

MINUTES  
**SENATE JUDICIARY & RULES COMMITTEE**

**DATE:** Friday, March 15, 2019  
**TIME:** 1:00 P.M.  
**PLACE:** Room WW54  
**MEMBERS PRESENT:** Chairman Lakey, Vice Chairman Lee, Senators Lodge, Anthon, Burgoyne, and Nye  
**ABSENT/ EXCUSED:** Senators Thayn, Grow, and Cheatham  
**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 Lakey** called the meeting of the Senate Judiciary & Rules Committee (Committee) to order at 1:00 p.m.  
**GUBERNATORIAL RE-APPOINTMENT HEARING:** **Committee Consideration of Gubernatorial Re-appointment Hearing** of Dr. David McClusky for Re-appointment to the Idaho State Board of Correction (Board).

**Dr. McClusky** stated that he was a third generation physician in Twin Falls, Idaho. He served in the United States Air Force as an officer for four years. He mentioned being involved in several community organizations, including founding Camp Rainbow Gold, and starting the first hospice in the Magic Valley. He was the Chairman of the Tobacco Advisory Committee and co-founder of the Wellness Tree, which is a free clinic taking care of refugees, the homeless, and those recently released from prison. He has recently become a part of Joining Forces in the Magic Valley. Their focus is helping veterans receive medical and dental care. **Dr. McClusky** also indicated that he is a professor of surgery on the new medical school board in Boise.

**Dr. McClusky** said that he felt his medical background, plus his ability to work hard and to deal with those in the community who have lesser opportunities, are the things that he can bring to the Board. He explained that there were two elements he felt were important in his position on the Board. The first one is trying to make sure people do not have to go into the prison system. He sees the absence of early and good education, the absence of good mental health, and the absence of a safe caring home is what brought most of the people that are in the prison system to that system. The second element is providing help for those who are in the prison system by helping them get a good education, teaching them to take care of their health needs, and having an opportunity to work in the community.

## H 30

**Relating to Psychiatric Examinations.** **Blake Brumfield**, Program Manager, Developmental Disability Crisis Prevention and Court Services, Division of Family and Community Services (Division), stated that **H 30** would be amended to require that if a defendant was thought not fit due to a developmental disability, a Division Evaluation Committee consisting of a psychologist, physician, and a social worker would perform an examination. There are obstacles related to using a school psychologist to perform these evaluations rather than a DD Evaluation Committee. It is difficult to determine malingering (faking incompetency) because of the challenge of gathering the patient's history. The Evaluation Committee meets and does examinations with people with disabilities so they are more familiar with the testing instruments and more experienced with interpretation. The Evaluation Committee is vetted by the director and they are licensed in their professions. If restoration is needed, an adequate assessment of risk is performed prior to placement and the patient would go into the least restrictive setting. **H 30** does not remove the defendant's ability to call their own experts to perform their own evaluations. According to 2018 statistics, it would cost the counties approximately \$1,000 to add a physician to the examination committee, while costs for the social worker are primarily borne by the Department of Health and Welfare (DHW). These changes are consistent with Children's Competency Evaluation, the Guardianship Code, and the Idaho Code for Civil Commitments. (See Attachment 1)

### DISCUSSION:

**Senator Anthon** stated that his understanding was that a finding by the court is made to determine if the person is developmentally disabled. He asked if someone in a civil setting would be evaluated with the same amount of rigor to make sure their property and decision making power is not taken away. **Mr. Brumfield** responded that the Evaluation Committee presents the facts to the judge to come to his conclusion. The civil liberties are not removed in a civil matter unless they are found not fit to proceed after 270 days of restoration and then they will lose some civil liberties.

**Senator Burgoyne** asked Mr. Brumfield to clarify the role of the DHW in the evaluation process. **Mr. Brumfield** stated that if the evaluation result is that the person is not competent, then the burden falls to the DHW in terms of dealing with that person. Being involved in the initial evaluation helps the DHW to manage the individual with respect to their custodial obligations. The more time and history they have available to them, the more accurate the decision will be regarding placement. **Senator Burgoyne** referenced a letter from Kelly Kumm (see Attachment 2) and asked if Mr. Brumfield felt that **H 30** was being redundant. **Mr. Brumfield** replied that the courts and the Attorney General were interpreting it differently. He stated that the recommended changes will make it less ambiguous.

