MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on January 10, 2003 at 8:00 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:
Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

Members Excused: None.

Members Absent: None.

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

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

Committee Business Summary:
Hearing(s) & Date(s) Posted: SB 57, 1/3/2003; SB 29, 1/7/2003; SB 49, 1/7/2003; SB 35, 1/7/2003; SB 30, 1/3/2003;
Executive Action:

HEARING ON SB 57

Sponsor: **SEN. BOB KEENAN, SD 38, Bigfork**

Proponents: **Ed Amberg, Montana State Psychiatric Hospital**
Donald Harr, Montana Psychiatric Association
Al Davis, Montana Mental Health Association
Anita Roessmann, Montana Advocacy Program (MAP)
Andrée Larose, Montana Advocacy Program (MAP)

Opponents: **None.**

Opening Statement by Sponsor:

SEN. KEENAN opened the hearing on SB 57 by stating this bill was a result of the HJR 1 Committee which furthered the study of mental health issues. SB 57 attempts to define in statute mental disease or defect. **SEN. KEENAN** explained that the Montana Supreme Court adopted a definition from New York for the term mental disease or defect. With that decision, Montana accepts all New York case law for this definition. **SEN. KEENAN** cited the difference between medical definitions and legal definitions. **SEN. KEENAN** is concerned with the language on line 24 which reads "or a disturbance in behavior, feeling, thinking, or judgment, to such an extent that the person afflicted requires care, treatment, and rehabilitation." **SEN KEENAN** feels this language is too broad and is a wide-open door and could render a not guilty but mentally ill (NGMI) status to anyone. **SEN. KEENAN** will submit an amendment which was a collaboration of work with **Beta Lovitt, Don Harr,** and the staff at the state hospital. **SEN. KEENAN** feels this is a policy decision which needs to be addressed.

Proponents' Testimony:

Ed Amberg, Director, Montana State Psychiatric Hospital at Warm Springs, stated that the state hospital employs forensic psychologists and forensic psychiatrists who testify in district court proceedings as expert witnesses. Therefore, they are very familiar with how the definition is implied. He believes the definition of mental disease or defect be narrowly defined and in statute, so people are not dependent upon case law. **Mr. Amberg** submitted a proposed amendment, **EXHIBIT(jus05a01)** which would strike subsection (2) in its entirety and substitute alternate language defining mental disease or defect.

Donald Harr, Montana Psychiatric Association, supports SB 57 and the amendments proposed. **Mr. Harr** has been very concerned that Montana's statutes do not include a definition. Without the amendment, the definition is too vague and would allow a misinterpretation of what the real intent should be.

Al Davis, Montana Mental Health Association, supports SB 57, as well as the recommended supplemental amendment, and urges a do pass for SB 57.

Anita Roessmann, Montana Advocacy Program (MAP), supports the definition in SB 57. Further, she stated that its breadth is not a problem. The proposed changes by **Mr. Amberg** give another definition of mental illness that is not the same as the definition found in 53-21-102. **Ms. Roessmann** suggested that if the Committee is going to amend the broad definition in the bill, there should be more discussion about what is accomplished by using a narrower definition. **Ms. Roessmann** contends the broader definition gives more discretion to judges. **Ms. Roessmann** hopes the Committee will make an effort to use the same definitions in both places in the code.

Valencia Lane, distributed a copy of Section 53-21-102, MCA, to the members of the Committee **EXHIBIT(jus05a02).**

Andrée Larose, Montana Advocacy Program (MAP), testified that she has one concern about the proposed amendment. Specifically, **Ms. Larose** is concerned about the whole exclusion of developmental disability as possibly being a mental disease or defect. This would be discriminatory to exclude one type of cognitive disability when, in fact, people with a severe developmental disability might be unable to appreciate the criminality of their actions.

Opponents' Testimony: None.

Questions from Committee Members and Responses:

SEN. DANIEL McGEE asked **SEN. KEENAN** if he had reviewed the proposed amendment submitted by **Mr. Amberg** and how he feels about the amendment.

SEN. KEENAN was involved in the drafting of the amendment to the extent that his e-mail address was used and he sat at the table as it was drafted. **SEN. KEENAN** is aware the bill needs some work, but he really does not have an opinion about the amendment or the bill other than the fact that he carries from HJR 1 Committee the need for this task to be accomplished. **SEN. KEENAN**

does not understand the concern for "a developmental disability as defined in 53-20-102" because that language is already in the original bill on line 28.

SEN. McGEE then addressed **Susan Fox** about the difference between what is identified as a mental disease or defect for criminal purposes, as opposed to the definition of mental disorder as defined in 53-21-102.

Ms. Fox informed the Committee that the definition in the bill is based upon a decision from the Montana Supreme Court. **EXHIBIT(jus05a03)** The Supreme Court used a definition based on case law because there was no definitive definition available in the code. The Supreme Court insinuated this would be a good definition for the Legislature to adopt. On page 1, line 24, the definition would include mental disorder and then adds an additional phrase. This is a legal standard for determining whether somebody has a mental disease or defect and not a medical definition. The Supreme Court has said an affirmative definition of mental disease or defect will enable district courts to reliably and appropriately distinguish the legal conclusion of mental disease or defect from the medical findings. This definition incorporated the mental disorder definition, which the amendment does not. If you look at the definition of medical disorder, there is a list of exclusions of what are not included as a mental disorder. Therefore, the legal standard and the medical standard are parallel. Developmental disability was excluded because there is a separate track for individuals who are developmentally disabled. **Ms. Fox** continued by saying many states do include developmentally disabled in their definition of mental disease or defect, but in Montana we have two different institutions representing two different conditions. There have been Montana Supreme Court cases that have said drug or alcohol addiction or intoxication does not absolve an individual from standing for an alleged criminal offense. This definition would recognize that the drug or alcohol addiction, while it may not have been a mental disorder, could have caused enough damage to a person that the court would believe that mental disease or defect may make a person incompetent to stand trial and/or it should be taken into consideration during sentencing. Expert witness testimony from the medical community is used to determine this, but mental disease or defect is a legal standard, and a mental disorder is a medical mental health standard. In this definition in the bill the definition did include those things listed as a mental disorder, and then broadened it slightly because there were things not considered mental disorders, but may, in fact, be used during criminal proceedings.

SEN. McGEE wondered whether **Ms. Fox** had an opportunity to look at **Mr. Amberg's** amendment. **Ms. Fox** replied she had.

SEN. McGEE then questioned how the suggested amended language would comply with what is the basis determined from case law.

Ms. Fox replied she is not an attorney and cannot render legal opinions. **Ms. Fox** maintained that when a definition is borrowed from another state, some history comes with it.

SEN. McGEE referred the question to **Mr. Amberg** who replied that the language came from a forensic textbook.

SEN. McGEE then asked **Greg Petesch** if he had an opportunity to review the language in the prosed amendment and what his sense was with regard to its applicability or the Supreme Court decision or case law.

Mr. Petesch reviewed the amendment at the beginning of the hearing and believes that it does differ from the definition that has been in effect since the Supreme Court adopted it in 1999. Essentially, what the bill does is, with the exception of adding the existing Montana definition of mental disorder, it codifies that Supreme Court holding. The difference is that the existing definition says you require care, treatment, and rehabilitation, and the substantive change in the proposed definition is in the ability to recognize reality. **Mr. Petesch** stated he is not qualified to say whether those two distinctions are different from a medical perspective. Because it would change what the definition was from New York, a new standard would be applied because we would not be using the case law that came along with the adoption of the New York language.

CHAIRMAN GRIMES needed to know the ramifications of any change made and invited **Greg Petesch** to explain what policy would be implemented by putting a definition in the criminal code of mental disease and defect. **CHAIRMAN GRIMES** rephrased and wanted to know what case law does in the code by defining it that way.

Greg Petesch explained that prior to the Supreme Court decision in Wooster, mental disease or defect was defined by saying what it was not. Essentially, prior to Wooster, it was a case-by-case determination by the courts as to what constituted a mental disease or defect for criminal procedure purposes. This procedure was used to determine whether an individual had fitness to proceed in the criminal process and to determine what was appropriate for sentencing, whether that person had a particular state of mind, or was capable of having a particular state of mind. This is an element of the crime of which they are charged.

In Wooster, the court recognized that one of the principles of statutory construction is that the court is not to insert what has been omitted from a statute. That is how the court raises a red flag for the Legislature.

