

House BILL NO. 444

INTRODUCED BY

*Boyer James Holland* *Hayden Robert Hurdle Keith*

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING REBUTTABLE PRESUMPTIONS IN CHILD CUSTODY PROCEEDINGS; ALLOWING A PARENT TO OBJECT AND HAVE A HEARING IN VISITATION PROCEEDINGS AND CUSTODY MODIFICATION PROCEEDINGS IF A PERSON RESIDING IN THE OTHER PARENT'S HOUSEHOLD HAS BEEN CONVICTED OF A CERTAIN LISTED CRIME; AND AMENDING SECTIONS 40-4-212, 40-4-217, AND 40-4-219, MCA."

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

**Section 1.** Section 40-4-212, MCA, is amended to read:

**"40-4-212. Best interest of child.** (1) The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors, including but not limited to:

- (a) the wishes of the child's parent or parents as to ~~his~~ custody;
  - (b) the wishes of the child as to ~~his~~ a custodian;
  - (c) the interaction and interrelationship of the child with ~~his~~ the child's parent or parents, ~~his~~ and siblings, and with any other person who may significantly affect the child's best interest;
  - (d) the child's adjustment to ~~his~~ home, school, and community;
  - (e) the mental and physical health of all individuals involved;
  - (f) physical abuse or threat of physical abuse by one parent against the other parent or the child;
- and
- (g) chemical dependency, as defined in 53-24-103, or chemical abuse on the part of either parent.

(2) A de facto custody arrangement, in the absence of a prior custody decree, does not require the child's parent or parents to prove the factors set forth in 40-4-219.

(3) The following are rebuttable presumptions and apply unless contrary to the best interest of the child:

(a) Custody should be granted to the parent who has provided most of the primary care during the child's life.

(b) A custody action brought by a parent within 6 months after a child support action against that

1 parent is vexatious.

2 (4) The following are rebuttable presumptions:

3 (a) A knowing failure to pay birth-related costs that the person is able to pay is not in the best  
4 interest of the child.

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8 **Section 2.** Section 40-4-217, MCA, is amended to read:

9 **"40-4-217. Visitation.** (1) A parent who is not granted custody of the child is entitled to reasonable  
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12 (2) In a proceeding for dissolution of marriage or legal separation, the court may, upon the petition  
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16 would serve the best interest of the child; but the court may not restrict a parent's visitation rights unless  
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18 or unless the provisions of subsection (6) apply.

19 (4) ~~So~~ As long as a noncustodial parent who has visitation rights under a decree or a custody  
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21 residence to another state and unless the noncustodial parent has given written consent, give written notice  
22 to the noncustodial parent, as provided in subsection (5).

23 (5) The written notice required by subsection (4) must be served personally or given by certified  
24 mail not less than 30 days before the proposed change in residence. Proof of service must be filed with the  
25 court that issued the custody order. The purpose of the notice is to allow the noncustodial parent to seek  
26 a modification of ~~his~~ the visitation schedule.

27 (6) (a) If a noncustodial parent or other person residing in the noncustodial parent's household has  
28 been convicted of any of the crimes listed in subsection (6)(c), the custodial parent or any other person  
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8 (c) This subsection (6) applies to the following crimes:

- 9 (i) deliberate homicide, as described in 45-5-102;  
10 (ii) mitigated deliberate homicide, as described in 45-5-103;  
11 (iii) sexual assault, as described in 45-5-502;  
12 (iv) sexual intercourse without consent, as described in 45-5-503;  
13 (v) incest, as described in 45-5-507;  
14 (vi) aggravated promotion of prostitution of a child, as described in 45-5-603(1)(b);  
15 (vii) endangering the welfare of children, as described in 45-5-622;  
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19 **Section 3.** Section 40-4-219, MCA, is amended to read:

20 **"40-4-219. Modification.** (1) The court may in its discretion modify a prior custody decree if it  
21 finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at  
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23 the child's custodian and that the modification is necessary to serve the best interest of the child and if it  
24 further finds that:

- 25 (a) the custodian agrees to the modification;  
26 (b) the child has been integrated into the family of the petitioner with consent of the custodian;  
27 (c) the child's present environment endangers seriously ~~his~~ the child's physical, mental, moral, or  
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30 (d) the child is 14 years of age or older and desires the modification;

