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SENATE BILL NO. 257  
INTRODUCED BY J. BOHLINGER

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR PROTECTION OF ABANDONED CHILDREN; SPECIFICALLY INCLUDING ABANDONMENT AS A BASIS FOR ABUSE OR NEGLECT PROCEEDINGS AND A DETERMINATION THAT A CHILD IS A YOUTH IN NEED OF CARE; AMENDING DEFINITIONS; PROVIDING THAT CERTAIN CARETAKERS OF A CHILD MAY PARTICIPATE AS PARTIES IN ABUSE AND NEGLECT PROCEEDINGS INVOLVING THAT CHILD; REQUIRING A COURT TO RECEIVE CERTAIN EVIDENCE AT A HEARING ON AN ABUSE OR NEGLECT PETITION; AMENDING SECTIONS 41-3-102, 41-3-401, AND 41-3-404, MCA; AND PROVIDING AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 41-3-102, MCA, is amended to read:

**"41-3-102. Definitions.** As used in this chapter, the following definitions apply:

(1) "Abandon", "abandoned", and "abandonment" mean:

(a) leaving a child under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the future;

(b) willfully surrendering physical custody for a period of 6 months and during that period not manifesting to the child and the person having physical custody of the child a firm intention to resume physical custody or to make permanent legal arrangements for the care of the child; or

(c) that the parent is unknown and has been unknown for a period of 90 days and that reasonable efforts to identify and locate the parent have failed.

(2) "A person responsible for a child's welfare" means:

(a) the child's parent, guardian, foster parent or an adult who resides in the same home in which the child resides;

(b) a person providing care in a day-care facility;

(c) an employee of a public or private residential institution, facility, home, or agency; or

(d) any other person responsible for the child's welfare in a residential setting.

1 (3) "Abused or neglected" means the state or condition of a child who has suffered child abuse  
2 or neglect.

3 (4) (a) "Adequate health care" means any medical care or nonmedical remedial health care  
4 recognized by an insurer licensed to provide disability insurance under Title 33, including the prevention  
5 of the withholding of medically indicated treatment or medically indicated psychological care permitted or  
6 authorized under state law.

7 (b) This chapter may not be construed to require or justify a finding of child abuse or neglect for  
8 the sole reason that a parent or legal guardian, due to religious beliefs, does not provide adequate health  
9 care for a child. However, this chapter may not be construed to limit the administrative or judicial authority  
10 of the state to ensure that medical care is provided to the child when there is imminent substantial risk  
11 of serious harm to the child.

12 (5) "Best interests of the child" means the physical, mental, and psychological conditions and  
13 needs of the child and any other factor considered by the court to be relevant to the child.

14 (6) "Child" or "youth" means any person under 18 years of age.

15 (7) (a) "Child abuse or neglect" means:

16 (i) actual harm to a child's health or welfare; ~~or~~

17 (ii) substantial risk of harm to a child's health or welfare; or

18 (iii) actual abandonment or substantial risk of abandonment.

19 (b) The term includes actual harm or substantial risk of harm by the acts or omissions of a person  
20 responsible for the child's welfare.

21 (c) The term does not include self-defense, defense of others, or action taken to prevent the child  
22 from self-harm that does not constitute harm to a child's health or welfare.

23 (8) "Department" means the department of public health and human services provided for in  
24 2-15-2201.

25 (9) "Harm to a child's health or welfare" means the harm that occurs whenever the parent or other  
26 person responsible for the child's welfare:

27 (a) inflicts or allows to be inflicted upon the child physical or psychological abuse or neglect;

28 (b) commits or allows to be committed sexual abuse or exploitation of the child;

29 (c) induces or attempts to induce a child into giving untrue testimony that the child or another  
30 child was abused or neglected by a parent or person responsible for the child's welfare;

1 (d) causes malnutrition or failure to thrive or otherwise fails to supply the child with adequate food  
2 or fails to supply clothing, shelter, education, or adequate health care, though financially able to do so or  
3 offered financial or other reasonable means to do so;

4 (e) exposes or allows the child to be exposed to an unreasonable risk to the child's health or  
5 welfare by failing to intervene or eliminate the risk; or

6 (f) abandons the child.

7 (10) "Limited emancipation" means a status conferred on a youth by a court in accordance with  
8 41-3-406 under which the youth is entitled to exercise some but not all of the rights and responsibilities  
9 of a person who is 18 years of age or older.

10 (11) "Parent" means a biological or adoptive parent or stepparent.

11 (12) "Parent-child legal relationship" means the legal relationship that exists between a child and  
12 the child's birth or adoptive parents, as provided in Title 40, chapter 6, part 2, unless the relationship has  
13 been terminated by competent judicial decree as provided in 40-6-234, Title 42, or part 6 of this chapter.

14 (13) "Physical abuse" means an intentional act, an intentional omission, or gross negligence  
15 resulting in substantial skin bruising, internal bleeding, substantial injury to skin, subdural hematoma,  
16 burns, bone fractures, extreme pain, permanent or temporary disfigurement, impairment of any bodily  
17 organ or function, or death.