(Tape : 1; Side : B)

The court, while recognizing they should not insert omitted material, did just that. The court looked at several definitions and determined the New York definition best applied. In doing this, they looked at both the civil definition and the New York criminal definition and adopted, with the exception of mental disorder from our civil statutes, the New York criminal definition, and that is what is codified here, with the addition of our existing civil definition of mental disorder. **Mr. Petesch** explained the ramifications, if the bill passes as is, will mean we continue largely as we have, but the Legislature will have made the policy choice that they agree with the definition supplied by the Supreme Court with the additional provision that incorporates the existing civil standard. Therefore, the Legislature will have fulfilled its responsibility to enact a statute which specifically states what the Legislature's policy is with regard to mental disease or defect. Now, a person reading the law will know what that standard is.

CHAIRMAN GRIMES followed by asking if we change this definition that has been used, do we then eliminate the use of all that case law that supports the language from New York criminal procedure law.

Mr. Petesch responded the court would be required to examine the new definition to see to what extent the new definition comports with the prior definition. It would then have to apply the new definition to cases after the new definition is adopted.

SEN. MANGAN called for **SEN. KEENAN** to explain where the separate track used by the developmentally disabled and referenced by **Ms. Fox** could be found, how it can be utilized, and how it would fit into the new language in the existing bill.

SEN. KEENAN deferred the question to **Ms. Larose** who responded she is not aware of where developmental disability is in statutes as a potential affirmative defense to guilt.

SEN. MANGAN asked the same question to **Mr. Petesch** who responded that the issue of an affirmative defense is whether, at the time the crime was committed, you had a particular state of mind that is an element of the offense or if a person was able to appreciate the criminality of the conduct. The definition of

developmental disability in 53-20-102, the other bill is bringing that definition into criminal procedure. Developmental disability by definition is an impairment of cognitive functioning and that is the ability to reason. Also, you must determine the level of developmental disability. There is another bill which will clarify distinctions. Until recently, it was thought that a person who was determined to have a serious developmental disability was not able to appreciate the criminality of their act or to form the requisite mental condition for the crime. A recent case found that belief to be not true. The other bill will make it clear how people with developmental disabilities are to be treated in criminal proceedings.

SEN. PERRY stated to **Mr. Petesch** that as he reads the amendment, it appears the entire text of the bill comes down to the definition of mental disease or defect and the four words "capacity to recognize reality." **SEN. PERRY** wonders what "reality" is and if that term is defined somewhere or whose definition would be used.

Greg Petesch suggested "reality" is what is actually happening as opposed to what a person perceives to be happening, although he could not say whether that was the medical definition of "reality."

SEN. WHEAT asked **Dr. Harr** if he made it a practice to testify in criminal cases regarding the mental capacity of defendants.

Dr. Harr has had that experience, but does not necessarily mean he does it consistently or constantly.

SEN. WHEAT then asked **Dr. Harr** what it is about the definition contained in SB 57 that concerns him.

Dr. Harr is concerned with the portion of the paragraph that refers to the afflicted person requiring care, treatment, and rehabilitation. **Dr. Harr** feels this is sufficiently vague and broad that it could include individuals with many personality disorders, but who do have the capacity to recognize what is happening to determine what they are doing. **Dr. Harr** stated the proposed amendment is sufficiently broad that it allows the court to take into account the testimony of any professional person involved in the case, so the judge can make a reasonable decision based on that testimony and not whether they might be considered to require care or treatment or rehabilitation.

SEN. WHEAT stated that in a case the involves the definition of mental disease or defect, the court will have to determine

whether the defendant did or did not have a state of mind that is the element of the offense and inquired whether **Dr. Harr** agreed.

Dr. Harr agreed but feels there are other statutes that cover that particular aspect.

SEN. WHEAT explained the definition of mental disease or defect, if broad enough, it is still the court that makes the ultimate decision, based on the evidence, whether the defendant has the requisite mental state to proceed with trial or appreciate the criminality of their conduct.

Dr. Harr agreed and feels the amendment makes it easier for the court to make that decision.

SEN. WHEAT then asked **SEN. KEENAN** if this bill was brought at the request of the Legislative Finance Committee.

SEN. KEENAN replied that when HJR 1 passed in the last session, Legislative Council assigned this study to be a subcommittee of the Finance Committee. That subcommittee ended up with many judicial-type committee meetings. Other than **SEN. GERALD PEASE**, not too many members of that committee were qualified to handle these matters.

SEN. CROMLEY instructed **Mr. Petesch** to look at 46-14-103 and asked if there is a duplication in this section that should be removed.

Mr. Petesch responded that at the time the subcommittee was working on the bill, they did not believe that was the case because they added in subsection (1)(a)(i) which states this definition is to be used in determining the defendant's fitness to proceed and stand trial. They believed they were essentially incorporating 103 by reference.

SEN. O'NEIL asked **SEN. KEENAN** whether the definition of mental disease or defect, as proposed in the bill or amendment, includes attention deficit disorder (ADD) and is it the intention to include ADD as a mental disease or defect.

SEN. KEENAN replied that he was not sure and stated he could not answer the question because it relates to mental health parody laws.

SEN. O'NEIL then re-referred his question to **Ms. Roessmann.**

Ms. Roessmann clarified that she did not believe ADD would be covered by the language in the statute and believes that is not

the intention of this bill. **Ms. Roessmann** expounded that ADD is a learning disability, but it does not create a disturbance in behavior, feeling, thinking, or judgment to such an extent that the afflicted person requires care, treatment, or rehabilitation. Under 53-21-102, the definition of mental disorder in the civil code, ADD is not a diagnosis that will get an individual committed.

SEN. O'NEIL followed up stating ADD requires a disturbance in behavior which requires treatment.

Ms. Roessmann replied that people require treatment because ADD affects their functioning in learning and focusing on tasks, but **Ms. Roessmann** does not believe ADD rises to a level of making it a mental disorder in the forensic context.

SEN. O'NEIL asked the same question of **Mr. Petesch** who replied that a disturbance of thinking that requires only treatment is not sufficient to be considered a mental disease or defect under the definition. **Mr. Petesch** directed **SEN. O'NEIL** to the end of line 25 which states the affliction requires care, treatment, and rehabilitation. Since these are conjunctive, all three apply, not just a single one. **Mr. Petesch** pointed out that even if a person is determined to have a mental disease or defect, regardless of which definition is adopted, does not mean that person is not fit to proceed, or that he does not have the appropriate mental state, or that he cannot be found guilty. It means there are additional procedures and determinations which need to be made by the court. The individual would then have to show by a preponderance of evidence that they were not able to appreciate the criminality of the act. The fact that a person has a mental disease or defect does not necessarily mean the person will not be proceeded against.

SEN. O'NEIL noted that if ADD was not considered to be a mental disease or defect, but if it would under the proposed amendment where it refers to "a substantial disorder of thought which significantly impairs behavior."

Mr. Petesch speculated it would depend on what "significantly impairs" means. **Mr. Petesch** reiterated that regardless of which testimony is adopted, medical expert witness testimony would be required in court. **Mr. Petesch** feels he is not qualified to say whether a certain medical disorder would fall within the definition.

CHAIRMAN GRIMES inquired of **Ms. Roessmann** as to who the definition was trying to include besides those defined in 53-21-102 and whether it was the seriously mentally disabled.

Ms. Roessmann purported that SB 57, with or without the amendment, does not include people with developmental disabilities in the definition of mental disease or defect for the purposes of making a determination of fitness to proceed. **Ms. Roessmann** said when the Committee considers SB 35 it will show that this needs to be included to close the circle.

(Tape : 2; Side : A)

It is important for courts and attorneys to have a definition in the statute. **Ms. Roessmann** reminded the Committee that this is just a small piece of the procedure. It is possible someone could come in and show that ADD is a mental defect under SB 57, but then they would have to convince someone that disorder rendered them unable to appreciate the criminality of their conduct. **Ms. Roessmann** does not believe this definition will open the door to things that are unacceptable to the community.

SEN. GRIMES then asked if Montana should rely on New York case law. **SEN. GRIMES** feels it may be a policy issue if we want to do this, or should the legislature be more specific.

Ms. Roessmann understood **SEN. GRIMES'** concern but reminded him that the legislature is not adopting New York law, just language. Attorneys would look at New York cases, but they would still need to convince our courts that is what we want in Montana. The language does not tell the courts how to rule.

