian. It ordered the father to pay child support of $950 per month. It denied the mother's request for attorney fees and costs and her lost wages immediately after W.L.'s birth. The court did not grant the mother's requests that it order the father to pay for a college education for W.L. or that it order the father to pay past child support. The mother appeals.

I

Did the District Court err by not applying the uniform child support guidelines to determine child support?

The District Court found that, from the evidence presented, necessary expenses for the care of W.L. are no more than $700 per month. The court concluded that the child support guidelines apply. It stated, however, that

> [c]hild support is meant to support the child, not the custodial parent of the child. The noncustodial parent has no obligation to support the custodial parent. Child support should not be used as a subterfuge to award maintenance to the custodial parent. [Citations omitted.]

As stated above, the court ordered child support of $950 per month. The mother contends that the uniform child support guidelines enacted by the Department of Social and Rehabilitation Services pursuant to § 40-5-209, MCA, require the father to pay $2,309.95 per month in child support.

The child support guidelines were amended after the hearing in this matter but before the court issued its findings, conclusions, and order. The effect of the amendment was to change the method by which child support is calculated on parental income in excess of $39,500 per year.

This Court recently held that district courts are to determine child support obligations according to the guidelines in effect at the time the court makes its decision. *In re Marriage of Johnston* (Mont. 1992), 843 P.2d 760, 763, 49 St.Rep. 1047, 1049. The amount of child support awarded in this case is therefore governed by the guidelines which took effect on July 31, 1992.

The July 31, 1992 guidelines determine child support in cases in which the parents' combined income exceeds $39,500 by adding 14 percent of the total income deemed available for child support purposes to a basic support amount. Section 46.30.1534, ARM. In making the child support order in this case, the District Court did not use that procedure.

[1] A district court can depart from the guidelines, but only if it finds "by clear and convincing evidence that the application of the standards and guidelines is unjust to the child or to any of the parties or is inappropriate in that particular case." Section 40-6-116(6)(a), MCA. In such a situation, a district court is required to "state its reasons for finding that the application of such standards and guidelines is unjust to the child or a party or is inappropriate in that particular case." Section 40-6-116(6)(b), MCA. In this case, the District Court has not met those statutory requirements for departing from the guidelines.

We remand this case for reconsideration of the proper amount of child support to be paid by the father to the mother and, if necessary, for entry of the required findings and conclusions in support of the court's determination as to child support.

II

Did the court err by failing to award the mother past child support?

The mother asks for past child support to reflect the difference between the amount the father should have been paying under the child support guidelines and the amount he actually paid. She concedes that the proper amount of past child support is established under the guidelines then in effect as 13.65 percent of the first $39,500 of parental income, supplemented on a case-by-case basis from the remaining income. Section 46.30.1543(2), ARM (1990).

As discussed under Issue I, departures from the guidelines must comply with § 40-6-116(6)(a) and (b), MCA. On remand, the District Court is directed to make such adjustments to its findings, conclusions, and order concerning past child support as are necessary as a result of this Opinion.

III

Did the court err by failing to award the mother her lost wages during the period of her confinement?

Section 40-6-116(3)(c), MCA, provides that, in a paternity action, the court may direct the father to pay "the reasonable expenses of the mother's pregnancy and confinement." The mother contends that, under that statute, she is entitled to $3,000 as compensation

for the net income she lost during the last weeks of her pregnancy and the first six weeks after W.L. was born.

[2] We decline to interpret § 40-6-116(3)(c), MCA, so broadly as to include lost wages as a reasonable *expense* of the mother's pregnancy and confinement. We hold that the District Court did not err in failing to award the mother those lost wages.

IV

Did the court err by failing to order the father to pay child support for W.L.'s college education?

Section 40-4-208(5), MCA, provides that a child support obligation terminates no later than the child's nineteenth birthday "unless the termination date is extended or knowingly waived by written agreement or by an express provision of the decree." The mother cites this Court's opinion in *Torma v. Torma* (1982), 198 Mont. 161, 645 P.2d 395, as authority that a district court cannot later modify child support to extend beyond a child's emancipation unless the original decree so provided. She claims the District Court erred in assuming it would retain continuing jurisdiction so that it could later provide for W.L.'s college education.

Section 40-4-208(5), MCA, and *Torma* do not control the issue of future educational support in this case, however. The mother did not bring her action under Title 40, Chapter 4, MCA, which governs child support in the context of marriage dissolution actions. She, instead, brought her action under the Uniform Parentage Act, Title 40, Chapter 6, MCA. In the instant case, § 40-6-118, MCA, controls. That statute provides that "[t]he court has continuing jurisdiction to modify or revoke a judgment or order: (1) *for future education* and support[.]" (Emphasis added.)

[3] Under that section of the code, the District Court retains jurisdiction to modify its initial support order to provide for the educational needs of the child. We therefore hold that the District Court did not err.

V

Did the court err by failing to grant the mother sole custody of W.L.?

There is no dispute about the actual custodial arrangement, just about whether it is called joint custody or sole custody. The mother contends that the court did not consider the factors required pursuant to § 40-4-212, MCA, for deciding custody. She argues that the case should be remanded for entry of further findings on the issue of custody.

The father points out that the court heard a day's worth of testimony in this case, and that it was not disputed that the mother is doing a good job of raising W.L. or that she should be his primary custodian. He also points out the statutory presumption favoring joint legal custody. See § 40-4-222, MCA.

The District Court found that both parents and W.L. are in good health. It found that W.L. has lived with his mother since his birth and that the father has visited him on numerous occasions. These findings relate directly to factors listed under § 40-4-212, MCA, for determining the best interest of a child. The court made no findings which rebut the statutory presumption favoring joint custody.

[4] We conclude that the court has met its obligation to state the determining factors upon which it based its decision on child custody in the best interest of W.L. We hold that the court did not err in failing to grant the mother sole custody of W.L.

VI

Did the court err by finding that the best interest of W.L. does not require that the mother remain home to raise him?

The mother claims that it would be in W.L.'s best interest for her to work only part-time, because she alone is raising him. She proposed to work two days a week and to stay home with W.L. five days a week.

[5] As the father points out, the court cannot order the mother to stay home and raise W.L. Best interest as defined at § 40-4-212, MCA, is used to determine the type of custody arrangement for a child, not to determine the employment status of the parents. We hold that the court did not err in finding that the best interest of W.L. does not require the mother to stay home to raise him.

VII

Did the court err by failing to award the mother her attorney fees and costs?

The mother argues that, in light of the parents' relative incomes and the father's position that he should be obligated to pay only $600 per month in child support, the District Court committed reversible error by failing to award her reasonable attorney fees and costs.

[6] Montana statutes do not provide for the award of attorney fees in a paternity action. We hold that the District Court did not err in failing to award the mother her attorney fees in this action.

Affirmed in part and reversed and remanded in part.

JUSTICES HARRISON, GRAY, TRIEWEILER, HUNT, NELSON and WEBER concur.

EXHIBIT 2
DATE 2-7-95
SB 286

STATE OF ARIZONA, KATHLEEN ROSE SANCIPRIAN, and JERRY D. COOK, Guardian ad litem for JULIET MARGARITE ROSE, a minor child, Petitioners and Respondents, v. ALAN DOUGLAS SASSE, Respondent and Appellant.