18 (14) "Psychological abuse or neglect" means severe maltreatment through acts or omissions that  
19 are injurious to the child's emotional, intellectual, or psychological capacity to function, including acts of  
20 violence against another person residing in the child's home.

21 (15) "Reasonable cause to suspect" means cause that would lead a reasonable person to believe  
22 that child abuse or neglect may have occurred or is occurring, based on all the facts and circumstances  
23 known to the person.

24 (16) "Residential setting" means an out-of-home placement where the child typically resides for  
25 longer than 30 days for the purpose of receiving food, shelter, security, guidance, and, if necessary,  
26 treatment.

27 (17) (a) "Sexual abuse" means the commission of sexual assault, sexual intercourse without  
28 consent, indecent exposure, deviate sexual conduct, sexual abuse, ritual abuse, or incest, as described  
29 in Title 45, chapter 5.

30 (b) Sexual abuse does not include any necessary touching of an infant's or toddler's genital area

1 while attending to the sanitary or health care needs of that infant or toddler by a parent or other person  
2 responsible for the child's welfare.

3 (18) "Sexual exploitation" means allowing, permitting, or encouraging a child to engage in a  
4 prostitution offense, as described in 45-5-601 through 45-5-603, or allowing, permitting, or encouraging  
5 sexual abuse of children as described in 45-5-625.

6 (19) "Social worker" means an employee of the department who, before the employee's field  
7 assignment, has been educated or trained in a program of social work or a related field that includes  
8 cognitive and family systems treatment or who has equivalent verified experience or verified training in  
9 the investigation of child abuse, neglect, and endangerment. This definition does not apply to any provision  
10 of this code that is not in this chapter.

11 (20) "Treatment plan" means a written agreement between the department and the parent or  
12 guardian or a court order that includes action that must be taken to resolve the condition or conduct of  
13 the parent or guardian that resulted in the need for protective services for the child. The treatment plan  
14 may involve court services, the department, and other parties, if necessary, for protective services.

15 (21) "Unfounded" means that after an investigation, the investigating person has determined that  
16 the reported abuse, neglect, or exploitation has not occurred.

17 (22) (a) "Withholding of medically indicated treatment" means the failure to respond to an infant's  
18 life-threatening conditions by providing treatment, including appropriate nutrition, hydration, and  
19 medication, that, in the treating physician's or physicians' reasonable medical judgment, will be most likely  
20 to be effective in ameliorating or correcting the conditions.

21 (b) The term does not include the failure to provide treatment, other than appropriate nutrition,  
22 hydration, or medication, to an infant when, in the treating physician's or physicians' reasonable medical  
23 judgment:

24 (i) the infant is chronically and irreversibly comatose;

25 (ii) the provision of treatment would:

26 (A) merely prolong dying;

27 (B) not be effective in ameliorating or correcting all of the infant's life-threatening conditions; or

28 (C) otherwise be futile in terms of the survival of the infant; or

29 (iii) the provision of treatment would be virtually futile in terms of the survival of the infant and the  
30 treatment itself under the circumstances would be inhumane. For purposes of this subsection (22), "infant"

1 means an infant less than 1 year of age or an infant 1 year of age or older who has been continuously  
2 hospitalized since birth, who was born extremely prematurely, or who has a long-term disability. The  
3 reference to less than 1 year of age may not be construed to imply that treatment should be changed or  
4 discontinued when an infant reaches 1 year of age or to affect or limit any existing protections available  
5 under state laws regarding medical neglect of children 1 year of age or older.

6 (23) "Youth in need of care" means a youth who has been adjudicated or determined, after a  
7 hearing, to be or to have been abused ~~or~~ neglected, or abandoned."

8

9 **Section 2.** Section 41-3-401, MCA, is amended to read:

10 **"41-3-401. Abuse and neglect petitions.** (1) The county attorney, attorney general, or an attorney  
11 hired by the county is responsible for filing all petitions under this chapter. The petition must be  
12 accompanied by an affidavit by the department alleging that the child appears to have been abused, or  
13 neglected, ~~or abandoned~~ and stating the basis for the allegation.

14 (2) Upon receipt of a petition, except a petition for temporary investigative authority, the court  
15 shall set a date for an adjudicatory hearing on the petition. The petitions must be given preference by the  
16 court in setting hearing dates.

17 (3) A petition alleging abuse or neglect is a civil action brought in the name of the state of  
18 Montana. The Montana Rules of Civil Procedure apply except as modified in this part. Proceedings under  
19 a petition are not a bar to criminal prosecution.

20 (4) The parents or parent, guardian, or other person or agency having legal custody of the youth  
21 named in the petition, if residing in the state, must be served personally with a copy of the petition and  
22 summons at least 5 working days before the date set for hearing. If the person or agency cannot be served  
23 personally, the person or agency may be served by publication in the manner provided by the Montana  
24 Rules of Civil Procedure for other types of proceedings.

25 (5) If personal service cannot be made upon the parents or parent, guardian, or other person or  
26 agency having legal custody, the court shall appoint an attorney to represent the unavailable party when  
27 in the opinion of the court the interests of justice require.

