MINUTES

MONTANA HOUSE OF REPRESENTATIVES
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BOB CLARK**, on February 28, 1995, at 8:00 AM.

ROLL CALL

Members Present:

Rep. Robert C. Clark, Chairman (R)
Rep. Shiell Anderson, Vice Chairman (Majority) (R)
Rep. Chris Ahner (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Bill Carey (D)
Rep. Aubyn A. Curtiss (R)
Rep. Duane Grimes (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Daniel W. McGee (R)
Rep. Debbie Shea (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)
Rep. Cliff Trexler (R)

Members Excused: Rep. Daniel Mc Gee

Members Absent: Vice Chair Diana Wyatt
Rep. Brad Molnar

Staff Present: John MacMaster, Legislative Council
Joanne Gunderson, Committee Secretary

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

Committee Business Summary:

Hearing: SB 69, SB 64, SB 77, SB 132
Executive Action: NONE

{Tape: 1; Side: A}

HEARING ON SB 69

Opening Statement by Sponsor:

SEN. RIC HOLDEN, SD 1, said that since 1974 the Montana Department of Military Affairs has adopted by reference federal laws, regulations, forms, precedence in usage in its governing the armed forces of the United States. He said the intent of this bill was to bring the adoption of the Uniformed Code of Military Justice (UCMJ) and the federal laws, regulations, forms and usages relating to and governing the armed forces of the United States in line with today's circumstances.

Proponents' Testimony:

Lt. Col. Chip Erdmann, Staff Judge Advocate 120th Fighter Group, Montana Air National Guard, supported the bill. UCMJ is the body of law which applies to the military and sets forth its criminal actions for those on active duty status under title 10 under the U. S. Code. Reserves are covered under title 32. Montana has adopted, by reference, the UCMJ. Since 1974 when it was first adopted, there have been changes. This bill would revise it by adoption of the current version of the UCMJ so that the rules which apply for active duty will be the same as those which apply for reserve duty. The reason for this bill was based on a speed-limit case in 1981 where the Montana Supreme Court ruled that they could not adopt by reference a federal law that might later change, but that they had to adopt what was in effect at the time.

Lt. Col. Mike McCabe, Judge Advocate for Department of Military Affairs, said it was important to understand that they would not be creating a totally unrivaled court system or modifying it to give absolute authority to the military over its members. The federal statute, 32 U.S.C. section 327, indicates that courts martial only have the authority to impose a fine of not more than $200, forfeiture of pay and allowances, a reprimand or dishonorable discharge, dismissal or reduction of a noncommissioned officer in rank. He said that the importance of bringing the UCMJ current is vital because it would apply to the title 32 status or guard status but would also apply while they are on state active duty as part of the state's militia. The use of UCMJ is designed for uniquely military offenses, which he outlined by examples. Other offenses would be referred for prosecution as has always been the practice.

MSG Roger Hagan, Montana National Guard Officer and Enlisted Associations, submitted his testimony in support of SB 69. **EXHIBIT 1**

Opponents' Testimony:

None

Questions From Committee Members and Responses:

REP. AUBYN CURTISS asked why this bill would provide for the removal of the State Judge Advocate and change it to Adjutant General.

Col. McCabe said that change was made to bring it into conformity with the UCMJ. The State Judge Advocate is a legal officer who is responsible to advise the command. The commander who has courts martial convening authority would be the Adjutant General of the state of Montana with the responsibility for making the final decisions. The change is a correction in the bill as it was drafted.

REP. CURTISS asked what specific differences there were between the codes they are presently serving under and those which they wish to adopt.

Col. McCabe said the distinctions which exist are in the 1984 federal revisions to UCMJ which is related to the procedure for conducting courts martial. Some of the offenses and penalties on the active duty side were modified. Those penalties are not applicable to them and the title 32 state active duty status. The goals were to bring themselves current and in conformity to state law.

REP. CURTISS asked if this would place the guardsmen under any kind of federal military court.

Col. McCabe said it would not. It primarily would adopt the procedure of the federal military courts for use in the state of Montana as state courts under the Montana National Guards, but would not subject them to federal courts.

Closing by Sponsor:

SEN. HOLDEN closed remarking on the support for it from the Governor's Office. **REP. CHRIS AHNER** agreed to carry the bill.

HEARING ON SB 77

Opening Statement by Sponsor:

SEN. CASEY EMERSON, SD 14, submitted SB 77 for the committee's consideration. SB 77 was presented as a constitutional amendment which would transfer the authority to adopt rules governing admission to the bar and the conduct of members of the bar from the Montana Supreme Court to the Judicial Standards Commission.

He testified that the transfer of this authority would more closely adhere to the principles of separation of powers than the current practice. He explained the history behind the current practice and why it created a situation where the supreme court (the head of the judicial branch) has influence in the executive branch of government when the governor is a lawyer and on the legislative branch where members happen to be members of the bar.

He described the make-up of the Judicial Standards Commission and why he felt it was a more balanced approach to the separation of powers in vesting these responsibilities with them. His other reasons for this proposed transfer was the overloading of work in the supreme court, he thought it would relieve the delay in justice being done when there is a problem between clients and lawyers and he thought it would help alleviate some of the attitude among the citizens toward lawyers and politicians.

Proponents' Testimony:

None

Opponents' Testimony:

Ward Shanahan, Helena Attorney, Past President of the State Bar of Montana, Board Member of Montana Law Foundation, questioned the need for this radical solution to a problem which he did not agree existed. He discussed how bringing control of his association over to the legislature instead of leaving it in the hands of the supreme court would create a problem. He said that if this bill should pass and the electorate would decide to adopt it, the state bar would cease to exist. He said it would need to be reorganized because they are private citizens and, although they are controlled by the supreme court to the extent of their professional conduct, he doubted that there were tentacles which extended from the supreme court into the legislature to the members of the bar. If the bill should pass, the legislature would have to reorganize the board of bar examiners and reorganize the commission on practice. The Judicial Standards Commission has to do with the conduct of judges which is a check and balance used by the legislature to exert some control over the quality of persons sitting on the bench.

Patrick Chenovick, Administrator, Montana Supreme Court, Chairman, Commission on Practice, read a letter opposing SB 77 into the record. **EXHIBIT 2**

Karen Sedlock, Secretary, Judicial Standards Commission, read a letter of opposition to SB 77. **EXHIBIT 3**

Russell Hill, Montana Trial Lawyers Association (MTLA), rose in opposition to SB 77.

{Tape: 1; Side: A; Approx. Counter: 43.0}

Informational Testimony:

EXHIBIT 4 was submitted in opposition to SB 77.

Questions From Committee Members and Responses:

REP. BILL TASH asked for clarification about what the appointment procedure would be in this proposed legislation.

SEN. EMERSON said the appointment procedure would continue as it always had.

REP. SHIELL ANDERSON commented on the sponsor alluding to an appearance of impropriety by having the judicial system also regulate admission and disciplinary action and asked for specific examples which would indicate favoritism, some "good-ol'-boyism," going on.

SEN. EMERSON answered that before the new Constitution, there were many attempts to unify the bar. There were many small bar associations around the state. After those attempts, the people realized that was a wrong approach. But after the passing of the new Constitution, the supreme court unified the bar. That means, he said, that anyone who wants to practice law in Montana has to belong to that bar. Prior to that, once having graduated from the University of Montana Law School a person was legal to practice law in the state. He said the unified bar was like a closed shop and has resulted in situations where people who have graduated are not allowed to take the test.

REP. ANDERSON rephrased his question to ask for specific examples where this system doesn't work perhaps in disciplinary situations.

SEN. EMERSON said that as far as discipline has been concerned, they had done fine though they were somewhat slow at times.

REP. ANDERSON asked if they would speed things up by putting them into the Judicial Standards Commission.

SEN. EMERSON thought it would. He said the supreme court was very busy and he did not think they could devote the time to act on those decisions quickly.

REP. DEB KOTTEL asked why it would take a long time to disbar a lawyer.

Mr. Chenovick gave a background on the Commission on Practice to help in his answer to explain why the process might be a little slow.

REP. KOTTEL asked what number of complaints resulted in disbarment or suspension.

Mr. Chenovick's answer is inaudible.

REP. KOTTEL asked if to his knowledge anyone who had graduated from an ABA-approved law school not been allowed to take the bar exam.

George Bousliman, State Bar of Montana, said he had knowledge of at least one ABA-approved law school graduate who was denied the privilege of taking the bar exam.

REP. KOTTEL asked if it was based on character and fitness and the answer was affirmative.

REP. KOTTEL asked if the same appearance of impropriety existed if a barber sat in the legislature and the Department of Commerce regulated their license.

REP. EMERSON replied, "I didn't say that they controlled them, I said that there is an influence there and there is an influence on the barber, there is an influence on me as a manufacturer, because when I look at a bill on manufacturing, I look at it differently than somebody else does. When I was in school teaching, it was the same deal. What I am trying to tell you is that there is an influence there, I don't know how much. I'm sure it varies from person to person."

REP. KOTTEL said that what is perceived as a problem is that there is a difference in having a knowledge area which might influence how a legislator would look at a particular issue and saying that the court influences the legislator or the commerce department influences the legislator. She asked him to be specific about any indication where the Commission on Practices or the supreme court sought to influence a legislator by threatening to pull their license or where the commerce department had threatened anyone who was licensed in the state because they sit on the legislature.

SEN. EMERSON said he was not worried about the barber since he would be just one member of the legislature and not one-third of the government. The judicial department is one-third of the government and he thought that needed to be taken into consideration.

REP. KOTTEL argued that the barber would be licensed out of the Department of Commerce which sits under the Executive Branch which is one-third of government.

SEN. EMERSON said that the barber business is not one-third of the government whereas the lawyers and the bar and the supreme court are one-third, being one group.

REP. KOTTEL said there was a difference between fragmentation of power and separation of power. She said that a number of supreme court cases had actually said that it violates the separation of

powers issue to give judicial power to another branch. She saw the goal in this legislation fragmentation of power among the three branches rather the concept of separation of powers. She asked him to help her clarify the difference.

SEN. EMERSON said he could not because they were her words and he thought it was all separation of powers.

REP. JOAN HURDLE asked who appoints the five members of the Judicial Standards Commission and for what term. She wanted the same information about the practices commission.

SEN. EMERSON said he had not mentioned the practices commission and that was set up specifically for certain purposes and is not set up by the Constitution. The Judicial Standards Commission is set up by the Constitution and includes two judges who are selected by all the judges in the state. The bar association chooses the one attorney and the Governor appoints two laymen. They serve four-year terms.

REP. HURDLE asked for more information about the practices commission and how the two relate.

Mr. Shanahan said they don't relate. The supreme court has the authority to regulate the bar and the practice of law. The Commission on Practices is specifically for that purpose. This bill would eliminate the Commission on Practices because it would provide for the regulation of the practice of law.

