

## **MINUTES**

### **MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION**

#### **COMMITTEE ON JUDICIARY**

**Call to Order:** By **ACTING CHAIRMAN WALTER MCNUTT**, on February 10, 1997, at 9:00 a.m., in the Senate Judiciary Chambers (Room 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 250, SB 278 posted February 4  
SB 283, HB 200 posted February 4

Executive Action: None

#### **HEARING ON SB 250**

**Sponsor:** SEN. BRUCE CRIPPEN, SD 10, Billings

**Proponents:** David Aronofsky, University of Montana General  
Counsel & Law School Faculty  
Candace Torgerson, State Bar of Montana  
Russell Hill, Montana Trial Lawyers Association  
(MTLA)  
Chief Justice Jean Turnage, Montana Supreme Court

**Opponents:** John Hollow, Family Law Attorney, Helena

**Opening Statement by Sponsor:** SEN. BRUCE CRIPPEN, SD 10, Billings. SB 250 would create the Montana Family Law Appeals Court (MFAC). Section 2 deals with family and child law case appeals to the District Courts; Section 3 defines the composition of the court; Section 4 is a new section establishing the Court and laying out jurisdiction (meat of the bill); Section 6 outlines the appeal process, from appellate court to the Supreme Court; Section 7 establishes rule-making authority for the Supreme Court; Sections 8-10 are present law to include the MFAC; Section 12 deals with codification; Section 14, provides an effective date of January 1, 1999.

**Proponents' Testimony:** David Aronofsky, University of Montana General Counsel, and Law School Faculty. I am here as a private citizen on leave today, as pro bono. I teach legislation and recently focused on juvenile justice and family issues. Every speaker in our classes - judges, prosecutors, legislators, etc., interrelated juvenile justice and family law matters, so the students saw this need. The challenge was to come up with something that made sense, as we put this bill together.

The bill relies on experienced judges, primarily those who are retired Supreme Court and District Court Justices. It utilizes District Judges on a voluntary, rotation basis. This proposal may not happen overnight, but we believe we would see better family law justice, and assurance that legislative intent is implemented. We urge your careful consideration and enactment of this legislation as it is valuable to Montana.

**Candace Torgerson, State Bar of Montana.** We support the bill. It takes some of the burden off the Supreme Court. We have concerns about district court judges being taken away from their duties on a regular basis, and about using retired judges, as judges are subject to the election process in Montana.

**Russell Hill, Montana Trial Lawyers Association (MTLA).** We support this bill, as the Courts are clogged with family law cases, and Montana's Supreme Court Justices have twice the number of written opinions as other Supreme Court Justices. The Supreme Court need the luxury of time to do what the Supreme Court is supposed to do.

*{Tape: 1; Side: A; Approx. Time Count: #15.8; Comments: 9:17 a.m..}*

**Chief Justice Jean Turnage, Montana Supreme Court.** I am willing to answer any technical questions I can. I am concerned about children nationwide who find their way to the judicial process and whose lives are very disrupted, stressed, and scarred. In 1996 there were 731 appeals filed, and in 1995 there were 633 appeals filed, so cases are increasing. More than 27 percent of the Supreme Court workload deals with domestic cases.

The cost would be minimal, as it doesn't require new, full time judges. Retired judges would serve at one-half of the existing salary, and could work from home. No buildings are required, however, we may need a modest amount for travel and for teleconferencing phone charges. Please note that the effective date is delayed and the Office of the Supreme Court could absorb costs.

I want to address the concerns raised about using district court judges for this court. I believe they will volunteer and not sacrifice in their daily work. We thought one panel in Eastern Montana and one in Western Montana would be best.

*{Tape: 1; Side: A; Approx. Time Count: #24.0; Comments: 9:25 a.m..}*

**Opponents' Testimony:** John Hollow, Family Law Attorney, Helena. There is not family law in Montana; there is family chaos. As a practitioner in Montana, I'm unable to advise a client. I can't accept this.

Two years ago I had this idea, and asked Hal Harper to carry it. Then I saw hope in a couple of Supreme Court decisions. I suggested that we need to back up and begin at the Legislature. The Supreme Court recently rewrote a section of law the Legislature passed, out of their frustrations in trying to resolve situations people bring before them.

