**MINUTES**

**MONTANA SENATE**
**57th LEGISLATURE - REGULAR SESSION**
**COMMITTEE ON JUDICIARY**

**Call to Order:** By **VICE CHAIRMAN DUANE GRIMES**, on January 17, 2001 at 9:10 A.M., in Room 303 Capitol.

**ROLL CALL**

**Members Present:**
Sen. Duane Grimes, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Walter McNutt (R)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)

**Members Excused:** Sen. Lorents Grosfield, Chairman (R)

**Members Absent:** None.

**Staff Present:** Anne Felstet, 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 17, 1/30/2001; SB 209, 1/30/2001
Executive Action: SB 28; SB 217

## HEARING ON SB 17

**Sponsor:** **SEN JERRY O'NEIL, SD 42, KALISPELL**

**Proponents:** **Harris Himes, representing self**

**Opponents:** **Rebecca Moog, Montana Women's Lobby**

**Opening Statement by Sponsor:**

**SEN JERRY O'NEIL, SD 42, Kalispell,** opened on SB 17. He said it would amend section 40-4-212, which provided the determining factors the court would consider in custody cases. He specifically wanted to add a defining clause to the continuity and stability of care relating to a parent's reckless disregard for the stability of the child's home. An example of this would be a parent going off with another significant other and leaving the family unit before the marriage was properly dissolved. However, this clause did not pertain to a parent leaving the home due to any sort of abuse. **SEN. O'NEIL** also restated the subsection relating to financial support of the child so that the court looked into each parent's ability to support the child, as well as the parent's history in supporting the child. He felt those parents who were working long hours in order to support the children, were working in the best interests of the child. With the bill, he hoped to prevent divorces and when they did occur, he felt this bill would encourage the parents to think of the child's best interests first. He provided a photocopy of the definition of reckless disregard, **EXHIBIT(jus13a02).** He also turned in a packet of information relating to divorce reform, **EXHIBIT(jus13a03).**

**Proponents' Testimony:**

**Harris Himes, representing himself,** introduced himself as an attorney who had done some divorce cases. He provided his thoughts in support of the bill in **EXHIBIT(jus13a01).**

**Dallas Erickson** turned in a witness statement in support of the bill, **EXHIBIT(jus13a04)**

**Opponents' Testimony:**

**Rebecca Moog, Montana Women's Lobby,** felt the bill chipped away at no-fault divorce. The organization had always supported no-fault divorce, especially in domestic abuse situations. She said reckless disregard was too vague.

**Questions from Committee Members and Responses**:

**SEN. RIC HOLDEN** wanted to know if **SEN. O'NEIL** had a short definition of reckless disregard and its essence. **SEN. O'NEIL** pointed out that he had passed out a definition of it from Black's Law dictionary, (exhibit 2).

**SEN. MIKE HALLIGAN** said in his experience with family law that judges were hesitant to make judgements of child custody based on someone's financial status. He pointed out that the male usually made more money, but wasn't necessarily the best provider. He felt the change in the bill regarding financial ability asked the judge to make those judgments. **SEN. O'NEIL** said he didn't think judges would favor the bread winner, but would look at how the parent was responsibly taking care of the child. He said he didn't know of a judge who would take a child away from the mother just because the father had more money. However, some families pursued divorce based on a parent's disregard for money by spending it on poor habits. **SEN. O'NEIL** wanted the judges to be able to consider that scenario. He also felt that it was important for the judge to consider a parent's savings and see that the parent had the ability to provide, but was not. He felt the judges were already able to consider these types of situations, but the new language allowed them to consider them even more. He especially wanted the judges to be able to know about a parent's significant other and how that adversely affected the family unit because it was relevant to the stability of care for the child.

**SEN. HALLIGAN** felt that attorneys would advocate for their client and maybe point the finger at the other one's long work hours and say that was careless disregard because that parent wasn't around to do a fair share of raising the child. However, he wanted to clarify that **SEN. O'NEIL** thought the bill would be used in the opposite way. **SEN. O'NEIL** responded that attorneys would bring in all the information and show what was really going on in the family; that the bread winner who worked long hours really was providing for the family.

**SEN. HALLIGAN** said he had counseled many divorces, some of them amicable, where people had simply grown apart after the child was grown. However, those were rare and in most custody cases, expert witnesses were brought in, but fault was usually not a factor. Therefore, the significant other was irrelevant unless that person could be proven to affect the children. He felt that the information **SEN. O'NEIL** was hoping to add already could be considered, and that it was inching away from the parenting aspect and putting more of an emphasis on self or fault, and not the best interests of the children. **SEN. O'NEIL** replied that

currently the court could consider the character of the significant other, but not the fact of that person in tearing apart the family. He felt SB 17 would make for fewer contested divorces because the parents would consider the consequences of their actions prior to leaving the family and therefore creating a more amicable divorce situation.