{Tape: 1; Side: A; Approx. Counter: 59.3}

Closing by Sponsor:

SEN. EMERSON contended that the judicial system needed to be changed and this constitutional amendment would change it. He said it was imperative that they act immediately. He said that there are always groups which want to control the people and the economy. He said the framers of the Constitution had provided for safety from those groups with separation of powers in government. He said that the law profession had had the largest growth in the past 25 years and it has created a problem because lawyers control one-third of the government through the judicial system. He cited how this has caused problems for Montana and how this proposed legislation would bring that under control.

{Tape: 1; Side: B}

HEARING ON SB 132

Opening Statement by Sponsor:

SEN. AL BISHOP, SD 9, proposed SB 132 as a change to the uniform probate code.

Proponents' Testimony:

Professor Ed Eck, University of Montana law professor, submitted a summary of his comments and addressed the changes which were made in the Senate. **EXHIBITS 5 and 6** He said that what they "caught" was intended as a law reform bill which was nonpartisan in its attempt to clean up some ambiguities. The noncontroversial bill took a substantial turn when the American Council of Life Insurance lobbied the Senate Judiciary Committee and made a substantial change in the rights of surviving spouses in the estates of their deceased spouses. He said that after the Senate action, it would now be possible for a husband to acquire a large insurance policy and exclude his wife from any claim by naming a third party as beneficiary to the policy proceeds.

He explained the rights which existed before the Senate action in order to assist in the understanding of this proposed act. He explained how the 1974 law applied to cases where someone might try to circumvent the spouse in providing for beneficiaries in estate planning. In 1993 there were revisions which were behind the dispute in this bill. The main change was that life insurance is subject to the same rule as other assets that a surviving spouse of at least 15 years of marriage would be eligible for one-half of the benefit.

He quoted from **EXHIBIT 6** in outlining the insurance industry's arguments which were raised in their attempt to change the original version of SB 132. He asked the committee to inquire from the insurance industry to name one principle reason why life insurance should be treated differently from every other asset. He noted that the American Association of Retired Persons (AARP) had endorsed the acts which were taken by the legislature in 1993 and specifically endorsed the inclusion of life insurance in the protected provisions for the survivor spouse. He distributed **EXHIBITS 7, 8, and 9** for the committee's information and consideration.

Dan McLean, State Bar of Montana Section on Trusts, Estates and Business Law, rose in support of the bill but in opposition to the amendments made in the Senate. He explained the elective share and the augmentation in the policy protection provisions. He said this was intended as a technical corrections bill. The main purpose of the bill was to clean up some language and ambiguity in the law. He outlined some of the technical changes in the bill which had to do with beneficiary designation protection for grandchildren if the child of the decedent should die before the owner of the policy and also a change in the reference to inheritance taxes.

He said that the amendments only protect the idea that someone can use life insurance to get around the spousal protection provisions. If someone had a legitimate reason to do so such as key man insurance, the simple solution to that it would be to obtain the spouse's consent as is done with IRA's, etc.

Bruce McGinnis, Attorney, Department of Revenue, supported the bill especially with regard to sections 32 and 33 of the bill on page 56. The tax and probate section of the bar association made changes to the definition of what is a gift in contemplation of death. The department felt that to fully effectuate the intent in changing that definition, an amendment needed to be made to section 72-16-308, MCA. They recommended those amendments to the Senate Judiciary Committee in section 33 of the bill..

Denny Moreen, Attorney, American Council of Life Insurance (ACLI), had presented the amendments to the Senate which would, if enacted, take life insurance out of the augmented estate. He presented his statements in written form as well as responding to previous testimony. **EXHIBIT 10**

He said that if the surviving spouse is not satisfied with the results of the probate, they can demand the elective share. He said that life insurance has not been traditionally included in that process because it is a product purchased for the specific reason that those funds will go directly to the beneficiary without having to be involved in probate. He said the law passed in 1993 included insurance in the augmented estate. He presented examples to substantiate the reasons for the amendment which would remove life insurance from the augmented estate. One example would be the naming of a disabled child as beneficiary and another would be key man insurance.

{Tape: 1; Side: B; Approx. Counter: 39.4}

Doug Lowney, Montana Association of Life Underwriters, said he was impressed with the work which was done in realigning the probate codes, but disagreed with the way that life insurance has been handled since 1993. He preferred to return to the way it was handled prior to that change in the law and stood in agreement with the Senate's decision regarding the amendments. He said that life insurance is a unique contract in that the loss is in the premium rather than in the value of the contract. The surviving spouse could then ask for the return of the premium, though he did not think that was what they wanted to do. In key man insurance, the purpose is to ensure that the business can continue after the death of the owner rather than for providing for the surviving spouse.

He said what the 1993 Legislature did was to allow insurance which named surviving children who were not a part of the marriage to be taken by the surviving spouse. Sometimes a specific creditor has been named for the receipt of the insurance proceeds because of an obligation. Because of this law, that creditor cannot rely on the insurance contract paying them because the spouse can take it. He suggested that the majority of people who purchase life insurance do so before writing a will and this suggested to him that it is the first place of importance in designating the receipt of assets upon their death.

Including insurance in the estate makes it bigger thus raising the potential probate fee.

Jacqueline Lenmark, American Insurance Association, stated support of the bill and especially of the amendments. She said that one principled reason why these amendments were valid and should remain on the bill was that frequently in a disputed dissolution life insurance is purchased with the agreement that child support would continue to be paid should something happen to one of the spouses. Without the amendments they will have difficulty in making that sort of an agreement because of the potential of remarriage of the spouse who purchased the insurance.

Roger McGlenn, Executive Director, Independent Insurance Agents' Association of Montana, stood in support of SB 132 as amended for the same reasons as previously stated. He said that a simplified reason was they were talking about freedom of choice for the consumer.

Joan Himel, Montana Credit Union League, said they were concerned with sections 29 - 31 regarding multiple party account owners and the rights they have to their accounts. They felt the clarifications in these sections are brief but necessary.

{Tape: 2; Side: A}

Opponents' Testimony:

None

Questions From Committee Members and Responses:

REP. ANDERSON asked if the motivation behind the opposition to the amendments was to increase attorney's share in an augmented estate.

Professor Eck replied that if life insurance is included in the augmented estate, that it is not the probated estate. The Montana statute sets a reasonable limit on attorney fees and then there is a percentage of the probate estate as being the maximum. Life insurance being included in the augmented estate calculation for the surviving spouse has nothing to do with the reasonable fee or the probate estate because they are totally unrelated.

REP. ANDERSON gave an example to examine whether this was a double-edged sword situation:

> An older gentleman married a younger woman and he purchased an insurance policy to take care of his children from a previous marriage.

Professor Eck said the children would not be left out because the scenario probably describes a relatively brief marriage. The

surviving spouse's interest would start at 2% a year of marriage though not 2% of every asset. His life insurance policy could still benefit his children. He pointed out example 1 of **EXHIBIT 6** to illustrate how it would work. The surviving spouse does not get 2% of every asset, but when all the assets are added together and multiplied by the appropriate percentage and it would be determined that the spouse had received the amount, the other assets are not altered. But when the spouse is deprived of the appropriate amount, then other assets would be considered. The worst potential case in which the insurance might be disturbed would be example 4 on page 5 of **EXHIBIT 6** where the only asset is an insurance policy payable to someone other than the spouse of at least a 15-year marriage.

REP. ANDERSON asked about the comment that the surviving spouse is only out the value of the premium and he asked if there is a way to recover the value of the premium.

Professor Eck responded that the gift of a life insurance policy is made when it is irrevocably transferred to a different owner. To suggest that the gift occurs when the premium is paid really isn't true, but it occurs when it becomes irrevocably paid out.

REP. KOTTEL said she was confused about some of the issues and said that with the spouse's elective share it was not right to dissipate the value of the estate to the detriment of the spouse. However, if an asset of value were sold or given away, the net worth of the estate would be reduced. When life insurance is purchased, the only change in the net value of the estate would be the assets of the estate used to pay the premium and the time value of money, but not necessarily the amount paid upon death. She asked why the spouse should be able to use their elective share and set aside the will to take one-half of the death benefit which was to provide for any other person or entity.

Professor Eck said that in the example she gave where a person made only one premium payment prior to death, he could not see where the surviving spouse had been injured beyond the amount of that one premium. But, he said, that was not the usual circumstance. He said that in a 15-year marriage in the particular circumstance she had cited, it would be counted in up to one-half of all of the assets.

REP. KOTTEL cited another example where a spouse is a spendthrift and the only things the insured can keep out are the premiums on the policy for a child from a previous marriage. She again asked if that spouse could set aside the will (there is no estate left) and take one-half of the insurance policy.

Professor Eck said that in her example that was true, but if the argument were carried out, it was true of every asset. A spendthrift spouse should be curtailed through the elimination of elective share altogether. He said there were other ways to deal with that sort of situation through trusts, etc.

REP. KOTTEL corrected **Professor Eck** about the percentages allowable to the surviving spouses. She said she could not see why insurance proceeds should go into an augmented estate. She asked that when there was a trust funded with the proceeds of an insurance policy, if he saw any problems that the trust might not be funded because the trust was the beneficiary of the policy which became subject to the spousal elective share.

Professor Eck answered, "No, the trust code has an express provision....." The basic common law rule is that a trust has to have property to be a trust. The 1989 trust code indicates that the mere designation of a trust as a beneficiary of a life insurance policy is a sufficient corpus to satisfy that requirement.

REP. KOTTEL asked about the key man insurance owned by the partnership whether the spouse would not have a right to the proceeds.

Professor Eck said that the only insurance which is included is insurance that is owned by the decedent. Insurance owned by another partner.....**REP. KOTTEL** interrupted that she was talking about insurance owned by the deceased partner. He replied that in that circumstance, that insurance would be included in the augmented estate for the purpose of the spousal protection. He mentioned other ways around that which could include a consent which would take care of the problem.

REP. KOTTEL asked if a charity were named as the beneficiary, who would own it.

Professor Eck said that for tax purposes people often transfer ownership of the policy to the charity and therefore it would not be included in the augmented estate. Another example would be in naming the charity as the beneficiary, then that asset would be part of the augmented estate if there were a deficiency in other assets.

REP. KOTTEL referred to the Internal Revenue Code which allows a person to give up to $20,000 per year if their spouse has not given their $10,000 share and that second $10,000 would not have to come out of the spouse's income. She asked if this would allow for that or only for the first $10,000 and if the estate would become augmented to the other $10,000.

Professor Eck said he was troubled by the question and did not understand it. He said that there were separate provisions addressed relative to inheritance tax purposes that have nothing to do with this issue. He described the provision in the bill which dealt with inheritance tax that only the first $10,000 would be subject to the Montana inheritance tax.

REP. KOTTEL asked why and he said he thought this was an improvement over the last situation and they had not considered dovetailing it with the federal gift tax provisions.

REP. KOTTEL said she understood that they wanted to close some loopholes and described other ways a spouse could be disinherited. She asked if they had closed a loophole that also would benefit an individual in their attempt to closing the loopholes.

Professor Eck said they could not close them all, but they could close all reasonable loopholes. He described further his reasons for supporting the legislation.

REP. HURDLE asked if there were ever instances where there was no estate and it would not go to probate at all.

