



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; PROVIDING THAT EXTENDED FAMILY MEMBERS HAVE PRIORITY FOR PURPOSES OF TEMPORARY OR PERMANENT LEGAL CUSTODY OR GUARDIANSHIP OF AN ABANDONED CHILD; AMENDING SECTIONS 41-3-102, 41-3-401, 41-3-404, 41-3-406, AND 41-3-421, 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.

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

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

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

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

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

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

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

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

(iii) abandonment.

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

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

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

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

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

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

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

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

or other reasonable means to do so;

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

(f) abandons the child.

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

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

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

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

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

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

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

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

(b) Sexual abuse does not include any necessary touching of an infant's or toddler's genital area while attending to the sanitary or health care needs of that infant or toddler by a parent or other person responsible for the child's welfare.

(18) "Sexual exploitation" means allowing, permitting, or encouraging a child to engage in a prostitution

offense, as described in 45-5-601 through 45-5-603, or allowing, permitting, or encouraging sexual abuse of children as described in 45-5-625.

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

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

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

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

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

(i) the infant is chronically and irreversibly comatose;

(ii) the provision of treatment would:

(A) merely prolong dying;

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

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

(iii) the provision of treatment would be virtually futile in terms of the survival of the infant and the treatment itself under the circumstances would be inhumane. For purposes of this subsection (22), "infant" means an infant less than 1 year of age or an infant 1 year of age or older who has been continuously hospitalized since birth, who was born extremely prematurely, or who has a long-term disability. The reference to less than 1 year of age may not be construed to imply that treatment should be changed or discontinued when an infant reaches 1 year of age or to affect or limit any existing protections available under state laws regarding medical neglect of children 1 year of age or older.

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

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

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

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

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

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

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

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

(7) (a) Any person interested in any cause under this chapter has the right to appear. Any foster parent, preadoptive parent, or relative caring for the child must be given legal notice by the attorney filing the petition of all judicial hearings for the child and must be given an opportunity to be heard. The right to appear or to be heard does not make that person a party to the action. Any foster parent, preadoptive parent, or relative caring for the child must be given notice of all reviews by the reviewing body.

(b) A foster parent, preadoptive parent, or relative of the child who is caring for or a relative of the child

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

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

(9) The petition must:

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

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

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

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

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

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

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

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

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

(ii) appointment of a guardian; or

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

(11) A request for a determination that reunification services need not be provided pursuant to 41-3-403 may be made in conjunction with the filing of a petition requesting relief, as provided for in subsection (10) of this section.

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

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

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

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

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

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

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

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

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

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

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

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

~~(3)~~(4) In all civil and criminal proceedings relating to abuse or neglect, the privileges related to the examination or treatment of the child do not apply, except the attorney-client privilege granted by 26-1-803 and the mediation privilege granted by 26-1-813.

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

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

Section 4. Section 41-3-406, MCA, is amended to read:

"41-3-406. Dispositional hearing -- temporary legal custody. (1) If a youth is found to be a youth in need of care under 41-3-404, the court may enter its judgment, making any of the following dispositions to protect the welfare of the youth:

(a) permit the youth to remain with the youth's parent or guardian, subject to those conditions and limitations the court may prescribe;

(b) grant an order of limited emancipation to a youth who is 16 years of age or older, as provided in 41-3-408;

(c) transfer temporary legal custody to any of the following:

(i) the department;

(ii) a licensed child-placing agency that is willing and able to assume responsibility for the education, care, and maintenance of the youth and that is licensed or otherwise authorized by law to receive and provide care of the youth; or

(iii) a relative or other individual who is recommended by the department or a licensed child-placing agency designated by the court and who is found by the court to be qualified to receive and care for the youth;

(d) order a party to the action to do what is necessary to give effect to the final disposition, including undertaking medical and psychological evaluations, treatment, and counseling that does not require an expenditure of money by the department unless the department is notified and a court hearing is set in a timely manner on the proposed expenditure. The department is the payor of last resort after all family, insurance, and other resources have been examined.

(e) order further care and treatment as the court considers in the best interests of the child that does not require an expenditure of money by the department unless the department is notified and a court hearing is set in a timely manner on the proposed expenditure. The department is the payor of last resort after all family, insurance, and other resources have been examined pursuant to 41-3-411.

