

MINUTES

MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE D. CRIPPEN**, on January 27, 1997, at 10:00 a.m., in the Senate Judiciary Chambers (325) of the State Capitol, Helena, Montana.

ROLL CALL

Members Present:

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

Members Excused: None

Members Absent: None

Staff Present: Valencia Lane, Legislative Services Division
Jody Bird, Committee Secretary

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

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 79, posted January 13, 1997
SB 176, posted January 14, 1997
Executive Action: SB 166 Tabled; SB 31 Do Pass
As Amended; SB 163 Do Pass As
Amended

DISCUSSION OF COMMITTEE BILL

Motion: **SENATOR MIKE HALLIGAN** made a motion to ask **Valencia Lane** to work with appropriate members of the Montana State Bar Association on a committee bill modifying inheritance laws in the State.

Discussion: **CHAIRMAN BRUCE CRIPPEN.** The President of the Senate has asked this committee to request legislation dealing with step-children and inheritance taxes. If a husband and wife marry

and have children that are under the age of 18 at the time of the marriage, these children are step-children and lineal descendants in the testate law. If the husband and wife marry and one of them has children above the age of 18, to qualify for the provisions of the inheritance tax rates these children would have to be adopted. Even though they may have gone for 60-70 years as a parent/child relationship, unless they were actually adopted, they are not treated as lineal descendants for inheritance tax purposes and would pay a much higher rate. I think this law is unfair and contravenes the intent of people, it is highly unknown that this situation exists in the law. This is appropriate and, as a matter of courtesy to the President, I think we ought to do it.

Vote: SENATOR HALLIGAN's motion carried 8-0. SENATORS ESTRADA, AND GROSFIELD were not present and did not leave proxy votes. This constituted 80 percent or more than the three-fourths vote required to request a committee bill.

Tape 1, Side A, #6.3, 9:40 a.m.

Motion: SENATOR HALLIGAN made a motion to allow Valencia Lane to work with the State Bar in creating a committee bill to address language changes in Montana's limited liability company or partnership laws, to ensure forming of these companies is being encouraged in Montana.

Discussion: CHAIRMAN CRIPPEN. This not unusual. This committee will probably do this more than any of the other committees, because often the bills deal with probate or some other section of the law that belongs before the Judiciary Committee. In the past, it has been the tradition for the President of the Senate to assign a request like this to the Senate Judiciary Committee.

SENATOR REINY JABS. Will these bills be heard by this committee?
CHAIRMAN CRIPPEN. Yes. The President will sign and present the first bill.

Vote: SENATOR HALLIGAN's motion carried 8-0, meeting the three-fourths requirement for a majority. SENATORS ESTRADA AND GROSFIELD were not present and did not leave proxy votes.

EXECUTIVE ACTION SB 48

Discussion: CHAIRMAN CRIPPEN. Are we still waiting for the fiscal note on SB 48? SENATOR HALLIGAN. The people concerned have met on this, and have zeroed out the fiscal note with some cautionary items. I believe the fiscal issues have been taken care of, but I don't want to push the bill if people are still uncomfortable with doing that. They have also identified several areas of concern by SENATOR JABS and SENATOR RIC HOLDEN, about whether we were mandating the family assessment centers. There is no mandatory or requirement language in the bill. If there is still a concern that we should hold the bill, I will defer to

that. I'd like it to have the full revised fiscal note before it goes to the floor.

SENATOR HOLDEN. I had an opportunity to look into this bill. While some of the fiscal note could have been zeroed out, it's not clear exactly how much has been. I think we need to wait for the fiscal note so we know exactly what we are talking about regarding these programs. I would like to know what the Department of Corrections thinks they will do with this piece of legislation. It should be reflected on the revised fiscal note. I'd ask to have it held at least a day until we can get a fiscal note. **CHAIRMAN CRIPPEN.** We don't have a fiscal note on SB 99 either. We will wait another day, but not much longer.

SENATOR JABS. I met with Director Day on both of these bills. I was assured it was zeroed out and that there was no fiscal impact of any consequence. The \$13 million is for secure care, but I understand your concerns.

EXECUTIVE ACTION SB 31

CHAIRMAN CRIPPEN. SB 31 has been rereferred to the Committee; however, **SENATOR LOREN JENKINS** isn't here. I'd like to get this bill out on the floor.

Tape 1, Side A, #11.6, 9:45 a.m.

EXECUTIVE ACTION SB 166

SENATOR HOLDEN. I have amendment 16610.avl for SB 166 which can be discussed today. This amendment strikes out everything up to page 5, line 2. On the back side of the amendment, as part of amendment 9, language is inserted to state, "if the spanking does not cause severe emotional harm to the child or harm to the child's health or welfare."

CHAIRMAN CRIPPEN. I would like a definition of severe emotional harm. **SENATOR HOLDEN.** "Emotional harm" could be broadly interpreted, whereas "severe" defines the word emotional more distinctly.

CHAIRMAN CRIPPEN. Another part provides for a substantive change in amendments #6, 7, and 8. **SENATOR HOLDEN** asked **Valencia Lane** to explain these parts of the amendment. **CHAIRMAN CRIPPEN.** You are getting into the publication of the offense; you're striking "involving an act of vandalism" on page 2, line 13. So it is just, "convicted of a criminal mischief for a first or subsequent offense". Why are you doing that? **Valencia Lane.** The amendments were drafted to take out all acts of public spanking, but it does leave one penalty in for vandalism and graffiti. It would provide that the judge could order public notification in the local newspaper concerning the sentencing for the act of vandalism, and would require the convicted person to pay for the cost of publication.

CHAIRMAN CRIPPEN. Do we have any precedent for that. **Valencia Lane.** I'm not sure.

SENATOR SUE BARTLETT. Am I correct in reading the amendment to apply only to public property? **Valencia Lane.** Yes.

