MINUTES

SENATE JUDICIARY & RULES COMMITTEE

DATE:	Monday, February 03, 2014
TIME:	1:30 P.M.
PLACE:	Room WW54
MEMBERS PRESENT:	Chairman Lodge, Vice Chairman Vick, Senators Davis, Mortimer, Hagedorn, Lakey, Bock and Werk
ABSENT/ EXCUSED:	Senator Nuxoll
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 1:31 p.m. and asked the secretary to call the roll.
RS 22726	**Relating to Boating - Senator Keough** stated the purpose of this legislation is to update Idaho Code § 67-7016 the Idaho Boating Act. She clarified that the reason for the update is because the code has been litigated twice and deemed unconstitutionally vague. Senator Keough indicated there is a need to have in place procedures to address boaters who have not been appropriate in the operation of their boat. She recounted recent situations resulting in accidents and injuries. Senator Keough offered to answer questions now or after the bill is printed. **Chairman Lodge** asked for questions. **Senator Werk** expressed interest in how this statute isn't vague enough. **Senator Keough** explained current Idaho Code § 67-7016 does not have specifics as to negligent operation and summarized a court decision indicating that specific actions were not delineated in the code and therefore was deemed unconstitutionally vague. **Senator Bock** requested that in a later hearing the new language be compared to the current language, specifically Subsection 1, questioning negligence versus gross negligence. **Senator Keough** agreed to provide the comparison in a later hearing.
MOTION:	**Senator Mortimer** moved to print **RS 22726.** Seconded by **Vice Chairman Vick.** The motion carried by **voice vote.**
S 1246	**Relating to Estates - Robert L. Aldridge,** Trust and Estate Professionals of Idaho, said this bill is only housekeeping. As changes have been made to the Idaho Probate Code, some cross-references that should have been deleted or modified have been missed. This has caused confusion as attorneys, laymen or courts ran across the incorrect cross-references and thought that these cross-references still existed in the Idaho Probate Code. This bill corrects two areas: 1) In Sections 1, 3, and 4, this bill deletes references to the "family allowance", which was eliminated from the Idaho Probate Code several years ago. 2) In Section 2, the time period for presentation of certain claims in probate was changed in the Uniform Probate Code from two years to three years, but the reference to that time period in this code section was not properly changed to state the three year period. In Sections 3 and 4 crossing out the reference to family allowance.

Vice Chairman Vick asked for a definition of "family allowance". **Mr. Aldridge** explained that family allowance was part of the original Probate Code when it was adopted in 1972. There were three allowances in the Idaho Code: 1) Homestead which was an amount to make sure that the surviving spouse had the ability to live for a period of time; 2) Exempt Property which was the ability to get certain items of personal property, up to a $10,000 limit; and 3) Family Allowance which was an amount of $18,000 which could be applied for by the surviving spouse or minor children for a living allowance. As they reviewed the legislation the family allowance had become a term that was not fulfilling its actual purpose. It was being used to manipulate the estate plan. If the individual who prepared the estate plan was not sophisticated they would be unaware that they could deny those to the surviving spouse and especially in a family situation where inheritance is to go to the children of the decedent the surviving spouse would file for all of the allowances and divert a large amount of the inheritance over to their side of the ledger. **Senator Bock** asked for clarification in Section 2 concerning the connection between the statute of limitations and the family allowance. **Mr. Aldridge** answered that all of these terms are incorrect cross-references within the Probate Code. This is simply a housekeeping bill to clean out these incorrect cross-references, either deleting them or changing them to the correct cross-reference.

MOTION: **Senator Hagedorn** moved to send **S 1246** to the floor with a do pass recommendation. Seconded by **Senator Mortimer.** The motion carried by **voice vote.**

S 1247 **Relating to Guardians - Robert Aldridge** explained the existing Idaho Probate Code on guardianship of minors does not have any provisions for the termination of such guardianship if the termination is not because of the death, resignation, or removal of the existing guardian. This lack was pointed out in an Idaho Supreme Court case, Doe v Doe. Additionally, there are no provisions for modification of the guardianship of a minor. Both of these are important matters that should be settled in the statute.

This bill provides in Section 1 for the termination of a minor guardianship if that is in the best interests of the minor. In Section 2, the bill adds provisions for modification of the guardianship in the best interests of the minor. This reflects the actual practice of the Idaho courts.