(2) To grant temporary legal custody, the court shall make a finding that:

(a) dismissing the petition would create a substantial risk of harm to the child or detriment to the child's physical or psychological well-being; and

(b) unless there is a finding that reasonable efforts are not required pursuant to 41-3-403, reasonable services have been provided to the parent or guardian to prevent the removal of the child from the home or to make it possible for the child to safely return home.

(3) (a) If the court awards temporary legal custody of an abandoned child other than to the department or to a noncustodial parent, the court shall award temporary legal custody of the child to a member of the child's extended family, including adult siblings, grandparents, great-grandparents, aunts, and uncles, if:

- (i) placement of the abandoned child with the extended family member is in the best interests of the child;
- (ii) the extended family member requests that the child be placed with the family member; and
- (iii) the extended family member is found by the court to be qualified to receive and care for the child.

(b) If more than one extended family member satisfies the requirements of subsection (3)(a), the court may award custody to the extended family member who can best meet the child's needs.

~~(3)~~(4) If reasonable efforts have been made to prevent removal of a child from the home or to return a child to the child's home but continuation of the efforts is determined by the court to be inconsistent with permanency for the child, the department shall make reasonable efforts to place the child in a timely manner in accordance with a permanent plan and to complete whatever steps are necessary to finalize the permanent placement of the child.

~~(4)~~(5) If the court finds that reasonable efforts are not necessary pursuant to subsection (2) or ~~(3)~~ (4), a permanency hearing must be held within 30 days of that determination and reasonable efforts must be made to place the child in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the child.

~~(5)~~(6) An order for temporary legal custody may be in effect for no longer than 6 months. Before the expiration of the order for temporary legal custody, the county attorney, the attorney general, or an attorney hired by the county shall petition for one of the following:

- (a) an extension of temporary legal custody, not to exceed a total of 6 months, upon a showing that additional time is necessary for the parent or guardian to successfully complete a treatment plan;
- (b) termination of the parent-child legal relationship and either:
 - (i) permanent legal custody with the right of adoption; or
 - (ii) appointment of a guardian pursuant to 41-3-607;
- (c) long-term custody pursuant to 41-3-412;
- (d) appointment of a guardian pursuant to 41-3-421; or
- (e) dismissal.

~~(6)~~(7) The court may continue an order for temporary legal custody pending a hearing on a petition provided for in subsection ~~(5)~~ (6).

~~(7)~~(8) If an extension of temporary legal custody is granted to the department, the court shall state the reasons why the child was not returned home and the conditions upon which the child may be returned home.

~~(8)~~(9) If the time limitations of this section are not met, the court shall review the reasons for the failure and order an appropriate remedy that considers the best interests of the child."

Section 5. Section 41-3-421, MCA, is amended to read:

"41-3-421. Abuse and neglect proceedings -- appointment of guardian -- financial subsidies. (1)

The court may, upon the petition of the department or guardian ad litem, enter an order appointing a guardian for a child who has been placed in the temporary or permanent custody of the department pursuant to 41-3-406, 41-3-412, or 41-3-607. The guardianship may be subsidized by the department under subsection ~~(8)~~ (9) if the guardianship meets the department's criteria, or the guardianship may be nonsubsidized.

(2) The court may appoint a guardian for a child pursuant to this section if the following facts are found by the court:

(a) the department has given its written consent to the appointment of the guardian, whether the guardianship is to be subsidized or not;

(b) if the guardianship is to be subsidized, the department has given its written consent after the department has considered initiating or continuing financial subsidies pursuant to subsection ~~(8)~~ (9);

(c) the child has been adjudicated a youth in need of care;

(d) the department has made reasonable efforts to reunite the parent and child, further efforts to reunite the parent and child by the department would likely be unproductive, and reunification of the parent and child would be contrary to the best interests of the child;

(e) the child is at least 12 years ~~old~~ of age or the child is in a group of siblings, at least one of whom is at least 12 years ~~old~~ of age, and the guardianship is in the best interests of the siblings;

(f) the child has lived with the potential guardian in a family setting and the potential guardian is committed to providing a long-term relationship with the child;

(g) it is in the best interests of the child to remain or be placed with the potential guardian;

(h) either termination of parental rights to the child is not in the child's best interests or parental rights to the child have been terminated, but adoption is not in the child's best interests; and

(i) if the child concerning whom the petition for guardianship has been filed is an Indian child, as defined in the Indian Child Welfare Act, 25 U.S.C. 1901, et seq., the child's tribe has received notification from the state

of the initiation of the proceedings.

