MINUTES

MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on March 24, 1999 at 9:05 A.M., in Room 325 Capitol.

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Sue Bartlett (D)
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: None.

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: HB 269, 3/21/1999
Executive Action: HJR 5, HB 109, HB 396, HB 527, HB 559

EXECUTIVE ACTION ON HB 109

SEN. GRIMES presented an amendment HB010901.avl, **EXHIBIT(jus66a01)**. He explained that for the purposes of offsetting the cost of tax incentives onto local government and taxpayers, the amendment proposed to take that amount of money and placed into an increase in the video gambling machine tax for the length of time necessary to make up this amount. The

potential sum is approximately $7 million. The tax would be increased to 16.5% for a short period of time.

Ms. Lane added that the tax increase would be a 1.5% increase for FY2002 only.

Motion: **SEN. GRIMES** moved that **HB 109 BE AMENDED.**

Discussion:

SEN. HALLIGAN remarked that it appeared that after March 31, 2004, the 1.5% would continue to be collected.

SEN. GRIMES clarified that if there were funds over and above what was necessary, it would be redistributed according to the formula.

Ms. Lane explained that for one year only, FY2002, there would be an additional 1.5% increase in the tax which would raise $3.6 million. This would be held aside by the state and redistributed according to the one-third, two-thirds split between the state and local government during the fiscal years when the credits are actually being taken against tax revenues.

Jim Opedahl, Administrator for the Gambling Control Division, explained that any collections not claimed under the credit would be distributed out of the account in a pro rata share based on the number of machines in a county or an incorporated city or town. This is a way of getting any excess back to where it would have been originally.

SEN. GRIMES remarked that a similar amendment by **REP. ROYAL JOHNSON** was added in the House Committee and then was stripped from the bill on the House Floor.

Mark Staples, Montana Tavern Association, clarified that this was an attempted amendment on the House Floor which was presented and defeated. His recollection is that this was a 3% permanent increase.

SEN. HOLDEN remarked that his problem with this bill is the cost to the taxpayer. On page 5, line 29, the $250 tax credit is addressed. This amounts to $4.6 million which is taken away from local governments and the General Fund. Also, on page 3, low interest loans are included. This is another benefit. The fiscal note asks for $1.5 million from the General Fund to help offset costs at the Department of Justice. We were sold on gambling to help people fund education, social welfare programs, etc.

SEN. HALLIGAN commented that his understanding is that the cost was $3.6 million instead of $4.6 million. **Mr. Opedahl** explained that with 70% of the machines coming on board, the cost would be $2.5 million. If all the machines capable of coming onto the system do so during the window allowed for taking advantage of the credit, this would be another $1.1 million. The loans are private loans that would be handled through the Board of Investments. The $1.5 million General Fund payback represents resources that have come out of the gambling account that were paid into the account and then stripped out in 1991, 1993, 1998, and 1999. The cost of staff without the system would amount to approximately $1.3 million per year. The impact to the General Fund in the fiscal note assumes that there will be a payback of $1.5 million that was loaned out of the Gambling Control Account to the General Fund in past years. This money would be used along with cash in the account at this time to buy the automated system.

SEN. HOLDEN asked if the loans would involve taking money from the Board of Investments. **Mr. Opedahl** responded that no state money was involved. There is a pledge in the bill for the taxes that secure the loans. The loans would be private and they would be negotiated with private institutions with a guarantee from the Board of Investments. This would provide a lower interest rate.

SEN. HOLDEN questioned if money would need to be set aside to secure the loans. **Mr. Opedahl** did not believe there was a set aside of money. There is pledge that if there are defaults, the tax revenue stands behind the default.

SEN. HALLIGAN asked if the Department is supporting the 1.5% increase. **Mr. Opedahl** explained that the Department believes that there is an agreement on the bill. They support the bill as presented and would oppose the amendment.

CHAIRMAN GROSFIELD asked **Mr. Staples** for his view of the amendment. **Mr. Staples** commented that one of the things that has not been factored into the bill is the growth in revenues which are not budgeted. The cities and towns, and the state are extremely conservative when budgeting for income from gambling revenues. He added that the $1.5 million came from the fees originally. They were given to the Gambling Control Division for purposes such as these and the legislature removed the fees. They would oppose the amendment.

SEN. GRIMES remarked that in Section 23-5-110 it states the public policy of the state concerning gambling. This states that revenue to fund the expense of administration and control of

gambling as regulated in these parts must be derived solely from fees, taxes, and penalties on gambling activities.

