OPD Dependency and Neglect Manual
(Working Document)
Last Updated: April 2022

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Declaration Of Policy

41-3-101. Declaration of policy. (1) It is the policy of the state of Montana to:

(a) provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for the children's care and protection;

(b) achieve these purposes in a family environment and preserve the unity and welfare of the family whenever possible;

(c) ensure that there is no forced removal of a child from the family based solely on an allegation of abuse or neglect unless the department has reasonable cause to suspect that the child is at imminent risk of harm;

(d) recognize that a child is entitled to assert the child's constitutional rights;

(e) ensure that all children have a right to a healthy and safe childhood in a permanent placement; and

(f) ensure that whenever removal of a child from the home is necessary, the child is entitled to maintain ethnic, cultural, and religious heritage whenever appropriate.

(2) It is intended that the mandatory reporting of abuse or endangerment cases by professional people and other community members to the appropriate authority will cause the protective services of the state to seek to prevent further abuses, protect and enhance the welfare of these children, and preserve family life whenever appropriate.

(3) In implementing this chapter, whenever it is necessary to remove a child from the child's home, the department shall, when it is in the best interests of the child, place the child with the child's noncustodial birth parent or with the child's extended family, including adult siblings, grandparents, great-grandparents, aunts, and uncles, when placement with the extended family is approved by the department, prior to placing the child in an alternative protective or residential facility. Prior to approving a placement, the department shall investigate whether anyone living in the home has been convicted of a crime involving serious harm to children.

(4) (a) The department shall create a registry for voluntary registration by close relatives of a child for purposes of notifying those relatives when a child that is related has been removed from the child's home pursuant to this chapter.

(b) The registry must contain the names of the child and the child's parents and may contain the names of the child's grandparents, aunts, uncles, adult brothers, and adult sisters and must contain the contact information for the child and parents and any of the relatives whose names appear in the registry.

(5) The department shall consult the registry and notify the relatives on the registry on the first working day after placing the child in accordance with **41-3-301**.

(6) The department may charge a fee commensurate with the cost of operating the registry. The fee may be charged only to those persons whose names are voluntarily entered in the registry.

(7) In implementing the policy of this section, the child's health and safety are of paramount concern.

History: (1)En. 10-1300 by Sec. 1, Ch. 328, L. 1974; Sec. 10-1300, R.C.M. 1947; (2)En. Sec. 1, Ch. 178, L. 1965; amd. Sec. 1, Ch. 292, L. 1973; Sec. 10-901, R.C.M. 1947; redes. 10-1303 by Sec. 14, Ch. 328, L. 1974; Sec. 10-1303, R.C.M. 1947; R.C.M. 1947, 10-1300, 10-1303; amd. Sec. 1, Ch. 543, L. 1979; amd. Sec. 1, Ch. 494, L. 1995; amd. Sec. 1, Ch. 564, L. 1995; amd. Sec. 1, Ch. 501, L. 1997; amd. Sec. 1, Ch. 566, L. 1999; amd. Sec. 1, Ch. 281, L. 2001; amd. Sec. 1, Ch. 311, L. 2001; amd. Sec. 1, Ch. 504, L. 2003; amd. Sec. 1, Ch. 196, L. 2009.

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Definitions

41-3-102. Definitions. As used in this chapter, the following definitions apply:

(1) (a) "Abandon", "abandoned", and "abandonment" mean:

(i) leaving a child under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the future;

(ii) willfully surrendering physical custody for a period of 6 months and during that period not manifesting to the child and the person having physical custody of the child a firm intention to resume physical custody or to make permanent legal arrangements for the care of the child;

(iii) that the parent is unknown and has been unknown for a period of 90 days and that reasonable efforts to identify and locate the parent have failed; or

(iv) the voluntary surrender, as defined in **40-6-402**, by a parent of a newborn who is no more than 30 days old to an emergency services provider, as defined in **40-6-402**.

(b) The terms do not include the voluntary surrender of a child to the department solely because of parental inability to access publicly funded services.

(2) "A person responsible for a child's welfare" means:

(a) the child's parent, guardian, or foster parent or an adult who resides in the same home in which the child resides;

(b) a person providing care in a day-care facility;

(c) an employee of a public or private residential institution, facility, home, or agency; or

(d) any other person responsible for the child's welfare in a residential setting.

(3) "Abused or neglected" means the state or condition of a child who has suffered child abuse or neglect.

(4) (a) "Adequate health care" means any medical care or nonmedical remedial health care recognized by an insurer licensed to provide disability insurance under Title 33, including the prevention of the withholding of medically indicated treatment or medically indicated psychological care permitted or authorized under state law.

(b) This chapter may not be construed to require or justify a finding of child abuse or neglect for the sole reason that a parent or legal guardian, because of religious beliefs, does not provide adequate health care for a child. However, this chapter may not be construed to limit the administrative or judicial authority of the state to ensure that medical care is provided to the child when there is imminent substantial risk of serious harm to the child.

(5) "Best interests of the child" means the physical, mental, and psychological conditions and needs of the child and any other factor considered by the court to be relevant to the child.

(6) "Child" or "youth" means any person under 18 years of age.

(7) (a) "Child abuse or neglect" means:

(i) actual physical or psychological harm to a child;

(ii) substantial risk of physical or psychological harm to a child; or

(iii) abandonment.

(b) (i) The term includes:

(A) actual physical or psychological harm to a child or substantial risk of physical or psychological harm to a child by the acts or omissions of a person responsible for the child's welfare;

(B) exposing a child to the criminal distribution of dangerous drugs, as prohibited by **45-9-101**, the criminal production or manufacture of dangerous drugs, as prohibited by **45-9-110**, or the operation of an unlawful clandestine laboratory, as prohibited by **45-9-132**; or

(C) any form of child sex trafficking or human trafficking.

(ii) For the purposes of this subsection (7), "dangerous drugs" means the compounds and substances described as dangerous drugs in Schedules I through IV in Title 50, chapter 32, part 2.

(c) In proceedings under this chapter in which the federal Indian Child Welfare Act is applicable, this term has the same meaning as "serious emotional or physical damage to the child" as used in 25 U.S.C. 1912(f).

(d) The term does not include self-defense, defense of others, or action taken to prevent the child from self-harm that does not constitute physical or psychological harm to a child.

(8) "Child protection specialist" means an employee of the department who investigates allegations of child abuse, neglect, and endangerment and has been certified pursuant to **41-3-127**.

(9) "Concurrent planning" means to work toward reunification of the child with the family while at the same time developing and implementing an alternative permanent plan.

(10) "Department" means the department of public health and human services provided for in **2-15-2201**.

(11) "Family engagement meeting" means a meeting that involves family members in either developing treatment plans or making placement decisions, or both.

(12) "Indian child" means any unmarried person who is under 18 years of age and who is either:

(a) a member of an Indian tribe; or

(b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

(13) "Indian child's tribe" means:

(a) the Indian tribe in which an Indian child is a member or eligible for membership; or

(b) in the case of an Indian child who is a member of or eligible for membership in more than one Indian tribe, the Indian tribe with which the Indian child has the more significant contacts.

(14) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control have been transferred by the child's parent.

(15) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized by:

(a) the state of Montana; or

(b) the United States secretary of the interior as being eligible for the services provided to Indians or because of the group's status as Indians, including any Alaskan native village as defined in federal law.

(16) "Limited emancipation" means a status conferred on a youth by a court in accordance with **41-1-503** under which the youth is entitled to exercise some but not all of the rights and responsibilities of a person who is 18 years of age or older.

(17) "Parent" means a biological or adoptive parent or stepparent.

(18) "Parent-child legal relationship" means the legal relationship that exists between a child and the child's birth or adoptive parents, as provided in Title 40, chapter 6, part 2, unless the relationship has been terminated by competent judicial decree as provided in **40-6-234**, Title 42, or part 6 of this chapter.

(19) "Permanent placement" means reunification of the child with the child's parent, adoption, placement with a legal guardian, placement with a fit and willing relative, or placement in another planned permanent living arrangement until the child reaches 18 years of age.

(20) "Physical abuse" means an intentional act, an intentional omission, or gross negligence resulting in substantial skin bruising, internal bleeding, substantial injury to skin, subdural hematoma, burns, bone fractures, extreme pain, permanent or temporary disfigurement, impairment of any bodily organ or function, or death.

(21) "Physical neglect" means either failure to provide basic necessities, including but not limited to appropriate and adequate nutrition, protective shelter from the elements, and appropriate clothing related to weather conditions, or failure to provide cleanliness and general supervision, or both, or exposing or allowing the child to be exposed to an unreasonable physical or psychological risk to the child.

(22) (a) "Physical or psychological harm to a child" means the harm that occurs whenever the parent or other person responsible for the child's welfare:

(i) inflicts or allows to be inflicted upon the child physical abuse, physical neglect, or psychological abuse or neglect;

(ii) commits or allows sexual abuse or exploitation of the child;

(iii) induces or attempts to induce a child to give untrue testimony that the child or another child was abused or neglected by a parent or other person responsible for the child's welfare;

(iv) causes malnutrition or a failure to thrive or otherwise fails to supply the child with adequate food or fails to supply clothing, shelter, education, or adequate health care, though financially able to do so or offered financial or other reasonable means to do so;

(v) exposes or allows the child to be exposed to an unreasonable risk to the child's health or welfare by failing to intervene or eliminate the risk; or

(vi) abandons the child.

(b) The term does not include a youth not receiving supervision solely because of parental inability to control the youth's behavior.

(23) (a) "Protective services" means services provided by the department:

(i) to enable a child alleged to have been abused or neglected to remain safely in the home;

(ii) to enable a child alleged to have been abused or neglected who has been removed from the home to safely return to the home; or

(iii) to achieve permanency for a child adjudicated as a youth in need of care when circumstances and the best interests of the child prevent reunification with parents or a return to the home.

(b) The term includes emergency protective services provided pursuant to **41-3-301**, written prevention plans provided pursuant to **41-3-302**, and court-ordered protective services provided pursuant to parts 4 and 6 of this chapter.

(24) (a) "Psychological abuse or neglect" means severe maltreatment through acts or omissions that are injurious to the child's emotional, intellectual, or psychological capacity to function, including the commission of acts of violence against another person residing in the child's home.

(b) The term may not be construed to hold a victim responsible for failing to prevent the crime against the victim.

(25) "Qualified expert witness" as used in cases involving an Indian child in proceedings subject to the federal Indian Child Welfare Act means:

(a) a member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices;

(b) a lay expert witness who has substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the Indian child's tribe; or

(c) a professional person who has substantial education and experience in providing services to children and families and who possesses significant knowledge of and experience with Indian culture, family structure, and child-rearing practices in general.

(26) "Qualified individual" means a trained professional or licensed clinician who:

(a) has expertise in the therapeutic needs assessment used for placement of youth in a therapeutic group home;

(b) is not an employee of the department; and

(c) is not connected to or affiliated with any placement setting in which children are placed.

(27) "Reasonable cause to suspect" means cause that would lead a reasonable person to believe that child abuse or neglect may have occurred or is occurring, based on all the facts and circumstances known to the person.

(28) "Residential setting" means an out-of-home placement where the child typically resides for longer than 30 days for the purpose of receiving food, shelter, security, guidance, and, if necessary, treatment.

(29) "Safety and risk assessment" means an evaluation by a child protection specialist following an initial report of child abuse or neglect to assess the following:

(a) the existing threat or threats to the child's safety;

(b) the protective capabilities of the parent or guardian;

(c) any particular vulnerabilities of the child;

(d) any interventions required to protect the child; and

(e) the likelihood of future physical or psychological harm to the child.

(30) (a) "Sexual abuse" means the commission of sexual assault, sexual intercourse without consent, aggravated sexual intercourse without consent, indecent exposure, sexual abuse, ritual abuse of a minor, or incest, as described in Title 45, chapter 5.

(b) Sexual abuse does not include any necessary touching of an infant's or toddler's genital area while attending to the sanitary or health care needs of that infant or toddler by a parent or other person responsible for the child's welfare.

(31) "Sexual exploitation" means:

(a) allowing, permitting, or encouraging a child to engage in a prostitution offense, as described in **45-5-601** through **45-5-603**;

(b) allowing, permitting, or encouraging sexual abuse of children as described in **45-5-625**; or

(c) allowing, permitting, or encouraging sexual servitude as described in **45-5-704** or **45-5-705**.

(32) "Therapeutic needs assessment" means an assessment performed by a qualified individual within 30 days of placement of a child in a therapeutic group home that:

(a) assesses the strengths and needs of the child using an age-appropriate, evidence-based, validated, functional assessment tool;

(b) determines whether the needs of the child can be met with family members or through placement in a youth foster home or, if not, which appropriate setting would provide the most effective and appropriate level of care for the child in the least restrictive environment and be consistent with the short-term and long-term goals for the child as specified in the child's permanency plan; and

(c) develops a list of child-specific short-term and long-term mental and behavioral health goals.

(33) "Treatment plan" means a written agreement between the department and the parent or guardian or a court order that includes action that must be taken to resolve the condition or conduct of the parent or guardian that resulted in the need for protective services for the child. The treatment plan may involve court services, the department, and other parties, if necessary, for protective services.

(34) (a) "Withholding of medically indicated treatment" means the failure to respond to an infant's life-threatening conditions by providing treatment, including appropriate nutrition, hydration, and medication, that, in the treating physician's or physicians' reasonable medical judgment, will be most likely to be effective in ameliorating or correcting the conditions.

(b) The term does not include the failure to provide treatment, other than appropriate nutrition, hydration, or medication, to an infant when, in the treating physician's or physicians' reasonable medical judgment:

(i) the infant is chronically and irreversibly comatose;

(ii) the provision of treatment would:

(A) merely prolong dying;

(B) not be effective in ameliorating or correcting all of the infant's life-threatening conditions; or

(C) otherwise be futile in terms of the survival of the infant; or

(iii) the provision of treatment would be virtually futile in terms of the survival of the infant and the treatment itself under the circumstances would be inhumane. For purposes of this subsection (34), "infant" means an infant less than 1 year of age or an infant 1 year of age or older who has been continuously hospitalized since birth, who was born extremely prematurely, or who has a long-term disability. The reference to less than 1 year of age may not be construed to imply that treatment should be changed or discontinued when an infant reaches 1 year of age or to affect or limit any existing protections available under state laws regarding medical neglect of children 1 year of age or older.

(35) "Youth in need of care" means a youth who has been adjudicated or determined, after a hearing, to be or to have been abused, neglected, or abandoned.

History: En. 10-1301 by Sec. 2, Ch. 328, L. 1974; amd. Sec. 18, Ch. 100, L. 1977; R.C.M. 1947, 10-1301; amd. Sec. 2, Ch. 543, L. 1979; amd. Sec. 2, Ch. 511, L. 1981; amd. Sec. 31, Ch. 465, L. 1983; amd. Sec. 1, Ch. 564, L. 1983; amd. Sec. 1, Ch. 626, L. 1985; amd. Sec. 1, Ch. 463, L. 1987; amd. Sec. 36, Ch.

609, L. 1987; amd. Sec. 1, Ch. 474, L. 1989; amd. Sec. 1, Ch. 439, L. 1993; amd. Sec. 6, Ch. 458, L. 1995; amd. Sec. 2, Ch. 528, L. 1995; amd. Sec. 159, Ch. 546, L. 1995; amd. Sec. 2, Ch. 564, L. 1995; amd. Sec. 3, Ch. 514, L. 1997; amd. Secs. 2, 19(1), Ch. 516, L. 1997; amd. Sec. 2, Ch. 566, L. 1999; amd. Sec. 1, Ch. 194, L. 2001; amd. Sec. 16, Ch. 277, L. 2001; amd. Sec. 2, Ch. 311, L. 2001; amd. Sec. 1, Ch. 398, L. 2003; amd. Sec. 1, Ch. 406, L. 2003; amd. Sec. 1, Ch. 458, L. 2003; amd. Sec. 2, Ch. 504, L. 2003; amd. Sec. 1, Ch. 555, L. 2003; amd. Sec. 1, Ch. 349, L. 2005; amd. Sec. 5, Ch. 179, L. 2009; amd. Sec. 2, Ch. 225, L. 2013; amd. Sec. 4, Ch. 367, L. 2019; amd. Sec. 1, Ch. 382, L. 2019; amd. Sec. 1, Ch. 468, L. 2019; amd. Sec. 1, Ch. 19, L. 2021; amd. Sec. 2, Ch. 202, L. 2021; amd. Sec. 5, Ch. 520, L. 2021.

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Jurisdiction And Venue

41-3-103. Jurisdiction and venue. (1) Except as provided in the federal Indian Child Welfare Act, in all matters arising under this chapter, a person is subject to a proceeding under this chapter and the district court has jurisdiction over:

(a) a youth who is within the state of Montana for any purpose;

(b) a youth or other person subject to this chapter who under a temporary or permanent order of the court has voluntarily or involuntarily left the state or the jurisdiction of the court;

(c) a person who is alleged to have abused or neglected a youth who is in the state of Montana for any purpose;

(d) a youth or youth's parent or guardian who resides in Montana;

(e) a youth or youth's parent or guardian who resided in Montana within 180 days before the filing of a petition under this chapter if the alleged abuse and neglect is alleged to have occurred in whole or in part in Montana.

(2) Venue is proper in the county where a youth is located or has resided within 180 days before the filing of a petition under this part or a county where the youth's parent or guardian resides or has resided within 180 days before the filing of a petition under this part.

History: En. 10-1302 by Sec. 3, Ch. 328, L. 1974; R.C.M. 1947, 10-1302; amd. Sec. 7, Ch. 458, L. 1995; amd. Sec. 1, Ch. 114, L. 2001; amd. Sec. 3, Ch. 504, L. 2003; amd. Sec. 1, Ch. 223, L. 2011.

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Prosecution Of Offenders

41-3-106. Prosecution of offenders. (1) If the evidence indicates violation of the criminal code, it is the responsibility of the county attorney to file appropriate charges against the alleged offender.

(2) The filing of a criminal charge does not toll a proceeding under this chapter.

(3) The district court has original jurisdiction under this section.

History: En. 10-1322 by Sec. 12, Ch. 328, L. 1974; R.C.M. 1947, 10-1322; amd. Sec. 3, Ch. 311, L. 2001.

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Interagency Cooperation

41-3-107. Interagency cooperation. (1) To effectuate the purposes of this chapter, the department of public health and human services shall cooperate with and shall seek the cooperation and involvement of all appropriate public and private agencies, including health, education, social services, and law enforcement agencies; juvenile courts; and any other agency, organization, or program providing or concerned with human services related to the prevention, identification, or treatment of child abuse or neglect. The cooperation and involvement may not include joint case management but may include joint policy planning, public education, information services, staff development, and other training.

(2) The department shall enter into a cooperative agreement with other state agencies, as provided in **52-2-203**, for the purpose of implementing this section.

History: En. Sec. 4, Ch. 543, L. 1979; amd. Sec. 12, Ch. 609, L. 1987; amd. Sec. 4, Ch. 655, L. 1991; amd. Sec. 160, Ch. 546, L. 1995.

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Child Protective Teams

41-3-108. Child protective teams. The county attorney, county commissioners, guardian ad litem, or department may convene one or more temporary or permanent interdisciplinary child protective teams. These teams may assist in assessing the needs of, formulating and monitoring a treatment plan for, and coordinating services to the child and the child's family. The supervisor of child protective services in a local service area or the supervisor's designee shall serve as the team's coordinator. Members must include:

(1) a child protection specialist;

(2) a member of a local law enforcement agency;

(3) a representative of the medical profession;

(4) a representative of a public school system;

(5) a county attorney; and

(6) if an Indian child or children are involved, someone, preferably an Indian person, knowledgeable about Indian culture and family matters.

History: En. Sec. 5, Ch. 543, L. 1979; amd. Sec. 37, Ch. 609, L. 1987; amd. Sec. 1, Ch. 67, L. 1989; amd. Sec. 161, Ch. 546, L. 1995; amd. Sec. 3, Ch. 566, L. 1999; amd. Sec. 6, Ch. 520, L. 2021.

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Proceedings Subject To Indian Child Welfare Act

41-3-109. Proceedings subject to Indian Child Welfare Act. If a proceeding under this chapter involves an Indian child, as defined in the Indian Child Welfare Act, 25 U.S.C. 1901, et seq., the proceeding is subject to the Indian Child Welfare Act.

History: En. Sec. 16, Ch. 516, L. 1997.

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Audio Or Video Testimony Allowed

41-3-110. Audio or video testimony allowed. A court may permit testimony by telephone, videoconference, or other audio or audiovisual means at any time in a proceeding pursuant to this chapter.

History: En. Sec. 1, Ch. 166, L. 2007.

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Appointment Of Court-Appointed Special Advocate -- Guardian Ad Litem

41-3-112. Appointment of court-appointed special advocate -- guardian ad litem. (1) In every judicial proceeding, the court shall appoint a court-appointed special advocate as the guardian ad litem for any child alleged to be abused or neglected. If a court-appointed special advocate is not available for appointment, the court may appoint an attorney or other qualified person to serve as the guardian ad litem. The department or any member of its staff who has a direct conflict of interest may not be appointed as the guardian ad litem in a judicial proceeding under this title. When necessary, the guardian ad litem may serve at public expense.

(2) The guardian ad litem must have received appropriate training that is specifically related to serving as a child's court-appointed representative.

(3) The guardian ad litem is charged with the representation of the child's best interests and shall perform the following general duties:

(a) to conduct investigations to ascertain the facts constituting the alleged abuse or neglect;

(b) to interview or observe the child who is the subject of the proceeding;

(c) to have access to court, medical, psychological, law enforcement, social services, and school records pertaining to the child and the child's siblings and parents or custodians;

(d) to make written reports to the court concerning the child's welfare;

(e) to appear and participate in all proceedings to the degree necessary to adequately represent the child and make recommendations to the court concerning the child's welfare;

(f) to perform other duties as directed by the court; and

(g) if an attorney, to file motions, including but not limited to filing to expedite proceedings or otherwise assert the child's rights.

(4) Information contained in a report filed by the guardian ad litem or testimony regarding a report filed by the guardian ad litem is not hearsay when it is used to form the basis of the guardian ad litem's opinion as to the best interests of the child.

(5) Any party may petition the court for the removal and replacement of the guardian ad litem if the guardian ad litem fails to perform the duties of the appointment.

History: En. Sec. 14, Ch. 543, L. 1979; amd. Sec. 1, Ch. 384, L. 1985; amd. Sec. 4, Ch. 434, L. 1993; amd. Sec. 5, Ch. 516, L. 1997; amd. Sec. 7, Ch. 566, L. 1999; Sec. 41-3-303, MCA 1999; redes. 41-3-112 by Sec. 17(3)(a), Ch. 281, L. 2001; amd. Sec. 1, Ch. 382, L. 2005; amd. Sec. 1, Ch. 132, L. 2017.

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Appeals

41-3-113. Appeals. (1) Appeals of court orders or decrees made under this part must be given precedence on the calendar of the supreme court over all other matters, unless otherwise provided by law.

(2) An appeal does not stay the order or decree appealed from and does not divest the presiding district court judge of jurisdiction to take steps that are necessary, in the best interests of the child, and in order to protect the health and safety of the child. The supreme court may order a stay upon application and hearing if suitable provision is made for the care and custody of the child.

(3) If the appeal results in the reversal of the order appealed, the legal status of the child reverts to the child's legal status before the entry of the order that was appealed. The child's prior legal status remains in effect until further order of the district court unless the supreme court orders otherwise.

History: En. Sec. 3, Ch. 463, L. 1987; Sec. 41-3-409, MCA 1999; redes. 41-3-113 by Sec. 17(3)(a), Ch. 281, L. 2001; amd. Sec. 4, Ch. 504, L. 2003.

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Foster Care Review Committee -- Foster Care Reviews -- Permanency Hearings

41-3-115. Foster care review committee -- foster care reviews -- permanency hearings. (1) Except as provided in Title 41, chapter 3, part 10, in every judicial district the district court judge, in consultation with the department, shall appoint a foster care review committee. The foster care review committee shall conduct foster care reviews as provided in this section and may, at the discretion of the court and absent an objection by a party to the proceeding, conduct permanency hearings as provided in **41-3-445**.

(2) (a) The members of the committee must be willing to act without compensation. The committee must be composed of not less than three or more than seven members. To the extent practicable, the members of the committee must be representatives of the various socioeconomic, racial, and ethnic groups of the area served.

(b) The members must include:

(i) one representative of the department who may not be responsible for the placement of the child or have any other direct conflict of interest;

(ii) a person who is knowledgeable in the needs of children in foster care placements and who is not employed by the department or the youth court; and

(iii) if the child whose care is under review is an Indian child, a person, preferably an Indian person, who is knowledgeable about Indian cultural and family matters and who is appointed effective only for and during that review.

(c) Members may also include but are not limited to:

(i) a representative of the youth court;

(ii) a representative of a local school district;

(iii) a public health nurse;

(iv) an at-large community member with knowledge of child protective services.

(3) (a) When a child is in foster care under the supervision of the department or if payment for care is made pursuant to **52-2-611**, the committee shall conduct a review of the foster care status of the child. The review must be conducted within the time limit established under the Adoption and Safe Families Act of 1997, 42 U.S.C. 675(5).

(b) The committee shall hear the case of each child in foster care to review issues that are germane to the goals of permanency and to accessing appropriate services for parents and children. In evaluating the accessibility, availability, and appropriateness of services, the committee shall consider:

(i) the safety, history, and specific needs of the child;

(ii) whether an involved agency has selected services specifically relevant to the problems and needs of the child and family;

(iii) whether appropriate services have been available to the child and family on a timely basis; and

(iv) the results of intervention.

(c) If the department has placed a child in foster care in another state, the committee shall consider whether the placement is appropriate and in the best interests of the child. In the case of a child who will not be returned to the parent, the committee shall consider both in-state and out-of-state placement options.