### TESTIMONY:

**Tom Arkoosh**, representing the Association of Criminal Defense Council, stated that they oppose the passage of this bill due to its ambiguities. **Mr. Arkoosh** explained that in one proceeding the DHW pays for the commitment. In another instance, if the family or the individual committed can pay for it, they have to pay. The Eighth Amendment prevents excessive fines. There is litigation going on surrounding this issue. He stated that his understanding was if a developmental disability was determined and it goes in front of a committee, then a change in funding is required.

**DISCUSSION:** **Chairman Lakey** suggested working on the language and getting consensus from the people involved. **Senator Burgoyne** indicated that it was his understanding that there was a divergence of legal opinion on whether or not the bill would be redundant to existing law or not. **Mr. Brumfield** stated that he thought the issue was easily resolved by clarity in the language. He explained that at least 13 courts chose to use a school psychologist rather than an evaluation committee. This outcome is inconsistent with how he interpreted the language, but the courts' interpretation is different.

A discussion was held among **Senator Burgoyne**, **Senator Nye**, and **Mr. Brumfield** regarding the fiscal note. The fiscal impact will vary depending on how many competencies the Evaluation Committee does each year. Medicaid will pay for 50 percent of the evaluation costs.

**MOTION:** **Senator Burgoyne** moved to send **H 30** to the 14th Order of Business for possible amendment. **Senator Anthon** seconded the motion. The motion carried by **voice vote**.

**H 139** **Relating for Foreign Defamation Judgments.** **Representative Barbara Ehardt**, District 33, House of Representatives, introduced **H 139** and said state courts have been put in a position to deal with libel suits, which are being called libel terrorism. Some federal legislation has not been successful causing states to pass their own laws. This bill has had wide bipartisanship support and media support. Representative Ehardt listed the states who have passed laws and they range from conservative to more liberal. The courts want the state legislatures to have the responsibility of articulating clearly what the State's public policy will be.

**TESTIMONY:** **Stephen Sharer**, Attorney, Meridian, Idaho testified in support of the bill. **Mr. Sharer** began his testimony by describing the two types of defamation law in Idaho including a statutory definition and a common law definition. Statutory defamation provides exemptions and protections for publications and broadcasting. Defamation consists of communication to a third person of false information which either intends to impugn the honesty, integrity, virtue or reputation of the person, or exposes that person to public hatred, contempt, or ridicule. **Mr. Sharer** stated that we need this law because we have protections that keep people from getting a judgment in the United States but we don't currently have protections against foreign judgments. This legislation will give instruction to the Idaho judicial system of how they should address the claims when a foreign judgment is entered in a different country and then filed in Idaho for collection. This law specifically addresses which judgments are valid and which ones are not. The law requires American due process and subject matter jurisdiction for the judgment to be granted in full faith and credit. It provides a statement regarding which judgments will not be recognized and allows an Idaho resident to obtain a declaratory judgment to determine whether or not the judgment should be enforced, provides protections for those who may have their judgments challenged in Idaho, and allows residents to seek injunctive relief.

**DISCUSSION:** **Senator Burgoyne** asked if there was anything in this law that would conflict with any of the treaties between the United States and foreign powers. **Mr. Sharer** replied that he did not know. **Senator Burgoyne** questioned whose law applies when an issue is raised. **Mr. Sharer** explained that if the question applies to a foreign court, that is exactly the issue that is being addressed in **H 139**. In the United States, the state which enters the judgment is entitled to full faith and credit in the State of Idaho. He stated that he was not aware of any law that has federal preemption that would preempt a defamation judgement. If a foreign court does not have personal jurisdiction over the defendant, or subject matter jurisdiction, a lawsuit can not continue. **Senator Burgoyne** asked if **H**

**139** had been patterned on laws that have been adopted in other states. **Mr. Sharer** replied in the affirmative.

**Representative Ehardt** closed by stating that **H 139** will codify that which Idaho wants and what it values.

**MOTION:** **Senator Anthon** moved to send **H 139** to the floor with a **do pass** recommendation. **Vice Chairman Lee** seconded the motion.