Professor Eck said there were many cases like that.

REP. HURDLE asked about those cases of no estate but there was a life insurance policy favoring a disabled son, then would there be a probate.

Professor Eck said there would not be a probate. The 1993 action did not subject that policy to probate. It would be considered in determining whether the spouse got the fair share.

REP. LIZ SMITH asked what impact this would have if the medical lien bill should pass which would provide that after three years from the dissolution of assets, the state would have an option to place a lien on all that dissolution if the surviving spouse should go under Medicaid services.

Professor Eck thought that if there was a lien provision, it would still likely affect the surviving spouse. If by reason of the augmented estate, the surviving spouse would have more assets, there are just more assets for the lien to attach directly to the surviving spouse rather than to the decedent.

Mr. McLean answered that the bill would not be impacted by the Medicaid lien bill nor would this bill impact that one.

REP. LOREN SOFT posed an example of a couple having farmed for several years and there is a dissolution of the marriage and one child involved. After the dissolution there is a continuation of the farming and he would make a charitable gift using the assets of the farm to fund a trust. For the child, an insurance policy is purchased. He asked if in that case under this bill without the amendments, would the assets of that policy become a part of the elective estate of the divorced spouse at the time of death of the owner.

Mr. McLean said that if the person did not remarry, the divorced spouse would have no claim whatsoever to any of the estate.

REP. SOFT asked about the effect if the person had remarried for a period of five years.

Mr. McLean said the surviving spouse would have a claim on any assets of the estate by the percentage allowed. Depending on the allowance, the policy might or might not be affected.

REP. CURTISS asked about the allowance before people are subject to inheritance tax.

Mr. McGinnis said he thought she was confusing the federal estate tax with the state inheritance tax. Under the state inheritance tax law, legal descendants and spouses are exempt.

REP. CURTISS asked if the augmented insurance would push the amount up to make them liable under the federal provision. She understood that there was consideration to bring it down to $200,000.

Mr. McGinnis said he had not understood how the augmented estate would impact the federal estate situation in terms of the present $600,000 exclusion.

Professor Eck said if there was any impact, it would be beneficial in that it would not enlarge the estate of the decedent at all. Any tax relationship would benefit the spouse and the marital deduction and reduce the federal tax. He and **REP. CURTISS** continued to clarify this point.

{Tape: 2; Side: A; Approx. Counter: 34.8}

Closing by Sponsor:

SEN. BISHOP closed with remarks about other ways to circumvent problems in a second marriage. He also said that historically the intent has been to protect the surviving spouse. With the amendments, they would reverse that and he admonished the committee to remove the emotion from their deliberations by considering the benefits to an aging spouse versus the children. He felt that in most cases the other assets would be sufficient to take care of the elective share leaving insurance policies untouched.

HEARING ON SB 64

Opening Statement by Sponsor:

SEN. DEL GAGE, SD 43, said SB 64 was being presented by request of the Board of Crime Control to deal with Minors in Possession (MIP) offenses. The Senate was concerned that they were treating those who are 18 - 20 the same as those under 18 and they felt there was enough difference to segregate them. With the exception of section 6 all of the other parts of the bill existed

because of having to change references with the addition of section 6. Section 6 reflected the revision of the law relating to youth in possession of intoxicating substances.

Proponents' Testimony:

Gene Kiser, Montana Board of Crime Control, presented his testimony supporting SB 64. **EXHIBIT 11**

Beth Baker, Assistant Chief Deputy Attorney General, submitted testimony in support of SB 64. She said the bill was designed to help deter youth drinking behaviors by increasing the penalties and allowing more sentencing options for the courts. She addressed the amendments in section 6 of the bill which provide for more moderate penalties for those 18 - 21. The Department of Justice supported the amendments. She noted that a letter from **Judge Larson** from Missoula expressed support for the bill and his suggestion for a coordinating instruction with HB 429 because it amends 41-5-601, MCA, dealing with confidentiality. She did not agree that a coordinating instruction would be needed. **EXHIBIT 12**

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

Mary Ellerd, Montana Juvenile Probation Officers' Association, said they definitely supported the bill. They did have a question about the difference in the amount of the fine for first and second offenses as it would apply to someone under 18 with a higher fine for the same offense for someone between 18 and 21. She pointed out the places in the bill which referred to those fines.

Marsha Armstrong, Department of Corrections and Human Services (DCHS), encouraged the committee's support of SB 64. She submitted written testimony from **Mike Shortell, Chairman, Minors in Possession Task Force (MIP); James Beckman, Member of the MIP Task Force** and **Robin Morris, Executive Director, Havre Encourages Long-range Prevention,** in support of the bill. **EXHIBITS 13 - 15**

Kathy Mc Gowan, Chemical Dependency Programs of Montana and Montana Sheriffs' and Peace Officers' Association, said both organizations were strongly in support of SB 64.

Jim Oberhoffer, retired Chief of Police, Missoula, strongly supported the bill.

Opponents' Testimony:

None

Informational Testimony:

EXHIBIT 16 is a brochure from the Montana Board of Crime Control and **EXHIBIT 17** is a letter of support.

Questions From Committee Members and Responses:

REP. TASH asked if he understood that this bill would only be effective for those counties which have the electronic record keeping system.

Ms. Baker said, "No. We are putting into the bill that the offenses will be tracked by reporting to the Montana Department of Justice, Records and Driver Control Bureau, because of the fact that most counties don't have electronic record keeping.

REP. DANIEL MC GEE asked why the offense listed on page 6 under item (ii) is not a DUI.

Ms. Baker said it is not necessarily a DUI for a minor to be in possession. This is the policy for a person who is not of legal drinking age who many not consume or possess. For a DUI offense, the person must be under the influence of an intoxicating substance and in control of the motor vehicle. For an MIP conviction, they need not be driving or in control of the motor vehicle. They do not need to have any measurable amount of alcohol in their system, but just possessing or consuming. The penalties for kids under 18 include drivers license consequences even if the offender is not driving at the time of the offense. The Task Force believed that the only way to reach the kids was through their ability to drive. The other penalties don't mean much to them. The 18 and older offenders' penalties restricting drivers licenses were different because the Senate did not think that by the time they reach adulthood, they should be punished in that way unless they were committing a driving offense. Most 18 - 21 year old's have more need for possession of a drivers license for transportation to and from work or school.

REP. MC GEE asked why they would want to have a higher fine for somebody under 18 than for somebody over 18.

Ms. Baker pointed out the provision of current law on page 5, lines 20 - 22, for different penalties for kids 18 and older. The Task Force decided it would be better to have consistent penalties for everyone, but in the Senate there were a number of concerns raised about strict penalties for minors who were technically, under the law, adults in all other respects. The Senate felt the younger children where the ones they were targeting with this bill. The result was the compromise language of this version of the bill.

REP. MC GEE asked if it was her impression that it was in the interest of getting the bill passed that it would be best not to try to amend it further.

Ms. Baker said they were satisfied with the bill as amended by the Senate and they believed there were some very important elements in this bill which would help address the problem of underaged drinking. The concerns in the Senate were strong enough that if those amendments were stripped, they would have difficulty getting it through the Senate. They would prefer that it go with the amendments rather than jeopardize the bill.

REP. KOTTEL asked how the penalties under this bill are parallel to the penalties in minors in possession of controlled substances.

Ms. Baker said this law addressed both intoxicating substances and controlled substances.

{Tape: 2; Side: B}

Most simple possessions would be charged under this statute though there were other statutes under title 45 which would have some other penalties for other offenses.

REP. KOTTEL asked for a definition of what it means to be in possession of an intoxicating substance. She was talking about the designated driver who does not consume being charged.

Ms. Baker replied that Montana law recognizes actual and constructive possession. There have been a number of cases defining what constructive possession means. Law enforcement struggles with it and they have advised their highway patrol officers and prosecutors not to charge the kids with the offense simply for being present. Possession means that they having knowing control for a sufficient amount of time to be able to terminate that control. In order to charge someone with the offense, the prosecutor will need corroborating evidence that a jury could use to find that there was knowing possession/knowing control of the substance.

REP. HURDLE asked if, as a member of the task force, **Ms. Armstrong** gained an impression whether or not this was a great problem in numbers in kids over 18 or in kids under 18.

Ms. Armstrong said the majority of their programs which deal with minors in possession were in the 18 - 21 year old group. They have a harder time grasping how many are under 18 because of the way they are treated in the system.

REP. HURDLE asked if all counties are developing alcohol and drug treatment programs.

Ms. Armstrong said that it is a statutory requirement which is reviewed and approved by each of the county commissioners.

REP. HURDLE noted that the bill says, "treatment plans if available."

Ms. Armstrong said the bill speaks to programs which are community based or a school-based. The majority of the treatment programs provide services in each of the counties.

REP. HURDLE asked if the drug and alcohol programs address the dramatic gender differences or if they could be made to do so.

Ms. Armstrong said they are required to target women in drug and alcohol programs in the prevention area.

REP. HURDLE asked what is being done to target the 70% attributed to males.

Ms. Armstrong said they have programs which are studying ways to prevent the use at such an early age.

REP. HURDLE asked if she knew why the split is 30% - 70% between females and males.

Ms. Armstrong alluded to the diminished numbers of arrests of women because law enforcement prefers to avoid female offenders and that there is a higher percentage among women than reported.

REP. HURDLE asked if there was a way to address the gender difference.

Ms. Armstrong said they were in the process of developing a needs assessment in the department over the next two years.

Closing by Sponsor:

SEN. GAGE addressed the concerns of the committee in his closing. He felt some of the gender split had something to do with media advertising influence. **REP. SOFT** said he was willing to carry the bill.

Motion: **REP. LINDA MC CULLOCH MOVED TO ADJOURN.**

{Comments: This set of minutes is complete on two 60-minute tapes.}

ADJOURNMENT

Adjournment: The meeting was adjourned at 11:15 AM.

Bob Clark
BOB CLARK, Chairman

Joanne Gunderson
JOANNE GUNDERSON, Secretary

BC/jg

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL DATE 2/28/95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Clark, Chairman	✓		
Rep. Shiell Anderson, Vice Chair, Majority	✓		
Rep. Diana Wyatt, Vice Chairman, Minority		✓	
Rep. Chris Ahner	✓		
Rep. Ellen Bergman	✓		
Rep. Bill Boharski	✓		
Rep. Bill Carey	✓		
Rep. Aubyn Curtiss	✓		
Rep. Duane Grimes	✓		
Rep. Joan Hurdle	✓		
Rep. Deb Kottel	✓		
Rep. Linda McCulloch	✓		
Rep. Daniel McGee			✓
Rep. Brad Molnar		✓	
Rep. Debbie Shea	✓		
Rep. Liz Smith	✓		
Rep. Loren Soft	✓		
Rep. Bill Tash	✓		
Rep. Cliff Trexler	✓		

EXHIBIT 1
DATE 2/28/95
SB 69

TESTIMONY IN SUPPORT OF SENATE BILL 69

House Judiciary Committee
02/28/95

Presented by:
ROGER A. HAGAN
Officer and Enlisted Associations of the Montana National Guard

Mr. Chairman, members of the committee, for the record my name is MSG Roger A. Hagan. I represent the more than 4,000 members of the Officer and Enlisted Associations of the Montana National Guard. It is my pleasure to rise in support of Senate Bill 69, a bill to adopt by reference The Uniform Code of Military Justice (UCMJ), as reflected in the Federal laws and regulations of the Armed Forces of the United States.