(d) The committee may hear the case of a child who remains in or returns to the child's home and for whom the department retains legal custody.

(4) (a) Prior to the beginning of the review, reasonable notice of each review must be sent to the following:

(i) the parents of the child or their attorneys;

(ii) if applicable, the foster parents, a relative caring for the child, the preadoptive parents, or the surrogate parents;

(iii) the child who is the subject of the review if the child is 12 years of age or older;

(iv) the child's attorney, if any;

(v) the guardian ad litem;

(vi) the court-appointed attorney or special advocate of the child; and

(vii) the child's Indian tribe if the child is an Indian.

(b) When applicable, notice of each review may be sent to other interested persons who are authorized by the committee to receive notice.

(c) All persons receiving notice are subject to the confidentiality provisions of **41-3-205**.

(d) If a foster care review is held in conjunction with a permanency hearing, notice of both proceedings must be provided.

(e) If a foster care review is held in conjunction with a permanency hearing, notice must be provided to the attorney who initiated the child abuse or neglect proceedings.

(5) The committee may elect to hold joint or separate reviews for groups of siblings, but findings and recommendations made by the committee must be specific to each child.

(6) After reviewing each case, the committee shall prepare written findings and recommendations with respect to:

(a) the continuing need for the placement and the appropriateness and safety of the placement;

(b) compliance with the case plan;

(c) the progress that has been made toward alleviating the need for placement;

(d) a likely date by which the child may be returned home or by which a permanent placement may be finalized.

(7) Following the permanency hearing, the committee shall send copies of its minutes and written findings and recommendations to the court and to the parties. If a party objects to the findings and recommendations, the party may within 10 days serve written objections upon the other party and file them with the court. A request for a hearing before the court upon the objections may be made by a party by motion. The court, after hearing the objections or upon its own motion and without objection, may adopt the findings and recommendations and shall issue an appropriate order.

(8) Because of the individual privacy involved, meetings of the committee, reports of the committee, and information on individuals' cases shared by committee members are confidential and subject to the confidentiality requirements of the department.

(9) The committee is subject to the call of the district court judge to meet and confer with the judge on all matters pertaining to the foster care of a child before the district court.

History: En. Sec. 2, Ch. 297, L. 1981; amd. Sec. 1, Ch. 201, L. 1983; MCA 1981, 41-5-807; amd. and redes. 41-3-1115 by Sec. 31, Ch. 465, L. 1983; amd. Sec. 1, Ch. 260, L. 1987; amd. Sec. 51, Ch. 609, L. 1987; amd. Sec. 16, Ch. 610, L. 1993; amd. Sec. 19, Ch. 311, L. 2001; amd. Sec. 13, Ch. 570, L. 2001; Sec. 41-3-1115, MCA 1999; redes. 41-3-115 by Sec. 17(3)(a), Ch. 281, L. 2001; amd. Sec. 2, Ch. 382, L. 2005; amd. Sec. 2, Ch. 166, L. 2007.

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Purpose

41-3-118. Purpose. The intent of **41-3-119** is to provide reimbursement for mental health outpatient counseling services to foster parents who experience the death of a foster child placed with them by the department or a licensed child placing agency. Many of the children have disabilities, terminal illnesses, or other special needs, and often these children spend their childhood in the homes of foster parents. The death of a child is a traumatic experience, and the legislature finds that providing reimbursement for counseling is a necessary support to those persons who are willing to open their homes to foster children who need a stable and safe environment.

History: En. Sec. 1, Ch. 127, L. 1999; Sec. 41-3-1160, MCA 1999; redes. 41-3-118 by Sec. 17(3)(a), Ch. 281, L. 2001.

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Foster Parent Counseling Services

41-3-119. Foster parent counseling services. (1) A person who provides substitute care to a foster child who dies while residing in a youth care facility must be offered reimbursement for mental health outpatient counseling services at the expense of the department.

(2) Upon the death of a foster child in substitute care, the department shall provide information about available reimbursement for mental health outpatient counseling services for the person or persons who were providing care to the foster child.

(3) The reimbursement for mental health outpatient counseling services must be available for up to 1 year in duration by a provider of the person's choice at an amount equivalent to that offered as a benefit to state employees under **2-18-702**, subject to the same maximum benefit levels and copayments.

History: En. Sec. 2, Ch. 127, L. 1999; Sec. 41-3-1161, MCA 1999; redes. 41-3-119 by Sec. 17(3)(a), Ch. 281, L. 2001.

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Liability Insurance For Foster Parents

41-3-120. Liability insurance for foster parents. (1) The department shall provide for liability and property damage insurance for a foster parent providing foster care services to children placed by the department and for a foster parent providing therapeutic foster care services under the auspices of a licensed child-placing agency.

(2) The state shall pay the cost of the premium for each policy issued under subsection (1). The foster parent may be required, as provided by rule, to pay a reasonable deductible for personal injury or property damage.

(3) The department shall adopt rules for the provision of insurance coverage to foster parents as provided in this section, including rules on premium payment and any deductibles required.

History: En. Sec. 1, Ch. 165, L. 2007.

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Certification Required For Use Of Title -- Exceptions

41-3-127. Certification required for use of title -- exceptions. (1) On certification in accordance with **41-3-127** through **41-3-130**, a person may use the title "certified child protection specialist".

(2) Subsection (1) does not prohibit a qualified member of another profession, such as a law enforcement officer, lawyer, psychologist, pastoral counselor, probation officer, court employee, nurse, school counselor, educator, baccalaureate, master's, or clinical social worker licensed pursuant to Title 37, chapter 22, clinical professional counselor licensed pursuant to Title 37, chapter 23, addiction counselor licensed pursuant to Title 37, chapter 35, or marriage and family therapist licensed pursuant to Title 37, chapter 37, from performing duties and services consistent with the person's licensure or certification and the code of ethics of the person's profession.

(3) Subsection (1) does not prohibit a qualified member of another profession, business, educational program, or volunteer organization who is not licensed or certified or for whom there is no applicable code of ethics, including a guardian ad litem, child advocate, or law enforcement officer, from performing duties and services consistent with the person's training, as long as the person does not represent by title that the person is a certified child protection specialist.

History: En. Sec. 1, Ch. 520, L. 2021.

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Certificate Requirements -- Supervision -- Fees

41-3-128. Certificate requirements -- supervision -- fees. (1) An applicant for certification as a child protection specialist shall:

(a) successfully complete a course in child protection, as defined by the department by rule, which must include training in:

(i) ethics;

(ii) governing statutory and regulatory framework;

(iii) role of law enforcement;

(iv) crisis intervention techniques;

(v) childhood trauma research;

(vi) evidence-based practices for family preservation and strengthening; and

(vii) the provisions of the Indian Child Welfare Act, 25 U.S.C. 1902, et seq.; and

(b) demonstrate the applicant's ability to perform all essential functions of the certified child protection role by earning a passing score on a competency examination developed pursuant to **41-3-130**.

(2) As a prerequisite to the issuance of a certificate, the department shall require the applicant to submit fingerprints for the purpose of fingerprint background checks by the Montana department of justice and the federal bureau of investigation as provided in **37-1-307**.

(3) An applicant who has a history of criminal convictions has the opportunity to demonstrate to the department that the applicant is sufficiently rehabilitated to warrant the public trust. The department may deny the certificate if it determines that the applicant is not sufficiently rehabilitated.

History: En. Sec. 2, Ch. 520, L. 2021.

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Certificate Renewal -- Continuing Education

41-3-129. Certificate renewal -- continuing education. (1) A certified child protection specialist shall renew the specialist's certification annually using a process specified by department rule, which must include proof of completion of at least 20 hours of continuing education developed or approved by the department.

(2) The continuing education may include any topic listed in subsection (1) of **41-3-128** and must include at least one unit focused on:

(a) ethics; and

(b) recent developments in governing law or rule.

History: En. Sec. 3, Ch. 520, L. 2021.

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Implementation Of Certification Requirement For Child Protection Specialists

41-3-130. Implementation of certification requirement for child protection specialists. (1) (a) The department shall engage and collaborate with an external organization to develop a child welfare certification and training program, including a competency examination, that must be an ongoing component of the department's child welfare work.

(b) The program and examination must be reevaluated every 2 years to ensure that they:

(i) reflect current trends, research, and developments in the law; and

(ii) promote evidence-based or evidence-informed practices.

(2) A person hired by the department for a child-facing position after October 1, 2021, shall become a certified child protection specialist pursuant to **41-3-127** through **41-3-130** within 1 year of the date of hire.

(3) A person already employed by the department in a child-facing position before October 1, 2021, shall obtain child protection specialist certification pursuant to **41-3-127** through **41-3-130** by October 1, 2023.

(4) For the purpose of this section, "child-facing position" means an employee role under this chapter that involves regular interaction with minors, including but not limited to investigating reports of child abuse, neglect, or endangerment.

History: En. Sec. 4, Ch. 520, L. 2021.

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Rulemaking Authority

41-3-131. Rulemaking authority. The department shall adopt rules necessary to carry out the purposes of this chapter.

History: En. Sec. 31, Ch. 311, L. 2001.

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Reports

41-3-201. Reports. (1) When the professionals and officials listed in subsection (2) know or have reasonable cause to suspect, as a result of information they receive in their professional or official capacity, that a child is abused or neglected by anyone regardless of whether the person suspected of causing the abuse or neglect is a parent or other person responsible for the child's welfare, they shall report the matter promptly to the department of public health and human services.

(2) Professionals and officials required to report are:

(a) a physician, resident, intern, or member of a hospital's staff engaged in the admission, examination, care, or treatment of persons;

(b) a nurse, osteopath, chiropractor, podiatrist, medical examiner, coroner, dentist, optometrist, or any other health or mental health professional;

(c) religious healers;

(d) school teachers, other school officials, and employees who work during regular school hours;

(e) a social worker licensed pursuant to Title 37, child protection specialist, operator or employee of any registered or licensed day-care or substitute care facility, staff of a resource and referral grant program organized under **52-2-711** or of a child and adult food care program, or an operator or employee of a child-care facility;

(f) a foster care, residential, or institutional worker;

(g) a peace officer or other law enforcement official;

(h) a member of the clergy, as defined in **15-6-201**(2)(b);

(i) a guardian ad litem or a court-appointed advocate who is authorized to investigate a report of alleged abuse or neglect;

(j) an employee of an entity that contracts with the department to provide direct services to children; and

(k) an employee of the department while in conduct of the employee's duties.

(3) A professional listed in subsection (2)(a) or (2)(b) involved in the delivery or care of an infant shall report to the department any infant known to the professional to be affected by a dangerous drug, as defined in **50-32-101**.

(4) Any person may make a report under this section if the person knows or has reasonable cause to suspect that a child is abused or neglected.

(5) (a) When a professional or official required to report under subsection (2) makes a report, the department:

(i) may share information with:

(A) that professional or official; or

(B) other individuals with whom the professional or official works in an official capacity if the individuals are part of a team that responds to matters involving the child or the person about whom the report was made and the professional or official has asked that the information be shared with the individuals; and

(ii) shall share information with the individuals listed in subsections (5)(a)(i)(A) and (5)(a)(i)(B) on specific request. Information shared pursuant to this subsection (5)(a)(ii) may be limited to the outcome of the investigation and any subsequent action that will be taken on behalf of the child who is the subject of the report.

(b) The department may provide information in accordance with **41-3-202**(8) and also share information about the investigation, limited to its outcome and any subsequent action that will be taken on behalf of the child who is the subject of the report.

(c) Individuals who receive information pursuant to this subsection (5) shall maintain the confidentiality of the information as required by **41-3-205**.

(6) (a) Except as provided in subsection (6)(b) or (6)(c), a person listed in subsection (2) may not refuse to make a report as required in this section on the grounds of a physician-patient or similar privilege.

(b) A member of the clergy or a priest is not required to make a report under this section if:

(i) the knowledge or suspicion of the abuse or neglect came from a statement or confession made to the member of the clergy or the priest in that person's capacity as a member of the clergy or as a priest;

(ii) the statement was intended to be a part of a confidential communication between the member of the clergy or the priest and a member of the church or congregation; and

(iii) the person who made the statement or confession does not consent to the disclosure by the member of the clergy or the priest.

(c) A member of the clergy or a priest is not required to make a report under this section if the communication is required to be confidential by canon law, church doctrine, or established church practice.

(7) The reports referred to under this section must contain:

(a) the names and addresses of the child and the child's parents or other persons responsible for the child's care;

(b) to the extent known, the child's age and the nature and extent of the child's injuries, including any evidence of previous injuries;

(c) any other information that the maker of the report believes might be helpful in establishing the cause of the injuries or showing the willful neglect and the identity of the person or persons responsible for the injury or neglect; and

(d) the facts that led the person reporting to believe that the child has suffered injury or injuries or willful neglect, within the meaning of this chapter.

History: En. Sec. 2, Ch. 178, L. 1965; amd. Sec. 2, Ch. 292, L. 1973; Sec. 10-902, R.C.M. 1947; redes. 10-1304 by Sec. 14, Ch. 328, L. 1974; R.C.M. 1947, 10-1304; amd. Sec. 6, Ch. 543, L. 1979; amd. Sec. 3, Ch. 511, L. 1981; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 1, Ch. 79, L. 1989; amd. Sec. 1, Ch. 785, L. 1991; amd. Sec. 8, Ch. 458, L. 1995; amd. Sec. 162, Ch. 546, L. 1995; amd. Sec. 4, Ch. 514, L. 1997; amd. Sec. 4, Ch. 311, L. 2001; amd. Sec. 3, Ch. 382, L. 2005; amd. Sec. 3, Ch. 166, L. 2007; amd. Sec. 2, Ch. 223, L. 2011; amd. Sec. 2, Ch. 278, L. 2011; amd. Sec. 1, Ch. 337, L. 2013; amd. Sec. 3, Ch. 235, L. 2017; amd. Sec. 5, Ch. 367, L. 2019; amd. Sec. 1, Ch. 216, L. 2021; amd. Sec. 7, Ch. 520, L. 2021.

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Action On Reporting

41-3-202. Action on reporting. (1) (a) Upon receipt of a report that a child is or has been abused or neglected, the department shall promptly assess the information contained in the report and make a determination regarding the level of response required and the timeframe within which action must be initiated.

(b) (i) Except as provided in subsection (1)(b)(ii), upon receipt of a report that includes an allegation of sexual abuse or sexual exploitation when the alleged perpetrator of the sexual abuse or sexual exploitation was 12 years of age or older or if the department determines during any investigation that the circumstances surrounding an allegation of child abuse or neglect include an allegation of sexual abuse or sexual exploitation when the alleged perpetrator of the sexual abuse or sexual exploitation was 12 years of age or older, the department shall immediately report the allegation to the county attorney of the county in which the acts that are the subject of the report occurred.

(ii) If a victim of sexual abuse or sexual exploitation has attained the age of 14 and has sought services from a contractor as described in **41-3-201**(2)(j) that provides confidential services to victims of sexual assault, conditioned upon an understanding that the criminal conduct will not be reported by the department to the county attorney in the jurisdiction in which the alleged crime occurred, the department may not report pursuant to **41-3-205**(5)(d) and subsection (1)(b)(i) of this section.

(c) If the department determines that an investigation and a safety and risk assessment are required, a child protection specialist shall promptly conduct a thorough investigation into the circumstances surrounding the allegations of abuse or neglect of the child and perform a safety and risk assessment to determine whether the living arrangement presents an unsafe environment for the child. The safety and risk assessment may include an investigation at the home of the child involved, the child's school or day-care facility, or any other place where the child is present and into all other nonfinancial matters that in the discretion of the investigator are relevant to the safety and risk assessment. In conducting a safety and risk assessment under this section, a child protection specialist may not inquire into the financial status of the child's family or of any other person responsible for the child's care, except as necessary to ascertain eligibility for state or federal assistance programs or to comply with the provisions of **41-3-446**.

(2) An initial investigation of alleged abuse or neglect may be conducted when an anonymous report is received. However, if the initial investigation does not within 48 hours result in the development of independent, corroborative, and attributable information indicating that there exists a current risk of physical

or psychological harm to the child, a child may not be removed from the living arrangement. If independent, corroborative, and attributable information indicating an ongoing risk results from the initial investigation, the department shall then conduct a safety and risk assessment.

(3) The child protection specialist is responsible for conducting the safety and risk assessment. If the child is treated at a medical facility, the child protection specialist, county attorney, or peace officer, consistent with reasonable medical practice, has the right of access to the child for interviews, photographs, and securing physical evidence and has the right of access to relevant hospital and medical records pertaining to the child. If an interview of the child is considered necessary, the child protection specialist, county attorney, or peace officer may conduct an interview of the child. The interview may be conducted in the presence of the parent or guardian or an employee of the school or day-care facility attended by the child.

(4) Subject to **41-3-205**(3), if the child's interview is audiotaped or videotaped, an unedited audiotape or videotape with audio track must be made available, upon request, for unencumbered review by the family.

(5) (a) If from the safety and risk assessment the department has reasonable cause to suspect that the child is suffering abuse or neglect, the department may provide emergency protective services to the child, pursuant to **41-3-301**, or enter into a written prevention plan, pursuant to **41-3-302**, and may provide protective services to any other child under the same care. The department shall:

(i) after interviewing the parent or guardian, if reasonably available, document the determinations of the safety and risk assessment; and

(ii) notify the child's family of the determinations of the safety and risk assessment, unless the notification can reasonably be expected to result in harm to the child or other person.

(b) Except as provided in subsection (5)(c), the department shall destroy all safety and risk assessment determinations and associated records, except for medical records, within 30 days after the end of the 3-year period starting from the date of completion of the safety and risk assessment.

(c) Safety and risk assessment determinations and associated records may be maintained for a reasonable time as defined by department rule under the following circumstances:

(i) the safety and risk assessment determines that abuse or neglect occurred;

(ii) there had been a previous or there is a subsequent report and investigation resulting in a safety and risk assessment concerning the same person; or

(iii) an order has been issued by a court of competent jurisdiction adjudicating the child as a youth in need of care based on the circumstances surrounding the initial allegations.

(6) The investigating child protection specialist, within 60 days of commencing an investigation, shall also furnish a written safety and risk assessment to the department and, upon request, to the family. Subject to time periods set forth in subsections (5)(b) and (5)(c), the department shall maintain a record system documenting investigations and safety and risk assessment determinations. Unless records are required to

be destroyed under subsections (5)(b) and (5)(c), the department shall retain records relating to the safety and risk assessment, including case notes, correspondence, evaluations, videotapes, and interviews, for 25 years.

(7) Any person reporting abuse or neglect that involves acts or omissions on the part of a public or private residential institution, home, facility, or agency is responsible for ensuring that the report is made to the department.

(8) The department shall, upon request from any reporter of alleged child abuse or neglect, verify whether the report has been received, describe the level of response and timeframe for action that the department has assigned to the report, and confirm that it is being acted upon.

History: En. Sec. 3, Ch. 178, L. 1965; amd. Sec. 3, Ch. 292, L. 1973; Sec. 10-903, R.C.M. 1947; redes. 10-1305 by Sec. 14, Ch. 328, L. 1974; R.C.M. 1947, 10-1305; amd. Sec. 8, Ch. 543, L. 1979; amd. Sec. 3, Ch. 567, L. 1979; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 1, Ch. 126, L. 1989; amd. Sec. 1, Ch. 329, L. 1993; amd. Sec. 1, Ch. 146, L. 1995; amd. Sec. 163, Ch. 546, L. 1995; amd. Sec. 3, Ch. 564, L. 1995; amd. Sec. 5, Ch. 514, L. 1997; amd. Sec. 3, Ch. 516, L. 1997; amd. Sec. 4, Ch. 566, L. 1999; amd. Sec. 5, Ch. 311, L. 2001; amd. Sec. 2, Ch. 406, L. 2003; amd. Sec. 2, Ch. 555, L. 2003; amd. Sec. 4, Ch. 382, L. 2005; amd. Sec. 1, Ch. 61, L. 2013; amd. Secs. 6, 14, Ch. 367, L. 2019; amd. Sec. 2, Ch. 382, L. 2019; amd. Sec. 2, Ch. 19, L. 2021; amd. Sec. 2, Ch. 364, L. 2021; amd. Sec. 8, Ch. 520, L. 2021.

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Immunity From Liability

41-3-203. Immunity from liability. (1) Anyone investigating or reporting any incident of child abuse or neglect under **41-3-201** or **41-3-202**, participating in resulting judicial proceedings, or furnishing hospital or medical records as required by **41-3-202** is immune from any liability, civil or criminal, that might otherwise be incurred or imposed unless the person was grossly negligent or acted in bad faith or with malicious purpose or provided information knowing the information to be false.

(2) A person who provides information pursuant to **41-3-201** or a person who uses information received pursuant to **41-3-205** to refuse to hire or to discharge a prospective or current employee, volunteer, or other person who through employment or volunteer activities may have unsupervised contact with children and who may pose a risk to children is immune from civil liability unless the person acted in bad faith or with malicious purpose.

History: En. Sec. 4, Ch. 178, L. 1965; Sec. 10-904, R.C.M. 1947; redes. 10-1306 by Sec. 14, Ch. 328, L. 1974; R.C.M. 1947, 10-1306; amd. Sec. 9, Ch. 543, L. 1979; amd. Sec. 1, Ch. 181, L. 1993; amd. Sec. 9, Ch. 458, L. 1995; amd. Sec. 5, Ch. 566, L. 1999; amd. Sec. 3, Ch. 382, L. 2019.

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Admissibility And Preservation Of Evidence

41-3-204. Admissibility and preservation of evidence. (1) In any proceeding resulting from a report made pursuant to the provisions of this chapter or in any proceeding for which the report or its contents are sought to be introduced into evidence, the report or its contents or any other fact related to the report or to the condition of the child who is the subject of the report may not be excluded on the ground that the matter is or may be the subject of a privilege related to the examination or treatment of the child and granted in Title 26, chapter 1, part 8, except the attorney-client privilege granted by **26-1-803**.

(2) A person or official required to report under **41-3-201** may take or cause to be taken photographs of the area of trauma visible on a child who is the subject of a report. The cost of photographs taken under this section must be paid by the department.

(3) When a person required to report under **41-3-201** finds visible evidence that a child has suffered abuse or neglect, the person shall include in the report either a written description or photographs of the evidence.

(4) A physician, either in the course of providing medical care to a minor or after consultation with child protective services, the county attorney, or a law enforcement officer, may require x-rays to be taken when, in the physician's professional opinion, there is a need for radiological evidence of suspected abuse or neglect. X-rays may be taken under this section without the permission of the parent or guardian. The cost of the x-rays ordered and taken under this section must be paid by the county child protective service agency.

(5) All written, photographic, or radiological evidence gathered under this section must be sent to the local affiliate of the department at the time that the written confirmation report is sent or as soon after the report is sent as is possible. The initial report and associated evidence must be handled in accordance with **41-3-202**.

History: En. Sec. 5, Ch. 178, L. 1965; Sec. 10-905, R.C.M. 1947; redes. 10-1307 by Sec. 14, Ch. 328, L. 1974; R.C.M. 1947, 10-1307; amd. Sec. 10, Ch. 543, L. 1979; amd. Sec. 38, Ch. 609, L. 1987; amd. Sec. 2, Ch. 146, L. 1995; amd. Sec. 189, Ch. 42, L. 1997; amd. Sec. 6, Ch. 514, L. 1997; amd. Sec. 4, Ch. 516, L. 1997; amd. Sec. 4, Ch. 382, L. 2019.

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Confidentiality -- Disclosure Exceptions

41-3-205. Confidentiality -- disclosure exceptions. (1) The case records of the department and its local affiliate, the local office of public assistance, the county attorney, and the court concerning actions taken under this chapter and all records concerning reports of child abuse and neglect must be kept confidential except as provided by this section. Except as provided in subsections (9) and (10), a person who purposely or knowingly permits or encourages the unauthorized dissemination of the contents of case records is guilty of a misdemeanor.

(2) Records may be disclosed to a court for in camera inspection if relevant to an issue before it. The court may permit public disclosure if it finds disclosure to be necessary for the fair resolution of an issue before it.

(3) Records, including case notes, correspondence, evaluations, videotapes, and interviews, unless otherwise protected by this section or unless disclosure of the records is determined to be detrimental to the child or harmful to another person who is a subject of information contained in the records, may be disclosed to the following persons or entities in this state and any other state or country:

(a) a department, agency, or organization, including a federal agency, military enclave, or Indian tribal organization, that is legally authorized to receive, inspect, or investigate reports of child abuse or neglect and that otherwise meets the disclosure criteria contained in this section;

(b) a licensed youth care facility or a licensed child-placing agency that is providing services to the family or child who is the subject of a report in the records or to a person authorized by the department to receive relevant information for the purpose of determining the best interests of a child with respect to an adoptive placement;

(c) a health or mental health professional who is treating the family or child who is the subject of a report in the records;

(d) a parent, grandparent, aunt, uncle, brother, sister, guardian, mandatory reporter provided for in **41-3-201**(2) and (5), or person designated by a parent or guardian of the child who is the subject of a report in the records or other person responsible for the child's welfare, without disclosure of the identity of any person who reported or provided information on the alleged child abuse or neglect incident contained in the records;

(e) a child named in the records who was allegedly abused or neglected or the child's legal guardian or legal representative, including the child's guardian ad litem or attorney or a special advocate appointed by the court to represent a child in a pending case;

(f) the state protection and advocacy program as authorized by 42 U.S.C. 15043(a)(2);

(g) approved foster and adoptive parents who are or may be providing care for a child;

(h) a person about whom a report has been made and that person's attorney, with respect to the relevant records pertaining to that person only and without disclosing the identity of the reporter or any other person whose safety may be endangered;

(i) an agency, including a probation or parole agency, that is legally responsible for the supervision of an alleged perpetrator of child abuse or neglect;

(j) a person, agency, or organization that is engaged in a bona fide research or evaluation project and that is authorized by the department to conduct the research or evaluation;

(k) the members of an interdisciplinary child protective team authorized under **41-3-108** or of a family engagement meeting for the purposes of assessing the needs of the child and family, formulating a treatment plan, and monitoring the plan;

(l) the coroner or medical examiner when determining the cause of death of a child;

(m) a child fatality review team recognized by the department;

(n) a department or agency investigating an applicant for a license or registration that is required to operate a youth care facility, day-care facility, or child-placing agency;

(o) a person or entity who is carrying out background, employment-related, or volunteer-related screening of current or prospective employees or volunteers who have or may have unsupervised contact with children through employment or volunteer activities. A request for information under this subsection (3)(o) must be made in writing. Disclosure under this subsection (3)(o) is limited to information that indicates a risk to children posed by the person about whom the information is sought, as determined by the department.