Two years ago a member of this body brought valid concerns of family law, but those concerns conflicted with statute. There is an internal conflict in the law.

What if we looked back to the problem areas in family law? A group did look at this in the past concerning custody disputes, but this needs to be done across the board.

I am terrified about this bill, because it passes authority to a group of three people who will be re-mixed, and thus interpretation won't remain consistent. How can I advise someone if I can't find an opinion? I don't believe this is planning ahead, but rather passing the buck. We need to look at where the Supreme Court has struggled.

Please don't go forward without clarifying this. Judges and attorneys often move out because of frustration with family law practice and the law. We need law. Then we can advise clients, and this will decrease the number of Supreme Court appeals. I do not get paid for many custody cases.

*{Tape: 1; Side: A; Approx. Time Count: #35.1; Comments: 9:35 a.m..}*

**Questions From Committee Members and Responses:** SEN. STEVE DOHERTY. I don't do family law, but when I attempt to find

mediators, the primary persons on the list are District Court judges who make good money. So, why would they want to serve on family court appeals? **SEN. CRIPPEN.** Chief Justice Turnage alluded to this, but I don't believe money relates to the particular interest of judges.

**SEN. DOHERTY.** With two divisions in bills and different parties sitting in on appeals, how would we bring consistency to this area of law? **SEN. CRIPPEN.** There is that possibility. I believe this might end up reducing the number of appeals before the Court.

**SEN. SHARON ESTRADA.** The Committee had a Code Commissioner bill last week which had a justice of the peace substitute list. Does this have to be a district judge? **SEN. CRIPPEN.** That's a good questions. I don't know if there is a law on the books to require this, but I don't think such people are anywhere near qualified to handle these cases.

*{Tape: 1; Side: A; Approx. Time Count: #42.8; Comments: 10:38 a.m..}*

**SEN. MIKE HALLIGAN.** Would you encourage the State Bar to set up a study commission to look at the issues brought forth by John Hollow? **Chief Justice Turnage.** You've touched on a serious issue. The core problem lies in the Uniform Marriage and Divorce Act, enacted by the Montana Legislature. So, I'm not sure a separate study commission of the State Bar would be that productive. Also, on the question of whether we are approaching consistency in family law, the underlying current is to do what's in the best interest of the child, but the Uniform Marriage and Divorce Act provisions don't always fit the realities of what's going on in the family. The Intermediate Appellate Court won't solve all of the problems. My secondary concern is the interests of the parties. I suggest the Legislature appoint an interim study commission on the Uniform Marriage and Divorce Act.

*{Tape: 1; Side: B; Approx. Time Count: #4.2; Comments: 9:50 a.m..}*

**SEN. SUE BARTLETT.** This legislation would limit the district court judge to serve no more than twelve months in any 6-year period, and it appears this could lead to a greater chance of inconsistency. **Professor Aronofsky.** We are trying to avoid two problems: 1) taking a district judge for too long a time from their regular duties and 10-11, states we now have family courts at the District Court level; and 2) to avoid burnout, as family law cases can be very gut-wrenching over a period of time. I believe the panel could address the inconsistency issues. We can't write perfect bills, but the Courts are well-equipped to deal with statutory ambiguities when they have time.

*{Tape: 1; Side: B; Approx. Time Count: #9.3; Comments: 9:55 a.m..}*

**SEN. BARTLETT.** Does Section 4, 1-7 mean all other court activities or just those of family law? **Professor Aronofsky.** It means family law.

**VICE CHAIRMAN LORENTS GROSFIELD.** Why are your proposals not effective until 1999? **Professor Aronofsky.** I don't recall putting this date in the bill draft. I believe it was delayed for a time to prepare for proper implementation.

**VICE CHAIRMAN GROSFIELD.** Do you have an idea as to the make up of an interim study commission, as has been proposed? **John Hollow.** I believe we need one member of the Supreme Court, two judges and two legislators (one each who likes family law and one who doesn't), two attorneys (one who practices family law and one who doesn't), one counselor, and two lay persons (one who has been through a divorce, and one who hasn't).

**VICE CHAIRMAN GROSFIELD.** I believe if we pass this bill, we will see an effort to formalize and build buildings next session. So, why not do it in the first place? **SEN. CRIPPEN.** The effective date was delayed because this legislation sets up a whole new system as an original, and the wheels of justice take time. Yes, we've hinted at a family law court ever since I've been in the Legislature. The Committee has more responsibility to the judicial system than any other committee.

