

MINUTES
SENATE JUDICIARY & RULES COMMITTEE

DATE: Friday, March 15, 2013

TIME: 1:30 P.M.

PLACE: Room WW54

MEMBERS PRESENT: Chairman Lodge, Vice Chairman Vick, Senators Davis, Mortimer, Nuxoll, Hagedorn, Lakey, Bock and Werk

**ABSENT/
EXCUSED:**

NOTE: The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CONVENED: **Chairman Lodge** called the meeting to order at 1:33 p.m. and asked the secretary to call the roll.

S 1109 **Relating to Annuity Contracts - Senator Davis** explained that this legislation modifies a person's annuity contract exemption. He said an attorney here in Boise reported this was a lot of work for bankruptcy trustees and gave some specific examples of the problem. On the other side, the annuity provider is concerned about two components of the bill.

1. In the event that a portion of the annuity becomes non-exempt, they may have already paid out some professional fees to those who held the security, and
2. They were also concerned about the time period.

Senator Davis spent time negotiating with both parties and the language presented here is the result of those conversations. (Attachment 1.) **Senator Davis** requested that the committee send S 1109 to the amending order and substitute this sub-part (d) instead of the language that is currently printed in the bill.

Senator Mortimer asked if this annuity was a monthly payout or a lump sum. **Senator Davis** said it was his understanding that the annuity that is currently exempt or being modified is an annuity in which no distributions are being made. The statute currently provides that if the annuitant is receiving a periodic payment of \$1200 per month, that amount is exempt and an amount greater than that is not subject to the current statutory exemption. This is intended to focus on those situations where funds are placed in the annuity, but the anticipated distribution does not begin until later. It appears that it has been done to isolate and protect or block creditor access to the funds. This bill is a hybrid between bankruptcy standards with an insider and a non-insider. Any contribution made within six months prior to the filing of a bankruptcy petition or alternatively if there is a levy of execution, a creditor or bankruptcy trustee or a party of interest could reach back six months and pull out the all of the contributions made to the annuity in that time period.

Senator Bock said suppose there was a structured settlement and there was no immediate plans to pay out of the annuity right away, but that was put into the annuity less than six months. He asked if this would take the annuity out of the exemption. **Senator Davis** responded there may not be enough protection for a debtor in title 11, chapter 6. Counsel of the annuity providers was shown language that would provide some additional protection to annuitants. He stated that most of the structured settlements are not ones that the funds are put in with the contemplation that there is a substantial down stream period of time for distribution. Rather, there is a distribution that begins almost immediately. He said this many be an area to be looked at as time goes by.

MOTION: **Senator Mortimer** moved to send **S 1109** to the 14th Order for amendment. **Senator Lakey** seconded the motion. The motion carried by **voice vote**.

Chairman Lodge asked if there were minutes to be approved.

MINUTES: **Senator Lakey** moved to approve the minutes of February 25, 2013 as written. **Senator Mortimer** seconded the motion. The motion carried by **voice vote**.

H 147

Relating to Examination of Case and Discharge or Commitment of Accused - Dan Chadwick, Executive Director of the Idaho Association of Counties. Mr. Chadwick said he was here in dual capacity as he was also a member of the Idaho Criminal Justice Commission (ICJC). He mentioned that earlier this session, there was a presentation by the ICJC about the work of the commission and the Public Defense Subcommittee. This is the first of the three bills that are the work of that subcommittee. This bill relates to general changes to the rules regarding the appointment of public defenders to adult defendants. The defense subcommittee, after working on these issues for three years, discovered problems with the appointment process and the standards and qualities of the public defender. There is significant variation from county to county in terms of what offenses and/or financial circumstances establish eligibility for an appointment of a public defender. The legislation creates clear and consistent terminology, using "defending attorney" and "indigent" in the place of "needy" and cleans up code references throughout. The amendments clarify that any offender has the right to counsel. Section 4 establishes presumptive financial eligibility for appointment of a public defender, but courts still have discretion to deny appointment of counsel. The court would be allowed to order reimbursement of public defender costs associated with a conviction, but only upon disposition of the case.