**Chairman Lakey** commented that this bill was not triggered by someone from a foreign jurisdiction coming to Idaho and trying to enforce the judgment here but he could see circumstances where this bill would be needed. He suggested looking at the fiscal note due to the costs of possible trials and the impact on existing budgets.

**VOICE VOTE:** The motion to send **H 139** to the floor with a **do pass** recommendation passed by **voice vote**. **Senator Nye** requested that his nay vote be recorded.

**S 1124** **Relating to Domestic Relations Regarding Visitation Rights of Grandparents and Great Grandparents.** **Senator Dean Mortimer**, District 30, Idaho Senate, introduced **S 1124** by giving a brief background on the history of grandparent legislation. Idaho has a statute that has not been updated since 1994. It is time for Idaho to have some clarity on the parameters not only for grandparents' and the great grandparents' rights, but also what it would take to make sure that parents rights are protected.

**DISCUSSION:** **Vice Chairman Lee** requested a copy of the amendments for **S 1124** for the Committee to reference (see Attachment 3).

**TESTIMONY:** **Brian Defriez**, attorney, Caldwell, Idaho, stated that one of the benefits of the new statute is that it puts Idaho litigants, petitioners, grandparents, and great grandparents on notice of the constitutional requirements that already exist in case law. It takes those tenants and makes them available so that petitioners can know what is required of them in petitioning and what the burdens of proof are. One other benefit of this legislation is that in the *Leavitt v. Leavitt* case, the Idaho Supreme Court made a point that grandparent visitation in Idaho is not subject to the best interest factors that apply in normal custody disputes. This legislation adds a comprehensive set of best interest factors which the Supreme Court has deemed constitutional. **Vice Chairman Lee** commented that she is concerned about inserting "best interests" in any significant policy proposal. She has worked on other legislation and the "best interests" issue has not been resolved. **Mr. Defriez** stated that he sees the new legislation being consistent with the policy adopted in 1972. It gives a set of criteria that judges can look to in determining best interest. Litigants are given notice that factors are giving heightened protection to parents. They are giving parents a voice in the decision regarding visitation and it can only be overcome by clear and convincing evidence that it will be in the child's best interests. The legislation contains a definition for visitation which clarifies that it is limited to contact with the child and it is not to be extended to anything that would approximate legal or physical custody rights. The courts are also allowed to award reasonable attorney fees if it finds the petitions are brought without foundation.

**DISCUSSION:** **Vice Chairman Lee** questioned where the venue would be. **Mr. Defriez** stated that venue and jurisdiction generally mean the place where the defendants reside. **Vice Chairman Lee** was concerned with the unfair imbalance in relation to visiting privileges and finances. **Mr. Defriez** stated that of the Idaho cases he was aware of, every effort was made to protect the parents' rights. That protection is not absolute in the sense that the State still retains interest in looking after the best interest of the children. In addressing the financial burdens, **S 1124** would allow the courts to award reasonable attorney fees to the parent when the court finds a petition was pursued unreasonably or frivolously.

A discussion was held among **Vice Chairman Lee, Senator Anthon, Senator Burgoyne, Senator Mortimer,** and **Mr. Defriez** regarding how important grandparents can be in the lives of children when there is a breakdown in their homes. **Vice Chairman Lee** expressed concern about an uneven balance from the courts with respect to the parents. **Mr. Defriez** reiterated that in his opinion this legislation would strengthen parents' rights because it puts into code the tenants of rebuttable presumption. **Senator Mortimer** indicated that he agreed that there can be a disparity between finances. He believes that the change of legislation requiring the party who does not prevail to be responsible for costs, may be somewhat of a protection.

**MOTION:** **Senator Nye** moved to send **S 1124** to the 14th Order of Business for possible amendment. **Senator Lodge** seconded the motion. Motion carried by **voice vote**.

**ADJOURNED:** There being no further business, **Chairman Lakey** adjourned the meeting at 2:35 p.m.

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Senator Lakey  
Chair

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Sharon Pennington  
Secretary