MINUTES

MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on February 15, 1999 at 10:00 A.M., in Room 104 Capitol.

ROLL CALL

Members Present:
Sen. Lorents Grosfield, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Steve Doherty (D)
Sen. Duane Grimes (R)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Walter McNutt (R)

Members Excused: Sen. Sue Bartlett (D)

Members Absent: None.

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

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

Committee Business Summary:
Hearing(s) & Date(s) Posted: SB 404, SB 416, 2/12/1999
Executive Action: HB 41, SB 153, SB 251, SB 306, SB 416, SB 372

HEARING ON SB 404

Sponsor: **SEN. WALTER MCNUTT, SD 50, Sidney**

Proponents: **Keith Colbo, Montana Independent Bankers**
John Cadby, Montana Bankers Association

Opponents: **Mike Moore, Montana Collectors Association**

Opening Statement by Sponsor:

SEN. WALTER MCNUTT, SD 50, Sidney, introduced SB 404. The intent of this bill is to make IRAs judgment proof. The 401K plans, company-sponsored pension plans, are judgment proof. This legislation addresses a fairness issue. Many young people are being encouraged to use IRAs. He has checked with banks, credit unions and brokerage houses and has been told that this will not cause an impact since there are a lot of guidelines and restrictions on how much money can be put into an IRA. Very narrow covenants govern these deposits.

{Tape : 1; Side : A; Approx. Time Counter : 10.07}

Proponents' Testimony:

Keith Colbo, Montana Independent Bankers, rose in support of SB 404.

John Cadby, Montana Bankers Association, rose in support of SB 404.

Opponents' Testimony:

Mike Moore, Montana Collectors Association, opposed SB 404. His association represents a number of creditors. This bill creates a safe haven for a judgment debtor to hide money. In §25-13-608, we already have a laundry list of items that are exempt from execution. This sets up a policy for a judgment debtor to hide his money and keep it from the judgment creditor. This would also say that it is more appropriate for a judgment debtor to place his money in an IRA and obtain tax and earnings benefits. At the same time, the judgment creditor may be suffering. The judgment debtor has either failed or refused to pay his debts; caused harm to another person or another person's property; or has committed some act of willful conduct such as physical violence, fraud, deceit, or defamation.

Some pensions are exempt from execution under federal statute. If the judgment debtor has $2,000, this should be paid to the creditor or the creditor should have the ability to access the money.

Questions from Committee Members and Responses:

SEN. HOLDEN remarked that it is public policy in Montana that social security, retirement disability, etc., were put in place prior to judgments. **Mr. Moore** remarked that everyone who works earns social security and is exempt. This is a level playing

field. We want people to save for the future and protect themselves so they can avoid public assistance. Should this policy trump the rights of the innocent party or the victim who has done nothing to cause the circumstance? If the judgement debtor has those funds available, why shouldn't they be made available to the judgment creditor who may be in just as dire straits as the judgment debtor.

SEN. DOHERTY questioned the qualified contribution under a Roth IRA and whether this is the only amount that would be exempted regardless of the amount contributed to the plan. **SEN. MCNUTT** responded that federal statute limits the amount which can legally be placed in an IRA. This amount is $2,000 a year. If $10,000 were contributed, the law states that any amount over the $2,000 would result in an excise tax of 6% and these funds can not be kept in the plan. This flags the account immediately and the money cannot be protected. This is not what the bill is designed to do.

SEN. DOHERTY remarked that if he were a judgment debtor and wanted to protect his money, he would gladly pay the 6% excise tax. **SEN. MCNUTT** clarified that it could not be held as an IRA contribution. The judgment creditor would have access to that money. The only safeguarded funds are the $2,000 contribution.

SEN. DOHERTY asked **Mr. Moore** his position on this bill if it addressed judgments for actions prior to the date. **Mr. Moore** questioned if this would mean the judgment creditor would be able to access amounts contributed post judgment.

SEN. DOHERTY affirmed. **Mr. Moore** responded that someone who has a large judgment may have made maximum contributions within the past five years. It seems harsh to limit a victim to that money. If that person had a house or vehicles, they would not be judgment proof. Even though these items may have been paid pre-judgment, the judgment creditor could after the items.

SEN. BISHOP questioned the difference between a Keogh Plan and a Roth Plan. **Mr. Moore** explained that a Keogh would be company sponsored. The employer contributes a certain percentage and employees contribute a certain percentage. These are ongoing. An IRA involves the individual contribution to his own retirement account. By federal statute, if an individual is gainfully employed and had funds going into a 401K or a qualified pension plan, that individual does not have access to the funds.

