

MINUTES
SENATE STATE AFFAIRS COMMITTEE

DATE: Monday, March 09, 2015

TIME: 8:00 A.M.

PLACE: Room WW55 – Moved to Lincoln Auditorium - WW02

MEMBERS PRESENT: Chairman McKenzie, Vice Chairman Lodge, Senators Davis, Hill, Winder, Siddoway, Lakey, Stennett and Buckner-Webb

ABSENT/ EXCUSED: None

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 McKenzie** called the Senate State Affairs Committee (Committee) to order at 8:04 a.m.

GUBERNATORIAL APPOINTMENT: **Vote on the Appointment of George Eskridge to the Idaho Energy Resources Authority.**

MOTION: **Senator Lodge** moved to send the gubernatorial appointment of George Eskridge to the Idaho Energy Resources Authority to the floor with the recommendation that it be confirmed by the Senate. **Senator Stennett** seconded the motion. The motion carried by **voice vote**.

RS 23705 **Relating to Electric Utilities to Revise Provisions Related to the Sale of Property.**

Senator Vick explained that the proposal will modify current law to require that the sale of property by an electric public utility or electrical corporation cannot increase costs to other rate-paying customers and must be approved by the Idaho Public Utilities Commission (PUC).

MOTION: **Senator Hill** moved to print **RS 23705**. **Senator Lakey** seconded the motion. The motion carried by **voice vote**.

H 113 **Relating to Parent and Child to Provide that Parental Rights are Protected.**

Representative Trujillo stated there are three types of rights in the law: absolute, fundamental and ordinary. If a right is absolute, the government cannot regulate it at all. If a right is fundamental, the government can restrict or regulate it if there is a compelling reason and there is not a less intrusive way to do it. If a right is ordinary, the government can restrict it for virtually any reason.

For decades, courts treated parental rights as fundamental; a change occurred in 2000. An important case about parental rights came before the U.S. Supreme Court. The court ruled in favor of the parents. Tragically, the court failed to state clearly that parental rights are fundamental.

In states where there is no statute on parental rights, courts no longer feel certain that parental rights really are fundamental, and some courts have actually started downgrading those rights to merely ordinary. If parental rights remain fundamental, it will continue to work as a limitation on just how far the government can expand into the areas of how parents raise their children. But if parental rights are downgraded to ordinary, this limitation will be removed.

Many of the normal things that parents do in raising their children today, and have done for generations, could be regulated or forbidden by the government. This can be prevented by the Idaho Legislature enacting a law saying that parental rights will continue to be fundamental. It will protect the rights by putting them into a safer place, the law-books of the State of Idaho. The status of parental rights is a decision that should be made by the people through their elected representatives, not by appointed judges.

The U.S. Supreme Court has repeatedly affirmed the well-established principle that parents possess a right to control the upbringing of their children. The custody, care and nurture of the child resides first with the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder.

Senator Stennett asked if a grandmother has taken custody of a grandchild but still has the mother in residence, who would have priority over the welfare of the child. **Representative Trujillo** replied that it would depend on the legal relationship that had been established by the court. **Senator Stennett** asked what if four sets of parents come into a school and complain that the environment of a teacher's classroom should be four very different things that would be in the best interest of their children. How does a teacher navigate through appeasing the parental rights of these four parent groups? **Representative Trujillo** answered once you establish where your child goes to school your parental rights do not govern the curriculum. The parents can choose to opt out of a school if the district has that policy in place.

Testimony in support of H 113:

Julie Lynde, Executive Director, Cornerstone Family Council, advised that with the realities of this new century, it has become very important to get the protection of parental rights into writing. **H 113** is proactive legislation that understands the past, is aware of the present, and wants to secure a future that is best for society. **H 113** will do the following:

- Protects the time-honored principle of parental rights. Families and children are protected and courts are given boundaries.
- Clarifies that parents or legal guardians have the fundamental right and responsibility to determine how a child is raised and educated.
- Places in Idaho law the reasonable boundaries that guide the original understanding of parental rights. An understanding that historically directed the courts to the two-prong, strict scrutiny test before the government interfered in the parental role.

Why is this necessary:

- A steady erosion of support for parental rights has been taking place within the federal courts leaving the child-parent relationship exposed to the eminent danger of government intrusion.
- Through law and policy, government actors are establishing a new tradition that views government, not parents, as the authority in determining what is in the best interests of children.
- The dwindling support for parental rights found on the federal level has opened the door to a growing, blatant disregard of parental rights within the lower courts of the nation. Parental rights violations are increasing across the country as courts exchange parental involvement for government control in the lives of America's children.