Vote: Motion **failed 3-5 on roll call vote.**

Ms. Lane presented amendments HB010902.avl, **EXHIBIT(jus66a02).** She explained that in the bill Sections 5 and 6 are both amendments to the same MCA Section, 23-5-610. Section 5 is effective on July 1, 1999 and terminates on December 31, 2005. Section 6 goes into effect on January 1, 2006 and then would be permanent law. The amendments would strike on page 7, the new subsection (2)(a) and on page 8, the new subsection (3), which are in the permanent version of the MCA section. This is already in the temporary version, Section 5 in the bill. They have no effective use after March 31, 2004. Without taking this out, in 2006 language would be placed into law that seized to have any affect in 2004.

Motion/Vote: **SEN. HALLIGAN** moved that **HB 109 BE AMENDED. Motion carried unanimously - 8-0.**

SEN. GRIMES noted that the pathological gambling bill was tabled in the Appropriations Committee because of the impact on the General Fund due to the additional FTE. He asked **Mr. Opedahl** how much money each percentage point raises in the tax and was told that each one-tenth of a percent raises $240,000. The funds asked for in the pathological gambling treatment bill amounted to $100,000 the first year and $200,000 the second year.

Motion: **SEN. GRIMES** moved that **HB 109 BE AMENDED BY RAISING THE GAMING MACHINE TAX TO 15.2% FOR THE PURPOSES OF FUNDING A PATHOLOGICAL GAMBLING TREATMENT PROGRAM.**

Discussion:

SEN. GRIMES insisted that this is a very important program. By raising the gaming machine tax by two tenths of a percent, $480,000 would be raised in one year.

CHAIRMAN GROSFIELD questioned whether the conceptual amendment included that the .2% be tied to SB 224 to provide funding for the bill. **SEN. GRIMES** affirmed.

SEN. HOLDEN remarked that the gambling industry always says they support the pathological gambler program. When the bill is close to being funded, they support the program and ask that the money be taken from the General Fund to pay for it. They are not willing to pay for the problem that the industry is causing.

SEN. BARTLETT asked the amount of the fiscal note on SB 224. **Ellen Engstedt, Don't Gamble With the Future,** explained that SB 224 was the framework of a piece of legislation needed to start the program. There was a $300,000 line item in the Governor's Budget that was not acted upon by the Subcommittee on HB 2. It would have funded $100,000 the first year and $200,000 the second year for the treatment program. This was out of the State Special Revenue Gambling Control Division's budget coming from gambling permit fees. Certain legislators noticed that there were two attorney positions within that same budget that were not funded by gambling permit fees that were being backfilled by General Fund money.

Dennis Casey, Gaming Industry Association, explained that the funding for SB 224 was from the Special Revenue Account that was created by the $200 machine permit fee.

CHAIRMAN GROSFIELD questioned if this is why the two attorney positions disappeared. **Mr. Opedahl** explained that the attorney positions are in the Gambling Control Division and work out of the Attorney General's Office. The question involved the balances and the ability to sustain both the automated accounting proposal and the problem gambler proposal. The Governor's Budget had funded the pathological treatment program out of the Gambling Control Division account and then switched the funding for the attorney positions to the General Fund.

SEN. HALLIGAN questioned whether the gambling industry is lobbying to have the money returned to SB 224. **Mr. Staples** explained that this bill has had a tough time. It always goes as far as the Appropriations Committee. There were two offered sources of funds which included the machine fees and also the interest that the taxes earn between the time they are collected by the Gambling Control Division before they are paid to the cities and towns, and to the state.

SEN. BARTLETT questioned whether the two attorney positions were restored. **Mr. Opedahl** responded that the Appropriations Subcommittee dealt with the Gambling Control Division budget and those two positions as they had always dealt with the budget. They did not switch the funding. Currently there is an ending fund balance of approximately $900,000. With the automated accounting and reporting needs and the General Fund amount that they are asking for, there would be an ending fund balance of approximately $400,000.

SEN. BARTLETT asked the Department's attitude toward the proposed amendment. **Mr. Opedahl** explained that the Attorney General supports SB 224 and also supports HB 109. The amendment in this

bill would have some title problems. The appropriate place to address the problem gambler issue is in SB 224.

Ms. Lane remarked that the title situation may be a close call. References to the tax are in the title and it is not a long stretch to add a sentence increasing the tax.

Mr. Staples commented that SB 224 has run into the same brick wall of the Appropriations Committee. This was carved down to $300,000 by leaving out the interest monies that could have been used and were originally proposed to be used. This would have bolstered it to $600,000. House Bill 109 and SB 224 are two separate bills and deal with two separate issues. They have attempted to fund the treatment bill with their fees and tax monies. Approximately $420 million has been paid into taxes and not one dime has been spent on treatment.