(p) the news media, if disclosure is limited to confirmation of factual information regarding how the case was handled and if disclosure does not violate the privacy rights of the child or the child's parent or guardian, as determined by the department;

(q) an employee of the department or other state agency if disclosure of the records is necessary for administration of programs designed to benefit the child;

(r) an agency of an Indian tribe, a qualified expert witness, or the relatives of an Indian child if disclosure of the records is necessary to meet requirements of the federal Indian Child Welfare Act;

(s) a juvenile probation officer who is working in an official capacity with the child who is the subject of a report in the records;

(t) an attorney who is hired by or represents the department if disclosure is necessary for the investigation, defense, or prosecution of a case involving child abuse or neglect;

(u) a foster care review committee established under **41-3-115** or, when applicable, a citizen review board established under Title 41, chapter 3, part 10;

(v) a school employee participating in an interview of a child by a child protection specialist, county attorney, or peace officer, as provided in **41-3-202**;

(w) a member of a county or regional interdisciplinary child information and school safety team formed under the provisions of **52-2-211**;

(x) members of a local interagency staffing group provided for in **52-2-203**;

(y) a member of a youth placement committee formed under the provisions of **41-5-121**; or

(z) a principal of a school or other employee of the school district authorized by the trustees of the district to receive the information with respect to a student of the district who is a client of the department.

(4) (a) The records described in subsection (3) must be disclosed to a member of the United States congress or a member of the Montana legislature if all of the following requirements are met:

(i) the member receives a written inquiry regarding a child and whether the laws of the United States or the state of Montana that protect children from abuse or neglect are being complied with or whether the laws need to be changed to enhance protections for children;

(ii) the member submits a written request to the department requesting to review the records relating to the written inquiry.

The member's request must include a copy of the written inquiry, the name of the child whose records are to be reviewed, and any other information that will assist the department in locating the records.

(iii) before reviewing the records, the member:

(A) signs a form that outlines the state and federal laws regarding confidentiality and the penalties for unauthorized release of the information; and

(B) receives from the department an orientation of the content and structure of the records.

(b) Records disclosed pursuant to subsection (4)(a) are confidential, must be made available for the member to view but may not be copied, recorded, photographed, or otherwise replicated by the member, and must remain solely in the department's possession. The member must be allowed to view the records in the local office where the case is or was active.

(c) Access to records requested pursuant to this subsection (4) is limited to 6 months from the date the written request to review records was received by the department.

(5) (a) The records described in subsection (3) must be promptly released to any of the following individuals upon a written request by the individual to the department or the department's designee:

(i) the attorney general;

(ii) a county attorney or deputy county attorney of the county in which the alleged abuse or neglect occurred;

(iii) a peace officer, as defined in **45-2-101**, in the jurisdiction in which the alleged abuse or neglect occurred; or

(iv) the office of the child and family ombudsman.

(b) The records described in subsection (3) must be promptly disclosed by the department to an appropriate individual described in subsection (5)(a) or to a county or regional interdisciplinary child information and school safety team established pursuant to **52-2-211** upon the department's receipt of a report indicating that any of the following has occurred:

(i) the death of the child as a result of child abuse or neglect;

(ii) a sexual offense, as defined in **46-23-502**, against the child;

(iii) exposure of the child to an actual and not a simulated violent offense as defined in **46-23-502**; or

(iv) child abuse or neglect, as defined in **41-3-102**, due to exposure of the child to circumstances constituting the criminal manufacture or distribution of dangerous drugs.

(c) (i) The department shall promptly disclose the results of an investigation to an individual described in subsection (5)(a) or to a county or regional interdisciplinary child information and school safety team established pursuant to **52-2-211** upon the determination that:

(A) there is reasonable cause to suspect that a child has been exposed to a Schedule I or Schedule II drug whose manufacture, sale, or possession is prohibited under state law; or

(B) a child has been exposed to drug paraphernalia used for the manufacture, sale, or possession of a Schedule I or Schedule II drug that is prohibited by state law.

(ii) For the purposes of this subsection (5)(c), exposure occurs when a child is caused or permitted to inhale, have contact with, or ingest a Schedule I or Schedule II drug that is prohibited by state law or have contact with drug paraphernalia as defined in **45-10-101**.

(d) (i) Except as provided in subsection (5)(d)(ii), the records described in subsection (3) must be released within 5 business days to the county attorney of the county in which the acts that are the subject of a report occurred upon the department's receipt of a report that includes an allegation of sexual abuse or sexual exploitation. The department shall also report to any other appropriate individual described in subsection (5)(a) and to a county or regional interdisciplinary child information and school safety team established pursuant to **52-2-211**.

(ii) If the exception in **41-3-202**(1)(b) applies, a contractor described in **41-3-201**(2)(j) that provides confidential services to victims of sexual assault shall report to the department as provided in this part without disclosing the names of the victim and the alleged perpetrator of sexual abuse or sexual exploitation.

(iii) When a contractor described in **41-3-201**(2)(j) that provides confidential services to victims of sexual assault provides services to youth over the age of 13 who are victims of sexual abuse and sexual exploitation, the contractor may not dissuade or obstruct a victim from reporting the criminal activity and, upon a request by the victim, shall facilitate disclosure to the county attorney and a law enforcement officer as described in Title 7, chapter 32, in the jurisdiction where the alleged abuse occurred.

(6) A school or school district may disclose, without consent, personally identifiable information from the education records of a pupil to the department, the court, a review board, and the child's assigned attorney, guardian ad litem, or special advocate.

(7) Information that identifies a person as a participant in or recipient of substance abuse treatment services may be disclosed only as allowed by federal substance abuse confidentiality laws, including the consent provisions of the law.

(8) The confidentiality provisions of this section must be construed to allow a court of this state to share information with other courts of this state or of another state when necessary to expedite the interstate placement of children.

(9) A person who is authorized to receive records under this section shall maintain the confidentiality of the records and may not disclose information in the records to anyone other than the persons described in subsections (3)(a) and (5). However, this subsection may not be construed to compel a family member to keep the proceedings confidential.

(10) A news organization or its employee, including a freelance writer or reporter, is not liable for reporting facts or statements made by an immediate family member under subsection (9) if the news organization, employee, writer, or reporter maintains the confidentiality of the child who is the subject of the proceeding.

(11) This section is not intended to affect the confidentiality of criminal court records, records of law enforcement agencies, or medical records covered by state or federal disclosure limitations.

(12) Copies of records, evaluations, reports, or other evidence obtained or generated pursuant to this section that are provided to the parent, grandparent, aunt, uncle, brother, sister, guardian, or parent's or guardian's attorney must be provided without cost.

History: En. 10-1308 by Sec. 4, Ch. 328, L. 1974; R.C.M. 1947, 10-1308; amd. Sec. 11, Ch. 543, L. 1979; amd. Sec. 1, Ch. 287, L. 1987; amd. Sec. 39, Ch. 609, L. 1987; amd. Sec. 1, Ch. 110, L. 1989; amd. Sec. 2, Ch. 126, L. 1989; amd. Sec. 2, Ch. 510, L. 1991; amd. Sec. 5, Ch. 655, L. 1991; amd. Sec. 15, Ch. 610, L. 1993; amd. Sec. 10, Ch. 458, L. 1995; amd. Sec. 164, Ch. 546, L. 1995; amd. Sec. 4, Ch. 564, L. 1995; amd. Sec. 7, Ch. 514, L. 1997; amd. Sec. 5, Ch. 550, L. 1997; amd. Sec. 6, Ch. 566, L. 1999; amd. Sec. 2, Ch. 281, L. 2001; amd. Sec. 6, Ch. 311, L. 2001; amd. Sec. 1, Ch. 570, L. 2001; amd. Sec. 45, Ch. 571, L. 2001; amd. Sec. 5, Ch. 504, L. 2003; amd. Sec. 2, Ch. 349, L. 2005; amd. Sec. 29, Ch. 449, L. 2005; amd. Sec. 4, Ch. 166, L. 2007; amd. Sec. 60, Ch. 2, L. 2009; amd. Sec. 2, Ch. 61, L. 2013; amd. Sec. 1, Ch. 332, L. 2013; amd. Sec. 8, Ch. 333, L. 2013; amd. Sec. 2, Ch. 337, L. 2013; amd. Sec. 5, Ch.

364, L. 2013; amd. Sec. 8, Ch. 354, L. 2015; amd. Sec. 1, Ch. 99, L. 2017; amd. Sec. 1, Ch. 180, L. 2017; amd. Sec. 4, Ch. 235, L. 2017; amd. Sec. 2, Ch. 248, L. 2019; amd. Sec. 7, Ch. 367, L. 2019; amd. Sec. 5, Ch. 382, L. 2019; amd. Sec. 3, Ch. 19, L. 2021; amd. Sec. 9, Ch. 520, L. 2021.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 2. Reports and Investigations

Procedure In Case Of Child's Death

41-3-206. Procedure in case of child's death. (1) A person or official required to report by law who has reasonable cause to suspect that a child has died as a result of child abuse or neglect shall report the person's suspicion to the appropriate medical examiner or law enforcement officer. Any other person who has reasonable cause to suspect that a child has died as a result of child abuse or neglect may report the person's suspicion to the appropriate medical examiner or law enforcement officer.

(2) The medical examiner or coroner shall investigate the report and submit findings, in writing, to the local law enforcement agency, the appropriate county attorney, the local child protective service, the family of the deceased child, and, if the person making the report is a physician, the physician.

History: En. Sec. 7, Ch. 543, L. 1979; amd. Sec. 5, Ch. 564, L. 1995.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 2. Reports and Investigations

Penalty For Failure To Report

41-3-207. Penalty for failure to report. (1) Any person, official, or institution required by **41-3-201** to report known or suspected child abuse or neglect who fails to do so or who prevents another person from reasonably doing so is civilly liable for the damages proximately caused by the act or omission.

(2) Except as provided in subsection (3), any person or official required by **41-3-201** to report known or suspected child abuse or neglect who purposely or knowingly fails to report known child abuse or neglect or purposely or knowingly prevents another person from making a report is guilty of a misdemeanor.

(3) Any person or official required by **41-3-201** to report known or suspected sexual abuse or sexual exploitation who purposely or knowingly fails to report known sexual abuse or sexual exploitation of a child or purposely or knowingly prevents another person from making a report is guilty of a felony and shall be imprisoned in the state prison for a term not to exceed 5 years or fined an amount not to exceed $10,000, or both.

History: En. Sec. 15, Ch. 543, L. 1979; amd. Sec. 1, Ch. 367, L. 1985; amd. Sec. 8, Ch. 367, L. 2019.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 2. Reports and Investigations

Rulemaking Authority

41-3-208. Rulemaking authority. (1) The department of public health and human services shall adopt rules to govern the procedures used by department personnel in preparing and processing reports and in conducting investigations and safety and risk assessments authorized by this chapter.

(2) The department shall adopt rules to govern the retention period and disclosure of safety and risk assessments and associated case records containing information related to reports and investigations of child abuse and neglect.

(3) The department shall adopt rules specifying the procedure to be used for the release and disclosure of records as provided in **41-3-205**(5). In adopting the rule, the department shall collaborate with the attorney general, the office of the child and family ombudsman, and appropriate county attorneys, law enforcement agencies, and county or regional interdisciplinary child information and school safety teams established pursuant to **52-2-211**.

History: En. Sec. 1, Ch. 567, L. 1979; amd. Sec. 31, Ch. 465, L. 1983; amd. Sec. 2, Ch. 287, L. 1987; amd. Sec. 40, Ch. 609, L. 1987; amd. Sec. 7, Ch. 696, L. 1991; amd. Sec. 165, Ch. 546, L. 1995; amd. Sec. 2, Ch. 332, L. 2013; amd. Sec. 9, Ch. 354, L. 2015; amd. Sec. 2, Ch. 180, L. 2017; amd. Sec. 3, Ch. 248, L. 2019; amd. Sec. 6, Ch. 382, L. 2019.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 2. Reports and Investigations

Reports To Office Of Child And Family Ombudsman

41-3-209. Reports to office of child and family ombudsman. (1) The department shall report to the office of the child and family ombudsman

within 1 business day, a death of a child who, within the last 12 months:

(a) had been the subject of a report of abuse or neglect;

(b) had been the subject of an investigation of alleged abuse or neglect;

(c) was in out-of-home care at the time of the child's death; or

(d) had received services from the department under a written prevention plan;

(2) The department shall report to the office of the child and family ombudsman within 5 business days:

(a) any criminal act concerning the abuse or neglect of a child;

(b) any critical incident, including but not limited to elopement, a suicide attempt, rape, nonroutine hospitalizations, and neglect or abuse by a substitute care provider, involving a child who is receiving services from the department pursuant to this chapter; or

(c) a third report received within the last 12 months about a child at risk of or who is suspected of being abused or neglected.

(3) The department shall report to the ombudsman as required under **41-3-1212** on its response to findings, conclusions, and recommendations made in cases investigated by the ombudsman.

History: En. Sec. 7, Ch. 354, L. 2015; amd. Sec. 4, Ch. 19, L. 2021; amd. Sec. 1, Ch. 411, L. 2021.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 2. Reports and Investigations

County Attorney Duties -- Certification -- Retention Of Records -- Reports To Attorney General And Legislature

41-3-210. County attorney duties -- certification -- retention of records -- reports to attorney general and legislature. (1) (a) The county attorney shall gather all case notes, correspondence, evaluations, interviews, and other investigative materials pertaining to each report from the department or investigation by law enforcement of sexual abuse or sexual exploitation of a child made within the county when the alleged perpetrator of the sexual abuse or sexual exploitation is 12 years of age or older. After a report is made or an investigation is commenced, the following individuals or entities shall provide to the county attorney all case notes, correspondence, evaluations, interviews, and other investigative materials related to the report or investigation:

(i) the department;

(ii) state and local law enforcement; and

(iii) all members of a county or regional interdisciplinary child information and school safety team established under **52-2-211**.

(b) The duty to provide records to the county attorney under subsection (1)(a) remains throughout the course of an investigation, an abuse and neglect proceeding conducted pursuant to this part, or the prosecution of a case involving the sexual abuse of a child or sexual exploitation of a child.

(c) Upon receipt of a report from the department, as required in **41-3-202**, that includes an allegation of sexual abuse of a child or sexual exploitation of a child, the county attorney shall certify in writing to the person who initially reported the information that the county attorney received the report. The certification must include the date the report was received and the age and gender of the alleged victim. If the report was anonymous, the county attorney shall provide the certification to the department. If the report was made to the county attorney by a law enforcement officer, the county attorney is not required to provide the certification.

(2) The county attorney shall retain records relating to the report or investigation, including the certification, case notes, correspondence, evaluations, videotapes, and interviews, for 25 years.

(3) By June 1 of each year, each county attorney shall report to the attorney general. The report to the attorney general must include, for each report from the department or investigation by law enforcement:

(a) a unique case identifier;

(b) the date that the initial report or allegation was received by the county attorney;

(c) the date of any decision to prosecute based on a report or investigation;

(d) the date of any decision to decline to prosecute based on a report or investigation; and

(e) if charges are filed against a defendant, any known outcomes of the case.

(4) The attorney general shall report to the law and justice interim committee each year by September 1 and as provided in **5-11-210**. The reports must provide aggregated information regarding the status of the cases reported by the county attorneys, including data on the total number of cases reported, the number of cases declined for prosecution, and the number of cases charged.

History: En. Sec. 1, Ch. 367, L. 2019; amd. Sec. 3, Ch. 364, L. 2021.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT

Part 3. Protective Care

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TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 3. Protective Care

Emergency Protective Service

41-3-301. *(Temporary)* **Emergency protective service.** (1) Any child protection specialist of the department, a peace officer, or the county attorney who has reason to believe any child is in immediate or apparent danger of harm may immediately remove the child and place the child in a protective facility. After ensuring that the child is safe, the department may make a request for further assistance from the law enforcement agency or take appropriate legal action. The person or agency placing the child shall notify the parents, parent, guardian, or other person having physical or legal custody of the child of the placement at the time the placement is made or as soon after placement as possible. Notification under this subsection must:

(a) include the reason for removal;

(b) include information regarding the option for an emergency protective services hearing within 5 days under **41-3-306**, the required show cause hearing within 20 days, and the purpose of the hearings;

(c) provide contact information for the child protection specialist, the child protection specialist's supervisor, and the office of state public defender; and

(d) advise the parents, parent, guardian, or other person having physical or legal custody of the child that the parents, parent, guardian, or other person:

(i) has the right to receive a copy of the affidavit as provided in subsection (6);

(ii) has the right to attend and participate in an emergency protective services hearing, if one is requested, and the show cause hearing, including providing statements to the judge;

(iii) may have a support person present during any in-person meeting with the child protection specialist concerning emergency protective services; and

(iv) may request that the child be placed in a kinship foster home as defined in **52-2-602**.

(2) If a child protection specialist, a peace officer, or the county attorney determines in an investigation of abuse or neglect of a child that the child is in danger because of the occurrence of partner or family member assault, as provided for in **45-5-206**, or strangulation of a partner or family member, as provided for in **45-5-215**, against an adult member of the household or that the child needs protection as a result of the

occurrence of partner or family member assault or strangulation of a partner or family member against an adult member of the household, the department shall take appropriate steps for the protection of the child, which may include:

(a) making reasonable efforts to protect the child and prevent the removal of the child from the parent or guardian who is a victim of alleged partner or family member assault or strangulation of a partner or family member;

(b) making reasonable efforts to remove the person who allegedly committed the partner or family member assault or strangulation of a partner or family member from the child's residence if it is determined that the child or another family or household member is in danger of partner or family member assault or strangulation of a partner or family member; and

(c) providing services to help protect the child from being placed with or having unsupervised visitation with the person alleged to have committed partner or family member assault or strangulation of a partner or family member until the department determines that the alleged offender has met conditions considered necessary to protect the safety of the child.

(3) If the department determines that an adult member of the household is the victim of partner or family member assault or strangulation of a partner or family member, the department shall provide the adult victim with a referral to a domestic violence program.

(4) A child who has been removed from the child's home or any other place for the child's protection or care may not be placed in a jail.

(5) The department may locate and contact extended family members upon placement of a child in out-of-home care. The department may share information with extended family members for placement and case planning purposes.

(6) If a child is removed from the child's home by the department, a child protection specialist shall submit an affidavit regarding the circumstances of the emergency removal to the county attorney and provide a copy of the affidavit to the parents or guardian, if possible, within 2 working days of the emergency removal. An abuse and neglect petition must be filed within 5 working days, excluding weekends and holidays, of the emergency removal of a child unless arrangements acceptable to the agency for the care of the child have been made by the parents or a written prevention plan has been entered into pursuant to **41-3-302**.

(7) Except as provided in the federal Indian Child Welfare Act, if applicable, a show cause hearing must be held within 20 days of the filing of the petition unless otherwise stipulated by the parties pursuant to **41-3-434**.

(8) If the department determines that a petition for immediate protection and emergency protective services must be filed to protect the safety of the child, the child protection specialist shall interview the parents of the child to whom the petition pertains, if the parents are reasonably available, before the petition may be filed. The district court may immediately issue an order for immediate protection of the child.

(9) The department shall make the necessary arrangements for the child's well-being as are required prior to the court hearing. *(Terminates June 30, 2023--sec. 8, Ch. 529, L. 2021.)*

41-3-301. *(Effective July 1, 2023)* **Emergency protective service.** (1) Any child protection specialist of the department, a peace officer, or the county attorney who has reason to believe any child is in immediate or apparent danger of harm may immediately remove the child and place the child in a protective facility. After ensuring that the child is safe, the department may make a request for further assistance from the law enforcement agency or take appropriate legal action. The person or agency placing the child shall notify the parents, parent, guardian, or other person having physical or legal custody of the child of the placement at the time the placement is made or as soon after placement as possible. Notification under this subsection must:

(a) include the reason for removal;

(b) include information regarding the emergency protective services and show cause hearings and the purpose of the hearings; and

(c) advise the parents, parent, guardian, or other person having physical or legal custody of the child that the parents, parent, guardian, or other person may have a support person present during any in-person meeting with the child protection specialist concerning emergency protective services.

(2) If a child protection specialist, a peace officer, or the county attorney determines in an investigation of abuse or neglect of a child that the child is in danger because of the occurrence of partner or family member assault, as provided for in **45-5-206**, or strangulation of a partner or family member, as provided for in **45-5-215**, against an adult member of the household or that the child needs protection as a result of the occurrence of partner or family member assault or strangulation of a partner or family member against an adult member of the household, the department shall take appropriate steps for the protection of the child, which may include:

(a) making reasonable efforts to protect the child and prevent the removal of the child from the parent or guardian who is a victim of alleged partner or family member assault or strangulation of a partner or family member;

(b) making reasonable efforts to remove the person who allegedly committed the partner or family member assault or strangulation of a partner or family member from the child's residence if it is determined that the child or another family or household member is in danger of partner or family member assault or strangulation of a partner or family member; and

(c) providing services to help protect the child from being placed with or having unsupervised visitation with the person alleged to have committed partner or family member assault or strangulation of a partner or family member until the department determines that the alleged offender has met conditions considered necessary to protect the safety of the child.

(3) If the department determines that an adult member of the household is the victim of partner or family member assault or strangulation of a partner or family member, the department shall provide the adult victim with a referral to a domestic violence program.

(4) A child who has been removed from the child's home or any other place for the child's protection or care may not be placed in a jail.

(5) The department may locate and contact extended family members upon placement of a child in out-of-home care. The department may share information with extended family members for placement and case planning purposes.

(6) If a child is removed from the child's home by the department, a child protection specialist shall submit an affidavit regarding the circumstances of the emergency removal to the county attorney and provide a copy of the affidavit to the parents or guardian, if possible, within 2 working days of the emergency removal. An abuse and neglect petition must be filed in accordance with **41-3-422** within 5 working days, excluding weekends and holidays, of the emergency removal of a child unless arrangements acceptable to the agency for the care of the child have been made by the parents or a written prevention plan has been entered into pursuant to **41-3-302**.

(7) Except as provided in the federal Indian Child Welfare Act, if applicable, a show cause hearing must be held within 20 days of the filing of the petition unless otherwise stipulated by the parties pursuant to **41-3-434**.

(8) If the department determines that a petition for immediate protection and emergency protective services must be filed to protect the safety of the child, the child protection specialist shall interview the parents of the child to whom the petition pertains, if the parents are reasonably available, before the petition may be filed. The district court may immediately issue an order for immediate protection of the child.

(9) The department shall make the necessary arrangements for the child's well-being as are required prior to the court hearing.

History: En. 10-1309 by Sec. 5, Ch. 328, L. 1974; amd. Sec. 19, Ch. 100, L. 1977; R.C.M. 1947, 10-1309; amd. Sec. 12, Ch. 543, L. 1979; amd. Sec. 1, Ch. 659, L. 1985; amd. Sec. 41, Ch. 609, L. 1987; amd. Sec. 166, Ch. 546, L. 1995; amd. Sec. 3, Ch. 281, L. 2001; amd. Sec. 2, Ch. 398, L. 2003; amd. Sec. 6, Ch. 504, L. 2003; amd. Sec. 3, Ch. 555, L. 2003; amd. Sec. 1, Ch. 422, L. 2005; amd. Sec. 1, Ch. 212, L. 2007; amd. Sec. 1, Ch. 11, L. 2011; amd. Sec. 3, Ch. 223, L. 2011; amd. Sec. 3, Ch. 376, L. 2015; amd. Sec. 4, Ch. 394, L. 2017; amd. Sec. 5, Ch. 19, L. 2021; amd. Sec. 2, Ch. 383, L. 2021; amd. Sec. 9, Ch. 520, L. 2021; amd. Sec. 3, Ch. 529, L. 2021.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 3. Protective Care

Responsibility Of Providing Protective Services -- Written Prevention Plans

41-3-302. Responsibility of providing protective services -- written prevention plans. (1) The department of public health and human services has the primary responsibility to provide the protective services authorized by this chapter and has the authority pursuant to this chapter to take temporary or permanent custody of a child when ordered to do so by the court, including the right to give consent to adoption.

(2) The department shall respond to emergency reports of known or suspected child abuse or neglect 24 hours a day, 7 days a week.

(3) (a) The department may provide voluntary protective services by entering into a written prevention plan with a parent, guardian, or other person having physical or legal custody of the child for the purpose of keeping the child safely in the home or for the purpose of returning the child to the home within a 30-day temporary out-of-home protective placement.

(b) The department shall inform a parent, guardian, or other person having physical or legal custody of a child who is considering entering into a written prevention plan that the parent, guardian, or other person may have another person of the parent's, guardian's, or other person's choice present whenever the terms of the written prevention plan are under discussion by the parent, guardian, or other person and the department. Reasonable accommodations must be made regarding the time and place of meetings at which a written prevention plan is discussed.