- 1 (e) the custodian willfully and consistently:
- 2 (i) refuses to allow the child to have any contact with the noncustodial parent; or
- 3 (ii) attempts to frustrate or deny the noncustodial parent's exercise of visitation rights; or
- 4 (f) the custodial parent has changed or intends to change the child's residence to another state.
- 5 (2) A court may modify a de facto custody arrangement in accordance with the factors set forth
- 6 in 40-4-212.
- 7 (3) The court shall presume the custodian is not acting in the child's best interest if the custodian
- 8 does any of the acts specified in subsection (1)(e) or (8).
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- 10 schedule and to apportion transportation costs between the parents.
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- 12 finds that the modification action is vexatious and constitutes harassment.
- 13 (6) A custody decree may be modified upon the death of the custodial parent pursuant to
- 14 40-4-221.
- 15 (7) As used in this section, "prior custody decree" means a custody determination contained in a
- 16 judicial decree or order made in a custody proceeding.
- 17 (8) (a) If a parent or other person residing in that parent's household has been convicted of any
- 18 of the crimes listed in subsection (8)(c), the other parent or any other person who has been granted custody
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4 (i) deliberate homicide, as described in 45-5-102;

5 (ii) mitigated deliberate homicide, as described in 45-5-103;

6 (iii) sexual assault, as described in 45-5-502;

7 (iv) sexual intercourse without consent, as described in 45-5-503;

8 (V) DEVIATE SEXUAL CONDUCT WITH AN ANIMAL, AS DESCRIBED IN 45-2-101 AND  
9 PROHIBITED UNDER 45-5-505;

10 ~~(v)~~(VI) incest, as described in 45-5-507;

11 ~~(vi)~~(VII) aggravated promotion of prostitution of a child, as described in 45-5-603(1)(b);

12 ~~(vii)~~(VIII) endangering the welfare of children, as described in 45-5-622;

13 ~~(viii)~~(IX) domestic abuse of the type described in 45-5-206(1)(a);

14 ~~(ix)~~(X) sexual abuse of children, as described in 45-5-625."

15

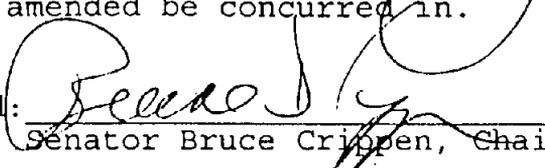
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SENATE STANDING COMMITTEE REPORT

Page 1 of 2  
March 20, 1995

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration HB 444 (third reading copy -- blue), respectfully report that HB 444 be amended as follows and as so amended be concurred in.

Signed:   
Senator Bruce Crippen, Chair

That such amendments read:

1. Title, lines 4 and 5.

Following: "PRESUMPTIONS" on line 4

Strike: remainder of line 4 through "CONSIDER" on line 5

Insert: "REBUTTABLE PRESUMPTIONS"

2. Title, line 8.

Following: "CRIME;"

Strike: "AND"

Insert: "REVISING THE OFFENSE OF CUSTODIAL INTERFERENCE;"

Following: "40-4-217,"

Strike: "AND"

Following: "40-4-219,"

Insert: "AND 45-5-304,"

Following: "MCA"

Insert: "; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE"

3. Page 1, lines 21 and 22.

Strike: subsection (f) in its entirety

Renumber: subsequent subsections

4. Page 2, line 10.

Following: line 9

Insert: "(3) The following are rebuttable presumptions and apply unless contrary to the best interest of the child:

(a) Custody should be granted to the parent who has provided most of the primary care during the child's life.

(b) A custody action brought by a parent within 6 months after a child support action against that parent is vexatious.

(4) The following are rebuttable presumptions:

(a) A knowing failure to pay birth-related costs that the person is able to pay is not in the best interest of the child.

(b) Failure to pay child support that the person is able to pay is not in the best interest of a child in need of the child support."

  
Amd. Coord.  
Sec. of Senate

  
Senator Carrying Bill

HB 444  
SENATE  
641503SC.SPv

5. Page 5, line 15.

Insert: "Section 4. Section 45-5-304, MCA, is amended to read:

"45-5-304. Custodial interference. (1) A person commits the offense of custodial interference if, knowing that ~~he~~ the person has no legal right to do so, the person:

(a) ~~he~~ takes, entices, or withholds from lawful custody any child, incompetent person, or other person entrusted by authority of law to the custody of another person or institution;

(b) prior to the entry of a court order determining custodial rights, ~~he~~ takes, entices, or withholds any child from the other parent ~~where~~ when the action manifests a purpose to substantially deprive that parent of parental rights; or

(c) ~~he~~ is one of two persons who has joint custody of a child under a court order and ~~he~~ takes, entices, or withholds the child from the other ~~where~~ when the action manifests a purpose to substantially deprive the other parent of parental rights.

(2) A person convicted of the offense of custodial interference shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed \$50,000, or both.