No. 90-172.
Submitted Sep. 9, 1990.
Decided Nov. 27, 1990.
47 St.Rep. 2171.
____Mont.____.
____P.2d____.

PATERNITY--LIMITATIONS OF ACTIONS--CONSTITUTIONAL LAW, Appeal from judgment declaring appellant to be natural father of 12- year old girl. The Supreme Court held:

1. Discriminatory classification based on illegitimacy is appropriate for intermediate scrutiny--a statutory classification must be substantially related to an important governmental objective, i.e., stable families and prevention of stale claims.

2. The five-year limitation in this case is not substantially related to an important governmental objective; the five-year statute of limitations in § 40-6-108(1)(b), MCA, is unconstitutional.

Appeal from the District Court of Dawson County.
Seventh Judicial District.
Honorable Dale Cox, Judge presiding.

For Appellant: **Kathleen M. Fritsch** argued, Glendive

For Respondent: **Ann Hefenieder** argued, Department of Social and Rehabilitation Services, Child Support Enforcement Division, Billings (State of Arizona); **Jerry D. Cook**, Glendive (guardian ad litem for the child)

Affirmed.

JUSTICE SHEEHY delivered the Opinion of the Court.

In this case, Alan Douglas Sasse maintains that the five-year statute of limitations contained in § 40-6-108(l) (b), MCA, bars the court from declaring that he is the natural father of Juliet Margarite Rose, a minor child. The District Court, Seventh Judicial District, Dawson County, rejected Sasse's statute of limitations claim and entered judgment declaring him to be the natural father of Juliet Margarite Rose. From that judgment, Sasse appeals. We affirm the District Court.

The minor child, Juliet Margarite Rose, was born in New Jersey on June 21, 1975. At the time of the child's conception and birth, Kathleen was married to Stelios Kazantzoglou. The mother, Kathleen, had married Stelios in 1971, but was living apart from Stelios and working in Tennessee. At that time, Sasse, age 17, was in the Armed Services and stationed in Tennessee. He frequented the cafe where Kathleen worked and sometime in August or September of 197 Kathleen invited Alan to her home which resulted one instance of sexual intercourse. Shortly thereafte Sasse was transferred to another station.

Kathleen and Stelios divorced in September, 197 in West Virginia. The court there found that tl parties had not lived together as man and wife for ov two years and that no children were born to tl marriage. Kathleen resumed her maiden name Rose. On June 24, 1980, an action was brought in tl State of Arizona by that state on behalf of Kathlee (who had now married Cesar Sanciprian) against Sasse for determination of paternity and for child support for Juliet. Sasse made a special appearance in that action and it was dismissed for lack of personal jurisdiction over him.

The instant action was begun by Kathleen with the State of Arizona as a co-plaintiff and was transferred to Montana for prosecution, on September 25, 1987, under the Uniform Reciprocal Enforcement of Support Act, when the child was 12 years old. Sasse filed his answer to the complaint, noting that he had no knowledge of Kathleen's marital status at the time of their contact since she was living alone in her apartment, but admitting that he had one occasion of sexual intercourse with her in 1974. In his answer, he did not plead the affirmative defense of the statute of limitations.

The District Court appointed a guardian ad litem for the minor child who was joined as a petitioner by stipulation of the parties.

Pursuant to § 40-6-110, MCA, the District Court caused notice to be given to Stelios Kazantzoglou of the proceedings. He has not intervened or otherwise appeared in the proceedings. The District Court, perceiving that the constitutional validity of the five year statute of limitations contained in § 40-6-108, MCA, was involved in the action, gave notice to the Attorney General of Montana, who decided not to appear.

The District Court refused to apply the statute of limitations on two principal grounds (1) that Sasse had waived the statute of limitations by not including it in his answer to the complaint, and (2) that in any event, the statute in this case was unconstitutional. We will confine our discussion in this case only to the constitutional issue since we find it dispositive.

By law, Stelios is presumed to be the father of Juliet because he and the mother, Kathleen, were married to each other and the child was born during the marriage. Section 40-6-105(1) (a), MCA. The presumption, however, may be rebutted in an appropriate action by a preponderance of the evidence. Section 40-6-105(2), MCA.

In a case where the existence of the father and child relationship is presumed, an action may be brought for the purpose of declaring the nonexistence of the presumed father and child relationship not later than five years after the child's birth. Section 40-6-108(1)(b), MCA.

On the other hand, an action to determine the existence or nonexistence of the father and child relationship as to a child who has no statutorily presumed father (for example, born out of wedlock) may be brought by the child up to two years after the child attains the age of majority, or may be brought by a state agency under Title IV-D of the Social Security Act before the child attains the age of majority. Section 40-6-108(3), MCA.

On the basis that § 40-6-108 creates a classification which distinguishes for disparate treatment children with presumed fathers and children without presumed fathers, the District Court held the statute in violation of the equal protection guarantees of Art. II, § 4 of the Montana Constitution and the Fourteenth Amendment of the United States Constitution.

Our cases on this point do not appear to be consistent. In Borchers v. McCarter (1979), 181 Mont. 169, 592 P.2d 941, we had a case where the mother of a child with a presumed father (born in wedlock) brought an action for support of the child against another man as the alleged natural father. Thus, the mother, in order to obtain support, had to establish a parent-child relationship between the child and a nonpresumed person. To do this she had first to rebut the statutory presumption of paternity in the presumed father. Because she had not rebutted the presumption within five years of the child's birth, this Court held that her claim was barred by the five-year statute of limitations.

In State Department of Revenue v. Wilson (Mont. 1981), 634 P.2d 172, the natural mother of a child born out of wedlock (no presumed father) brought an action to determine the paternity of the alleged natural father. At that time, there was a three-year statute of limitations applicable to this class of action. This Court noted the disparate treatment of children born in wedlock and those born out of wedlock, in that children born in wedlock could bring an action for support against the presumed father at any time within the majority, whereas, under the three-year statute, the child born out of wedlock lost its right of determination of paternity and child support after three years from birth. We there held that the three-year statute was invalid under the Fourteenth Amendment of the United States Constitution because it was "not substantially related to a permissible state interest." *Wilson*, 634 P.2d at 174.

In Matter of W.C. (1983), 206 Mont. 432, 671 P.2d 621, the child was born in wedlock and thus had a presumed father. The mother and the presumed father were divorced nearly three years after the birth and the final decree stated that the child was born of the parties' marriage. Later, the mother married the alleged natural father, who filed an action to determine the parentage of the child. The District Court dismissed the petition on the basis that the alleged natural father was barred by the five-year statute of limitations from challenging the presumed father and child relationship. In upholding the application of the five-year statute of limitations, this Court distinguished the decisions of the United States District Court in Mills v. Habluetzel (1982), 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed. 2d 770 and Pickett v. Brown (1983), 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372, which cases had struck down one-year and two-year statutes of limitations respectively. The distinguishing factor utilized by this Court was that in the case of *W.C.*, there was no question involved of the child's right to support. Since the action was brought by the natural father who was then supporting the child, this Court held that there was no discrimination as between children born in wedlock and those born out of wedlock as to their right to claim support.