SEN. BARTLETT asked if traditionally the industry has been opposed to any increase in the tax to fund a pathological gambling treatment program. **Mr. Staples** stated that they have because they have been trying to fund this all along with the taxes that are being paid and the interest on the taxes. The cities and towns agree that this is a good use for the interest money. They have also supported the use of the fees, but they are always taken by the General Fund.

Ms. Engstedt remarked that **Don't Gamble with the Future** has traditionally opposed any kind of tax increase, simply because they have tried not to have government sucked into even more reliance on gambling revenue. However, .2% of the gambling revenue would raise more than they had hoped for from the State Special Revenue Fund. This is such a small amount of money for the gambling industry which took $244 million out of Montana's economy last year. They would support the amendment.

SEN. GRIMES commented that people have testified about spouses who were addicted gamblers and the family lost everything.

Vote: Motion **carried 7-2 on roll call vote with Halligan and McNutt voting no.**

Motion: **SEN. HALLIGAN** moved that **HB 109 BE CONCURRED IN AS AMENDED.**

Discussion:

SEN. DOHERTY remarked that there are a number of jobs tied to the gaming industry. He would like to see that these jobs pay a livable wage. We are giving the industry tax credits. He

encouraged the industry to become unionized which may cause the wages to increase.

SEN. HALLIGAN maintained that it is a very good idea to get 70% of these machines on the electronic monitoring system. This should have happened at the beginning of legalized gambling in Montana. The tax credits are lower than the tax credits which have been proposed in the other bills. It is important that a new operator, at some point, must absolutely connect 100% of the machines in the business. The balance has been struck and the rules are fair to all parties involved.

SEN. HOLDEN related that giving the tax credits would result in a loss of revenue to the General Fund and local governments. How will we ever recover the lost revenue we will lose by passing this bill? **SEN. HALLIGAN** explained that regarding the $1.5 million in the General Fund that is addressed in the fiscal note, there has been that amount of money taken from the $200 fees on the machines. The industry could have used this money for this purpose if it hadn't been put to other uses. If we had used it for a valid purpose, it would not be a loss. Statewide, local governments will have a one-time $780,000 reduction in revenue. Following that, the growth in revenue will cause a net positive impact because of the efficiencies generated from this.

SEN. HOLDEN claimed that by acknowledging inefficiencies, **SEN. HALLIGAN** was conceding that the gambling industry has not been paying the amount of tax they should have been paying and by computerizing that industry, we will be collecting more taxes than were previously collected.

SEN. HALLIGAN insisted he was not conceding that at all. By making the system as electronically up-to-date as possible, more revenues will be collected.

SEN. HOLDEN questioned how the $250 tax credit could be defended. **SEN. HALLIGAN** maintained that this is lower than any other proposal. The compromise is to get people to invest in the system so that they are online.

SEN. BARTLETT remarked that as a member of the Legislative Audit Committee, she remembered the day that auditors contracted specially by the Gambling Control Division in an effort to clear up some issues, explained how they visited specific locations and attempted to arrive at the appropriate tax for that entity. The amount of time that it takes in a paper system makes it a nightmare. Establishment owners who have gambling machines could do their level best and still run into problems in a paper system. The dial-up system is a important step forward that

ultimately will benefit the establishments as well as the Gambling Control Division and the taxpayers of the state.

SEN. JABS believed that the automated system would eventually pay for itself in years to come. It is time to go ahead with this right now.

SEN. DOHERTY agreed. The amendment that was adopted is significant. If funding is available, there may be a change of heart for the increase. He has had too many discussions with people whose lives have been absolutely devastated by gambling addiction. It is a farce for the state to talk about addressing the issue and not funding the needed programs. He hoped that this could be funded this legislative session.

CHAIRMAN GROSFIELD remarked that last session he carried a mandatory version of the dial-up bill. It stayed in this Committee by one vote. As fast as technology is moving, within a few years every machine in the state will be online.

Vote: Motion **that HB 109 BE CONCURRED IN AS AMENDED carried 8-1 with Holden voting no.**

{Tape : 1; Side : B; Approx. Time Counter : 10.05}

EXECUTIVE ACTION ON HB 527

SEN. HALLIGAN stated that there is an administrative requirement that someone cannot apply for a license unless they have completed a certain course. Regarding hardship cases, he questioned whether there may be other options to deal with the issue of the person who does not have the funds necessary to pay for the interlock device.

Brenda Nordlund, Department of Justice, explained that there are a constellation of factors that impact a driver who would be restricted to an ignition interlock device and these factors are many and varied. An insurance company who underwrites for DUI recorded drivers has provided here with factors about rates. Other factors include that they require a $100 reinstatement fee upon suspension or revocation of a license. These individuals will have faced a criminal penalty fine of $300 and higher. This individual needs to participate in ACT. Second and subsequent offenders are required to obtain treatment. These individuals need to have liability insurance. Their exposure increases the premiums they must pay.

