

VOLUME NO. 43

OPINION NO. 50

COURTS - Necessary allegations in petition for temporary restraining order under section 40-4-121(3), MCA;
MONTANA CODE ANNOTATED - Sections 27-19-201(5), 40-4-121, 40-4-123, 45-5-206(1)(b);
MONTANA LAWS OF 1985 - Chapters 526, 700.

HELD: A petition for injunctive relief under section 40-4-121(3), MCA, must allege physical abuse, harm, or bodily injury.

December 22, 1989

Keith D. Haker
Custer County Attorney
1010 Main
Miles City MT 59301

Dear Mr. Haker:

You have requested my opinion on the following question:

Must there be physical abuse committed before a temporary restraining order may be issued by a justice court under section 40-4-121(3), MCA?

In 1985 the Legislature addressed the issue of domestic violence by enacting two separate pieces of legislation. Senate Bill 449 (1985 Mont. Laws, ch. 700) created and defined the criminal offense of domestic abuse, codified at section 45-5-206, MCA, and amended criminal procedure statutes concerning arrest and bail. House Bill 310 (1985 Mont. Laws, ch. 526) amended statutes in Titles 27 and 40 of the Montana Code Annotated so as to permit certain abused family and household members to obtain self help temporary restraining orders and preliminary injunctions. See §§ 27-19-201, 27-19-315, 27-19-316, 40-4-121, MCA. House Bill 310 also provided for municipal and justice court jurisdiction to hear and issue the protective orders. In 1989 the Legislature extended this civil jurisdiction to city courts. § 40-4-123, MCA.

Your inquiry arises in part from an apparent ambiguity created by sections 27-19-201(5) and 40-4-121(3), MCA. Section 27-19-201(5), MCA, provides that an injunction order may be granted "when it appears the applicant has

suffered or may suffer physical abuse under the provisions of [section] 40-4-121." However, section 40-4-121, MCA, provides in subsection (3)(a) that a person may seek injunctive relief by filing a verified petition "alleging physical abuse, harm, or bodily injury against the petitioner by a family or household member." While the former statute appears to allow injunctive relief for potential victims of physical abuse which may occur in the future, the latter statute requires a petition for such relief to allege the prior occurrence of physical abuse, harm, or bodily injury.

In addition, your letter notes that a person may be convicted of the criminal offense of domestic abuse, as specified in section 45-5-206(1)(b), MCA, if he "purposely or knowingly causes reasonable apprehension of bodily injury in a family member or household member." Under this provision, actual physical abuse or bodily injury is not required to sustain a charge of domestic abuse. If the victim of such criminal domestic abuse is unable to allege actual physical abuse, harm, or bodily injury and is thereby precluded from obtaining a civil temporary restraining order to prevent further abuse, the statutes create an anomaly which arguably serves to frustrate the prophylactic purpose of the 1985 legislation.

Prior to 1981 a district court could enjoin a party in a marriage dissolution or legal separation proceeding from molesting or disturbing the peace of the other party. § 40-4-106, MCA (recodified in 1985 as § 40-4-121, MCA). Recognizing that state laws were not providing adequate protection to some spouse abuse victims, the 1981 Legislature extended the availability of district court injunctive relief to spouse abuse victims who had not filed a petition for dissolution of marriage or legal separation. 1981 Mont. Laws, ch. 180. This legislation added subsection (3) to former section 40-4-106, MCA, which is now section 40-4-121, MCA, and added subsection (5) to section 27-19-201, MCA. As discussed above, the 1985 Legislature enacted further changes in these laws to increase the availability and effectiveness of the protective orders. See "Montana's New Domestic Abuse Statutes: A New Response to an Old Problem," Women's Law Caucus, 47 Mont. L. Rev. 403, 414-18 (1986). Former spouses and cohabitants, as well as current spouses, may now obtain protective orders, which are enforceable by criminal misdemeanor sanctions. §§ 40-4-121(3)(b), 45-5-626, MCA. Municipal, justice, and city courts have concurrent jurisdiction with district courts to issue protective orders under section 40-4-123, MCA.

Initially, it is necessary to distinguish between injunctive relief available to parties in a district court proceeding for dissolution of marriage or legal separation under subsection (2) of section 40-4-121, MCA, and injunctive relief available under subsection (3) of section 40-4-121, MCA, where a petition for dissolution or separation has not been filed. In the former instance, a motion brought by a spouse under subsection (2) does not have to allege physical abuse in order for the district court to issue a temporary injunction against the other spouse. In the latter instance, subsection (3)

requires an allegation of physical abuse, harm, or bodily injury against the petitioner. Since section 27-19-201(5), MCA, authorizes injunctive relief in both instances, its language ("has suffered or may suffer physical abuse") is not inconsistent with the different requirements of subsections (2) and (3) of section 40-4-121, MCA.

