

SENATE BILL NO. 31
INTRODUCED BY J. ESP

BY REQUEST OF THE CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING CONTINUED CUSTODY OF A CHILD BY THE CHILD'S CARETAKER RELATIVE FOLLOWING VOLUNTARY SURRENDER OF THE CHILD BY A PARENT OF THE CHILD UNDER CIRCUMSTANCES INDICATING ABANDONMENT; PROVIDING FOR AN EX PARTE ORDER BY A DISTRICT COURT; PROHIBITING A PEACE OFFICER OR COURT FROM REQUIRING SURRENDER OF THE CHILD BY THE CARETAKER RELATIVE EXCEPT IN CERTAIN CIRCUMSTANCES; PROVIDING IMMUNITY; AND PROVIDING AN APPLICABILITY DATE."

WHEREAS, THE LEGISLATURE RECOGNIZES THAT THE RIGHT OF PARENTS TO THE CUSTODY AND CONTROL OF THEIR CHILDREN IS BASED UPON THE LIBERTIES SECURED BY THE UNITED STATES AND MONTANA CONSTITUTIONS AND THAT A PARENT'S RIGHT TO THAT CUSTODY AND CONTROL IS THEREFORE NORMALLY SUPREME TO THE INTERESTS OF OTHER PERSONS; AND

WHEREAS, THE LEGISLATURE ALSO RECOGNIZES A GROWING PHENOMENON IN WHICH ABSENT OR OTHERWISE UNAVAILABLE PARENTS HAVE TEMPORARILY SURRENDERED THE CUSTODY AND CARE OF A CHILD TO A GRANDPARENT OR OTHER CARETAKER RELATIVE FOR A LENGTHY PERIOD OF TIME; AND

WHEREAS, THE LEGISLATURE FINDS THAT A CARETAKER RELATIVE FREQUENTLY OFFERS A CHILD A LOVING, STABLE, AND SECURE ENVIRONMENT IN WHICH TO LIVE, MAKE FRIENDS, AND ATTEND SCHOOL, WHICH IS AN ENVIRONMENT NOT PROVIDED BY A PARENT WHO TEMPORARILY ABANDONS A CHILD; AND

WHEREAS, A CHILD IS DEPRIVED OF THAT CARING AND SAFE ENVIRONMENT WHEN A PARENT RETURNS TO CLAIM THE CHILD WITH LITTLE OR NO NOTICE TO THE CARETAKER RELATIVE; AND

WHEREAS, THIS SITUATION, WHICH IN SOME INSTANCES HAS OCCURRED MULTIPLE TIMES WITH THE SAME CHILD, IS DISRUPTIVE TO THE MORE STABLE LIFE OFFERED BY THE CARETAKER RELATIVE AND MAY VIOLATE THE CHILD'S RIGHTS ENSURED BY ARTICLE II, SECTION 15, OF THE MONTANA CONSTITUTION, SUCH AS THE RIGHT UNDER ARTICLE II, SECTION 3, OF THE MONTANA CONSTITUTION OF SEEKING SAFETY, HEALTH, AND HAPPINESS; AND

WHEREAS, FOR THESE REASONS, IT IS THE PURPOSE OF [THIS ACT] TO EXERCISE THE LEGISLATURE'S POLICE POWERS FOR THE HEALTH AND WELFARE OF CHILDREN WHO HAVE BEEN ABANDONED BY THEIR PARENTS TO THE CARE OF RELATIVES AND TO CREATE A PROCEDURE, APPLICABLE IN LIMITED SITUATIONS CAUSED BY THE VOLUNTARY SURRENDER OF A CHILD BY A PARENT, UNDER CIRCUMSTANCES INDICATING ABANDONMENT, WHEREBY A CHILD IN THE CARE OF A

RELATIVE MAY REMAIN WITH THAT RELATIVE WHILE THE ISSUE OF ABANDONMENT BY THE PARENT IS REVIEWED AND DETERMINED BY A COURT OF LAW; AND

WHEREAS, THE LEGISLATURE BELIEVES THAT THIS TEMPORARY INFRINGEMENT ON THE RIGHT OF A PARENT TO THE CUSTODY AND CONTROL OF A MINOR CHILD IS JUSTIFIED BY THE POSSIBILITY OF ABANDONMENT BY THE PARENT, BECAUSE THE WELFARE OF THE CHILD IS AT STAKE, AND BECAUSE OF THE LIKELY VIOLATION OF THE CHILD'S RIGHTS ENSURED BY ARTICLE II, SECTION 15, OF THE MONTANA CONSTITUTION.