A person whose drivers' license is revoked for any reason, must file proof of financial responsibility for three years following

that revocation. This means that the insurance company needs to file an SR22 for these individuals and anytime their insurance is dropped the Department is notified by an SR26. They require proof of financial responsibility for a myriad of offenses that include DUIs. The proof of financial responsibility could be waived for a person who installs the interlock device. They would still need to carry mandatory vehicle liability insurance. The Department could require them to give the name of their carrier, the name of their agent, the address and telephone number, and the Department could randomly contact to see if for this subset of drivers, they are still maintaining their insurance. This would be separate from an SR22 Program. It may not be popular with the insurance companies to get rid of the SR22 Program from this population of drivers.

Help an individual maintain safe driving and overcome their drinking problem by the use of this device, is a policy decision for this Committee.

SEN. HOLDEN didn't see how this would free up any money for the indigent person to purchase the interlock system.

Ms. Nordlund explained that she could not guarantee that there would be a monetary savings. This depends on what the insurance companies know or don't know about that individual's driving record. When an insured receives a second DUI, the insurance company is not automatically notified. The only reason the insurance company learns of the second DUI is because the Department requires SR22s before they come back as a licensed driver. The insured needs to ask the insurance company for an SR22. The insurance company may not learn about the second DUI until they do a sweep of the motor vehicle records or the individual is involved in an accident. This is where the financial leeway would occur.

Because of the T21 federal highway funding, there will be a large amount of money transferred into the Highway Safety Traffic Program.

Motion: **SEN. GRIMES** moved that **HB 527 BE CONCURRED IN.**

Discussion:

SEN. HOLDEN raised a concern about these devices being serviced in rural areas of eastern Montana. **SEN. HALLIGAN** insisted that the judges in those areas would have had contacts from the entities selling the devices before the devices would be ordered to be installed on the vehicles.

SEN. HOLDEN added that it was his understanding that this was not mandatory. **SEN. HALLIGAN** disagreed and emphasized that it was mandatory.

SEN. BARTLETT questioned what proportion of the second DUI offenders were indigent. **SEN. HALLIGAN** believed this would be 15% to 20%.

SEN. GRIMES questioned why more interlock devices weren't currently being ordered to be installed. He didn't sense a reluctance from the judges about having this mandated. He contended that this resource would lower the number of third time offenders. The intent is not to mandate something that will hurt the indigent or his or her family. He added that **Ms. Nordlund's** proposal was unique and he appreciated this concept being presented to the Committee although it may be a little too broad to implement.

SEN. BARTLETT requested more information from the Traffic Safety Division regarding T21 highway funds. **Ms. Nordlund** agreed to provide same.

Vote: Motion **carried 7-1 with Jabs voting no. SEN. DOHERTY** was excused from the meeting.

{Tape : 1; Side : B; Approx. Time Counter : 10.23}

EXECUTIVE ACTION ON HB 396

CHAIRMAN GROSFIELD clarified that amendment HB039603.avl, **EXHIBIT(jus66a03)**, had been adopted with exception of amendment no. 5.

SEN. GRIMES raised a concern with the language on page 3, (e) stating that a passenger may not steer, control, or otherwise operate an amusement ride in a manner that might harm another person. **SEN. DOHERTY** remarked that in bumper cars one is expected to steer into other bumper cars.

{Tape : 2; Side : A; Approx. Time Counter : 10.26}

Motion: **SEN. HALLIGAN** moved that **HB 396 BE AMENDED ON PAGE 3, LINE 12, BY DELETING "STEER, CONTROL OR OTHERWISE" AND ADDING "OPERATE AN AMUSEMENT RIDE IN A MANNER THAT MIGHT HARM ANOTHER PERSON".**

Discussion:

Ms. Lane suggested the language "use an amusement ride in a manner contrary to ride instructions". The definition of a passenger is someone who is waiting to board the ride, entering the ride, using the ride, getting off or exiting the ride.

SEN. HALLIGAN remarked that passengers are usually not given instructions on the ride. **Ms. Lane** suggested that following the word "instructions" adding the language "if any".

SEN. BARTLETT related that (c) spoke to failing or refusing to comply with the instructions of an operator or employee. The bill also contemplates that signs will be posted which will include operational instructions, safety guidelines, restrictions on the use, behavior or activities prohibited, etc. She suggested striking "(e)" entirely. This is the only provision that speaks to potential harm or harm to another person.

Ms. Lane added that when reviewing (a) through (i) the Committee should consider the effect of putting this in statute and also the effect in tort law in terms of presumptions. The bill had a presumption that they were conclusively assumed. This is the same as a non-rebuttal presumption that they assumed the risk. By taking this out, what is the effect of the remaining subsections (1) and (2).