The term "best interests" is well understood by attorneys and by courts and has a long history of its meaning and application.

Senator Davis questioned the difference between "termination" and "removal". **Mr. Aldridge** explained that removal means that the individual acting as guardian is removed, while termination means that the guardianship itself is ended. **Senator Davis** further questioned the language. **Mr. Aldridge** gave an example of a situation where the language would be applied. **Senator Davis** again questioned **Mr. Aldridge** concerning the language about "termination". **Mr. Aldridge** indicated that termination concerns two meanings, one of the guardianship and another of the guardian. **Senator Bock** asked about the last sentence in Section 1 specifically the word "may" instead of "shall". **Mr. Aldridge** recounted situations where the court would need discretion as to termination and that the language contained in the legislation reflects that.

Senator Davis asked further about termination of the guardianship and suggested alternate language. Mr. Aldridge agreed that the alternate words suggested the same purpose as the language contained in the legislation indicating the desire to make as few changes in the language as possible. Discussion ensued between **Senator Davis** and **Mr. Aldridge** concerning language relating to terminating the guardianship responsibility and authority, including the basis for termination and the methodology of the termination. **Mr. Aldridge** indicated the desire to keep the language as close as possible to the original language and predicted the future need to rewrite the section entirely. **Senator Hagedorn** echoed Senator Davis' concerns about wording specifically concerning the number of times the word "or" was used. **Mr. Aldridge** clarified stating that consistency of language in the legislation and that different alternatives were the reason for repeating the word "or" as many times.

MOTION: **Senator Davis** moved that **S 1247** be referred to the 14th Order for amendment. Seconded by **Senator Bock.** The motion carried by **voice vote.**

S 1248 **Relating to Testamentary Appointments of Guardians of Minors - Robert Aldridge** stated the ability of a parent to appoint a guardian for a minor or developmentally disabled child has been in the Idaho Probate Code for many years. This procedure provides an inexpensive and quick way to get a guardian in place for a minor or developmentally disabled child if the parent dies. However, a question not answered in the current code is how to proceed if the nominated guardian does not or cannot, accept the nomination. Normally, the will making the nomination will have a priority list of additional nominations, but the Idaho Probate Code does not provide any guidance about the use of those additional nominations.

This bill will provide a clear solution to the situation by providing in Section 1 a method, paralleling the method used for the first named nominee to be guardian. It also validates the use of a priority list of nominees in the will. The bill imposes a thirty day time limit, since it is essential that a guardian be put in place as quickly as possible, and also describes other situations in which the next named guardian could proceed, such as the death or declination to act or ceasing to act of the proposed guardian. Section 1 also makes some technical changes in wording.

Section 2 preserves and clarifies the right of a minor, if age 14 or more, to object to the appointment and the effect of such an objection. Basically, the next nominee then can accept appointment, but the minor still has the right of objection to that nominee.

Senator Hagedorn questioned the language about filing notices of declination. **Mr. Aldridge** clarified. **Senator Davis** asked what the minor did during the 30 day interim period when the named guardian could accept or decline. **Mr. Aldridge** explained possible options and the limitation of those options. **Senator Davis** questioned language in reference to a situation in which the appointed guardian fails to accept the guardianship within 30 days thereby defaulting responsibility to the alternate guardian and that the language indicated each designated guardian or alternate would each have a 30 day right to decline. **Mr. Aldridge** agreed. **Senator Bock** questioned how the thirty day waiting period and appointment of a temporary guardian inter-relates with the provisions of the will. **Mr. Aldridge** recounted how an independent action could be filed after the finalization of the will. **Senator Bock** further questioned concerning the time within the thirty day period if decisions are needed to be made about the minor. **Mr. Aldridge** indicated that there would be a list in place of priorities as to who can make medical decisions in the event a guardian has not been appointed.

MOTION: **Senator Hagedorn** moved to send **S 1248** to the floor with a do pass recommendation. Seconded by **Vice Chairman Vick.** The motion carried by **voice vote.**

S 1249 **Relating to Probate - Robert Aldridge** said Summary Administration under Idaho Code § 15-3-1205 and the Small Estate Affidavit under Idaho Code §15-3-1201 have for many years been thought by the practicing bar and by courts to be exempt from the three year limitation on general probate proceedings under Idaho Code §12-3-108. This has allowed those two procedures to be an easy, efficient, and inexpensive way to pass property to the correct heirs if a standard probate is barred by the three year limitation.