SEN. DANIEL McGEE sought an opinion from **Jeff Sherlock, District Court Judge**, as to how the court would arrive at the qualified meaning of, for instance, "substantial" and whether it is the medical profession or the legal profession that gives the court guidance for words such as "abnormal" or "substantial."

Judge Sherlock stated that the word "substantial disorder" would be determined to be a term of art, and a court would be likely to rely more on a medical opinion than a legal opinion. **Judge Sherlock** feels that he would be persuaded more by what a doctor or psychiatrist would say. Courts tend to rely more on the experts.

SEN. McGEE questions whether words like "substantial" or "abnormal" or "atypical" need to be defined. **SEN. McGEE** requested **Dr. Harr** to speak to what a "substantial disorder" is and whether that definition should be included in the language.

Dr. Harr agrees with **SEN. McGEE** that these words are subject to the perception of the individual making the interpretation. **Dr.**

Harr's perception of "substantial" would be an indication of anyone's condition that caused them to fit into the remainder of the definition. **Dr. Harr** believes it is a matter of degree of severity.

SEN. WHEAT asked **Dr. Harr** if he uses the DSM manual when examining a patient.

Dr. Harr replied he uses his knowledge of the DSM 4 as the standard by which diagnoses are made. However, his opinion as to whether the individual's condition meets the definition, does not depend on the diagnosis itself. **Dr. Harr** confirmed that the DSM 4 is an accepted manual in the medical community that helps doctors make their diagnoses.

SEN. WHEAT stated that this manual helps define various criteria that doctors rely upon in making certain diagnosis and **Dr. Harr** agreed stating the DSM 4 manual is the general accepted standard by which diagnoses are qualified.

Upon question by **SEN. WHEAT, Dr. Harr** stated that he is not limited to one diagnosis and in some cases, there are numerous diagnoses.

SEN. WHEAT then questioned whether in making the diagnosis, Dr. Harr used his experience and training to characterize the individual's condition as "severe," "less severe," or "moderate."

Dr. Harr replied that the degree of severity is one of the conditions which needs to be recognized and understood.

SEN. WHEAT clarified that if **Dr. Harr** were testifying in court, he would use his ability to make that distinction and would, in fact, advise the court as to the level of severity the individual suffered from.

Dr. Harr stated that under those circumstances, he would rely very much on his experience.

SEN. PERRY stated that he is worried about the definition of "reality" and is worried that a clever defense attorney could twist the definition, and a jury would let a truly guilty person escape justice.

Mr. Petesch replied that he believes in Title 46, Chapter 14, the definition is applied in the examination of the defendant by the professional person. Based on that recommendation and further expert testimony presented at trial. **Mr. Petesch** explained that the credibility of witnesses and the persuasiveness of counsel is

what the judicial system is based upon. The legislature is charged with providing a definition which can be applied to the facts.

Closing by Sponsor:

SEN. KEENAN closed the hearing on SB 57 by stating if this bill does not pass it will not be the end of the world, but the HJR 1 Committee felt this issue needed to be considered. **SEN. KEENAN** is willing to help the members sort this issue out.

HEARING ON SB 29

Sponsor: SEN. JERRY O'NEIL, SD 42, Columbia Falls

Proponents: None.

Opponents: Corbin Howard, Self
Jeffrey Sherlock, Self
Cindy Weese, Executive Director of Missoula YWCA
Beth Satre, Public Policy Specialist
Montana Coalition Against Domestic
and Sexual Violence
Linda Gryczan, representing the Montana Women's Lobby
Susan Gobbs, Self
Robyn Weber, Self
John Hollow, Self

Opening Statement by Sponsor:

SEN. O'NEIL opened the hearing on SB 29 by stating at one time, Montana law allowed couples to prove fault when filing for divorce. However, this law was ineffective because the parties would have to hire private investigators, and it caused many messy divorces. Presently, Montana has no fault divorce where the court does not consider fault. While this worked better than divorces where the parties needed to prove fault, **SEN. O'NEIL** believes the no fault provision encourages divorce. **SEN. O'NEIL** believes the state needs to strike a balance between the two options, and allow the court to consider fault in divorce proceedings. SB 29 will not allow fault to be considered in all divorces. As a mediator, **SEN. O'NEIL** feels some parties need to have fault addressed in their divorce. Since marriage is essentially a contract, when a party desires to break the contract, the court needs to become involved. **SEN. O'NEIL** believes that when a parenting plan is created for the children, the court should be able to consider whether a spouse's behavior,

such as taking a new lover, was in the best interest of the child. While the court does consider these facts to some extent, the court does not encourage, and sometimes excludes, this type of testimony. **SEN. O'NEIL** portrayed the purpose of SB 29 as letting the court make more judicious and righteous decisions. Also, this law will discourage parties from divorcing and making bad decisions, such as running off with a new lover. **SEN. O'NEIL** believes SB 29 will decrease divorce in Montana by five percent, especially in families with children. In the future, **SEN. O'NEIL** sees this bill as saving enough money to balance the state's budget by having less children in prison, foster care, and other dire situations.

(Tape : 2; Side B)

Proponents' Testimony: None.

Opponents' Testimony:

Corbin Howard, an attorney from Billings, practices in family law. Mr. Howard feels personal issues in a marriage are best addressed in private by marriage counselors and psychologists. SB 29 would require judges to address these issues in public. **Mr. Howard** feels addressing personal issues in public will humiliate the parties and destroy any hope of cooperation between the parties in the future. **Mr. Howard** feels this legislation will not be helpful. **Mr. Howard** claimed the current statutes are child focused. **Mr. Howard** feels the proposed legislation will take the focus off the children and focus on the history of the conflict between the two adults. **Mr. Howard** is concerned because the proposed legislation does not contain a definition of "marital misconduct." This is a recipe for extended litigation at both the district court and Supreme Court level. Uncertainty in the law will guarantee more trials and more work at taxpayer expense. The bottom line offered by **Mr. Howard** was that he would be the only one, as a practicing attorney, to benefit because litigation is expensive. Under 40-4-107(2) the district court has the authority to refer the parties to counseling. **Mr. Howard** respectfully requested the Committee to give the bill a do not pass recommendation.

Jeffrey Sherlock, has been a district court judge in Helena since 1988, and has handled a good number of divorce cases. He echos the concerns voiced by **Mr. Howard** and would consider this legislation a step backward. **Judge Sherlock** feels these types of issues will cause more fights and nastier fights, and this will result in the parties being permanently estranged from each other. This will not help them be better parents. **Judge**

Sherlock is also concerned that there is no definition of "marital misconduct" contained in the bill. Is it failure to support your spouse financially, emotionally, psychologically? Attorneys are very clever, and this bill will throw a bone into a dog fight. In many cases where there is marital misconduct, as a judge, he finds out about it anyway, particularly if the question is what is in the best interest of the children. **Judge Sherlock** urged the Committee to vote no on the proposal.

Cindy Weese, Executive Director of Missoula YWCA stated that when analyzing this policy they asked, how will this policy affect women and children who are living in violent homes, and how will this policy give more power to abusers who batter their spouses. Initially, this bill would seem to have a positive impact on battered women. By allowing the courts to consider domestic violence when dividing property, victims of abuse would seem to benefit. However, the YWCA of Missoula opposed SB 29 because they believe this bill will give more power to abusive spouses. **Ms. Weese**, is also concerned about the lack of a definition of marital misconduct. **Ms. Weese** is concerned about an abusive spouse accusing the other spouse of marital misconduct in order to manipulate control of their marital property or block the ability to retain custody of the children. **Ms. Weese** believes this is poor public policy and may have unforeseen negative impacts on battered women and their children. **Ms. Weese** urged the Committee to stand against SB 29.

Beth Satre, Public Policy Specialist for the Montana Coalition Against Domestic and Sexual Violence, declared SB 29 has many hidden dangers and may encourage victims of domestic violence to remain in abusive marriages. Two common reasons a woman will remain in a violent relationship is that they are afraid they will lose their children, and they do not believe they can make it on their own. **Ms. Satre** is also concerned the bill does not contain a definition of marital misconduct. **Ms. Satre** believes this will give an abusive spouse another tool to use against their victims. Typically, victims of domestic violence do not fare well in the civil court system. At times, an abusive spouse will even use the court system as a weapon. This will give victims of domestic violence one more hurdle to overcome.