(4) A written prevention plan may include provisions for:

(a) a family engagement meeting and implementation of safety plans developed during the meeting;

(b) a professional evaluation and treatment of the parent, guardian, or other person having physical or legal custody of the child or of the child, or both;

(c) a safety plan for the child;

(d) in-home services aimed at permitting the child to remain safely in the home;

(e) temporary relocation of a parent, guardian, or other person having physical or legal custody of the child in order to permit the child to remain safely in the home;

(f) a 30-day temporary out-of-home protective placement; or

(g) any other terms or conditions agreed upon by the parties that would allow the child to remain safely in the home or allow the child to safely return to the home within the 30-day period, including referrals to other service providers.

(5) A written prevention plan is subject to termination by either party at any time. Termination of a written prevention plan does not preclude the department from filing a petition pursuant to **41-3-422** in any case in which the department determines that there is a risk of harm to a child.

(6) If a written prevention plan is terminated by a party to the agreement, a child who has been placed in a temporary out-of-home protective placement pursuant to the agreement must be returned to the parent, guardian, or other person having physical or legal custody of the child within 2 working days of termination of the agreement unless an abuse and neglect petition is filed by the department.

History: En. 10-1315 by Sec. 11, Ch. 328, L. 1974; R.C.M. 1947, 10-1315; amd. Sec. 13, Ch. 543, L. 1979; amd. Sec. 4, Ch. 511, L. 1981; amd. Sec. 42, Ch. 609, L. 1987; amd. Sec. 167, Ch. 546, L. 1995; amd. Sec. 4, Ch. 555, L. 2003; amd. Sec. 54, Ch. 130, L. 2005; amd. Secs. 2, 3, Ch. 141, L. 2017; amd. Sec. 6, Ch. 19, L. 2021.

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Criminal Background Checks Of Adults Residing In Potential Emergency Placements Authorized -- Rulemaking

41-3-304. Criminal background checks of adults residing in potential emergency placements authorized -- rulemaking. (1) (a) If a child is removed from the child's parental or custodial home for protective care pursuant to this part and an emergency placement is offered, the department or an authorized tribe may request, in accordance with the procedures set forth in 28 CFR 901.1 through 901.4, that each adult 18 years of age or older who is residing in a home where the potential emergency placement is to be made consent to a preliminary state and federal name-based background check that must be followed within 15 calendar days from the date that the name-based background search was conducted with the submission of fingerprints to the state repository, as defined in **44-5-103**, for a fingerprint-based background check conducted in accordance with subsection (2) of this section.

(b) If a name-based background check demonstrates that none of the adults residing in the home where the emergency placement is to be made has been convicted of a disqualifying criminal offense, the department or authorized tribe may place the child in the home pending the outcome of the fingerprint-based background check.

(c) If an adult refuses to consent to the department's or an authorized tribe's request for a name-based and fingerprint-based background check, the department or authorized tribe may not place the child in a home in which the adult resides, or if the child was already placed in the home, the department or authorized tribe shall immediately remove the child from the home.

(2) An adult who consents to a name-based and fingerprint-based background check pursuant to subsection (1) shall submit to the department or an authorized tribe a complete set of fingerprints and written permission authorizing the department or the authorized tribe to submit the fingerprints to the state repository for processing of the state and federal background check. Results of the name-based and fingerprint-based background check must be provided to the quality assurance division of the department of public health and human services or to an authorized tribe.

(3) If the department or an authorized tribe elects to perform an initial name-based background check and a fingerprint-based background check pursuant to this section, the department or the authorized tribe may not make an emergency placement or continue an emergency placement in a home in which an adult

resident has been convicted of a disqualifying criminal offense.

(4) The state repository and the federal bureau of investigation may charge a reasonable fee for processing a fingerprint-based criminal background check.

(5) If an emergency placement is denied as a result of a name-based background check of a resident and the resident contests the denial, the resident may within 15 calendar days of the denial submit to the department or authorized tribe a complete set of fingerprints with written permission allowing the department or authorized tribe to submit the fingerprints to the state repository for processing of the state and federal background check.

(6) The department shall by rule designate those criminal offenses that constitute a disqualifying criminal offense under this section, which may include but are not limited to felony convictions for violent crimes, crimes involving children, family members, or the elderly or disabled, and crimes involving drugs in which the conviction occurred within a certain period of time.

(7) For the purposes of this section, the following definitions apply:

(a) "Authorized tribe" means the tribal child services unit and its approved designees responsible for overseeing foster care licensing for an Indian tribe located within the borders of Montana that has in place a valid tribal fingerprint program user agreement with the Montana department of justice.

(b) "Emergency placement" means an instance in which the department or an authorized tribe provides protective services and places a child in the home of private individuals, including but not limited to family, neighbors, or friends of the child.

History: En. Sec. 1, Ch. 267, L. 2013.

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Emergency Protective Services Hearing On Request -- Exceptions

41-3-306. *(Temporary)* **Emergency protective services hearing on request -- exceptions.** (1) (a) If requested by the parents, parent, guardian, or other person having physical or legal custody of a child removed from the home pursuant to **41-3-301**, a district court shall hold an emergency protective services hearing within 5 business days of the child's removal to determine whether to continue the removal beyond 5 business days.

(b) The department shall provide notification of the option for the hearing as required under **41-3-301**.

(c) A hearing is not required if the child is released prior to the time of the requested hearing.

(2) The hearing may be held in person, by videoconference, or, if no other means are available, by telephone.

(3) The child and the child's parents, parent, guardian, or other person having physical or legal custody of the child must be represented by counsel at the hearing.

(4) If the court determines that continued out-of-home placement is needed, the court shall:

(a) establish guidelines for visitation by the parents, parent, guardian, or other person having physical or legal custody of the child pending the show cause hearing; and

(b) review the availability of options for a kinship placement and make recommendations if appropriate.

(5) The court may direct the department to develop and implement a treatment plan before the show cause hearing if the parents, parent, guardian, or other person having physical or legal custody of the child stipulates to a condition subject to a treatment plan and agrees to immediately comply with the treatment plan if a plan is developed.

(6) If the court determines continued removal is not appropriate, the child must be immediately returned to the parents, parent, guardian, or other person having physical or legal custody of the child.

(7) This section does not apply:

(a) in judicial districts that are holding voluntary prehearing conferences pursuant to **41-3-307**; or

(b) to cases involving an Indian child who is subject to the Indian Child Welfare Act. *(Terminates June 30,*

2023--sec. 8, Ch. 529, L. 2021.)

41-3-306. *(Effective July 1, 2023)* **Emergency protective services hearing -- exception.** (1) (a) A district court shall hold a hearing within 5 business days of a child's removal from the home pursuant to **41-3-301** to determine whether there is probable cause to continue the removal beyond 5 business days.

(b) The department shall provide notification of the hearing as required under **41-3-301**.

(c) A hearing is not required if the child is released prior to the time of the required hearing.

(2) The hearing may be held in person, by videoconference, or, if no other means are available, by telephone.

(3) The child and the child's parents, parent, guardian, or other person having physical or legal custody of the child must be represented by counsel at the hearing.

(4) If the court determines that continued out-of-home placement is needed, the court shall:

(a) establish guidelines for visitation by the parents, parent, guardian, or other person having physical or legal custody of the child pending the show cause hearing; and

(b) review the availability of options for a kinship placement and make recommendations if appropriate.

(5) The court may direct the department to develop and implement a treatment plan before the show cause hearing if the parents, parent, guardian or other person having physical or legal custody of the child stipulates to a condition subject to a treatment plan and agrees to immediately comply with the treatment plan if a plan is developed.

(6) If the court determines continued removal is not appropriate, the child must be immediately returned to the parents, parent, guardian, or other person having physical or legal custody of the child.

(7) This section does not apply to cases involving an Indian child who is subject to the Indian Child Welfare Act.

History: En. Sec. 1, Ch. 383, L. 2021, Sec. 1, Ch. 529, L. 2021.

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Voluntary Prehearing Conferences -- Pilot Project Counties

41-3-307. *(Temporary)* **Voluntary prehearing conferences -- pilot project counties.** (1) The parents, parent, guardian, or other person having physical or legal custody of a child who has been removed from the home pursuant to **41-3-301** may participate in a conference within 5 days of the child's removal and before a show cause hearing held by the court if the court is participating in a pilot project testing the effectiveness of prehearing conferences.

(2) A prehearing conference may be held under this section only if it involves:

(a) the parents, parent, guardian, or other person having physical or legal custody of the child;

(b) the person's legal counsel;

(c) the county attorney's office; and

(d) a department social worker.

(3) To the greatest degree possible using available funding, the meetings must be conducted by an independent and trained facilitator.

(4) At a minimum, the meetings must involve discussion of:

(a) the child's current placement and options for continued placement if the child remains out of the home;

(b) whether other options exist for an in-home safety plan or resource that may allow the child to remain in the home;

(c) parenting time schedules; and

(d) treatment services for the family.

(5) This section does not apply to cases involving an Indian child who is subject to the Indian Child Welfare Act.

(6) This section applies to a district court participating in the prehearing conference pilot project funded by the court improvement program on May 14, 2021, and to any district court in a rural county or multicounty district that chooses to hold conferences in accordance with this section on or after that date. *(Terminates June 30, 2023--sec. 8, Ch. 529, L. 2021.)*

History: En. Sec. 2, Ch. 529, L. 2021.

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Abuse And Neglect Petitions -- Burden Of Proof

41-3-422. Abuse and neglect petitions -- burden of proof. (1) (a) Proceedings under this chapter must be initiated by the filing of a petition. A petition may request the following relief:

(i) immediate protection and emergency protective services, as provided in **41-3-427**;

(ii) temporary investigative authority, as provided in **41-3-433**;

(iii) temporary legal custody, as provided in **41-3-442**;

(iv) long-term custody, as provided in **41-3-445**;

(v) termination of the parent-child legal relationship, as provided in **41-3-607**;

(vi) appointment of a guardian pursuant to **41-3-444**;

(vii) a determination that preservation or reunification services need not be provided; or

(viii) any combination of the provisions of subsections (1)(a)(i) through (1)(a)(vii) or any other relief that may be required for the best interests of the child.

(b) The petition may be modified for different relief at any time within the discretion of the court.

(c) A petition for temporary legal custody may be the initial petition filed in a case.

(d) A petition for the termination of the parent-child legal relationship may be the initial petition filed in a case if a request for a determination that preservation or reunification services need not be provided is made in the petition.

(2) The county attorney, attorney general, or an attorney hired by the county shall file all petitions under this chapter. A petition filed by the county attorney, attorney general, or an attorney hired by the county must be accompanied by:

(a) an affidavit by the department alleging that the child appears to have been abused or neglected and stating the basis for the petition; and

(b) a separate notice to the court stating any statutory time deadline for a hearing.

(3) Abuse and neglect petitions must be given highest preference by the court in setting hearing dates.

(4) An abuse and neglect petition is a civil action brought in the name of the state of Montana. The Montana Rules of Civil Procedure and the Montana Rules of Evidence apply except as modified in this chapter. Proceedings under a petition are not a bar to criminal prosecution.

(5) (a) Except as provided in subsection (5)(b), the person filing the abuse and neglect petition has the burden of presenting evidence required to justify the relief requested and establishing:

(i) probable cause for the issuance of an order for immediate protection and emergency protective services or an order for temporary investigative authority;

(ii) a preponderance of the evidence for an order of adjudication or temporary legal custody;

(iii) a preponderance of the evidence for an order of long-term custody; or

(iv) clear and convincing evidence for an order terminating the parent-child legal relationship.

(b) If a proceeding under this chapter involves an Indian child, as defined in the federal Indian Child Welfare Act, 25 U.S.C. 1901, et seq., the standards of proof required for legal relief under the federal Indian Child Welfare Act apply.

(6) (a) Except as provided in the federal Indian Child Welfare Act, if applicable, the parents or parent, guardian, or other person or agency having legal custody of the child named in the petition, if residing in the state, must be served personally with a copy of the initial petition and a petition to terminate the parent-child legal relationship at least 5 days before the date set for hearing. If the person or agency cannot be served personally, the person or agency may be served by publication as provided in **41-3-428** and **41-3-429**.

(b) Copies of all other petitions must be served upon the person or the person's attorney of record by certified mail, by personal service, or by publication as provided in **41-3-428** and **41-3-429**. If service is by certified mail, the department must receive a return receipt signed by the person to whom the notice was mailed for the service to be effective. Service of the notice is considered to be effective if, in the absence of a return receipt, the person to whom the notice was mailed appears at the hearing.

(7) If personal service cannot be made upon the parents or parent, guardian, or other person or agency having legal custody, the court shall immediately provide for the appointment or assignment of an attorney as provided for in **41-3-425** to represent the unavailable party when, in the opinion of the court, the interests of justice require. If personal service cannot be made upon a putative father, the court may not provide for the appointment or assignment of counsel as provided for in **41-3-425** to represent the father unless, in the opinion of the court, the interests of justice require counsel to be appointed or assigned.

(8) If a parent of the child is a minor, notice must be given to the minor parent's parents or guardian, and if there is no guardian, the court shall appoint one.

(9) (a) Any person interested in any cause under this chapter has the right to appear. Any foster parent, preadoptive parent, or relative caring for the child must be given legal notice by the attorney filing the petition of all judicial hearings for the child and has the right to be heard. The right to appear or to be heard does not make that person a party to the action. Any foster parent, preadoptive parent, or relative caring for the child must be given notice of all reviews by the reviewing body.

(b) A foster parent, preadoptive parent, or relative of the child who is caring for or a relative of the child who has cared for a child who is the subject of the petition who appears at a hearing set pursuant to this section may be allowed by the court to intervene in the action if the court, after a hearing in which evidence is presented on those subjects provided for in **41-3-437**(4), determines that the intervention of the person is in the best interests of the child. A person granted intervention pursuant to this subsection is entitled to participate in the adjudicatory hearing held pursuant to **41-3-437** and to notice and participation in subsequent proceedings held pursuant to this chapter involving the custody of the child.

(10) An abuse and neglect petition must state:

(a) the nature of the alleged abuse or neglect and of the relief requested;

(b) the full name, age, and address of the child and the name and address of the child's parents or the guardian or person having legal custody of the child; and

(c) the names, addresses, and relationship to the child of all persons who are necessary parties to the action.

(11) Any party in a proceeding pursuant to this section is entitled to counsel as provided in **41-3-425**.

(12) At any stage of the proceedings considered appropriate by the court, the court may order an alternative dispute resolution proceeding or the parties may voluntarily participate in an alternative dispute resolution proceeding. An alternative dispute resolution proceeding under this chapter may include a family engagement meeting, mediation, or a settlement conference. If a court orders an alternative dispute resolution proceeding, a party who does not wish to participate may file a motion objecting to the order. If the department is a party to the original proceeding, a representative of the department who has complete authority to settle the issue or issues in the original proceeding must be present at any alternative dispute resolution proceeding.

(13) Service of a petition under this section must be accompanied by a written notice advising the child's parent, guardian, or other person having physical or legal custody of the child of the:

(a) right, pursuant to **41-3-425**, to appointment or assignment of counsel if the person is indigent or if appointment or assignment of counsel is required under the federal Indian Child Welfare Act, if applicable;

(b) right to contest the allegations in the petition; and

(c) timelines for hearings and determinations required under this chapter.

(14) If appropriate, orders issued under this chapter must contain a notice provision advising a child's parent, guardian, or other person having physical or legal custody of the child that:

(a) the court is required by federal and state laws to hold a permanency hearing to determine the permanent placement of a child no later than 12 months after a judge determines that the child has been abused or neglected or 12 months after the first 60 days that the child has been removed from the child's home;

(b) if a child has been in foster care for 15 of the last 22 months, state law presumes that termination of parental rights is in the best interests of the child and the state is required to file a petition to terminate parental rights; and

(c) completion of a treatment plan does not guarantee the return of a child.

(15) A court may appoint a standing master to conduct hearings and propose decisions and orders to the court for court consideration and action. A standing master may not conduct a proceeding to terminate parental rights. A standing master must be a member of the state bar of Montana and must be knowledgeable in the area of child abuse and neglect laws.

History: En. 10-1310 by Sec. 6, Ch. 328, L. 1974; amd. Sec. 20, Ch. 100, L. 1977; R.C.M. 1947, 10-1310; amd. Sec. 4, Ch. 567, L. 1979; amd. Sec. 5, Ch. 511, L. 1981; amd. Sec. 2, Ch. 659, L. 1985; amd. Sec. 2, Ch. 463, L. 1987; amd. Sec. 43, Ch. 609, L. 1987; amd. Sec. 2, Ch. 329, L. 1993; amd. Sec. 11, Ch. 458, L. 1995; amd. Sec. 168, Ch. 546, L. 1995; amd. Sec. 6, Ch. 516, L. 1997; amd. Sec. 1, Ch. 428, L. 1999; amd. Sec. 8, Ch. 566, L. 1999; amd. Sec. 4, Ch. 83, L. 2001; amd. Sec. 2, Ch. 194, L. 2001; amd. Secs. 4, 18(2), Ch. 281, L. 2001; amd. Sec. 7, Ch. 311, L. 2001; Sec. 41-3-401, MCA 1999; redes. 41-3-422 by Sec. 17(2), Ch. 281, L. 2001; amd. Sec. 1, Ch. 189, L. 2003; amd. Sec. 7, Ch. 504, L. 2003; amd. Sec. 1, Ch. 118, L. 2005; amd. Sec. 30, Ch. 449, L. 2005; amd. Sec. 5, Ch. 166, L. 2007; amd. Sec. 1, Ch. 52, L. 2017; amd. Sec. 7, Ch. 19, L. 2021.

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Reasonable Efforts Required To Prevent Removal Of Child Or To Return -- Exemption -- Findings -- Permanency Plan

41-3-423. Reasonable efforts required to prevent removal of child or to return -- exemption -- findings -- permanency plan. (1) (a) The department shall make reasonable efforts to prevent the necessity of removal of a child from the child's home and to reunify families that have been separated by the state.

(b) (i) For the purposes of this subsection (1), the term "reasonable efforts" means the department shall in good faith develop and implement voluntary services agreements and treatment plans that are designed to preserve the parent-child relationship and the family unit and shall in good faith assist parents in completing voluntary services agreements and treatment plans.

(ii) The term includes but is not limited to:

(A) written prevention plans;

(B) development of individual written case plans specifying state efforts to preserve or reunify families;

(C) placement in the least disruptive setting possible with priority given to family placement as provided in **41-3-439**;

(D) provision of services pursuant to a case plan that is designed to address the parent's treatment and other needs precluding the parent from safely parenting, including but not limited to individual and family therapy, parent education, substance abuse treatment, and trauma-related services; and

(E) periodic review of each case to ensure timely progress toward reunification or permanent placement.

(c) In determining preservation or reunification services to be provided and in making reasonable efforts at providing preservation or reunification services, the child's health and safety are of paramount concern.

(2) Except in a proceeding subject to the federal Indian Child Welfare Act, the department may, at any time during an abuse and neglect proceeding, make a request for a determination that preservation or reunification services need not be provided. If an indigent parent is not already represented by counsel, the court shall immediately provide for the appointment or assignment of counsel to represent the indigent

parent in accordance with the provisions of **41-3-425**. A court may make a finding that the department need not make reasonable efforts to provide preservation or reunification services if the court finds that the parent has:

(a) subjected a child to aggravated circumstances, including but not limited to abandonment, torture, chronic abuse, or sexual abuse or chronic, severe neglect of a child;

(b) committed, aided, abetted, attempted, conspired, or solicited deliberate or mitigated deliberate homicide of a child;

(c) committed aggravated assault against a child;

(d) committed neglect of a child that resulted in serious bodily injury or death; or

(e) had parental rights to the child's sibling or other child of the parent involuntarily terminated and the circumstances related to the termination of parental rights are relevant to the parent's ability to adequately care for the child at issue.

(3) Preservation or reunification services are not required for a putative father, as defined in **42-2-201**, if the court makes a finding that the putative father has failed to do any of the following:

(a) contribute to the support of the child for an aggregate period of 1 year, although able to do so;

(b) establish a substantial relationship with the child. A substantial relationship is demonstrated by:

(i) visiting the child at least monthly when physically and financially able to do so; or

(ii) having regular contact with the child or with the person or agency having the care and custody of the child when physically and financially able to do so; and

(iii) manifesting an ability and willingness to assume legal and physical custody of the child if the child was not in the physical custody of the other parent.

(c) register with the putative father registry pursuant to Title 42, chapter 2, part 2, and the person has not been:

(i) adjudicated in Montana to be the father of the child for the purposes of child support; or

(ii) recorded on the child's birth certificate as the child's father.

(4) A judicial finding that preservation or reunification services are not necessary under this section must be supported by clear and convincing evidence.

(5) If the court finds that preservation or reunification services are not necessary pursuant to subsection (2) or (3), a permanency hearing must be held within 30 days of that determination and reasonable efforts, including consideration of both in-state and out-of-state permanent placement options for the child, must be made to place the child in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the child.

(6) If reasonable efforts have been made to prevent removal of a child from the home or to return a child to the child's home but continuation of the efforts is determined by the court to be inconsistent with the permanency plan for the child, the department shall make reasonable efforts to place the child in a timely manner in accordance with the permanency plan, including, if appropriate, placement in another state, and to complete whatever steps are necessary to finalize the permanent placement of the child. Reasonable efforts to place a child permanently for adoption or to make an alternative out-of-home permanent placement may be made concurrently with reasonable efforts to return a child to the child's home. Concurrent planning, including identifying in-state and out-of-state placements, may be used.

(7) When determining whether the department has made reasonable efforts to prevent the necessity of removal of a child from the child's home or to reunify families that have been separated by the state, the court shall review the services provided by the agency including, if applicable, protective services provided pursuant to **41-3-302**.

History: En. 10-1311 by Sec. 7, Ch. 328, L. 1974; amd. Sec. 21, Ch. 100, L. 1977; R.C.M. 1947, 10-1311(4), (5); amd. Sec. 4, Ch. 659, L. 1985; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 1, Ch. 696, L. 1991; amd. Sec. 1, Ch. 112, L. 1993; amd. Sec. 1, Ch. 362, L. 1993; amd. Sec. 13, Ch. 458, L. 1995; amd. Sec. 3, Ch. 501, L. 1997; amd. Sec. 7, Ch. 516, L. 1997; amd. Sec. 9, Ch. 566, L. 1999; amd. Sec. 5, Ch. 83, L. 2001; amd. Secs. 8, 18(3), Ch. 281, L. 2001; amd. Sec. 9, Ch. 311, L. 2001; Sec. 41-3-403, MCA 1999; redes. 41-3-423 by Sec. 17(2), Ch. 281, L. 2001; amd. Sec. 5, Ch. 555, L. 2003; amd. Sec. 31, Ch. 449, L. 2005; amd. Sec. 6, Ch. 166, L. 2007; amd. Sec. 8, Ch. 19, L. 2021; amd. Sec. 1, Ch. 222, L. 2021.

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Dismissal

41-3-424. Dismissal. Unless the petition has been previously dismissed, the court shall dismiss an abuse and neglect petition on the motion of a party, or on its own motion, in any case in which all of the following criteria are met:

(1) a child who has been placed in foster care is reunited with the child's parents and returned home;

(2) the child remains in the home for a minimum of 6 months with no additional confirmed reports of child abuse or neglect; and

(3) the department determines and informs the court that the issues that led to department intervention have been resolved and that no reason exists for further department intervention or monitoring.

History: En. Sec. 6, Ch. 555, L. 2003.

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Right To Counsel

41-3-425. Right to counsel. (1) Any party involved in a petition filed pursuant to **41-3-422** has the right to counsel in all proceedings held pursuant to the petition.

(2) Except as provided in subsections (3) through (5), the court shall immediately appoint the office of state public defender to assign counsel for:

(a) any indigent parent, guardian, or other person having legal custody of a child or youth in a removal, placement, or termination proceeding pursuant to **41-3-422**, pending a determination of eligibility pursuant to **47-1-111**;

(b) any child or youth involved in a proceeding under a petition filed pursuant to **41-3-422** when a guardian ad litem is not appointed for the child or youth; and

(c) any party entitled to counsel at public expense under the federal Indian Child Welfare Act.

(3) When appropriate, the court may appoint the office of state public defender to assign counsel for any child or youth involved in a proceeding under a petition filed pursuant to **41-3-422** when a guardian ad litem is appointed for the child or youth.

(4) When appropriate and in accordance with judicial branch policy, the court may assign counsel at the court's expense for a guardian ad litem or a court-appointed special advocate involved in a proceeding under a petition filed pursuant to **41-3-422**.

(5) Except as provided in the federal Indian Child Welfare Act, a court may not appoint a public defender to a putative father, as defined in **42-2-201**, of a child or youth in a removal, placement, or termination proceeding pursuant to **41-3-422** until:

(a) the putative father is successfully served notice of a petition filed pursuant to **41-3-422**; and

(b) the putative father makes a request to the court in writing to appoint the office of state public defender to assign counsel.

History: En. Sec. 15, Ch. 449, L. 2005; amd. Sec. 1, Ch. 511, L. 2007; amd. Sec. 1, Ch. 343, L. 2011; amd. Sec. 1, Ch. 29, L. 2013; amd. Sec. 2, Ch. 52, L. 2017.

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Petition For Immediate Protection And Emergency Protective Services -- Order -- Service

41-3-427. Petition for immediate protection and emergency protective services -- order -- service. (1) (a) In a case in which it appears that a child is abused or neglected or is in danger of being abused or neglected, the county attorney, the attorney general, or an attorney hired by the county may file a petition for immediate protection and emergency protective services. In implementing the policy of this section, the child's health and safety are of paramount concern.

