MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON PUBLIC HEALTH, WELFARE AND SAFETY

Call to Order: By **CHAIRMAN JERRY O'NEIL**, on January 27, 2003 at 3:10 P.M., in Room 102 Capitol.

ROLL CALL

Members Present:
Sen. Jerry O'Neil, Chairman (R)
Sen. Duane Grimes, Vice Chairman (R)
Sen. John C. Bohlinger (R)
Sen. Brent R. Cromley (D)
Sen. Bob DePratu (R)
Sen. John Esp (R)
Sen. Dan Harrington (D)
Sen. Trudi Schmidt (D)
Sen. Emily Stonington (D)

Members Excused: None.

Members Absent: None.

Staff Present: Dave Bohyer, Legislative Branch
Andrea Gustafson, Committee Secretary

Please Note:
Audio-only Committees: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing & Date Posted:
Executive Action: SB 95

EXECUTIVE ACTION ON SB 95

Motion: **SEN. GRIMES** moved that **SB 95 DO PASS** for discussion.

Discussion:

SEN. JERRY O'NEIL made a motion **DO PASS** on his amendment SB 009501.abd. He explained the bill currently would allow all hearsay evidence of the child. If somebody is accused of doing something to the child, a person could say the child said this was what the child wanted, or the child said it did not happen. The neighbor could say, "the child told me something happened," or anybody could say whatever the child supposedly told them. He said that could bring in a whole bunch of evidence that is not good evidence and quite likely not be good evidence. The rules of evidence say the hearsay has to have reason for it. It has to be relevant and has to be likely to be true, he thought, but had not looked at the rules of evidence yet.

SEN. DUANE GRIMES said the amendment put him on the fence. On the one hand, hearsay evidence made by accusers is sometimes false. It could be abuse coming from another source, resulting in those allegations, because the child does not want to name the real source, such as a sibling or a parent. It made sense to continue to use the Montana Rules of Evidence, however, he could see where that could be awkward. When a child is required to be in the court room, getting the incriminating evidence for the true guilty party can be difficult. He thought it a tough call.

SEN. O'NEIL said the amendment would not forbid use of hearsay. He said all that it would do is make hearsay allowable according to the Montana Rules of Evidence. He did not want it left open for just any hearsay.

SEN. JOHN ESP asked if the effect of his amendment was to leave existing law in place for that particular part. **SEN. O'NEIL** said yes.

SEN. EMILY STONINGTON asked if **SEN. O'NEIL** could remember what the discussion was on why the department wanted to remove that phrase. **SEN. O'NEIL** could not.

SEN. GRIMES said he wrote down two things regarding the hearsay being discussed: 1)was it in the child's best interest if they are not there, and 2) were the show cause statements applicable.

SEN. STONINGTON wanted to know why **SEN. O'NEIL** wanted to add this amendment. **SEN. O'NEIL** said because if this line was taken out, it would allow all hearsay of a child to be introduced.

SEN. GRIMES clarified the term "hearsay," in this case, relates to third party testimony about what somebody else said. He said **SEN. O'NEIL** was correct saying hearsay evidence from someone else on statements made by the affected youth is really what the bill is talking about and is admissible. Under the show cause hearing section on page 19, line 23-24, it was laid out, how the hearsay evidence would be used, the guardian parent or other person is represented by legal council. When allowing and admitting that evidence, in his mind, would allow a broader array of hearsay, without the phrase, "according to the Montana Rules of Evidence." **Dave Bohyer, Research Director, Legislative Services Division,** said that was true.

SEN. ROBERT DEPRATU said it was indicated in some testimonies. An amendment might be needed for the statement on page 21, line 26.

SEN. STONINGTON said she would call Shirley Brown to come to the meeting. She thought **Ms. Brown** needed to be there to help clarify the bill and answer some questions.

SEN. GRIMES asked **SEN. O'NEIL** if he wanted to withdraw his amendment just for the moment, until **Ms. Brown** arrived. **SEN. GRIMES** wondered if he could go with another amendment. On page 3, line 28, he wanted to strike that and put the original language back in.

SEN. O'NEIL withdrew his amendment to hear **SEN. GRIMES** amendment.

SEN. GRIMES motioned to substitute an amendment striking line 28, page 3. He said this was the fourth year it has come up. It was different from the residential settings they do investigations in. It was time consuming because there were more people involved. It does not happen that frequently, but when it does happen, there is a potential front page story. In addition, there is potential for a whole community getting scared because somebody has been alleged to be an abuser in a neighborhood center. He said the licensing people were not skilled in this area. The deputy sheriffs have varying degrees of skill in dealing with children. **SEN. GRIMES** thought it critical that the phrase "a person providing care in a daycare facility," was left in.