In the case at bar, the District Court relied on the holding in *Wilson*, and decided that the five-year statute of limitations in § 46-6-108, MCA, was unconstitutional because it denied the equal protection of the laws "by affording a twenty (20) year limitation period for paternity actions involving illegitimate children and a five (5) year limitation period for paternity actions involving legitimate children."

In *Wilson*, this Court utilized the rational basis test in determining the equal protection issue. We here examine the level of test to be used and the application of the statutes of limitations in paternity cases in the light of Clark v. Jeter, 486 U.S. 456, 108 S.Ct. 1910,

EXHIBIT 2
DATE 2-7-95
SB 286

100 L.Ed. 2d 465 (1988). There the United States Supreme Court had before it a case involving Pennsylvania law where a child born out of wedlock was required to prove paternity to receive support from the natural father, and the suit to establish paternity was required to be brought within six years of the child's birth. By contrast, under Pennsylvania law, a child born in wedlock could seek support from his or her parents at any time.

In *Clark*, the United States Supreme Court determined to apply a level of intermediate scrutiny in determining the equal protection issues. The Court said:

"In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. (Citing cases.) Classifications based on race or national origin, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) and classifications affecting fundamental rights, e.g., *Harder v. Virginia Board of Elections*, 383 U.S. 663, 672 (1966), are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy (citing cases).

"To withstand intermediate scrutiny, a statutory classification must be substantially related to a governmental objective. Consequently, we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because 'visiting this condemnation on the head of an infant is illogical and unjust.'" (Citing a case.)

Clark, 486 U.S. at 461.

In *Clark*, the Supreme Court then went on to examine the equal protection issue. It reviewed *Mills* and *Pickett*, referred to by this Court in *W.C.* It then went on to conclude that Pennsylvania's six- year statute of limitations violated the federal Equal Protection Clause.

Since the case at bar involves a discriminatory classification based on illegitimacy, it is appropriate for us under *Clark* to examine the equal protection issues here on the level of intermediate scrutiny. On that level, a statutory classification must be substantially related to an important governmental objective. That objective in this case is not hard to determine: The statutory classification is based on the state's interest in maintaining stable families and in the prevention of stale or fraudulent claims. Countervailing these state's interests here established is likewise the state's interest in requiring proper support for all children, lest they become a burden upon the state or others. A limitations statute must also be examined as to whether it affords a reasonable opportunity to bring such suits. In *Mills*, 456 U.S. at 105, the United States Supreme Court noted the unwillingness of a mother to file a paternity action on behalf of her child, which could stem from her relationship with the natural father or from the emotional strain of having an illegitimate child, or even from the desire to avoid community and family disapproval which might continue years after the child is born. That was one of the reasons why the United States Supreme Court in *Clark* struck down Pennsylvania's six-year statute.

Other factors also militate against the constitutionality of our five- year statute. Under § 40-6-108, MCA, a child with a presumed father may establish the presumed father's paternity at any time, which seems to negate any argument respecting stale claims. Moreover, advances in technology relating to genetic markers found in blood tests remove much of the fear of false or fraudulent claims of paternity. We noted the reliability of such blood tests in Rose [no relation to the parties at bar] v. District Court, Eighth Judicial District (1981), 192 Mont. 341, 628 P.2d 662; *Wilson*, 634 P.2d at 174. Under § 40-6-113(4), MCA, a district court may require the parties to submit to appropriate tests.

Indeed the accuracy of modern blood tests removes many of the justifications asserted for a five-year limitations statute. Such tests can refute false or fraudulent claims of paternity, or provide evidence that might otherwise be unavailable through the passage of time.

This case is prosecuted by the State of Arizona under the Uniform Reciprocal Enforcement of Support Act (URESA). The principal object of URESA actions is to fix the duty of support, an object that is accomplished here. The effect of this decision setting aside the five-year limitations in paternity actions should not be overestimated. We have simply set aside a time-bar that may otherwise have thwarted the truth in URESA or other paternity actions. There is no restraint under this decision that prevents a court in this state from considering other issues that might arise in such actions once the time-bar is lifted. The other provisions of URESA, as enacted in this state, take care of that. Thus our courts are not fenced off under URESA from considering other issues than support that may affect the child, or his adoptive, natural or presumed parents. Section 40-6-116, MCA,

gives the Court in URESA actions broad latitude in fixing a judgment:

"40-16-116. Judgment or order. (1) The judgment or order of the Court determining the existence or nonexistence of the parent and child relationship is determined for all purposes.

". . .

"3(a) The judgment or order may contain any other provision directed against the appropriate party to the proceeding concerning the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the adjudgment, *or any other matter in the best interest of the child.* (Emphasis added.)"

So such issues as the best interest of the child can be separately considered by the Court in URESA actions.

On consideration of these relevant factors, we find the constitutional balance is tilted. The five-year limitation in this case is not substantially related to an important governmental objective, since under our statutes the limitations vary from case to case.

We therefore determine and hold, and agree with the District Court, that the five-year statute of limitations contained in § 40-6- 108(1)(b), MCA, is unconstitutional.

We bring to the attention of the legislature, if it again considers this statute, a provision of the federal Child Support Enforcement Amendments of 1984 which requires all states participating in the federal child support program to have procedures to establish paternity of any child who is less than eighteen years old. 98 Stat. 1307, 42 U.S.C. § 666(a) (5).

Affirmed.

* * * * *

JUSTICE BARZ dissenting.

Section 40-6-108(1) (b), MCA, may not be in conformity with the federal Child Support Enforcement Amendments of 1984 requiring "[p]rocedures which permit the establishment of the paternity of any child at any time . . ." 98 Stat. 1307, 42 U.S.C. § 666(a) (5), however, the statute is nonetheless constitutional. The majority asserts that this Court's earlier decisions regarding this matter are not consistent. I disagree. This Court's earlier decisions are in fact consistent. It is the majority's present opinion that does not appear to be consistent.

In Borchers v. McCarter (1979), 181 Mont. 169, 592 P.2d 941, this Court correctly held that the five-year statute of limitations barred the mother from attempting to prove the nonexistence of the presumed father and child relationship. Likewise, this Court correctly held in Matter of W.C. (1983), 206 Mont. 432, 671 P.2d 621, that § 40-6-108(1)(b), MCA, is *not* unconstitutional and the Montana statutes do not differentiate between children born of wedlock and children born out of wedlock. The statute rightfully protected the presumed father from having his father and child relationship challenged years later by the natural father.

It was this Court's decision in State, Department of Revenue v. Wilson (Mont. 1981), 634 P.2d 172, 38 St.Rep. 1299, holding a three-year statute of limitations unconstitutional because the statute applied to *all* children born out of wedlock, that pertains to the same reasoning employed by the United States Supreme Court in the line of cases holding these statutes unconstitutional.

In Jimenez v. Weinberger (1974), 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed. 2d 363, the Court struck down laws establishing disabilities on *illegitimate* children.

In Levy v. Louisiana (1968), 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436, a wrongful death statute, which precluded recovery by *illegitimate* children, was declared unconstitutional.

In Trimble v. Gordon (1977), 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed. 2d 31, a statute barring *illegitimate* children from inheriting from an intestate father was held unconstitutional.

In Weber v. Aetna Casualty & Surety Company (1972), 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768, the Court held that *illegitimate* children were entitled to workman's compensation benefits relating to the death of the father; and in Gomez v. Perez (1973), 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56, the Court established that *illegitimate* children have a right to the father's support.