Senator Bock said the fiscal note says no impact and yet discussions relating to this on the commission there was a possibility that this could cost the state \$20 million. **Mr. Chadwick** said he thought in terms of this legislation it may be a 'wash'. The discussion of additional costs to the state was in reference to the potential of creating a statewide system.

Senator Nuxoll asked if there were no guidelines before. **Mr. Chadwick** said that was correct. **Senator Bock** asked what the consequences would be if we fail to act in anticipation of a lawsuit. **Mr. Chadwick** stated there has been a nationwide review of what states provide in terms of public defenders. He said they did need to deal with these issues in a timely fashion.

MOTION: **Senator Bock** moved to send **H 147** to the floor with a **do pass** recommendation. **Senator Werk** seconded the motion. The motion carried by **voice vote**.

H 148

Relating to the Child Protective Act - Mr. Chadwick said that currently in child protective actions, an attorney may be required to serve a dual role as both guardian ad litem (GAL) and counsel for the child. When acting as a GAL the person must advocate for the child's best interests whereas acting as an attorney requires the person to pursue the child's own wishes. This creates ethical conflicts of interest and a potential violation of the Idaho State Bar's Rules of Professional Responsibility. The amendments would prevent these conflicts from arising. For children under 12, a GAL would be appointed along with counsel for the GAL. An additional attorney can be appointed for the child if the court thought that was in the best interest of the child.

MOTION: **Senator Hagedorn** moved to send **H 148** to the floor with a **do pass** recommendation. **Senator Nuxoll** seconded the motion. The motion carried by **voice vote**.

H 149

Relating to the Juvenile Correction Act - Mr. Chadwick explained this would clarify the circumstances in which juveniles are appointed counsel and seek to conform their rights to counsel to the same as that of adults. However, a child's choice to represent him or herself may be restricted. The amendments would prohibit juveniles from waiving their right to the assistance of counsel in the proceedings in certain cases, e.g., felonies, sex crimes, etc. The amendments clarify procedures for a juvenile to waive the right to counsel and for establishing financial eligibility for appointment of counsel as well as repayment of the associated costs.

Senator Bock wanted to discuss his belief that the minor never has the capacity to waive counsel. He wanted an explanation why this was not such a serious concern in this context and also mentioned that sometimes the parents put pressure on the children to waive counsel. **Mr. Chadwick** said the right to counsel belongs to the child, not the parents. The child may have the ability, the mental capacity and the knowledge to make an intelligent waiver. One must look at the best interest of the child.

Senator Werk needed further explanation of this issue as he thought of a fifteen year old having the right to waive counsel. **Mr. Chadwick** responded that the key is the court's ability to look at the intelligence of the juvenile. The purpose of the court is to take the pressure off the juvenile. This would be a case by case determination. **Senator Werk** asked if there is ever a financial interest that enters into that kind of decision. **Mr. Chadwick** said the financial aspect will come into the determination. The child may have an estate to pay for counsel or the parents may have sufficient resources and therefore the state is not obligated to provide a public defender. Any other financial consideration doesn't fit within the context of the court's decision.

MOTION:

Senator Bock moved to send **H 149** to the floor with a **do pass** recommendation. **Senator Nuxoll** seconded the motion. **Senator Bock** commented that there were three or four judges on the committee and the general conclusion was that the circumstance of a waiver of any serious consequences to the juvenile would be nonexistent. The motion carried by **voice vote**.

Chairman Lodge said she had two RS's to present; a memorial and a resolution.

RS 22282

Memorial to Congress relating to SNAP Benefits - Chairman Lodge explained that many states including Idaho were overwhelmed by rising Medicaid costs and the increases in Social Services being sought by folks. The Department of Agriculture oversees the SNAP benefits and in this memorial the states administer this food stamp program by rules that are promulgated by the United States Department of Agriculture and Congress. The health of the citizens of Idaho is affected by the consumption of food items that have been purchased with the SNAP benefits. This is to encourage the buying of Idaho grown and produced products where possible. Healthy eating choices mean less chance of developing chronic diseases that are raising health care costs. Idaho is requesting flexibility to determine the best methods of helping their citizens create a comprehensive state-based approach to promote physical activity, nutritional food selections and healthy lifestyle choices.