I like the limited applicability of this, as it gives the ability to observe the system before making more changes. This ventures out into a new area, as it should be.

**SEN. AL BISHOP.** In 1987 in Taxation Committee, Senator Crippen said "God so loved the world that He didn't send a Committee." Did you consider not having an East/West division? **Professor Aronofsky.** We talked with the Chief Justice and his colleagues, and Larry Eagleson and David Patterson who are on the University of Montana Law School faculty. I believe Mr. Patterson should be on any panel, as he is the recognized authority on family law in Montana.

*{Tape: 1; Side: B; Approx. Time Count: #20.6; Comments: 10:05 a.m..}*

**SEN. BISHOP.** Why not increase the number of justices and assign a couple of them to family law? **Chief Justice Turnage.** This may not be wise, as it takes a majority opinion to decide anything, and I don't know if that would be expeditious. The bill is more concerned with children and parties in family marital dissolution. I realize this is experimental. There are two kinds of thoughts: 1) old and better; and 2) new and even better.

**SEN. BISHOP.** Why can't we tailor this like the Federal Appeals Court? **Chief Justice Turnage.** We might have to change the Constitution. I would have to look at the law.

{Tape: 1; Side: B; Approx. Time Count: #24.0; Comments: 10:08 a.m..}

SEN. REINY JABS. I don't see how this would cut appeals to the Supreme Court. I believe this is a theory. **Chief Justice Turnage.** Hopefully, wise attorneys will advise their clients appropriately, and this may give Justices time to study this issue more. The Supreme Court is current now, but as we get backed up, people will have to wait for decisions and this is not good.

Closing by Sponsor: SEN. CRIPPEN. It is easy to place the blame on the Legislature for the interpretation of law, but this is not to say some laws don't need clarification. This committee makes decisions on family public policy. I am dismayed that the Montana Bar didn't come forward more clearly as a proponent.

This is the proper place for this bill. This is a definite change in the judicial system, and deals with the process. Keep in mind that the Supreme Court decides whether an issue will be brought before the Court.

{Tape: 1; Side: B; Approx. Time Count: #33.0; Comments: 10:16 a.m..}

SEN. CRIPPEN resumed the Chair at this point.

HEARING ON SB 278

Sponsor: SEN. DOROTHY ECK, SD 15, Bozeman

Proponents: Ellen Engstedt, Don't Gamble with the Future  
Sharon Hoff, Montana Catholic Conference  
Janet Jessup, Department of Justice  
Julie Ippolito, Citizens Against Gambling  
Expansion (CAGE)  
Betty Waddell, Montana Association of Churches  
Arlette Randash, Eagle Forum  
Laurie Koutnik, Christian Coalition of Montana  
Ruth Sasser, self  
Roger Strant, self

Opponents: Dennis Casey, Executive Director, Gaming Industry  
Association  
Mark Staples, Montana Tavern Association  
Dave Brown, Independent Gaming Association  
Rick Miller, Best Bet Casino, Missoula, and  
President, Montana Gaming Association

Opening Statement by Sponsor: SEN. DOROTHY ECK, SD 15, Bozeman.  
This bill makes it a criminal offense for a minor to loiter in an area of live card games and gambling devices. I don't believe anyone wants gambling as family entertainment. A number of

bar/restaurants in small communities are family gathering places.

A couple of years ago when we amended **SEN. WATERMAN'S** bill that a minor was not to be in the same room with machines, but could remain in the area, we didn't see the gaming industry come in with an amendment to define "area".

Line 24 addresses amusement games. I believe these should be separated from gambling machines. This is most innocuous from the point of the industry, I would think. An attorney from the Department of Commerce wants to ensure that lottery ticket sales are exempt.

**Proponents' Testimony:** Ellen Engstedt, **Don't Gamble with the Future** read from prepared testimony. We call it the toddler bill (**EXHIBIT #1**). Ten to fourteen percent of adolescents are at risk to gambling problems.

{Tape: 2; Side: A; Approx. Time Count: #00.0; Comments: 10:26 a.m..}

**Sharon Hoff, Montana Catholic Conference.** It is important to set an example, but does Montana want to set the example that gambling is a good industry?