Senator Davis advised that there have already been several cases such as *Leavitt v. Leavitt*, *Hernandez v. Hernandez*, and the *Dodd* decision; in all three of these the Idaho Supreme Court upheld the fundamental rights of the parent. These cases are plain and aggressive in the protection of the fundamental rights of parents. The Idaho Supreme Court has been stalwart in the protection of parental rights. Why does Idaho need **H 113** if the purpose is to create a precedent that might subsequently influence federal courts? **Ms. Lynde** answered that she was not certain what Senator Davis meant about the purpose being to set a precedent. The purpose of the bill is to set into code a boundary for the courts. She appreciates the cases that Senator Davis cited with the Idaho Supreme Court. Idaho does have a judiciary that tends to stand up for parental rights.

In conclusion, no government regardless of how well intentioned it might be can replace the love and nurturing of a parent in the life of a child. Parents are willing to brave danger and sacrifice, hardship and heartache to ensure the best for their kids.

Senator Stennett asked if there was a definition for fundamental parental rights in **H 113**. **Ms. Lynde** stated the definition of fundamental rights are rights in which a two-prong test is taken. The two prong test asks:

1. Does the government have a compelling interest to interject itself on the parental rights?
2. Is the government doing that by the least restrictive means?

This has been the legal understanding of the term fundamental rights as opposed to ordinary or absolute rights. **Senator Stennett** asked if the two prong definition was in **H 113**. **Ms. Lynde** responded that the two prong definition is not in the language of **H 113** because it is a definition that is understood within the legal system. **Senator Stennett** stated that if this definition is understood, then these rights should be retained regardless of whether or not the courts continued to recognize them. **Ms. Lynde** stated that is a valid concern, and what the phrase in the bill means is that no one can defy a court ruling. The statute would be in place as the boundary in Idaho, and a court decision in another state cannot override an Idaho statute.

Stephanie Gifford, representing herself, stated she feels very strongly about the need to codify parental rights. Although the courts have ruled in favor of parental rights in the past, the public cannot continue to rely on the courts to do the right thing when it comes to their rulings. It is the job of the Legislature to protect people's rights, not the courts. Codifying inherent fundamental rights such as these is not necessary because they are not given by government. In this age of increasing government overreach, it is critical for this body to take a stand to protect the family.

Emilee Murdoch, representing herself, stated the strength of society depends on the strength of the family. This bill will serve to support, strengthen, safeguard, and affirm the most fundamental unit of society. It codifies parents' fundamental rights to make decisions concerning care, custody, education and control of their children and will safeguard parents' rights against the overreach of government.

Becky Foster, representing herself, explained that the responsibility that she and her husband share to care for and protect their six children was not allotted to them by the state; it was a fundamental, God given responsibility. It is vital that the State does not take over the role of a parent. The parent child relationship is the foundational root of all society and has been since the beginning of time.

Ms. Foster believes that Idaho needs to codify the inherent rights of parents and protect those rights from those who would undermine that right.

Senator Hill stated his belief that the rights of parents are paramount. His concern is that the bill says the State is granting parents those rights, but what the State can give it can also take away. **Ms. Foster** advised that initially she had the same concerns as Senator Hill. She read through the Bill of Rights. Many times we believe our rights are already protected by the Constitution, yet the foresight of our nations founders provided the need to protect individual rights. This bill simply states that parents have inherent rights to the care, custody, education and control of their children.

Barry Peters, attorney in private practice, spoke on the history of the development of this legislation beginning with the U.S. Supreme Court cases of *Meyers v. Nebraska* and *Pierce v. Society of Sisters* in the 1920s. Both were overturned and the court ruled that parents and guardians have the right to direct the upbringing and education of their children. Over the years there have been multiple references to this language until 2000 when *Troxel v. Granville* was heard and a decision was rendered that the mother had the fundamental right to control her own children.

Senator Davis asked how this legislation changes federal court interpretation of the liberty interest in the Fourteenth Amendment. The U.S. Supreme Court has chosen to push away from the rational relationship test. When it involves civil cases the test will be clear and convincing evidence. This legislation makes it clear that even if the U.S. Supreme Court should complete the demotion of parental rights, Idaho will view them as fundamental rights and impose the strict scrutiny requirement before the State can intrude and overrule the rights and intentions of the parents. **Senator Davis** clarified that this legislation is to provide within the State's courts guidance when it comes to the protection of parental rights; that they are to be fundamental rights, and Idaho chooses to have a narrow standard.

Senator Lakey advised that the right of a guardian is created by the court pursuant to statute. Does this bill create a situation where a legal guardian would have a fundamental right? **Mr. Peters** stated that the declarations in this bill are the starting point. There is a great deal of flexibility within the statutes and the constitutional principles that already exist. The courts have had 90 years of court case experience in dealing with the rights of parents and guardians. This is an important bill to firm up parental rights so they are not jeopardized by what might occur in the future.