As members of the United States Army and Air Force, during our basic training active duty tour, we are schooled on the requirements and responsibilities of members of the Armed Forces with respect to the UCMJ. It is reasonable, then, to assume that similar requirements and responsibilities are conferred upon us when we return to our home state as members of the Montana National Guard.

To adopt the Federal UCMJ as our governing document for the Montana Militia is the most reasonable and prudent course of action. This bill merely adopts the most current Federal UCMJ on the effective date of this act. Additionally, it provides for the administration of military justice by outlining assignments of trial counsel and appeal procedures.

Our Associations urge the adoption of this legislation. Thank you for your favorable consideration of this bill and I will remain available for questions.

EXHIBIT 2
DATE 2/28/95
SB 77

COMMISSION ON PRACTICE OF THE SUPREME COURT
OF THE STATE OF MONTANA
ROOM 315, JUSTICE BUILDING
215 NORTH SANDERS
HELENA, MONTANA 59620-3002

February 27, 1995

Rep. Bob Clark, Chairman
House Judiciary Committee
Room 312-1, Capital Building
Helena, MT 59620

RE: SB 77

Chairman Clark and Members of the Committee:

The Montana Constitution gives the Montana Supreme Court original and exclusive jurisdiction over all matters involving admission of persons to practice law in Montana and the conduct and disciplining of such persons. Pursuant to that authority the Supreme Court adopted its Rules for Lawyer Disciplinary Enforcement and created the Commission on Practice, which is made up of eight lawyers from different areas of the state plus three non-lawyers. I am chairman of the Commission on Practice. The Commission opposes SB77 which seeks to transfer the lawyer admission and disciplinary functions from the Supreme Court to the Judicial Standards Commission.

In 1992 the Montana Supreme Court invited the American Bar Association to review Montana's lawyer regulatory system. As requested the ABA sent to Montana a six-person consulting team (which included the Chair of the ABA Joint Committee on Lawyer Regulation). The team conducted on site interviews and research from June 16 to 18, 1993, and rendered its Report On The Montana Lawyer Regulation System in November, 1993. Thereafter the Supreme Court appointed an eight-person Task Force to review the ABA Report and recommend changes to the lawyer disciplinary system in Montana. The Task Force held meetings during 1994 and will give its recommendations to the Supreme Court next month.

Central to the ABA team Report was their conclusion that the Lawyer Disciplinary System "should be controlled and managed exclusively by the Montana Supreme Court", and the Court's Commission on Practice.

In our experience it is vital to the operation of the lawyer disciplinary system that these functions be carried out through the visible authority of the Montana Supreme Court. Transferring these functions away from the Supreme Court can only weaken the process. We urge defeat of SB77.

Respectfully submitted,

Rockwood Brown / by (KS)

Rockwood Brown, Chairman
Commission on Practice

cc: Chief Justice, J. A. Turnage
Commission on Practice Members

EXHIBIT 3
DATE 2/28/95
SB 77

JUDICIAL STANDARDS COMMISSION

STATE OF MONTANA

ROOM 315, JUSTICE BLDG.
215 NORTH SANDERS
PO BOX 203002
HELENA, MONTANA 59620-3002
TELEPHONE (406) 444-2608
FAX (406) 444-3274

February 28, 1995

House Judiciary Committee: Room 312-1, 8:00 a.m.

Thank you, Chairman Clark and Members of the Committee:

For the record, my name is Karen Sedlock.

The Hon. Ed McLean, Chairman of the Judicial Standards Commission regrets he was unable to attend the hearing this morning, however, he would like me to inform you that he is opposed to the passage of SB77.

In reviewing the statistics from calendar year 1994, the Judicial Standards Commission received 41 complaints. This was a comfortable amount of complaints for this size of a Commission to handle. In comparison, the Commission on Practice received 242 complaints during the same time period. It would be virtually impossible to expect the Judicial Standards Commission to absorb that many more complaints.

Currently the Judicial Standards Commission is composed of five members who serve on a volunteer basis. The membership consists of two district court judges, one attorney, and two lay-members. Due to the number of complaints received against judges, there is no way this Commission could handle an increased workload.

In comparison, the Commission on Practice has 11 volunteer members. The large number of complaints received each year are divided equally among the members for review. If the Judicial Standards Commission were expected to take on the complaints against attorneys in addition to their own workload this would result in a 690% increase in workload -- and I haven't even addressed the work involved with the Admission to the State Bar.

The Commission on Practice is doing an exemplary job in handling the workload they currently undertake. They have sufficient manpower to handle the complaints which would not be the case if this workload were turned over to the Judicial Standards Commission.

I have personally staffed both Commissions and I want to reiterate that these are volunteer boards. They do not get paid for the many hours of time and dedication they give to our communities and the State of Montana. I think we should take the time to thank the Judicial Standards Commission for the work they are currently doing and not ask them to do more. Therefore, I am strongly opposed to SB 77.

EXHIBIT 4
DATE 2/28/95
SB 77

JUDICIAL STANDARDS COMMISSION

STATE OF MONTANA

ROOM 315, JUSTICE BLDG.
215 NORTH SANDERS
PO BOX 203002
HELENA, MONTANA 59620-3002
TELEPHONE (406) 444-2608
FAX (406) 444-3274

January 24, 1995

Representative Bob Clark
Chairman
House Judiciary Committee

Chairman Clark and Members of the Committee,

The Judicial Standards Commission **opposes** the passage of SB77, the transfer of certain constitutional authority from the Supreme Court to the Judicial Standards Commission.

The Commission on Practice is doing a splendid job in reviewing the complaints against attorneys in the state of Montana and the Court Administrator's Office is doing a great job in administering the Board of Bar Exams. These duties should be left unchanged.

Sincerely,

Ed McLean / by KS

Ed McLean, Chairman
JUDICIAL STANDARDS COMMISSION

EXHIBIT 5
DATE 2/28/95
SB 132

TECHNICAL CORRECTIONS ACT
SENATE BILL NO. 132
COMMENTS

[Note: The explanation of Senate Bill No. 132 which follows explains the Bill as introduced by Senators Bishop and Halligan. The following section-by-section explanation does not include a discussion of the amendments made in the Senate Judiciary Committee.]

E. Edwin Eck
University of Montana
School of Law
Missoula, MT 59812
406-243-6534

Section 1. Explanation of Technical Amendment.

The wording of §27-2-404 (2) differs from that §72-3-803(1). Both set time limits for commencing actions against a decedent's estate. The limit of §27-2-404(2) is one year after issuing letters testamentary. The primary limit of §72-3-803(1) is one year after the decedent's death. The amendment eliminates any conflict between the two sections by repealing §27-2-404(2).

Section 2. Explanation of Technical Amendment

This amendment to a definition conforms to the proposed technical amendment to §72-2-712.

Section 3. Explanation of Technical Amendment

This amendment deletes some extraneous words which were added as part of an amendment to Revised Article II of the Montana Uniform Probate Code adopted in the 1993 session.

Section 4. Explanation of Technical Amendment

As part of the overall reorganization of the elective share provisions, the provision indicating that the spouse's elective share is in addition to the various probate exemptions and allowances is moved from a separate section toward the end of the elective share provisions to a subsection of the first section. This relocation puts readers more readily on notice of this important provision.

Section 5. Explanation of Technical Amendment

This section is amended to clarify the types of property interests included in the augmented estate. The section is reorganized into more understandable paragraphs and sub-paragraphs and language is added to make more clear the amount included in the augmented estate in each category. The provision concerning joint tenancies is expanded to include nonseverable as well as severable joint tenancies because, even in a nonseverable joint tenancy, each joint tenant has an equal vote on whether to sell or sever the property.

Subsections (5) and (6) are shown as deleted (lined through) above, but in fact these subsections are merely moved to later sections. They are not actually deleted from this Part.

Section 6. Explanation of Technical Amendment

The technical amendments to this section merely account for a change in nomenclature.

Section 7. Explanation of Technical Amendment

§40-2-604 indicates that a premarital agreement is enforceable without consideration. The technical amendments to §72-2-224 make it clear that the same rule applies to a written waiver of the elective share.

Section 8. Explanation of Technical Amendment

While listed as a "new section," subsection (1) constitutes an amendment to §72-2-227(4) and subsection (2) constitutes an amendment to §72-2-222(6)(b). The technical amendments in this section amount merely to a switching of one section and another and changes in nomenclature.

Section 9. Explanation of Technical Amendment

This section is added by relocating § 72-2-222(5) without change.

Section 10. Explanation of Technical Amendment

The technical amendments to this section merely account for a change in nomenclature.

Section 11. Explanation of Technical Amendment

The technical amendments to this section merely account for changes in nomenclature and relocation of subsections.

EXHIBIT 5
DATE 2-28-95
SB 132

Section 12. Explanation of Technical Amendment

Subsection (1) is amended to make it clear that any lapsed devise that passes under §72-2-614 to a child of the testator by a prior marriage, rather than only to a descendant of such a child. For example, suppose that G's will devised the residue of his estate "to my two children, A and B, in equal shares." A and B are children of G's prior marriage. G is survived by A and by G's new spouse, X. B predeceases G, without leaving any descendants who survived G by 120 hours. Under §72-2-614, B's half of the residue passes to G's child, A. A is a child of the testator's prior marriage but not a descendant of B. The amendment aligns the statutory language with the original intent, that is, that X's rights under §72-2-331 are to take an intestate share in that portion of G's estate not covered by the residuary clause.

Section 13. Explanation of Technical Amendment

Because subsection (3) only applies to the case of a child omitted solely because thought dead, the exceptions contained in subsection (2) need not be explicitly applicable to subsection (3), and making them explicitly applicable could cause confusion. Consequently, the technical amendment deletes the explicit application of the subsection (2) exceptions to subsection (3).

Section 14. Explanation of Technical Amendment

The technical amendment to this section simply removes a potential ambiguity.

Section 15. Explanation of Technical Amendment

Amendments to subsection (1) and (2). The exception of the Uniform TOD Security Registration Act (UTODSRA) from the 120 hour survival requirement was inserted because UTODSRA then made no provision for quickly successive deaths and was then being promoted to the Stock Transfer Association (NY) with the argument that transfers at death via TODSRA registration would be implemented with all of the simplicity of familiar reregistration requests made by survivors of joint tenancy registrations. At the time, discussion of extending the 120-hour survival requirement to joint tenancy registrations had barely begun, and language, now appearing in 72-2-712(1) had yet to be developed.

Now that UTODSRA has been enacted in a number of states and the Simultaneous Death Act revision has been finalized, the earlier concern has passed and the anomalous TODSRA exception to the 120 hour survival requirement can be, and should be, eliminated.