(3) A With respect to the first alleged commission of the offense only, a person who has not left the state does not commit an offense under this section if ~~he~~ the person voluntarily returns ~~such~~ the child, incompetent person, or other person to lawful custody prior to arraignment. A With respect to the first alleged commission of the offense only, a person who has left the state does not commit an offense under this section if ~~he~~ the person voluntarily returns ~~such~~ the child, incompetent person, or other person to lawful custody prior to arrest."

NEW SECTION. Section 5. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 6. Effective date. [This act] is effective on passage and approval."

-END-

## 1 HOUSE BILL NO. 444

2 INTRODUCED BY HARPER, WYATT, HURDLE, KOTTEL, SOFT, GRIMES, HOLLAND

3  
 4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING ~~REBUTTABLE PRESUMPTIONS~~ AN ADDITIONAL  
 5 FACTOR THAT A COURT MUST CONSIDER REBUTTABLE PRESUMPTIONS IN CHILD CUSTODY  
 6 PROCEEDINGS; ALLOWING A PARENT TO OBJECT AND HAVE A HEARING IN VISITATION PROCEEDINGS  
 7 AND CUSTODY MODIFICATION PROCEEDINGS IF A PERSON RESIDING IN THE OTHER PARENT'S  
 8 HOUSEHOLD HAS BEEN CONVICTED OF A CERTAIN LISTED CRIME; ~~AND REVISING THE OFFENSE OF~~  
 9 CUSTODIAL INTERFERENCE; AMENDING SECTIONS 40-4-212, 40-4-217, ~~AND 40-4-219, AND 45-5-304,~~  
 10 MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

11  
 12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

13  
 14 **Section 1.** Section 40-4-212, MCA, is amended to read:

15 **"40-4-212. Best interest of child.** (1) The court shall determine custody in accordance with the best  
 16 interest of the child. The court shall consider all relevant factors, including but not limited to:

17 (a) the wishes of the child's parent or parents as to ~~his~~ custody;

18 (b) the wishes of the child as to ~~his~~ a custodian;

19 (c) the interaction and interrelationship of the child with ~~his~~ the child's parent or parents, ~~his~~ and  
 20 siblings, and with any other person who may significantly affect the child's best interest;

21 (d) the child's adjustment to ~~his~~ home, school, and community;

22 (e) the mental and physical health of all individuals involved;

23 ~~(F) A KNOWING FAILURE OF A PARENT TO PAY BIRTH RELATED COSTS OR CHILD SUPPORT~~  
 24 THAT THE PARENT IS ABLE TO PAY;

25 ~~(G)(F)~~ physical abuse or threat of physical abuse by one parent against the other parent or the  
 26 child; and

27 ~~(g)(H)(G)~~ chemical dependency, as defined in 53-24-103, or chemical abuse on the part of either  
 28 parent.

29 (2) A de facto custody arrangement, in the absence of a prior custody decree, does not require the  
 30 child's parent or parents to prove the factors set forth in 40-4-219.

1 ~~(3) The following are rebuttable presumptions and apply unless contrary to the best interest of the~~  
 2 ~~child:~~

3 ~~(a) Custody should be granted to the parent who has provided most of the primary care during the~~  
 4 ~~child's life.~~

5 ~~(b) A custody action brought by a parent within 6 months after a child support action against that~~  
 6 ~~parent is vexatious.~~

7 ~~(4) The following are rebuttable presumptions:~~

8 ~~(a) A knowing failure to pay birth-related costs that the person is able to pay is not in the best~~  
 9 ~~interest of the child.~~

10 ~~(b) Failure to pay child support that the person is able to pay is not in the best interest of a child~~  
 11 ~~in need of the child support.~~

12 (3) THE FOLLOWING ARE REBUTTABLE PRESUMPTIONS AND APPLY UNLESS CONTRARY TO  
 13 THE BEST INTEREST OF THE CHILD:

14 (A) CUSTODY SHOULD BE GRANTED TO THE PARENT WHO HAS PROVIDED MOST OF THE  
 15 PRIMARY CARE DURING THE CHILD'S LIFE.

16 (B) A CUSTODY ACTION BROUGHT BY A PARENT WITHIN 6 MONTHS AFTER A CHILD SUPPORT  
 17 ACTION AGAINST THAT PARENT IS VEXATIOUS.

18 (4) THE FOLLOWING ARE REBUTTABLE PRESUMPTIONS:

19 (A) A KNOWING FAILURE TO PAY BIRTH-RELATED COSTS THAT THE PERSON IS ABLE TO PAY  
 20 IS NOT IN THE BEST INTEREST OF THE CHILD.

