

SENATE BILL NO. 48

INTRODUCED BY J. ESP

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

A BILL FOR AN ACT ENTITLED: "AN ACT GRANTING TO A RELATIVE WHO IS A CARETAKER BUT NOT A PARENT OF A CHILD THE POWER TO APPROVE MEDICAL CARE FOR THE CHILD UNDER CERTAIN CONDITIONS; PROVIDING FOR A CARETAKER RELATIVE MEDICAL AUTHORIZATION AFFIDAVIT; PROVIDING FOR GOVERNMENTAL IMMUNITY; AMENDING SECTIONS 20-5-412 AND 20-5-420, MCA; AND PROVIDING AN APPLICABILITY DATE."

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

NEW SECTION. Section 1. Purpose -- legislative intent -- parental rights -- definitions. (1) The legislature recognizes that the rights of parents to the custody and control of a child are based upon liberties secured by the United States and Montana constitutions and that a parent's rights to that custody and control of a child are 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 their children to a grandparent or other relative for lengthy periods of time. Regardless of the purpose of the absence, a child willfully surrendered to a relative for an extended time period still has the same needs as a child in the care of its parents. In this situation, a caretaker relative assumes responsibilities for the child but has no legal right of control over the child, a situation that interferes in the caretaker relative's ability to perform routine functions of child rearing, including tending to the medical needs of the child. It is therefore the purpose of the legislature in these instances to protect the rights of a child granted by Article II, section 15, of the Montana constitution by granting a caretaker relative limited authority for a child left in the relative's care.

(2) It is the intent of the legislature that a caretaker relative given the responsibility of caring for a child with little or no warning and without any other provision having been made for the child's care, such as the appointment of a guardian or the provision of a power of attorney, be granted authority to consent to medical care for the child without superseding any parental rights regarding the child.

(3) [Section 2] and this section are not intended to affect the rights and responsibilities of a parent, legal guardian, or other custodian regarding the child, do not grant legal custody of the child to the caretaker relative, and do not grant authority to the caretaker relative to consent to the marriage or adoption of the child or to receive

notice of a medical procedure, including abortion, not consented to by the relative, if notice is required by law, for the child except as expressly provided in this section.

(4) For the purposes of [section 2] and this section, the following definitions apply:

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

(b) "Caretaker relative medical authorization affidavit" or "affidavit" means an affidavit completed in compliance with [section 2].

(c) "Health care provider" means a person who provides medical care.

(d) "Medical care" means care, by a health care provider for which parental consent is normally required, for the prevention, diagnosis, or treatment of a mental, physical, or dental injury or disease that is needed to prevent serious bodily harm or death to the child.

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

NEW SECTION. Section 2. Caretaker relative medical authorization affidavit -- use -- immunity -- format. (1) A caretaker relative of a child who has voluntarily been given custody of the child by a parent of the child has the same authority as a custodial parent of the child to consent to medical care for the child for which parental consent is usually required if:

(a) in leaving the child with the caretaker relative, the parent expressed no definite time period in which the parent would return for the child;

(b) the child is residing with the caretaker relative on a full-time basis;

(c) the caretaker relative is unable to contact the parent following the voluntary leaving of the child with the relative or the parent refuses to regain custody of the child after a written request by the relative to do so;

(d) no adequate provision, such as the appointment of a guardian ad litem or execution of a power of attorney, has otherwise been made for the medical care of the child; and

(e) a caretaker relative medical authorization affidavit is completed in compliance with this section.

(2) An affidavit is effective only if it is signed by the caretaker relative, under oath, before a notary public. A clear photographic copy of an affidavit completed in compliance with this section is sufficient in any instance in which an original is required by a health care provider.

(3) Unless the rights of a parent have been judicially terminated or unless the ability to give legal consent for the child to receive medical care for which parental consent is usually required has been granted to the

caretaker relative pursuant to 40-4-211 and 40-4-228, a decision by a parent of the child communicated to the health care provider regarding the health care of the child supersedes a conflicting decision by a caretaker relative made pursuant to an affidavit completed in compliance with this section. However, a decision by a parent does not supersede a decision by a relative made pursuant to an affidavit completed in compliance with this section if the decision by the parent endangers the life of the child. A health care provider may require reasonable proof of authenticity of a decision by a parent intended to supersede a decision by a caretaker relative.

(4) (a) A [public or] private health care provider or a [public or] private school official who acts in good faith reliance on a caretaker relative medical authorization affidavit completed in compliance with this section who has no actual knowledge of facts contrary to those indicated in the affidavit is not subject to civil liability or criminal prosecution or to a professional disciplinary procedure for an action that would have been proper if the facts had been as the health care provider believed them to be.