**Janet Jessup, Department of Justice (EXHIBIT #2).** The standard of proof is "purposefully and knowingly", in Title 45, Chapter 2, MCA.

**Julie Ippolito, Citizens Against Gambling Expansion (CAGE) (EXHIBIT #3).** Approximately 15.1 percent of children have gambled with a parent. Children need to be taught responsible money management, especially with regard to gambling. Las Vegas has found a way to target the very young as future gamblers.

**Betty Waddell, Montana Association of Churches** read from prepared testimony, but did not turn it in. \$145.86 million was spent by gamblers in Montana.

**Arlette Randash, Eagle Forum,** stated her support of the bill.

**Laurie Koutnik, Christian Coalition of Montana.** We are concerned with the effect of gambling on families and children.

**Ruth Sasser, self,** stated her support of the bill.

**Roger Strant, self,** read from a recent article in the Wall Street Journal on gambling and kids.

**Opponents' Testimony:** Dennis Casey, **Executive Director, Gaming Industry Association.** We agree that toddlers need to be kept off parents' laps while the parents are gambling. Our problem is

with the word "distance". **SEN. ECK** suggested inserting "sufficiently close enough to play the machines". We are willing to work on this.

**Mark Staples, Montana Tavern Association.** I echo Mr. Casey's remarks. We do need to take into account the small bar/restaurants where children are present. I'm not sure what is being accomplished with this bill, but we encourage players to be responsible. I grew up in Butte, and can list many public officials from that era who also grew up there and don't have a gambling problem.

**Dave Brown, Independent Gaming Association.** We have a problem with the latter part of the bill, and need to figure out a definition that works. I believe amusement games ought to be deleted from the bill.

**Rick Miller, Best Bet Casino, Missoula, and President, Montana Gaming Association.** I agree with Dave Brown, and I want to see a statement of intent from **SEN. ECK**.

Questions From Committee Members and Responses: **SEN. HALLIGAN.** The amusement games section seems beyond the title of the bill. Do you want this in or out? **SEN. ECK.** In the bill.

**VICE CHAIRMAN GROSFIELD.** Line 13 says "in the area" and line 24 says "in the immediate vicinity". How would the Gambling Control Division interpret either one? **Janet Jessup.** We will work with the sponsor to tighten up the language for a reasonable approach. The Department has no issue on amusement machines.

**SEN. RIC HOLDEN.** How can we define limits for a small town bar/restaurant? **SEN. ECK.** Maybe we need non-gaming tables for families and gaming tables for others. The same is true with the location of amusement games. I don't believe this is a serious impediment.

**SEN. HALLIGAN.** Could anyone be charged with a misdemeanor? **Janet Jessup.** I believe so.

**SEN. ESTRADA.** Is it possible to put language in that an adult may not have a child on their lap while gambling? The industry doesn't approve of that anyway. **SEN. ECK.** We may need to get that specific. **Janet Jessup.** Several casinos try to keep children away.

*{Tape:2; Side: A: Approx. Time Count: #27.9; Comments: None.}*

**CHAIRMAN CRIPPEN.** I am surprised the Department of Justice hasn't brought before the Committee what other states do on this, so I'm requesting this information in the next day or two.

Closing by Sponsor: **SEN. ECK.** I don't believe families went to bars in Butte's older days. Gaming may have been in the back



room, and I don't believe families participated. **SEN. ESTRADA** has a bill to help pathological gamblers. I am not looking forward to the time when we have thousands of little compulsive gamblers.

HEARING ON HB 200

Sponsor: REP. CHRIS AHNER, HD 51, Helena

Proponents: Becky Malensek, Helena  
Kathryn (Katie) LaRoe  
Arlette Randash, Eagle Forum  
Candace Torgerson, Montana State Bar Pro Bono  
Lobby Committee and Montana Retail Assoc.

Opponents: None

Opening Statement by Sponsor: REP. CHRIS AHNER, HD 51, Helena. I will let the others describe the bill for you.

Proponents' Testimony: Becky Malensek, Helena (EXHIBIT #4). Five years ago my daughter was asked to model for a record company in the mall. Later on she became devastated when she found out she had been video-taped while she was undressing/changing clothing. That man invaded her privacy.