Recently some courts have held to the contrary, and in some districts, judges in the same district have ruled differently on that question. This has lead to confusion and to arbitrary denial of the procedures in cases where they should be allowed. There are very limited, and very expensive, alternatives if summary administration cannot be used.

This bill eliminates that confusion by clearly stating that the two procedures are not subject to the three year limitation.

MOTION: **Senator Hagedorn** moved to send **S 1249** to the floor with a do pass recommendation. Seconded by **Senator Lakey.** The motion carried by **voice vote.**

S 1250 **Relating to Protected Persons - Robert Aldridge** explained Idaho Probate Code has had a long-standing provision, in section 15-5-408(b)(5), that the granting of a conservatorship has no effect on the capacity of the protected person. The Code was silent as to the effect of the granting of a guardianship on such capacity. It had been the opinion of the practicing attorneys that the granting of a guardian or conservator did not remove the ability of a person to undertake testamentary actions, such as a will.

In 2011, in the case of Rogers v. Household Life Insurance Company, the Idaho Supreme Court held that a person for whom a full guardianship had been granted had no contractual capacity. In a 2012 case, In re Conway, the Idaho Supreme Court upheld a will done by a person for whom a limited guardianship and conservatorship had been granted, looking only to the standard tests for capacity for making a will. These two cases have raised numerous questions in the practicing bar about what actions can and cannot be taken by a person under guardianship or conservatorship. Great confusion has resulted.

In Sections 4, 5, and 6, a general guardianship or conservatorship removes contractual capacity, as the Idaho Supreme Court held in Rogers, but does not automatically remove testamentary capacity.

In Section 1, it states that the granting of a temporary or permanent guardianship or conservatorship does not have any effect on the testamentary capacity of the person, and defines what testamentary capacity covers.

The bill also clarifies that all of the standard claims, challenges, or defenses regarding the validity or effectiveness of the exercise of testamentary capacity remain valid. Therefore, lack of capacity, undue influence, and similar grounds will still be available to challenge the validity of a testamentary document.

This bill merely states that the granting of a conservatorship and/or guardianship does not automatically remove testamentary capacity. It does not disturb the holding of the Idaho Supreme Court in Rogers that the appointment of a guardian in and of itself removes contractual capacity.

Senator Davis voiced his understanding of Section 1 concerning a temporary or semi-permanent conservatorship and the relation to testamentary capacity. **Mr. Aldridge** agreed with Senator Davis' understanding. **Senator Davis** continued questioning the language about testamentary capacity. He asked if the word "include" means "defined as" in reference to testamentary capacity. **Mr. Aldridge** clarified that the language provides a base list of things that are clearly testamentary capacity and that ultimately the court would decide these things because the court will examine principles set forth in the language and make a determination. **Senator Davis** reviewed language concerning evidence of testamentary capacity asking if his understanding of the language was correct. **Mr. Aldridge** agreed. **Senator Davis** then examined language concerning a person who has a conservator appointed and has no power to make a contract of any kind and asked if that language was not in conflict with later language. **Mr. Aldridge** stated that the later language was specific to contracts and would be left alone. **Senator Davis** questioned why the person had the ability to modify a contract but not the statutory ability to create. **Mr. Aldridge** stated he did not think they had the ability to modify. The sole purpose of the language was to allow them to change the flow of beneficiaries which uses a lower standard of capacity, than the whole concept of whether to enter into a contract. **Senator Davis** voiced concern why an incapacitated person could modify a contract but could not make a contract. **Mr. Aldridge** acknowledged the whole concept of capacity is very complicated and further explained the nature for the current legislation before the Committee. He further stated the intent was to keep the new language specific and simple and to not touch the whole area of contractual capacity.

MOTION: For lack of a motion the bill will remain in Committee.

ADJOURNED: There being no further business, the meeting adjourned at 2:55 p.m.

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Senator Lodge
Chair

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Carol Deis
Secretary

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Marian Smith
Assistant to Majority Leader