(3) In the case of an abandoned child, the court may give priority to a member of the abandoned child's extended family, including adult siblings, grandparents, great-grandparents, aunts, and uncles, if placement with the extended family member is in the best interests of the child. If more than one extended family member has requested to be appointed as guardian, the court may determine which extended family member to appoint in the same manner provided for in 41-3-406(3).

~~(3)~~(4) The entry of a decree of guardianship pursuant to this section terminates the custody of the department and the involvement of the department with the child and the child's parents except a provision of a financial subsidy, if any, pursuant to subsection ~~(8)~~ (9).

~~(4)~~(5) A guardian appointed under this section may exercise the powers and has the duties provided in 72-5-231.

~~(5)~~(6) The court may revoke a guardianship ordered pursuant to this section if the court finds, after hearing on a petition for removal of the child's guardian, that continuation of the guardianship is not in the best interests of the child. Notice of hearing on the petition must be provided by the moving party to the child's lawful guardian, the department, any court appointed guardian ad litem, the child's parent if the rights of the parent have not been terminated, and other persons directly interested in the welfare of the child.

~~(6)~~(7) A guardian may petition the court for permission to resign the guardianship. A petition may include a request for appointment of a successor guardian.

~~(7)~~(8) After notice and hearing on a petition for removal or permission to resign, the court may appoint a successor guardian or may terminate the guardianship and restore temporary legal custody to the department pursuant to 41-3-406.

~~(8)~~(9) The department may provide a financial subsidy to a guardian appointed pursuant to this section if the guardianship meets the department's criteria and if the department determines that a subsidy is in the best interests of the child. The amount of the subsidy must be determined by the department.

~~(9)~~(10) This section does not apply to guardians appointed pursuant to Title 72, chapter 5."

Section 6. Department to give placement priority to extended family member of an abandoned child. (1) If the department has received temporary legal custody of an abandoned child pursuant to 41-3-406 or permanent legal custody pursuant to 41-3-607, the department shall give priority to a member of the child's extended family, including adult siblings, grandparents, great-grandparents, aunts, and uncles, in determining

the person or persons with whom the abandoned child should be placed if:

- (a) placement with the extended family member is in the best interests of the abandoned child;
- (b) the extended family member has requested that the abandoned child be placed with the family member; and
- (c) the department has determined that the extended family member is qualified to receive and care for the abandoned child.

(2) If more than one extended family member of the abandoned child has requested that the child be placed with the family member and all are qualified to receive and care for the child, the department may determine which extended family member to place the abandoned child with in the same manner as provided for in 41-3-406(3).

(3) This part does not affect the department's ability to assess the appropriateness of placement of the child with a noncustodial parent when abandonment has been found against only one parent.

Section 7. Codification instruction. [Section 6] is intended to be codified as an integral part of Title 41, chapter 3, part 4, and the provisions of Title 41, chapter 3, part 4, apply to [section 6].

Section 8. Applicability. [This act] applies to proceedings on petitions filed pursuant to 41-3-401 after October 1, 2001.

- END -

I hereby certify that the within bill,
SB 0257, originated in the Senate.

Secretary of the Senate

President of the Senate

Signed this _____ day
of _____, 2019.

Speaker of the House

Signed this _____ day
of _____, 2019.

SENATE BILL NO. 257

INTRODUCED BY J. BOHLINGER, SCHRUMPF

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; PROVIDING THAT EXTENDED FAMILY MEMBERS HAVE PRIORITY FOR PURPOSES OF TEMPORARY OR PERMANENT LEGAL CUSTODY OR GUARDIANSHIP OF AN ABANDONED CHILD; AMENDING SECTIONS 41-3-102, 41-3-401, 41-3-404, 41-3-406, AND 41-3-421, MCA; AND PROVIDING AN APPLICABILITY DATE.