SENATOR BARTLETT. That might present a minor conflict. The language to be inserted by amendment #7 specifies "public property" and the language in amendment #8 references "private or public property." **Valencia Lane.** You are correct, and I'm not sure it was intended that way.

CHAIRMAN CRIPPEN. What was intended? **SENATOR HOLDEN.** "Private" should be included in amendment #7 to make it consistent with amendment #8.

CHAIRMAN CRIPPEN. I would like to segregate these amendments.

SENATOR HOLDEN asks if this can be done. **Valencia Lane.** There are two concepts here: one is to amend the penalty for vandalism to allow for publication of the name and make the person pay for the notification; the other is to amend the existing laws on harm to children to say that spanking is not sexual abuse or physical injury if it does not cause severe emotional harm to the child or harm to the child's health or welfare. I'd have to go through and find which amendment goes with which concept.

Tape 1, Side A, #20.7, 10: 50 a.m.

Motion: **SENATOR HOLDEN** made a motion to allow the public notification in local newspapers concerning the sentencing for certain acts of vandalism, specifically concerning the placing of graffiti on private or public property without consent.

Discussion: **SENATOR BARTLETT.** Was **VICE CHAIRMAN GROSFIELD** interested in having the public notice in the newspaper exclusively in reference to crimes that involved graffiti on private or public property? **Valencia Lane.** It was my understanding that he wanted that for vandalism.

SENATOR BARTLETT. I don't believe that amendments #7 and 8 read together are as clear as **VICE CHAIRMAN GROSFIELD** would probably want them to be.

CHAIRMAN CRIPPEN. This is the heart of the issue. Should we, as a matter of public policy, require in cases like these that we go one step further than we do in any other criminal offense, and have a public notice put on record and require the defendant to pay for it?

SENATOR STEVE DOHERTY. The Committee has attempted to walk a fine line in protecting juveniles from publication, understanding that when kids go really bad we have to deal with them. When kids occasionally go bad, the Legislature had, historically, gone toward the direction of trying to keep juvenile crimes quiet. If

we're changing this for graffiti, as opposed to the other crimes, I'm not sure that may be a good public policy. We're giving this sentencing discretion to the judge. We're also not giving any direction to the judge about when it might or might not be an appropriate instance to impose this particular sentence. Hopefully, the judge would use sound discretion, but we're not giving any instructions in the amendment.

SENATOR HALLIGAN. The confidentiality provisions for juveniles were addressed during the past two legislative sessions, making most of these a matter of public record. We used to keep them quieter than we do, but for acts that are delinquent, the newspapers are reporting the names. I'm concerned because you have the potential for the victim's property being put in the newspaper, and you may want some confidentiality for the victim. The judges in Ravalli County are ordering some of this anyway, I think it is under the existing broad guidelines for sentencing. I think the whole bill needs to stay in the Committee. **CHAIRMAN CRIPPEN.** I want to get this thing out. All that was asked for is the right of the parent to spank.

SENATOR HOLDEN. I would like to withdraw my motion unless **VICE CHAIRMAN GROSFIELD** has some additional comments.

CHAIRMAN CRIPPEN. I suggest the Committee amend this bill to strike everything else out, and deal with the amendment on page 5, lines 3 and 8 pertaining to spanking.

Motion: **SENATOR HOLDEN** made a motion to approve the amendment suggest by **CHAIRMAN CRIPPEN**.

Discussion: **CHAIRMAN CRIPPEN.** By this amendment, the Committee will only deal with the issue involving spanking, and insert the language stating "if the spanking does not cause severe emotional harm to the child."

Valencia Lane. I am asking for clarification. The Committee is: 1) striking section 1 from the bill, which deals with criminal mischief and vandalism; 2) leaving in section 2 of the bill with an amendment to that section; and 3) striking section 3 of the bill which deals with juvenile court, so all that will remain in the bill is section 2 with amendments. When you read the amendment you read, "if the spanking does not cause severe emotional harm to the child." I assume that you want to continue with the amendment as written, "or harm to the child's health or welfare." **CHAIRMAN CRIPPEN.** That is fine.

Tape 1, Side A, #28.4, 10:05 a.m.

SENATORS GROSFIELD AND ESTRADA are present at this point.

Discussion: **SENATOR DOHERTY.** If I understand the motion, we're amending the definition of both physical injury and sexual abuse to make a statement that spanking is neither physical injury nor

sexual abuse, if the spanking does not cause severe emotional harm to the child or harm to the child's health or welfare. I think what we are trying to get at is a good thing, I don't know if these words get us there. If we have an individual who is charged with either physical injury or sexual abuse, their defense would now be expanded, i.e., their ability to avoid a guilty verdict on either one of those charges. Do we want to expand their ability to obtain a not guilty verdict by giving them the additional defense -in this instance- of saying, "it did not cause severe emotional harm to the kid when I hit him or touched him in that sexual way, it only caused him a minor degree of emotional harm or a moderate degree of emotional harm." This is something we need to be very careful of.

I don't know what the magic words are but I think these words give a potential defendant more defenses. **CHAIRMAN CRIPPEN.** You are absolutely correct; the language is a little vague. We can keep this bill or we can pass it out with this amendment - it's up to the committee.

SENATOR HOLDEN. We heard this bill quite some time ago. If **SENATOR DOHERTY** had some ideas or really wanted to bring ideas to the Committee, they'd be here. I think we should go ahead and vote.

SENATOR HALLIGAN. I'm asking for clarification on the motion. The motion is simply to strip the vandalism and criminal mischief part right now, isn't it? **CHAIRMAN CRIPPEN.** We're dealing with amendment #9 now, and everything else is still in the bill.

SENATOR HOLDEN. My motion is to strip everything from the bill, and insert the language in amendment #9 that deals with spanking.

SENATOR HALLIGAN. I request that the Chair segregate the motions, so we can vote on them separately. **CHAIRMAN CRIPPEN.** The Committee is voting on amendment #9 only right now.