Linda Gryczan, representing the Montana Women's Lobby, submitted written testimony opposing SB 29. **EXHIBIT(jus05a04)**

Susan Gobbs, an attorney practicing family law in Helena, echoed previous testimony in opposition to SB 29. **Ms. Gobbs** explained that the mandatory mediation process will be rendered useless by this bill. **Ms. Gobbs** feels marital misconduct will be alleged in most, if not all, dissolution cases. Also, **Ms. Gobbs** feels the

bill is not fiscally neutral and will clog the court system, both at the district court and Supreme Court levels. In addition, it will be harmful to children to conduct divorce proceedings at a public rather than private level. Currently, there are 13 factors a court has to consider, and **Ms. Gobbs** does not believe there needs to be a 14th factor. This bill will keep more lawyers, accountants, therapists, counselors, guardians ad litem, and others involved in court litigation employed, but **Ms. Gobbs** doubted whether this was the true intention of the bill.

Robyn Weber, a family law attorney in Helena, opposes SB 29. **Ms. Weber** reported that in most of her cases, there is alleged marital misconduct reported from both sides. Currently, with the revamping of the statutes in 1997, most of her cases are solved through negotiations, mediations, and parenting plans. Adding fault back into the statutes will legislate morality. **Ms. Weber** contends that it is very sad when marriages end, and putting fault back into the statutes will add to this tragedy. Also, this will put the focus on the parties, rather than the children, and will increase the huge cost already associated with these cases.

John Hollow, an attorney in Helena, stated he formerly worked in the Legislative Council office, and would like to address the bill from that perspective. **Mr. Hollow** feels the term "marital misconduct" not only needs to be defined, but it also needs to be incorporated into 40-4-202 as to how it affects that statute. **Mr. Hollow** warned that simply removing the language stating you cannot consider marital misconduct, will not have the opposite affect and make the language considerable.

(Tape : 3; Side : A)

Mr. Hollow reemphasized that this bill will take the focus off the children. Once you say marital misconduct can be considered, then you focus on that conduct, as opposed to the needs of the child. This bill adds nothing as drafted. **Mr. Hollow** urged the Committee to not pass the bill. As a final remark, **Mr. Hollow** stated if the concern is decreasing the divorce rate, something should be done up front, such as educating youth in school or through funding reconciliation courts. Once a couple appears at his office, reconciliation does not occur.

Questions from Committee Members and Responses:

SEN. PERRY inquired of **SEN. O'NEIL**, sponsor of SB 29, how the phrase "which is considered to be not in the child's best interest," on p. 3, line 17, would be defined and who would make that determination.

SEN. O'NEIL recited a scenario about a man who went up to the North Slope of Alaska to work and was sending home his paychecks. When he came back home, he found his house closed up, his furnishings gone, and that his wife had moved away with another man. **SEN. O'NEIL** feels this behavior should have been considered in divorce proceedings. **SEN. O'NEIL** stated he would agree to deleting "without regard to marital misconduct" on page 1, lines 14 and 15. **SEN. O'NEIL** feels this makes sense since there is no definition of "marital misconduct" contained in the bill. Therefore, the judge would be allowed to consider all the facts of the conduct. **SEN. O'NEIL** would agree to deleting references to "marital misconduct" throughout the statute.

SEN. McGEE asked **Mr. Howard** why, in his opinion, not having a definition for "marital misconduct" would open the doors for litigation, when the term is currently used in statute.

Mr. Howard responded that it is not necessary to define "marital misconduct" because it does not create a litigation problem since the statute reads that it is not going to be considered. As a practical matter, it has not been litigation on this point simply because it is excluded rather than included as something that must be addressed.

SEN. McGEE wondered how the court or an attorney would know when you have strayed into the realm of "marital misconduct" if it is not currently defined or understood.

Mr. Howard responded that for his part, if he cannot specifically tie the testimony or exhibit to one of the other positively identified factors listed in 202, it does not get admitted into evidence.

SEN. McGEE then re-referred the same question to **Judge Sherlock** who responded that marital misconduct is like pornography, and you just know it when you see it. **Judge Sherlock** agrees with what was stated by **Mr. Howard** that unless a party can prove relevance to one of the elements already enumerated in the statute, it is irrelevant, and **Judge Sherlock** recognizes that they are just trying to make him have a bad view of the other party. **Judge Sherlock** feels he does hear a certain amount of what would be considered to be "marital misconduct," but it is as it relates to something else.

SEN. McGEE sought to know if the court would know marital misconduct when they see it.

Judge Sherlock replied he believed it would recognize marital misconduct.

SEN. MANGAN asked **SEN. O'NEIL** to address the concerns shared by **Ms. Weese** and the Coalition Against Domestic and Sexual Violence.

SEN. O'NEIL feels it would increase the chances for abused spouses to receive financial compensation through the court because they are allowed to explain situations which now are confined to some degree. This will allow the court to hear the facts, so it can rightfully address abuse.

SEN. MANGAN is concerned about the facts which **SEN. O'NEIL** keeps referring to. For example, if a woman were involved in a violent situation and was placed in the position of having to defend herself from an accusation, what recourse would she have in defending herself?

SEN. O'NEIL feels SB 29 does not change anything since the burden of proof would be the same as what the law requires now.

SEN. MANGAN asked **SEN. O'NEILL** whether he feels that if this bill were passed whether it would dissuade women from battered homes from seeking a divorce.

SEN. O'NEIL did not feel this would significantly prohibit someone from seeking a divorce if they had cause. It would depend on whether the facts were for or against the person. **SEN. O'NEIL** did not see how putting a blindfold on a judge would stop people from going to court if they had a righteous cause.

SEN. MANGAN then re-directed the question to **Ms. Weese,** asking whether the language of the bill could be utilized to blackmail, intimidate, or coerce victims.

Ms. Weese responded that was precisely her concern. Victims are at a disadvantage up front when leaving a marriage. Accusations against the victims are often used to threaten and manipulate them.

Closing by Sponsor:

SEN. O'NEIL stated he will propose an amendment in executive action to strike "without regard to marital misconduct" since that is an undefined phrase. **SEN. O'NEIL** feels the reference to conciliation court should also be removed, since these courts do not even exist in some places, for example Flathead County. He feels the judge should be allowed to consider just the evidence in a divorce. **SEN. O'NEIL** submitted an informational article from internet site www.family.org entitled "Divorce and Public Policy Fact Sheet." **EXHIBIT(jus05a05)**

HEARING ON SB 49

Sponsor: **SEN. DEBBIE SHEA, SD 18, Butte**

Proponents: **Chris Crauthers, Disabled American Veterans, Chapter 6; American Legion Post No. 1; and United Veterans' Council for Silver Bow County**
Robert Throssell, Montana Association of Clerks and Recorders
Roger Hagen, Officer and Enlisted Associations of the Montana National Guard
Larry Longfellow, Veterans of Foreign Wars
Gary White, American Legion of Montana

Joe Foster, Montana Veterans Affairs Division

Opponents: **None.**

Opening Statement by Sponsor:

SEN. DEBBIE SHEA opened the hearing by stating there are always issues and opposition to any proposal. A DD 214 is the most common type of proof of military service. This form is issued to veterans discharged from all branches of service since January 1, 1950. The critical pieces of information on a DD 214 include the veteran's identification, information, and character of service. Until recently, veterans were encouraged to register their DD 214 with the County Clerk and Recorder for safekeeping. Veterans need the information contained on the DD 214 if they want to access medical services. Families also need this information to receive burial payments for veterans. Currently, any individual can go up and request this information from the Clerk and Recorder's Office. Identity theft is one of the fastest moving crimes in America. This legislation is proposed to safeguard the rights of privacy and ensure veterans the protection they deserve. **SEN. SHEA** submitted a proposed amendment, **EXHIBIT(jus05a06)**, which would include funeral homes, which would enable them to secure payment for burial purposes. **SEN. SHEA** stated she did not want to eliminate or exclude individuals who need to have access to this information, but by the same token, she did not want to leave access so open as to compromise the intent of the bill. **SEN. SHEA** also looked at the Wisconsin Department of Veterans and what they had in law, and it included access to the Veteran's Service Officer or the Department of Veterans' Affairs. This would be a necessary provision in case of indigence. Also, access could be granted to a deceased veteran's dependents. Also, subsection (3) will need to be stricken from the bill.