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

~~NEW SECTION. Section 1. Legislative finding and purpose -- definitions. (1) The legislature recognizes that the right of parents to the custody and control of their children is based upon the liberties secured by the United States and Montana constitutions and that a parent's right to that custody and control is therefore normally supreme to the interests of other persons. The legislature also recognizes a growing phenomenon in which absent or otherwise unavailable parents have temporarily surrendered the custody and care of a child to a grandparent or other caretaker relative for a lengthy period of time. The legislature finds that a caretaker relative frequently offers a child a loving, stable, and secure environment in which to live, make friends, and attend school, which is an environment not provided by a parent who temporarily abandons a child. However, a child is deprived of that caring and safe environment when a parent returns to claim the child with little or no notice to the caretaker relative. This situation, which in some instances has occurred multiple times with the same child, is disruptive to the more stable life offered by the caretaker relative and may violate the child's rights ensured by Article II, section 15, of the Montana constitution, such as the right under Article II, section 3, of the Montana constitution of seeking safety, health, and happiness. For these reasons, it is the purpose of the legislature in enacting [section 2] and this section to exercise its police powers for the health and welfare of children who have been abandoned by their parents to the care of relatives and to create a procedure, applicable in limited situations caused by the voluntary surrender of a child by a parent, under circumstances indicating abandonment, whereby a child in the care of a relative may remain with that relative while the issue of abandonment by the parent is reviewed and determined by a court of law. The legislature believes that this temporary infringement on the right of a parent to the custody and control of a minor child is justified by the possibility of abandonment by the parent, because the welfare of the child is at stake, and because of the likely violation of the child's rights ensured by Article II, section 15, of the Montana constitution.~~

~~(2) As used in [section 2] and this section, the following definitions apply:~~

~~———— (a) "Caretaker relative" or "relative" means an individual related to a child by blood, marriage, or adoption by another individual, who has care and custody of a child but who is not a parent, foster parent, stepparent, or legal guardian of the child.~~

~~———— (b) "Parent" means a biological or adoptive parent or other legal guardian of a child. ————~~

NEW SECTION. Section 1. Caretaker relative rights upon return of parent -- continuing custody affidavit -- review, finding, and order by district court -- limited reconsideration -- immunity. (1) If custody of a child has been voluntarily given to a relative of the child by a parent of the child and the child has remained with that relative for at least 6 months under circumstances in which it is unclear whether or when the parent will return and retake custody of the child, the provisions of this section apply unless, during that 6-month period, the parent expresses to the relative a firm intention and a date on which the parent will return and resume custody of the child and subsequently adheres to that schedule.

(2) Upon a return of the parent and an expression by the parent of an intent by that parent to reassert the parent's right of custody and control over the child, the caretaker relative may file with the district court in the county of the relative's residence a detailed affidavit as provided in this section. The affidavit must contain the following matters, the exclusion of any of which makes the affidavit void:

- (a) the identification of:
 - (i) the caretaker relative, including the relative's address;
 - (ii) the child in the custody of the relative; and
 - (iii) the parent demanding custody of the child, including the parent's address, if known;
- (b) a statement of the facts, as nearly as can be determined, of:
 - (i) the date, time, and circumstances surrounding the voluntary surrender of the custody of the child to the caretaker relative, including any conversation between the relative and the parent concerning the purpose of the parent's absence and when the parent would return and resume custody of the child;
 - (ii) the reason for the surrender of the child to the relative, as far as is known by the relative;
 - (iii) the efforts made by the relative to care for the child, including:
 - (A) facts explaining the nature of the home provided by the relative for the child;
 - (B) the schooling of the child while in the relative's custody; and
 - (C) the socialization of the child with other children and adults, both inside and outside the family of the caretaker relative; and
 - (iv) whether any contact was made by the child's parent with the relative, the child, or both, during the

absence of the parent and if so, the date, time, and circumstances of that contact, including any conversation between the relative and the parent concerning when the parent would return and resume custody of the child;

(c) a statement by the caretaker relative as to why the relative wishes to maintain custody of the child;

(d) a warning, in at least 10-point type, to the caretaker relative in the following language: "WARNING: DO NOT SIGN THE FOREGOING AFFIDAVIT IF ANY OF THE ABOVE STATEMENTS ARE INCORRECT, OR YOU WILL BE COMMITTING AN OFFENSE PUNISHABLE BY FINE, IMPRISONMENT, OR BOTH."; and

(e) a notarized signature of the caretaker relative following a written declaration that the affidavit is made under oath and under penalty of the laws of Montana governing the giving of false sworn testimony and that the information stated by the caretaker relative in the affidavit is true and correct.

(3) A copy of the affidavit filed with the district court must be provided by the caretaker relative to the child's parent, if the address or location of the parent is known to the relative, ~~to the county attorney of the county in which the caretaker relative resides, and to the local and state offices of~~ MAY BE PROVIDED TO the department of public health and human services. A caretaker relative may maintain temporary custody of the child for 5 days following the return of the parent and the demand by the parent for custody of the child pending completion of the affidavit and the order of the district court. During that 5-day period, the caretaker relative may not be deprived of the custody of the child by a peace officer or by the order of a court unless a court finds, upon petition by the child's parent and after a hearing and upon notice to the caretaker relative as the court shall require, that:

(a) the child has not been in the custody of the caretaker relative for at least 6 months;

(b) the caretaker relative has committed child abuse or neglect with regard to the child in the custody of the relative; or

(c) the action by the caretaker relative to make and file the affidavit with the district court in accordance with this section was not made in good faith.

