

MAINE STATE LEGISLATURE

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117th MAINE LEGISLATURE

FIRST REGULAR SESSION-1995

Legislative Document

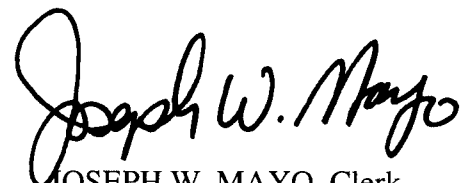
No. 1337

H.P. 948

House of Representatives, April 13, 1995

**An Act Making Comprehensive Changes to the Child and Family
Services and Child Protection Act.**

Reference to the Committee on Judiciary suggested and ordered printed.


JOSEPH W. MAYO, Clerk

Presented by Representative LANE of Enfield.

Cosponsored by Representatives: AHEARNE of Madawaska, BUCK of Yarmouth, CAMPBELL of Holden, CHICK of Lebanon, CLARK of Millinocket, FARNUM of South Berwick, GERRY of Auburn, JONES of Pittsfield, JOY of Crystal, KEANE of Old Town, LABRECQUE of Gorham, LEMONT of Kittery, LIBBY of Buxton, MARSHALL of Eliot, MURPHY of Berwick, PINKHAM of Lamoine, RICE of South Bristol, SAVAGE of Union, STEDMAN of Hartland, TUTTLE of Sanford, UNDERWOOD of Oxford, WATERHOUSE of Bridgton, WHEELER of Bridgewater, YACKOBITZ of Hermon, Senators: AMERO of Cumberland, KIEFFER of Aroostook, LORD of York.

Be it enacted by the People of the State of Maine as follows:

2
3 **Sec. 1. 4 MRSA §152, sub-§5, ¶Q,** as amended by PL 1989, c.
4 919, §1 and affected by §18, is further amended to read:

6 Q. Actions in which the equitable relief is sought through
7 an equitable defense, a counterclaim, a cross-claim or other
8 responsive pleading or reply permitted by the Maine Rules of
9 Civil Procedure; and

10 **Sec. 2. 4 MRSA §152, sub-§5, ¶R,** as enacted by PL 1989, c.
12 919, §2 and affected by §18, is amended to read:

14 R. Actions to enforce access to health care under Title 22,
15 section 1715+; and

16 **Sec. 3. 4 MRSA §152, sub-§5, ¶S** is enacted to read:

18 S. Actions in which it is alleged that a state or other
20 government employee has committed an intentional or
21 constitutional tort. For purposes of injunctive relief,
22 commission of an intentional tort or violation of
23 constitutional rights is presumed to cause irreparable harm
24 to a complaining party.

26 **Sec. 4. 14 MRSA §8102, sub-§5** is enacted to read:

28 5. Tort. "Tort" means and includes offenses of negligent
29 commission or omission only.

30 **Sec. 5. 14 MRSA §8103, sub-§1,** as repealed and replaced by PL
32 1977, c. 578, §1, is amended to read:

34 **1. Immunity.** Except as otherwise expressly provided by
35 statute, all governmental entities ~~shall-be~~ are immune from suit
36 on any and all tort claims seeking recovery of damages. When
37 immunity is removed by this chapter, any claim for damages ~~shall~~
38 must be brought in accordance with the terms of this chapter.

40 A governmental entity is not liable for a claim that results from
41 an employee's performance or failure to perform a discretionary
42 duty, regardless of whether the discretion is abused and whether
43 the law under which the discretionary duty is performed is valid
44 or invalid, except that there is no discretionary immunity under
45 this section for an employee who commits an intentional tort or
46 violates a citizen's constitutional right. The issue of whether
47 an employee's behavior rises to the level of an intentional tort
48 or a violation of a constitutional right is a question of fact
49 for a fact finder at trial in the appropriate court.