Proponents' Testimony:

(Tape : 3; Side : B)

Chris Crauthers, representing the Disabled American Veterans, Chapter 6; American Legion Post No. 1; and United Veterans' Council for Silver Bow County, believes this is an important issue that can affect many veterans who have placed their trust in their counties to safeguard a personal document which contains vital information, i.e. the DD 214. Once an individual is discharged, the DD 214 is used to obtain medical care, apply for housing loans, apply for assistance in federal and state programs, and once the veteran has fought his last battle, it is used to assist the family with burial expenses. **Mr. Crauthers** testified he could obtain a copy of anybody's DD 214 without the necessity of supplying proof of identification or an explanation as to why he needed the document. The only requirement was that he send the necessary fee and a list of the veterans whose information he was seeking. Identity theft is one of the fastest growing crimes in America. **Mr. Crauthers** read part of an article from *The Afterburner*, an official periodical published by the Retiree's Services Branch and authorized by the Air Force Instruction 36-3106, entitled "DD 214 - to record or not to record." This article stated there is evidence that recording the DD 214 may not be a wise decision and is a decision which must be made on an individual basis. The article went on to report the theft of several thousand DD 214s through access of courthouse records. The article encouraged veterans to contact their local recording agencies to ensure their DD 214s are being safeguarded from viewing by unauthorized individuals. Since documents are not recorded and maintained the same way in all counties and states, each person's DD 214 must be treated on an individual basis. It is important that Montana do everything possible to keep vital information from those who would use it illegally. **Mr. Crauthers** implored the Committee to pass SB 49, with amendments.

Robert Throssell, representing the Montana Association of Clerks and Recorders, supports SB 49 with the proposed amendment. With the amendments, veteran discharge papers will be protected as are birth records that have been removed from the pubic record. The Clerks and Recorders agree with the veterans that the information on the discharge documents is confidential. It is important the veterans have the opportunity to record this document as a safeguard to ensuring there is a permanent record. However, this permanent record should not be available to anyone.

Roger Hagen, representing the Officer and Enlisted Associations of the Montana National Guard, submitted written testimony and is

concerned with this issue. **Mr. Hagen** testified that every time the National Guard is called to duty, it generates DD 214s. Since September 11 there has been a lot more activity than in the past. **Mr. Hagen** submitted written testimony, **EXHIBIT(jus05a07).** In addition, **Mr. Hagen** submitted an article from the Army News Service and copies of his personal DD 214 as an example of the information contained in these forms. The article from *The Afterburner* and the DD Form 214 Security Notice from Wisconsin were also submitted, **EXHIBIT(jus05a08).**

Larry Longfellow, representing the Veterans of Foreign Wars, would like to go on record as supporting SB 49, with the proposed amendments.

Gary White, representing the American Legion of Montana, would like to go on record as supporting SB 48, with the proposed amendments.

Joe Foster, representing Montana Veterans Affairs Division, supports the legislation.

Opponents' Testimony: None.

Questions from Committee Members and Responses:

CHAIRMAN GRIMES informed the Committee that he has requested **Valencia Lane** to draft the appropriate wording to capture **SEN. SHEA'S** additional issues which she would like addressed in the amendment. This amendment would have language along the line of authorized Veterans' Affairs representatives.

SEN. CROMLEY asked **Mr. Throssell** to speak to whether marriage certificates, death certificates, and birth certificates are freely available to the public. **SEN. CROMLEY** is under the impression these documents are not readily available to the public and would like to know what the authority is for them not being made available.

Mr. Throssell did not have the exact statutory citations, but stated those vital statistic records, in the statutes that authorize their collection, are specific as to whom they can be released. Birth certificates are handled through the State Department of Health and administered at the county level, and the person requesting a copy must complete a form and sign an affidavit before the clerk can issue. Marriage licenses are maintained by the Clerk of District Court. Birth certificates become public record after thirty years due to a policy decision made by the legislature.

SEN. O'NEIL noted to **SEN. SHEA** that social security numbers are no longer placed on discharge or retirement certificates. **SEN. O'NEIL** wondered what we were trying to safeguard if the social security numbers were not on the documents.

SEN. SHEA referred the question to **Chris Crauthers,** who replied that the DD 214 is an official document issued by the military. The certificate used to contain a social security number, but they are no longer putting the social security numbers on the certificates because of identity theft. The DD 214, however, still contains the social security number because it is an official document.

SEN. PEASE asked **SEN. SHEA** whether anyone could walk into the Clerk and Recorder's office with the fee and obtain a copy of DD 214.

SEN. SHEA responded that was correct.

SEN. PEASE stated that he, too, is a veteran and would not like anyone attempting to steal his identity.

SEN. WHEAT stated that he also sits on the State Administration Committee which will soon hear SB 50 and SB 4, both of which are involved with reorganization of Veteran Affairs. **SEN WHEAT** questioned whether this issue would be part of that discussion.

SEN. SHEA responded it would not be in that discussion at all.

SEN. WHEAT proceeded, wondering if it were possible for the veterans' organization and the state of Montana to maintain copies of the DD 214 for the benefit of its veteran members.

Larry Longfellow responded that a copy of the DD 214 is required when someone joins the Veterans of Foreign Wars organization. This information stays on the post level and goes no further.

CHAIRMAN GRIMES asked **Mr. Throssell** to address the same question.

Mr. Throssell responded that by putting the DD 214 on the record and maintaining it at the Clerk and Recorder's office means the copy can then be certified as a true and correct copy.

Closing by Sponsor:

SEN. SHEA closed the hearing on SB 49 by stating the DD 214 is an important document, and veterans need to be assured that this document is removed from public access. **SEN. SHEA** assured the

Committee she will have representatives assist **Ms. Lane** in drafting the amendments.

HEARING ON SB 35

Sponsor: **SEN. DUANE GRIMES, SD 20, Clancy**

Proponents: **Andrée Larose, Montana Advocacy Program (MAP), Wally Melcher, Montana Association for Independent Disability Services Systems Advocacy.**

Opponents: **None.**

Opening Statement by Sponsor:

SEN. DUANE GRIMES opened the hearing on SB 35 by stating this bill came out of the Children and Families Interim Committee where these issues were brought as a result of a court action and were the result of questions brought by the legislators to legal staff in **Mr. Petesch's** office. There were a couple of issues which the interim committee decided to defer to the legislature. In a nutshell, the problem is that if there has been a commitment of a dangerous offender to the Montana Developmental Center. This inserts into a very delicate environment a different type of patient. This has implications on medicaid and our certification under medicaid. This person also had a developmental disability. There is no mechanism in place to deal with a developmentally disabled person who is also a serious offender, as opposed to someone who has a mental defect. SB 35 will require proof that a person is developmentally disabled and create a mechanism for moving someone into the Montana Developmental Center. **SEN. GRIMES** explained that the Montana Developmental Center underwent a tremendous expansion a few years ago and is very much a community-oriented center. Under current statute, there are no provisions for what is done with a developmentally disabled person who is convicted in a criminal proceeding. Although the statute is very specific as to a mental disease or defect conviction, but that is significantly different from a person who is guilty but developmentally disabled. The statute does not provide for placement in a facility for the developmentally disabled, however, a commitment to MDC has occurred. Initially, it was thought this might open a floodgate, but this has not happened. **SEN. GRIMES** acknowledges that this bill could have an impact on future commitments for people who are guilty but developmentally disabled. There is a fiscal note requested, but **SEN. GRIMES** does not feel there will be much of an impact.