MOTION:

Senator Mortimer moved to print **RS 22282** and send it to the 10th Order of business on the floor. **Senator Nuxoll** seconded the motion. The motion carried by **voice vote**.

RS 22276

Concurrent Resolution authorizing an Interim Committee on Criminal Justice - Chairman Lodge explained the purpose of this legislation is to authorize the Legislative Council to appoint an interim committee to undertake and complete a study of the criminal justice system in Idaho. Idaho has been selected by the Justice Reinvestment Technical Assistance to complete a study of our criminal justice system. They have done this in several states throughout the United States and have come up with ways to save money at the beginning. This summer there will be a study with five members from the House and Senate with assistance from various agencies. They will be meeting with Representative Wills, myself and the three branches of government. They will also meet with Director Reinke and his staff, Director Harrigfeld, the courts, and the counties.

MOTION:

Senator Werk moved to print **RS 22276** and send it to the 10th Order of business on the floor. **Vice Chairman Vick** seconded the motion. The motion carried by **voice vote**.

S 1137

Relating to Garnishments - John Watts, representing the Idaho Collectors Association, explained the purpose of this bill was to provide a new service process for wage garnishment. He described the two key terms; (1) a serving attorney and (2) employee and agent. These terms are included throughout titles 8 and 11. This will create a new process and policy for businesses to track garnishments in place against any employee. The new policy will limit a serving attorney to wage garnishments only, excluding bank garnishments or attachments. It creates new requirements for the judgment creditor to provide two addressed envelopes (one envelope to whoever serves and one envelope to the court) for the defendant's claim of exception. **Mr. Watts** said it also sets out fees for serving, receiving and distributing garnished funds.

Senator Werk was confused about the fees for services not to exceed the fees charged by the sheriff of the county and later it says, "...in addition to such fees..." and then mentions the percentages of 1.5 percent and 0.5 percent for a commission and the sum not to exceed \$75. He was concerned that the verbiage suggested there would be additional fees. **Senator Werk** made reference to page 3 of Mr. Watt's handout which was a copy of title 31, Counties and County Law and chapter 32 on Fees. **Mr. Watts** responded they were allowed to have a service fee of an average \$45 in addition to the percentages on the recovery. **Senator Werk** asked if these fees were identical to what a sheriff could charge for the exact same service. **Mr. Watts** replied that the formula was the same, but he would defer to Bryan Zollinger to discuss this later.

Senator Hagedorn asked how many of the groups listed that received drafts for comment provided feedback and what was the percentage of the feedback that was incorporated into the bill. **Mr. Watts** mentioned that some associations responded and most were neutral. He said he had spoken with the Sheriff's Association several times and their concerns have been the order of garnishments and if they know there's one in place. That provision is built in. The flow of the money will still be the same. Serving attorneys are involved with the money in both processes. **Mr. Watts** mentioned that the sheriffs and the courts both mentioned that it was tradition that the sheriffs do this. He is just asking for consideration for an alternative form of service so business can recover their money more quickly. There was more discussion from the senators with concerns of the fees collected.

TESTIMONY:

Rich Fairbanks, Bonneville Collection Agency, stated that his agency operates in several different states and this is the only state that uses a sheriff for this service. Their concern has always been the amount of time it takes to get the funds back to their creditor clients. **Chairman Lodge** asked how long it took for a sheriff to get this filled and how long would it take the attorney. **Mr. Fairbanks** said there were particular counties that would hold the money for at least ninety days.