(4) Upon receipt of the caretaker relative's affidavit pursuant to subsection (3), the department ~~shall~~ MAY proceed pursuant to 41-3-202 as if a report of abandonment of the child had been received.

(5) (a) Within 48 hours of the filing of the affidavit, the district court shall review the affidavit and determine ex parte whether the affidavit contains prima facie evidence that the child was abandoned by the child's parent. If the court determines that there is prima facie evidence that the child was abandoned by the child's parent, the court shall within 3 days of its determination of prima facie evidence enter appropriate findings of fact concerning the abandonment and enter an ex parte order approving and ordering continued custody and control of the child by the caretaker relative. An order of the district court pursuant to this subsection approving and ordering continued custody by the caretaker relative is effective for 14 days following entry of the order.

(b) If the court determines that the affidavit does not provide prima facie evidence of abandonment by the parent, the court shall within 3 days of its determination make appropriate findings of fact and order the child returned to the parent. Upon receipt of the written findings and order of the court, the caretaker relative shall surrender the custody and control of the child to the child's parent.

(c) DURING OR AFTER THE 14-DAY PERIOD ESTABLISHED UNDER SUBSECTION (5)(A), THE CARETAKER RELATIVE MAY COMMENCE A PARENTING PLAN PROCEEDING UNDER 40-4-211 OR PETITION THE COURT TO BE APPOINTED THE GUARDIAN OF THE MINOR UNDER 72-5-225.

(6) Upon entry of an order by the district court pursuant to subsection (5)(a), the clerk shall send a copy of the order to the child's parent, if the address of the parent is known, ~~to the county attorney, and to the local and state offices of the department of public health and human services. The department shall treat the order as a substantiated allegation of abandonment for the purposes of this chapter.~~

(7) The child's parent may, after receipt of the court's findings and order ordering continued custody of a child by a caretaker relative ~~and only if the parent provides evidence of nonabandonment that was not considered by the court,~~ apply to the court, upon notice to the caretaker relative as the court shall provide, for a reconsideration of the court's order approving continued custody of the child by the relative. The court shall reconsider its order and may reverse its order based ~~only~~ upon presentation of evidence of nonabandonment ~~that was not considered by the court in making its order approving the continued custody of the child by the relative.~~ Pending a reconsideration pursuant to this subsection, custody of the child must remain with the relative unless the order of the district court approving that custody expires or a court has ordered a change of custody pursuant to subsection (3).

(8) [(a)] A caretaker relative refusing to surrender custody of a child while acting in good faith and in accordance with this section is immune from civil or criminal action brought because of that refusal.

[(b) A peace officer acting in good faith and taking or refusing to take custody of a child from a relative in accordance with this section and the entity employing the officer is immune from civil or criminal action or professional discipline brought because of the taking of or refusal to take custody of the child.]

(9) AS USED IN THIS SECTION, THE FOLLOWING DEFINITIONS APPLY:

(A) "CARETAKER RELATIVE" OR "RELATIVE" MEANS AN INDIVIDUAL RELATED TO A CHILD BY BLOOD, MARRIAGE, OR ADOPTION BY ANOTHER INDIVIDUAL AND WHO HAS CARE AND CUSTODY OF A CHILD BUT WHO IS NOT A PARENT, FOSTER PARENT, STEPPARENT, OR LEGAL GUARDIAN OF THE CHILD.

(B) "PARENT" MEANS A BIOLOGICAL OR ADOPTIVE PARENT OR OTHER LEGAL GUARDIAN OF A CHILD.

NEW SECTION. Section 2. Codification instruction. [~~Sections 1 and 2~~] are [SECTION 1] IS intended to be codified as an integral part of Title ~~44, chapter 3~~ 40, CHAPTER 9, and the provisions of Title ~~44, chapter 3~~ 40, CHAPTER 9, apply to [~~sections 1 and 2~~] [SECTION 1].

NEW SECTION. Section 3. Two-thirds vote required -- contingent voidness. Because [section ~~2(8)(b)~~ 1(8)(B)] limits governmental liability, Article II, section 18, of the Montana constitution requires a vote of two-thirds of the members of each house of the legislature for its passage. If [this act] is not approved by at least two-thirds of the members of each house of the legislature, then the bracketed language in [section ~~2(8)~~ 1(8)] is void.

NEW SECTION. Section 4. Applicability. [This act] applies to the voluntary surrender of a child by the child's parent to a caretaker relative, ~~all as defined in [section 1]~~, occurring on or after October 1, 2007.

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