SEN. HALLIGAN related that the Medicaid Program application asks whether any assets were transferred within the past 3-5 years. This makes sure that the individual is not intentionally planing

to make sure that the taxpayers are paying for this individual. He questioned whether a similar approach would work with this bill. **Mr. Moore** explained that in estates they look at transfers two years prior to death. The time that a judgment comes about may not be near the time at which the harm occurred. If, during the term of the litigation, the person is intentionally planning to secure these funds, he may be able to accumulate $10,000 to $15,000. If contributions were included for the past five years, this would make it a little more palatable.

SEN. MCNUTT remarked that the intent of the bill was to make this commensurate with other retirement programs. He didn't want any mischief in the law, but was concerned with this proposal.

SEN. JABS stated that someone, who had not been in the habit of putting money away, who started making consistent contributions, may trigger the ruling of intentional planning. **Mr. Cadby** responded that there are bankruptcy laws in the federal code that limit the amount which can be put into any pension plan that can be accessed by creditors. He added that this bill will level the playing field between pension plans so they are all judgment proof. A judgment could be the result of an unforeseeable future accident.

{Tape : 1; Side : A; Approx. Time Counter : 10.30}

Closing by Sponsor:

SEN. MCNUTT summarized that people are being encouraged to be responsible by putting money away for retirement. Not all people have access to the qualified plans or the 401Ks. He agreed that it may be a good idea to change this to past contributions. If a judgment occurred, the past contributions could be protected while the individual would not be able to put money in an IRA in lieu of paying the judgment. He believed that federal statute would keep the mischief out of this bill.

{Tape : 1; Side : A; Approx. Time Counter : 10.32}

HEARING ON SB 416

Sponsor: **SEN. LORENTS GROSFIELD, SD 13, Big Timber**

Proponents: **None**

Opponents: **None**

Opening Statement by Sponsor:

SEN. LORENTS GROSFIELD, SD 13, Big Timber, introduced SB 416. The proposed legislation was brought to the committee by Greg Petesch, Code Commission. This addresses a Supreme Court decision, State v. Brummer. Mr. Brummer was charged with rape, aggravated kidnaping, and assault. He was acquitted on all counts. Two women were also involved in this case. It appeared that all three people ought to be in jail. Robbery and drugs were involved in the incident. The state brought a lesser charge of kidnaping against Mr. Brummer. After the jury's verdict but before entering judgment, the district court, on its own initiative, notified the parties of its intent to order a new trial.

Current law states that following a verdict or finding of guilty, the court may grant the defendant a new trial if required in the interest of justice. The motion for a new trial must be in writing and must specify the grounds for a new trial. On hearing the motion for a new trial, the court may grant a new trial. Neither party had made a motion for a new trial. The state disagreed. The Supreme Court affirmed the ability of the judge to order a new trial. The state pointed to (2) and (3) and stated that a motion was necessary. The motion needed to be filed by the defendant and it needed to be specific about a new trial. Mr. Brummer's attorney argued that (1) included plain language.

The Supreme Court held that the language of §46-16-702 is anything but plain. The parties relied on particular subsections rather than on the language of the statute as a whole. The fact that (1),(2) and (3) of the statute contain plain language individually does not necessarily mean the statute as a whole is plain. The statute does not specifically require a proper defense motion but, also does not specifically authorize a court to order a new trial without a motion, thus it appears that this statute is ambiguous.

The Court further held that in construing this statute, they cannot ignore the elementary rule in statutory construction. The court held that §1-2-101 states ". . . the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

The dissenting opinion states that had the legislature chosen to grant the district court the authority to grant a new criminal trial, it would have explicitly set out that power. It is improper that we presume the existence of such a power from the non-existence of language specifically authorizing it.

Everyone agreed that the statute is not clear. The question is whether it should be made clear that the judge can order a new trial or whether it should be made clear that the judge cannot order a new trial. The legislation, SB 416, is drafted to give the court the discretion.

Proponents' Testimony: None.

Opponents' Testimony: None.

{Tape : 1; Side : A; Approx. Time Counter : 10.43}

Questions from Committee Members and Responses:

SEN. DOHERTY added that he had recently submitted a brief to the Supreme Court dealing with the insertion of language in a workers' compensation case.

SEN. HALLIGAN remarked that he would rather have this handled by motion and hearing rather than having judges be activists.

SEN. GROSFIELD related that in the Brummer case, the judge ordered a new trial before anyone had an opportunity to make a motion.

SEN. DOHERTY stated that prior to the verdict, the judge has the authority to declare a mistrial with or without a motion. The question is whether the judge should have that authority after the verdict.