More recently, the Supreme Court struck down similar statutes in Mills v. Habluetzel (1982), 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770; Pickett v. Brown (1983), 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372; and Clark v. Jeter (1988), 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed. 2d 465. All these statutes deny *illegitimate* children a right enjoyed by legitimate children, and were found to be unconstitutional, as was Montana's statute in *Wilson*. However, § 40-6-108(1)(b), MCA, can be easily distinguished from the unconstitutional statutes. Notwithstanding that the statute creates a classification of children to be treated differently, the statute sustains more important government purpose than do the unconstitutional statutes and consequently, passes the muster of intermediate scrutiny analysis.

The precise statutory classification created by § 40-6-108(1)(b), MCA, must be accurately recognized before the intermediate scrutiny test can be properly applied. The statute does not draw a line between children born of wedlock and children born out of wedlock, and thereby deprive one class or the other of a constitutional right. It more correctly draws a line between children with presumed fathers who seek support from someone other than the presumed father and all others ("all others" include both children with presumed fathers and children without presumed fathers). The issue then becomes whether or not this classification is substantially related to an important governmental objective. The State's objective, as the majority states, is to maintain stable families and prevent stale or fraudulent claims. While it could be argued that these interests alone are important enough, there are additional interests that may be more important. The best interests of the child have always been the most salient consideration in determining family matters where children are involved. How can the best interests of the child be served by allowing paternity actions to be brought years after a child has developed a child-parent relationship with the presumed father? Upon careful examination of the statute it becomes obvious that it serves to *promote* legitimacy in that it ensures that the presumption of legitimacy will not be challenged, once the child reaches the age of five, by *anyone*. In other words, once the five-year statute has elapsed, if there has been no paternity action, the child's father is the presumed father. The argument, that a child with a presumed father should have the right to seek support from the natural father at any time up to the age of majority, actually confers upon that child a right other children *do not* have; the right to choose their father. Such a right is not provided by the constitution. This statute simply requires any challenge to the presumed father's status to be made within five years or not be made at all. The possibility now exists that the presumed father's relationship with the child can be disrupted by an alleged natural father at any time. This situation was precisely the kind that occurred in *Matter of W.C.*, and it was § 40-6-108(1)(b), MCA, that prevented the alleged natural father from disrupting the presumed father's relationship with his child. Once a child has reached the age of five, there unquestionably has been created a parent-child bond between the presumed father and the child. A paternity action challenging the presumed father and child relationship years after that relationship has been developed can serve only to damage and erode the bond between father and child.

Without § 40-6-108(1)(b), MCA, the possibility also exists that the presumed father will, upon discovering his spouse's malevolent transgressions years later, claim not to be the natural father and attempt to establish the nonexistence of the presumed father and child relationship. In such a scenario, the mother and child may not, after many passing years, be able to locate the natural father for purposes of establishing a legal entitlement to support. Would it not be in the best interests of the child to continue to receive support from the presumed father and at least *have* a father?

This is similar to the situation that occurred in Clay v. Clay (Minn. Ct. App. 1986), 397 N.W.2d 571. A presumed father attempted to establish the nonexistence of his paternity during marriage dissolution proceedings. Minnesota's three-year statute of limitations (identical to ours except it reads three instead of five years[1]) barred the presumed father from doing so and thereby appropriately protected the child. Minn. State. Ann. § 257.57 (1) (b). The constitutionality of the statute was raised and the appellate court affirmed the lower court's decision upholding the statute, saying the three-year statute "[w]as designed to promote legitimacy . . . [and] [p]ermitting a challenge to the legitimacy of a child more than three years after its birth would defeat the clear statutory purpose of promoting legitimacy." *Clay*, 397 N.W.2d at 577. *Clay* was appealed to the U.S. Supreme Court and the Court dismissed the appeal. (Clay v. Clay (1987), 484 U.S. 804, 108 S.Ct. 49, 98 L.Ed. 2d 14.) Therefore, it appears the United States Supreme Court was not troubled by the constitutionality question.

In Michael H. v. Gerald D. (1989), __ U.S. __, 109 S.Ct. 2333, 105 L.Ed. 2d 91, the United States Supreme Court looked at a statute providing that a presumption of fatherhood could be rebutted by blood tests, and only if motion for such tests was made within two years from the date of the child's birth. The Court found the statute to be constitutional and not a violation of the due process clause or the equal protection clause of the United States Constitution.

It must be re-emphasized that § 40-6-108(1)(b), MCA, affects only children that already have a presumed father. Therefore, the majority's concern that there be "proper support for all children, lest they become a burden upon the state" is unfounded because only children attempting to seek support from someone other than their presumed father, would be barred by the five-year statute of limitations. The

[1] A 1989 Amendment rewrote the Minnesota statute to include a longer limitation (one year after the child's majority) in situations where the presumed father becomes divorced from the child's mother and is unaware of the child's birth.

presumed father would still be legally required to support the child because he too would be barred by the same five-year statute from doing otherwise. The present case is illustrative of this point. The majority opinion notes that the West Virginia court, in granting the divorce between Kathleen and the presumed father, Stelios, found that the parties had no children born to the marriage. If such is the case, then § 40-6-108(1) (b), MCA, has been satisfied and the presumed father's status is sufficiently rebutted within the five-year period. If such is not the case, then Stelios remains the presumed father and is obligated to support the child; in either event the child *is* supported.

The statute not only serves to prevent stale or fraudulent claims and help maintain stable families, it also, more importantly, serves to protect the best interests of the child and the rights of the presumed father by promoting legitimacy and the sanctity of the family in which the child was brought up. The statute is not in conformity with the federal Child Support Enforcement Amendments of 1984 and should be changed, however, it is not unconstitutional as its classification is substantially related to a clearly important government interest.

EXHIBIT 2
DATE 2-7-95
SB 286

whose contract and tort counterclaims based on mother's failure to use birth control devices had been dismissed from paternity action. Linda D. v. Fritz C., 1984, 687 P.2d 223, 38 Wash.App. 288.

Illegitimate children have the same judicially enforceable right to support as do legitimate children. People in Interest of S. P. B., Colo. 1982, 651 P.2d 1213.

In paternity action brought by mother and child, evidence was sufficient to support the award of $10,000 back child support. Nettles v. Beckley, 1982, 648 P.2d 508, 32 Wash.App. 606.

8. Record of proceedings

Trial court after informal hearing entered its "judgment" determining paternity and temporary custody in violation of statutes requiring that record of proceedings be kept, and that recommendation for settlement be made by court, and thus the judgment was void and of no force and effect. Matter of TRG, Wyo.1983, 665 P.2d 491.

9. Res judicata

Judgment of domestic relations court declaring that child was issue of marriage between child's mother and her husband was not res judicata to action brought by putative father in juvenile court pursuant to R.C. §§ 3111.04, 3111.06(A) to determine paternity of child, absent showing that putative father was in privity with parties or persons in privity and identity of issues in divorce proceeding. Gatt v. Gedeon, 1984, 485 N.E.2d 1059, 20 Ohio App.3d 285, 20 O.B.R. 376.

Initial determination of custody in paternity proceeding was res judicata even though parties were living together at time and did not dispute or litigate custody. Knutson v. Primeau, Minn.App.1985, 371 N.W.2d 582.