(b) A petition for immediate protection and emergency protective services must state the specific authority requested and must be supported by an affidavit signed by a representative of the department stating in detail the alleged facts upon which the request is based and the facts establishing probable cause or, if the case is subject to the federal Indian Child Welfare Act, clear and convincing evidence that a child is abused or neglected or is in danger of being abused or neglected. The affidavit of the department representative must contain information, if any, regarding statements made by the parents about the facts of the case.

(c) If from the alleged facts presented in the affidavit it appears to the court that there is probable cause or, if the case is subject to the federal Indian Child Welfare Act, clear and convincing evidence to believe that the child has been abused or neglected or is in danger of being abused and neglected, the judge shall grant emergency protective services and the relief authorized by subsection (2) until the adjudication hearing or the temporary investigative hearing. If it appears from the alleged facts contained in the affidavit that there is insufficient probable cause or, if the case is subject to the federal Indian Child Welfare Act, clear and convincing evidence to believe that the child has been abused or neglected or is in danger of being abused or neglected, the court shall dismiss the petition.

(d) If the parents, parent, guardian, person having physical or legal custody of the child, or attorney for the child disputes the material issues of fact contained in the affidavit or the veracity of the affidavit, the person may request a contested show cause hearing pursuant to **41-3-432** within 10 days following service of the petition and affidavit.

(e) The petition for immediate protection and emergency protective services must include a notice advising the parents, parent, guardian, or other person having physical or legal custody of the child that the parents, parent, guardian, or other person having physical or legal custody of the child may have a support person present during any in-person meeting with a child protection specialist concerning emergency protective services. Reasonable accommodation must be made in scheduling an in-person meeting with the child protection specialist.

(2) Pursuant to subsection (1), if the court finds probable cause or, if the case is subject to the federal Indian Child Welfare Act, clear and convincing evidence based on the petition and affidavit, the court may issue an order for immediate protection of the child. The court shall consider the parents' statements, if any, included with the petition and any accompanying affidavit or report to the court. If the court finds probable cause or, if the case is subject to the federal Indian Child Welfare Act, clear and convincing evidence, the court may issue an order granting the following forms of relief, which do not constitute a court-ordered treatment plan under **41-3-443**:

(a) the right of entry by a peace officer or department worker;

(b) the right to place the child in temporary medical or out-of-home care, including but not limited to care provided by a noncustodial parent, kinship or foster family, group home, or institution;

(c) the right of the department to locate, contact, and share information with any extended family members who may be considered as placement options for the child;

(d) a requirement that the parents, guardian, or other person having physical or legal custody furnish information that the court may designate and obtain evaluations that may be necessary to determine whether a child is a youth in need of care;

(e) a requirement that the perpetrator of the alleged child abuse or neglect be removed from the home to allow the child to remain in the home;

(f) a requirement that the parent provide the department with the name and address of the other parent, if known, unless parental rights to the child have been terminated;

(g) a requirement that the parent provide the department with the names and addresses of extended family members who may be considered as placement options for the child who is the subject of the proceeding; and

(h) any other temporary disposition that may be required in the best interests of the child that does not require an expenditure of money by the department unless the court finds after notice and a hearing that the expenditure is reasonable and that resources are available for payment. The department is the payor of last resort after all family, insurance, and other resources have been examined.

(3) An order for removal of a child from the home must include a finding that continued residence of the child with the parent is contrary to the welfare of the child or that an out-of-home placement is in the best interests of the child.

(4) The order for immediate protection of the child must require the person served to comply immediately with the terms of the order and to appear before the court issuing the order on the date specified for a show cause hearing. Upon a failure to comply or show cause, the court may hold the person in contempt or place temporary physical custody of the child with the department until further order.

(5) The petition must be served as provided in **41-3-422**.

History: En. 10-1311 by Sec. 7, Ch. 328, L. 1974; amd. Sec. 21, Ch. 100, L. 1977; R.C.M. 1947, 10-1311(1) thru (3); amd. Sec. 3, Ch. 659, L. 1985; amd. Sec. 44, Ch. 609, L. 1987; amd. Sec. 12, Ch. 458, L. 1995; amd. Sec. 169, Ch. 546, L. 1995; amd. Sec. 2, Ch. 501, L. 1997; amd. Sec. 5, Ch. 281, L. 2001; amd. Sec. 8, Ch. 311, L. 2001; Sec. 41-3-402, MCA 1999; redes. 41-3-427 by Sec. 17(2), Ch. 281, L. 2001; amd. Sec. 8, Ch. 504, L. 2003; amd. Sec. 2, Ch. 422, L. 2005; amd. Sec. 2, Ch. 11, L. 2011; amd. Sec. 4, Ch. 223, L. 2011; amd. Sec. 11, Ch. 520, L. 2021.

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TITLE 41. MINORS
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Service Of Process -- Service By Publication -- Effect

41-3-428. Service of process -- service by publication -- effect. (1) Except as otherwise provided in this chapter, service of process must be made as provided in the Montana Rules of Civil Procedure.

(2) If a person cannot be served personally or by certified mail, the person may be served by publication as provided in **41-3-429**. Publication constitutes conclusive evidence of service, and a hearing must then proceed at the time and date set, with or without the appearance of the person served by publication. At or after the hearing, the court may issue an order that will adjudicate the interests of the person served by publication.

(3) If a parent cannot be identified or found prior to the initial hearings allowed by part 4, the court may grant the following relief, pending service by publication on the parent who cannot be identified or found and based upon service of process on only the parent, guardian, or other person having legal custody of the child:

(a) immediate protection;

(b) temporary investigative authority; and

(c) temporary legal custody.

History: En. Sec. 1, Ch. 83, L. 2001; amd. Sec. 2, Ch. 118, L. 2005.

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Service By Publication -- Summons -- Form

41-3-429. Service by publication -- summons -- form. (1) Before service by publication is authorized in a proceeding under this chapter, the department shall file with the court an affidavit stating that, after due diligence, the person cannot be identified or found and stating the diligent efforts made to identify, locate, and serve the person. The affidavit is sufficient evidence of the diligence of any inquiry made by the department. The affidavit may be combined with any other affidavit filed by the department. Upon complying with this subsection, the department may obtain an order for the service to be made upon the party by publication. The order may be issued by either the judge or the clerk of the court.

(2) Service by publication must be made by publishing notice three times, once each week for 3 successive weeks:

(a) in a newspaper in a community in which the publication can reasonably be calculated to be seen by the person, based upon the last-known address or whereabouts, if known, of the person if in the state of Montana; or

(b) if no last-known address exists, if the last-known address is outside Montana, or if the identity of the person is unknown, in a newspaper in the county in which the action is pending, if a newspaper is published in the county, and, if a newspaper is not published in the county, in a newspaper published in an adjoining county and having a general circulation in the county.

(3) Service by publication is complete on the date of the last publication required by subsection (2).

(4) A summons required under this chapter must:

(a) be directed to the parent, legal guardian, other person having legal custody of the child, or any other person who is required to be served; and

(b) be signed by the clerk of court, be under the seal of the court, and contain:

(i) the name of the court and the cause number;

(ii) the initials of the child who is the subject of the proceedings;

(iii) the name of the child's parents, if known;

(iv) the time within which an interested person shall appear;

(v) the department's address;

(vi) a statement in general terms of the nature of the proceedings, including the date and place of birth of the child, the date and place of the hearing, and the phone number of the clerk of the court in which the hearing is scheduled; and

(vii) notification apprising the person served by publication that failure to appear at the hearing will constitute a denial of interest in the child, which denial may result, without further notice of this proceeding or any subsequent proceeding, in judgment by default being entered for the relief requested in the petition.

History: En. Sec. 2, Ch. 83, L. 2001; amd. Sec. 3, Ch. 118, L. 2005.

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Putative Fathers -- Service By Publication -- Continuation Of Proceedings

41-3-430. Putative fathers -- service by publication -- continuation of proceedings. (1) Reasonable efforts must be made to resolve issues of paternity, if any, as early as possible in proceedings under this chapter. The department shall make every reasonable effort to obtain service of process of a petition on a putative father, as defined in **42-2-201**.

(2) If a putative father cannot be served personally, the putative father may be served by publication as provided in **41-3-428** and **41-3-429**.

(3) Regardless of the provisions of subsections (1) and (2), if a putative father cannot be identified or found prior to the initial hearings allowed by part 4, the court may grant the following relief, pending service by publication on the putative father and based upon service of process on only the parent, guardian, or other person having legal custody of the child:

(a) immediate protection;

(b) temporary investigative authority; and

(c) temporary legal custody.

(4) Throughout the proceedings, the court, in its discretion, may order the department to continue to attempt to identify, locate, and serve a putative father.

(5) A court may order termination of the parental rights of a putative father under this chapter based on service by publication if the provisions of **41-3-428** and **41-3-429** have been met.

History: En. Sec. 3, Ch. 83, L. 2001.

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Show Cause Hearing -- Order

41-3-432. Show cause hearing -- order. (1) (a) Except as provided in the federal Indian Child Welfare Act, a show cause hearing must be conducted within 20 days of the filing of an initial child abuse and neglect petition unless otherwise stipulated by the parties pursuant to **41-3-434** or unless an extension of time is granted by the court. A separate notice to the court stating the statutory time deadline for a hearing must accompany any petition to which the time deadline applies.

(b) If a proceeding under this chapter involves an Indian child and is subject to the federal Indian Child Welfare Act, a qualified expert witness is required to testify that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) The court may grant an extension of time for a show cause hearing only upon a showing of substantial injustice and shall order an appropriate remedy that considers the best interests of the child.

(2) The person filing the petition has the burden of presenting evidence establishing probable cause for the issuance of an order for temporary investigative authority after the show cause hearing, except as provided by the federal Indian Child Welfare Act, if applicable.

(3) If a contested show cause hearing is requested pursuant to **41-3-427** based upon a disputed issue of material fact or a dispute regarding the veracity of the affidavit of the department, the court may consider all evidence and shall provide an opportunity for a parent, guardian, or other person having physical or legal custody of the child to provide testimony regarding the disputed issues. Hearsay evidence of statements made by the affected child is admissible at the hearing. The parent, guardian, or other person may be represented by legal counsel and may be appointed or assigned counsel as provided for in **41-3-425**.

(4) At the show cause hearing, the court shall explain the procedures to be followed in the case and explain the parties' rights, including the right to request appointment or assignment of counsel if indigent or if appointment or assignment of counsel is required under the federal Indian Child Welfare Act, if applicable, and the right to challenge the allegations contained in the petition. The parent, guardian, or other person having physical or legal custody of the child must be given the opportunity to admit or deny the allegations contained in the petition at the show cause hearing. Inquiry must be made to determine whether the notice requirements of the federal Indian Child Welfare Act, if applicable, have been met.

(5) Except as provided in the federal Indian Child Welfare Act, if applicable, the court shall make written findings on issues including but not limited to the following:

(a) whether the child should be returned home immediately if there has been an emergency removal or remain in temporary out-of-home care or be removed from the home;

(b) if removal is ordered or continuation of removal is ordered, why continuation of the child in the home would be contrary to the child's best interests and welfare;

(c) whether the department has made reasonable efforts to avoid protective placement of the child or to make it possible to safely return the child to the child's home;

(d) financial support of the child, including inquiry into the financial ability of the parents, guardian, or other person having physical or legal custody of the child to contribute to the costs for the care, custody, and treatment of the child and requirements of a contribution for those costs pursuant to **41-3-446**; and

(e) whether another hearing is needed and, if so, the date and time of the next hearing.

(6) The court may consider:

(a) terms and conditions for parental visitation; and

(b) whether orders for examinations, evaluations, counseling, immediate services, or protection are needed.

(7) Following the show cause hearing, the court may enter an order for the relief requested or amend a previous order for immediate protection of the child if one has been entered. The order must be in writing.

(8) If a child who has been removed from the child's home is not returned home after the show cause hearing or if removal is ordered, the parents or parent, guardian, or other person or agency having physical or legal custody of the child named in the petition may request that a citizen review board, if available pursuant to part 10 of this chapter, review the case within 30 days of the show cause hearing and make a recommendation to the district court, as provided in **41-3-1010**.

(9) Adjudication of a child as a youth in need of care may be made at the show cause hearing if the requirements of **41-3-437**(2) are met. If not made at the show cause hearing, adjudication under **41-3-437** must be made within the time limits required by **41-3-437** unless adjudication occurs earlier by stipulation of the parties pursuant to **41-3-434** and order of the court.

History: En. Sec. 6, Ch. 281, L. 2001; amd. Sec. 2, Ch. 189, L. 2003; amd. Sec. 9, Ch. 504, L. 2003; amd. Sec. 3, Ch. 349, L. 2005; amd. Sec. 32, Ch. 449, L. 2005; amd. Sec. 7, Ch. 166, L. 2007; amd. Sec. 5, Ch. 223, L. 2011.

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Temporary Investigative Authority

41-3-433. Temporary investigative authority. The department may petition the court for authorization to conduct an investigation into allegations of child abuse, neglect, or abandonment when necessary. An order for temporary investigative authority may not be issued for a period longer than 90 days. The petition must be served as provided in **41-3-422**.

History: En. Sec. 7, Ch. 281, L. 2001.

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Stipulations

41-3-434. Stipulations. Subject to approval by the court, the parties may stipulate to any of the following:

(1) the child meets the definition of a youth in need of care by the preponderance of the evidence;

(2) a treatment plan, if the child has been adjudicated a youth in need of care;

(3) the disposition; or

(4) extension of the timeframes contained in this chapter, except for the timeframe contained in **41-3-445**.

History: En. Sec. 14, Ch. 281, L. 2001; en. Sec. 32, Ch. 311, L. 2001; amd. Sec. 10, Ch. 504, L. 2003.

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Adjudication -- Temporary Disposition -- Findings -- Order

41-3-437. Adjudication -- temporary disposition -- findings -- order. (1) Upon the filing of an appropriate petition, an adjudicatory hearing must be held within 90 days of a show cause hearing under **41-3-432**. Adjudication may take place at the show cause hearing if the requirements of subsection (2) are met or may be made by prior stipulation of the parties pursuant to **41-3-434** and order of the court. Exceptions to the time limit may be allowed only in cases involving newly discovered evidence, unavoidable delays, stipulation by the parties pursuant to **41-3-434**, and unforeseen personal emergencies.

(2) The court may make an adjudication on a petition under **41-3-422** if the court determines by a preponderance of the evidence, except as provided in the federal Indian Child Welfare Act, if applicable, that the child is a youth in need of care. Except as otherwise provided in this part, the Montana Rules of Civil Procedure and the Montana Rules of Evidence apply to adjudication and to an adjudicatory hearing. Adjudication must determine the nature of the abuse and neglect and establish facts that resulted in state intervention and upon which disposition, case work, court review, and possible termination are based.

(3) The court shall hear evidence regarding the residence of the child, paternity, if in question, the whereabouts of the parents, guardian, or nearest adult relative, and any other matters the court considers relevant in determining the status of the child. Hearsay evidence of statements made by the affected youth is admissible according to the Montana Rules of Evidence.

(4) In a case in which abandonment has been alleged by the county attorney, the attorney general, or an attorney hired by the county, the court shall hear offered evidence, including evidence offered by a person appearing pursuant to **41-3-422**(9)(a) or (9)(b), regarding any of the following subjects:

(a) the extent to which the child has been cared for, nurtured, or supported by a person other than the child's parents; and

(b) whether the child was placed or allowed to remain by the parents with another person for the care of the child, and, if so, then the court shall accept evidence regarding:

(i) the intent of the parents in placing the child or allowing the child to remain with that person;

(ii) the continuity of care the person has offered the child by providing permanency or stability in residence, schooling, and activities outside of the home; and

(iii) the circumstances under which the child was placed or allowed to remain with that other person, including:

(A) whether a parent requesting return of the child was previously prevented from doing so as a result of an order issued pursuant to Title 40, chapter 15, part 2, or of a conviction pursuant to **45-5-206**; and

(B) whether the child was originally placed with the other person to allow the parent to seek employment or attend school.

(5) In all civil and criminal proceedings relating to abuse or neglect, the privileges related to the examination or treatment of the child do not apply, except the attorney-client privilege granted by **26-1-803** and the mediation privilege granted by **26-1-813**.

(6) (a) If the court determines that the child is not an abused or neglected child, the petition must be dismissed and any order made pursuant to **41-3-427** or **41-3-432** must be vacated.

(b) If the child is adjudicated a youth in need of care, the court shall set a date for a dispositional hearing to be conducted within 20 days, as provided in **41-3-438**(1), and order any necessary or required investigations. The court may issue a temporary dispositional order pending the dispositional hearing. The temporary dispositional order may provide for any of the forms of relief listed in **41-3-427**(2).

(7) (a) Before making an adjudication, the court may make oral findings, and following the adjudicatory hearing, the court shall make written findings on issues, including but not limited to the following:

(i) which allegations of the petition have been proved or admitted, if any;

(ii) whether there is a legal basis for continued court and department intervention; and

(iii) whether the department has made reasonable efforts to avoid protective placement of the child or to make it possible to safely return the child to the child's home.

(b) The court may order:

(i) terms for visitation, support, and other intrafamily communication pending disposition if the child is to be placed or to remain in temporary out-of-home care prior to disposition;

(ii) examinations, evaluations, or counseling of the child or parents in preparation for the disposition hearing that does not require an expenditure of money by the department unless the court finds after notice and a hearing that the expenditure is reasonable and that resources are available for payment. The department is the payor of last resort after all family, insurance, and other resources have been examined.

(iii) the department to evaluate the noncustodial parent or relatives as possible caretakers, if not already done;

(iv) the perpetrator of the alleged child abuse or neglect to be removed from the home to allow the child to remain in the home; and

(v) the department to continue efforts to notify noncustodial parents.

(8) If a proceeding under this chapter involves an Indian child and is subject to the federal Indian Child Welfare Act, a qualified expert witness is required to testify that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

History: En. 10-1312 by Sec. 8, Ch. 328, L. 1974; R.C.M. 1947, 10-1312; amd. Sec. 19, Ch. 543, L. 1979; amd. Sec. 5, Ch. 567, L. 1979; amd. Sec. 5, Ch. 659, L. 1985; amd. Sec. 14, Ch. 458, L. 1995; amd. Sec. 8, Ch. 516, L. 1997; amd. Sec. 3, Ch. 481, L. 1999; amd. Sec. 10, Ch. 566, L. 1999; amd. Sec. 3, Ch. 194, L. 2001; amd. Sec. 9, Ch. 281, L. 2001; amd. Sec. 10, Ch. 311, L. 2001; Sec. 41-3-404, MCA 1999; redes. 41-3-437 by Sec. 17(2), Ch. 281, L. 2001; amd. Sec. 11, Ch. 504, L. 2003; amd. Sec. 55, Ch. 130, L. 2005; amd. Sec. 4, Ch. 349, L. 2005; amd. Sec. 4, Ch. 210, L. 2009.

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Disposition -- Hearing -- Order

41-3-438. Disposition -- hearing -- order. (1) Unless a petition is dismissed or unless otherwise stipulated by the parties pursuant to **41-3-434** or ordered by the court, a dispositional hearing must be held on every petition filed under this chapter within 20 days after an adjudicatory order has been entered under **41-3-437**. Exceptions to the time limit may be allowed only in cases involving newly discovered evidence, unavoidable delays, stipulation by the parties pursuant to **41-3-434**, and unforeseen personal emergencies.

(2) (a) A dispositional order must be made after a dispositional hearing that is separate from the adjudicatory hearing under **41-3-437**. The hearing process must be scheduled and structured so that dispositional issues are specifically addressed apart from adjudicatory issues. Hearsay evidence is admissible at the dispositional hearing.

(b) A dispositional hearing may follow an adjudicatory hearing in a bifurcated manner immediately after the adjudicatory phase of the proceedings if:

(i) all required reports are available and have been received by all parties or their attorneys at least 5 working days in advance of the hearing; and

(ii) the judge has an opportunity to review the reports after the adjudication.

(c) The dispositional hearing may be held prior to the entry of written findings required by **41-3-437**.

(3) If a child is found to be a youth in need of care under **41-3-437**, the court may enter its judgment, making any of the following dispositions to protect the welfare of the child:

(a) permit the child to remain with the child's custodial parent or guardian, subject to those conditions and limitations the court may prescribe;

(b) order the department to evaluate the noncustodial parent as a possible caretaker;

(c) order the temporary placement of the child with the noncustodial parent, superseding any existing custodial order, and keep the proceeding open pending completion by the custodial parent of any treatment plan ordered pursuant to **41-3-443**;

(d) order the placement of the child with the noncustodial parent, superseding any existing custodial order, and dismiss the proceeding with no further obligation on the part of the department to provide services to the parent with whom the child is placed or to work toward reunification of the child with the

parent or guardian from whom the child was removed in the initial proceeding;

(e) grant an order of limited emancipation to a child who is 16 years of age or older, as provided in **41-1-503**;

(f) transfer temporary legal custody to any of the following:

(i) the department;

(ii) a licensed child-placing agency that is willing and able to assume responsibility for the education, care, and maintenance of the child and that is licensed or otherwise authorized by law to receive and provide care of the child; or

(iii) a nonparent relative or other individual who has been evaluated and recommended by the department or a licensed child-placing agency designated by the court and who is found by the court to be qualified to receive and care for the child;

(g) order a party to the action to do what is necessary to give effect to the final disposition, including undertaking medical and psychological evaluations, treatment, and counseling that does not require an expenditure of money by the department unless the department consents and informs the court that resources are available for payment. The department is the payor of last resort after all family, insurance, and other resources have been examined.

(h) order further care and treatment as the court considers in the best interests of the child that does not require an expenditure of money by the department unless the department consents and informs the court that resources are available for the proposed care and treatment. The department is the payor of last resort after all family, insurance, and other resources have been examined pursuant to **41-3-446**.

(4) (a) If the court awards temporary legal custody of an abandoned child other than to the department or to a noncustodial parent, the court shall award temporary legal custody of the child to a member of the child's extended family, including adult siblings, grandparents, great-grandparents, aunts, and uncles, if:

(i) placement of the abandoned child with the extended family member is in the best interests of the child;

(ii) the extended family member requests that the child be placed with the family member;

(iii) the extended family member is able to offer continuity of care for the child by providing permanency or stability in residence, schooling, and activities outside of the home; and

(iv) the extended family member is found by the court to be qualified to receive and care for the child.

(b) If more than one extended family member satisfies the requirements of subsection (4)(a), the court may award custody to the extended family member who can best meet the child's needs.

(c) If a member of the child's extended family, including an adult sibling, grandparent, great-grandparent, aunt, or uncle, has requested that custody be awarded to that family member, the department shall investigate and determine if awarding custody to the family member is in the best interests of the child. The department shall provide the reasons for any denial to the court. If the court accepts the department's

custody recommendation, the court shall inform any denied family member of the reasons for the denial to the extent that confidentiality laws allow. The court shall include the reasons for denial in the court order if the family member who is denied temporary legal custody requests it to be included.

(5) If reasonable efforts have been made to prevent removal of a child from the home or to return a child to the child's home but continuation of the efforts is determined by the court to be inconsistent with permanency for the child, the department shall make reasonable efforts to place the child in a timely manner in accordance with a permanent plan and to complete whatever steps are necessary to finalize the permanent placement of the child.

(6) If the court finds that reasonable efforts are not necessary pursuant to **41-3-442**(1) or subsection (5) of this section, a permanency hearing must be held within 30 days of that determination and reasonable efforts must be made to place the child in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the child.

(7) If the time limitations of this section are not met, the court shall review the reasons for the failure and order an appropriate remedy that considers the best interests of the child.

History: En. 10-1314 by Sec. 10, Ch. 328, L. 1974; R.C.M. 1947, 10-1314; amd. Sec. 7, Ch. 567, L. 1979; amd. Sec. 170, Ch. 575, L. 1981; amd. Sec. 3, Ch. 564, L. 1983; amd. Sec. 6, Ch. 659, L. 1985; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 2, Ch. 696, L. 1991; amd. Sec. 2, Ch. 362, L. 1993; amd. Sec. 15, Ch. 458, L. 1995; amd. Sec. 170, Ch. 546, L. 1995; amd. Sec. 9, Ch. 516, L. 1997; amd. Sec. 2, Ch. 428, L. 1999; amd. Sec. 11, Ch. 566, L. 1999; amd. Sec. 4, Ch. 194, L. 2001; amd. Secs. 10, 18(3), Ch. 281, L. 2001; amd. Sec. 11, Ch. 311, L. 2001; Sec. 41-3-406, MCA 1999; redes. 41-3-438 by Sec. 17(2), Ch. 281, L. 2001; amd. Sec. 12, Ch. 504, L. 2003; amd. Sec. 1, Ch. 178, L. 2005; amd. Sec. 5, Ch. 382, L. 2005; amd. Sec. 1, Ch. 73, L. 2007; amd. Sec. 6, Ch. 179, L. 2009; amd. Sec. 5, Ch. 210, L. 2009.

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Department To Give Placement Priority To Extended Family Member Of Abandoned Child

41-3-439. Department to give placement priority to extended family member of abandoned child. (1) If the department has received temporary legal custody of an abandoned child pursuant to **41-3-438** or permanent legal custody pursuant to **41-3-607**, the department shall give priority to a member of the child's extended family, including adult siblings, grandparents, great-grandparents, aunts, and uncles, in determining the person or persons with whom the abandoned child should be placed if:

(a) placement with the extended family member is in the best interests of the abandoned child;

(b) the extended family member has requested that the abandoned child be placed with the family member;

(c) the extended family member is able to offer the child continuity of care by providing permanency or stability in residence, schooling, and activities outside of the home; and

(d) the department has determined that the extended family member is qualified to receive and care for the abandoned child.

(2) If more than one extended family member of the abandoned child has requested that the child be placed with the family member and all are qualified to receive and care for the child, the department may determine which extended family member to place the abandoned child with in the same manner as provided for in **41-3-438**(4).