28 (6) If a parent of the child is a minor, notice must be given to the minor parent's parents or  
29 guardian, and if there is no guardian, the court shall appoint one.

30 (7) (a) Any person interested in any cause under this chapter has the right to appear. Any foster

1 parent, preadoptive parent, or relative caring for the child must be given legal notice by the attorney filing  
2 the petition of all judicial hearings for the child and must be given an opportunity to be heard. The right  
3 to appear or to be heard does not make that person a party to the action. Any foster parent, preadoptive  
4 parent, or relative caring for the child must be given notice of all reviews by the reviewing body.

5 (b) A foster parent, preadoptive parent, or relative of the child who is caring for or has cared for  
6 a child who is the subject of the petition who appears at a hearing set pursuant to this section may be  
7 allowed by the court to intervene in the action if the court, after a hearing in which evidence is presented  
8 on those subjects provided for in 41-3-404(3), determines that the intervention of the person is in the best  
9 interests of the child. A person granted intervention pursuant to this subsection is entitled to participate  
10 in the adjudicatory hearing held pursuant to 41-3-404 and to notice and participation in subsequent  
11 proceedings held pursuant to this chapter involving the custody of the child.

12 (8) Except when the proceeding is instituted or commenced at the request of the department, a  
13 citation must be issued and served upon a representative of the department before the court hearing.

14 (9) The petition must:

15 (a) state the nature of the alleged abuse or neglect;

16 (b) state the full name, age, and address of the youth and the name and address of the youth's  
17 parents or guardian or person having legal custody of the youth;

18 (c) state the names, addresses, and relationship to the youth of all persons who are necessary  
19 parties to the action.

20 (10) The petition may ask for the following relief:

21 (a) temporary investigative authority and protective services, as provided in 41-3-402;

22 (b) temporary legal custody, as provided in 41-3-406;

23 (c) appointment of a guardian pursuant to 41-3-421;

24 (d) termination of the parent-child legal relationship and either:

25 (i) permanent legal custody with the right to consent to adoption, as provided in 41-3-607; or

26 (ii) appointment of a guardian; or

27 (e) any combination of the provisions of subsections (10)(a) through (10)(d) or any other relief that  
28 may be required for the best interests of the child.

29 (11) A request for a determination that reunification services need not be provided pursuant to  
30 41-3-403 may be made in conjunction with the filing of a petition requesting relief, as provided for in

1 subsection (10) of this section.

2 (12) The petition may be modified for different relief at any time within the discretion of the court.

3 (13) The court may at any time on its own motion or the motion of any party appoint counsel for  
4 any indigent party."

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6 **Section 3.** Section 41-3-404, MCA, is amended to read:

7 **"41-3-404. Adjudicatory hearing -- temporary disposition.** (1) In the adjudicatory hearing on a  
8 petition under 41-3-401, the court shall determine by a preponderance of the evidence whether the youth  
9 is a youth in need of care and ascertain, as far as possible, the cause.

10 (2) The court shall hear evidence regarding the residence of the youth, the whereabouts of the  
11 parents, guardian, or nearest adult relative, and any other matters the court considers relevant in  
12 determining the status of the youth.

13 (3) In a case in which abandonment has been alleged by the county attorney, the attorney general,  
14 or an attorney hired by the county, the court shall hear offered evidence, including evidence offered by  
15 a person appearing on the petition pursuant to 41-3-401(7)(a) or (7)(b), regarding any of the following  
16 subjects:

17 (a) the extent to which the child has been cared for, nurtured, or supported by a person other than  
18 the child's parents; and

19 (b) whether the child was placed or allowed to remain by the parents with another person for the  
20 care of the child, and, if so, then the court shall accept evidence regarding:

21 (i) the intent of the parents in placing the child or allowing the child to remain with that person;  
22 and

23 (ii) the circumstances under which the child was placed or allowed to remain with that other  
24 person, including:

25 (A) whether a parent requesting return of the child was previously prevented from doing so as a  
26 result of an order issued pursuant to Title 40, chapter 15, part 2, or of a conviction pursuant to 45-5-206;  
27 and

28 (B) whether the child was originally placed with the other person to allow the parent to seek  
29 employment or attend school.

30 ~~(3)~~(4) In all civil and criminal proceedings relating to abuse or neglect, the privileges related to the

1 examination or treatment of the child do not apply, except the attorney-client privilege granted by  
2 26-1-803 and the mediation privilege granted by 26-1-813.

3 ~~(4)~~(5) (a) If the court determines that the youth is not an abused or neglected child, the petition  
4 must be dismissed and any order made pursuant to 41-3-403 must be vacated.

5 (b) If the youth is adjudicated a youth in need of care, the court shall set a date for a dispositional  
6 hearing to be conducted within 30 days and order any necessary or required investigations. The court may  
7 issue a temporary dispositional order pending the dispositional hearing. The temporary dispositional order  
8 may provide for any of the forms of relief listed in 41-3-403(6)."

9

10 NEW SECTION. **Section 4. Applicability.** [This act] applies to proceedings on petitions filed  
11 pursuant to 41-3-401 after October 1, 2001.

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- END -