10. Review

In action brought under Uniform Parentage Act, role of Supreme Court in reviewing trial court's findings regarding visitation rights is to determine whether or not such findings are clearly erroneous. C.B.D. v. W.E.B., N.D.1980, 298 N.W.2d 493.

District court's determination under Uniform Parentage Act on matter of child support is treated as finding of fact and will not be set aside by court on appeal unless it is clearly erroneous. Id.

Bastardy act of Washington territory was properly reviewable by state Supreme Court as successor to Territorial Supreme Court, and was properly invalidated by State Supreme Court, and thus statute which requires that paternity suits be tried to the court did not violate constitutional article which guarantees right of trial by jury on basis that since territorial bastardy act was enacted in penal rather than civil code, right to jury trial in filiation actions was included when State Constitution was enacted. State ex rel. Goodner v. Speed, 1982, 640 P.2d 13, 96 Wash.2d 838, certiorari denied 103 S.Ct. 140, 459 U.S. 863, 74 L.Ed.2d 119.

§ 16. [Costs]

The court may order reasonable fees of counsel, experts, and the child's guardian ad litem, and other costs of the action and pre-trial proceedings, including blood tests, to be paid by the parties in proportions and at times determined by the court. The court may order the proportion of any indigent party to be paid by [appropriate public authority].

COMMENT

This allows the court to apportion the cost of litigation among the parties or, if a party is indigent, charge it to the appropriate public authority.

Action In Adopting Jurisdictions

Variations from Official Text:

California. Omits last sentence.

Colorado. Omits last sentence.

Hawaii. Substitutes "the State, or such person as the court shall direct" for "[appropriate public authority]".

Minnesota. Provisions relating to the subject matter of sections 16 and 19 of the Uni-

SB 286 U.P.A.

... Act are combined in one section of the Minnesota act, which reads as follows:

257.69 Right to counsel; costs; free transcript on appeal.

"Subdivision 1. In all proceedings under sections 257.51 to 257.74, any party may be represented by counsel. If the public authority charged by law with support of a child is a party, the county attorney shall represent the public authority. If the child receives public assistance and no conflict of interest exists, the county attorney shall also represent the custodial parent. If a conflict of interest exists, the court shall appoint counsel for the custodial parent at no cost to the parent. If the child does not receive public assistance, the county attorney may represent the custodial parent at the parent's request. The court shall appoint counsel for a party who is unable to pay timely for counsel in proceedings under sections 257.51 to 257.74.

"Subd. 2. The court may order expert witness and guardian ad litem fees and other costs of the trial and pre-trial proceedings, including appropriate tests, to be paid by the parties in proportions and at times determined by the court. The court shall require a party to pay part of the fees of court-appointed counsel according to the party's ability to pay, but if counsel has been appointed the appropriate agency shall pay the party's proportion of all other fees and costs. The agency responsible for child support enforcement shall pay the fees and costs for blood tests in a proceeding in which it is a party, is the real party in interest, or is acting on behalf of the child. However, at the close of a proceeding in which paternity has been established under sections 257.51 to 257.74, the court shall order the adjudicated father to reimburse the public agency, if the court finds he has sufficient resources to pay the costs of the blood tests. When a party bringing an action is represented by the county attorney, no filing fee shall be paid to the clerk of court.

"Subd. 3. If a party is financially unable to pay the cost of a transcript, the court shall furnish on request a transcript for purposes of appeal."

Montana. Omits this section.

Wyoming. Omits last sentence.

Library References

Children Out-of-Wedlock ⇐75.
C.J.S. Bastards § 137 et seq.

WESTLAW Electronic Research

See WESTLAW guide following the Explanation pages of this volume.

Notes of Decisions

1. Blood tests

In a civil paternity suit where an indigent defendant's motion for blood tests had been granted, the indigent is entitled to have the compensation of the expert conducting the tests paid initially by the county; the compensation of the appointed expert shall be fixed by the court and ordered paid by the county, subject to being later taxable to the parties as costs in the action. Michael B. v. Superior Court of Stanislaus County, 1978, 150 Cal.Rptr. 586, 86 C.A.3d 1006.

§ 17. [Enforcement of Judgment or Order]

(a) If existence of the father and child relationship is declared, or paternity or a duty of support has been acknowledged or adjudicated under this Act or under prior law, the obligation of the father may be enforced in the same or other proceedings by the mother, the child, the public authority that has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, support, or funeral, or by any other person, including a private agency, to the extent he has furnished or is furnishing these expenses.

(b) The court may order support payments to be made to the mother, the clerk of the court, or a person, corporation, or agency designated to administer them for the benefit of the child under the supervision of the court.

child relationship was not time barred. State of Ga. ex rel. Brooks v. Braswell, Minn.1991, 474 N.W.2d 346.

Uniform Parentage Act does not preclude application of doctrine of res judicata to determine parentage. State ex rel. Daniels v. Daniels, Colo.App.1991, 817 P.2d 632.

Under doctrine of res judicata, divorce decree which specifically found that two children were born as issue of marriage was bar to husband's proceeding under Parentage Act for determination of nonexistence of parent-child relationship; husband and mother were identical parties in divorce proceeding, divorce proceeding dealt with question of paternity and both district court and parties found that son and daughter were born of marriage, question of paternity was directly related to final adjudication of divorce proceedings, and both husband and mother had same fundamental interests in determination of paternity in divorce proceeding. Matter of Paternity of JRW, Wyo.1991, 814 P.2d 1256.

Res judicata did not bar child from bringing paternity action under Uniform Parentage Act, although child's mother had brought unsuccessful paternity action against same putative father pursuant to prior paternity statute; child was not substantially identical party as mother and was not in privity with mother since child had different interests in establishing existence of paternity. Ex parte Snow, Ala.1987, 508 So.2d 266, on remand 508 So.2d 269.

9a. Estoppel

Adjudication in dissolution or annulment action concerning paternity of child estops husband or wife from raising that issue in any subsequent action or proceeding. In re Marriage of Holland, 1986, 730 P.2d 410, 414 Mont. 224.

9b. Collateral attack

Former husband's failure to raise defense of nonpaternity during dissolution proceedings in which child support orders were issued barred him from collaterally attacking the determination of paternity which implicitly supported the award of child support incident to that proceeding. State ex rel. Daniels v. Daniels, Colo.App.1991, 817 P.2d 632.

9c. Prejudgment interest

Mother's claim in paternity action to recover past expenditures for child born out of wedlock was unliquidated and did not earn prejudgment interest; amount due was contingent upon court's determination as to father's liability for past support. R.E.M. v. R.C.M., Mo.App.1991, 804 S.W.2d 813.

10. Review

Whether requested name change is in the best interest of minor child is factual determination for the trial court but, when facts are presented by stipulations, affidavits, and other documentary material, appellate court may draw its own conclusions from the evidence. D.K.W. v. J.L.B., Colo.App.1990, 807 P.2d 1222.

Although dismissal of paternity action brought pursuant to Alabama Uniform Parentage Act as part of multiparty, multi-claim action constituted final judgment for purposes of appeal under Rule 54(b), appeal was dismissed due to absence of Rule 54(b) certification, rather than remanded, where appeal was filed outside 14-day period, and record did not reflect that paternity case was properly joined with divorce action or required waivers of right to jury trial by all parties. C.L.D. v. D.D., Ala.Civ.App.1991, 575 So.2d 1140.