(3) This part does not affect the department's ability to assess the appropriateness of placement of the child with a noncustodial parent when abandonment has been found against only one parent.

(4) If a member of the child's extended family, including an adult sibling, grandparent, great-grandparent, aunt, or uncle, has requested that the child be placed with that family member and the department denies the request, the department shall give that family member a written statement of the reasons for the denial to the extent that confidentiality laws allow.

History: En. Sec. 6, Ch. 194, L. 2001; amd. Sec. 80, Ch. 114, L. 2003; amd. Sec. 2, Ch. 178, L. 2005; amd. Sec. 6, Ch. 210, L. 2009.

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Limitation On Placement

41-3-440. Limitation on placement. Except as provided in **41-3-301**(1) and in the absence of a dispute between the parties to the action regarding the appropriate placement, the department shall determine the appropriate placement for a child alleged to be or adjudicated as a youth in need of care. The court shall settle any dispute between the parties to an action regarding the appropriate placement. The child may not be placed in a youth assessment center, youth detention facility, detention center, or other facility intended or used for the confinement of adults or youth accused or convicted of criminal offenses.

History: En. Sec. 30, Ch. 311, L. 2001.

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Review Of Necessity Of Nonyouth Foster Home Placement

41-3-441. Review of necessity of nonyouth foster home placement. (1) Within 60 days of placement of a child in a therapeutic group home, the court shall:

(a) conduct a hearing to:

(i) review the therapeutic needs assessment of the child;

(ii) consider whether the needs of the child can be met through placement in a youth foster home;

(iii) consider whether placement of the child in a therapeutic group home provides the most effective and appropriate level of care for the child in the least restrictive environment; and

(iv) consider whether placement of the child in a therapeutic group home is consistent with the short-term and long-term goals for the child as specified in the child's permanency plan; and

(b) issue a written order stating the reasons for the court's decision to approve or disapprove the continued placement of the child in a therapeutic group home. The order must be included in and made part of the child's case plan.

(2) If the child remains placed in a therapeutic group home, the following evidence must be submitted at each status review or permanency hearing held concerning the child:

(a) the ongoing assessment of the strengths and needs of the child that continues to support the determination that the needs of the child cannot be met through placement in a youth foster home;

(b) that the child's placement in a therapeutic group home provides the most effective and appropriate level of care for the child in the least restrictive environment;

(c) that the placement is consistent with the short-term and long-term goals for the child as specified in the child's permanency plan;

(d) documentation of the specific treatment or service needs that will be met for the child in the placement and the length of time the child is expected to need the treatment or services; and

(e) documentation of the efforts made by the department to prepare the child to return home, to be placed with a fit and willing relative, legal guardian, or adoptive parent, or to be placed in a youth foster

home.

History: En. Sec. 1, Ch. 202, L. 2021.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 4. Abuse or Neglect Proceedings

Temporary Legal Custody

41-3-442. Temporary legal custody. (1) If a child is found to be a youth in need of care under **41-3-437**, the court may grant temporary legal custody under **41-3-438** if the court determines by a preponderance of the evidence that:

(a) dismissing the petition would create a substantial risk of harm to the child or would be a detriment to the child's physical or psychological well-being; and

(b) unless there is a finding that reasonable efforts are not required pursuant to **41-3-423**, reasonable services have been provided to the parent or guardian to prevent the removal of the child from the home or to make it possible for the child to safely return home.

(2) An order for temporary legal custody may be in effect for no longer than 6 months.

(3) The granting of temporary legal custody to the department allows the department to place a child in care provided by a custodial or noncustodial parent, kinship foster home, youth foster home, youth group home, youth shelter care facility, or institution.

(4) Before the expiration of the order for temporary legal custody, the county attorney, the attorney general, or an attorney hired by the county shall petition for one of the following:

(a) an extension of temporary legal custody, not to exceed 6 months, upon a showing that:

(i) additional time is necessary for the parent or guardian to successfully complete a treatment plan; or

(ii) continuation of temporary legal custody is necessary because of the child's individual circumstances;

(b) continued temporary placement of the child with the noncustodial parent, superseding any existing custodial order;

(c) termination of the parent-child legal relationship and:

(i) permanent legal custody with the right of adoption;

(ii) permanent placement of the child with the noncustodial parent, superseding any existing custodial order; or

(iii) appointment of a guardian pursuant to **41-3-607**;

(d) long-term custody when the child is in a planned permanent living arrangement pursuant to **41-3-445**;

(e) appointment of a guardian pursuant to **41-3-444**; or

(f) dismissal.

(5) The court may continue an order for temporary legal custody pending a hearing on a petition provided for in subsection (2).

(6) If an extension of temporary legal custody is granted to the department, the court shall state the reasons why the child was not returned home and the conditions upon which the child may be returned home and shall specifically find that an extension is in the child's best interests.

(7) If the time limitations of this section are not met, the court shall review the reasons for the failure and order an appropriate remedy that considers the best interests of the child.

(8) In implementing the policy of this section, the child's health and safety are of paramount concern.

(9) A petition requesting temporary legal custody must be served as provided in **41-3-422**.

History: En. Sec. 11, Ch. 281, L. 2001; amd. Sec. 13, Ch. 504, L. 2003; amd. Sec. 2, Ch. 73, L. 2007.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
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Treatment Plan -- Contents -- Changes

41-3-443. Treatment plan -- contents -- changes. (1) The court may order a treatment plan if:

(a) the parent or parents admit the allegations of an abuse and neglect petition;

(b) the parent or parents stipulate to the allegations of abuse or neglect pursuant to **41-3-434**; or

(c) the court has made an adjudication under **41-3-437** that the child is a youth in need of care.

(2) Every treatment plan must contain the following information:

(a) the identification of the problems or conditions that resulted in the abuse or neglect of a child;

(b) the treatment goals and objectives for each condition or requirement established in the plan. If the child has been removed from the home, the treatment plan must include but is not limited to the conditions or requirements that must be established for the safe return of the child to the family.

(c) the projected time necessary to complete each of the treatment objectives;

(d) the specific treatment objectives that clearly identify the separate roles and responsibilities of all parties addressed in the treatment plan; and

(e) the signature of the parent or parents or guardian, unless the plan is ordered by the court.

(3) A treatment plan may include but is not limited to any of the following remedies, requirements, or conditions:

(a) the right of entry into the child's home for the purpose of assessing compliance with the terms and conditions of a treatment plan;

(b) the requirement of either the child or the child's parent or guardian to obtain medical or psychiatric diagnosis and treatment through a physician or psychiatrist licensed in the state of Montana;

(c) the requirement of either the child or the child's parent or guardian to obtain psychological treatment or counseling;

(d) the requirement of either the child or the child's parent or guardian to obtain and follow through with alcohol or substance abuse evaluation and counseling, if necessary;

(e) the requirement that either the child or the child's parent or guardian be restricted from associating with or contacting any individual who may be the subject of a department investigation;

(f) the requirement that the child be placed in temporary medical or out-of-home care;

(g) the requirement that the parent, guardian, or other person having physical or legal custody furnish services that the court may designate.

(4) A treatment plan may not be altered, amended, continued, or terminated without the approval of the parent or parents or guardian pursuant to a stipulation and order or order of the court.

(5) A treatment plan must contain a notice provision advising parents:

(a) of timelines for hearings and determinations required under this chapter;

(b) that the state is required by federal and state laws to hold a permanency hearing to determine the permanent placement of a child no later than 12 months after a judge determines that the child has been abused or neglected or 12 months after the first 60 days that the child has been removed from the child's home;

(c) that if a child has been in foster care for 15 of the last 22 months, state law presumes that termination of parental rights is in the best interests of the child and the state is required to file a petition to terminate parental rights; and

(d) that completion of a treatment plan does not guarantee the return of a child and that completion of the plan without a change in behavior that caused removal in the first instance may result in termination of parental rights.

(6) A treatment plan must be ordered by no later than 30 days after the date of the dispositional hearing held pursuant to **41-3-438**, except for good cause shown.

History: En. Sec. 15, Ch. 566, L. 1999; amd. Sec. 13, Ch. 281, L. 2001; amd. Sec. 15, Ch. 311, L. 2001; Sec. 41-3-420, MCA 1999; redes. 41-3-443 by Sec. 17(2), Ch. 281, L. 2001; amd. Sec. 6, Ch. 382, L. 2005; amd. Sec. 1, Ch. 131, L. 2017.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 4. Abuse or Neglect Proceedings

Abuse And Neglect Proceedings -- Appointment Of Guardian -- Financial Subsidies

41-3-444. Abuse and neglect proceedings -- appointment of guardian -- financial subsidies. (1) The court may, upon the petition of the department or guardian ad litem, enter an order appointing a guardian for a child who has been placed in the temporary or permanent custody of the department pursuant to **41-3-438**, **41-3-445**, or **41-3-607**. The guardianship may be subsidized by the department under subsection (9) if the guardianship meets the department's criteria, or the guardianship may be nonsubsidized.

(2) The court may appoint a guardian for a child pursuant to this section if the following facts are found by the court:

(a) the department has given its written consent to the appointment of the guardian, whether the guardianship is to be subsidized or not;

(b) if the guardianship is to be subsidized, the department has given its written consent after the department has considered initiating or continuing financial subsidies pursuant to subsection (9);

(c) the child has been adjudicated a youth in need of care;

(d) the department has made reasonable efforts to reunite the parent and child, further efforts to reunite the parent and child by the department would likely be unproductive, and reunification of the parent and child would be contrary to the best interests of the child;

(e) the child has lived with the potential guardian in a family setting and the potential guardian is committed to providing a long-term relationship with the child;

(f) it is in the best interests of the child to remain or be placed with the potential guardian;

(g) either termination of parental rights to the child is not in the child's best interests or parental rights to the child have been terminated, but adoption is not in the child's best interests; and

(h) if the child concerning whom the petition for guardianship has been filed is an Indian child, as defined in the Indian Child Welfare Act, 25 U.S.C. 1901, et seq., the child's tribe has received notification from the state of the initiation of the proceedings.

(3) In the case of an abandoned child, the court may give priority to a member of the abandoned child's extended family, including adult siblings, grandparents, great-grandparents, aunts, and uncles, if placement

with the extended family member is in the best interests of the child. If more than one extended family member has requested to be appointed as guardian, the court may determine which extended family member to appoint in the same manner provided for in **41-3-438**(4).

(4) The entry of a decree of guardianship pursuant to this section terminates the custody of the department and the involvement of the department with the child and the child's parents except for the department's provision of a financial subsidy, if any, pursuant to subsection (9).

(5) A guardian appointed under this section may exercise the powers and has the duties provided in **72-5-231**.

(6) The court may revoke a guardianship ordered pursuant to this section if the court finds, after hearing on a petition for removal of the child's guardian, that continuation of the guardianship is not in the best interests of the child. Notice of hearing on the petition must be provided by the moving party to the child's lawful guardian, the department, any court-appointed guardian ad litem, the child's parent if the rights of the parent have not been terminated, and other persons directly interested in the welfare of the child.

(7) A guardian may petition the court for permission to resign the guardianship. A petition may include a request for appointment of a successor guardian.

(8) After notice and hearing on a petition for removal or permission to resign, the court may appoint a successor guardian or may terminate the guardianship and restore temporary legal custody to the department pursuant to **41-3-438**.

(9) The department may provide a financial subsidy to a guardian appointed pursuant to this section if the guardianship meets the department's criteria and if the department determines that a subsidy is in the best interests of the child. The amount of the subsidy must be determined by the department.

(10) This section does not apply to guardians appointed pursuant to Title 72, chapter 5.

History: En. Sec. 4, Ch. 428, L. 1999; amd. Sec. 5, Ch. 194, L. 2001; amd. Sec. 15, Ch. 281, L. 2001; Sec. 41-3-421, MCA 1999; redes. 41-3-444 by Sec. 17(2), Ch. 281, L. 2001.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 4. Abuse or Neglect Proceedings

Permanency Hearing

41-3-445. Permanency hearing. (1) (a) (i) Subject to subsection (1)(b), a permanency hearing must be held by the court or, subject to the approval of the court and absent an objection by a party to the proceeding, by the foster care review committee, as provided in **41-3-115**, or the citizen review board, as provided in **41-3-1010**:

(A) within 30 days of a determination that reasonable efforts to provide preservation or reunification services are not necessary under **41-3-423**, **41-3-438**(6), or **41-3-442**(1); or

(B) no later than 12 months after the initial court finding that the child has been subjected to abuse or neglect or 12 months after the child's first 60 days of removal from the home, whichever comes first.

(ii) Within 12 months of a hearing under subsection (1)(a)(i)(B) and every 12 months thereafter until the child is permanently placed in either an adoptive or a guardianship placement, the court or the court-approved entity holding the permanency hearing shall conduct a hearing and the court shall issue a finding as to whether the department has made reasonable efforts to finalize the permanency plan for the child.

(b) A permanency hearing is not required if the proceeding has been dismissed, the child was not removed from the home, the child has been returned to the child's parent or guardian, or the child has been legally adopted or appointed a legal guardian.

(c) The permanency hearing may be combined with a hearing that is required in other sections of this part or with a review held pursuant to **41-3-115** or **41-3-1010** if held within the applicable time limits. If a permanency hearing is combined with another hearing or a review, the requirements of the court related to the disposition of the other hearing or review must be met in addition to the requirements of this section.

(d) The court-approved entity conducting the permanency hearing may elect to hold joint or separate reviews for groups of siblings, but the court shall issue specific findings for each child.

(2) At least 3 working days prior to the permanency hearing, the department shall submit a report regarding the child to the entity that will be conducting the hearing for review. The report must address the department's efforts to effectuate the permanency plan for the child, address the options for the child's permanent placement, examine the reasons for excluding higher priority options, and set forth the proposed plan to carry out the placement decision, including specific times for achieving the plan.

(3) At least 3 working days prior to the permanency hearing, the guardian ad litem or an attorney or advocate for a parent or guardian may submit an informational report to the entity that will be conducting the hearing for review.

(4) In a permanency hearing, the court or other entity conducting the hearing shall consult, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child.

(5) (a) The court's order must be issued within 20 days after the permanency hearing if the hearing was conducted by the court. If a member of the child's extended family, including an adult sibling, grandparent, great-grandparent, aunt, or uncle, has requested that custody be awarded to that family member or that a prior grant of temporary custody with that family member be made permanent, the department shall investigate and determine if awarding custody to that family member is in the best interests of the child. The department shall provide the reasons for any denial to the court. If the court accepts the department's custody recommendation, the court shall inform any denied family member of the reasons for the denial to the extent that confidentiality laws allow. The court shall include the reasons for denial in the court order if the family member who is denied custody requests it to be included.

(b) If an entity other than the court conducts the hearing, the entity shall keep minutes of the hearing and the minutes and written recommendations must be provided to the court within 20 days of the hearing.

(c) If an entity other than the court conducts the hearing and the court concurs with the recommendations, the court may adopt the recommendations as findings with no additional hearing required. In this case, the court shall issue written findings within 10 days of receipt of the written recommendations.

(6) The court shall approve a specific permanency plan for the child and make written findings on:

(a) whether the child has been asked about the desired permanency outcome;

(b) whether the permanency plan is in the best interests of the child;

(c) whether the department has made reasonable efforts to effectuate the permanency plan for the individual child;

(d) whether the department has made reasonable efforts to finalize the plan;

(e) whether there are compelling reasons why it is not in the best interest of the individual child to:

(i) return to the child's home; or

(ii) be placed for adoption, with a legal guardian, or with a fit and willing relative; and

(f) other necessary steps that the department is required to take to effectuate the terms of the plan.

(7) In its discretion, the court may enter any other order that it determines to be in the best interests of the child that does not conflict with the options provided in subsection (8) and that does not require an expenditure of money by the department unless the court finds after notice and a hearing that the expenditures are reasonable and that resources are available for payment. The department is the payor of last resort after all family, insurance, and other resources have been examined.

(8) Permanency options include:

(a) reunification of the child with the child's parent or guardian;

(b) permanent placement of the child with the noncustodial parent, superseding any existing custodial order;

(c) adoption;

(d) appointment of a guardian pursuant to **41-3-444**; or

(e) long-term custody if the child is in a planned permanent living arrangement and if it is established by a preponderance of the evidence, which is reflected in specific findings by the court, that:

(i) the child is being cared for by a fit and willing relative;

(ii) the child has an emotional or mental handicap that is so severe that the child cannot function in a family setting and the best interests of the child are served by placement in a residential or group setting;

(iii) the child is at least 16 years of age and is participating in an independent living program and that termination of parental rights is not in the best interests of the child;

(iv) the child's parent is incarcerated and circumstances, including placement of the child and continued, frequent contact with the parent, indicate that it would not be in the best interests of the child to terminate parental rights of that parent; or

(v) the child meets the following criteria:

(A) the child has been adjudicated a youth in need of care;

(B) the department has made reasonable efforts to reunite the parent and child, further efforts by the department would likely be unproductive, and reunification of the child with the parent or guardian would be contrary to the best interests of the child;

(C) there is a judicial finding that other more permanent placement options for the child have been considered and found to be inappropriate or not to be in the best interests of the child; and

(D) the child has been in a placement in which the foster parent or relative has committed to the long-term care and to a relationship with the child, and it is in the best interests of the child to remain in that placement.

(9) For a child 14 years of age or older, the permanency plan must:

(a) be developed in consultation with the child and in consultation with up to two members of the child's case planning team who are chosen by the child and who are not a foster parent or child protection specialist for the child;

(b) identify one person from the case management team, who is selected by the child, to be designated as the child's advisor and advocate for the application of the reasonable and prudent parenting standard; and

(c) include services that will be needed to transition the child from foster care to adulthood.

(10) A permanency hearing must document the intensive, ongoing, and unsuccessful efforts made by the department to return the child to the child's home or to secure a permanent placement of the child with a relative, legal guardian, or adoptive parent.

(11) The court may terminate a planned permanent living arrangement upon petition of the birth parents or the department if the court finds that the circumstances of the child or family have substantially changed and the best interests of the child are no longer being served.

History: En. Sec. 11, Ch. 516, L. 1997; amd. Sec. 3, Ch. 428, L. 1999; amd. Sec. 12, Ch. 566, L. 1999; amd. Sec. 12, Ch. 281, L. 2001; amd. Sec. 13, Ch. 311, L. 2001; Sec. 41-3-412, MCA 1999; redes. 41-3-445 by Sec. 17(2), Ch. 281, L. 2001; amd. Sec. 14, Ch. 504, L. 2003; amd. Sec. 56, Ch. 130, L. 2005; amd. Sec. 3, Ch. 178, L. 2005; amd. Sec. 7, Ch. 382, L. 2005; amd. Sec. 3, Ch. 73, L. 2007; amd. Sec. 8, Ch. 166, L. 2007; amd. Sec. 1, Ch. 182, L. 2017; amd. Sec. 12, Ch. 520, L. 2021.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 4. Abuse or Neglect Proceedings

Contributions By Parents Or Guardians For Youth's Care

41-3-446. Contributions by parents or guardians for youth's care. (1) If physical or legal custody of the youth is transferred to the department, the court shall examine the financial ability of the youth's parents or guardians to pay a contribution covering all or part of the costs for the care, custody, and treatment of the youth, including the costs of necessary medical, dental, and other health care.

(2) If the court determines that the youth's parents or guardians are financially able to pay a contribution as provided in subsection (1), the court shall order the youth's parent or guardian to pay an amount based on the uniform child support guidelines adopted by the department of public health and human services pursuant to **40-5-209**.

(3) (a) Except as provided in subsection (3)(b), contributions ordered under this section and each modification of an existing order are enforceable by immediate or delinquency income withholding, or both, under Title 40, chapter 5, part 4. An order for a contribution that is inconsistent with this section is nevertheless subject to withholding for the payment of the contribution without need for an amendment of the support order or for any further action by the court.

(b) A court-ordered exception from contributions under this section must be in writing and must be included in the order. An exception from the immediate income-withholding requirement may be granted if the court finds that there is:

(i) good cause not to require immediate income withholding; or

(ii) an alternative arrangement between the department and the person who is ordered to pay contributions.

(c) A finding of good cause not to require immediate income withholding must, at a minimum, be based upon:

(i) a written determination and explanation by the court of the reasons why the implementation of immediate income withholding is not in the best interests of the child; and

(ii) proof of timely payment of previously ordered support in cases involving modification of contributions ordered under this section.

(d) An alternative arrangement must:

(i) provide sufficient security to ensure compliance with the arrangement;

(ii) be in writing and be signed by a representative of the department and the person required to make contributions; and

(iii) if approved by the court, be entered into the record of the proceeding.

(4) Upon a showing of a change in the financial ability of the youth's parent or guardian to pay, the court may modify its order for the payment of contributions required under subsection (2).

(5) (a) If the court orders the payment of contributions under this section, the department shall apply to the department of public health and human services for support enforcement services pursuant to Title IV-D of the Social Security Act.

(b) The department of public health and human services may collect and enforce a contribution order under this section by any means available under law, including the remedies provided for in Title 40, chapter 5, parts 2 and 4.

History: En. Sec. 10, Ch. 516, L. 1997; amd. Sec. 12, Ch. 311, L. 2001; Sec. 41-3-411, MCA 1999; redes. 41-3-446 by Sec. 17(2), Ch. 281, L. 2001.

I. Montana Resources
a. Montana Code Annotated
ii. Termination

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT

Part 6. Parent-Child Legal Relationship Termination

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TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 6. Parent-Child Legal Relationship Termination

Short Title

41-3-601. Short title. This part may be cited as the "Parent-Child Legal Relationship Termination Act of 1981".

History: En. Sec. 1, Ch. 420, L. 1981.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 6. Parent-Child Legal Relationship Termination

Purpose

41-3-602. Purpose. This part provides procedures and criteria by which the parent-child legal relationship may be terminated by a court if the relationship is not in the best interest of the child. The termination of the parent-child legal relationship provided for in this part is to be used in those situations when there is a determination that a child is abused or neglected, as defined in **41-3-102**.

History: En. Sec. 2, Ch. 420, L. 1981; amd. Sec. 17, Ch. 458, L. 1995.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 6. Parent-Child Legal Relationship Termination

When Petition To Terminate Parental Rights Required

41-3-604. When petition to terminate parental rights required. (1) If a child has been in foster care under the physical custody of the state for 15 months of the most recent 22 months, the best interests of the child must be presumed to be served by termination of parental rights. If a child has been in foster care for 15 months of the most recent 22 months or if the court has found that reasonable efforts to preserve or reunify a child with the child's parent or guardian are not required pursuant to **41-3-423**, a petition to terminate parental rights must be filed unless:

(a) the child is being cared for by a relative;

(b) the department has not provided the services considered necessary for the safe return of the child to the child's home; or

(c) the department has documented a compelling reason, available for court review, for determining that filing a petition to terminate parental rights would not be in the best interests of the child.

(2) Compelling reasons for not filing a petition to terminate parental rights include but are not limited to the following:

(a) There are insufficient grounds for filing a petition.

(b) There is adequate documentation that termination of parental rights is not the appropriate plan and not in the best interests of the child.

(3) If a child has been in foster care for 15 months of the most recent 22 months and a petition to terminate parental rights regarding that child has not been filed with the court, the department shall file a report to the court or review panel at least 3 days prior to the next hearing or review detailing the reasons that the petition was not filed.

(4) If a hearing results in a finding of abandonment or that the parent has subjected the child to any of the circumstances listed in **41-3-423**(2)(a) through (2)(e) and that reasonable efforts to provide preservation or reunification are not necessary, unless there is an exception made pursuant to subsections (1)(a) through (1)(c) of this section, a petition to terminate parental rights must be filed within 60 days of the finding.

(5) If an exception in subsections (1)(a) through (1)(c) of this section applies, a petition for an extension of temporary legal custody pursuant to **41-3-438**, a petition for long-term custody pursuant to **41-3-445**, or a petition to dismiss must be filed.

(6) A hearing on a petition for termination of parental rights must be held no later than 45 days from the date the petition was served on the parent or parents, except for good cause shown.

History: En. Sec. 14, Ch. 566, L. 1999; amd. Sec. 16, Ch. 311, L. 2001; amd. Sec. 15, Ch. 504, L. 2003; amd. Sec. 2, Ch. 131, L. 2017.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 6. Parent-Child Legal Relationship Termination

Petition For Termination -- Separate Hearing -- No Jury Trial

41-3-607. Petition for termination -- separate hearing -- no jury trial. (1) Except as provided in Title 40, chapter 6, part 10, the termination of a parent-child legal relationship may be considered only after the filing of a petition pursuant to **41-3-422** alleging the factual grounds for termination pursuant to **41-3-609**.

(2) If termination of a parent-child legal relationship is ordered, the court may:

(a) transfer permanent legal custody of the child, with the right to consent to the child's adoption, to:

(i) the department;

(ii) a licensed child-placing agency; or

(iii) another individual who has been approved by the department and has received consent for the transfer of custody from the department or agency that has custody of the child; or

(b) transfer permanent legal custody of the child to the department with the right to petition for appointment of a guardian pursuant to **41-3-444**.

(3) If the court does not order termination of the parent-child legal relationship, the child's prior legal status remains in effect until further order of the court.

(4) A guardian ad litem must be appointed to represent the child's best interests in any hearing determining the involuntary termination of the parent-child legal relationship. The guardian ad litem shall continue to represent the child until the child is returned home or placed in an appropriate permanent placement. If a respondent parent is a minor, a guardian ad litem must be appointed to serve the minor parent in addition to any appointed or assigned counsel requested by the minor parent.

(5) There is no right to a jury trial at proceedings held to consider the termination of a parent-child legal relationship.