SEN. ESP restated **SEN. GRIMES** intent for clarification. **SEN. GRIMES** said he was correct.

SEN. ESP said he would support **SEN. GRIMES** motion. **SEN. ESP** said he had talked to those from licensing services after the hearing

on SB 95. He said they indicated they were not set up to do that sort of investigation within their boundaries.
SEN. STONINGTON said she knew the department wanted to take out their responsibility for oversight in the childcare facilities. She had received comment from childcare people in her community, who have said it will not happen. The licensing people cannot do it. She said the woman that contacted her who is the head of all the childcare people in Bozeman said there had only been approximately six instances in the last year. **SEN. STONINGTON** said she would go along with this amendment.

SEN. O'NEIL wanted to know who investigated the Wenatchee childcare case. **SEN. GRIMES** said he could not remember, but guessed it was someone untrained. He said that was the danger. If people with the best intentions are used, but are untrained in dealing with children, they might transfer their abuse somewhere else. They may have had an event that happened there, but it was between other children, and may be just a supervisory problem, not a sexual offense. He thought everyone was afraid of an incident similar to the Wenatchee incident. He said what should be done, was to make sure the proper people were there, if there were some allegations.

SEN. O'NEIL asked for all those in favor of SEN. GRIMES amendment to page 3, line 28.

Motion/Vote: **SEN. O'NEIL** moved that **SB 95 BE AMENDED. Motion carried 9-0.**

SEN. GRIMES said a vote could be made on the amendment. He said it would not be a difficult amendment to handle on the floor. It would get discussion whether the amendment was done or not. He said bills going through clean was nice, but here it would be discussed anyway. He thought whichever way the amendment fell, the committee could talk to **Ms. Brown** later. Then based on **Ms. Brown**'s feedback or others concerns, it could be dealt with as an amendment on the floor.

SEN. O'NEIL said on the floor he would speak passionately against it if line 26 on page 21 were taken out.

SEN. STONINGTON asked **SEN. BRENT CROMLEY** to shed some light on the impact of the Montana Rules of Evidence in hearsay statements from the affected youth. **SEN. CROMLEY** said he was torn. He thought **SEN. O'NEIL** might be correct in putting it in. It would be before the judge, who will often consider in an individual case, hear the evidence and then reject it. He thought the judge would do that much better than a jury can, to decide what is

relevant. Under the Rules of Evidence, if a child is there available to testify, it probably would not be admissible anyway. Much is admissible, although technically it is hearsay. **SEN. CROMLEY** said if line 26 is left the way it is, saying it is admissible, in a sense it takes out the discretion of the court, and he or she will have to listen to everything. It did not bother him to pass the amendment and leave it under the Montana Rules of Evidence, which does allow quite a bit of discretion with the judge. He said most often the child would be testifying to some extent and is available to authenticate hearsay testimony.

SEN. STONINGTON asked **SEN. O'NEIL** for clarification. **SEN. O'NEIL** wanted to ask **SEN. CROMLEY** a question before answering.

SEN. O'NEIL said the bill was about regulating the child abuse and neglect. He asked if a person charged with child abuse and neglect had the right to a jury trial. **SEN. CROMLEY** asked if it were criminal. **SEN. O'NEIL** said criminally or civilly.

SEN. CROMLEY said in a criminal charge, a person would. He thought this had to do only with adjudication of the status of the child. **Mr. Bohyer** said yes, it was concerning adjudicatory hearing, 41-3-437. **SEN. CROMLEY** asked if that were only in concern with the status of the child. **Mr. Bohyer** believed it was, but said he was not familiar with those statutes.

SEN. O'NEIL wanted to know if there was a right to a jury trial in that situation. **Mr. Dave Bohyer** said this related to the disposition of the child. It was not the criminal complaint against the alleged abuser. It was about the welfare of the child.

SEN. STONINGTON still was not clear why **SEN. O'NEIL** thought the amendment was important.

SEN. GRIMES said there were exceptions in the Montana Codes Annotated.

SEN. GRIMES thought what would happen, when using Montana Rules of Evidence, there would be more technical ground where hearsay would not be admitted.

SEN. STONINGTON asked **SEN. O'NEIL** if his intent to amend was to limit hearsay evidence heard.

SEN. O'NEIL said yes. The third party would have to show he actually saw the child before they could say what the child said to them.

SEN. GRIMES said much would depend on the judge on how the statement was interpreted. He said an excited utterance: a statement relating to a startling event, could be thrown out if the judge deems it to be excited utterance; or it may not be thrown out, given the other circumstances. The Rules of Evidence is a guide for the court.