Vote: **SENATOR HOLDEN's** motion to adopt amendment #9 passed in a roll call vote (6-4).

Motion/Vote: **SENATOR ESTRADA** made a motion to TABLE SB 166. The motion carried in a roll call vote (6-4).

HEARING ON SB 176

Sponsor: **SENATOR JOHN HERTEL, SD 47, Moore**

Proponents: Vern Peterson, Fergus County Commissioner
Gordon Morris, Director, Montana Association of
Counties (MACO)

Opponents: Russell Hill, Montana Trial Lawyers Association
(MTLA)

Opening Statement by Sponsor: SENATOR JOHN HERTEL, SD 47, Moore.

This small bill, would correct a situation adversely affecting counties now. Counties are strapped for funds, and officials are trying to be as efficient as possible. Everyone is entitled to legal counsel. If people don't have sufficient funds, the Court determines whether court-appointed counsel is appropriate. This bill provides that such counsel would not be not determined merely by substantial hardship in providing for personal or family necessities.

In some cases, we believe the people can afford their own counsel. Thus, more emphasis should be placed on what the individual owns and has in his possession at the time. The bill strikes "without substantial hardship in providing for personal or family necessities." A financial statement would still be used to determine indigence. Others here can explain this legislation in greater detail.

Proponents' Testimony:

Vern Peterson, Fergus County Commissioner. It's becoming more difficult every year to fund justice and district courts. Rather than trying to increase those budgets, we need to try to put the responsibility back on the individual and off the taxpayer as much as possible. This bill is a small step in that direction. I've seen people driving much newer vehicles than do, who have court appointed counsel. It is not fair to the taxpayer to continue that. We have increased these line items almost continuously since I've been a county commissioner. This year we've expended 75 percent of our line item in the first half of the year, although we felt the budget was sufficient when the year began. This is simple legislation. Substantial hardship probably means something different to everyone; therefore, the bill would be better off with this language stricken. Instead it requires a sworn financial statement as to whether or not people are eligible for counsel. This bill puts responsibility where it belongs, and that is with the individual.

Gordon Morris, Director, Montana Association of Counties (MACO). This is a MACO issue, supported by the membership. We ask for your favorable consideration of this bill. It doesn't change a lot, other than requiring a sworn financial statement rather than demonstration of hardship.

Opponents' Testimony:

Russell Hill, Montana Trial Lawyers Association (MTLA). We oppose removal of the language regarding substantial hardship. I urge the Committee to look at the difference between the comments that were made on cost-savings, as a potential from this bill, and the underlying sense we all have that it's a certain unfairness, or that we ought to additionally punish people who require court-appointed counsel. The only reference to abuse that I heard has to do with defendants driving nicer cars than

other people at the same time that they have court-appointed counsel. That is offensive to everybody, but the fact is people have living standards when they are charged with a crime.

This bill raises real problems with the current financial status of a defendant, whatever their indebtedness is or their possessions already are. The fiscal note is "very squishy" in terms of cost savings. It doesn't explore the possibility that by denying defendants counsel, you may actually increase costs because you have litigants representing themselves, and more vulnerable convictions. When a truly joined adversarial system doesn't exist, the prosecution has a smoother skate. Indigent does not mean destitute. You don't have to be completely unable to afford expensive private counsel in order to be indigent. What this bill does, is get into a defendant's ability to support his family. Financial resources of others are irrelevant to the defendant's ability to pay. This bill may have symbolic value, but I don't think it will have much realistic value.

Questions From Committee Members and Responses:

SENATOR BARTLETT. Please give examples of what a judge might consider to be included under substantial hardship in providing for necessities that you might disagree with. Has this caused a county to have to pay for the criminal defense of a defendant when you thought it was inappropriate? **Commissioner Peterson.** I am not sure. I think substantial hardship means something different to every judge. This is part of the clarification that I hope we would gain by removing that language. For the most part they would probably look at providing for the family.

SENATOR DOHERTY. Which counties have had to provide funds for legal representation, in the last two years, in justice and district courts where the judges have abused the direction that is currently in the statute? Statute says they have to consider, on the basis of sworn statements, an individual's ability to provide personal or family necessities before ordering that kind of representation. **Gordon Morris.** I can't tell you of any instances where the judges have abused this section of law in terms of determining whether or not there is substantial hardship on an individual before making a determination they are indigent, and, therefore, eligible for court ordered representation.

Tape 1, Side A, #46.0

SENATOR DOHERTY. Why, as a matter of public policy, is it a good idea to take out the direction of substantial hardship? **SENATOR HERTEL.** There are instances where the financial statement is not looked at hard enough. If this were studied more diligently, perhaps it would be emphasized more.

Tape 1, Side B, #00

SENATOR DOHERTY. Did you contact anyone from the County Attorney's office in Fergus County to find out if the individuals driving a nicer car than yours had submitted false statements to the Justice of the Peace or District Court to qualify for the Judge ordering legal representation? **Commissioner Peterson.** Yes, I have followed up on several different occasions. The investigation of a financial statement is another burden that would be required. They don't have the time to investigate them. We have one full time attorney and no deputy. I have been told that as long as people sign their statement, if something comes up down the road, we can prosecute. However, he has never investigated to the point of finding out if there was a false statement.

SENATOR HALLIGAN. Help me to understand the district court reimbursement program. **Mr. Morris.** The district court reimbursement program was passed in 1985. The money for that program, reimbursing counties for criminal costs associated with district court trials, comes from the 7 percent portion of the 2 percent motor vehicle fees that are collected statewide. On an annual basis, this amounts to approximately \$3.5 million, which is then available, under the administration of the Supreme Court, for reimbursement to local government to offset the costs associated with indigent defense, court ordered legal representation, psychological exams, and jury trials associated with it. That program has annually paid out all of the money it collects.