(Tape : 4; Side : A)

Proponents' Testimony:

Andrée Larose, representing the Montana Advocacy Program (MAP), discussed the bill with **SEN. GRIMES** and legislative staff. **Ms. Larose** believes this issue needs clarification as to how people with developmental disabilities get treated in the criminal system. This bill will guarantee that a person with a developmental disability will have civil rights protection at each step of the process. First, in determining whether that person is fit to proceed, and then if they are determined fit to proceed, this will provide a provision in the law to raise the defense that they are not guilty by reason of insanity. The bill will also address what to do in sentencing if that person is found fit to proceed and their developmental disability or their mental disease or defect does not prevent them from appreciating the criminality of their actions. Many people recognize it might not be appropriate to send a person with a developmental disability to prison because they could easily become a victim in that type of environment. With regard to her concern about not including developmental disability within the definition of mental disease or defect in SB 57, **Ms. Larose** suggested adding in 46-14-102 and 103 to state a person with a mental disease or defect or developmental disability could raise that defense. **Ms. Larose** discussed this proposal with **Ms. Fox** and **Mr. Petesch**, and they agreed to take a look at her proposal. This friendly amendment, together with this bill, could guarantee a person with a mental illness or developmental disability has that civil rights protection at each stage of the criminal process. When a person is charged with a crime, and they have a developmental disability, they have the right, just as any other American has the right, to go into court and defend themselves against that crime. Currently, sometimes prosecutors do not file charges, they get committed, and the allegation continues to hang over their head without ever having a trial to prove or disprove the truth of the allegations. Provided a person is found fit to proceed, it is important they have an opportunity to go through a criminal trial and force the state to prove their guilt. **Ms. Larose** also suggested that in Section 46-14-221(2), the staff should consider whether the phrase at the end of that (2)(a) that places a person in a facility "so long as the unfitness endures" should be revised to say "until disposition of the defendant is made pursuant to this section." Ms. Larose feels the way it reads reflects a life sentence for being disabled. **Ms. Larose** also asked the sponsor and Committee to consider that in section 46-14-312, which discusses the imposition of sentence it refers to professionals providing treatment to the defendant and perhaps it should say "and professionals who have evaluated the defendant." This language appears twice within that section. **Ms. Larose** informed the Committee that "facility" as defined in

53-21-102 and 53-20-202, does include the potential for sentencing to community-based facilities.

Wally Melcher, Montana Association for Independent Disability Services Systems Advocacy. This organization consists of approximately 45 community-based programs which serve persons with developmental disabilities across the state of Montana. These include work services, group home services, independent living services, and supported living services. **Mr. Melcher** is speaking in favor of SB 35 because people with developmental disabilities deserve a right to a trial and to go through a process of determination to see if they can fully understand the proceedings, and are fit to stand trial. **Mr. Melcher** is concerned about the evaluation phase in determining a person's fitness to proceed and discussed referring persons to "residential facilities." In the code, "residential facility" is defined as Montana Developmental Center or Eastmont Human Services Center. In section (4) and look at the imposition of sentence, it speaks to "developmental disability facilities" which is defined in the code as any facility that is providing treatment and care for any individual with disabilities, including community group homes and those types of programs. If individuals are going to be assigned by the department to community-based programs, such as a group home, there needs to be adequate funding to create the kind of security for them to employ staff who will have the ability to care for people with severe, and maybe even criminal, type behaviors. **Mr. Melcher** directed the Committee's attention to section 53-20-132 which prohibits the court from ordering someone into a community facility. The Committee may want to review the extent of that prohibition. **Mr. Melcher** reminded the Committee that he believes this bill will support the rights of individuals with disabilities. He does, however, believe there are some inherent concerns and dangers with the bill regarding whether it would be in the best interest of people who are currently residing in the community.

Opponents' Testimony: None.

Questions from Committee Members and Responses:

SEN. WHEAT questioned **Jeff Sturm, Superintendent of the Montana Developmental Center**, about his concerns and interest in this legislation.

Mr. Sturm responded that his concerns are more related to the capacity of the Montana Developmental Center (MDC). **Mr. Sturm** agrees this is a good bill. There has always been a good deal of controversy over whether MDC could accept criminal commitments.

Mr. Sturm explained the MDC is an open facility which utilizes cottages for housing. He is concerned about taking individuals with criminal backgrounds into a facility that does not have the kind of security which might be needed. In addition, Mr. Sturm has fiscal concerns since, for the most part, the majority of individuals who come to MDC are on medicaid. Therefore, MDC follows the same F map rate that other community programs do, which is a 28/72 match. When someone arrives at MDC under criminal statutes, they are 100 percent general fund. MDC currently runs at $140,000 per year per resident, so this is a substantial impact on the budget. Since there has only been one individual to arrive at MDC as a criminal impact, Mr. Sturm is not fully aware of what the impact will be. Right now, the impact is minimal. **Mr. Sturm** warned that if the floodgate gets opened, it could cause significant problems. **Mr. Sturm** is also concerned about mixing criminal commitment clients with civil commitment clients. The courts may have to get involved if they start mixing those populations together. **Mr. Sturm** reiterated the concerns voiced by **Mr. Melcher** regarding the funding of community-based facilities. **Mr. Sturm** is also the Director of the Developmental Disability Program for the state and because of the way the system is designed, individuals are placed by need and not because the court says you place somebody in the community. Currently, there is a long, large waiting list, and openings are filled as rapidly as they become open. If the court ordered them to take a criminal commitment into a facility, they would have to look at not only whether the facility could meet the needs of that individual but how they were going to fund that individual. **Mr. Sturm** reflected that the Committee needs to take a look at the mission of MDC and should it be required to serve a criminal population. If it does, under what circumstances should MDC serve these individuals?

SEN. WHEAT wondered if Mr. Sturm had reviewed any of the proposed amendments or discussed them with anyone.

Mr. Sturm replied he just looked at them briefly.

Closing by Sponsor:

SEN. GRIMES closed the hearing on SB 35 by reiterating his opening statement. **SEN. GRIMES** feels this is statutory authority for the missing element for those people who are developmentally disabled and criminally committed. SB 35 will force these individuals to go through the additional steps necessary to ensure their rights are protected, as well as enable the state to fulfill its obligation to make sure these individuals are properly committed and given their day in court.

HEARING ON SB 30

Sponsor: **SEN. JERRY O'NEIL, SD 42, Columbia Falls**

Proponents: **Representative Jim Shockley, HD 61**
Al Smith, Montana Trial Lawyers' Association
Anita Roessmann, Self
Tony DuMay, Self
Kandi Matthew-Jenkins, Self
Patrick McKee, Self

Opponents: **John Connor, Chief of the Special Prosecutions Unit, Montana Attorney General's Office**
Jim Smith, Montana County Attorneys' Association
Shirley Brown, Administrator for Child and Family Services Division for Public Health and Human Services

Informational Witnesses: **Paul Kennedy, Yellowstone County Commissioner, Montana Association of Counties**

SEN. MANGAN voiced his objection to written testimony submitted to the Committee by **Jody Wardell**, an absentee voter of Enon, Ohio. **SEN. MANGAN** feels this letter does not reflect the tenor or tone needed to press forward, and he is opposed to this correspondence being placed in the record.

CHAIRMAN GRIMES asked **SEN. MANGAN** to clarify whether his issue was with the way the testimony was presented to the Committee, or whether the letter should be presented as testimony at all.

SEN. MANGAN stated his respectful objection was to whether the letter should be placed into the record.

CHAIRMAN GRIMES then questioned **SEN. O'NEIL** as to whether he requested the letter to be placed in the file. **CHAIRMAN GRIMES** felt it would have been appropriate for the individual to go through the sponsor of the bill if they wanted their testimony entered into the record.

SEN. O'NEIL replied he did not request the letter to be presented to the Committee.

CHAIRMAN GRIMES then ruled the letter would be allowed. **EXHIBIT(jus05a09).**

Opening Statement by Sponsor:

SEN. O'NEIL opened the hearing on SB 30 by stating the Montana Constitution, article 2, Section 26, the right of trial by jury is secured to all and shall remain inviolate. If a person were accused of stealing, they have a right to a trial by jury. This right to trial by jury is not predicated upon the seriousness of the issue, but logically the more serious the issue, the more inviolate would be a person's right to trial by jury. Most people would agree their most precious possession is their children. At the present time, a person is not entitled to a trial by jury when the state is considering terminating the parent-child relationship. **SEN. O'NEIL** is expecting opponents to voice that jury trials will increase the cost for the state. **SEN. O'NEIL** does not feel we should predicate our constitutional rights on inconvenience and cost. If you want to resolve a disputed issue, the quickest way to resolution is to present the issue to a jury. **SEN. O'NEIL** stated he has seen judges delay court case decisions for over a year.

(Tape : 4; Side : B)

Presently, Michigan, Colorado, Wyoming, and Wisconsin allow trial by jury in termination of parental rights cases. It is interesting that the Oklahoma and Montana Constitutions are similar on this issue, and a parent challenged the Oklahoma Constitution and cited federal law which states that a parent has a constitutional right to trial by jury in termination of parental right proceedings. **SEN. O'NEIL** believes that not allowing a trial by jury in termination proceedings is unconstitutional. The Montana Supreme Court has stated that because no right to a jury trial in these proceedings existed at the time the Constitution was adopted, none exists now. **SEN. O'NEIL** feels very few parental termination cases will actually go to a jury trial. **SEN. O'NEIL** feels that the very same attributes, i.e., alcoholism or drug addiction, that cause the state to consider termination of parental rights, will make it unlikely the parents will ask for a jury trial.

