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As of: August 10, 2006 (9:35am)

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**** Bill No. ****

Introduced By *****

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 under circumstances indicating abandonment; providing for a continuing custody affidavit; providing for ex parte review of the affidavit and an order by the district court; prohibiting a peace officer or court from requiring surrender of the minor child except in certain situations; providing governmental immunity; and providing an applicability date."

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 rights 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 children to a grandparent or other relative for lengthy periods of time. The purpose of

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that surrender is all too frequently for the convenience of the parent. A caretaker relative, who is frequently a grandparent, offers the children a loving, stable, and secure environment in which to live, make friends, and attend school, which is an environment not provided by the parent temporarily giving up custody. All too frequently, however, a child is deprived of that caring and safe environment when a birth parent returns to claim the child with little or no notice to the caretaker relative. This situation, which in some instances occurs multiple times with the same child, is disruptive to the more stable life offered by the caretaker relative and is harmful to the child in that it injects apprehension, uncertainty, and a lack of trust into the relationship between the child and the caretaker relative and frequently deprives the child of the friends made while in the care of the relative and the love and attention of the caretaker relative. The legislature believes this disruption of a stable environment is inimical to the long-term health and welfare of children caught in this situation and that this type of voluntary surrender of children by their parents violates the children's rights ensured by Art. II, sec. 15 of the Montana Constitution . For these reasons, it is the purpose of the legislature in enacting [sections 1 and 2] to exercise its police powers for the health and welfare of children in the care of relatives and to create a procedure, applicable in limited situations caused by the voluntary surrender of a child by its parent, whereby a child in the care of a relative may remain with that relative while the issue of abandonment is reviewed and

determined by the courts. 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 children's rights ensured by Art. II, sec. 15 of the Montana Constitution.

(2) As used in 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 appointed guardian of the child.

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

NEW SECTION. Section 2. Caretaker relative rights upon return of parent -- continuing custody affidavit -- review, finding, and order by district court -- department action required. (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 six months under circumstances where it is unclear whether or when the parent will return and regain custody of the child, the provisions of this section apply, unless, during that six 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

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subsequently adheres to that schedule.

(2) Upon a return of the parent in a situation to which this section applies, and the expression by the parent at the time of return of an intent by that parent to reassert custody and control over the child, the relative may file with the district court in the county of the residence of the relative a detailed affidavit as provided in this section. The affidavit must contain the following matters, the exclusion of any which makes the affidavit void and of no legal effect:

(a) the identification of:

(I) the relative;

(ii) the child; and

(iii) the parent(s) of the minor.

(b) a statement of the facts, including dates 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 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;

(B) the schooling of the child; and

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© the socialization of the child with other children and adults both inside and outside the family of the caretaker relative.

(iv) whether any contact was made by the parent with the child 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;

© a statement by the relative as to why the relative wishes to maintain a home for the child pending a review of the relative's affidavit by a district court; and

(d) a warning in at least ten-point type to the 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 relative following a written declaration under penalty of the laws of Montana 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 to the county attorney of the county in which the caretaker relative resides and to the local and state offices of the department of public health and human services. A caretaker relative may maintain temporary custody of the child for five days pending completion of the affidavit and review of the affidavit by the district court. During that five day

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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, after a hearing and upon notice to the caretaker relative as the court shall require, that the child has not been in the custody of the caretaker relative for at least six months or that an alleged attempt by the caretaker relative to make and file an affidavit with the district court in accordance with this section is not in good faith.

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

(5) Within 48 hours of the filing of the affidavit, the district court shall review the affidavit and determine whether the affidavit constitutes prima facie evidence that the child has been abandoned. If the court finds that there is prima facie evidence that the child has been abandoned during the time the child was cared for by the caretaker relative, the court shall enter findings of fact as to the abandonment and enter an ex parte order approving continued custody and control of the child by the caretaker relative. Upon a written finding by the court that there is no prima facie evidence of abandonment, the caretaker relative shall surrender the custody and control of the child to the child's parent. An order of the district court pursuant to this section approving continued custody by the caretaker relative is effective for 14 days following its issuance.

(6) Upon entry of an order by the district court pursuant

to subsection (5), a copy of the order must be sent by the clerk 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 Title 41, chapter 3.

(7) (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 based upon that refusal.

(b) A peace officer acting in good faith and taking or refusing to take custody of a child except in conformity with this section, and the entity employing the officer, is immune from civil or criminal action or professional discipline based upon that taking of, or refusal to take, custody of the child.

NEW SECTION. **Section 3. {standard} Codification**

instruction. [Sections 1 and 2] are intended to be codified as an integral part of Title 41, chapter 3, and the provisions of Title 41, chapter 3, apply to [sections 1 and 2].

NEW SECTION. **Section 4. Two-thirds vote required --**

contingent voidness. Because [section 2(7)(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

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the legislature, then [section 2(7)(b)] is void.

NEW SECTION. **Section 5. 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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