Substitute Motion/Vote: **SEN. DOHERTY** moved that **HB 396 BE AMENDED BY STRIKING (E), PAGE 3, LINES 12 AND 13. Motion carried unanimously - 9-0.**

Motion/Vote: **SEN. DOHERTY** moved that **HB 396 BE CONCURRED IN AS AMENDED. Motion carried 8-1 with Bishop voting no.**

{Tape : 2; Side : A; Approx. Time Counter : 10.36}

EXECUTIVE ACTION ON HJR 5

Motion: **SEN. HOLDEN** moved that **HJR 5 BE CONCURRED IN.**

Discussion:

Ms. Lane explained that two sets of amendments have been prepared, HB000501.avl, **EXHIBIT(jus66a04)** and HB000502.avl, **EXHIBIT(jus66a05)**.
Both sets of amendments remove "memorializing" and use the word "urging". Both remove the word "belligerent". Amendments HB000501.avl insert "knowledge, active, and aggressive". They also leave in the same request to repeal the Brady Law and urge development of an opt out provision for states, such as Montana.

Motion: **SEN. DOHERTY** moved that **HJR 5 BE AMENDED, HB000502.avl.**

Discussion:

SEN. DOHERTY recounted that the question of reserved rights and whether or not this law calls this into question. He was uneasy saying that this is in direct conflict with the Constitution. The second "Whereas" deals with the equal footing doctrine. This may have an unanticipated impact. The language stricken on page 3, lines 2-8, is an incorrect statement. The testimony addressed the problems related to the instant check system, the compilation of information on citizens, and the fees levied for the checks.

SEN. HOLDEN maintained that this resolution is a statement that we are sending back to our Congressional Delegation explaining that we do not like the Brady Law. He was opposed to the amendments.

CHAIRMAN GROSFIELD agreed with amendments nos. 1 and 2. Familiar language should be used. He agreed with the first part of amendment no. 3, but suggested that the second "Whereas" stay in the bill. He believed that it was erosive of Tenth Amendment authority. The Brady Law is not wanted in Montana.

Substitute Motion/Vote: **SEN. DOHERTY** moved that **HJR 5 BE AMENDED, HJ000502.avl, AND LEAVING THE LAST "WHEREAS" IN THE BILL. Motion carried unanimously 8-1 with SEN. HOLDEN voting no.**

Motion/Vote: **SEN. HOLDEN** moved that **HJR 5 BE AMENDED, HJOOO501.avl, AMENDMENTS NO. 3 AND 5. Motion carried unanimously.**

Motion: **SEN. HOLDEN** moved that **HJR 5 BE CONCURRED IN AS AMENDED.**

Discussion:

SEN. BARTLETT remarked that she recalls several meetings where there was clear support from almost everyone in the room for the Brady Law and for retaining the law and also making it effective.

Vote: Motion **carried 8-1 with Bartlett voting no.**

EXECUTIVE ACTION ON HB 559

Motion: **SEN. HOLDEN** moved that **HB 559 BE AMENDED, HB0055901.avl, EXHIBIT(jus66a06).**

Discussion:

SEN. HOLDEN suggested striking the entire bill except for page 4 which spoke to the definition of takings or damaging.

Ms. Lane explained that definition of taking and damage would read, "means depriving a property owner of private property or causing a reduction in the fair market value of private property in a manner requiring compensation." On line 16, "substantial and disproportionate" would be stricken.

SEN. HOLDEN explained that the fair market value of land surrounding land which is "taken" would be reduced. The definition states "or causing a reduction in the fair market value of private property." This still allows a private property owner to make a case to a governmental agency or to the courts, that not only have they been deprived of their private property, but they are causing a reduction in the fair market value. This allows another avenue to address. It may also be used to negotiate a higher payment on the taking of property.

SEN. GRIMES remarked that by removing the words "substantial and disproportionate" any reduction in fair market value would be defined under takings. He preferred the higher threshold of substantial and disproportionate.

SEN. HALLIGAN remarked that the amendments would greatly expand the amount government would have to pay. He added that the guidelines stated government actions may adversely affect one or more strands in the bundle of rights without there being a taking under the property. The government may prohibit the use of property that is a nuisance without paying compensation because the right to create a nuisance is not a component part of the bundle or rights. The amendments would state that any reduction in value is a taking. This changes a hundred years of the takings law.

SEN. HOLDEN agreed to segregate the amendments.