SENATOR HALLIGAN. Is there more demand on that fund? Is that where the county property taxes potentially come in to fund the public defenders that may have been referred to by the Fergus County Commissioner? **Mr. Morris.** That is correct. This is a District Court reimbursement program as opposed to Justice of the Peace Courts.

SENATOR HALLIGAN. Do you have information from MACO on how most counties handle their public defender? Are they on staff or on contract? **Mr. Morris.** On a statewide basis, most of them are under contract with the counties. An outside legal firm provides public defender services to the county.

SENATOR HALLIGAN. Are the contracts set prior to that, and does an attorney have to take every case that is assigned to him? How do those costs increase? **Mr. Morris.** If I understand the question, most of the contracts would have a threshold provision covering "x" number of cases to be taken by that firm/attorney and there would be a mechanism for anything in excess of that. We know there are more people using court-appointed attorneys than ever before. We're trying to provide an adequate test to make sure they're clearly indigent, and don't have the financial wherewithal to handle their own representation.

SENATOR HALLIGAN asked that **Mr. Morris** check a couple of counties for the Committee, and let them know what those contracts say in terms of volume and if there are thresholds.

VICE CHAIRMAN GROSFIELD. How does this work in the practical sense? You are dealing with the criminal code, so you are talking about someone who is charged with a crime and they go to the court and say they can't afford a lawyer? We don't know how much it is going to cost because it depends on how tough the case gets? Perhaps the defendant might think initially it will cost less than it really does. How does a judge make a determination when he doesn't know the costs up front? **Mr. Morris.** I'm not in a position to answer this question. I'm not sure how you measure that or that the judges know how.

VICE CHAIRMAN GROSFIELD. Are we saying a person will have to sell their assets before the judge will determine indigence, by eliminating substantial hardship and talking about financial inability? **Mr. Morris.** I thinks it is as simple as submitting a sworn financial statement demonstrating financial inability.

VICE CHAIRMAN GROSFIELD. A sworn statement may say there is no way I can afford this unless I sell the house. That is the way the judge will read it. What is your intention here, that I sell the house? **Mr. Morris.** I think the individual's assets should be the first line of defense in terms of paying for the cost, not the taxpayers'.

CHAIRMAN CRIPPEN. Is it the intent of this bill, should it pass, is that it reduce costs to the taxpayers as far as providing counsel for those people in criminal cases only? **Mr. Morris.** That is correct.

CHAIRMAN CRIPPEN. What if you require an individual to provide his/her counsel on a criminal case, and he/she ends up spending several thousands of dollars and that individual is then found to be not guilty? Is there any provision in the law that allows that individual to recoup his/her legal expenses? **Mr. Morris.** There is no recourse at that point, as far as I know.

Closing by Sponsor:

SENATOR HERTEL. I thank the Committee for a good hearing. We're trying to make this a fair situation. There are those who need the help the statutes provide today; however, we feel that for those who can afford it, they should be required to pay. We are not attempting to punish anyone anymore than what they are already getting applied to them. This is a fairness issue, with an emphasis on looking at the financial statement and evaluating it before a determination is actually made.

HEARING ON SB 79

Sponsor: **SENATOR CHRIS CHRISTIAENS, SD 23, GREAT FALLS**

Proponents: Clyde Dailey, State Auditor's Office, Insurance
Department
Bob Pyfer, Montana Credit Unions League
Tom Ellis, Norwest Bank
John Cadby, Montana Bankers Association
Verner Bertelsen, Montana Senior Citizens
Association
Susan Good, Montana Association of Life Underwriters
Beth Baker, Department of Justice
Gene Hoffman, Retiree
Irene Thewer, American Association of Retired
Persons (AARP)
Greg Overturf, Department of Commerce

Opponents: None

Opening Statement by Sponsor: SENATOR CHRIS CHRISTIAENS, SD 23,
Great Falls. SB 79 creates the Montana Living Trust Act. This
amendment and testimony from the Supreme Court address living
trusts (EXHIBITS #1 and #2). Living trusts are devices whereby
one protects assets from estate and other taxes. In Montana,
present regulation of living trusts is extremely limited.
Problems have arisen because insurance and security agents, with
histories of disciplinary problems, have begun to sell these
products statewide. These fill-in-the-blank living trusts are
overpriced, and can seriously complicate the settlement of
estates.

An article published in the November 23, 1996 issue of Montana
Law Week, cites a special concurrence of the majority of the
State Supreme Court, noting that an unregistered, unlicensed
salesman had sold 200 living trusts in 3 states, including
Montana. One Montana family paid more than \$2,000 for a living
trust that ended up causing them serious problems in the handling
of that estate.

This bill provides clear regulation in the marketing and sale of
living trusts. It also sets forth criminal and civil remedies
for fraudulent and deceptive sales practices.

Tape 1, Side B, #15.6, 10:40 a.m.

Specifically, the bill 1) requires the person selling a living
trust to obtain a license from the State Auditor; 2) allows the
Auditor to issue an order denying, suspending or revoking any
pending or approved application or license to sell living trusts
in the State if it is in the best interest of the public; 3)
requires the Auditor to keep a register of all license
applications, to remain open for public inspection; 4) requires
licensees to maintain accounts and other records as required by
the State Auditor's office; 5) makes it illegal to defraud
Montanan's in an offer and sale of living trusts; 6) makes it
illegal for a person to sell a living trust to a person for whom
a living trust might not be suitable.

Having had a living trust in my family for over 30 years, I can tell you that many times people enter into these without fully understanding the ramifications. You don't understand the ramifications until there is a death in the family in which there is a living trust involved. It causes many problems when these trusts have not been kept up to date. In the case of my family, the trust was set up by someone from out of state who lost track of the family and only contacted us once in over 30 years. This bill goes a long way toward protecting Montana's citizens in the purchase of a vital estate planning mechanism, a living trust.

Tape 1, Side B, #17.0, 10:41 a.m.