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Sec. 6. 14 MRSA §8104-E is enacted to read:

§8104-E. Tort; limitations

This Act does not apply to the commission of intentional torts or the violation of citizens' constitutionally protected rights whether under color of law or otherwise. This Act does not apply to a situation in which a court might be asked to order temporary injunctive relief to stop or prohibit the commission of an intentional tort or violation of a constitutionally protected interest.

Sec. 7. 14 MRSA §8107, sub-§6 is enacted to read:

6. Intentional torts and constitutional violations excluded. Notice of provisions of the Act apply only to negligence torts and not to intentional or constitutionally based torts.

Sec. 8. 22 MRSA §4002, sub-§3-B is enacted to read:

3-B. Clear and convincing evidence. "Clear and convincing evidence" means an intermediate standard of proof. It is the measure or degree of proof that will produce in the mind of the court a firm belief or conviction as to the allegations sought to be established. In all cases, conviction by plea, including nolo contendere, or trial of a criminal offense of any form of child abuse is clear and convincing evidence that the abuse occurred. A verdict of not guilty is clear and convincing evidence that the abuse did not occur.

Sec. 9. 22 MRSA §4003, first ¶, as enacted by PL 1979, c. 733, §18, is amended to read:

Recognizing that parents have a liberty interest in raising children without state interference, which is protected by the United States Constitution, and that the State must demonstrate a compelling interest in order to overcome a constitutionally protected liberty interest, but that the right to family integrity is limited by the right of children to be protected from abuse and neglect, and recognizing also that uncertainty and instability are possible in extended foster home or institutional living, it is the intent of the Legislature that this chapter:

Sec. 10. 22 MRSA §4003, sub-§2, as enacted by PL 1979, c. 733, §18, is amended to read:

2. Removal from parental custody. Provide that children will may be taken from the custody of their parents only where

2 when there is clear and convincing evidence that failure to do so
3 would jeopardize their health or welfare;

4 **Sec. 11. 22 MRSA §4004, sub-§2-A** is enacted to read:

6 **2-A. Evaluation by mental health professionals.** If during
7 and as part of its investigation of alleged abuse, the department
8 determines that it is desirable to have the suspected abuser, the
9 alleged victim or other family members evaluated by a mental
10 health professional in connection with the suspected abuse or in
11 regard to parenting skills or both, the individuals must
12 cooperate with the evaluations only if:

14 A. The evaluations are conducted only by suitably licensed
15 mental health professionals;

16 B. In addition to or instead of an evaluation performed by
17 a mental health professional chosen by the State, the family
18 is given the option of having another evaluation performed
19 by a mental health professional chosen by the family; and

22 C. The evaluations are conducted at state expense.

24 If the family does not wish to choose a particular mental health
25 professional, the department may assign an examiner or examiners
26 to provide the evaluations.

28 **Sec. 12. 22 MRSA §4004, sub-§3**, as enacted by PL 1979, c. 733,
29 §18, is amended to read:

30 **3. Objection of parent.** Except as specifically authorized
31 by law, no person or public or private agency or employee of a
32 public or private agency may take charge of a child over the
33 objection of his the child's parent or custodian, take an action
34 or make a statement that would cause or threaten to cause a break
35 in the family's integrity or use influence to cause such a break
36 without affording the parent or custodian appropriate due process
37 of law.

40 **Sec. 13. 22 MRSA §4005, sub-§2**, as amended by PL 1983, c. 733,
41 §2, is repealed and the following enacted in its place:

42 **2. Parents and custodians.** In protective custody hearings,
43 parents and custodians are entitled to the following rights.

44 A. Parents and custodians are entitled to legal counsel in
45 child protection proceedings except a petition for a medical
46 treatment order under section 4071 but including hearings on
47 such an order. The parent or custodian may request the
48 court to appoint legal counsel. The court, if it finds them
49 incompetent to represent themselves, may appoint legal counsel.
50 The court, if it finds them

2 indigent, shall appoint and pay the reasonable costs and
3 expenses of their legal counsel. The parent or custodian is
4 not entitled to court-appointed counsel until a request for
5 a preliminary protection order or child protective petition
6 is filed with the court and a hearing date is set.