Closing by Sponsor:

SEN. GROSFIELD closed on SB 416.

{Tape : 1; Side : B; Approx. Time Counter : 10.52}

EXECUTIVE ACTION ON SB 153

Motion/Vote: **SEN. HALLIGAN** moved that **SB 153 BE AMENDED - SB015301.agp, EXHIBIT(jus37a01). The motion carried unanimously.**

Motion: **SEN. HALLIGAN** moved that **SB 153 DO PASS AS AMENDED.**

Discussion:

SEN. MCNUTT remarked that the priority would be changing on lien input commodities in agriculture such as fuel, fertilizer, and

seed. This will cause a lot of concern in the agricultural community.

SEN. HALLIGAN didn't think the priority would change. This addresses a perfected security in crops growing on real property over a conflicting interest of an encumbrancer or owner.

CHAIRMAN GROSFIELD remarked that the delayed effective date is very important on a bill of this size which affects many transactions around the state. The business world has two years to study the changes before they go into effect. This is a responsible approach.

Vote: The motion carried unanimously - 8-0.

{Tape : 1; Side : B; Approx. Time Counter : 11:00}

EXECUTIVE ACTION ON HB 41

CHAIRMAN GROSFIELD remarked that this involves 5 FTEs. There are two other CI-75 bills that went along with this bill and were tabled in the House. The question is whether or not a CI-75 ballot issue is necessary under this bill. His sense is that it is. **Greg Petesch, Legislative Services Division,** prepared a brief which states that it is required. In the testimony offered by the Chief Justice, he stated that he believes that it is exempt from CI-75 for the reason that the great majority of surcharges are found in criminal prosecutions both in district courts and courts of limited jurisdiction. This means that all are not included. Some of them may require a vote of the people.

The bill could be tabled, waiting for action from the House. Another option would be to pare it down so it only covers criminal surcharges.

SEN. DOHERTY questioned why the House didn't pass the bills. They are relying on the opinion of one of seven justices at the Supreme Court. He is in favor of the bill and continuing the surcharge.

SEN. HALLIGAN maintained that the CI-75 language clearly stated that civil fines and penalties are excluded from CI-75. A surcharge may cause a problem. He didn't believe this could cover only a part of the surcharges. There is a lot of revenue generated from civil cases. Since the Committee's Chief Legal Counsel has stated that this needs voter approval, the Committee could be sued if they are disregarding that opinion. It would be prudent to have the House send the other bills to the Senate.

CHAIRMAN GROSFIELD related that the bill could be tabled with a message sent to the House Committee that this Committee is awaiting the accompanying bills. Those bills may need to meet the transmittal deadline.

Motion/Vote: **SEN. HALLIGAN** moved that **HB 41 BE TABLED. Motion carried unanimously - 8-0.**

SEN. HALLIGAN clarified that HB 41 was tabled in an attempt to leverage the House to send the other bills. The Committee is supportive of the bill and will work very hard to pass the same.

CHAIRMAN GROSFIELD added that HB 49 was tabled in House Appropriations on January 26th.

EXECUTIVE ACTION ON HB 251

Motion: **SEN. HALLIGAN** moved that **SB 251 BE AMENDED - SB025105.avl, EXHIBIT(jus37a02).**

Discussion:

Ms. Lane explained that **SB0025106.avl, EXHIBIT(jus37a03),** is a substitute bill. Everything after the enacting clause would be eliminated. It would amend two sections only, Sections 61-8-714 and 61-8-732. This would accomplish the minimum that the DUI Task Force would like to see this legislature provide. This would be to extend the court's supervision of a DUI offender up to one year. The other amendment would address 61-8-732 and would clarify existing law in that an assessment is required and a judge in his or her discretion could require the defendant to complete the chemical dependency assessment before he sentenced the defendant. This would be discretionary.

The amendments, SB025105.avl, are the consensus amendments. No one objects to these amendments. All concerns have been incorporated and the amendments were distributed to interested parties. She has not heard from anyone that they are opposed to the amendments. This would allow the one year extension of supervision of the court. The rest of the amendments address Section 61-8-732. This clarifies that an assessment is necessary and required. It would be in the judge's discretion to do this before sentencing. The licensing language has been eliminated. Also, a second assessment could be done by a chemical dependency counselor and not a licensed facility or program.

Vote: The motion carried unanimously - 8-0.