Proponents' Testimony: Clyde Dailey, Insurance Division, Office of the State Auditor. This bill is a compromise after many years of trying to figure out what to do with living trusts. We have worked with the Department of Commerce, the Attorney General's office and others during this period. Currently, the only regulation of a living trust is through the Department of Commerce. We're asking that sellers of these trusts register with the State, so we know who and where they are.

The amendments deal primarily with licensing, and enable us to collect the appropriate fees for same. We hope this will help to resolve the problems encountered as a result of less than scrupulous individuals coming through the State with their seminars. They get people to pay anywhere from \$300-\$3,000, and then leave the State. Mr. Dailey read an article on "wolf packs" or "trust mills" to the Committee.

Bob Pyfer, Montana Credit Unions League. When we began getting calls from credit unions whose members were asking to have their shares put into an outside living trust, we developed procedures and forms to allow credit unions to do this properly. Consequently, we became aware that many, mostly older members were being bilked into paying exorbitant prices for "boilerplate" language that wasn't even customized to fit the individual members' needs. As a result, we developed a standard newsletter article for credit unions warning members about living trust scams. We also had conversations with the senior citizens ombudsmen and the Business Law Section of the Montana Bar Association. Eventually the Bar Association put together a pamphlet called, Living Trust Scams and Older Customers, and we distributed this pamphlet through credit unions to their members. **(EXHIBIT #3).**

Evidently, consumer education efforts haven't solved this problem, so a narrowly-drawn, targeted program to address this problem does appear to have merit. We ask for one amendment on page 1, line 26, to specifically exclude POD (payable on death) accounts from the definition. These accounts are passed on to a beneficiary when the owner dies. Under the old law these are sometimes called living trusts; however, we want to make clear that these are not living trusts for purposes of this act.

Tape 1, Side B, #22.0, 10:47 a.m.

Tom Ellis, Norwest Bank. On January 17, 1997 Norwest Bank completed it's 99th year of exercising trust powers and providing trust services to over 3,000 Montana residents, who have entrusted almost \$2 billion to us. Trust accounts can be very valuable and, if utilized properly, can provide additional financial security to families and beneficiaries. A considerable amount of federal law, as well as state law, has been developed to protect trustors, trustees and beneficiaries and to provide a means by which trustees can carry out their duties and responsibilities efficiently and safely.

It has been mentioned that there are a lot of boilerplate plans. We've seen those in the commercial side of the bank. Interestingly, none of the 3,000 accounts that we administer at Norwest are alike. Each trust account is governed according to a trust agreement which has been prepared by a legal professional, usually an attorney practicing law in Montana.

The trust area of commercial banking is probably the most regulated area in the bank, as we have a lot of discretion over assets. A trustee has the discretion to do a lot of different things and needs to know what their duties and responsibilities are. Trustees need to be accountable to the beneficiaries. Because bankers and trust officers are regulated, they receive oversight for the sale and administration of financial services.

Insurance sales, real estate sales, stock and bond brokers are regulated and licensed. Even contractors, electricians and plumbers are subject to oversight. At least a consumer has some place to go if they think they have not been treated correctly. Many very vulnerable individuals often do not understand the means of transferring their assets to a trust and many trustees do not understand their duties and responsibilities in carrying out the administration of a trust. (EXHIBIT #4)

John Cadby, Montana Bankers Association. We support this bill for the reasons already expressed. I want to bring to your attention that most banks in Montana do not have trust powers. There would be very few exempted by the amendment proposed on page 2, line 5-7. I wonder if we should add "trust corporations" following "national bank" in this amendment. In Montana, two or three trust corporations are regulated and audited by the State just like banks.

Verner Bertelsen, Montana Senior Citizens Association. We strongly support this legislation. Senior citizens, especially those that are alone, are very vulnerable to the unscrupulous efforts of agents, who talk them into some scheme and take their money. We support the protection this legislation would give.

Susan Good, Montana Association of Life Underwriters. The Association supports this bill, with a couple of comments for

consideration during executive session. In the past, this has been in the province of the Department of Commerce and the Attorney General. The way some of living trusts are being marketed, is almost tantamount to practicing law without a license. We would offer that the Committee might want to have someone other than the State Auditor regulate this.

The Association would like to go on record as clearly opposing the "wolf packs" discussed today. Anytime there is fraud in the insurance industry, the Montana Association of Life Underwriters strongly supports prosecuting such persons to the full extent of the law.

Beth Baker, Department of Justice. The Department supports this bill. Our involvement in this issue began in 1991 when then Attorney General, Marc Racicot, wrote to the State Bar encouraging public education concerning the potential problems involved in the marketing of living trusts.

Later, the Department met with concerned members of the Montana Bankers Association and the Tax and Estate Section of the Montana State Bar. We met with the Department of Commerce and the State Auditor to figure out how to deal with this. We all agreed that our current consumer protection laws didn't really address this problem.

The brochure you heard mention of was developed and published by the American Association of Retired Persons (AARP) and Dean Eck of the University of Montana School of Law. It is widely disseminated by the Consumer Affairs Office, and we believe it has helped in the prevention some problems with the sale of living trusts. The targets of this fraud are usually older consumers, and we believe the bill will help protect them.

I brought a copy of a Senior Consumer Alert, prepared by the National Association of Attorney's General and the AARP, that could be consulted to learn more about the problems consumers have had with these types of things and the efforts that have made to correct them (**EXHIBIT #5**).

Tape 1, Side B, #313, 10:56 a.m.

Gene Hoffman, Retiree. I stand in support of this bill because my parents were two of the people who were ripped-off. They are two of the greatest people in the world, are well-educated, they love Montana and the life they have had. A man walked in the door and sold them a living trust. I happened to be in Missoula, and when I returned Dad told they bought a living trust. I asked if he wrote them a check, and he had. I suggested stopping payment on the check, but my Dad is the kind of guy that when he shakes a man's hand, that's it - so the check went through.