Substitute Motion/Vote: **SEN. HOLDEN** moved that **HB 559 BE AMENDED, HB0055901.avl, AMENDMENTS 1,2,4, AND 5. Motion carried unanimously - 9-0.**

Substitute Motion: **SEN. HOLDEN** moved that **HB 559 BE AMENDED, HB0055901.avl, AMENDMENT 3.**

Discussion:

SEN. HOLDEN contended that if reduction in private property is not the definition of a takings, what is a takings? **SEN. HALLIGAN** responded that this is handled on a case-by-case basis.

The guidelines state that the government may regulate business, prohibit illegal activities, and establish and enforce a multitude of regulations that restrict the use of property. Often this adjustment of private property and public benefit limits property rights and decreases the value of property. To require compensation under all such circumstances would effectively compel the government to regulate by purchase.

Vote: Motion **failed 1-7.**

Motion: **SEN. GRIMES** moved that **HB 559 BE CONCURRED IN AS AMENDED.**

Discussion:

SEN. GRIMES stated that every rancher in his district would have their options reduced regarding what could be done with their property in lean times if this bill had not been amended. By selling a parcel of their land, this could reduce the neighbor's property.

SEN. HALLIGAN remarked that the case in Billings which was mentioned at the hearing involved the situation where the court held that there was a taking due to the changes that the city had made. This was done under existing law. Changing the law in this manner is not a wise move. Mistakes will be made that will hurt property owners as well as public entities.

Motion/Vote: **SEN. HALLIGAN** moved that **HB 559 BE TABLED. Motion carried 6-2 with Holden voting no. SEN. DOHERTY** was excused from the meeting.

{Tape : 2; Side : B; Approx. Time Counter : 11.10}

HEARING ON HB 269

Sponsor: **REP. BRAD MOLNAR, HD 22, Laurel**

Proponents: **Gloria Lovell, Park City**
Brenda Adams, Park City
Betty Asplin, Laurel
Eunice Ash, Billings
Krystyna Nerling, Sun River
Velma Morris Fitzgerald, Rockville
Frank Fitzgerald, Rockville

Opponents: **Al Smith, Montana Trial Lawyers Association**

Opening Statement by Sponsor:

REP. BRAD MOLNAR, HD 22, Laurel, introduced HB 269, which creates the position of advocate. This bill states that the Department of Family Services will take the rights enumerated in the bill, hand it to the parents and tell them that they have a right to an advocate. It gives an example of whom may serve as an advocate. The intent is to have someone serve between the distraught parent and the social worker who has a case to prove. The bill has been amended. **Chuck Hunter, Child Protective Services**, has attended every hearing and has been supportive of the bill.

Page 2 states that a child/family advocate can be, but is not limited to, a member of the clergy, a professional social worker, an attorney, a licensed counselor, a mediator, a teacher, or a family advocacy group. Lines 25-27 state that a document, report, record, or other information may not be disclosed if it is determined to be detrimental to the child or harmful to another individual who is the subject of the document, record, or information.

Page 3, line 23, allows the advocate to explain circumstances to the Department so that the funds can follow the child to take care of the child's needs in a timely manner.

On page 5, the bill states that a family advocate may not limit, delay or in any way interfere with the Department's ability to conduct or complete an investigation as required by law.

Page 8 of the bill speaks to non-disclosure of any person who reported or provided information on the alleged child abuse or alleged neglect contained in the report. By law, those names are kept confidential.

These amendments were brought forward by the Department.

Proponents' Testimony:

Gloria Lovell, Park City, remarked that when she was 15 years old her mother had problems with pain medication. It was taking over her life. She quit school and took over her mother's job. She talked to a probation officer and explained that an aunt would take all four of the children while her mother was getting help. In court, the assistant district attorney was questioning her about her mother being a drunk. She begged the judge to listen to the reason she was in court. She wanted her mother to have help for her drug problem. The judge assured her that her mother would get help and that the children could live with their aunt until their mother was well. The next thing she knew, all four

of the children were placed in separate foster homes. She ran away from the foster home and refused to go back. They were finally allowed to live with their aunt.

Brenda Adams, Park City, related that she had custody of her grandchildren for nine months. When custody was granted back to the parents, it was stated that Child Services could watch over them and the parents should and would stay in contact. She has not heard from them in seven months. The parents are known drug offenders. Having two totally confused, misplaced children is not easy.

Betty Asplin, Laurel, remarked that she heard that education is an important part of the advocate position. She submitted her name for the position of senior advocate at the Council of Aging. She asked the qualifications necessary and was told that none were needed. She only needed to be a strong advocate, participate in two and a half days of training. and pass an exam. She added that his bill will help save families.

Eunice Ash, Billings, commented that animals have advocates. If someone hurts or starves an animal, they are in big trouble. This bill will allow for advocates for young families with family problems.