**VICE CHAIRMAN GRIMES** suggested that domestic violence cases could be adversely affected if the new language of reckless disregard was strictly applied. **SEN. O'NEIL** said the word reckless was added to cover such situations because a judge would determine that it wasn't reckless for the victim of abuse to run, but was in fact the proper decision in considering the stability of care for the child.

**Closing by Sponsor:**

**SEN. O'NEIL** closed on SB 17 saying it did change no-fault divorce by putting some recognition of fault if custody was involved. Fault did make a difference to the child involved and to society. This bill modified that, making it better for society.

## HEARING ON SB 209

**Sponsor:** **SEN. MIGNON WATERMAN, SD 26, HELENA**

**Proponents:** **NONE**

**Opponents:** **NONE**

**Opening Statement by Sponsor:**

**SEN. MIGNON WATERMAN, SD 26, HELENA,** opened on SB 209 by providing clarifying information on the issue: **EXHIBIT(jus13a05).** This bill added balancing test language to existing law, which clarified that judges could use the balancing test as provided in the Montana Constitution before they determined a settlement of a claim against the state. The issue evolved from a case in Helena, the Pengray case where a woman was killed by someone on probation from the corrections program. The family sued the state and the settlement was not made public, however, it was challenged at the Supreme Court level and reversed. A law passed a few sessions ago said that in all cases state settlements were open to the public. SB 209 changed the language so that judges could opt to use the balancing test, the individual right to privacy against the public's right to know, to determine whether the settlement would be disclosed. The presumption in law was that all should be open, however, in some occasions, the

individual's right to privacy clearly could exceed the public's right to know. She noted that it had been argued that public disclosure law could be overturned, but this bill prevented that by allowing the judges to use the balancing test. Without the balancing test option, the existing statute probably could be overturned, and harm the public's right to know.

**Proponents' Testimony: None**

**Opponents' Testimony: None**

**Questions from Committee Members and Responses:**

**SEN. RIC HOLDEN** asked if the individual listed in the bill was a private citizen, a business owner, or a large national company. **SEN. WATERMAN** said the language came from the Constitution, so the individual was defined in Montana law. She thought it would be an individual as opposed to a business.

**Valencia Lane, Legislative Staffer**, also answered that question saying that she would have to look it up in case law. She didn't think "individual" included a corporation, but person did, and corporations could have individual rights when person was used.

**SEN. HOLDEN** asked for the intent of the sponsor, whether she wanted to include corporations and big business or private citizens. **SEN. WATERMAN** said she wanted to keep the existing statute legal and not set-up a situation where a court couldn't use the balancing test. Therefore, if business, or person could be added to meet the privacy balancing test in the Constitution, she had no objections. She said she had no ulterior motives, other than when the Pengray decision came down, the issue was raised that the entire statute regarding public disclosure of settlements by the state could be overturned. She wanted to avoid that happening and make it clear that a judge could use the balancing test. She didn't have a preference as to who the balancing test would apply to, as long as it could be used.

**SEN. MIKE HALLIGAN** responded by saying that it only referred to when a public entity was involved in a settlement. A private insurance company settling private claims with an insured would not apply. He said he didn't know whether "individual" was a different word in statute than the word "person". He pointed out that in the Constitution it stated "individual" right to privacy, not a "person's", which also included corporations.

**SEN. WATERMAN** said that if the state was in a lawsuit with a corporation, and a settlement was made, she didn't know whether they had a privacy right to not disclose the settlement

agreement. However, in the case she was talking about, it was a private citizen and serious questions arose as to their individual privacy rights, and whether disclosure could cause further trauma to the family.

**Closing by Sponsor:**

**SEN. WATERMAN** closed on SB 209 saying that Greg Petesch, the drafter, could clarify the word "individual", but that her understanding was the Constitution allowed individual right to privacy to be weighed in the balancing test, but if something else needed to be added, she would accept that.

## EXECUTIVE ACTION ON SB 28

**Discussion:**

**SEN. JERRY O'NEIL** contacted **Chief Justice Gray**, and then he contacted a judge in Kalispell regarding the bill. They had a concern that the money could be used to bolster the current court system and still meet the demands that SB 28 addressed. They hadn't been able to meet on the issue yet.