Proponents' Testimony:

REP. JIM SHOCKLEY, HD 61, stated that common law, at its origins, made sense. Criminal law and contract law allowed for jury trials. Real estate did not allow for jury trials. When you do or do not get a jury trial is basically historical. **REP. SHOCKLEY** maintains his position that pleading not guilty with a judge was simply pleading guilty slowly. Parental rights termination is based on facts and emotion and should not be decided simply by a judge. This responsibility should be spread on the community. The litigants should have the benefit of a jury of their peers.

Al Smith, representing the Montana Trial Lawyers' Association, stated one of the purposes of this organization is to preserve and protect the civil justice system and the right of a trial by jury. **Mr. Smith** reminded the Committee that juries are chosen from the list of registered voters, the same voters who elected the members of the Committee. You should trust juries to make decisions. They are capable of listening to complex and emotional issues. **Mr. Smith** feels the other thing the Committee should consider is that jury trials open up government and corporate wrong doings. It is good to have an open eye on what the government is doing in the people's name. This is essential to democracy. **Mr. Smith** closed by stating the Montana Trial Lawyers' Association strongly supports jury trials.

Anita Roessmann, appeared on her own accord as a person who worked as a law student for the Oregon Department of Justice on termination of parental rights cases. **Ms. Roessmann** stated that the work done on a parental termination case that leads the case up to the point where parental rights are going to be terminated, is a closed process. The light of community values, community reasoning, and community judgment needs to be shed on this process. **Ms. Roessmann** stated there is only one thing more severe a penalty than termination of parental rights, and that is the death penalty. Indeed, imprisonment is not as great a loss as losing your parental rights. In closing, **Ms. Roessmann** stated that she knows the people who bring these matters to the point of termination believe they are doing what is in the best interest of the child. Evidence is being accumulated that concludes termination of parental rights, being placed in foster care, and being adopted are all risk factors for trouble later in life. **Ms. Roessmann** feels the jury is still out on whether we are actually "saving" children and the more scrutiny brought to bear on this the better.

Tony DuMay, representing himself, submitted written testimony of experiences he had regarding his grandson **EXHIBIT(jus05a10).**

SEN. MANGAN raised a point of order and voiced his objection to **Mr. DuMay's** testimony. **SEN. MANGAN** stated the bill deals with the right to a jury trial and not the actions of child protective workers. **SEN. MANGAN** felt **Mr. DuMay's** testimony was inappropriate.

CHAIRMAN GRIMES ruled that he will allow some latitude in testimony relating to the topic, and stated he believes **Mr. DuMay's** point was that removal of his grandson was done inappropriately, and a jury trial would have corrected some of those things. **CHAIRMAN GRIMES** cautioned that he will correct the witness when derogatory statements are made, but when there are

allegations of wrongdoing, as long as they are not too far afield, it is the public's right to air those. **CHAIRMAN GRIMES** further stated that statements he made initially to the Committee at the onset of the session were meant to address the Committee's decorum toward the public. There is a balance to be struck between the public's right to participate and what should or should not be on the public record. Therefore, **CHAIRMAN GRIMES** ruled **Mr. DuMay's** testimony to be in order, but he encouraged the witness to refer to allegations as allegations. From the Committee's standpoint, they will be recognized as unsubstantiated allegations. **CHAIRMAN GRIMES** instructed **Mr. DuMay** to continue with his testimony.

Mr. DuMay continued stating everything was in the file he presented to the Committee. **Mr. DuMay** feels trial by jury in termination of parental rights would save the state millions of dollars. **Mr. DuMay** strongly supports SB 30.

Kandi Matthew-Jenkins submitted written testimony in support of SB 30 **EXHIBIT(jus05a11)**. **Ms. Matthew-Jenkins** believes the state has no right to take away a constitutionally guaranteed right, such as a trial by jury. If there is a dispute in the amount of $20, a person has a right to a trial by jury. **Ms. Matthew-Jenkins** told the Committee her children cost her thousands of dollars. The value of a child, if that is what the law wants to rely on, is much greater than the cost of a trial by jury. **Ms. Matthew-Jenkins** apologized to SEN. MANGAN, referring to him as "Jeff," if her testimony was bothering him.

CHAIRMAN GRIMES warned **Ms. Matthew-Jenkins** to address **SEN. MANGAN** as "Senator" and allowed **Ms. Matthew-Jenkins** to continue with her testimony.

Ms. Matthew-Jenkins also requested permission to submit written testimony from another proponent of the bill who was not present at the hearing.

CHAIRMAN GRIMES stated he would need to consider her request.

Patrick McKee, of Missoula, Montana, and a Montana resident for 30 years, submitted written testimony with attached exhibits **EXHIBIT(jus05a12)**.

(Tape : 5; Side : A)

Opponents' Testimony:

John Connor, Chief of the Special Prosecutions Unit, Montana Attorney General's Office, testified that he does not disagree with the concept of SB 30. **Mr. Connor** has three individuals in his office who assist county attorneys in Montana in handling dependent neglect actions. **Mr. Connor** asked these individuals for their input on the question of whether a jury trial should be allowed. **Mr. Connor** asked that the record be corrected to reflect that the Jimmy Ray Bromgard case referenced in **Mr. McKee's** written testimony did involve a jury trial and three appeals to the Montana Supreme Court. **Mr. Connor** requested his co-workers to contact the various county attorney offices and they contacted 23 counties and determined there were 182 termination actions in those 23 counties, 50 of which were in Yellowstone County alone. In many of those cases, there were multiple children and often multiple fathers. Therefore, **Mr. Connor** is concerned there may have to be multiple trials. Also, some children have one parent who is Caucasian and another who is Native American. The burden of proof under the Indian Child Welfare Act requires proof beyond a reasonable doubt and this is a different standard of proof than that required for Caucasian children. This will present some instructional issues for the jury.

Mr. Connor continued stating the biggest concern he heard voiced was that of confidentiality. Parents may be entitled to a jury, but the child is the one who will suffer the remunerations of having the family laundry aired in public. Dependent neglect statutes are very complex, and they are by law confidential. It will be difficult to maintain confidentiality if you bring in a jury panel. The child's rights of privacy is of greatest concern to those involved.

Mr. Connor would like the Committee to be aware that the Montana Supreme Court has decided that in dependent neglect cases, there is not a right to a jury trial. There were no termination proceedings when Montana's Constitution was enacted in 1889 and subsequently, in 1972. Mr. Connor went on to quote a case entitled In the Matter of C.L.A. and J.A., Youths in Need of Care, 685 P.2d 931. This case reflects the opinion that there is no constitutional provision to provide for jury trials.

Jim Smith, representing the Montana County Attorneys' Association, stated that he discussed this bill with the Gallatin County Attorney, as well as the Board of Directors of the County Attorneys' Association, and they feel there ought to be a zone of privacy around certain matters. It is their position that the existing laws should be maintained. Also, **Mr. Smith** reminded the Committee that the judges who adjudicate these matters and make the decisions are elected officials, and they stand for election

periodically. **Mr. Smith** stated that he worked with the Montana Association of Group Homes and Childcare Facilities, and he knows thee are difficult cases, and he would not say the Department of Family Services is perfect in every regard in each and every case and the procedure does not run like a Swiss watch. By and large, the social workers at the Department of Family Services do the best they can to get to the facts of the situation to make honest, credible, ethical, and proper recommendations to the courts. **Mr. Smith** feels the state is well-served by these folks.

Shirley Brown, Administrator for Child and Family Services Division for Public Health and Human Services, opposes SB 30. On one hand, she agrees public input is good. However, **Ms. Brown** is concerned about the privacy interests of the child. One parent may choose to have a jury; one parent may not. This would cause two separate hearings. Putting a child through a hearing can be very traumatic for the child. With jury trials, more people in a community would know details about the child. **Ms. Brown** feels having a judge make a decision is more objective because jurors are more likely to make a decision based on emotion. **Ms. Brown** also has concerns about timeliness. Currently, court dockets are crowded, and it is difficult to schedule bench trials. **Ms. Brown** feels jury trials will force children to stay in foster care longer. **Ms. Brown** anticipates that if there is right to a jury trial, and there will be multiple requests for one. This will increase costs associated with trials.