Amendments to subsection (4). The technical amendments to subsection (4) clarify the rule to be followed in cases in which the 120-hour requirement of survival is inapplicable.

Section 16. Explanation of Technical Amendment

After approval of the UPC Article II revisions, a question arose as to whether the drafters intended to include parties to joint accounts in financial institutions in the "anti-lapse" provision of §72-2-716. The answer was that joint tenancies and joint accounts were not considered to be appropriate vehicles for gifts at death to which "anti-lapse" should apply. However, the question provoked careful reading of §72-2-716 and relevant definitions of "beneficiary," "beneficiary designation" and "governing instrument" in §72-1-103(3), (4) and (20). In result, it was concluded that the approved text left the answer unclear and that language excluding joint account holders and joint tenants should be added to the section. Under UPC Article VI, "party" means one designated in an account as having a present right to payment from the account other than as a beneficiary or agent. Joint account holders own portions of the available balance in proportion to the net contributions of each, meaning that one might own 100% while the other or others own nothing. On a party's death, any ownership interest passes to surviving parties. Technically, the account is a "governing instrument" and each party is a potential death beneficiary of another party's beneficial interest. The definitions applicable to §72-2-716 plus UPC's treatment of ownership of joint accounts generate an implied death benefit situation that might, but should not, be subject to anti-lapse provisions intended for other contractual death benefits. Anti-lapse application to joint and survivor accounts in banks and similar organizations is deemed unsuitable because, unlike other death benefits within §72-2-716, the joint account appears as a form of present divided ownership, rather than as a likely-to-be overlooked death benefit appended to one's solely owned asset. TOD accounts and "Totten trust" accounts differ and remain subject to the anti-lapse provisions in this section.

Section 17. Explanation of Technical Amendment

Subsection (5) is added to clarify the passing of the property in cases in which the future interest is created by the exercise of a power of appointment.

Section 18. Explanation of Technical Amendment

This technical amendment makes two changes.

The phrase "if any" is added to subsection (3) to clarify the point that, under per stirpes, the initial division of the estate is made at the children generation even if no child survives the ancestor.

Subsection (4) is added. During the 1993 legislative session, the House Judiciary Committee voted to retain the existing statute's definition of "representation" for the intestacy

provisions of revised Article II. This technical amendment extends the same definition of "representation" to governing instruments.

Section 19. Explanation of Technical Amendment

This section is amended to make it applicable to present as well as future interests in favor of heirs and the like. Application of this section to present interests codifies the position of the Restatement (Second) of Property § 29.4 cmts. c & g (1987).

Section 20. Explanation of Technical Amendment

Subsection (4)(a) and (b) are amended to clarify the effect of a disclaimer in a case in which G, who died intestate, had two children, A and B. A had one child, X; B had two children, Y and Z. B actually predeceased G. A survived G, but disclaimed. The technical amendments make it clear that X takes A's disclaimed one-half by providing that if "the descendants of the disclaimant would share in the disclaimed interest by representation . . . were the disclaimant to predecease the decedent . . . , then the disclaimed interest passes by representation . . . to the descendants of the disclaimant who survive the decedent . . . . " In this case, were A actually to have predeceased G, A's descendants would share in the disclaimed interest under the representation system employed in the Code, but would not "take" all of the disclaimed interest. The amendments clarify the point that the fact that X would share in the disclaimed interest is enough to give that disclaimed interest to X as a result of A's disclaimer.

Section 21. Explanation of Technical Amendment

Subsection (5) is amended to make it clear that the antilapse statute applies in appropriate cases in which the killer is treated as having disclaimed.

Section 22. Explanation of Technical Amendment

Subsection (4) is amended to make it clear that the antilapse statute applies in appropriate cases in which the divorced individual or relative is treated as having disclaimed.

Section 23. Explanation of Technical Amendment

The technical amendments to this section accomplish several purposes. The original description of an honorary trust was too broad because, taken literally, it applied to regular trusts for family members. The revision narrows the scope to true honorary trusts.

Several of the provisions previously applicable only to trusts for pets are equally appropriate for honorary trusts, and the

amendments extend those provisions to honorary trusts.

Because some pet animals live for more than 21 years, the 21-year limitation is removed. The removal of the 21-year limitation necessitates restricting trusts for pets to pets living when the trust was created, and excluding the pet's future offspring.

Section 24. Explanation of Technical Amendment

See explanation to section 25.

Section 25. Explanation of Technical Amendment

A 1975 Technical Amendment added former exception (d) to this section's 3 year bar on probate and appointment proceedings. The added exception permits use of familiar procedures to establish a devise by an unprobated will as previously permitted by exception to §72-3-102. The original §72-3-102 exception permitted proof, otherwise than via a probate proceeding, of wills that were not probated within three years following death were not probated within three years following death because of specified circumstances tending to justify the failure to act in the permitted time. Included was the situation where a will favored persons already in possession of devised land who, possibly because of erroneous assumption of good title by right of survivorship or by undelivered deed, saw no need to probate the will. Another excused failure to probate a will was when a decedent's successors mistakenly believed there were no assets warranting use of probate procedures and originally made no claim to an asset later discovered to have belonged to the decedent.

Experience has taught that specification of limited circumstances excusing timely probate of a will was a mistake. As originally framed, the §72-3-122 exceptions as derived from original §72-3-102 bristled with potential proof problems that invited litigation. Also, it is far from clear that reasons behind the original UPC policy of definite settlement of certain unopened estates within an arbitrary time period served any policy important enough to block discovery and effectuation of duly executed wills.

As reported in 1975 Ariz. St. L. J. 478, four (Arizona, Montana, Nebraska and Utah) of the original eleven UPC states altered UPC §3-108 (72-3-122) so as to permit late limited proceedings in cases where no probate of a will or administration had occurred during the three year period. Colorado also altered its version of UPC §3-108 to achieve similar results. These deviations from the original official text demonstrate that late-offered wills and tardy administrations occur frequently and that UPC's effort to classify such estates as intestate unless original UPC §3-102's exception applies is not acceptable to important numbers of practicing attorneys. Additional resistance to original UPC §3-108 (72-3-122) developed in connection with an aborted, 1991

effort to enact UPC in Mississippi. Mineral lease buyers protested new complications affected their familiar methods of dealing with intestate successors of unadministered estates. The effort to respond to these concerns by reference to UPC §3-108(4) proved to be more complicated than useful.

JEB-UPC recommends substitution of the Arizona exception to §72-3-122 for existing (d). If this change is approved, the language beginning with "except" and continuing to the end of § 72-3-102 also can be deleted and revision of that section as shown above is also recommended. The changes have the practical effect of removing the time bar on proceedings to establish wills, but leave the three year period operative as a time limit on contests seeking to upset a prior informal probate, including efforts to probate a will governing an estate previously opened and administered as intestate. Finally, the new exception means that informal appointment proceedings can be used to generate title-perfecting paperwork in successors, whether testate or intestate, when no probate or appointment proceeding occurred within three years. Former §72-3-122 permitted this result, but only in the narrowly described and troublesome to prove situations deemed sufficient to excuse timely proceedings.

An additional problem with §72-3-122 that is not corrected by the Arizona adaptation may arise when a testator's will is not presented for probate either because all successors were adults who agreed to administer the estate as intestate, or because the will was not discovered in time to avoid an intestacy distribution and settlement. To this, add that a will or trust of another person directs distribution of assets as of the end of a life estate to appointees of a power of appointment given to testator and exercised by the unprobated will. Or, the other person's dispositive instrument directs distribution to beneficiaries of testator's residuary estate. New (e) is recommended to permit a testacy proceeding for testator's will even though testator's estate has been administered within the three year period. Note, too, that unlike (d), it does not produce appointment of a personal representative for testator's estate, but only permits establishment of the will for the sole purpose of directing devolution of property of a person other than the testator.

Section 26. Explanation of Technical Amendment

The recommended changes clarify text that was made unclear by Committee of the Whole substitution of "or" for "and". Litigation in Nebraska focused attention on the problem.

Section 27. Explanation of Technical Amendment

1993 technical amendments to this and the following section clarified original intention that the described procedure would be available to resolve controversies other than those concerning a

will.

Section 28. Explanation of Technical Amendment

See the explanation to section 27.

Section 29. Explanation of Technical Amendment

The technical amendments to this and the following two sections clarify that a party to an account may alter the terms of the account, including the addition of another party to the account and the removal of an existing party. For example, a party to a multiple-party account may alter the account to a single-party account.

Section 30. Explanation of Technical Amendment

See the explanation to section 29.

Section 31. Explanation of Technical Amendment

See the explanation to section 29.

Section 32. Explanation of Technical Amendment

Former law excluded transfers made within three years of the transferor's death from the inheritance tax if the decedent was not required to file any federal gift tax return for the year with respect to the gift.

The wording of the exception led to an unfortunate result. A donor could make a gift of $10,000 (or any smaller value) and none of the gift was subject to inheritance tax. However, if the donor made a gift of $10,001 (or any amount greater than $10,000), the entire gift was subject to the inheritance tax if the gift was made within three years of death.

The technical amendment would modify the result. To the extent that the gift qualifies for annual exclusion to the federal gift tax (currently the first $10,000 of a present interest gift), the transfer is not subject to the inheritance tax. This technical amendment will negate the result in Estate of Joseph F. Langendorf 863 P2d 434 (1993).

Section 33. Explanation of Technical Amendment

See the explanation to section 32.

Section 34. Explanation of Technical Amendment

The deleted phrase is unnecessary because no person could effectively hold a power to revoke unless the trust is revocable.

EXHIBIT 5
DATE 2-28-95
SB 132

Section 35. Explanation of Technical Amendment

This technical amendment clearly indicates that the trustee's nonliability for following directions applies only when the power holder is competent. Thus, this section applies the same standard found in §72-33-701.

Section 36. Explanation of Technical Amendment

This technical amendment clarifies that a trustee is relieved from liability for failing to following the directions of a person holding a power to revoke if that power holder is incompetent as defined in the trust instrument. In absence of such a definition, the trustee is relieved from liability if the trustee reasonably believes the power holder to be incompetent.

EXHIBIT 6
DATE 2/28/95
SB 132

SENATE BILL 132

E. Edwin Eck
University of Montana
School of Law
Missoula, MT 59812
406-243-6534

As introduced, this will was primarily a "Technical Corrections" Bill designed to remove potential ambiguities.

Senate action removed life insurance proceeds owned by the insured from any claim by a surviving spouse.

Background

Since Montana has been a state, the legislature has enacted some form of protection to a surviving spouse from complete disinheritance. The legislation has evolved over time to insure effectiveness and to defeat attempts to avoid the legislative rules.

Early statutes required a certain fraction of property passing by will to be subject to the spouse's claim. In New York, a husband attempted an "end run" around such a statute by placing all of his assets in a revocable trust which would distribute his assets after his death. After substantial litigation, the surviving spouse was able to convince a court that assets of a revocable trust should also be entitled to a surviving spouse's claim.