Senator Davis asked if it is absolute that a parent has the right to control or direct the upbringing and education of a child. **Mr. Peters** responded that it was not.

Testimony in opposition of H 113:

Linda Martin, representing herself, stated that she believed that parents rights were important and should be protected as long as those rights do not cause harm or death to a child. She was raised in a faith healing community in Boise. Under Idaho statute, parents have the right to withhold medical treatment based solely on the parent's religious beliefs. **H 113** will give legal guardians the same rights, which may put even more children's lives at risk. This bill is in direct conflict with Idaho Statute § 18-1523(2) which says a child under 14 years of age shall not be branded, tattooed or body pierced. Another bill, H 177, is also attempting to add tanning beds to that statute. Parents in Idaho can decide to withhold basic lifesaving medical care but do not have the right to allow a child to be tattooed or pierced.

Idaho has lenient homeschooling regulations with little oversight. This allows parents with limited education to teach their children. These children do not learn the necessary skills to be self-sufficient and thrive in life. By adding education

to the language in Chapter 10, Title 23 of Idaho Code, many of these parents will believe that they have the right to withhold education completely from their children. There have been no examples presented to show how much parental rights in Idaho are under attack. She requested that the Committee vote against **H 113**. It is time for the Idaho Legislature to find a way to balance parental rights and children's rights so children can lead safe, happy and healthy lives.

Ben Wilson representing the Interfaith Alliance of Idaho, spoke of the dangerous premise of this legislation. The Followers of Christ faith and the 209 out of 593 graves in Peaceful Valley Cemetery that are for minor children who went untreated because of their parents' faith. Those mortality numbers are 30 percent higher than any across the State. It is not a failure of faith that these children are dead, it is the failure of the State to promote these children's well being and their rights, and the failure to prosecute those who promote negligence and danger in the name of religion. Faith is a supplement to the responsible actions of responsible parents and guardians. This bill fails to make any explicit distinction by making an effort to investigate the circumstances of the death of children.

Janet Heimlich, Executive Director, Child-Friendly Faith Project (CFFP), opposes **H 113** because its language is broad and vague, and it has the potential to allow unfit parents too much power in controlling the lives of their children. The bill has two significant problems:

1. It gives a vague definition of fundamental parental rights.
2. It states that those rights will be retained regardless of whether courts continue to recognize them.

CFFP disputes the notion that parental rights in Idaho are under attack. If parents' rights need to be codified or expanded, then CFFP urges the Legislature to take one of two actions: 1) pass a bill that speaks to the specific areas where the laws fall short, or 2) pass **H 113** adding the provision that these rights shall not be construed to apply to a parental action or decision that would lead to the physical, sexual or emotional abuse or the educational, medical, or physical neglect of a minor.

Senator Davis clarified that if the bill is intended to adopt an approximate 90 year old judicial standard, don't you believe that the government can demonstrate a compelling governmental purpose in protecting the life and safety of children. **Ms. Heimlich** answered there are many individuals who believe that the rights of children are not protected. If a child can be denied medical care simply because they are being raised by a parent of a certain religious persuasion, then there needs to be diligence to make sure that child's rights are not eroded. A lengthy discussion ensued concerning the language being too broad and vague.

Judy Cross, President of the Board of Directors, Interfaith Alliance of Idaho (IAOI), advised that not all parents are able or have the knowledge or resources to fully protect their children. Her concern was that **H 113** put parental rights ahead of the child's safety. If there is to be error in legislation it should be in favor of children because they are the ones that have no voice. She advised the Committee to consider the wording, constitutionality and consequences of the bill.

Michael Henderson, Legal Counsel, Idaho Supreme Court, advised that Representative Trujillo consulted with the Administrative Office of the Court about this bill. Senior Judge Barry Wood discussed the bill with her in length. As they continued to scrutinize the legislation the following concerns surfaced and should be considered:

1. Under Section 1 parents and legal guardians that have legal custody of minor children have a fundamental right to make decisions concerning the care, custody, education and control of their child. Subsection 3 refers to this as a codification of parents' and legal guardians' fundamental rights as now recognized by law. This is not precisely a statement of what the courts have recognized in that regard. In the recent court case of Doe v. Doe, which terminated the parental rights of Doe, the Idaho Supreme Court determined that parents have a fundamental right to maintain a familiar relationship in the custody, care and control of their children. This right is protected by the Fourteenth Amendment. The court has used this same language in a few other cases.
2. There is a concern about including legal guardianship in the legislation. Parental rights are not dependant on the Legislature or the Idaho courts' determination. Parents do have a fundamental right to the care, custody and control of their children. A fundamental right means that parents have a right that can be restricted only when it is necessary to advance a compelling state interest. The law must be narrowly tailored to that interest. When you apply this to legal guardianship, it will be problematic. Guardianship is controlled by statute enacted by the Legislature. You may have testamentary guardianship with parents out of picture and where the child has been abandoned, abused or neglected. In those situations you have a parent that is still in the picture whose parental rights have not been terminated.

