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January 16, 1985

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THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Mr. Birch:

You have requested an opinion regarding (1) the legal age for the consumption of alcohol, (2) statutory prohibitions against furnishing alcohol to or procuring alcohol for persons under age, and (3) the scope of exceptions, as set forth in Idaho Code § 23-1023, to these statutory proscriptions.

Specifically, you request guidance on how the exceptions in Idaho Code § 23-1023 apply to the holding of graduation parties "on private property each year, at which parties minors are allowed to consume alcohol under the supervision of chaperones."

As you note in your letter, the answers to your first two questions are clear-cut. The legal age for consumption of alcohol is nineteen years or older. Idaho Code § 23-949 (alcoholic liquor); 23-1023 (beer); 23-1334(a) (wine). A person who furnishes or procures alcohol to or for a minor is guilty of a misdemeanor. Idaho Code §§ 18-1502(a); 23-603; 23-1023; see Idaho Code §§ 23-929; 23-1013; 23-1334(b) and (d).

The answer to your final question--i.e., the scope of exceptions to these statutory prohibitions--is less clear. You raise several concerns and the statute itself raises still others.

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The plain and literal wording of the statute must be our starting point. Local 1494 of International Association of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 639, 586 P.2d 1346 (1978). Thus, we begin by quoting the statute, Idaho Code § 23-1023, in full:

Any person who shall procure beer for any person under nineteen (19) years of age or any person under nineteen (19) years of age who shall purchase, attempt to purchase or otherwise procure, consume or possess beer, shall be guilty of a misdemeanor. This section does not apply to possession by a person under the age of nineteen (19) years making a delivery of beer in pursuance of the order of his parent or in pursuance of his employment, or when such person under the age of nineteen (19) years is in a private residence accompanied by his parent or guardian and with such parent's or guardian's consent. (emphasis added)

Your first concern is whether the "private residence" exception is limited exclusively to the residence of a parent or guardian. A plain reading of Idaho Code § 23-1023 is that it does not restrict possession of beer by a minor to the private residence of the minor's parent or guardian. Possession is allowed in "a"--or any--private residence so long as the minor is accompanied by his or her parent or guardian and has the parent's or guardian's consent.

Next, you ask whether "the supervision of (adult) chaperones" can substitute for that of the minor's own "parent or guardian," as required by statute. The answer is no. Under Idaho law, a person becomes the "guardian" of a minor only by "testamentary appointment or upon appointment by the court." There is no precedent, either in Idaho law or elsewhere, for a loose usage of the word "guardian" that would extend to chaperones. See 39 Am.Jur. 2d "Guardian and Ward."

Thus, in the graduation party context, the exception carved out by Idaho Code § 23-1023 does extend to the private residences of adults other than the minor's parents or guardian; but it does not extend to substitution of chaperones for that of the minor's own parents or guardian.

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A final cluster of problems surrounding Idaho Code § 23-1023 poses a trap for the unwary and a dilemma for prosecutors. On these items, we offer only the fruits of our research. Enforcement obviously remains a delicate matter of prosecutorial discretion.

For one thing, it should be pointed out that the Idaho Code § 23-1023 exception to the state's alcoholic beverage laws appears only in chapter 10, i.e., "the beer law." There is no parallel exception in chapter 9 (the alcoholic liquor law) or in chapter 13 (the wine law). Thus, even if Idaho Code § 23-1023 can be construed to allow minors to consume beer in a private residence when accompanied by a consenting parent or guardian, no such exception exists for wine or other alcoholic beverages. Taken literally, this would mean that a parent could not serve a minor a cup of Christmas egg nog, or a sip of New Year's Eve champagne, or even a glass of wine at a religious Passover observance.

Furthermore, as you note in your letter, the exception spelled out in the beer law is unambiguous only with regard to "possession," not "consumption," of beer. The plain reading of Idaho Code § 23-1023 is that a minor may possess beer (1) if making a delivery for his or her parent or employer, or (2) if in a private residence, accompanied by and with the consent of his or her parent or guardian.

It would be plausible to read the second portion of Idaho Code § 23-1023 as allowing a minor to lawfully consume as well as "possess" beer, and as allowing an adult to lawfully procure the beer, so long as the "private residence" exception is otherwise satisfied. An argument supporting this contention would be that Idaho Code § 23-1023 should be construed to make sense. Gavica v. Hanson, 101 Idaho 58, 60, 608 P.2d 861 (1980). And the section does not make much sense if construed as allowing possession but not consumption.

Though plausible, such a reading might not prevail. Taken literally, the entire second sentence of Idaho Code § 23-1023 applies only to possession, not consumption, of beer. This restricted reading is supported by the title of the enacting bill, which read in part: "...AND MAKING EXCEPTION TO CERTAIN KINDS OF 'POSSESSION.'" 1967 Sess.L., Ch. 351 at 995.

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Moreover, the conspicuous omission of "consumption" from the second sentence--after "consume" is specifically enumerated in the first sentence along with "possess"--could be read as a deliberate exclusion of consumption from the ambit of the second sentence. See Local 1494, supra at 639; Peck v. State, 63 Idaho 375, 380, 120 P.2d 820 (1941).

Also troubling is the fact that the prohibitions against procuring and furnishing beer for minors, set forth in Idaho Code § 23-1023 and other sections cited above, are not expressly excepted by the express wording of Idaho Code § 23-1023. Taken literally, this could lead to the result that Idaho Code § 23-1023 gives a minor the right to possess beer, but denies any legal means (i.e., procurement by adults) to transform the right into a practical reality.

Dictum in the Idaho case of State v. Bush, 93 Idaho 538, 466 P.2d 578 (1970), acknowledges that ambiguities exist in the code provisions regarding alcohol. Bush reads Idaho Code § 23-1013 to prohibit the sale, serving, or dispensing of beer to a minor by a private person, whether pursuant to a commercial transaction or not. Justice McQuade, in a concurring opinion, expressed misgivings about the court's holding vis-a-vis section 23-1023:

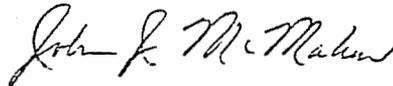
Prosecutions under Idaho Code § 23-1013 in situations not involving a commercial transaction may modify the safeguards afforded parents in Idaho Code § 23-1023. Parents and friends of parents may be prosecuted for serving minors beer in the privacy of their residences, despite the presence and permission of parents . . . We must look to the legislature to safeguard the citizens of Idaho from the jeopardy of a criminal conviction under Idaho Code § 23-1013 for "dispensing" beer to their children and their friends' children in the privacy of their own homes. I call attention to that body to make its intention clear and unambiguous.

93 Idaho at 541.

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In the fifteen years since Bush, the legislature has not seen fit to "make its intention clear and unambiguous" regarding the scope of Idaho Code § 23-1023's private residence exception. Until the legislature takes such action, the citizens of Idaho must remain in "jeopardy of a criminal conviction . . . for 'dispensing' beer to their children and their friends' children in the privacy of their own homes," and the prosecutors of Idaho must remain in a quandary as to their duties in this delicate matter.

Sincerely,



JOHN J. McMAHON
Chief Deputy

JJM/lh