I looked at the document when it arrived. It stated that if they had not filed all the documents related to the trust, it would be

of no use. That means their house and all their property that wasn't placed in this trust, yet they paid the full bill. It gave an 800 number in California to call, but that number had been disconnected. Their office was in California, the lawyer was in Wyoming, and the trust was sold through an insurance company.

I suggest a fine be added to this bill of \$20,000. Also, the Committee may want to require that licensees be bonded in an amount large enough to handle a claim, and there is presently no recourse for a person who buys one of these living trusts.

Irene Thewer, AARP. The Associations recommends a do pass on this legislation. Many times elderly people will welcome people in because somebody nice comes to the door to talk with them and that is how they get hooked.

Greg Overturf, Department of Commerce. I work closely with the Consumer Affairs Office, and we would like to go on record in support of this bill. We have a large number of complaints and inquiries every year - over 750 last year - dealing with this subject, and we feel that the present laws are not adequate.

Opponents' Testimony: None

Questions From Committee Members and Responses: **VICE CHAIRMAN GROSFIELD.** Where is the right place for this? Is it the State Auditor, the Department of Justice or the Department of Commerce? **Beth Baker.** I think the reason the Attorneys General nationwide have been involved with this issue is that in many states it is the Attorney General's office that handles consumer protection. Many states have put their living trust regulations in their consumer protection and unfair trade practices acts.

I think if the committee is inclined to move jurisdiction, it would be more appropriate in the Consumer Protection Office. I don't know that it belongs better in either place. The State Auditor has similar regulatory functions with other types of advisors, and so it would probably be just as appropriate there. I don't think it would be appropriate to put it in the Department of Justice, because we don't do other consumer protection matters right now.

SENATOR HALLIGAN. Was bonding thought about in drafting the bill or have any of the departments looked at that? **Clyde Dailey.** We looked at all aspects of bonding, but given the present concern among general public about over-regulation, we felt that taking the strongest approach might limit the bill's chance of passing the legislature. We tried to stay with the regulatory scheme we currently have in both insurance and securities.

SENATOR SHARON ESTRADA. It appears that bonding an individual and raising the fine might be a good idea. Do you think there are any problems with that? **Clyde Dailey.** We are always

amenable to improving the bill and, if bonding is something the Committee would like to take a look at, we're happy to work with you on it.

VICE CHAIRMAN GROSFIELD. Is the \$75,000 in the State Auditor's budget? **SENATOR CHRISTIAENS.** The \$75,000 would come from fees and would have to be coordinated through the Auditor's budget. We think the fees would cover this amount.

SENATOR AL BISHOP. I note that you've exempted attorneys from the provision of this act. In preparing these living trusts many attorneys will use a CPA. What would be the effect on that? Would they have to get approval from the State Auditor? **SENATOR CHRISTIAENS.** They would not because a CPA will generally work with an attorney in drafting of living trust between.

SENATOR BISHOP. Why does the bill say revocable trust? Why not revocable or irrevocable? **SENATOR CHRISTIAENS.** I believe you have more control of one than the other, as you can make changes to a revocable trust. Once irrevocable living trusts are written, they generally remain the same. Perhaps **Clyde Dailey** might like to go into that a little further.

SENATOR BISHOP. It seems to me it would be more heinous for somebody to set up an irrevocable trust than a revocable trust. You could do something with a revocable trust, at least you could revoke it. If it is irrevocable you are in a world of hurt. **Tom Ellis, Norwest Bank.** I called the Auditor's office in December, 1996 when I saw the first draft of this bill, and asked them the same question. My personal preference would be to see irrevocable trusts covered as well as revocable trusts. The big difference is a revocable trust can be revoked by the trustor, the person who created the trust. An irrevocable trust, once established, is irrevocable. Some of the problems we have seen relate to irrevocable trusts. People transfer their assets in trust to a trustee irrevocably.

Changed to Tape 2, Side A, #00, 11:08 a.m.

VICE CHAIRMAN GROSFIELD. I cannot find any fees in this bill. I see some fines that go to the General Fund. Actually this costs \$90,000, not \$75,000. It is projected to be offset a little bit by fines. How many licenses might we be looking at in any one year, and how much would we have to charge them in order to take care of that \$90,000? **Clyde Dailey.** The amendments address most of these questions. The fee schedule is the same as if you were going to be what is defined as a registered investment advisor. I believe the fee is \$50 per entity you represent. If it is the brokerage itself, it is \$200.

VICE CHAIRMAN GROSFIELD. Do you think there are 1,000 entities that are likely to apply for this? **Clyde Dailey.** There are a lot of them out there. We've never tracked them because we've never asked them to register before.

SENATOR HOLDEN. Do you have fraud statutes on the books now?
Greg Overturf, Department of Commerce. We've primarily dealt with this under the Consumer Protection Act, specifically using the Personal Solicitation Sales Act which enables purchasers to revoke for a given period of time. We've had some success with that; however, the Consumer Protection Act doesn't quite fit here. We believe it would be very useful to have people register.

SENATOR HOLDEN. Can anyone go to an attorney in Montana and have this set up? Could we amend the Consumer Protection Act with regard to this issue without creating a whole new agency?
Greg Overturf. It could be done, with extensive revision - you would have to set up provisions to register people - but it doesn't really fit very well.

SENATOR BARTLETT. As the bill was originally written, it appears that only fines were contemplated as a funding source, and that the registration fee was added. I'm wondering if you want to have the sponsor request a revised fiscal note. **Clyde Dailey.** We had anticipated that. Contingent upon the amendments passing, we would definitely request an amended fiscal note. We can request it immediately if that is the pleasure of the Committee.

CHAIRMAN CRIPPEN. Were these amendments are drafted by the Department? Please work with **Valencia Lane** to get them in order so they will fit in the bill. **Clyde Dailey.** I will E-mail them.

Tape 2, Side B, #6.6, 11:15 a.m.