21 (B) FAILURE TO PAY CHILD SUPPORT THAT THE PERSON IS ABLE TO PAY IS NOT IN THE BEST  
 22 INTEREST OF A CHILD IN NEED OF THE CHILD SUPPORT."

23  
 24 **Section 2.** Section 40-4-217, MCA, is amended to read:

25 **"40-4-217. Visitation.** (1) A parent who is not granted custody of the child is entitled to reasonable  
 26 visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's  
 27 physical, mental, moral, or emotional health.

28 (2) In a proceeding for dissolution of marriage or legal separation, the court may, upon the petition  
 29 of a grandparent, grant reasonable visitation rights to the grandparent of the child if the court finds, after  
 30 a hearing, that the visitation would be in the best interest of the child.

1 (3) The court may modify an order granting or denying visitation rights whenever modification  
2 would serve the best interest of the child; but the court may not restrict a parent's visitation rights unless  
3 it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health  
4 or unless the provisions of subsection (6) apply.

5 (4) ~~So~~ As long as a noncustodial parent who has visitation rights under a decree or a custody  
6 agreement remains a resident of this state, a resident custodial parent shall, before changing the child's  
7 residence to another state and unless the noncustodial parent has given written consent, give written notice  
8 to the noncustodial parent, as provided in subsection (5).

9 (5) The written notice required by subsection (4) must be served personally or given by certified  
10 mail not less than 30 days before the proposed change in residence. Proof of service must be filed with the  
11 court that issued the custody order. The purpose of the notice is to allow the noncustodial parent to seek  
12 a modification of ~~his~~ the visitation schedule.

13 (6) (a) If a noncustodial parent or other person residing in the noncustodial parent's household has  
14 been convicted of any of the crimes listed in subsection (6)(c), the custodial parent or any other person  
15 who has been granted custody of the child pursuant to court order may file an objection to visitation with  
16 the court. The custodial parent or other person having custody shall give notice to the noncustodial parent  
17 of the objection as provided by the Montana Rules of Civil Procedure, and the noncustodial parent shall  
18 have 20 days from the notice to respond. If the noncustodial parent fails to respond within 20 days, the  
19 visitation rights of the noncustodial parent are suspended until further order of the court. If the noncustodial  
20 parent responds and objects, a hearing must be held within 30 days of the response.

21 (b) The noncustodial parent has the burden at the hearing to prove that visitation by the  
22 noncustodial parent does not seriously endanger the child's physical, mental, moral, or emotional health  
23 and that the modification of visitation is not in the best interest of the child.

24 (c) This subsection (6) applies to the following crimes:

25 (i) deliberate homicide, as described in 45-5-102;

26 (ii) mitigated deliberate homicide, as described in 45-5-103;

27 (iii) sexual assault, as described in 45-5-502;

28 (iv) sexual intercourse without consent, as described in 45-5-503;

29 (V) DEVIATE SEXUAL CONDUCT WITH AN ANIMAL, AS DESCRIBED IN 45-2-101 AND  
30 PROHIBITED UNDER 45-5-505;

- 1       ~~(vi)~~(VI) incest, as described in 45-5-507;
- 2       ~~(vii)~~(VII) aggravated promotion of prostitution of a child, as described in 45-5-603(1)(b);
- 3       ~~(viii)~~(VIII) endangering the welfare of children, as described in 45-5-622;
- 4       ~~(ix)~~(IX) domestic abuse of the type described in 45-5-206(1)(a);
- 5       ~~(x)~~(X) sexual abuse of children, as described in 45-5-625."

6

7       **Section 3.** Section 40-4-219, MCA, is amended to read:

8       "**40-4-219. Modification.** (1) The court may in its discretion modify a prior custody decree if it

9 finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at

10 the time of entry of the prior decree, that a change has occurred in the circumstances of the child or ~~his~~

11 the child's custodian and that the modification is necessary to serve the best interest of the child and if it

12 further finds that:

- 13       (a) the custodian agrees to the modification;
- 14       (b) the child has been integrated into the family of the petitioner with consent of the custodian;
- 15       (c) the child's present environment endangers seriously ~~his~~ the child's physical, mental, moral, or
- 16 emotional health and the harm likely to be caused by a change of environment is outweighed by its
- 17 advantages to ~~him~~ the child;
- 18       (d) the child is 14 years of age or older and desires the modification;
- 19       (e) the custodian willfully and consistently:
- 20       (i) refuses to allow the child to have any contact with the noncustodial parent; or
- 21       (ii) attempts to frustrate or deny the noncustodial parent's exercise of visitation rights; or
- 22       (f) the custodial parent has changed or intends to change the child's residence to another state.

