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As of: August 3, 2006 (11:21am)

LCCF05

**** Bill No. ****

Introduced By *****

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; and providing an applicability date."

Be it enacted by the Legislature of the State of Montana:

NEW SECTION. **Section 1. Purpose -- legislative intent -- parent's rights -- definitions.** (1) The Legislature recognizes that the rights of parents to the custody and control of a child is based upon liberties secured by the United States and Montana constitutions and that a parent's right to that custody and control of a child 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 their children to a grandparent or other relative for lengthy periods of time and the reason for the surrender of their children can be for the care of their children is all too frequently for the convenience of the parents. Regardless of the purpose of the absence, a

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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 Art. II, sec. 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 existing parental rights regarding the child.

(3) [Sections 1 and 2] and the affidavit are not intended to affect the rights and responsibilities of the parent, guardian, or custodian regarding the child, do not grant legal custody to the caretaker relative, do not grant authority to the caretaker relative to consent to the marriage or adoption of the child, or receive notice of a medical procedure, including abortion, for the child except as expressly provided in this section.

(4) For the purposes of [sections 1 and 2], 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) "caretaker relative medical authorization affidavit" or "affidavit" means an affidavit completed in compliance with [section 2].

(c) "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, needed to prevent death or serious bodily harm.

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

NEW SECTION. Section 2. Caretaker relative medical authorization affidavit -- use -- format. (1) A 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 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, 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;

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(c) the 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 education of the child; and

(e) the relative executes a caretaker relative medical authorization affidavit as provided in this section.

(2) An affidavit is effective only if executed by the affiant signing under oath before a notary public. A clear photographic copy of an affidavit prepared and executed in accordance with this section is sufficient in any instance in which an original is required by a health care provider or other person.

(3) Until a child has been judicially determined to be abused or neglected under the provisions of Title 41, chapter 3, and custody of the child has been given to another individual pursuant to that determination, or until the ability to give legal consent for a child in the relatives's custody to receive medical care for which parental consent is usually required has been given 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 supercedes any conflicting decision by a caretaker relative made pursuant to the execution of an affidavit made in compliance with this section. However, no such decision by a parent supercedes a

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decision by a relative made in conformance with this section if the decision by the parent endangers the life of the child. A health care provider or other person may require reasonable proof of authenticity of a decision by a parent intended to supercede a decision by a caretaker relative.

(4) (a) A person who acts in good faith reliance on a caretaker relative medical authorization affidavit completed as provided in this section who has no actual knowledge of facts contrary to those stated in the affidavit, is not subject to civil liability or criminal prosecution, or to professional disciplinary procedure, for an action which would have been proper if the fact had been as the person believed them to be.

(b) This subsection applies even if medical care is provided to a child in contravention of the wishes of the parent of that child if the person rendering the service does not have actual knowledge of the wishes of the parent.

(c) This subsection applies only [to governmental entities and] to nongovernmental entities.

(5) A person who relies on an affidavit completed as provided in this section has no obligation to make further inquiry or investigation.

(6) An affidavit completed in accordance with this section is effective for six months, until it has been revoked by the caretaker relative, or until the child no longer resides with the caretaker relative, whichever occurs first.

(7) If the child ceases to live with the caretaker relative or the caretaker relative revokes the affidavit, the caretaker

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relative must notify in writing of that fact all persons to whom the relative has given the affidavit or to whom the relative has caused the affidavit to be given.

(8) Nothing in this section relieves a person from a violation of other law and nothing in this section affects the rights of a child's parents except as provided in this section.

[(9) A caretaker relative executing an affidavit as provided in 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's 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: Completion and the 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 (adult giving authorization):
- d. My home address:
- e. My relationship to the child (must be grandparent, aunt

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or uncle, adult brother or sister):

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):

The parent of the child 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(s) of the child at this time, to notify them 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:

Date:

(signature and seal of notary public)

7. NOTICES:

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a. This declaration 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 non-legal custodian has legal custody of the child.

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

c. This affidavit is not valid for more than six months after the date on which it is executed.

8. ADDITIONAL INFORMATION:

a. TO CARETAKER RELATIVES:

If the child stops living with you, you are required to notify anyone to whom you have given this affidavit as well as anyone of whom you have actual knowledge who received the affidavit from a third party.

b. TO PRIVATE HEALTH CARE PROVIDERS AND PRIVATE SCHOOL OFFICIALS [AND PUBLIC HEALTH CARE PROVIDERS AND PUBLIC SCHOOL OFFICIALS]:

(i) A person who acts in good faith reliance upon a caretaker relative's affidavit to render medical care, without actual knowledge of facts contrary to those stated in the affidavit, may not be 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.

(ii) This notice applies only [to governmental entities and] to nongovernmental entities.

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

instruction. [Section 1] is intended to be codified as an integral part of Title 41, chapter 3, and the provisions of Title 41, chapter 3, apply to [section 1].

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

contingent voidness. Because [section 2(4)(c)] 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)(c)] and in the notice to school officials or medical personnel in paragraph 8B of [section 2(9)] is void.

NEW SECTION. **Section 5. Applicability.** [This act] applies

to a caretaker relative to whom a minor is given by a parent after October 1, 2007 for care by the relative.

- END -

{Name : David S. Niss
Title : Staff Attorney
Agency : Legislative Services Division
Phone : (406) 444-3064
E-Mail : dniss@state.mt.us}