CHAIRMAN CRIPPEN asked **SENATOR CHRISTIAENS** to work on revising the fiscal note based on the amendment.

Closing by Sponsor: **SENATOR CHRISTIAENS.** I believe this is an extremely important bill. We discussed the fees and what they should be reflecting as far as income when the fiscal note came out. It is difficult to come up a figure when we really don't know how many people are in the state selling living trusts. One reason this legislation is attached to the State Auditor's office is that they already regulate and handle securities- and insurance-related consumer complaints, and so it seemed to be a natural fit.

Boilerplate language definitely does not fit everyone's needs as they are purchasing living trusts. I believe this bill may save a lot of consumers great heartache down the road. I urge your support.

Tape 2, Side A, #9.2, 11:17 a.m.

EXECUTIVE ACTION ON SB 166

Amendments: sb016601.avl

Motion/Vote: VICE CHAIRMAN GROSFIELD made a motion to adopt amendment 10, last page of 016601.avl, and to delete all of Section 3. The motion carried unanimously.

CHAIRMAN CRIPPEN advised the Committee that amendments 9 and 10 have been adopted. VICE CHAIRMAN GROSFIELD asked if amendment 9 was adopted with the word "severe" included.

Tape 2, Side A, #12.8, 11:22 a.m.

VICE CHAIRMAN GROSFIELD. Amendments 1-8 deal with Section 1 of the bill. I would like to either amend it as indicated here or strike it from the bill. These amendments don't give the judges any authority they don't already have, but do give them a hint that we would like to see a lot more of that. This bill has been a relatively high visibility bill and including these amendments in the bill might give them a strong hint.

Motion: VICE CHAIRMAN GROSFIELD made a motion to adopt amendments 1-8, 016601.avl.

Discussion: SENATOR HOLDEN. I already made a motion to adopt these amendments while VICE CHAIRMAN GROSFIELD was out of the room. We discussed it quite a bit, and I decided to withdraw the amendment.

VICE CHAIRMAN GROSFIELD withdrew his motion to adopt amendments 1-8, 016601.avl.

Motion/Vote: VICE CHAIRMAN GROSFIELD made a motion to strike Section 1 from SB 166, and modify the title accordingly. The motion carried unanimously.

Motion: VICE CHAIRMAN GROSFIELD made a motion that SB 166 DO PASS AS AMENDED.

Discussion: SENATOR DOHERTY. If you believe you were making a statement that parents can, under appropriate circumstances, discipline their kids by spanking them, that is a good thought that we share. I think the mischief in the amendments make this a bill that provides an opportunity for individuals who are charged with physical injury or sexual abuse to children, by giving them an extra defense.

I have not seen an instance when the prosecutors of Montana have violated their charge when people have either physically or sexually abused kids and overstepped their bounds. I think we are making it more difficult to convict those individuals, and I

charged with physical injury or sexual abuse to children, by giving them an extra defense.

I have not seen an instance when the prosecutors of Montana have violated their charge when people have either physically or sexually abused kids and overstepped their bounds. I think we are making it more difficult to convict those individuals, and I don't think that is a good thing to do as a matter of public policy.

SENATOR BARTLETT. I sympathize with the intent, but am curious to know if anyone has seen the language that the Department is proposing which addresses this same issue in a different bill. Is that language any more definitive or easily identified as to what is and is not physical abuse? **SENATOR HALLIGAN.** I heard from Anne Gilkey of the Department that they were looking at something substantial.

{Tape: 2; Side: A; Approx. Time Count: #19.0; Comments: 11:28 a.m.}

SENATOR BARTLETT. While I think I understand what people are trying to accomplish, and I don't have any objections to the real purpose here, I don't think this language does it. It is wide open for people's judgements yet again. Someone will end up having to determine whether or not a spanking, or some other physical punishment that a parent administered to a child, did or did not cause severe emotional harm or harm to the child's health or welfare. I think that is exactly the situation we're in now that has some people concerned about the authority of the Family Services Division of the Department of Health. I don't think this language does much to clear any of those situations up.

Motion: **SENATOR ESTRADA MADE A SUBSTITUTE MOTION TO TABLE SB 166.**

Discussion: **SENATOR HALLIGAN.** I support of the motion. I've prosecuted these kind of cases for five years when I was with the County Attorney's office. I guarantee what we, as relatively normal people, think of disciplining our children is far different than the pictures I saw - almost on a weekly basis - of kids who were severely injured because of parental discipline. When you use the word severe, the context is far different and there is a range in there we don't want to allow.

VICE CHAIRMAN GROSFIELD. I opposes the substitute motion. I think we have a bill that makes a statement now, and it is a statement we ought to make. I call your attention to page 5, line 1. We use the word "severe". Current law uses the word "excessive", so the language to be interpreted is already there. It doesn't seem any more difficult to interpret "severe emotional harm or excessive corporal punishment." We always have the problem of interpreting adjectives in a court setting. This is the nature of the system.

SENATOR HOLDEN. SENATOR HALLIGAN pointed out that the Department is going to help us out, but we have been waiting and haven't seen it. We have to help ourselves, the department isn't going to do it. I oppose the motion to table the bill.

Motion: SENATOR ESTRADA'S MOTION TO TABLE SB 166 CARRIED 6-4 IN A ROLL CALL VOTE WITH SENATORS HOLDEN, JABS, GROSFIELD AND CRIPPEN VOTING NO.

EXECUTIVE ACTION ON SB 31

Amendments: VICE CHAIRMAN GROSFIELD. Amendment 3103.avl takes out any reference in the bill to the concept of surgical castration. The emphasis on this bill, as far as public understanding, of it has been focused on the word castration. If you look at page 1, line 20, that has always been at the discretion of the convicted person. I would like this bill to go out on the merits of the chemical treatment issue.

Motion/Vote: VICE CHAIRMAN GROSFIELD MADE A MOTION TO ADOPT AMENDMENTS sb03103.avl. THE MOTION CARRIED UNANIMOUSLY.