The fundamental rule of statutory construction is that the intention of the Legislature controls. § 1-2-102, MCA. See Missoula County v. American Asphalt, 216 Mont. 423, 701 P.2d 990 (1985). The intention of the Legislature is first determined, if possible, from the plain meaning of the words used. Haker v. Southwestern Railway Co., 178 Mont. 364, 578 P.2d 724 (1978). If legislative intent cannot be so determined, other rules of statutory construction, including consideration of the statute's legislative history, may be applied to ascertain the intent. State ex rel. Normile v. Cooney, 100 Mont. 391, 47 P.2d 637 (1935); Thiel v. Taurus Drilling Ltd. 1980 II, 218 Mont. 201, 710 P.2d 33 (1985).

Subsection (3) of section 40-4-121, MCA, provides in relevant part:

A person may seek the relief provided for in subsection (2) of this section without filing a petition under this part for a dissolution of marriage or legal separation by filing a verified petition:

- (a) alleging physical abuse, harm, or bodily injury against the petitioner by a family or household member; and
- (b) requesting relief under Title 27, chapter 19, part 3.

The question is whether the Legislature intended to authorize a justice court to issue a temporary restraining order under this subsection where the person requesting relief has been threatened with physical abuse or has a reasonable apprehension of bodily injury but has not been physically abused, harmed, or injured. The plain meaning of the words "alleging physical abuse, harm, or bodily injury" supports the view that threats or apprehension would not be a sufficient basis for a petition requesting injunctive relief under section 40-4-121(3), MCA. This view is further supported by the legislative history of House Bill 310, and I must conclude that the Legislature did not intend to provide for injunctive relief under this statute in the absence of physical abuse, harm, or bodily injury.

As introduced, House Bill 310 required the subsection (3) petition to allege "physical abuse against the petitioner, including attempting to cause or causing bodily injury or causing the petitioner to engage in involuntary sexual relations by threat or force." At the hearing before the House Judiciary Committee on February 5, 1985, Representative Kruegar noted that courts may be reluctant to issue temporary restraining orders in response to threats

alone. Committee minutes, House Judiciary Committee, February 5, 1985. House Bill 310 was thereafter amended so that a subsection (3) petition could allege "physical abuse, harm, or bodily injury or the threat of physical abuse, harm, or bodily injury." However, the Senate Judiciary Committee voted to strike the amendment's reference to "threat of physical abuse, harm, or bodily injury," and the Senate passed the bill with the reference deleted. The House of Representatives subsequently concurred in the Senate version of House Bill 310, resulting in the present language in section 40-4-121(3)(a), MCA.

Generally, the rejection of an amendment indicates that the Legislature did not intend the bill to include the provisions embodied in the rejected amendment. 2A Sutherland Statutory Construction § 48.18 (4th ed. 1984). Cf. Matter of W.J.H., 226 Mont. 479, 736 P.2d 484 (1987). I am persuaded that the Legislature's rejection of the specific provision concerning threats of physical abuse, harm, or bodily injury indicates its intention that injunctive relief under section 40-4-121(3), MCA, should not be granted solely upon an allegation of such threats.

The Legislature did not choose to define the terms "physical abuse," "harm," and "bodily injury" for purposes of section 40-4-121(3), MCA. However, the definitions of "harm" and "bodily injury" found in section 45-2-101, MCA, appear to be applicable to the terms as they are used in Title 40. See § 1-2-107, MCA. The 1985 Legislature added the two latter terms to accompany the term "physical abuse," indicating an intention to expand the range of abusive conduct to which injunctive relief under section 40-4-121(3), MCA, would be an appropriate judicial response. Finally, I note that in admitting a defendant to bail in a criminal domestic abuse proceeding, the judge may prescribe reasonable conditions in order to protect any person from bodily injury. In particular, the judge may order the defendant to avoid all contact with the alleged victim of the crime. § 46-9-501(b)(v), MCA.

THEREFORE, IT IS MY OPINION:

A petition for injunctive relief under section 40-4-121(3), MCA, must allege physical abuse, harm, or bodily injury.

Sincerely,

MARC RACICOT
Attorney General