Questions from Committee Members and Responses:

CHAIRMAN GRIMES asked **Paul Kennedy, Yellowstone County Commissioner, representing the Montana Association of Counties,** whether he had anything he would like to add.

Mr. Kennedy stated he would like clarification that the proposed jury trials would be paid for by the state.

SEN. WHEAT addressed **Ms. Brown's** concern about the privacy issues of the child and wondered if those privacy interests would be affected just as much when the evidence is presented to a judge.

Ms. Brown responded that there is a significant difference in having the evidence presented when there is a judge and just the immediate people involved in the case, as opposed to having the evidence presented to the judge and a jury of twelve people. Also, questions asked of potential jurors would have to go to the nature of the case. Therefore, all the potential jurors would have information about the child. It broadens the number of people who have the information. **Ms. Brown** feels there is a difference between speculation and absolute knowledge.

SEN. WHEAT asked Ms. Brown if it is her opinion that the constitutional right the child has to privacy outweighs a parent's right to a jury trial when the state is trying to terminate their parental interest.

Ms. Brown responded it is a balance between a parent's rights and children's privacy rights. Because parents are afforded due process now, **Ms. Brown** agreed the child's privacy interest does outweigh the parent's rights.

SEN. WHEAT inquired whether **Ms. Brown** believes a judge would be more objective than a jury.

Ms. Brown stated she believes a judge would be more objective because a judge sees more of these types of cases. Whereas, community members would only have experience with one case. Given the serious nature of the abuse perpetrated upon a child, a **Ms. Brown** feels a judge is better able to stay objective than would 12 community members who are hearing very specific details about child abuse for the first time.

SEN. PERRY asked **Ms. Brown** whether she would agree that if parent custody is terminated that the child's life is permanently affected.

Ms. Brown stated she would agree.

SEN. PERRY then asked **Ms. Brown** which is more devastating to a child: Jury trial or the forced separation from that child's parents in error.

Ms. Brown began by stating in her professional opinion, the cases that go to termination are very, very serious. Of the children who go into foster care, over 50 percent are returned to the parent. Given what she knows about the cases that go to termination, **Ms. Brown** does not believe parental rights are terminated in error. The maltreatment children experience is more traumatic to the child, and this increases with the more people who know.

SEN. PERRY charged that we are speaking of a jury trial; therefore, we must be speaking about the alleged violations of the child's rights. **SEN. PERRY** interpreted **Ms. Brown's** response to be that termination is appropriate in virtually every case.

Upon **CHAIRMAN GRIMES'** request to restate the question, **SEN. PERRY** withdrew the question.

SEN. PERRY then asked **Mr. Connor** about his statement that there was no right to jury trial in the case of child protective custody in 1889.

Mr. Connor agreed.

SEN. PERRY wondered whether there was a Department of Child Protective Services in 1889.

Mr. Connor believed there was not, but feels that was what the court was stating. Mr. Connor stated the court's thinking was that termination actions are actions in equity, which **Mr. Connor** finds odd. Because it was not a right in 1889, it did not exist by right constitutionally.

(Tape : 5; Side : B)

SEN. PEASE questioned Mr. Conner if there was a statute in place in the Indian Child Welfare Act which is similar to what **SEN. O'NEIL** is presenting.

Mr. Connor responded it is his belief that the Indian Child Welfare Act does not provide for a jury trial. It is his understanding that the Act requires termination has to be "proven beyond a reasonable doubt," as opposed to other standard known as "clear and convincing evidence." Also, there are different evidentiary steps that have to be taken for termination, such as calling an expert witness skilled in Indian cultural issues.

SEN. PEASE followed up by wondering how SB 30 would affect what is provided in the Indian Child Welfare Act and whether it would have an adverse affect on the Act.

Mr. Connor stated he could see some practical problems with a jury if you had two different standards of proof.

SEN. WHEAT wanted to know if it was typical in cases involving termination of parental rights that a guardian ad litem is appointed by the court.

Mr. Connor responded it was.

SEN. WHEAT wondered if that happened in every case.

Mr. Connor stated that to his knowledge it happens in every case.

SEN. WHEAT restated then that even in a case where the judge is the deciding entity, there is a lawyer appointed to represent the child.

Mr. Connor stated that is correct and he has personal knowledge because his wife acts as guardian ad litem. She represents an independent position and submits her own findings and conclusions to the court, independent of both the county attorney and the attorneys for the parents.

SEN. WHEAT wanted confirmation that the standard courts currently use to terminate parental rights is "beyond a reasonable doubt."

Mr. Connor responded that the statutes provide that in order to adjudicate a child that is dependent neglect, it is by "a preponderance of the evidence." In order to terminate parental rights, which is the next step, it is by "clear and convincing evidence." If it involves an Indian Child Welfare Act case, it is by "beyond a reasonable doubt."

SEN. WHEAT then asked **Mr. Connor**, assuming SB 30 is signed into law into Governor, would the Attorney General's office have to hire additional staff to assist with jury trials.

Mr. Connor explained his unit was originally created because dependent neglect actions were the biggest drain on county attorney offices. **Mr. Connor** did not feel hiring additional staff would be a realistic possibility.

SEN. WHEAT then posed the same hypothetical question to **Ms. Brown** and what the financial impact to DPHHS would be.

Ms. Brown maintained the impact on the Division would be that it would require more social worker time. **Ms. Brown** also feels there will be a cost to the court. There are about 300 termination hearings a year. It would be a best guess as to how many of those would request a jury trial, but she believes there would have to be a cost involved.

SEN. CURTISS questioned **Mr. Connor** whether the duties of the people in his office are limited to prosecutorial assistance and whether they relate to criminal cases.

Mr. Connor responded that the duties of those three individuals are, exclusively, to assist with dependent neglect cases. They are not assigned criminal cases.

SEN. CURTISS then asked **Mr. McKee** whether a guardian ad litem was appointed in his case.

Mr. McKee explained that he had requested a guardian ad litem from the onset; however, it was one year after the actual abuse before a guardian ad litem was appointed. Ultimately, Mike

Halligan, who later went to work for DFS, was appointed guardian ad litem.

CHAIRMAN GRIMES inquired of **Ms. Brown** whether there were levels of review in cases where there are recommendations for termination.

Ms. Brown expounded that there are administrative review panels that review case plans every six months. These panels are external to the department. Internally, it is a review process that would entail the social worker consulting with the supervisor. If the county attorney does not feel proper grounds exist for terminating parental rights, he will not file the petition. There are also external administrative reviews such as the Foster Care Review Committee in some jurisdictions, or the Citizen Review Board in others. Those administrative panels review the child's case plan every six months and make recommendations to the court. The statute also requires a permanency planning hearing be held either 12 months from a judge's determination that this is an abused or neglected child, or 12 months after the first sixty days the child is in care, whichever comes first. Therefore, there is a whole system of reviews, although they are not internal.

CHAIRMAN GRIMES inquired of **SEN. O'NEIL** whether all his witnesses had been able to attend the hearing. **SEN. O'NEIL** responded they had not all been able to attend. **CHAIRMAN GRIMES** wanted to ensure **SEN. O'NEIL** felt he had a proper hearing.

Closing by Sponsor:

SEN. O'NEIL closed the hearing on SB 30 by stating it is interesting that when a prosecutor is pressing charges against someone for sexual conduct with their daughter, for instance, the defendant is allowed a jury trial. However, in termination of parental rights cases, the parents do not have a right to a jury trial. **SEN. O'NEIL** pointed out that when a social worker is questioning a child, what the child says to the social worker is admissible evidence, even though it is clearly hearsay. **SEN. O'NEIL** spoke with Al Smith, who assured him that his research has determined the legislature does have the right through statute to grant parents the right to a jury trial. **SEN. O'NEIL** submitted an article from The Bozeman Daily Chronicle entitled "Social Worker charged with extorting cocaine from client." **EXHIBIT(jus05a13)**, as well as the results of research he conducted on similar laws in other states. **EXHIBIT(jus05a14)** **SEN. O'NEIL** does not feel maintaining the status quo is a sufficient reason to continue denying jury trials to parents who face termination of their rights. **SEN. O'NEIL** believes a child

has a right to know what happened to his life. In order to protect our Constitution, families, and system of justice, SB 30 needs to be passed.

ADJOURNMENT

Adjournment: 12:33 P.M.

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SEN. DUANE GRIMES, Chairman

_____
CINDY PETERSON, Secretary

DG/CP

EXHIBIT(jus05aad)