Krystyna Nerling, Sun River, related that she has been in foster care for ten years. She should not have been in foster care. She could not say a word in court. The county attorneys and the Department of Family Services were the only ones who participated in court. In ten years of foster care she has been in ten homes, schools, and churches. The medication she was taking was no good for her. She lived in Great Falls, Billings, Laurel, Missoula, and then was moved back to Great Falls. She could not have survived if it wasn't for the love of her grandma and grandpa and the love of God. Foster children do need help.

Velma Morris Fitzgerald, Rockville, reported that this bill does not harm anyone. Many groups have advocates. One of our Senators has proudly stated that his greatest resource is his family. She added that Montana's greatest resource is Montana families. This bill will allow advocates to help families.

{Tape : 2; Side : B; Approx. Time Counter : 11.32}

Frank Fitzgerald, Rockville, remarked that the family is under siege from every direction which includes lifestyles that are not conduce to the raising of children all the way down to actual child abuse and neglect. The state spends vast sums of money on foster care and not all of it is needed. His daughter was in

foster care for 12 years. He has been fighting for families ever since.

If an advocate program is set in place, he would like to start a statewide organization for advocates. Training programs are important in every community. Advocates are people of first contact with the parents. The family advocate is a gatherer of information as well as a supplier of information. Social workers have large caseloads and are under a great deal of stress. Montana is very diverse. It is important that advocates be diverse as well because families are not all the same.

He further added that **Krystyna Nerling** is part Native American and should have fallen under the Indian Child Welfare Act. An advocate would have known this and explained this to the social worker. Montana has a large Native American population and not all the families are identical to non-Native American. An advocate would appear before a foster care review committee with the correct information.

In his daughter's case, the foster care review committee held that both parents were terminated of their rights. This was not true. The advocate knows the facts of the case. Confidentiality is an important part of the advocate's job. He had two stay orders from the Chief Justice of the Supreme Court. They were not obeyed. His attorney failed. He had an unanimous Supreme Court decision in his favor reversing and remanding the case for further findings. The state did not obey this and held a new trial. An advocate would have been very helpful. Attorneys are very busy people.

Opponents' Testimony:

Al Smith, Montana Trial Lawyers Association, maintained that they recognize there is a need for addressing child abuse and neglect. They also recognize that there is need to hold the system accountable. Their concern is with the immunity from liability provisions. They did not testify in the Human Services or Public Health Committees.

The immunity provisions are found on page 2, lines 11-14. Generally they oppose immunity provisions because they believe they violate a person's Constitutional right under the Montana Constitution of access to the courts for redress of injuries they may suffer to their person or property. Line 12 makes reference to Section 41-3-203, the child abuse and neglect statutes. This provides that anyone investigating, reporting, furnishing records, or participating in judicial proceedings under a child abuse and neglect proceeding, is not liable unless it is for gross negligence or they acted in bad faith or with a malicious

purpose. Immunity cuts both ways in that it inhibits accountability and responsibility from both sides. Families that have been wronged by the system are inhibited as well. They cannot hold a social worker responsible for mere negligence in this immunity provision. Under this bill, advocates will not be held responsible for their negligent actions in performing services.

{Tape : 2; Side : B; Approx. Time Counter : 11.46}

Questions from Committee Members and Responses:

SEN. HOLDEN asked the sponsor how the bill was created. **REP. MOLNAR** explained that it was the product of six years of work. The confidentiality provisions and immunity provisions are similar to current state policy. The duties of the advocate includes that they may do certain things. Arizona or New Mexico provide that the guardian ad litem also works for the family.

SEN. HOLDEN asked if child advocates would have the right to appear before the court and testify on behalf of the family. **REP. MOLNAR** maintained that they could currently act in that capacity.

SEN. HALLIGAN asked **Ms. Nerling** if an attorney represented her during the ten years that she was in foster care. **Ms. Nerling** affirmed that she had an attorney and he told the judge that she wanted to live with her grandparents.

SEN. HALLIGAN questioned whether she had been under the tribal system during the ten years. **Ms. Nerling** stated that she had never been in tribal court.

SEN. HALLIGAN further questioned the whereabouts of her mother and father. **Ms. Nerling** explained that her mother lived in Great Falls. She was taken away from her mother and her step dad. Her father lived in Havre and could not care for her.

SEN. HALLIGAN insisted that families cannot be stereotyped. The parents may not agree with each other or a family advocate. Each wants the child to live with them. He raised a concern with one family advocate working for a divided family that is in a crisis situation. **REP. MOLNAR** remarked that in the hearing in the House **Chuck Hunter, Department of Family Services,** answered this question by explaining that each parent could have an advocate. There will be disagreement because not all facts are reviewed in the same manner. It is important to let the judge decide.