Including legal guardianship in the legislation, giving them the same fundamental right to care, custody and control that parents have, limits the ability of this Legislature to set standards for guardianship. It will place limitations on the ability of the court to oversee those cases and will create complications between the rights of guardians and parents.

Senator Lakey asked if guardianship should be excluded or clarified in the bill. **Mr. Henderson** answered if the guardianship language remains in the bill, the Legislature should clarify how the courts should proceed. **Senators Stennett** and **Hill** discussed their issues on how the courts would apply the wording of "parents and legal guardians who have legal custody of minor children have this fundamental right to make these decisions". Does the phrase "who have legal custody of minor children" apply only to legal guardians or to the parents as well? **Mr. Henderson** answered that the court would codify what is in law; parents would still have the fundamental right with regard to care, custody and control regardless of whether they physically had legal custody of their children. This would be modified if there was a guardianship.

MOTION:

Senator Davis moved to hold **H 113** for time certain of Friday, March 13, 2015. **Senator Hill** seconded the motion. The motion carried by **voice vote**.

Senator Davis stated his reason for holding the bill is it would allow the sponsors of this bill some time to communicate on the concerns with the legislation that have been expressed. **Senators Lakey** and **Lodge** stated they were in favor of the concepts and they would help with amendments.

Senator Stennett had concerns with the language in the bill that gives both parents and legal guardians the same fundamental rights and places the Legislature at odds statutorily and constitutionally with what they are required to do. She can support the bill if there is a better definition of parent and guardian rights.

**PASSED THE
GAVEL:**

Chairman McKenzie passed the gavel to Vice Chairman Lodge.

**S 1106
CONT.**

Relating to Controlled Substances to Revise and Define Definitions Related to "Cannabidiol Oil" (CBD oil).

Senator McKenzie noted that this bill was presented to the Committee on Wednesday, and there were a number of concerns about the approach. He researched legislation on CBD oil from other states and tried to incorporate some changes into **S 1106** that addressed each of those concerns raised at Wednesday's meeting. He circulated this draft to other Legislators who had helped draft the bill, the Committee, and the different organizations that had testified. He received comments back from the Office of Drug Policy on Friday and amended the language to address the following concerns:

- Do we want the parents of children who are suffering from these intractable epilepsy conditions to have access to the CBD oil?
- Do we want to set drug policy in the State or should it be open to the federal government?
- How do we address the concerns that were expressed about the use of drug dogs to investigate drug crimes and the fear of opening up CBD Oil abuse?

The approach taken was an affirmative defense to a limited category of people with very high sideboards. Under this approach the State is not legalizing the oil it is just initiating a defense in court. The parent having the CBD oil for their child must have a written recommendation from a physician licensed in Idaho. The oil must be in a container with its original label from the manufacturer showing that it meets the definition of CBD Oil. An independent laboratory must have verified the THC and CBD percentages, and the oil qualifies within Idaho's definition of CBD Oil.

MOTION:

Senator Winder moved to hold **S 1106** in Committee to the call of the Chair, no later than Friday, March 13, 2015. **Senator Davis** seconded the motion.

**SUBSTITUTE
MOTION:**

Senator Davis moved that **S 1106** be referred to the 14th Order for possible amendment. **Senator Siddoway** seconded the motion.

Senator Lakey advised that there are concerns about making the language in the bill workable for the medical community, law enforcement and the parents of the affected children. It would be better to deal with this outside of the 14th Order.

Senator Stennett was inclined to support the original motion of a date certain.

**ROLL CALL
VOTE:**

Vice Chairman Lodge requested a roll call vote on the substitute motion. **Senators Davis, Siddoway** and **Chairman McKenzie** voted aye. **Vice Chairman Lodge** and **Senators Hill, Winder, Lakey, Stennett** and **Buckner-Webb** voted nay. The substitute motion failed.

The original motion carried by **voice vote**.

**PASSED THE
GAVEL:**

Vice Chairman Lodge passed the gavel to Chairman McKenzie.

ADJOURNED:

Chairman McKenzie adjourned the meeting at 10:26 a.m.

Senator McKenzie
Chair

Twyla Melton, Secretary

Carol Deis, Assistant Secretary