

## LEGAL REVIEW NOTE

**Bill No.:** HB 436

**LC#:** LC 0882, To Legal Review Copy, as  
of January 16, 2023

**Short Title:** Revise laws related to judge  
substitution

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**Date:** February 7, 2023

### CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

*As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.*

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See *Alexander v. Bozeman Motors, Inc.*, 356 Mont. 439, 234 P.3d 880 (2010); *Eklund v. Wheatland County*, 351 Mont. 370, 212 P.3d 297 (2009); *St. v. Pyette*, 337 Mont. 265, 159 P.3d 232 (2007); and *Elliott v. Dept. of Revenue*, 334 Mont. 195, 146 P.3d 741 (2006).*

#### Legal Reviewer Comments:

HB 436, as drafted, may raise potential constitutional issues associated with Article VII, sec. 2, of the Montana Constitution and the separation of powers doctrine.

Article VII, sec. 2, provides:

**Section 2. Supreme court jurisdiction.** (1) The supreme court has appellate jurisdiction and may issue, hear, and determine writs appropriate thereto. It has original jurisdiction to issue, hear, and determine writs of habeas corpus and such other writs as may be provided by law.

(2) It has general supervisory control over all other courts.

(3) It may make rules governing appellate procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members. Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation.

(4) Supreme court process shall extend to all parts of the state. (emphasis added).

For example, in Coate v. Omholt, 203 Mont. 488, 662 P.2d 591(1983), the Montana Legislature enacted laws setting time limits on the number of days a judge had to issue a ruling. The law was declared unconstitutional on three grounds by a District Court. The Supreme Court affirmed, and in its ruling, the court specifically analyzed Article VII, sec. 2(3);

The second sentence of subdivision (3) obviously means, without the necessity for any strained construction, that as to rules of appellate procedure and rules of procedure for other courts, such as the Montana Rules of Civil Procedure, the promulgation of such rules is subject to disapproval by the legislature.

Without question, Art. VII, § 2(3) vests in the Supreme Court the authority to adopt rules for appellate procedure and trial and appellate procedures "for all other courts." Just as clearly, the legislature is empowered to veto any such rules promulgated by this Court. However, once a legislative veto is exercised, the legislature is not empowered to fill the vacuum by enacting its own legislation governing appellate procedure or lower court procedure.

Coate v. Omholt, 203 Mont. at 504, 662 P.2d at 600 (1983).

HB 436, as drafted, amends section 3-1-804, MCA, by revising the procedures related to substitution of judges and allowing a motion for substitution to be filed in child abuse and neglect cases. Section 3-1-804, MCA, codifies a rule of procedure of the Montana Supreme Court. Consequently, because HB 436 revises a Montana Supreme Court rule of procedure, it raises the potential issue of whether those revisions conform to the provisions of Article VII, sec. 2, of the Montana Constitution that limit the Legislature's authority to disapproval of the rules in either of the two sessions following promulgation.

**Requester Comments:**