History: En. Sec. 4, Ch. 420, L. 1981; amd. Sec. 2, Ch. 388, L. 1985; amd. Sec. 19, Ch. 458, L. 1995; amd. Sec. 12, Ch. 516, L. 1997; amd. Sec. 5, Ch. 428, L. 1999; amd. Sec. 16, Ch. 566, L. 1999; amd. Sec. 16, Ch. 504, L. 2003; amd. Sec. 33, Ch. 449, L. 2005; amd. Sec. 4, Ch. 388, L. 2017.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 6. Parent-Child Legal Relationship Termination

Notice

41-3-608. Notice. Before a termination of the parent-child legal relationship may be ordered, the court shall determine whether the provisions of **41-3-428** and **41-3-429** relating to service of process have been followed.

History: En. Sec. 5, Ch. 420, L. 1981; amd. Sec. 6, Ch. 83, L. 2001.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 6. Parent-Child Legal Relationship Termination

Criteria For Termination

41-3-609. Criteria for termination. (1) The court may order a termination of the parent-child legal relationship upon a finding established by clear and convincing evidence, except as provided in the federal Indian Child Welfare Act, if applicable, that any of the following circumstances exist:

(a) the parents have relinquished the child pursuant to **42-2-402** and **42-2-412**;

(b) the child has been abandoned by the parents;

(c) the parent is convicted of a felony in which sexual intercourse occurred or is a minor adjudicated a delinquent youth because of an act that, if committed by an adult, would be a felony in which sexual intercourse occurred and, as a result of the sexual intercourse, the child is born;

(d) the parent has subjected a child to any of the circumstances listed in **41-3-423**(2)(a) through (2)(e);

(e) the putative father meets any of the criteria listed in **41-3-423**(3)(a) through (3)(c); or

(f) the child is an adjudicated youth in need of care and both of the following exist:

(i) an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful; and

(ii) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time.

(2) In determining whether the conduct or condition of the parents is unlikely to change within a reasonable time, the court shall enter a finding that continuation of the parent-child legal relationship will likely result in continued abuse or neglect or that the conduct or the condition of the parents renders the parents unfit, unable, or unwilling to give the child adequate parental care. In making the determinations, the court shall consider but is not limited to the following:

(a) emotional illness, mental illness, or mental deficiency of the parent of a duration or nature as to render the parent unlikely to care for the ongoing physical, mental, and emotional needs of the child within a reasonable time;

(b) a history of violent behavior by the parent;

(c) excessive use of intoxicating liquor or of a narcotic or dangerous drug that affects the parent's ability to care and provide for the child; and

(d) present judicially ordered long-term confinement of the parent.

(3) In considering any of the factors in subsection (2) in terminating the parent-child relationship, the court shall give primary consideration to the physical, mental, and emotional conditions and needs of the child.

(4) A treatment plan is not required under this part upon a finding by the court following hearing if:

(a) the parent meets the criteria of subsections (1)(a) through (1)(e);

(b) two medical doctors or clinical psychologists submit testimony that the parent cannot assume the role of parent within a reasonable time;

(c) the parent is or will be incarcerated for more than 1 year and reunification of the child with the parent is not in the best interests of the child because of the child's circumstances, including placement options, age, and developmental, cognitive, and psychological needs; or

(d) the death or serious bodily injury, as defined in **45-2-101**, of a child caused by abuse or neglect by the parent has occurred.

(5) If a proceeding under this chapter involves an Indian child and is subject to the federal Indian Child Welfare Act, a qualified expert witness is required to testify that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

History: En. Sec. 6, Ch. 420, L. 1981; amd. Sec. 7, Ch. 15, L. 1985; amd. Sec. 3, Ch. 388, L. 1985; amd. Sec. 2, Ch. 599, L. 1991; amd. Sec. 3, Ch. 439, L. 1993; (5)En. Sec. 2, Ch. 369, L. 1995; amd. Sec. 20, Ch. 458, L. 1995; amd. Sec. 166, Ch. 480, L. 1997; amd. Sec. 8, Ch. 514, L. 1997; amd. Sec. 13, Ch. 516, L. 1997; amd. Sec. 1, Ch. 395, L. 1999; amd. Sec. 17, Ch. 566, L. 1999; amd. Sec. 1, Ch. 44, L. 2003; amd. Sec. 17, Ch. 504, L. 2003; amd. Sec. 5, Ch. 349, L. 2005.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
Part 6. Parent-Child Legal Relationship Termination

Effect Of Decree

41-3-611. Effect of decree. (1) An order for the termination of the parent-child legal relationship divests the child and the parents of all legal rights, powers, immunities, duties, and obligations with respect to each other as provided in Title 40, chapter 6, part 2, and Title 41, chapter 3, part 2, except the right of the child to inherit from the parent.

(2) An order or decree entered pursuant to this part may not disentitle a child to any benefit due the child from any third person, including but not limited to any Indian tribe, agency, state, or the United States.

(3) After the termination of a parent-child legal relationship, the former parent is neither entitled to any notice of proceedings for the adoption of the child nor has any right to object to the adoption or to participate in any permanent placement proceedings held pursuant to **41-3-445**.

History: En. Sec. 8, Ch. 420, L. 1981; amd. Sec. 99, Ch. 370, L. 1987; amd. Sec. 21, Ch. 458, L. 1995; amd. Sec. 18, Ch. 504, L. 2003.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 3. CHILD ABUSE AND NEGLECT
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Appeals

41-3-612. Appeals. Appeals of court orders or decrees made under this part shall be given precedence on the calendar of the supreme court over all other matters, unless otherwise provided by law.

History: En. Sec. 9, Ch. 420, L. 1981.

Montana Code Annotated 2021

TITLE 42. ADOPTION
CHAPTER 2. ADOPTION OF CHILD
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Venue

42-2-601. Venue. Proceedings to terminate parental rights may be filed in the court in the county in which a petitioner resides, the child resides, or an office of the agency that is placing the child is located.

History: En. Sec. 61, Ch. 480, L. 1997.

Montana Code Annotated 2021

TITLE 42. ADOPTION
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Necessity For Parental Rights To Be Terminated

42-2-602. Necessity for parental rights to be terminated. A child is not legally free for adoption until the parental rights of the birth parent or parents have been terminated by a court:

(1) as provided in this title;

(2) pursuant to Title 41, chapter 3; or

(3) of competent jurisdiction in another state or country.

History: En. Sec. 62, Ch. 480, L. 1997.

Montana Code Annotated 2021

TITLE 42. ADOPTION
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Petition For Termination Of Parental Rights

42-2-603. Petition for termination of parental rights. (1) Pending the termination or other disposition of the rights of the father of the child, the birth mother may execute a relinquishment and consent to adoption.

(2) The department, a licensed child-placing agency, the prospective adoptive parent to whom the relinquishment is issued, or a guardian with custody of the child shall file with the court a signed and notarized petition for termination of parental rights pursuant to Title 41, chapter 3, or pursuant to this title.

(3) At the request of the relinquishing parent, the execution of a relinquishment may be conditioned as set forth in **42-2-411**.

(4) Pending disposition of the petition, the court may enter an order authorizing temporary care of the child.

History: En. Sec. 63, Ch. 480, L. 1997.

Montana Code Annotated 2021

TITLE 42. ADOPTION
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Contents Of Petition For Termination Of Parental Rights

42-2-604. Contents of petition for termination of parental rights. (1) The petition for termination of parental rights must state:

(a) the identity of the petitioner;

(b) the date and location of the birth of the child;

(c) the date of the relinquishment by the birth mother or relinquishing parent;

(d) the current location of the child;

(e) the names and locations, if known, of any putative or presumed father of the child;

(f) whether a parent is one from whom consent is not required;

(g) whether court orders from any other proceeding have been issued terminating parental rights to the child that is the subject of the petition;

(h) any other evidence supporting termination of the legal rights that a person has with regard to the child; and

(i) a request for temporary custody of the child prior to the adoption.

(2) The petitioner shall file with the petition for termination of parental rights the following documents received in support of the petition:

(a) any relinquishments and consents to adoption;

(b) any denials of paternity;

(c) any acknowledgments of paternity and denial of parental rights;

(d) any affidavits from the putative father registry that have been executed by the department;

(e) the adoptive decision support services report required under **42-2-409**;

(f) proof of prior service of any notice or acknowledgment of service or waiver of service received; and

(g) proof of compliance with the Indian Child Welfare Act of 1978 and Interstate Compact on the Placement of Children, if applicable.

History: En. Secs. 64, 65, Ch. 480, L. 1997; amd. Sec. 5, Ch. 175, L. 2021.

Montana Code Annotated 2021

TITLE 42. ADOPTION
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Notice Of Hearing -- Service

42-2-605. Notice of hearing -- service. (1) Notice of a hearing to be held on the petition for termination of parental rights must be served in any manner appropriate under the Montana Rules of Civil Procedure or in any manner that the court may direct on:

(a) a putative or presumed father who has timely and properly complied with the putative father registry;

(b) a putative father who was not served with a notice of intent to release at least 20 days before the expected date of birth as specified in the notice of intent to release;

(c) a person adjudicated, in Montana, to be the father of the child for the purpose of child support;

(d) a person who is recorded on the child's birth certificate as the child's father;

(e) a person who is openly living with the child and the child's mother at the time that the proceeding is initiated or at the time the child was placed in the care of an authorized agency and who is representing to the public that the person is the child's father;

(f) a spouse, if the parent relinquishing the child for adoption was married to that person at the time of conception of the child or at any time after conception but prior to birth; or

(g) a parent or legal guardian of the child in question who has not waived notice.

(2) The notice of hearing must inform the putative or presumed father or other parent that failure to appear at the hearing constitutes a waiver of the individual's interest in custody of the child and will result in the court's termination of the individual's rights to the child.

(3) Proof of service of the notice of hearing must be filed with the court. A notarized acknowledgment of service by the party to be served is proof of personal service. Proof of service is not required if the putative father is present at the hearing. A waiver of notice of the hearing by an individual entitled to receive notice is sufficient.

(4) If the court finds that the father of the child is a person who did not receive either a timely notice of intent to release pursuant to **42-2-205** or a notice required pursuant to this section and who has not waived the right to notice of hearing and that person is not present at the hearing, the court shall adjourn further proceedings until that person is served with a notice of hearing.

History: En. Secs. 66, 67, Ch. 480, L. 1997.

Montana Code Annotated 2021

TITLE 42. ADOPTION
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Hearing On Petition To Terminate Parental Rights

42-2-606. Hearing on petition to terminate parental rights. (1) The court shall hold a hearing as soon as practical to determine the identity of and terminate the parental rights of the parents of the child.

(2) If a putative father has not been named and no one has registered with the putative father registry, the court shall cause inquiry to be made in an effort to identify any legal father. The inquiry must include whether the mother was married at the time of conception of the child or at any time after conception and prior to birth.

(3) Based on the evidence received and the court's inquiry, the court shall enter a finding identifying the father or declaring that the identity of the father could not be determined.

(4) Based on the grounds set forth in **42-2-607** and the evidence received at the hearing, the court shall enter an order concerning the parental rights to the child.

(5) If the court terminates the parental rights to the child and the department, agency, or prospective adoptive parent has agreed to accept custody of the child until the child is adopted, the court shall issue an order awarding custody of the child to the petitioner.

History: En. Secs. 68, 69, Ch. 480, L. 1997.

Montana Code Annotated 2021

TITLE 42. ADOPTION
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Grounds For Termination Of Parental Rights

42-2-607. Grounds for termination of parental rights. The court may terminate a parent's rights to a child who is the subject of an adoption proceeding based upon:

(1) the voluntary acts of the parent in:

(a) executing a voluntary relinquishment and consent to adopt;

(b) submitting a notarized denial of paternity executed pursuant to **42-2-421**; or

(c) submitting a notarized acknowledgment of paternity and denial of interest in custody of the child executed pursuant to **42-2-422**;

(2) a determination under **42-2-608** that the parent is unfit;

(3) a determination under **42-2-609** that the relationship of parent and child does not exist;

(4) a determination under **42-2-610** that a putative father has failed to establish and maintain a substantial relationship with the child; or

(5) a determination that the parent has irrevocably waived parental rights by failing to timely act to protect the rights.

History: En. Sec. 70, Ch. 480, L. 1997; amd. Sec. 5, Ch. 257, L. 1999.

Montana Code Annotated 2021

TITLE 42. ADOPTION
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Finding Of Unfitness

42-2-608. Finding of unfitness. (1) The court may terminate parental rights for purposes of making a child available for adoption on the grounds of unfitness if:

(a) the court makes a determination that the parent has been judicially deprived of custody of the child on account of abuse or neglect toward the child;

(b) the parent has willfully abandoned the child, as defined in **41-3-102**, in Montana or in any other jurisdiction of the United States;

(c) it is proven to the satisfaction of the court that the parent, if able, has not contributed to the support of the child for an aggregate period of 1 year before the filing of a petition for adoption;

(d) it is proven to the satisfaction of the court that the parent is in violation of a court order to support either the child that is the subject of the adoption proceedings or other children with the same birth mother;

(e) the parent has been found guilty by a court of competent jurisdiction of:

(i) aggravated assault on the adoptee, as provided in **45-5-202**;

(ii) sexual assault on a child, as provided in **45-5-502**;

(iii) sexual intercourse without consent, as provided in **45-5-503**, if the victim was a child;

(iv) incest, as provided in **45-5-507**, if the victim was a child;

(v) homicide of a child, as provided in **45-5-102** or **45-5-103**;

(vi) sexual abuse of a child, as provided in **45-5-625**; or

(vii) ritual abuse of a minor, as provided in **45-5-627**;

(f) the child has been maintained by a public or private children's institution, a charitable agency, a licensed child-placing agency, or the department for a period of 1 year without the parent contributing to the support of the child during that period, if able;

(g) a finding is made for a parent who is given proper notice of hearing:

(i) that the parent has been convicted of a crime of violence or of violating a restraining or protective order; and

(ii) the facts of the crime or violation and the parent's behavior indicate that the parent is unfit to maintain a relationship of parent and child with the child;

(h) a finding is made for a parent who is given proper notice of hearing and is a respondent to the petition to terminate parental rights and:

(i) by a preponderance of the evidence, it is found that termination is in the best interests of the child; and

(ii) upon clear and convincing evidence, it is found that one of the following grounds exists:

(A) if the child is not in the legal and physical custody of the other parent, that the respondent is not able or willing to promptly assume legal and physical custody of the child and to pay for the child's support in accordance with the respondent's financial means;

(B) if the child is in the legal and physical custody of the other parent and a stepparent who is the prospective adoptive parent, that the respondent is not able or willing to promptly establish and maintain contact with the child and to pay for the child's support in accordance with the respondent's financial means;

(C) placing the child in the respondent's legal and physical custody would pose a risk of substantial harm to the physical or psychological well-being of the child because the circumstances of the child's conception, the respondent's behavior during the mother's pregnancy or since the child's birth, or the respondent's behavior with respect to other children indicates that the respondent is unfit to maintain a relationship of parent and child with the child; or

(D) failure to terminate the relationship of parent and child would be detrimental to the child.

(2) In making a determination under subsection (1)(h)(ii)(D), the court shall consider any relevant factor, including the respondent's efforts to obtain or maintain legal and physical custody of the child, the role of other persons in thwarting the respondent's efforts to assert parental rights, the respondent's ability to care for the child, the age of the child, the quality of any previous relationship between the respondent and the child and between the respondent and any other children, the duration and suitability of the child's present custodial environment, and the effect of a change of physical custody on the child.

History: En. Sec. 71, Ch. 480, L. 1997; amd. Sec. 77, Ch. 51, L. 1999; amd. Sec. 19, Ch. 566, L. 1999.

Montana Code Annotated 2021

TITLE 42. ADOPTION
CHAPTER 2. ADOPTION OF CHILD
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Determination That No Parent And Child Relationship Exists

42-2-609. Determination that no parent and child relationship exists. For purposes of making a child available for adoption, the court may terminate the parental rights of a putative father on the grounds that the parent and child relationship does not exist if:

(1) a judicial determination is made under **40-6-107** that the parent and child relationship does not exist. This includes the termination of the parental rights of the husband of the mother who is placing the child for adoption or the parental rights of an individual who is a presumed father of the child.

(2) a determination is made that:

(a) an individual has not timely registered with the putative father registry;

(b) an individual has not been adjudicated, in Montana, to be the father of the child for the purpose of child support;

(c) an individual has not been recorded on the child's birth certificate as the child's father;

(d) an individual has not openly lived with the child and the child's mother at the time that the proceeding is initiated or at the time that the child was placed in the care of an authorized agency and an individual is not representing to the public that the individual is the child's father; and

(e) the child's mother was not married to the person who is the subject of the termination proceedings at the probable time of the child's conception or at the time that the child was born; or

(3) a putative father appears at the hearing but is unable to establish by a preponderance of the evidence the minimum requirements provided in **42-2-610** for demonstrating the establishment of a substantial relationship with the child.

History: En. Sec. 72, Ch. 480, L. 1997; amd. Sec. 6, Ch. 257, L. 1999.

Montana Code Annotated 2021

TITLE 42. ADOPTION
CHAPTER 2. ADOPTION OF CHILD
Part 6. Petition to Terminate Parental Rights

Putative Father -- Termination Based Upon Failure To Establish Substantial Relationship

42-2-610. Putative father -- termination based upon failure to establish substantial relationship. (1) The parental rights of a putative father may be terminated by the court if the putative father has failed to timely establish and maintain a substantial relationship with the child.

(2) A putative father who is not married to the child's mother but who has openly lived with the child since the child's birth or for a period of 6 months immediately preceding placement of the child with adoptive parents and has openly claimed to be the father of the child during that period is considered to have developed a substantial relationship with the child and to have otherwise met the requirements of this section.

(3) In order to meet the minimal showing of having established a substantial relationship with regard to a child who is the subject of an adoption proceeding, a putative father has the burden of showing that the putative father has:

(a) demonstrated a full commitment to the responsibilities of parenthood by providing financial support for the child in a fair and reasonable sum and in accordance with the putative father's ability and by either:

(i) visiting the child at least monthly when physically and financially able to do so; or

(ii) having regular contact with the child or with the person or agency having the care and custody of the child when physically and financially able to do so; and

(b) manifested an ability and willingness to assume legal and physical custody of the child if the child was not in the physical custody of the other parent.

(4) In order to meet the minimal showing of having established a substantial relationship with regard to a child who is the subject of an adoption proceeding involving a child who is under 6 months of age at the time that the child becomes the subject of adoption proceedings, a putative father has the burden to show that the putative father has manifested a full commitment to parental responsibilities by:

(a) performing all of the acts described in this subsection (4) prior to the time that the mother executed a relinquishment and consent to adopt;

(b) if the putative father had actual knowledge of the pregnancy, paying a fair and reasonable amount of the expenses incurred in connection with the pregnancy and the child's birth in accordance with the putative father's means when not prevented from doing so by the person or authorized agency having lawful custody of the child;

(c) making reasonable and consistent payments, in accordance with the putative father's means, for the support of the child since birth;

(d) visiting regularly with the child; and

(e) manifesting an ability and willingness to assume legal and physical custody of the child if, during this time, the child was not in the physical custody of the mother.

(5) The subjective intent of a putative father, whether expressed or otherwise, unsupported by evidence of acts specified in this section does not preclude a determination that the father failed to meet the requirements of this section.

History: En. Sec. 73, Ch. 480, L. 1997; amd. Sec. 7, Ch. 257, L. 1999.

Montana Code Annotated 2021

TITLE 42. ADOPTION
CHAPTER 2. ADOPTION OF CHILD
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Irrevocable Waiver Of Parental Rights

42-2-611. Irrevocable waiver of parental rights. (1) The court may find an irrevocable waiver of parental rights of:

(a) a putative father who was timely served with notice of intent to release if the court is provided with proof of service and proof that the putative father failed to timely comply with the requirements of the putative father registry;

(b) a parent or putative father who is served with notice of proceedings and fails to appear at the hearing; or

(c) a parent or putative father who is served with notice of proceedings and appears and denies any interest in custody of the child.

(2) The court may terminate parental rights under this section upon a finding of irrevocable waiver of all rights to the child.

History: En. Secs. 74, 75, Ch. 480, L. 1997.

Montana Code Annotated 2021

TITLE 42. ADOPTION
CHAPTER 2. ADOPTION OF CHILD
Part 6. Petition to Terminate Parental Rights

Appearance Of Parent At Hearing -- Determination Of Custody

42-2-616. Appearance of parent at hearing -- determination of custody. (1) If a parent appears at the hearing on the petition to terminate parental rights, objects to the termination of rights, and requests custody of the child, the court shall set deadlines that allow the parties to complete discovery and shall set a hearing on the determination of the parent's rights to the child.

(2) At the hearing, the court shall consider whether there is a basis for terminating parental rights and whether the best interests of the child will be served by granting custody to the respondent parent, the department, a licensed child-placing agency, or a prospective adoptive parent in a direct parental placement adoption.

(3) If the petitioner has established that there are grounds for terminating parental rights and it is in the best interests of the child for termination to occur, those rights must be terminated.

History: En. Sec. 76, Ch. 480, L. 1997.

Montana Code Annotated 2021

TITLE 42. ADOPTION
CHAPTER 2. ADOPTION OF CHILD
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Effect Of Order Terminating Parental Rights

42-2-617. Effect of order terminating parental rights. (1) An order granting the petition for termination of parental rights:

(a) terminates the parent and child relationship except for an obligation for arrearages of child support;

(b) terminates the jurisdiction of the court over the child in any dissolution or separate maintenance action;

(c) extinguishes any right the parent had to withhold consent to a proposed adoption of the child or to further notice of a proceeding for adoption; and

(d) awards custody of the child to the department, agency, or prospective adoptive parent to whom the relinquishment was given if the department, agency, or prospective adoptive parent has agreed in writing to accept custody of the child until the adoption is finalized.

(2) A person accepting custody is responsible for the support of the child.

History: En. Sec. 77, Ch. 480, L. 1997.

Montana Code Annotated 2021

TITLE 42. ADOPTION
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Appeal

42-2-618. Appeal. An order terminating parental rights is a final order for purposes of appeal.

History: En. Sec. 78, Ch. 480, L. 1997.

Montana Code Annotated 2021

TITLE 42. ADOPTION
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Expediency

42-2-619. Expediency. A contested termination of parental rights action must take precedence over other cases and matters in the court or on appeal. The court shall examine any issues raised in challenging termination of a parent's rights or regarding the validity of any adoption decree and shall render a decision as soon as possible.

History: En. Sec. 79, Ch. 480, L. 1997; amd. Sec. 8, Ch. 257, L. 1999.

Montana Code Annotated 2021

TITLE 42. ADOPTION
CHAPTER 2. ADOPTION OF CHILD
Part 6. Petition to Terminate Parental Rights

Finality

42-2-620. Finality. Subject to the disposition of a timely appeal, upon expiration of 6 months after an order terminating parental rights has been issued, the order may not be questioned by any person, in any manner, or upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or the subject matter.

History: En. Sec. 80, Ch. 480, L. 1997.

Montana Code Annotated 2021

TITLE 40. FAMILY LAW
CHAPTER 6. PARENT AND CHILD

Part 10. Termination of Parent-Child Legal Relationship -- Sexual Abuse

Montana Code Annotated 2021

TITLE 40. FAMILY LAW
CHAPTER 6. PARENT AND CHILD
Part 10. Termination of Parent-Child Legal Relationship -- Sexual Abuse

Petition For Termination -- Criteria -- Process

40-6-1001. Petition for termination -- criteria -- process. (1) A district court may order a termination of the parent-child legal relationship after the filing of a petition pursuant to this section alleging the factual grounds for termination as provided for in subsection (2).

(2) Grounds for termination pursuant to this section exist when the parent of a child:

(a) is convicted of a felony in which sexual intercourse occurred or is a minor adjudicated a delinquent youth because of an act that, if committed by an adult, would be a felony in which sexual intercourse occurred and, as a result of the sexual intercourse, the child is born; or

(b) at a fact-finding hearing is found by clear and convincing evidence, except as provided in the federal Indian Child Welfare Act, if applicable, to have committed an act of sexual intercourse without consent, sexual assault, or incest that caused the child to be conceived.

(3) The court's order must state the reasons for the decision.

(4) The victim of the crime or act may file a petition pursuant to this section. If the victim is a minor, the victim's parent or guardian may file a petition on the victim's behalf.

(5) The respondent to the petition has the right to counsel in all proceedings held pursuant to the petition.

(6) Before termination of the parent-child legal relationship may be ordered, the court shall determine whether the provisions of **40-6-1002** and **40-6-1003** have been followed.

(7) There is no right to a jury trial at proceedings held to consider the termination of a parent-child legal relationship.

(8) (a) An order for the termination of the parent-child legal relationship divests the child and the parent of all legal rights, powers, immunities, duties, and obligations with respect to each other as provided in Title 40, chapter 6, part 2, and Title 41, chapter 3, part 2, except:

(i) the right of the child to inherit from the parent; and

(ii) that nothing in this section may be construed to relieve the parent whose rights are terminated as provided in this part of any child support obligations as provided in Title 40, chapters 4 and 5.

(b) An order or decree entered pursuant to this part may not disentitle a child to any benefit due to the child from a third person, including but not limited to an Indian tribe, an agency, a state, or the United States.

History: En. Sec. 1, Ch. 388, L. 2017; Sec. 41-3-801, MCA 2017; redes. 40-6-1001 by Code Commissioner, 2019.

Montana Code Annotated 2021

TITLE 40. FAMILY LAW
CHAPTER 6. PARENT AND CHILD
Part 10. Termination of Parent-Child Legal Relationship -- Sexual Abuse

Service Of Process -- Service By Publication -- Effect

40-6-1002. Service of process -- service by publication -- effect. (1) Except as otherwise provided in this part, service of process must be made as provided in the Montana Rules of Civil Procedure.