23       (2) A court may modify a de facto custody arrangement in accordance with the factors set forth

24 in 40-4-212.

25       (3) The court shall presume the custodian is not acting in the child's best interest if the custodian

26 does any of the acts specified in subsection (1)(e) or (8).

27       (4) The court may modify the prior decree based on subsection (1)(f) to provide a new visitation

28 schedule and to apportion transportation costs between the parents.

29       (5) Attorney fees and costs ~~shall~~ must be assessed against a party seeking modification if the court

30 finds that the modification action is vexatious and constitutes harassment.

1 (6) A custody decree may be modified upon the death of the custodial parent pursuant to  
2 40-4-221.

3 (7) As used in this section, "prior custody decree" means a custody determination contained in a  
4 judicial decree or order made in a custody proceeding.

5 (8) (a) If a parent or other person residing in that parent's household has been convicted of any  
6 of the crimes listed in subsection (8)(c), the other parent or any other person who has been granted custody  
7 of the child pursuant to court order may file an objection to the current custody order with the court. The  
8 parent or other person having custody shall give notice to the ~~convicted~~ other parent of the objection as  
9 provided by the Montana Rules of Civil Procedure, and the ~~convicted~~ other parent shall have 20 days from  
10 the notice to respond. If the ~~convicted~~ other parent fails to respond within 20 days, the custody rights of  
11 the ~~convicted~~ other parent are suspended until further order of the court. If the ~~convicted~~ other parent  
12 responds and objects, a hearing must be held within 30 days of the response.

13 (b) The ~~convicted~~ other parent has the burden at the hearing to prove that custody by the  
14 ~~convicted~~ other parent does not seriously endanger the child's physical, mental, moral, or emotional health  
15 and that the modification of custody is not in the best interest of the child.

16 (c) This subsection (8) applies to the following crimes:

17 (i) deliberate homicide, as described in 45-5-102;

18 (ii) mitigated deliberate homicide, as described in 45-5-103;

19 (iii) sexual assault, as described in 45-5-502;

20 (iv) sexual intercourse without consent, as described in 45-5-503;

21 (V) DEVIATE SEXUAL CONDUCT WITH AN ANIMAL, AS DESCRIBED IN 45-2-101 AND  
22 PROHIBITED UNDER 45-5-505;

23 ~~(vi)~~ incest, as described in 45-5-507;

24 ~~(vii)~~ aggravated promotion of prostitution of a child, as described in 45-5-603(1)(b);

25 ~~(viii)~~ endangering the welfare of children, as described in 45-5-622;

26 ~~(ix)~~ domestic abuse of the type described in 45-5-206(1)(a);

27 ~~(x)~~ sexual abuse of children, as described in 45-5-625."

28  
29 SECTION 4. SECTION 45-5-304, MCA, IS AMENDED TO READ:

30 "45-5-304. Custodial interference. (1) A person commits the offense of custodial interference if,

1 knowing that ~~he~~ the person has no legal right to do so, the person:

2 (a) ~~he~~ takes, entices, or withholds from lawful custody any child, incompetent person, or other  
3 person entrusted by authority of law to the custody of another person or institution;

4 (b) prior to the entry of a court order determining custodial rights, ~~he~~ takes, entices, or withholds  
5 any child from the other parent ~~where~~ when the action manifests a purpose to substantially deprive that  
6 parent of parental rights; or

7 (c) ~~he~~ is one of two persons who has joint custody of a child under a court order and ~~he~~ takes,  
8 entices, or withholds the child from the other ~~where~~ when the action manifests a purpose to substantially  
9 deprive the other parent of parental rights.

10 (2) A person convicted of the offense of custodial interference shall be imprisoned in the state  
11 prison for any term not to exceed 10 years or be fined an amount not to exceed \$50,000, or both.

12 (3) A With respect to the first alleged commission of the offense only, a person who has not left  
13 the state does not commit an offense under this section if ~~he~~ the person voluntarily returns ~~such~~ the child,  
14 incompetent person, or other person to lawful custody prior to arraignment. A With respect to the first  
15 alleged commission of the offense only, a person who has left the state does not commit an offense under  
16 this section if ~~he~~ the person voluntarily returns ~~such~~ the child, incompetent person, or other person to  
17 lawful custody prior to arrest."  
18

19

20 NEW SECTION. SECTION 5. SEVERABILITY. IF A PART OF [THIS ACT] IS INVALID, ALL VALID  
21 PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT]  
22 IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID  
23 APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.

24

25 NEW SECTION. SECTION 6. EFFECTIVE DATE. [THIS ACT] IS EFFECTIVE ON PASSAGE AND  
26 APPROVAL.

26

-END-