(b) This subsection (4) applies even if medical care is provided to a child against the wishes of a parent of that child if the health care provider rendering the service does not have actual knowledge of the parent's wishes.

(5) A health care provider who relies on an affidavit completed in compliance with this section has no obligation to make further inquiry or investigation.

(6) An affidavit completed in compliance with this section is effective for the earlier of:

(a) 6 months;

(b) until it has been revoked by the caretaker relative; or

(c) until the child no longer resides with the caretaker relative.

(7) If the child ceases to live with the caretaker relative or the caretaker relative revokes the affidavit, the caretaker relative shall provide written notice of that fact to all health care providers to whom the caretaker relative has given the affidavit or to whom the caretaker relative has caused the affidavit to be given.

(8) This section does not relieve a person from a violation of other law, and this section does not affect the rights of a child's parent except as provided in this section.

(9) A caretaker relative completing an affidavit in compliance with this section shall send a copy of the affidavit to the local and state offices of the department of public health and human services. The department shall treat the affidavit as an allegation of abandonment of the child.

(10) A caretaker relative medical authorization affidavit is invalid unless it is written in substantially the following form and contains the warning provided for in paragraph 5 of the format below:

CARETAKER RELATIVE'S MEDICAL AUTHORIZATION AFFIDAVIT

Use of this affidavit is authorized by [this section].

1. INSTRUCTIONS: The completion and signing of the affidavit before a notary public are sufficient to authorize medical care for the named child. Please print clearly.

The child named below lives in my home, and I am 18 years of age or older.

a. Name of child:

b. Child's date of birth:

c. My name (caretaker relative):

d. My home address:

e. My relationship to the child (the caretaker relative must be an individual related by blood, marriage, or adoption by another individual to the child whose care is undertaken by the caretaker relative, but who is not a parent, foster parent, stepparent, or legal guardian of the child):

2. I hereby certify that this affidavit is not being used for an unlawful purpose.

3. My date and year of birth:

4. Check the following if true (all must be checked for this affidavit to apply):

A parent of the child identified in paragraph 1a of this affidavit has left the child with me and has expressed no definite time period when the parent will return for the child.

The child is now residing with me on a full-time basis.

I am unable to locate or contact the parent of the child at this time to notify that parent of my intended authorization, or the parent refuses to regain custody of the child even though I have asked in writing that the parent do so.

No adequate provision, such as appointment of a guardian ad litem or execution of a power of attorney, has been made for medical care for the child.

5. WARNING: DO NOT SIGN THIS FORM IF ANY OF THE STATEMENTS ABOVE ARE INCORRECT, OR YOU WILL BE COMMITTING A CRIME PUNISHABLE BY A FINE, IMPRISONMENT, OR BOTH.

6. I declare under penalty of false swearing under the laws of Montana that the foregoing is true and correct.

Signed this ___ day of _____, 20__.

(Signature of caretaker relative)

(Signature, county, state, and seal of notary public)

7. NOTICES:

a. Completion of this affidavit does not affect the rights of the child's parent or legal guardian regarding the care, custody, and control of the child and does not mean that the caretaker relative has legal custody of the child.

b. A health care provider who relies on this affidavit has no obligation to make any further inquiry or investigation.

c. This affidavit is not valid for more than 6 months after the date on which it is signed by the caretaker relative.

8. ADDITIONAL INFORMATION:

a. TO CARETAKER RELATIVES:

If the child stops living with you, you shall notify anyone to whom you have given this affidavit, as well as anyone who has received the affidavit from someone else.

b. TO [PUBLIC AND] PRIVATE HEALTH CARE PROVIDERS AND [PUBLIC AND] PRIVATE SCHOOL OFFICIALS: A [public or] private health care provider or a [public or] private school official who acts in good faith reliance upon a caretaker relative medical authorization affidavit to provide medical care, without actual knowledge of facts contrary to those indicated in the affidavit, is not subject to criminal prosecution or civil liability to any person, or subject to any professional disciplinary action, for reliance on the affidavit if the form is completed in compliance with [this section].

Section 3. Section 20-5-412, MCA, is amended to read:

"20-5-412. Definition -- parent-designated adult -- administration of glucagon -- training. (1) As used in 20-5-413 and this section, "parent-designated adult" means a school district employee, selected by a parent, an individual who has executed a caretaker relative medical authorization affidavit pursuant to [section 2], or a guardian of a diabetic student, who voluntarily agrees to administer glucagon to the student.

(2) A parent, an individual who has executed a caretaker relative medical authorization affidavit pursuant to [section 2], or a guardian of a diabetic student may designate an adult to administer glucagon to the student as provided in subsection (3). Written proof of the designation by a parent, an individual who has executed a caretaker relative medical authorization affidavit pursuant to [section 2], or a guardian and acceptance of the designation by the parent-designated adult must be filed with the school district.