In 1974, this legislature enacted the first version of the Uniform Probate Code (1969) which was designed to avoid this and other attempts to avoid a spouse's family obligations:

revocable trusts
joint tenancy
gifts with retained life estates
death-bed gifts

The legislature did not wait for any specified number of cases to be litigated. It nipped these problems in the bud and reaffirmed the responsibilities husbands and wives have to each other.

In 1993, this legislature enacted the 1990 version of the Uniform Probate Code which went further to close loopholes. One change is that life insurance owned by the decedent-insured was added to the assets subject to claim by the surviving spouse.

Insurance Industry Arguments and Responses

On the Senate side this session, the life insurance industry advanced the following arguments:

1. The rights of a contract should be honored.

Response: This legislature and the courts have repeatedly found some contracts to be unenforceable because they are contrary to public policy. One such contract is a contract which would disinherit the surviving spouse.

2. The National Conference of Commissioners on Uniform Laws cannot document the number of times life insurance is being used as a devise to avoid a surviving spouse her rights.

Response: True. But, this legislature has often taken the lead to anticipate problems.

3. The inclusion of life insurance in this provision means than an impersonal court will determine who will receive the benefits of life insurance, instead of the owner of the policy.

Response: While courts are the ultimate forums for the resolution of any dispute under our legislature's statues, there is no need to expect any increase of litigation. Since the UPC was adopted in 1974, only 6 Montana Supreme Court cases have been annotated under the spousal protection provisions. Since the 1993 legislative action, my search on Westlaw indicates that there are no Montana Supreme Court cases.

4. These provisions adversely affect "keyman" insurance.

Response: False.

5. These provisions adversely affect insurance used with "buy-sell" agreements.

Response: False.

6. These provisions adversely affect insurance owned by charities for tax reasons.

Response: False.

7. The North Dakota House of Representatives is in the process of adopting the revised UPC without including life insurance in the spousal protection provisions.

Response: True. But should North Dakota be our model? What is motivating the North Dakota insurance lobby? Is it motivated in part by a potential marketing tool to the unhappily marrieds who

wish to avoid their family responsibilities? Will a North Dakota agent be able to say: "I can sell you an asset (life insurance) which is the only asset that is not subject to a claim by your wife upon your death?"

Conclusion

Life insurance is one of the most important forms of wealth transmission in the U.S.

Challenge: **NAME <u>ONE PRINCIPLED REASON</u> WHY SHOULD LIFE INSURANCE BE PERMITTED TO BE USED TO AVOID ONE'S FAMILY RESPONSIBILITIES? WHY SHOULD LIFE INSURANCE BE TREATED DIFFERENTLY FROM ALL OTHER ASSETS? WHAT IS UNIQUE ABOUT LIFE INSURANCE?**

EXHIBIT 6
DATE 2-28-95
SB 132

EXAMPLES

The following are examples of application of a spouse's right to assets of a deceased spouse. All of the examples are based upon a marriage of 15 or more years. Under such a marriage, the surviving spouse is entitled to 50% of the assets. In all of the examples which follow, the husband (H) predeceases his wife (W).

Example 1

Assets

$100,000	house goes to W by will
100,000	life insurance proceeds on policy owned by H. The beneficiary (B) is someone other than W.
0	assets in W's name at the time of H's death.
$200,000	

Results after 1993 Legislation. W has a right to 50% of $200,000 (house and life insurance). Her right to $100,000 is fully satisfied since she receives a $100,000 house. B receives the $100,000 of life insurance proceeds.

[The result under the 1995 Senate's action: Only the $100,000 house is included in the calculations. The surviving spouse would still be entitled to receive it. Thus, the result is the same.]

Example 2

[Same as Example 1 except the $100,000 life insurance policy has been increased to a $500,000 policy.]

Assets:

$100,000	house goes to W by will
500,000	life insurance proceeds on policy owned by H. The beneficiary (B) is someone other than W.
0	assets in W's name at the time of H's death.
$600,000	

Results after 1993 Legislation. W has a right to 50% of $600,000 (house and life insurance). In other words, she is entitled to $300,000 of assets. She is credited with having received $100,000 (the house). She is also entitled to receive $200,000 of the $500,000 life insurance proceeds. B is entitled to receive the remaining $300,000 of life insurance proceeds.

[The result under the 1995 Senate's action: Only the $100,000 house is included in the calculations. The surviving spouse

would still be entitled to receive it. B would receive the full $500,000 life insurance benefits.]

EXHIBIT 6
DATE 2-28-95
SB 132

Example 3

[Same as Example 2 except a second policy of life insurance has been added. This second policy is payable to W. That policy provides $20,000 in proceeds.]

Assets:

$100,000	house goes to W by will
500,000	life insurance proceeds on policy owned by H. The beneficiary (B) is someone other than W.
20,000	life insurance proceeds on policy owned by H. W is the beneficiary
0	assets in W's name at the time of H's death.
$620,000	

Results after 1993 Legislation. W has a right to 50% of $620,000 (house and life insurance policies). Her right to receive $310,000 is partially satisfied because she is credited with having received $100,000 (the house) and the $20,000 life insurance proceeds payable to her. She is also entitled to receive $190,000 of the $500,000 life insurance proceeds. B is entitled to receive the remaining $310,000 of life insurance proceeds.

[The result under the 1995 Senate's action: Only the $100,000 house and the $20,000 of insurance payable to the surviving spouse are included in the calculations. The surviving spouse would receive these $120,000 of assets. B would receive the full $500,000 life insurance benefits. Under the Senate's action, life insurance payable to the surviving spouse is included in the calculations and "counts" against her. Life insurance payable to others is not counted.]

Example 4

[Prior to death, a bitter husband takes all of his assets, converts them to cash, and buys a $500,000 life insurance policy. He makes the policy payable to someone other than W.]

Assets:

500,000	life insurance proceeds on policy owned by H. The beneficiary (B) is someone other than W.
0	assets in W's name at the time of H's death.
$500,000	

Results after 1993 Legislation. W has a right to 50% of $500,000. She is entitled to receive $250,000 of the $500,000 life insurance proceeds. B is entitled to receive the remaining $250,000 of life insurance proceeds.

[The result under the 1995 Senate's action: None of the insurance is included in the calculations. The surviving spouse would receive nothing. B would receive the full $500,000 life insurance benefits.]

Example 5

Assets

$100,000	house goes to W by will
100,000	life insurance proceeds on policy owned by H. The beneficiary (B) is someone other than W.
50,000	life insurance proceeds on policy owned by H's favorite charity (C). The charity is the beneficiary of the policy.
0	assets in W's name at the time of H's death.
$200,000	assets included in the calculations. The policy owned by the charity is not counted.

Results after 1993 Legislation. W has a right to 50% of $200,000 (house and life insurance owned by H). Her right to $100,000 is fully satisfied since she receives a $100,000 house. B receives the $100,000 of life insurance proceeds. C receives the $50,000 of life insurance proceeds.

[The result under the 1995 Senate's action: Only the $100,000 house is included in the calculations. The surviving spouse would still be entitled to receive it. Thus, the result is the same.]

JOINT EDITORIAL BOARD FOR UNIFORM PROBATE CODE

EXHIBIT 7
DATE 2/28/95
SB 132

RESPONSE TO THE LIFE INSURANCE INDUSTRY

The Joint Editorial Board for the Uniform Probate Code (JEB) has become aware of lobbying efforts against the Uniform Probate Code by the Life Insurance Industry, spearheaded by the American Council of Life Insurance (ACLI). The JEB issues this statement in response to the Life Insurance Industry's opposition. The Life Insurance Industry's opposition must be understood for what it is--not a principled argument on the merits, but a claim by a powerful industry lobby for special treatment for its industry's products. Regrettably, in their anti-UPC lobbying efforts, the ACLI and other representatives of the Life Insurance Industry often misrepresent, exaggerate, and distort the true meaning and significance of the UPC provisions to which they object.

The main targets of the Life Insurance Industry are the UPC inclusion of life insurance payable to third parties as part of the property that is subject to the elective share of the surviving spouse and the inclusion of life insurance and other nonprobate transfers in the UPC's rules of construction. The JEB observes at the outset that the American Law Institute, in the Restatement (Second) of Property (1992), has also taken the position that life insurance payable to third parties should be subject to the surviving spouse's elective share and that rules of construction for both probate and nonprobate transfers (including life insurance) should be uniform. *Consequently, state legislators should be aware that both the Uniform Law Conference and the American Law Institute, the two premier and disinterested national organizations devoted to law reform, agree on these two issues.*

The UPC Protects Insurance Companies (and Other Payors) from Liability. Before discussing the merits of the UPC's position on these two issues, the JEB wishes to point out that the UPC (but not the Restatement) goes out of its way to protect insurance companies from liability. The UPC contains elaborate payor protection provisions. The term "payor" is a defined term that includes life insurance companies. Insurance companies (and other "payors") are protected from liability if they pay to the designated beneficiaries before receiving notice of a contrary claim. If they receive notice of a contrary claim before making payment, they can disentangle themselves from the dispute (and avoid liability) by paying the proceeds into court. Consequently, the UPC does not impose administrative costs on insurance companies (or other payors). Insurance companies (or other payors) need not expend resources on investigating the validity of claims under the elective share or the rules of construction. Cases in which a contrary claim is filed will be small in number. They will be the exception, not the rule. In those isolated cases, the courts, not the insurance companies, are charged with determining who is ultimately entitled to receive the insurance proceeds. For additional discussion of the UPC's payor protection provisions and related issues, see **Attachment No. 5.**

EXHIBIT 8
DATE 2/28/95
SB 132

JOINT EDITORIAL BOARD FOR UNIFORM PROBATE CODE

SUMMARY OF RESPONSE TO THE LIFE INSURANCE INDUSTRY

- Both the Uniform Law Conference (in the UPC) and the American Law Institute (in the Restatement, Second, of Property: Donative Transfers), the two premier and disinterested national organizations devoted to law reform, agree that life insurance should be included in the property that is subject to the elective share of the surviving spouse and that life insurance and other nonprobate transfers should be subject to the same rules of construction.

- The UPC protects insurance companies (and other payors) from liability if they pay to the designated beneficiaries before receiving notice of a contrary claim. If they receive notice of a contrary claim before making payment, they can disentangle themselves from the dispute (and avoid liability) by paying the proceeds into court. Consequently, the UPC does not impose administrative costs on insurance companies (or other payors). Insurance companies (or other payors) need not expend resources on investigating the validity of claims under the elective share or the rules of construction.

- Cases in which a contrary claim is filed will be small in number. They will be the exception, not the rule. In those isolated cases, the courts, not the insurance companies, are charged with determining who is ultimately entitled to receive the insurance proceeds.

- Under the UPC's elective share system, the *most* that the surviving spouse could take from life insurance beneficiaries is 50% of the proceeds. In most cases, the surviving spouse will be entitled to substantially less.

- If the public policy of this country is to protect surviving spouses--mostly elderly widows--from disinheritance by will, there is no defensible case for allowing disinheritance by will substitutes (nonprobate transfers), which are functional equivalents of wills. Recently, federal law recognized this by protecting surviving spouses from being deprived of employee death benefits under plans covered by the Employee Retirement Income Security Act (ERISA), as amended by the Retirement Equity Act (REACT).