§ 16. [Costs].

Action in Adopting Jurisdictions

Variations from Official Text:

Colorado. In first sentence, substitutes "shall order" for "may order".

Hawaii. Substitutes "genetic tests" for "blood tests".

New Mexico. Section reads: "The court may order reasonable fees of counsel, experts, the child's guardian and other costs of the action and pre-trial proceedings, including blood or genetic tests, to be paid by any party in proportions and at times determined by the court. The court may order the proportion of any indigent party to be paid from court funds."

North Dakota. Substitutes "genetic tests" for "blood tests".

Wyoming. Substitutes "genetic tests" for "blood tests".

Notes of Decisions

1. Blood tests

In paternity action in which results of genetic testing clearly excluded indigent putative father as natural father of child, costs of genetic testing were properly taxable against mother and would thus be paid by county child support agency under statute authorizing payment of court costs by local social service agency when custodian was recipient of Aid for Dependent Children and defendant was found to be indigent. Little v. Stoops, 1989, 585 N.E.2d 475, 65 Ohio App.3d 758.

After father established paternity, trial court abused its discretion in awarding him $408 as costs for blood tests in absence of any record evidence as to actual costs of tests; although father had attempted to introduce report of tests into evidence, it was excluded because it had not been designated as exhibit pursuant to pretrial order. Matter of SAJ, Wyo.1989, 781 P.2d 528.

2. Attorney's fees

Mother was entitled to attorney fees and costs to establish paternity, even though neither father nor mother had much more than minimal assets; father contested paternity even after first blood test establishing paternity and had higher net income, and mother had custody of child and incurred further costs, even though motion for summary judgment was confessed after results of second blood test. Carnes v. Dressen, Ill.App. 4 Dist.1991, 574 N.E.2d 845.

Awarding attorney fees to mother who prevailed in paternity action was not an abuse of discretion, even though putative father argued that he was financially unable to pay mother's attorney fees; there was no error in procedure in awarding such attorney fees where court received extensive evidence concerning both parties' relative income and living expenses and about amount of time and labor mother's attorney put into the case; and as to that court thought fees were mandatory when mother prevailed; trial court's comment that mother, having prevailed, was entitled to attorney fees meant that court, in its discretion, determined mother to be entitled to fees after she prevailed. Jiles v. Spratt, 4 Dist.1990, 142 Ill.Dec. 21, 552 N.E.2d 371, 195 Ill.App.3d 354.

Fee-shifting provision of Illinois Parentage Act did not extend to attorney fees incurred by mother in successfully defending putative father's appeal of paternity judgment, notwithstanding mother's contention that term "action" in provision was broad enough to include appeals. Brezinsky v. Chervinko, 1989, 139 Ill.Dec. 203, 548 N.E.2d 588, 192 Ill.App.3d 124.

Application for fees filed by attorney who represented mother in proceeding for visitation brought by father under Parentage Act should have been made in pending parentage proceeding and could not, during period of that proceeding, be brought as new action in another court. Gitlin v. Hartmann, 1988, 125 Ill.Dec. 426, 530 N.E.2d 584, 175 Ill.App.3d 805.

Award of attorney fees and expenses at trial of paternity action is a matter of trial court's discretion and will not be disturbed absent abuse of that discretion. J.L.B. v. T.E.B., Minn.App.1991, 474 N.W.2d 599.

Appointment of counsel for father in paternity proceeding was a condition precedent to any obligation of the Department of Health and Social Services to assume the cost of representation. State By and Through Dept. of Family Services v. Jennings, Wyo.1991, 818 P.2d 1149.

Court's award of attorney fees of $975 to mother in action to modify child support payments was proper based upon evaluation of resources of parties and fact that fees represented less than half of legal expenses incurred by mother. Pippins v. Jankelson, Wash.1988, 754 P.2d 105, 110 Wash.2d 475.

3. Appellate fees

Award of appellate fees rests within discretion of Court of Appeals on appeal of paternity action. J.L.B. v. T.E.B., Minn.App.1991, 474 N.W.2d 599.

§ 17. [Enforcement of Judgment or Order].

Action in Adopting Jurisdictions

Variations from Official Text:

California. In subsec. (c), second sentence reads: "All remedies for the enforcement of judgments, including imprisonment for contempt, apply."

New Mexico. In subsec. (a), substitutes "any interested party" for remaining text following "other proceedings by".

Subsec. (b) reads: "The court may order support payments to be made to the mother; the clerk of the court; or a person, corporation or agency designated to collect or administer such funds for the benefit of the child, upon such terms as the court deems appropriate."

§ 18. [Modification of Judgment or Order].

Action in Adopting Jurisdictions

Variations from Official Text:

California. Section now reads: "The court has continuing jurisdiction to modify a judgment or order made under this part. A judgment or order relating to an adoption may only be modified in the same manner and under the same conditions as a decree of adoption may be modified under Section 228.10 or 228.15."

Colorado. Designates Official Text provisions as subsec. (1), and adds a subsec. (2) which reads: "The court may modify an order of support only in accordance with the provisions of and the standard for modification in section 14-10-122, C.R.S."

Hawaii. Designates Official Text provisions as subsec. (a), and adds a subsec. (b) which reads: "(b) In those cases where child support payments are to continue due to the adult child's pursuance of education, the child support enforcement agency, three months prior to the adult child's nineteenth birthday, shall send notice by regular mail to the adult child and the custodial parent that prospective child support will be suspended unless proof is provided by the custodial parent or adult child, to the child support enforcement agency, prior to the child's nineteenth birthday, that the child is presently enrolled as a full-time student in school or has been accepted into and the plans to attend as a full-time student for the next semester a post-high school university, college or vocational school. If the custodial parent or adult child fails to do so, prospective child support payments may be automatically suspended by the child support enforcement agency, hearings officer, or court upon the child reaching the age of nineteen years. In addition, if applicable, the agency, hearings officer, or court may issue an order terminating existing assignments against the responsible parent's income and income assignment orders."

New Mexico. Section reads: "The court has continuing jurisdiction to modify or revoke a judgment or order for future support."

Wyoming. The provisions of W.S.1977 § 14-2-113(f), set out in the variation note in the main volume, now read: "(f) The court has continuing jurisdiction to modify a judgment or order made pursuant to W.S. 14-2-101 through 14-2-120. Provisions respecting support may be modified only upon a showing of a substantial and material change in circumstances. If any order of support provides for periodic payments or installments to the clerk of court, any amount unpaid at the time it is due shall become a judgment by operation of law. An order for child support is not subject to retroactive modification except the order may be modified with respect to any period during which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligor is the petitioner, or to the obligor, if the obligee is the petitioner."

Notes of Decisions

½. Construction with other laws

Best interests of the child standard for modification of a child support order under the Parentage Act, is different than the material change in circumstances standard under the statute applicable to divorced parents. State ex rel. Dix v. Plank, 1989, 780 P.2d 171, 14 Kan.App.2d 12.