SEN. HALLIGAN maintained that the court could be confused as to which person was the family advocate. The judge may dismiss both advocates. **REP. MOLNAR** clarified that the family advocate does not practice law. They are to gather information and present it to the people who need it.

SEN. HALLIGAN further remarked that with two family advocates in the courtroom, the advocate for the mother will need to say something bad about the father. Instead of advocating for the family, they will need to be involved in mud slinging. **REP. MOLNAR** insisted that the advocate generally would not be acting as an attorney so this should not happen. However, if the person could not afford an attorney the advocate could come forward and explain that the reason he or she is advocating for the mother is because she provides a stable home and that the father has a drug problem and an anger problem. Until he completes treatment, the children will be safe with the mother. This is opposite of what the Child Protective Services would state which may be that they want the children in foster care. The judge would then consider the two positions.

He added that this is a new program. In four years it will sunset. If there are problems, adjustments can be made. There currently is no option for these people.

CHAIRMAN GROSFIELD remarked that the immunity section references Section 41-3-203 which excludes everyone. He asked **Mr. Smith** if he was aware of cases that fell through the cracks due to this immunity provision. **Mr. Smith** was not aware of a specific case. Attorneys have been approached by potential clients and have been told that this does not rise to the level of gross negligence.

CHAIRMAN GROSFIELD further remarked that the language stated that they were immune from liability when acting pursuant to Sections 1 through 10. He questioned what this would mean with respect to Section 11. **Mr. Smith** assumed that Section 11, the confidentiality section, would not have the immunity.

CHAIRMAN GROSFIELD added that page 2, Section 5, includes a confidentiality section. **Mr. Smith** clarified that Section 5 set out the standard but immunity would not be granted on that basis.

REP. MOLNAR agreed that Section 5 mentioned confidentiality and the purpose was to let people know that information was to remain confidential but that full cooperation was needed with regard to the confidentiality because legal counsel would also need to maintain the confidentiality of the information. Section 11, 41-3-205, states that the laundry list is immune other than in cases

of gross negligence or bad faith actions. This would allow advocates to work in the same system and under the same rules.

CHAIRMAN GROSFIELD commented that on page 4, line 4, the language stated that whenever a case is instituted, the family advocate may provide a copy to the family. He believed the Department should be providing the copy to the family. **REP. MOLNAR** explained that this was stated elsewhere. This is a duplicative effort. On page 4, line 4 states whenever a child is removed from the home the Department shall provide a copy of . . .

SEN. BARTLETT remarked that the bill allows for a non-profit or for profit organization to act as a family advocate. She asked for examples of corporations that may be appropriate in this role. **REP. MOLNAR** explained that this would include attorneys as well as the Catholic Services, Methodist Services, Salvation Army, etc. This would include an organization familiar with the family.

SEN. BARTLETT questioned if any grants were available. **REP. MOLNAR** insisted that there is a lot of money for experimentation in providing better social services. The advocates could apply for these grants.

Ms. Fitzgerald remarked that regarding the subject of mothers and fathers going separate directions, the Department of Social and Rehabilitative Services started a program where instead of removing the child from its home, school, church, and other relatives, the child was left in the home and the abuser was removed from the home.

Al Nerling, Sun River, remarked that his granddaughter had an attorney, but the attorney did not help her. She told her attorney she wanted to live with her grandparents instead of going to foster care.

{Tape : 3; Side : A; Approx. Time Counter : 12.21}

Closing by Sponsor:

REP. MOLNAR summarized that if the family advocate believes that a case is not proceeding in a timely manner, they may seek counsel from the public defender's office or the legal aid society. Advocates are seeking legal counsel and are not practicing law. There is a big difference.

The child has a guardian ad litem. The advocate is for the family and the child is a part of that family. In **Ms. Nerling's** case the advocate would have helped the grandparents who were

saying that they wanted to keep the child and that it was not necessary to place her into ten years of foster care. The mother and father were not able to care for the child. In this particular case, **Ms. Nerling** saw her guardian ad litem twice in ten years.

Advocates will be volunteers. They are given the same cover from liability and false suit as the state is given unless gross negligence or bad faith is involved. Volunteers need this protection.

He ran a survey in his district where the people were asked if they wanted their children talking to social workers at school should the social worker believe the child had been abused. The response was 85% no, 1% yes, and the rest were undecided.

Out of the 10,000 cases brought forward every year, 6,000 are dismissed. The Department's image is tarnished because it is deep and dark and people do not understand the system. This bill passed the House with a vote of 95 to 5.

ADJOURNMENT

Adjournment: 12:30 P.M.

_____
SEN. LORENTS GROSFIELD, Chairman

_____
JUDY KEINTZ, Secretary

LG/JK

EXHIBIT(jus66aad)