(3) A parent-designated adult may administer glucagon to a diabetic student in an emergency situation. The glucagon must be provided by the parent, an individual who has executed a caretaker relative medical

authorization affidavit pursuant to [section 2], or a guardian of the student.

(4) A parent-designated adult must be trained in recognizing hypoglycemia and the proper method of administering glucagon. Training must be provided by a health care professional, as defined in 33-36-103, or a recognized expert in diabetic care selected by the parent, an individual who has executed a caretaker relative medical authorization affidavit pursuant to [section 2], or a guardian. Written documentation of the training received by the parent-designated adult must be filed with the school district."

Section 4. Section 20-5-420, MCA, is amended to read:

"20-5-420. Self-administration of asthma medication. (1) As used in this section, the following definitions apply:

(a) "Anaphylaxis" means a systemic allergic reaction that can be fatal in a short time period and is also known as anaphylactic shock.

(b) "Asthma" means a chronic disorder or condition of the lungs that requires lifetime, ongoing, medical intervention.

(c) "Medication" means a medicine, including inhaled bronchodilators, inhaled corticosteroids, and autoinjectable epinephrine, prescribed by a licensed physician as defined in 37-3-102, a physician assistant who has been authorized to prescribe asthma medications as provided in 37-20-404, or an advanced practice registered nurse with prescriptive authority as provided in 37-8-202(5).

(d) "Self-administration" means a pupil's discretionary use of the asthma medication prescribed for the pupil.

(2) A school, whether public or nonpublic, shall permit the self-administration of medication by a pupil with asthma if the parents or guardians of the pupil provide to the school:

(a) written authorization, acknowledging and agreeing to the liability provisions in subsection (4), for the self-administration of medication;

(b) a written statement from the pupil's physician, physician assistant, or advanced practice registered nurse containing the following information:

(i) the name and purpose of the medication;

(ii) the prescribed dosage; and

(iii) the time or times at which or the special circumstances under which the medication is to be administered;

(c) documentation that the pupil has demonstrated to the health care practitioner and the school nurse,

if available, the skill level necessary to administer the medication as prescribed; and

(d) documentation that the pupil's physician, physician assistant, or advanced practice registered nurse has formulated a written treatment plan for managing asthma or anaphylaxis episodes of the pupil and for medication use by the pupil during school hours.

(3) The information provided by the parents or guardians must be kept on file in the office of the school nurse or, in the absence of a school nurse, the school's administrator.

(4) The school district or nonpublic school and its employees and agents are not liable as a result of any injury arising from the self-administration of medication by the pupil unless an act or omission is the result of gross negligence, willful and wanton conduct, or an intentional tort. The parents or guardians of the pupil must be given a written notice and sign a statement acknowledging that the school district or nonpublic school may not incur liability as a result of any injury arising from the self-administration of medication by the pupil and that the parents or guardians shall indemnify and hold harmless the school district or nonpublic school and its employees and agents against any claims, except a claim based on an act or omission that is the result of gross negligence, willful and wanton conduct, or an intentional tort.

(5) The permission for self-administration of medication is effective for the school year for which it is granted and must be renewed each subsequent school year or, if the medication dosage, frequency of administration, or other conditions change, upon fulfillment of the requirements of this section.

(6) If the requirements of this section are fulfilled, a pupil with asthma may possess and use the pupil's medication:

(a) while in school;

(b) while at a school-sponsored activity;

(c) while under the supervision of school personnel;

(d) before or after normal school activities, such as while in before-school or after-school care on school-operated property; or

(e) while in transit to or from school or school-sponsored activities.

(7) If provided by the parent, an individual who has executed a caretaker relative medical authorization affidavit pursuant to [section 2], or a guardian and in accordance with documents provided by the pupil's physician, physician assistant, or advanced practice registered nurse, backup medication must be kept at a pupil's school in a predetermined location or locations to which the pupil has access in the event of an asthma or anaphylaxis emergency.

(8) Youth correctional facilities are exempt from this section and shall adopt policies related to access

and use of asthma medications."

NEW SECTION. **Section 5. Codification instruction.** [Sections 1 and 2] are intended to be codified as an integral part of Title 40, chapter 6, and the provisions of Title 40, chapter 6, apply to [sections 1 and 2].

NEW SECTION. **Section 6. Two-thirds vote required -- contingent voidness.** Because [section 2(4)(a)] 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 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(4)(a)] and in the notice to health care providers and school officials in paragraph 8b of [section 2(10)] is void.

NEW SECTION. **Section 7. Applicability.** [This act] applies to a caretaker relative, as defined in [section 1], to whom a child is given by a parent after October 1, 2007, for care by the relative.

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