EXHIBIT 3
DATE 1/30/2009
SB SB 40

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Children, Families, Health, and Human Services Interim Committee

60th Montana Legislature

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TO: Committee members
FROM: Lisa Mecklenberg Jackson, Staff Attorney
RE: Background for bill draft regarding friend of respondent in involuntary commitment proceedings
DATE: August 7, 2008

As you may recall from your June 2008 CFHHS meeting, I discussed with you a recent Montana Supreme Court case, The Matter of the Mental Health of D.V., 2007 MT 351, 340 Mont. 319, 174 P.3d 503, in which D.V., arrested for family member assault after he allegedly threatened his mother, was involuntarily committed to the Montana State Hospital for 90 days. The Montana Supreme Court held that the district court erred in appointing the respondent's mother to act as his "friend" when she was also the complaining witness, an obvious conflict of interest. The court urged the legislature to amend Title 53, Chapter 21, and set forth some qualifications or criteria for appointing only unbiased and objective individuals to act as "friend" of the respondent in involuntary commitment cases. At the June meeting, the CFHHS Committee asked that a bill draft be written to address this recommendation.

A BIT OF BACKGROUND:

The friend of the respondent is defined in 53-21-102(8), MCA.

"Friend of respondent" means any person willing and able to assist a person suffering from a mental disorder and requiring commitment or a person alleged to be suffering from a mental disorder and requiring commitment in dealing with legal proceedings, including consultation with legal counsel and others. The friend of respondent may be the next of kin, the person's conservator or legal guardian, if any, representatives of a charitable or religious organization, or any other person appointed by the court to perform the functions of a friend of respondent set out in this part. Only one person may at any one time be the friend of respondent within the meaning of this part. In appointing a friend of respondent, the court shall consider the preference of the respondent. The court may at any time, for good cause, change its designation of the friend of respondent.

In 1979, all references to "responsible person" in Title 53, chapter 21, were amended to "friend of respondent." Under section 53-21-122, MCA, the court shall appoint someone in the role of "friend of respondent" in involuntary commitment procedures. If no family member or friend is identified or interested in serving, the court will appoint another individual to serve in this capacity, such as a representative from NAMI, or Disability Rights Montana, or even a law clerk. This person works with the respondent's attorney, often a public defender, to make sure the

respondent's rights are respected and any actions undertaken are in the respondent's best interest.

Specific Duties of the Friend of the Respondent:
-assist with legal proceedings (53-21-102(8), MCA)
-may secure attorney of own choice for the respondent (53-21-117, MCA)
-may secure professional person of own choice to examine respondent and testify at hearing (53-21-118, MCA)
-if respondent not capable of making knowing decision, friend and counsel may act together to waive respondent's rights (can't waive right to counsel or right to treatment). May also waive respondent's right to be physically present at hearing if certain conditions are met (i.e. respondent's presence at the hearing would adversely affect his or her mental condition) (53-21-119, MCA)
-friend of respondent must be notified of future legal actions involving the respondent, such as a petition for commitment by the county attorney (53-21-121(2)(f), MCA) or an extension of the respondent's commitment period (53-21-128, MCA)

Because the primary role of the friend of the respondent is to advocate for the respondent, by its very nature the role of the friend can't be "unbiased" or "objective," words the court was looking for from the legislature in its opinion. In addition, it would be virtually impossible to determine if an appointed friend is "unbiased" or "objective," which is a very subjective standard indeed. Accordingly, the attached bill draft uses the words "The friend may not be a party in the litigation involving the respondent" and "the court must change the designation of the friend if it determines that a conflict of interest exists." Hopefully, this will address the rather unusual situation of concern to the Montana Supreme Court in the Mental Health of D.V.

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