SCHEDULE OF JUDICIAL SALARIES
(WESTERN STATES COMPARISON)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 2/2/95
BILL NO. SB 266

POPULATION *	STATE	CHIEF JUSTICE **	JUSTICE **	DISTRICT **
466,000	WYOMING	$85,000	$85,000	$77,000
636,000	NORTH DAKOTA	$73,595	$71,555	$67,551
711,000	SOUTH DAKOTA	$76,232	$74,241	$71,323
824,000	MONTANA	$65,722	$64,452	$63,178
1,067,000	IDAHO	$80,863	$79,183	$75,714
AVERAGES		$76,282	$74,886	$70,953
AVERAGES WITHOUT MONTANA		$78,923	$77,495	$72,897

SOURCES: * NCSC State Court Caseload Statistics 1992

** NCSC Salary Survey - July 1994

c:\wp\WEST

(2) The delegates of the Conference of the States will propose, debate, and vote on elements of an action plan to restore checks and balances between states and the national government. Measures agreed upon will be formalized in an instrument called a States' Petition and returned to the delegation's state for consideration by the entire legislature.

(3) The Conference of the States shall be convened under the §501 (c) (3) auspices of the Council of State Governments in cooperation with the National Governors' Association and the National Conference of State Legislatures no later than 270 days after at least 26 legislatures adopt a resolution of participation.

(4) Prior to the official convening of the Conference of the States, the steering committee will draft:

(a) The governance structure and procedural rules for the conference;

(b) The process for receiving rebalancing proposals; and

(c) The financial and administrative functions of the Conference, including the Council of State Governments as fiscal agent.

(5) The bylaws shall:

(a) Conform to the provisions of this resolution;

(b) Specify that each state delegation shall have one vote at the Conference; and

(c) Specify that the Conference agenda be limited to fundamental, structural, long-term reforms.

(6) Upon the official convening of the Conference of the States, the State delegations will vote upon and approve the Conference governing structure, operating rules, and by-laws.

(7) Adoption of this Resolution does not constitute an application by the legislature of Colorado for the calling of a federal constitutional convention within the meaning of Article V of the United States Constitution.

Amendment added by Colorado Senate to resolution for participation in the Conference of the States.

 SJR 6

A copy of the resolution with the new wording inserted is attached to this document. Should you have any questions about The Conference of the States or the wording of the resolution, please call The Conference of the States' Information Line (606) 244-8158.

RESOLUTION OF PARTICIPATION IN A CONFERENCE OF THE STATES

[Whereas clauses to be provided by individual states]
The following language needs to be incorporated into each state's resolution:

Now, Therefore, Be It Resolved:

That the following be adopted:

(1) A delegation ~~of five~~ NOT TO EXCEED SEVEN voting persons from the State of , shall be appointed to represent the State of at a Conference of the States for the purposes described in Section (2) to be convened as provided in Section (3). The delegation shall ~~consist of five~~ NOT EXCEED SEVEN voting persons as follows: (a) the governor or, if the governor does not wish to be a member of the delegation then a constitutional officer selected by the governor; and (b) ~~four legislators, two~~ A NUMBER OF LEGISLATORS NOT TO EXCEED SIX; THREE from each house, OF WHICH AT LEAST ONE SHALL BE FROM EACH MAJOR POLITICAL PARTY, selected by the presiding officer of that house. ~~No more than two of the four legislators may be from the same political party.~~ Each presiding officer may designate two alternate legislator delegates, one from each party, who have voting privileges in the absence of the primary delegates.

(2) The delegates of The Conference of the States will propose, debate and vote on elements of an action plan to restore checks and balances between states and the national government. Measures agreed upon will be formalized in an instrument called a States' Petition and returned to the delegation's state for consideration by the entire legislature.

(3) The Conference of the States shall be convened under the § 501(c)3 auspices of The Council of State Governments in cooperation with the National Governors' Association and the National Conference of State Legislatures no later than 270 days after at least 26 legislatures adopt ~~this~~ A resolution ~~without amendment~~ OF PARTICIPATION.

(4) Prior to the official convening of The Conference of the States the steering committee will draft:

(a) the governance structure and procedural rules for the Conference;
(b) the process for receiving rebalancing proposals; and
(c) the financial and administrative functions of the Conference, including The Council of State Governments as fiscal agent.

(5) The bylaws shall:

(a) conform to the provisions of this resolution;
(b) specify that each state delegation shall have one vote at the Conference; and
(c) specify that the Conference agenda be limited to fundamental, structural, long-term reforms.

(6) Upon the official convening of The Conference of the States, the State delegations will vote upon and approve the Conference governing structure, operating rules and bylaws.

--end of the resolution --

Amendment prepared by C.S.G. for states wishing to expand their delegations to the Conference of the States from 5 to 7 members.

DATE 2-7

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: SB 286, SJR 16, SB 266

< ■ > PLEASE PRINT < ■ >

Name	Representing	Bill No.	Check One: Support ✓	Oppose
James D. Elsbury	Parents Against Patriarchy	?		
Betty L. Babcock	SJR 16			
Ward Shanahan	State Bar	266	✓	
Pamela Weber		SJR 16		X
J. A. Turnage	MT. Eng Ctr	266	✓	
Tom Ebzery	MT Judges Ass	266	✓	
Tom McKittrick	MT. Judges Ass	266	✓	
Ted O. Lympus	MT. Judges Assn.	266	✓	
Bob Sullivan	MT Magistrates Association	266	✓	
George Bousliman	STATE BAR	266	✓	
Russell Hill	MT Trial Lawyers	SB 266	✓	
Tom Hurst	Dist Ct	SJR 24	—	
Chris Tweeten	AG & Justice Dept	SJR 1 SB 266,	✓	
Don McCutcheon	STATE BAR	266	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

REGISTER.F10

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 6
DATE 2/2/95
BILL NO. SJR 6

Statement to the Judiciary Committee of the Montana State Legislature

Re: A Joint Resolution of the Senate and the House of Representatives Pledging Montana's Support for and Intent to Participate in the Conference of States

by Betty L Babcock

Mr. Chairman, members of the Judiciary Committee, Senator Bob Brown, sponsor of SJR 6, my name is Betty L. Babcock, former Legislator, Constitutional Delegate, President of Montana Eagle Forum.

I am here to oppose SJR6. It is with great difficulty, for I have the greatest respect for the sponsor and for all of you on the Judiciary Committee and at least 98% of the time agree with most all of your decisions. I sincerely appreciate all that you do.

Every Legislative Session the issue of the **"Con-Con"** raises it's ugly head one way or another. Last session it was SJR9 calling for a Constitutional Convention for the purpose of passing a Balanced Budget Amendment. I have in my hand a list of all the citizens of Montana who appeared to oppose that resolution, not because of the Balanced Budget Amendment, but because of the risk to the United States Constitution. I feel certain, these same people would be here today to oppose SJR 6 if they had been informed and given time to do so.

Many of the Legislators, both in the House and Senate are newly elected and are serving in their first session, and probably never heard of the "Con-Con" and the risk it brings to our United States Constitution.

By supporting SJR6 you are **Reconstructing History to Play it Again!**
Even though the orchestrators of the COS aren't talking about a Constitutional Convention the ground work is being laid to declare a Convention when the meeting convenes in Philadelphia this year.