{Tape: 2; Side: A; Approx. Time Count: #25.3; Comments: 11:35 a.m.}

Motion: VICE CHAIRMAN GROSFIELD MADE A MOTION THAT SB 31 DO PASS AS AMENDED.

Discussion: CHAIRMAN CRIPPEN. It is my understanding that this bill does not make chemical treatment voluntary. VICE CHAIRMAN GROSFIELD. It makes it voluntary for the judge, but not voluntary for the convicted person. The judge can order voluntary chemical treatment in cases where he thinks it will work. From a fiscal perspective we may end up with a net savings.

CHAIRMAN CRIPPEN. What is the purpose of line 29, prior to chemical treatment, that the person must be fully medically informed of its effects? VICE CHAIRMAN GROSFIELD. There was some indication in testimony that the drug may have some side effects in some cases. I think it is appropriate for the person to be fully medically informed, so if they have a condition that might become a problem with this drug, they can ask that to be taken into consideration.

{Tape: 2; Side: A; Approx. Time Count: #29.7; Comments: 11::40 a.m.}

CHAIRMAN CRIPPEN. For the voluntary aspect that would be fine, but for the discretionary aspect the person can be fully informed but there is nothing to provide for the Court to consider that. I don't see anything in here that would put parameters on the latitude of the Court to do that. The Court can choose to ignore that, but if the person has a problem later on and becomes

medically injured by this, it may result in a lawsuit with the state.

SENATOR DOHERTY. Is there is any other section of our criminal code dealing with sentences in which we give a judge the authority to order a medical procedure to be done? **CHAIRMAN CRIPPEN.** Only as far as pre-sentencing and a psychological examination.

SENATOR DOHERTY. We're giving a judge the authority to order, as part of a sentence, that somebody take a certain medication. I'm uncomfortable with making judges make that decision. **CHAIRMAN CRIPPEN.** Do you have an amendment you would like to add, perhaps to give some direction to the Judge?

SENATOR BISHOP. During a case in Billings, the Judge had to decide whether or not to order him to take medication and, I think, eventually the Judge did order him to take medication. Apparently, that can be done, so I don't see anything unusual about that. **CHAIRMAN CRIPPEN.** I question if that would go to the issue here, to chemically castrate an individual.

SENATOR HALLIGAN. I called Mike Scolatti last week who is an expert in this. Mr. Scolatti indicated he has seven men at the prison taking Depoprovera. It doesn't affect the motivational factors so the anger, power and control parts still need to be addresses. It affects the testosterone level by reducing it to pre-puberty levels, which is why they get reduced sexual drive. Less than 5 percent of sexual offenders convicted are eligible for chemical treatment, because they don't have the willingness to make it work.

Remember, that 95 percent of those offenders Mr. Scolatti is dealing with don't offend with the penis, they do it with their tongue or finger when they re-offend. We've been talking about one-third of the issue here. You can put it in the law, but you've got to make it so the Judge can order the sex offender test, and if you are capable of doing it, get it ordered that way. That way we know we are doing it with a voluntary population, because forcing it on someone who may get out of prison early, will put a dangerous person on the street.

Mr. Scolatti said, within a week of cessation of treatment, the testosterone level goes up to normal. We need to take a fine area here and make sure it is being used appropriately.

CHAIRMAN CRIPPEN. We've discussed the broad aspects of the bill in previous discussions.

SENATOR ESTRADA. That 5 percent is good enough for me.

Vote: VICE CHAIRMAN GROSFIELD'S MOTION THAT SB 31 DO PASS AS AMENDED CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON SB 163

Amendments: SENATOR DOHERTY. Amendment 16301.avl addresses the question of why to give the discretion to object just to the prosecution. Why not give it to both sides? John Connor of the County Prosecutor's Office indicate it would be acceptable to amend the bill so either party can object.

Motion/Vote: SENATOR DOHERTY MADE A MOTION TO ADOPT THE AMENDMENTS sb016301.avl. THE MOTION CARRIED UNANIMOUSLY.

Motion/Vote: SENATOR DOHERTY MADE A MOTION THAT SB 163 DO PASS AS AMENDED. THE MOTION CARRIED UNANIMOUSLY.

CHAIRMAN CRIPPEN Would this committee object to having this meeting go into the lunch hour?

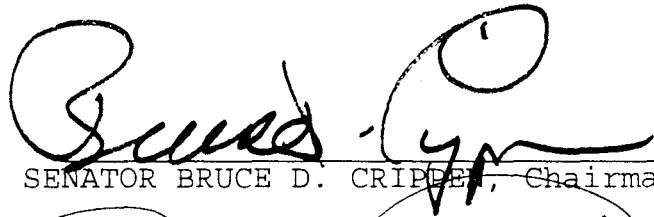
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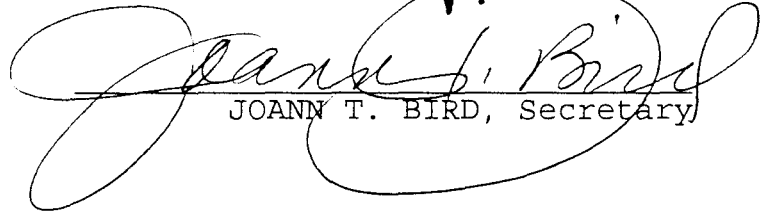
EXECUTIVE ACTION ON SB 176

Discussion: VICE CHAIRMAN GROSFIELD. I am uncomfortable with the way this bill is worded, but feel this may need to be addressed. I would like to put the stricken language back in, and then try to deal with the concept of substantial hardship. CHAIRMAN CRIPPEN asked that the amendments be prepared for tomorrow's meeting at 10:00 a.m.

ADJOURNMENT

Adjournment: 12 noon


SENATOR BRUCE D. CRIPPEN, Chairman


JOANN T. BIRD, Secretary

BDC/JTB