- There is nothing unique about life insurance. The purchase of life insurance by the decedent spouse is a way of shifting the decedent's assets into one of a variety of forms of investment. There is no meritorious case for treating one form of investment more favorably than other forms of investment.

- There is a profound parallel between the elective share of the surviving spouse and the federal estate tax. The federal estate tax taxes both probate and nonprobate transfers (including life insurance). The reason is simple. If the federal estate tax only taxed probate transfers, the tax would be ineffective because people would swarm to the nonprobate transfers. If the federal estate tax taxed both probate and nonprobate transfers, but left out one form of nonprobate transfer--life insurance--people would use life insurance to avoid the estate tax. The same point holds true for the elective share. If life insurance were the only exempted nonprobate transfer, life insurance would be the estate-depleting transfer of choice for people determined to disinherit their surviving spouses.

- Life insurance is one of the most important forms of wealth transmission in the United States. Life

insurance has become the principal last will and testament of our legal system. If the elective share is to be effective, life insurance must not be exempted.

- The UPC's elective share, as revised in 1990, has been endorsed by the American Association of Retired Persons and by the Consumer Federation of America.

- The UPC has always covered nonprobate transfers and other matters extending beyond decedents' estates. UPC coverage of nonprobate transfers (including life insurance) is not new.

- One of the themes of the 1990 revisions of the UPC was further to unify the law of probate and nonprobate transfers, so that all donative transfers, whether by will or will substitute, would be covered by the same rules of construction.

- One of the rules of construction that the UPC extends to nonprobate transfers (including life insurance) is a provision on "antilapse." The main goal of antilapse statutes is to protect against an unintended disinheritance of the decedent's grandchildren. Antilapse statutes are founded on common intention--on the conviction, borne out by experience, that most decedents, if they had thought about the possibility of an unusual order of deaths, would have provided that a deceased child's share should go to the deceased child's issue. Antilapse statutes do not, however, force this result on donors: if there is persuasive evidence that the decedent did think about the possibility and deliberately provided that the deceased child's issue not take, then that intent is honored.

- An antilapse statute for life insurance and similar beneficiary plans is especially needed. Life insurance is often taken out early in life when the policyholder is a young adult, fairly recently married, and with young children. This is a time of life when the parent is least likely to anticipate the possibility of an unusual order of deaths.

- The problem is compounded by the fact that life insurance companies and similar payor institutions typically offer a fairly rigid set of beneficiary options that usually do not include the one that most people would choose were it offered--the one designating a deceased child's issue to take the share that the deceased child would have taken.

- The option that most insurance companies give their policyholders is one providing that the deceased child's share goes to the other (surviving) children, not to the deceased child's issue. For the administrative convenience of the insurance companies, the Life Insurance Industry promulgates the false idea that this anti-grandchild option is what most policyholders want.

- The Life Insurance Industry often misrepresents, exaggerates, and distorts the true meaning and significance of the UPC provisions to which they object.

EXHIBIT 9
DATE 3/28/95
SB 132

February 24, 1995
1400 Gerald
Missoula, Mt. 59801

House Judiciary Committee
Helena, Montana

Members of the Committee,

I am a Roman Catholic priest of the diocese of Helena for 34 years. I am currently the pastor of Christ the King parish in Missoula.

I am writing to you about the proposed legislation which seeks to change the present law that an estate cannot entirely disinherit a spouse.

I have been involved with many families as a parish priest for 34 years. I have known and been touched by the pain and turmoil which families so often encounter at the time of death and the financial difficulties of many widows.

There are significant moral issues of justice involved in this legislation. I think that the proposed legislation asking that life insurance be excluded from the surviving spouses right of election is unjust.

> "all assets, including life insurance, be subject to the surviving spouses right of election".

Thank you for your consideration.

Sincerely yours,

James J. Hogan

Father James J. Hogan
Pastor / Christ the King

EXHIBIT 10
DATE 2/28/95
SB 132

POSITION PAPER
S.B. 132 (Probate Code revisions)
American Council of Life Insurance
Denny Moreen

S.B. 132 is a bill to revise the Probate Code. The code was extensively redone in 1993. This is a "Uniform" law redone at the behest of the Uniform Law Commissioners.

If a surviving spouse feels like he or she is disinherited, he or she can demand to take what is called the "elective share." To determine what that share is, the court must look at all the property that transferred through the estate and all property that transferred outside the estate (gifts before death, property held in joint tenancy, etc.). All of these are combined and the total is called the "augmented estate." Before 1993 life insurance was not included in the "augmented estate."

The 1993 recodification included life insurance in the "augmented estate." Life insurance companies feel this interferes with the basic contract of life insurance, immediate payment to the beneficiary. Insurance purchased for an adult disabled child would be held up if the spouse decided to request the elective share (even though the child may eventually get most or all of the proceeds of the policy).

It is for this reason that we proposed amendments to the bill in Senate Judiciary which remove life insurance from the "augmented estate." The amendments were adopted by Senate Judiciary and the bill, with the amendments, passed the Senate. (The amendments are the striking on page 2, lines 23, 26, 27, 30, page 12, lines 6 through 15, and page 13, lines 13 through 17; the capitalized underlining on page 14, lines 7 through 12; the striking on page 15, lines 5 through 7; the capitalized underlining on page 15, lines 16 through 18.)

The argument against the amendments and in favor of having life insurance in the "augmented estate" is that there is a chance that the deceased

could have bought a substantial life insurance policy shortly before death and named someone other than the spouse as beneficiary which would adversely affect the surviving spouse. The uniform commissions were not presented with any example of this happening when they included life insurance. No one that I have spoken to has ever encountered such a problem except for the estate attorney from Great Falls who testified at the Senate Judiciary Committee hearing that she knew of one such case. She also testified that the "augmented estate" comes into play very seldom. Therefore the question is, is it worthwhile to jeopardize every life insurance policy to prevent the very rare anomaly? We believe the answer is no. North Dakota agrees. It is enacting these very amendments.

(Our amendments also change the procedure and notice provisions for life insurance companies relating to when the deceased is murdered and when the spouse is divorced at the time of death. [The spouse is not a valid beneficiary under those circumstances.] These are not controversial amendments as far as we know. Those amendments are the capitalized underlining contained on pages 19, 20, 42, 43, 44, 46, and 47. They are not related to the "augmented estate" amendments.)

EXHIBIT 11
DATE 2/28/95
SB 64

STATE OF MONTANA

DEPARTMENT OF JUSTICE

BOARD OF CRIME CONTROL

303 North Roberts - PO Box 201408 - Helena, MT 59620-1408

Joseph P. Mazurek
Attorney General

Phone (406) 444-3604
FAX (406) 444-4722

SB 64 : Minor In Possession

Sponsor: Senator Del Gage

Testimony: Gene Kiser
Montana Board of Crime Control
444-3604

Based on statements of concern from justice system professionals throughout the state, the Board of Crime Control appointed a task force in 1993. Its charge was to assess the effectiveness of Minor in Possession (MIP) enforcement and make recommendations for changes, if any deficiencies were found. The task force, chaired by Havre Police Chief Mike Shortell, was made up of representatives from law enforcement, the judiciary, juvenile probation, and treatment professionals. Staff from Crime Control, Highway Traffic Safety, and the Alcohol and Drug Abuse Division of Corrections & Human Services provided support for the task force.

SB 64 reflects the work of the MIP Task Force - a combination of reviewing statutes, data regarding arrests and dispositions, a survey of justice professionals, and the wealth of experience represented by task force members.

A survey was conducted in the summer of 1993 of Sheriffs & Police Chiefs (116), Chief Juvenile Probation Officers (20),Courts of Limited Jurisdiction (126) and treatment professions (37). Response rates varied from 76 - 95%; the high return lends validity to the results.

- A majority (70-95%) indicated that current MIP statutes are inadequate.
- 69% of law enforcement and 78% of treatment professionals felt that dispositions were too lenient.

DATA:

- **5,160** minors were arrested in 1993 for possession, an increase of 3,700 over the 1,485 arrested in 1983. Of those, about 1/5th (900), were referred to Youth Court.
- The gender split has consistently been about **70/30 for males and females**.
- 90% are arrests of white youth; 8% arrests of native americans.

The major intents of this legislation are to: **establish consistency, provide effective deterrents, and provide a method of tracking**.

1. Problem: no method of tracking repeat offenders.
proposal: require that all convictions be reported to Records & Drivers Control. 1st offense cannot be used for insurance purposes.

2. Problem: lack of consistent treatment because jurisdiction is shared between Youth Court and Courts of Limited Jurisdiction.
proposal: require same penalties irrespective of jurisdiction.

3. Problem: Current statutes have limited impact and questionable deterrent effect.
proposal: establish increased penalties for 2nd and 3rd offenses. Increase the fines for possession and attempt to purchase, use suspension or revocation of driving privileges, require community service and substance abuse education - if available.

Substantial consideration was given to the question of using driving privilege penalties for non-driving offenses. The majority of Task Force members, although not all, felt that fines alone were not effective. It was their judgment that the potential loss of driving privileges would have the most profound effect.

Concern for "multiple offenders" was raised repeatedly. Over the life of the task force, members frequently brought newsclippings showing citations for 5 and 6 Mip offenses. As there is no data system currently collecting the information, we have no way of judging how many of the 5,000+ kids cited during 1993 had more than one arrest. Until the court automation projects are implemented, using Records and Drivers Control Division is the most efficient, immediately available option. The Division has indicated that they can accomodate service.

Copies detailing the full deliberation of the Task Force as well as the complete response for the survey are available from the Board.

Senator Gage
EXHIBIT 12
DATE 2/28/95
SB 64

ATTORNEY GENERAL
STATE OF MONTANA

Joseph P. Mazurek
Attorney General

Department of Justice
215 North Sanders
PO Box 201401
Helena, MT 59620-1401

MEMORANDUM

TO: Major Bud Garrick
Montana Highway Patrol

FROM: Beth Baker
Assistant Chief Deputy Attorney General

DATE: March 30, 1994

SUBJECT: Minors In Possession

You have requested legal advice concerning when it is appropriate to charge a minor with possession of alcohol in violation of Mont. Code Ann. § 45-5-624. In particular, the question has been raised whether all minors present at a party where alcohol is being served may be prosecuted for possession.

Mont. Code Ann. § 45-5-624(1)(a) provides:

> A person under the age of 19 years commits the offense of possession of an intoxicating substance if the person knowingly consumes or has in the person's possession an intoxicating substance. The person need not be consuming or in possession of the intoxicating substance at the time of arrest to violate this subsection.

The last sentence of this section was added in 1989 in an attempt to clarify that minors who are clearly intoxicated or suspected of accepting an intoxicating substance from another person may be charged even if they are not physically holding the alcohol in their hands at the time of arrest.