SEN. STONINGTON asked if the discretion of the judge was part of the issue. **SEN. CROMLEY** thought that right. He said the way it was written now, there was no discretion in the court because any hearsay would be admissible. An example would be if a neighbor who says six year old Johnny came to him and told him his mother and father were beating him. The question would be if the neighbor could testify or not. Technically, he probably could not testify under the rules of hearsay. It could be admitted under exclusion because the child is available to testify whether it did or did not happen.

SEN. TRUDI SCHMIDT asked what would be in the child's best interest. **SEN. CROMLEY** said if he were the judge, he would rather listen to all the evidence, in which case, he would then lean against the amendment. He thought a judge would have quite a bit of experience in this type of case and could sift out what should and should not be considered. There could be many technical fights about the rules of evidence, particularly hearsay.

SEN. GRIMES surmised the reason the department would want "according to Montana Rules of Evidence" stricken was because they must have some people getting off who they feel would otherwise not get off because of technical grounds. He suspected that it did not happen often, but critical when it does.

SEN. CROMLEY said he would vote against the amendment although it was a good proposal to make. He said when there is a jury trial, one has to be very careful about Rules of Evidence. When dealing with workers' compensation and mediation situations where evidence is being presented, rules of evidence was not usually of concern. This is because a person is in the business, in this case, the business of being a judge. From a standpoint of giving a person leeway to consider or reject items of evidence, **SEN. CROMLEY** proposed not to go back to the Rules of Evidence.

SEN. O'NEIL asked if anyone remembered when he had a bill in to say a murderer could be put to death and could be commuted to life in prison. It was voted down because there was much case law on how murderers were sentenced and how to execute people, and if the law were changed, it would change the case law.

{Tape: 1; Side: B}

There is a lot of case law in Montana that does allow hearsay of children to be used in court. There are lines drawn as to where some hearsay can be used and some considered too undependable to be heard. The present language allows that. It has made the distinction between what evidence the judge should and should not hear. He said if this section was changed, it could possibly change case law, which could change the balance where innocent people were convicted. He said he was not willing to change case law by leaving out the Rules of Evidence. **SEN. O'NEIL** thought how hearsay evidence was heard currently was coming close to doing it the right way.

SEN. GRIMES said that having hearsay statements admissible according to Montana Rules of Evidence, was desirable sometimes. He wondered if saying hearsay evidence would be admissible after being weighed or investigated by the judge would be more acceptable. It would put more responsibility on the judge to not only to accept the statements, but to rule on them. Of course, that is what the rules do anyway. He said a compromise might not accomplish anything, but cause an open discussion.

SEN. CROMLEY proposed the wording,"...hearsay evidence of statements made by the affected youth is admissible at the discretion of the presiding judge." It would mean the judge would not have to admit it, but could examine it.

SEN. O'NEIL said that would be an improvement.

SEN. GRIMES made a motion to insert on line 26, after admissible, to put "at the discretion of the presiding judge."

SEN. DAN HARRINGTON thought judges have that discretion anyway.

SEN. O'NEIL did not think so. He thought the judge would have to hear it in an offer of proof, rather than hearing it as part of the case. Once hearsay is accepted without any confinement, it becomes part of the record, which can be appealed on what the hearsay declaration was, whether it was something the judge would have admitted or not, after it is in there. Putting it in as **SEN. GRIMES** suggested, there could be an offer of proof, and it does not necessarily become part of the record.

SEN. HARRINGTON asked **SEN. CROMLEY** what his thoughts were on it. **SEN. CROMLEY** thought it would broaden the discretion available to the judge. He said he might have misspoke earlier when he said this was entirely in the discretion of the court. The hearsay rules and exceptions were complicated, where often in trial there

were ways to get around it. In a jury trial, it was sensitive and would be in the best interest to prevent the hearsay evidence to come before a jury. This was because the jury was not able to reject it, even if they were told to do so, where the court would. The court does not have complete discretion. Putting in the language **SEN. GRIMES** made substitute motion on, would be a good thing.

SEN. DEPRATU said he would like to have some sideboards on the hearsay. He said up in his area many complaints are made concerning abuse. He said some of it might be justified and some may not. **SEN. DEPRATU** thought lately there had been an abnormal number of people approaching him. Generally, grandparents have had to take over their grandchildren. Their complaint was somebody said something about the children's parent(s)and the judge has listened to them, as they should, but thought definite perimeters should be in place to control it to a certain extent.