**SEN. MIKE HALLIGAN** asked for clarification on the monetary concern.

**SEN. O'NEIL** said that he was concerned about putting the money into two places: 1) discovery phase 2) judging phase, and the judges were going to study it. He wondered if the court system could be bolstered with the funds in order to have a special family law court, to increase justice for all family litigants, not just the child support collection agency. He suggested the funds could be put into the current court system instead of creating an additional court system. He wanted to see if SB 28 could accomplish that.

**SEN. HALLIGAN** had asked before if the process could be used to deal with visitation issues while also talking about child support issues. Federal legislation prohibited going beyond the financial aspect of child support and go into other issues that district court judges did in normal dissolution proceedings. He didn't think there was any ability to do that, but thought it was a good idea to research it further.

**SEN. DUANE GRIMES** said they would delay action until the next day because there was positive action being done to find out further information regarding the bill.

**SEN. O'NEIL** said that was OK because he was waiting on some information that would come that day.

**SEN. HALLIGAN** mentioned that **Mary Ann Wellbank** was present and could answer the question administratively whether there was an ability to use any of the child support enforcement funds, no matter where they came from, to do the things **SEN. O'NEIL** asked about.

**MARY ANN WELLBANK, Administrator of Child Support Enforcement Division of DPHHS,** said that Title 4D of the Social Security Act, specifically provided that the federal portion of the funding could only be used for specifically outlined functions in the federal regulation. It would not include anything outside of the Child Support Division. It also specifically excluded salaries for judges as an area in which federal participation was available.

**SEN. O'NEIL** thought that he had understood her the other day to say that there was a chance to include salaries for special administrators.

**Ms. Wellbank** said if the system was judicial based and not administrative based, and the litigation went through the judiciary, then a portion was available for the department's workers and lawyers to proceed with cases, but only those cases involving child support. It was very limited.

**SEN. O'NEIL** clarified whether it mattered if an administrative law judge, who heard cases about child support, was under the administrative or judicial branch of government.

**Ms. Wellbank** said that it did matter; that the statute stated it was under judiciary. She thought they wanted to make sure federal funds were limited and not to back-fill the court system.

**SEN. O'NEIL** asked what it excluded and included.

**Ms. Wellbank** said it excluded judges in the judiciary, included judges in the agency (Administrative law judges).

**SEN. O'NEIL** questioned if the federal government was demanding that states do their judging on child support enforcement outside of the judicial system.

**Ms. Wellbank** said no, that some states did have judicial systems, where all cases went to the judicial branch of government. She said that was considered the 'old' way because it was less efficient, and less cost-effective. However, if a judicial

system was in place for child support, then the state could use federal money to pay for their attorneys to go to court, but they couldn't use the money for the judge to decide the case.

**SEN. GRIMES** interrupted asking if **SEN. O'NEIL** objected to the committee voting on this bill, knowing that if further information was provided, that **SEN. HALLIGAN** would be amenable to considering those concerns.

**SEN. O'NEIL** replied he wouldn't be comfortable moving ahead with the bill because the judge from Kalispell and **Chief Justice Gray** had it under consideration. He was looking at ways to preserve the three branches of government, use the federal money, and still advance child support collections.

**SEN. HALLIGAN** said that if two people were not in court and wanted to use the administrative process because it didn't require attorneys, then those people could file the application and proceed. This process did not involve the judiciary. However, if they were in action in a district court, and the agency issued an administrative order from one of their administrative law judges, it was no longer effective until it was referred to the judiciary who gave final approval. However, if one or both parties were involved in a district court action, then this required that modification of the order to the judiciary and it had to be approved. There had to be a hearing if one party objected. He would help **SEN O'NEIL** reach the people that could address his concerns if he wanted to hold the bill.

**SEN. O'NEIL** said most of his clients were below poverty level. The first court, the administrative court, would be the default and even if they didn't want to go to court, they wouldn't have a choice. Their only option was to go to that court, then hire an attorney to go through a second court case. He said that was not feasible for many people. He hated to see the use of administrative courts in order to avoid the judicial system. He was concerned about giving more judging responsibility and resources to the administrative branch, the executive branch, than the judicial branch where it rightfully belonged. He wanted to give a judge the opportunity to address those concerns.

**SEN. GRIMES** said they would hold on executive action for one day.

## EXECUTIVE ACTION ON SB 217

**Motion/Vote**: **SEN. HALLIGAN** moved that **SB 217 DO PASS. Motion carried 7-0, SEN. McNUTT, SEN. GROSFIELD** excused. No discussion.

**ADJOURNMENT**

Adjournment: 10:00 A.M.

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SEN. DUANE GRIMES, Vice Chairman

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ANNE FELSTET, Secretary

LG/AFCT

**EXHIBIT(jus13aad)**