Motion/Vote: **SEN. HALLIGAN** moved that **SB 251 DO PASS AS AMENDED. Motion carried unanimously - 8-0.**

{Tape : 2; Side : A; Approx. Time Counter : 11.23}

EXECUTIVE ACTION ON SB 306

SEN. GRIMES asked that the amendments, SB030601.avl - **EXHIBIT(jus37a04)**, be segregated. He remarked that the concept of custodian was eliminated. The testimony during the hearing was that the problem with this is that parents were going to try to be good parents in order to be identified as a custodian. He added the language "prior to the separation of the parents." He believed that the mother who has spent all her time with the children, should probably have the children.

Motion: **SEN. GRIMES** moved that **SB 306 BE AMENDED BY STRIKING SECTION 1.**

Discussion:

SEN. GRIMES stated that this would be based on the best interests of the child rather than which parent the child lived with.

Vote: The motion carried unanimously - 8-0.

Motion: **SEN. GRIMES** moved that **SB 306 BE AMENDED - Amendment 11.**

Discussion:

SEN. GRIMES explained that his intention is that if there is serious endangerment to the child, this would be an issue parents could use to redetermine residency. The reason it was pulled out is that this is source of a lot controversy between parents. On page 3, Subsection (f) would be stricken from the bill.

Vote: The motion carried unanimously - 8-0.

Discussion:

SEN. GRIMES related that parents who are following the parenting plan, decide that they do not want to send their children back after summer has ended. They file an affidavit saying that it is in the child's best interest, based on their wishes, to stay with one parent when they enroll in school. The other parent is not able to do anything about it until halfway through the school year.

Ms. Lane conveyed that amendment no. 3 was found on page 2 of the marked up bill on page 2, line 20. The remaining lines on page 2 and also lines 1-8 on page 3, become (b).

SEN. GRIMES remarked that his major concern is that one parent could change the residency of a child by coercing the child to say that he would rather live with one parent rather than the other. This language allows for amending a parenting plan for anything contained in the best interest section on page 1. If the residency was to be changed, it would be necessary to stay with the language under 219, which begins on line 26, page 2. This creates a two-tier structure. He remarked that this caused some pause in the Family Law Section. Their concern was that we were moving too quickly.

Motion: **SEN. GRIMES** moved that **SB 306 BE AMENDED WITH AMENDMENTS 3, 4, 8 AND 10.**

Discussion:

Ms. Lane explained that current law stated that a court, in its discretion, may amend a prior parenting plan if it finds that changes have occurred, etc. As drafted, the qualifying subsections do not go to (a) they would only go to (b). The new (b) would say that a court cannot change a prior parenting plan in regard to residence. The new (b) would apply only to a change in residence and it would be necessary to meet the qualifiers that the parents agree, etc.

SEN. GRIMES added that, with regard to residency, the parent cannot use coercion of the child's wishes to reverse residency. This matches the Washington statute. There are different opinions within the Family Law Section in this area.

SEN. HALLIGAN remarked that the Family Law Section and the Women's Law Section were in conflict on this bill.

SEN. GRIMES added that he would be willing to strike this and live with the affidavit changes.

Vote: Motion **carried unanimously - 8-0.**

Motion/Vote: **SEN. GRIMES** moved that **SB 306 BE AMENDED BY STRIKING "OR THREATENED" AND "OR DELAY" ON PAGE 3, LINE 1. ON PAGE 3, LINES 14 AND 15, WOULD BE RETURNED TO THE ORIGINAL LANGUAGE. The motion carried unanimously - 8-0.**

Motion/Vote: **SEN. GRIMES** moved that **SB 306 DO PASS AS AMENDED. Motion carried unanimously - 8-0.**

EXECUTIVE ACTION ON SB 416

Motion/Vote: **SEN. HALLIGAN** moved that **SB 416 DO PASS. Motion carried unanimously, 8-0.**

{Tape : 2; Side : B; Approx. Time Counter : 11.50}

EXECUTIVE ACTION ON SB 372

SEN. HALLIGAN commented that the **Clerks of Court Association** did not like the language proposed. The amendments, SB037201.avl, **EXHIBIT(jus37a05)**, provide that if an agreement was signed, it was not necessary to pay the fee.

Motion/Vote: **SEN. HALLIGAN** moved that **SB 372 BE AMENDED. Motion carried unanimously.**

Motion/Vote: **SEN. HALLIGAN** moved that **SB 372 DO PASS AS AMENDED. Motion carried unanimously, 8-0.**

ADJOURNMENT

Adjournment: 11:55 A.M.

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SEN. LORENTS GROSFIELD, Chairman

_____
JUDY KEINTZ, Secretary

LG/JK

EXHIBIT(jus37aad)