7 B. Parents and custodians are entitled to be apprised that
8 investigations in child protection proceedings may involve
9 the interruption of their constitutionally protected right
10 to family integrity. The child protection worker or agency
11 shall notify the parent or custodian of this fact in writing
12 and inform the parent or custodian of the right to be
13 represented by an attorney throughout the investigative
14 process.

15 **Sec. 14. 22 MRSA §4007, sub-§1**, as amended by PL 1985, c. 495,
16 §17, is amended to read:

17 **1. Procedures.** All child protection proceedings shall ~~must~~
18 be conducted according to the rules of civil procedure and the
19 rules of evidence, except as provided otherwise in this chapter.
20 All the proceedings shall ~~must~~ be recorded. ~~All proceedings and~~
21 ~~records shall be closed to the public, unless the court orders~~
22 ~~otherwise.~~ Upon a clear and convincing showing by a party that
23 proceedings that are open to the public present a reasonable
24 probability of causing permanent harm to the child whom the State
25 seeks to protect or severe temporary harm that may have an
26 enduring effect, the court, in its discretion, may close the
27 proceedings and the record of those proceedings to the public.

28 **Sec. 15. 22 MRSA §4007, sub-§3-A**, as enacted by PL 1989, c.
29 226, is repealed and the following enacted in its place:

30 **3-A. Report of licensed mental health professional.** In any
31 hearing held in connection with a child protection proceeding
32 under this chapter, the written report of a licensed mental
33 health professional who has treated or evaluated the child on
34 behalf of the State must be admitted as evidence if:

35 A. The party seeking admission of the written report has
36 furnished a copy of the report to all parties at least 21
37 days prior to the hearing; and

38 B. The parent, guardian or other respondent in the case has
39 been given the opportunity to choose a mental health
40 professional, who may present testimony adverse to that of
41 the State's expert, to evaluate the child; and, if that
42 parent, guardian or other respondent is indigent, the
43 additional evaluations have been at state expense.

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2 The reports may not be admitted as evidence without the testimony
3 of the mental health professional if a party objects to that
4 admission at least 7 days prior to the hearing. This subsection
5 does not apply to the caseworker assigned to the child.

6 **Sec. 16. 22 MRSA §4011, sub-§1**, as amended by PL 1989, c.
7 819, §2, is further amended by adding after the first paragraph a
8 new paragraph to read:

10 These individuals are required to report only when, as reasonable
11 professionals, they find demonstrable, clinical evidence that
12 abuse has occurred; they may not report based on unsubstantiated,
13 3rd-party observations or hearsay evidence. In the case of
14 3rd-party observations or hearsay evidence, professionals shall
15 advise the 3rd parties to report the allegations directly to the
16 department. Professionals may report as private citizens if, in
17 such a report, they make it clear to the department that they are
18 not reporting based on any empirical, demonstrable, clinical
19 evidence but merely according to unprofessional lay opinion.

20 **Sec. 17. 22 MRSA §4014, sub-§1**, as amended by PL 1987, c.
21 395, Pt. A, §89, is further amended to read:

24 **1. Reporting and proceedings.** A person, including an agent
25 of the department, participating in good faith in reporting under
26 this subchapter or participating in a related child protection
27 investigation or proceeding, including, but not limited to, a
28 multidisciplinary team, out-of-home abuse investigating team or
29 other investigating or treatment team, is immune from any
30 criminal or civil liability for the act of reporting or
31 participating in the investigation or proceeding. "Good faith in
32 reporting" means reporting by an individual who has a sufficient
33 basis of information to justify that reporting. "Good faith
34 reporting" may not be determined conclusively by a person's
35 protestations alone. Good faith does not include instances when
36 a false report is made and the person knows or should know the
37 report is false. Nothing in this section may be construed to bar
38 criminal or civil action regarding perjury charges or an
39 appropriate civil suit in tort against the reporter or regarding
40 the abuse or neglect which that led to a report, investigation or
41 proceeding in those cases when good faith in reporting is not
42 exercised.