In the COS position paper by Governor Mike Leavitt of Utah, he speaks eloquently about the usurpation of power by the Federal Government---- he states "despite all the talk there's very little real action or real improvement--- everyone talks about the erosion of States Rights----no one really does anything about it. He continues to say it is also important for reasons of efficiency, cost effectiveness and global competitiveness". This paper outlines a simple, powerful process for the States to take control of their own destiny. It is **powerful** because it relies upon the **precedent** established by our **Founding Fathers**. Then he explains the events leading up to the first Constitutional Convention. **It is vitally important to see how the Founders solved the problem of the weak Confederation, something had to be done**. They called for a **Conference of States.** Only 5 states responded so they requested that all

states send delegates to another meeting in Philadelphia on the 2nd Monday of May, 1787. As we all know the delegates to the Great Constitutional Convention in 1787 in Philadelphia did much more than that. Thy threw out the Articles of Confederation and drafted a **New Constitution.**

The resolution for the 1995 Conference of States will provide for 5 delegates from each state,. just like in 1787. The Governor, and four Legislators, two Senators and two Representatives, equal party representation and guess who selects the delegates. The four Legislative Leaders.

The original Constitutional Convention of 1787 deliberated in complete secrecy and there were no leaks to the press. That is obviously impossible today. At least eight reporters would attend per delegate---that was the ratio at the 1988 and 1992 national nominating conventions of both parties.

The demonstrators would hold court outside the Convention Hall, with the TV cameras giving us daily, live on -the-spot coverage of pressure groups and radicals demanding constitutional changes. We would have round-the-clock coverage by CNN and C-Span. Demonstrations would be staged by the pro-abortionists and the pro-lifers, the gay activists and their opponents, the feminists led by Molly Yard or Eleanor Smeal, the environmentalists, the gun control people, the animal rights extremists, and D.C. Statehood agitators, those who want to relax immigration and those who would restrict it, the homeless, and the unions, ---all demanding that their perceived "rights" be recognized in the Constitution.

The advocates of a Constitutional Convention try to make us believe that it would be a dignified gathering where delegates would discuss constitutional issues in a rational way and come to constructive conclusions. They are dreaming. Politics is not dignified and rational-- it is confrontational, divisive , and ruled by 20-second television sound bites.

The COS is only one of the many ways they have tried to call a Convention. Proposing the Balanced Budget Amendment and Term Limits, although some of you may believe are desirable, are two of the ways and they must not be attained at the destruction of our Great Constitution. Do you realize if only 34 of the needed 38 States ratify the amendment, Congress is compelled to call a Convention. The same situation could exist if 34 states approve this resolution.

In Washington state, Representative Val Stevens introduced the resolution for participation in the Conference of States (COS) We're told by several of her colleagues she is a true conservative, and sponsored it only because she was not aware of the dangers involved. When the facts were laid before her, she gave her word to the people of Washington state it would never be calendared..... "it's dead" , she stated. We salute Rep. Stevens. This resolution for the COS is being pushed by legislative leaders... so far Republican leaders. We pray there are thousands of State Legislators

EXHIBIT 6
DATE 2-7-95
SJR 6

with the courage and conviction of Val Stevens.

ALL IS NOT LOST: There is an Alternative: The advocates of the Constitutional Convention have not been able to get resolutions passed through enough states (thank god): and now courageous, pro-Constitutional State Legislators (43 states) supported by millions of Americans are invoking the Constitution by passing and implementing the 10th Amendment State Sovereignty Resolution. The 10th amendment Resolution is a clear, concise and powerful message that the states are declaring sovereignty over the federal government (not begging to be partners), and sends a notice and demand to the federal government to "cease and desist immediately" all mandates outside the scope of its Constitutionally delegated authority. It doesn't address "unfunded mandates as the COS orchestrators are doing, but "un-Constitutional" mandates, and you can bet that will take care of most or all unfunded "mandates, because the majority of mandates forced upon the states over the past several decades have been un-Constitutional.

AMERICA'S CHALLENGE:

The miracle of our great United States Constitution is that it has lasted two centuries, accommodating our great geographic, population and economic expansion, while preserving individual liberties. Many different groups----both left and right---are supporting major constitutional changes. Some even want to change our entire form of government. A new national Constitutional Convention would open up a Pandora's Box of unnecessary troubles.

Among the patriotic groups solidly opposed to calling a new Constitutional Convention are the American Legion and the Veterans of Foreign wars. Those who have fought for America realize how precious our Constitution is. Changes should be made in the traditional way that 26 amendments were added to our Constitution--one amendment at a time.

No James Madisons, George Washingtons, Ben Franklins, or Alexander Hamiltons are evident in America today. We should not risk making our Constitution the political plaything of those who want to rewrite our great Constitution. They have a hidden agenda.

George Washington and James Madison both called our Constitution a "miracle." It's unlikely that a similar miracle could happen again.

TO SAVE OUR CONSTITUTION, I URGE YOU TO **VOTE NO ON HJR6** AND SUPPORT AN ALTERNATIVE. MAY GOD BLESS AMERICA AND OUR EFFORTS TO KEEP HER FREE.

SJR 6

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Vice-Chairman of:
Education
Member of:
State, Veterans, and Military Affairs
Transportation

Senate Chamber
State of Colorado
Denver

February 4, 1995

To Whom It May Concern:

The Tenth Amendment Resolution was sponsored by me in Colorado to enable our state to take a strong stand against the unconstitutional behavior of the Environmental Protection Agency. Since then, it has taken on a new proportion as other states adopt a similar resolution.

Our present Constitution gives us all the rights we need for states to reclaim their sovereignty. There is no need for a new Constitution. There are those, however, who wish to embrace the Tenth Amendment Movement in order to call for a Conference of States (COS). This is a constitutionally dangerous act to take. A meeting of states, duly sanctioned by state legislatures, has the power to turn such a conference into a Constitutional Convention by resolution. It would mean the death of our present Constitution.

For these reasons, I am opposed to the Conference of States proposal. Although there are many ways to prevent the COS from becoming a Constitutional Convention, I have not found the leadership of the COS to be willing to take even the smallest step in that direction. There will be amendments to the resolution for the COS in some states in an attempt to preclude the COS delegates from allowing the COS to become a Constitutional Convention. These amendments will not work, however, since the COS delegates, once assembled, are in fact considered to be representatives of the people, not the legislatures. There are many court rulings to support the contention that they may, therefore, disobey or ignore any prior instructions. Please do what you can to prevent your state's participation in the COS. It is but one more step that would ultimately mean the end of our present very precious Constitution.

Sincerely,

Charles R. Duke

Charles R. Duke

DATE 2-7-95

SENATE COMMITTEE ON JUDICIARY

BILLS BEING HEARD TODAY: SB 286, SJR 6, SB 266

< ■ > PLEASE PRINT < ■ >

Name	Representing	Bill No.	Check One: Support	Oppose
JOE ROBERTS	MT. CTY. ATTY'S ASSN	266	✓	
Jacqueline Lenmark	~~State Bar of MT~~ ~~AM. JUD. ASSN~~	266	✓	
David Owen	MT Chamber MT Liability coalition	266	✓	
Lorna Frank	MT. Farm Bureau	SJ 6	✓	
JEROME ANDERSON	MT. BAR ASS	SB 266	✓	
STEVE Benedict	Senate Dist 30	SJR 6	✓	
[signature]	Governors Office	SJR 6	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

REGISTER.F10