SEN. SCHMIDT asked **SEN. DEPRATU** if he thought the amended provision would offer those sideboards. **SEN. DEPRATU** thought it was a definite step toward it. He thought **SEN. O'NEIL'S** version was a bigger sideboard. He said he did not have the expertise of **SEN. CROMLEY** and respected what he had to say.

SEN. O'NEIL asked **Mr. Bohyer** if he could give some idea between the two amendment versions being discussed. **Mr. Bohyer** said he could not because he was not an attorney and could not give an opinion better than **SEN. CROMLEY.** He would say what **SEN. CROMLEY** said.

SEN. **O'NEIL** took votes on amending page 21, line 26 to cross out "evidence" and insert "at the discretion of the presiding judge." Motion carried unanimously.

SEN. STONINGTON moved the bill as amended.

SEN. ESP had a question regarding the bottom of page 23, line 30. He said he had in his notes it needed some work.

SEN. SCHMIDT said she thought work needed to be spent there on the phrase "superceding any existing custodial order."

SEN. O'NEIL said an example would be a father with custody of the child being turned in for child abuse and neglect. The child then goes to the mother, which supercedes the divorce order. The mother was not determined to be a bad parent when the divorce decree was entered. It was determined at the time the father should have majority time with the child. Unless the mother has

been declared as an unfit parent, she should have a chance to have the child because she is the child's parent. It does not preclude the court from studying to see if the mother was a bad parent. If the mother was a bad parent, this did not force the child to be placed with her.

SEN. STONINGTON saw an effort to have some closure in some of these instances. There were several different options of possible dispositions for the child. This is just one way. She said they were all discretionary, permissive, using the word "may." In this case, it was trying to say that superceding the custodial order was in the best interest of the child. She said simultaneously, temporary legal custody could be transferred to any of those options.

SEN. ESP questioned when the disposition occurred in the investigation, regarding section 41-3-438. **Ms. Shirley Brown** said when making an emergency protective placement, depending on how much the social worker knows at the time the emergency placement is met, is what determines what kind of petition is done. A petition for emergency protective services combined with temporary investigative authority is filed if the social worker thinks the child is in imminent risk but does not have enough to show the child was being abused and neglected. If the petition for three months was started and if the department were still involved at the end and felt a need to keep the child in foster care, a petition would be filed for temporary legal custody. This asks the judge to look at the evidence and determine whether this was an abused and neglected child by a preponderance of the evidence. If the judge says the child is abused or neglected, then it moves into the disposition. It is possible the child could be in foster care for three months before the department asks the judge to say this be an abused or neglected child. **Ms. Brown** said in the past, the department has tried to start by showing the evidence of the abused or neglected child by preponderance of the evidence. The department tries to start with the emergency protective services, temporary legal custody. If the department starts with that, then generally a show cause hearing has to be within ten days. The show cause hearing is generally continued. The disposition happens after the judge had found, by a preponderance of the evidence, that the child was abused and neglected.

SEN. GRIMES asked if the language of placing a child with the non custodial parent, superceding any custodial order, suited the needs of the department. **Ms. Brown** recalled **Mike Halligan** testifying at the hearing for SB 95. He questioned whether this was possible. **Ms. Brown** said the language was recommended by the drafter. She said it made sense because if a custodial order

were out there, there could be some issues of which order came first.

SEN. STONINGTON recalled **Mike Halligan**'s comment was not to get crosswise with the divorce proceedings, and that his concern was if it were taking place at the same time the divorce proceedings and custody hearing were taking place.

Ms. Brown said the department tries hard not to get involved in a custody dispute currently between parents. She thought **Mike Halligan** addressed it clearly, as giving the child stability, which was why this was a good amendment. Sometimes the noncustodial parent was out there and the department has not always brought them in when they should. The department has been working on that the last few years. This is another reason. The department wants to pull that noncustodial parent in as quickly as they can.

SEN. GRIMES said what it would do then, was allow the department to get away from it, not have to work between the two parents anymore and just let it go. He wondered if there would be any problem with the department for not investigating or checking out the noncustodial parent. Did the department still do the placement, if there were circumstances where the noncustodial parent showed disinterest. **Ms. Brown** said this would only be used in instances when the parent wanted the children. The department would not force this on a non custodial parent who did not want the children.

Motion/Vote: **SEN. O'NEIL** moved that **SB 95 DO PASS AS AMENDED. Motion carried 9-0.**

ADJOURNMENT

Adjournment: 4:03 P.M.

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SEN. JERRY O'NEIL, Chairman

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ANDREA GUSTAFSON, Secretary

JO/AG

EXHIBIT(phs17aad)