It took us four years in civil court, and all he got was a slap on the wrist and a charge of invasion of privacy. This situation caused my daughter to lose trust in adults and the legal system. I believe this legislation is helping her self-esteem now.

**Kathryn (Katie) LaRoe (EXHIBIT #5).** I am the victim. I was approached by a man at the record store. He made comments to stay in front of the curtain when changing clothes. Later he raped and molested a girl, and the police confiscated the video tapes in his home. It was then that I found out I was on a tape. This was humiliating and devastating. I was crushed. I don't believe people should have to worry about this. We need to stop these things now.

**Arlette Randash, Eagle Forum,** asked the Committee to support the bill.

**Candace Torgerson, Montana State Bar Pro Bono Lobby Committee and Montana Retail Association.** We support the bill and ask your favorable consideration.

Opponents Testimony: None

Questions From Committee Members and Responses: **VICE CHAIRMAN LORENTS GROSFIELD.** Do we have another Senate bill on the same issue? **CHAIRMAN CRIPPEN.** Yes.

SEN. HALLIGAN. SEN. FRANKLIN felt that both bills could stand alone. REP. AHNER. HB 200 deals with the public issue.

SEN. CRIPPEN. Did you ever go to the mall owners and pursue any action against them, as this man clearly violated the terms of his lease. Becky Malensek. No, I didn't think about it.

Closing by Sponsor: REP. AHNER. I believe it took courage for Katie to come forward on this issue, and that this legislation is part of her healing process. I ask the Committee for favorable consideration.

HEARING ON SB 283

Sponsor: SEN. BURNETT, SD 12, Luther

Proponents: None

Opponents: None

Opening Statement by Sponsor: SEN. BURNETT, SD 12, Luther. I believe the Department's input is acceptable. I'm trying to reach their 'untouchables'.

Proponents' Testimony: None

Opponents' Testimony: None

Informational Testimony: Hank Hudson, Administrator, Division of Child and Family Services, Department of Health and Human Services (DHHS). We are offering a possible amendment (EXHIBIT #6). Some people believe they've been unfairly treated by the Department, but I believe the Department is doing it's job, although bias can be present at times.

*{Tape: 2; Side: B; Approx. Time Count: #14.0; Comments: None.}*

Carolyn Clemmons, Deputy County Attorney, Lewis and Clark County. I've been handling these cases for twelve years. I believe the amendments go a long way in cleaning up the bill, but it still has inherent problems. Many times there are no parents available, at the time the petition is filed, to supply a statement to the Judge or to present an affidavit to the Court. We do need as much information as possible supplied to the Judge.

In 90 percent of cases, we don't even know where the father is. The statute allows 20 days to come before the Court and present the story, and to come into court with an attorney. It is difficult to explain to the Court why parents left a child, so it is beneficial to allow them time to get with an attorney. I would support the bill with the amendments.

Ann Gilkey, Department of Health and Human Services (EXHIBIT #6). The amendments would require the Department to interview the

parent if possible prior to court o page 1 of the bill. They also strike the remainder of the language at the top of page 2 of the bill. The Department is also required to put in any statements made by the parents concerning the event. The Court would be required to consider these statements before making a decision at the top of page 3.

Questions From Committee Members and Responses: **SEN. HOLDEN.** Do you agree with the amendments? **SEN. BURNETT.** I have been trying to amend this since 1991, and I believe this is a breakthrough. I will accept the amendments as they are better than what we have now.

**SEN. BARTLETT.** If the amendments were adopted, would this be a change in how DHHS operates? **Hank Hudson.** I don't think so, but it may serve as a vehicle to remind line staff of their obligation to work with parents.

Closing by Sponsor: **SEN. BURNETT.** I think the Department has changed its attitude considerably since 1991. I hope this will continue. When caseworkers request a TIA, it should be investigated and found to be true and correct. Caseworkers should also be under oath. I have seldom seen the Department alter the desires of the caseworker. In one instance, the caseworker admitted he was wrong (**EXHIBITS #7 and #8**).

ADJOURNMENT

Adjournment: 11:35 a.m.



SEN. BRUCE D. CRIPPEN, Chairman



JOANN T. BIRD, Secretary

BDC/JTB