TESTIMONY: **Bryan Zollinger**, Attorney from Bonneville County, Idaho Falls, explained that his company deals with creditor/debtor collections, representing both. He chose to focus on the fees because of the expressed concerns. **Mr. Zollinger** said there were four basic fees that are allowed under Idaho Code § 31-3203 for the sheriff and these are set by the county commissioners. They are as follows:

1. Service fee - a one time fee for serving the documents (they range from \$40 to \$70)
2. Interim return fee - every check received from the employer if they are sending a monthly check (\$10 to \$25)
3. Commission - 1.5 percent on the first \$1,000 and 0.5 percent of anything over that amount, not to exceed \$75
4. Return fee - the final fee when the garnishment is sent back (\$10 to \$15)

In a high county on an average \$2,000 garnishment, the sheriff is charging about \$310 to process. The sheriff takes his fees off the top and the small businesses that he represents may not receive the garnishment even after they have paid the sheriff.

Senator Hagedorn mentioned again the concern that additional monies could be charged. **Mr. Zollinger** said the commission was on top of the service fees which were set by the commissioners. They have mirrored the language of the sheriff's fees. **Senator Hagedorn** was not clear on whether the commission was considered part of the fees. **Mr. Zollinger** said they are different; there is a fee plus the commission. **Senator Werk** mentioned that the sheriff's fees are specified in an amount reasonably related to, but not to exceed, the actual cost. **Mr. Zollinger** said it was his belief that charges should not be pushed to the limit. **Senator Werk** asked if the incentive was for the private sector to minimize the fees charged to the collection agency. If the fees are collected from the judgement debtor as an additional amount added to the writ of execution, those fees become a pass-through if charged to the collector. Why would the collector care what fees were charged? **Mr. Zollinger** said no business wants to send their bills over to a collection agency because they are losing money, but collections recover 25 to 30 percent of the accounts that are turned over. The bulk of the garnishments are not recovered, but they still have to pay the \$70 or whatever the sheriff charges.

Michael Kane, representing the Sheriff's Association, said the sheriffs were in opposition of this bill. He would like to give time to the attorney for the sheriffs, Joe Mallet.

TESTIMONY: **Joe Mallet**, said he was speaking on behalf of Sheriff Raney, the Ada County Sheriff's Office and the Sheriff's Association. He gave their perspective on this bill and said they served approximately 16,000 garnishments yearly, which is over 1,300 garnishments a month. He also said they are served within one day and when the money is received it is turned around within one day. The benefit for the sheriff's service is that they are a neutral and detached party. They apply these rules equally and fairly to both the creditor and the debtor. As a litigant, it would be an adversarial position. He said they had referred five cases to the Attorney General's office. When cases come across the desk with fraudulent abusive practices; they open an investigation.

Senator Bock asked for Mr. Mallett's insights on the fee concerns. **Mr. Mallet** agreed that the language should be cleaned up because it does imply that you can charge what the sheriff charges and in addition to that you could have this extra commission. **Senator Hagedorn** noted that the language in the many letters that were passed around by Mr. Kane were the same and he would doubt if that was coincidence. **Mr. Kane** said he did know that there was a coalition formed that included the sheriffs, some of the cities, hospitals, and other entities. **Senator Hagedorn** asked if it was his perception or the sheriff's that the private sector cannot do this; that it can only be done by the sheriff. **Mr. Kane** said there was no question that it could be done, but certain things go away such as the queue system. The typical employer of a large number of people will write one check to the sheriff and if part of that should have gone to a different attorney, it would have to be returned and rewritten. The neutral arbiter would also go away if not done by the sheriffs.

- TESTIMONY:** **Brian Smith**, attorney with Smith & Zollinger, testified also in favor of this bill, but refocused on the fees. **Senator Bock** pointed out that chapter 32, entitled Fees, and yet the commissions are located at the end of the section. There was still concern.
- MOTION:** Due to time constraints, **Senator Hagedorn** moved to hold **S 1137** in Committee until Wednesday's meeting. **Senator Werk** seconded the motion. The motion carried by **voice vote**.
- ADJOURNED:** There being no further business, **Chairman Lodge** adjourned the meeting at 4:08 p.m.

Senator Lodge
Chairman

Leigh Hinds
Secretary