44 **Sec. 18. 22 MRSA §4014, sub-§3**, as enacted by PL 1979, c.
45 733, §18, is repealed.

46 **Sec. 19. 22 MRSA §4033, sub-§2**, as enacted by PL 1979, c. 733,
47 §18, is amended to read:

2 **2. Notice of preliminary protection order.** If there is to
3 be a request for a preliminary protection order, the petitioner
4 shall, by any all reasonable means, attempt to notify the parents
5 and custodians of his the intent to request that order and of the
6 time and place at which he the petitioner will make the request.
7 This notice is not required if the petitioner includes in the
8 petition a sworn statement of his the petitioner's belief, along
9 with a detailed description of the reasons for holding that
10 belief, that:

11 A. The child would suffer serious harm during the time
12 needed to notify the parents or custodians; or

13 B. Prior notice to the parents or custodians would increase
14 the risk of serious harm to the child or petitioner.

15 **Sec. 20. 22 MRSA §4034, sub-§§1 and 2,** as enacted by PL 1979,
16 c. 733, §18, are amended to read:

17 **1. Request.** A petitioner may add to a child protection
18 petition a request for a preliminary protection order, which
19 shall must include a sworn summary of facts to support the
20 request, along with a detailed description of the petitioner's
21 reason or reasons to believe that an immediate risk of serious
22 harm or potential for further abuse may arise in the case if
23 notice of the request is given to the parent or custodian.

24 **2. Order.** If the court finds by a preponderance of the
25 evidence presented in the sworn summary or otherwise that there
26 is an immediate risk of serious harm to the child, it may order
27 any disposition under section 4036. A preliminary protection
28 order shall ~~automatically expire~~ expires at the time of the
29 issuing of a final protection order under section 4035. A court
30 may not order a child into state custody for more than 7 days
31 without a hearing at which both the petitioner and the parent or
32 custodian may present evidence concerning alleged child abuse.
33 If the court finds abuse, it must state in writing and in detail
34 its findings of fact and conclusions of law in support of a
35 decision to continue state custody. The court shall state that
36 it finds clear and convincing evidence of abuse, specifying what
37 that evidence is.

38 **Sec. 21. 22 MRSA §4034, sub-§4,** as amended by PL 1983, c. 184,
39 §4, is further amended to read:

40 **4. Preliminary hearing.** If the custodial parent appears and
41 does not consent, or if a noncustodial parent requests a hearing,
42 then the court shall hold a preliminary hearing on that order
43 within ~~10~~ 7 days of its issuance or request, unless all parties
44 expressly agree to a later date. The petitioner shall ~~bear~~ bears

2 the burden of proof. If, after the hearing, the court finds, by a
preponderance of the evidence, that returning the child to his
4 the custodian would place ~~him~~ the child in immediate risk of
serious harm, it shall continue the order or make another
6 disposition under section 4036.

8 **Sec. 22. 22 MRSA §4035, sub-§2**, as enacted by PL 1979, c. 733,
§18, is amended to read:

10 **2. Adjudication.** After hearing evidence, the court shall
make a finding, ~~by a preponderance of the evidence,~~ through clear
12 and convincing evidence whether the child is in circumstances of
jeopardy to his the child's health or welfare.

14 **Sec. 23. 22 MRSA §4036, sub-§4**, as enacted by PL 1985, c. 739,
16 §10, is repealed.

18 STATEMENT OF FACT

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22 This bill makes a number of changes to the Child and Family
Services and Child Protection Act by amending the procedures by
24 which the Department of Human Services may remove a child from a
parent's custody. The bill requires any mental health
26 evaluation required by the department to be conducted by a
professional chosen by the family and at the expense of the
State. The bill also requires certain professional persons
28 making a report of abuse or neglect to provide clinical evidence
that the abuse has occurred.

30 The bill also amends the Maine Tort Claims Act.
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