"Possession" is defined in the Montana criminal code as "the knowing control of anything for a sufficient time to be able to terminate control." Mont. Code Ann. § 45-2-101(52) (emphasis added). This definition applies to all Title 45 offenses, including a violation of Mont. Code Ann. § 45-5-624. The Montana Supreme Court, considering possession in the context of drug cases, has held that possession may be either actual or constructive:

> Actual possession means that the drugs are in the personal custody of the person charged with possession; whereas constructive possession means that the drugs are not in actual physical possession but that the person charged with possession has dominion and control over the drugs. . . . In order to find either actual or constructive possession, the fact finder must find that there was "knowing" possession.

State v. Van Voast, 805 P.2d 1380, 1383 (Mont. 1991) (emphasis added). Thus, as in other criminal cases, the State has the burden of proving, as an element of the offense, the mental state of "knowingly." Id. Accord State v. Hall, 816 P.2d 438, 441 (Mont. 1991). In one recent case, the Court found insufficient proof of knowing possession where, although the defendant owned the trailer in which illegal drugs were found, no evidence was produced to tie the defendant to the drugs and there were others who had access to the trailer during the time in question. State v. Gorder, 811 P.2d 1291, 1293 (Mont. 1991).

Since there is usually no direct evidence of knowledge, it may be inferred from evidence of acts, declarations, or conduct of the accused. Hall, 816 P.2d at 441; Van Voast, 805 P.2d at 1383 ("A mental state may be inferred from the acts of the accused and the facts and circumstances connected with the offense"). Accordingly, each case must be evaluated in light of the evidence available. In order for a minor to be charged with possession, the prosecutor must be satisfied that evidence--direct or circumstantial--exists to show that the minor had "knowing" possession, either actual or constructive. Factors that might be considered include, most notably, evidence of intoxication, as well as evidence that the minor had been seen drinking from an alcoholic beverage container or had purchased the alcohol at an earlier time.

A county attorney has considerable discretion in deciding whether to bring charges in a given case. In order for the state to obtain a conviction, it must prove each element of the offense by evidence beyond a reasonable doubt. If the county attorney does not believe that the evidence supports such a finding, he or she is ethically obligated to refrain from filing charges. As described above, constructive possession includes the element of "knowing" control for a sufficient time to be able to terminate control. It is up to the county attorney to review the evidence available and determine whether that element can be proved beyond a reasonable doubt. A prosecutor does not abuse his discretion in determining not to file charges simply on evidence that a minor was present where alcohol was being consumed by others.

EXHIBIT 12
DATE 2-28-95
SB 64

There must be some other evidence tending to show "dominion and control" of the alcohol by the suspect. It is not necessary that such control be exclusive; as the Court stated in Hall, "[w]here a controlled substance is found in a place subject to the joint dominion and control of two persons, possession may be imputed to either or both persons." 816 P.2d at 441. However, mere presence at the scene is not sufficient, standing alone, to show dominion and control, and it is within the judgment of the prosecutor to determine whether sufficient additional evidence exists to support a conviction.

c: John P. Connor, Jr., CPS
Cathy Kendall, MBCC

February 25, 1995

EXHIBIT 13
DATE 2/28/95
SB 64

Chairman Bill Clark
House Judiciary Committee

Sir:

I urge the House Judiciary Committee to support Senate Bill No. 64 as introduced by Senator Gage.

As Chairman of the Minors in Possession Task Force of the Board of Crime Control, I can assure you that the members of the Task Force, through much diligence and thoughtful discussion, came to the conclusion that the changes in penalty and the provisions for driver license confiscation and suspension are necessary as a meaningful deterrent to underage drinking.

Another major concern of the Task Force was the inconsistency with which minor offenders are dealt with state wide. The provisions for community service and community based substance abuse information courses will go a long way towards addressing these issues.

I realize these increases in penalty may be perceived by some as too harsh. I disagree with that view. Effective law demands effective enforcement. Effective enforcement depends on meaningful consequences. Consequences must overcome peer pressure. The loss of a driver's license may very well be too high a price for a youth to pay to risk succumbing to the pressure applied by friends to go partying.

Please give this legislation a chance. Please join in sending a message to our youth that old attitudes, which can almost be described as a wink and nod acceptance that drinking by youth is an inherent right of passage in Montana, is no longer acceptable,

Thank you for your consideration.

Sincerely,
Mike Shortell

EXHIBIT 14
DATE 2/28/95
SB 64

ADSGC
ALCOHOL & DRUG SERVICES OF GALLATIN COUNTY

February 27, 1995

Senate Judiciary Committee

Chairman and Members of the Committee:

As a member of the Governor's MIP Task Force that gathered data for Senate Bill 64 I urge passage of this bill.

I have worked as a professional in the field of Alcohol & Drug Addiction for 25 years. At present I am the Executive Director of Alcohol & Drug Services of Gallatin County in Bozeman. This program, by the way, admits between 300 to 400 MIP's a year. With a program this large, we have the opportunity to experience firsthand, some of the problems with current MIP laws.

Problem 1: There are few options for Judges with repeat offenders.
Problem 2: Most MIP's who go through our program view the fines and cost of education programs as "no big deal" and seem always to have the money to pay.
Problem 3: The majority of repeat MIP's are already having serious problems in other areas of their life because of alcohol but because the present law does not give the court enough authority to order evaluations and treatment, we miss the chance to intervene at age 17 to 20. This enables Montana's young adults to further develop their addiction and end up with more serious problems, which might include DUI's, suicide, assaults and other criminal behavior. This is proven by admission to our other programs two or three years later when these repeat offenders are admitted for more serious issues.

I do believe that stiffer penalties and giving the courts the authority to intervene earlier with evaluations and or treatment, will alleviate many of these problems.

Again, I urge passage of Senate Bill 64.

Sincerely,

James W. Beckman
Executive Director

JWB/dj

cc: file

EXHIBIT 15
DATE 2/28/95
SB 64

H. E. L. P.
(Havre Encourages Long-Range Prevention)
306 3rd Avenue, Ste 205
Post Office Box 68
Havre, MT 59501
(406) 265-6206
(Phone & FAX)

February 27, 1995

Chairman Bob Clark
House Judiciary Committee

Dear Sir:

As the Executive Director for Havre Encourages Long-range Prevention, a not-for-profit community-based organization with a 15 year history in alcohol, tobacco and other drug abuse prevention, I strongly encourage you to support SB 64.

Since it's inception H.E.L.P. has tracked the incidence of alcohol related offenses in our region. Sadly, the number of youth involved with possession of alcohol has increased. Granted, the number increased along with the increased drinking age (19 to 21) that went to in effect in April of 1987; however, the 18-21 year olds are not getting the message from the laws that now exist! As it is illegal for them to consume alcohol, the law should reflect a zero tolerance by those under age. That requires a consequence of significance. Perhaps these youth will look at drinking in a different light if that behavior could take away something they treasure -- their drivers license.

Please give SB 64 your most careful consideration. I have a 16 year old son that will be affected by it's outcome. As the law presently sits there is a lot of pressure for those that choose not to drink to take on the role of designated driver. The law does not discourage it; however SB 64 would. As it should. A designated driver only condones the illegal behavior. Lets' clear up one of the mixed messages that our youth are faced with -- if you are under 21, don't drink, because if you do you will have to pay a fair price.
Thank you for your consideration.

Sincerely,

Robin E. Morris
Executive Director

EXHIBIT 16
DATE 2/28/95
SB 64

MINORS IN POSSESSION:

A PROBLEM FOR MONTANA

MBCC

MONTANA BOARD OF CRIME CONTROL

EXHIBIT 17
DATE 2/28/95
SB 64

FLATHEAD VALLEY CHEMICAL DEPENDENCY CLINIC

P.O. Box 7115
1312 N. Meridian Road
Kalispell, MT 59904-0115
(406) 756-6453
FAX (406) 756-8546

North Valley Office
P.O. Box 2418
6 - 9th Street
Columbia Falls, MT 59912
(406) 892-7900

HOUSE JUDICIARY COMMITTEE
TESTIMONY ON SENATE BILL 64

Thank you for this opportunity to express our support of Senate Bill 64 revising laws related to youth who possess an intoxicating substance.

We commend this recognition that alcohol and other drug use by our youth is a serious concern which requires our utmost attention.

The strength of this bill lies with the fact that youth are held accountable for their actions by assuring tangible predictable consequences coupled with an opportunity for assistance.

Unfortunately, the motivation for change rarely comes until we experience discomfort. An external inconvenience, which forces us to look at our actions and the negative ramifications, can lay the foundation for better decisions in the future.

I particularly endorse the suspension of driving privileges. As a former juvenile probation counselor, I can attest first hand to the motivational benefit this standard loss of privilege created in the Court which I served.

While we are concerned by the apparent double message and standard set for 18 to 20 year olds, we believe this bill is a much needed step in the right direction and encourage its passage.

Respectfully submitted,

Michael Cummins, MA
Executive Director
Flathead Valley Chemical Dependency Clinic

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE 2/28/95

BILL NO. SB 69 SPONSOR(S) Sen. Holden

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
Michael T. McCabe	MT Nat'l Guard	✓	
Roger A. Hagan	Officer + Enlisted Assoc of the N.G.	✓	
Chip Erdmann	MT Air Nat Guard	X	
Jim Taflan	MT Air Nat'l Guard	X	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HR:1993
wp:vissbcom.man
CS-14

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE 2/28/95

BILL NO. SB 71 SPONSOR(S) Sen. Emerson

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
KAREN SEDLOCK			X
CASEY EMERSON Casey Emerson	SPONSOR		
GEORGE BOUSLIMAN	STATE BAR OF MT		X
Ward Flaherty			X
Jacqueline Lenmark	State Bar Mt		X
PATRICK A. CHENOVICK	MT SUPREME CT		X

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HR:1993
wp:vissbcom.man
CS-14

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE 2/28/95

BILL NO. SB 132 SPONSOR(S) Sen. Bishop

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NAME AND ADDRESS	REPRESENTING	Support	Oppose
R Brown McLean	DOR	✓	
Dan McLean	State Bar of MT	✓	
Ed Eck	Uniform Laws	✓	
Doug Kaney	MFALU (Life Underwriters)	✓ w/ Amendments	
Joan Himel	MT Credit Unions League	✓	
Anne Alberts	MT. Assoc. of REALTORS	Monitor	
Jacqueline Lenmark	Am. Ins. Assoc.	✓ ~~w/ amdts~~	
Roger McGlenn	Independent Ins. Agents Assoc of MT	✓	
Denny Moreen	ACLI	As Amended	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

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HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE 2/28/95

BILL NO. SB 64 SPONSOR(S) Sen. Gage

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
GENE KISER	MBCC	✓	
Jim OBERHOFFER	MT Chiefs of Police	✓	
MARY ELLERD	MJPOA	✓	
Beth Baker	Dept of Justice	✓	
KATHY McGOWAN	CDPM, MSPOA	✓	
Bob Gilbert	MT Magistrates Assn	✓	
Steve Yeakel	MT Council for Maternal & Child Health	✓	
Marcia Armstrong	Dept. Corrections & Human Srv.	✓	

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