(2) If a person cannot be served personally or by certified mail, the person may be served by publication as provided in **40-6-1003**. Publication constitutes conclusive evidence of service, and a hearing must then proceed at the time and date set, with or without the appearance of the person served by publication. During or after the hearing, the court may issue an order that will adjudicate the interests of the person served by publication.

(3) If the parent cannot be found prior to the hearings allowed by **40-6-1001**, the court may grant the petition as filed or may order the person filing the petition to continue to attempt to locate the person whose parental rights are subject to termination through service by publication.

History: En. Sec. 2, Ch. 388, L. 2017; amd. Sec. 25, Ch. 3, L. 2019; Sec. 41-3-802, MCA 2017; redes. 40-6-1002 by Code Commissioner, 2019.

Montana Code Annotated 2021

TITLE 40. FAMILY LAW
CHAPTER 6. PARENT AND CHILD
Part 10. Termination of Parent-Child Legal Relationship -- Sexual Abuse

Service By Publication -- Summons -- Form

40-6-1003. Service by publication -- summons -- form. (1) Before service by publication is authorized in a proceeding under this part, the person filing the petition pursuant to **40-6-1001**(4) shall file with the court an affidavit stating that, after due diligence, the parent whose rights are subject to termination cannot be identified or found and stating the diligent efforts made to identify, locate, and serve the person. The affidavit is sufficient evidence of the diligence of any inquiry made by the person filing the petition. The affidavit may be combined with another affidavit filed by the person filing the petition. Upon complying with this subsection, the person filing the petition may obtain an order for the service to be made on the party by publication. The order may be issued by either the judge or the clerk of the court.

(2) Service by publication must be made by publishing notice three times, once each week for 3 successive weeks:

(a) in a newspaper in a community in which the publication can reasonably be calculated to be seen by the person whose parental rights are subject to termination, based on the last-known address or whereabouts, if known, of the person if in the state of Montana; or

(b) if no last-known address exists, if the last-known address is outside Montana, or if the identity of the person whose parental rights are subject to termination is unknown, in a newspaper in the county in which the action is pending, if a newspaper is published in the county, or, if a newspaper is not published in the county, in a newspaper published in an adjoining county and having a general circulation in the county.

(3) Service by publication is complete on the date of the last publication required by subsection (2).

(4) A summons required under this part must:

(a) be directed to the parent whose parental rights are subject to termination; and

(b) be signed by the clerk of court, be under the seal of the court, and contain:

(i) the name of the court and the cause number;

(ii) the initials of the child who is the subject of the proceedings;

(iii) the name of the person filing the petition pursuant to **40-6-1001**(4);

(iv) the timeframe within which an interested person shall appear;

(v) a statement in general terms of the nature of the proceedings, including the date and place of birth of the child, the date and place of the hearing, and the phone number of the clerk of the court in which the hearing is scheduled; and

(vi) notification apprising the person served by publication that failure to appear at the hearing will constitute a denial of interest in the child, which may result, without further notice of the proceeding or any subsequent proceeding, in judgment by default being entered for the relief requested in the petition.

History: En. Sec. 3, Ch. 388, L. 2017; amd. Sec. 26, Ch. 3, L. 2019; Sec. 41-3-803, MCA 2017; redes. 40-6-1003 by Code Commissioner, 2019.

Montana Code Annotated 2021

TITLE 42. ADOPTION
CHAPTER 2. ADOPTION OF CHILD
Part 4. Voluntary Relinquishment and Consent to Adopt

Child Available For Adoption -- Voluntary Acts Of Parents

42-2-401. Child available for adoption -- voluntary acts of parents. A parent may voluntarily make a child available for adoption by:

(1) executing a voluntary relinquishment and consent to adoption;

(2) executing a denial of paternity; or

(3) submitting a notarized acknowledgment of paternity and a denial of any interest in custody of the child.

History: En. Sec. 42, Ch. 480, L. 1997.

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Voluntary Relinquishment -- Validity

42-2-402. Voluntary relinquishment -- validity. (1) A voluntary relinquishment is not valid unless the parent specifically relinquishes custody of the child to the department, a licensed child-placing agency, or a specifically identified prospective adoptive parent and:

(a) the department or agency to whom the child is being relinquished has agreed in writing to accept custody of the child until the child is adopted; or

(b) the identified prospective adoptive parent has agreed in writing to accept temporary custody and to provide support and care to the child until that person's adoption petition is granted or denied.

(2) A voluntary relinquishment of a parent's rights solely to the child's other parent does not relieve the parent executing the relinquishment of any duty owed to the child or for the child's support.

History: En. Sec. 43, Ch. 480, L. 1997.

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Arrearages Of Child Support -- Responsibility To Child

42-2-403. Arrearages of child support -- responsibility to child. (1) A voluntary relinquishment of a parent's rights and responsibilities toward a child does not cancel any responsibility to pay arrearages of child support unless the party to whom the arrearages are owed agrees in writing to waive the payment of the arrearages.

(2) A parent who executes a voluntary relinquishment of rights and responsibilities toward a child remains financially responsible for the child until a court actually terminates parental rights to the child.

History: En. Sec. 44, Ch. 480, L. 1997.

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Who May Relinquish -- To Whom

42-2-404. Who may relinquish -- to whom. (1) A parent or guardian whose consent to the adoption of a child is required may relinquish to the department or an agency all rights with respect to the child, including legal and physical custody and the right to consent to the child's adoption.

(2) A parent or guardian whose consent to the adoption of a child is required and who has filed a notice of parental placement under **42-4-103** for a direct parental placement adoption may:

(a) relinquish to the prospective adoptive parent all rights with respect to the child, including legal and physical custody; and

(b) consent to the child's adoption by the prospective adoptive parents.

History: En. Sec. 45, Ch. 480, L. 1997.

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Relinquishment By Minor Parent -- Separate Legal Counsel In Direct Parental Placement Adoption

42-2-405. Relinquishment by minor parent -- separate legal counsel in direct parental placement adoption. (1) A parent who is a minor has the right to relinquish all rights to that minor parent's child and to consent to the child's adoption. The relinquishment is not subject to revocation by reason of minority.

(2) In a direct parental placement adoption, a relinquishment and consent to adopt executed by a parent who is a minor is not valid unless the minor parent has been advised by an attorney who does not represent the prospective adoptive parent. Legal fees charged by the minor parent's attorney are an allowable expense that may be paid by prospective adoptive parents under **42-7-101**, subject to the limitations in **42-7-102**.

(3) If in the court's discretion it is in the best interest of justice, the court may order the office of state public defender, provided for in **2-15-1029**, to assign counsel to represent the minor parent.

History: En. Sec. 46, Ch. 480, L. 1997; amd. Sec. 38, Ch. 449, L. 2005; amd. Sec. 12, Ch. 358, L. 2017.

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TITLE 42. ADOPTION
CHAPTER 2. ADOPTION OF CHILD
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Time And Prerequisites For Execution Of Relinquishment And Consent To Adoption -- Copy Of Preplacement Evaluation -- Notarization

42-2-408. Time and prerequisites for execution of relinquishment and consent to adoption -- copy of preplacement evaluation -- notarization. (1) A parent whose consent to the adoption of a child is required may execute a relinquishment and consent to adoption only after the following criteria have been met:

(a) the child has been born;

(b) not less than 72 hours have elapsed since the birth of the child;

(c) the parent has received adoptive decision support services in accordance with **42-2-409**; and

(d) in a direct parental placement adoption:

(i) the parent has been informed that fees for any required counseling and legal fees are allowable expenses that may be paid by a prospective adoptive parent under **42-7-101**, subject to the limitations set in **42-7-102**;

(ii) if the parent is a minor, the parent has been represented by separate legal counsel; and

(iii) prior to the execution of the relinquishment, the parent has been provided a copy of the preplacement evaluation prepared pursuant to **42-3-204** pertaining to the prospective adoptive parent.

(2) A guardian may execute a relinquishment and consent to adopt at any time after being authorized by a court.

(3) The department or a licensed child-placing agency may execute a consent for the adoption at any time before or during the hearing on the petition for adoption.

(4) A child whose consent is required may execute a consent at any time before or during the hearing on the petition to adopt.

(5) Except as provided in this section, a relinquishment and consent to adopt must be a separate instrument executed before a notary public.

(6) If the person from whom a relinquishment and consent to adopt is required is a member of the armed services or is in prison, the relinquishment may be executed and acknowledged before any person authorized by law to administer oaths.

History: En. Sec. 47, Ch. 480, L. 1997; amd. Sec. 1, Ch. 175, L. 2021.

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TITLE 42. ADOPTION
CHAPTER 2. ADOPTION OF CHILD
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Adoptive Decision Support Services

42-2-409. Adoptive decision support services. (1) In department, agency, and direct parental placement adoptions, the birth mother must receive the adoptive decision support services required under this section. If any other parent is involved in an adoptive placement, adoptive decision support services are encouraged for that parent.

(2) Adoptive decision support services must be provided by a person employed by the department or by a staff person of a licensed child-placing agency designated to provide the services. Unless the requirement is waived for good cause by a court, a minimum of 3 hours of adoptive decision support services must be provided prior to execution of a relinquishment of parental rights and consent to adopt. A relinquishment and consent to adopt executed prior to provision of the required services is void.

(3) The person providing adoptive decision support services shall offer an explanation of:

(a) adoption procedures and options that are available to a parent through the department or licensed child-placing agencies;

(b) adoption procedures and options that are available to a parent through direct parental placement adoptions, including the right to an attorney and that legal expenses are an allowable expense that may be paid by a prospective adoptive parent as provided in **42-7-101** and **42-7-102**;

(c) the alternative of parenting rather than relinquishing the child for adoption;

(d) the resources that are available to provide assistance or support for the parent and the child if the parent chooses not to relinquish the child;

(e) the legal and personal effect and impact of terminating parental rights and of adoption;

(f) the options for contact and communication between the birth family and the adoptive family;

(g) postadoptive issues, including grief and loss, and the existence of any postadoptive counseling and support program offered pursuant to **42-4-211**;

(h) the option for obtaining medically necessary prenatal and postnatal outpatient mental health services. The person shall provide a list of state mental health resources.

(i) the reasons for and importance of providing accurate medical and social history information under **42-3-101**;

(j) the operation of the confidential intermediary program; and

(k) the fact that the adoptee may be provided with a copy of the original birth certificate upon request after reaching 18 years of age unless the birth parent has specifically requested in writing that the vital statistics bureau withhold release of the original birth certificate. The birth parent may change the request at any time by notifying the vital statistics bureau in writing of the change.

(4) The person providing adoptive decision support services shall prepare a written report containing a description of the topics covered and the number of hours of counseling. The report must specifically include the person's opinion of whether or not the parent understood all of the issues and was capable of informed consent. The report must, on request, be released to the person counseled, to the department, to an agency, or with the consent of the person counseled, to an attorney for the prospective adoptive parents.

History: En. Sec. 48, Ch. 480, L. 1997; amd. Sec. 2, Ch. 151, L. 2009; amd. Sec. 1, Ch. 162, L. 2015; amd. Sec. 2, Ch. 175, L. 2021.

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Revocation Of Relinquishment And Consent

42-2-410. Revocation of relinquishment and consent. (1) The parent who executed the relinquishment and consent to adopt and the department, agency, or prospective adoptive parent named or described in the relinquishment and consent to adopt may mutually agree to its revocation prior to the issuance of an order terminating parental rights.

(2) A relinquishment may not be revoked if an order has been issued terminating parental rights.

History: En. Sec. 49, Ch. 480, L. 1997.

Montana Code Annotated 2021

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Conditional Relinquishment And Consent

42-2-411. Conditional relinquishment and consent. (1) A relinquishment and consent to adopt may provide that it not take effect only if:

(a) the other parent does not execute a relinquishment and consent to adopt within a specified period; or

(b) a court decides to not terminate another individual's parental relationship to the child.

(2) A relinquishment and consent to adopt may not be conditioned on whether or not existing agreements for matters, including but not limited to visitation and ongoing communication with the child, are later performed.

History: En. Sec. 50, Ch. 480, L. 1997.

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Content Of Relinquishment And Consent To Adopt

42-2-412. Content of relinquishment and consent to adopt. (1) A relinquishment and consent to adopt must be in writing and must contain:

(a) the date, place, and time of the execution of relinquishment and consent to adopt;

(b) the name, date of birth, and current mailing address of the individual executing the relinquishment and consent to adopt;

(c) the date of birth and the name of the child to be adopted; and

(d) the name, address, and telephone numbers of the department or agency to which the child is being relinquished or the name, address, and telephone numbers of the prospective adoptive parent with whom the individual executing the relinquishment and consent has placed or intends to place the child for adoption.

(2) A relinquishment and consent to adopt executed by a parent or guardian must state that the parent or guardian executing the document is voluntarily and unequivocally consenting to the:

(a) permanent transfer of legal and physical custody of the child to the department or agency for the purposes of adoption; or

(b) transfer of permanent legal and physical custody to, and the adoption of the child by, a specific identified adoptive parent whom the parent or guardian has selected.

(3) A relinquishment and consent to adopt must state:

(a) that after the document is signed or confirmed in substantial compliance with this section, it is final and, except under a circumstance stated in **42-2-411**, may not be revoked or set aside for any reason, including the failure of an adoptive parent to permit the individual executing the relinquishment and consent to adopt to visit or communicate with the child;

(b) that the relinquishment will result in the extinguishment of all parental rights and obligations that the individual executing the relinquishment and consent to adopt has with respect to the child, except for arrearages of child support unless the arrearages are waived by the person to whom they are owed, and that

the relinquishment will remain valid whether or not any agreement for visitation or communication with the child is later performed;

(c) that the individual executing the relinquishment and consent to adopt has:

(i) received a copy of the relinquishment and consent to adopt;

(ii) received a copy of a written agreement by the department, agency, or prospective adoptive parent to accept temporary custody and to provide support and care to the child until an adoption petition is granted or denied;

(iii) if required, received adoptive decision support services pursuant to **42-2-409** explaining the meaning and consequences of an adoption and informing the individual of the option for obtaining medically necessary prenatal and postnatal outpatient services;

(d) in direct parental placement adoptions, that the individual has:

(i) if a minor parent, been advised by a lawyer who is not representing the adoptive parent;

(ii) if an adult, been advised of the right to have a lawyer who is not representing the adoptive parent;

(iii) been advised that the attorney fees are allowable expenses that can be paid by the prospective adoptive parents; and

(iv) been provided with a copy of the prospective adoptive parent's preplacement evaluation;

(e) in agency and direct parental placement adoptions, that the individual has:

(i) been advised of the obligation to provide the medical and social history information required under **42-3-101** pertaining to disclosures; and

(ii) not received or been promised any money or anything of value for execution of the relinquishment and consent to adopt, except for payments authorized by **42-7-101** and **42-7-102**.

(4) A relinquishment and consent to adopt may provide that the individual who is relinquishing waives notice of any proceeding for adoption.

History: En. Sec. 51, Ch. 480, L. 1997; amd. Sec. 4, Ch. 257, L. 1999; amd. Sec. 3, Ch. 175, L. 2021.

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TITLE 42. ADOPTION
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Consequences Of Relinquishment And Consent To Adopt

42-2-413. Consequences of relinquishment and consent to adopt. Except under a circumstance stated in **42-2-411** a relinquishment and consent to the adoption of a child that is executed by a parent or guardian in substantial compliance with **42-2-412** is final and irrevocable. The relinquishment and consent to adopt:

(1) unless a court orders otherwise to protect the welfare of the child, entitles the department, agency, or prospective adoptive parent named or described to the legal and physical custody of the child and imposes on that department, agency, or prospective adoptive parent responsibility for the support and medical and other care of the child;

(2) terminates, as provided in **42-2-403**, any duty of the parent who executed the document with respect to the child except for arrearages of child support; and

(3) terminates any right of the parent or guardian who executed the document to:

(a) object to the placement of the child for adoption by the department or agency; and

(b) object to the child's adoption by the prospective adoptive parent.

History: En. Sec. 52, Ch. 480, L. 1997.

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Notification Of Availability Of Mental Health Services

42-2-414. Notification of availability of mental health services. A health care provider providing primary or prenatal care to a birth mother shall inform the birth mother of the availability of medically necessary outpatient mental health services.

History: En. Sec. 4, Ch. 175, L. 2021.

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Grounds For Court To Set Aside Relinquishment And Consent

42-2-417. Grounds for court to set aside relinquishment and consent. (1) The court shall set aside a relinquishment and consent to adopt if the individual who executed the relinquishment and consent establishes:

(a) by clear and convincing evidence, before a decree of adoption is issued, that the consent was obtained by fraud or duress; or

(b) by a preponderance of the evidence, that a condition permitting revocation has occurred, as expressly provided for in **42-2-411**.

(2) A verbatim record of testimony must be made.

History: En. Sec. 53, Ch. 480, L. 1997.

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Remedy When Relinquishment And Consent To Adopt Revoked Or Set Aside -- Expediency

42-2-418. Remedy when relinquishment and consent to adopt revoked or set aside -- expediency. (1) If a relinquishment and consent to adopt that was executed by an individual is revoked or set aside, the department, agency, or prospective adoptive parent shall immediately return the child to the individual's custody and move to dismiss a proceeding for adoption or termination of the individual's parental rights to the child unless:

(a) the department has legal custody pursuant to a court order;

(b) there are grounds for the department to seek a court order under the provisions of Title 41, chapter 3; or

(c) the individual did not have legal custody of the child at the time the relinquishment and consent to adopt was executed.

(2) In the circumstances described in subsections (1)(a) through (1)(c) and when there is no existing court order providing for care and custody, the court shall issue an order providing for the care and custody of the child according to the best interests of the child under any law applicable to the circumstances of the case.

(3) Except as provided in subsection (1), if after revocation or the setting aside of a relinquishment or consent a child is not returned immediately by the department, agency, or prospective adoptive parent, the individual may petition the court for appropriate relief. The action must take precedence over other cases and matters in the court. The court shall examine the petition, hear the case, and render a decision as soon as possible.

History: En. Sec. 54, Ch. 480, L. 1997.

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TITLE 42. ADOPTION
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Notarized Denial Of Paternity -- No Entitlement To Notice

42-2-421. Notarized denial of paternity -- no entitlement to notice. (1) Execution of a notarized denial of paternity of a child is a voluntary act that constitutes a waiver of all parental rights to the child, except for the duty to pay support if paternity is established or presumed.

(2) A notarized denial of paternity is irrevocable when executed. An individual who has executed a denial of paternity toward a child who is the subject of adoption proceedings is not entitled to notice of either the hearing to terminate parental rights or the hearing on an adoption petition.

History: En. Sec. 55, Ch. 480, L. 1997.

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TITLE 42. ADOPTION
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Notarized Acknowledgment Of Paternity And Denial Of Interest In Custody -- No Entitlement To Notice

42-2-422. Notarized acknowledgment of paternity and denial of interest in custody -- no entitlement to notice. (1) Submission of a notarized acknowledgment of paternity and a denial of any interest in the custody of the child is a voluntary act that constitutes a waiver of all parental rights to the child but does not absolve the person of the duty to pay support.

(2) An individual who has executed an acknowledgment of paternity and denial of interest in the custody in a child who is the subject of adoption proceedings is not entitled to notice of either the hearing to terminate parental rights or the hearing on an adoption petition unless, subsequent to execution of the acknowledgment of paternity and denial of interest in custody, the individual has complied with all of the requirements of **42-2-205** and has done so within the time limits established in **42-2-206**.

History: En. Sec. 56, Ch. 480, L. 1997.

I. Montana Resources

a. Montana Code Annotated

iii. Interstate Compact on the Placement of Children (ICPC)

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 4. INTERSTATE PLACEMENT OF CHILDREN

Part 1. Text of Compact

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 4. INTERSTATE PLACEMENT OF CHILDREN
Part 1. Text of Compact

Enactment -- Provisions

41-4-101. Enactment -- provisions. The Interstate Compact on the Placement of Children is hereby enacted into law and entered into with all other jurisdictions legally joining in the compact in the form substantially as follows:

Article I. Purpose and Policy

It is the purpose and policy of the party states to cooperate with each other in the interstate placement of children to the end that:

(1) each child requiring placement shall receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care;

(2) the appropriate authorities in a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with applicable requirements for the protection of the child;

(3) the proper authorities of the state from which the placement is made may obtain the most complete information on the basis of which to evaluate a projected placement before it is made;

(4) appropriate jurisdictional arrangements for the care of children will be promoted.

Article II. Definitions

As used in this compact:

(1) "child" means a person who, by reason of minority, is legally subject to parental, guardianship, or similar control;

(2) "sending agency" means a party state, officer or employee thereof; a subdivision of a party state or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency, or other entity which sends, brings, or causes to be sent or brought any child to another party state;

(3) "receiving state" means the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies and whether for placement with state or local public authorities or for placement with private agencies or persons;

(4) "placement" means the arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution but does not include any institution caring for the mentally ill, mentally defective, or epileptic or any institution primarily educational in character and any hospital or other medical facility.

Article III. Conditions for Placement

(1) No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein.

(2) Prior to sending, bringing, or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring, or place the child in the receiving state. The notice shall contain:

(a) the name, date, and place of birth of the child;

(b) the identity and address or addresses of the parents or legal guardian;

(c) the name and address of the person, agency, or institution to or with which the sending agency proposes to send, bring, or place the child;

(d) a full statement of the reasons for such proposed action and evidence of the authority pursuant to which the placement is proposed to be made.

(3) Any public officer or agency in a receiving state which is in receipt of a notice pursuant to (2) of this article may request of the sending agency or any other appropriate officer or agency of or in the sending agency's state and shall be entitled to receive therefrom such supporting or additional information as it may deem necessary under the circumstances to carry out the purpose and policy of this compact.

(4) The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.

Article IV. Penalty for Illegal Placement

The sending, bringing, or causing to be sent or brought into any receiving state of a child in violation of the terms of this compact shall constitute a violation of the laws respecting the placement of children of both the state in which the sending agency is located or from which it sends or brings the child and of the receiving state. Such violation may be punished or subjected to penalty in either jurisdiction in accordance with its laws. In addition to liability for any such punishment or penalty, any such violation shall constitute full and sufficient grounds for the suspension or revocation of any license, permit, or other legal authorization held by the sending agency which empowers or allows it to place or care for children.

Article V. Retention of Jurisdiction

(1) The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment, and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting, or is discharged with the concurrence of the appropriate authority in the receiving state. Such jurisdiction shall also include the power to effect or cause the return of the child or the child's transfer to another location and custody pursuant to law. The sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement. Nothing contained herein shall defeat a claim of jurisdiction by receiving state sufficient to deal with an act of delinquency or crime committed therein.

(2) When the sending agency is a public agency, it may enter into an agreement with an authorized public or private agency in the receiving state providing for the performance of one or more services in respect of such case by the latter as agent for the sending agency.

(3) Nothing in this compact shall be construed to prevent a private charitable agency authorized to place children in the receiving state from performing services or acting as agent in that state for a private charitable agency of the sending state, nor to prevent the agency in the receiving state from discharging financial responsibility for the support and maintenance of a child who has been placed on behalf of the sending agency without relieving the responsibility set forth in (1) hereof.

Article VI. Institutional Care of Delinquent Children

A child adjudicated delinquent may be placed in an institution in another party jurisdiction pursuant to this compact, but no such placement shall be made unless the child is given a court hearing on notice to the parent or guardian with opportunity to be heard prior to the parent's or guardian's child being sent to such other party jurisdiction for institutional care and the court finds that:

(1) equivalent facilities for the child are not available in the sending agency's jurisdiction; and

(2) institutional care in the other jurisdiction is in the best interest of the child and will not produce undue hardship.

Article VII. Compact Administrator

The executive head of each jurisdiction party to this compact shall designate an officer who shall be general coordinator of activities under this compact in the officer's jurisdiction and who, acting jointly with like officers of other party jurisdictions, shall have power to promulgate rules to carry out more effectively the terms and provisions of this compact.

Article VIII. Limitations

This compact shall not apply to:

(1) the sending or bringing of a child into a receiving state by the child's parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or nonagency guardian in the receiving state;

(2) any placement, sending, or bringing of a child into a receiving state pursuant to any other interstate compact to which both the state from which the child is sent or brought and the receiving state are party or to any other agreement between said states which has the force of law.

Article IX. Enactment and Withdrawal

This compact shall be open to joinder by any state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and with the consent of congress, the government of Canada or any province thereof. It shall become effective with respect to any such jurisdiction when such jurisdiction has enacted the same into law. Withdrawal from this compact shall be by the enactment of a statute repealing the same, but shall not take effect until 2 years after the effective date of such statute and until written notice of the withdrawal has been given by the withdrawing state to the governor of each other party jurisdiction. Withdrawal of a party state shall not affect the rights, duties, and obligations under this compact of any sending agency therein with respect to a placement made prior to the effective date of withdrawal.

Article X. Construction and Severability

The provisions of this compact shall be liberally construed to effectuate the purposes thereof. The provisions of this compact shall be severable, and if any phrase, clause, sentence, or provision of this compact is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state party thereto, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

History: En. 10-1401 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1401; amd. Sec. 1596, Ch. 56, L. 2009.

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TITLE 41. MINORS
CHAPTER 4. INTERSTATE PLACEMENT OF CHILDREN
Part 1. Text of Compact

Financial Responsibility

41-4-102. Financial responsibility. Financial responsibility for any child placed pursuant to the provisions of the Interstate Compact on the Placement of Children must be determined in accordance with the provisions of Article V of that compact in the first instance. However, in the event of partial or complete default of performance under the compact, the provisions of Title 40, chapter 5, part 10 (Uniform Interstate Family Support Act), **41-3-446**, and **52-2-611** also may be invoked.

History: En. 10-1402 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1402; amd. Sec. 18, Ch. 543, L. 1979; amd. Sec. 31, Ch. 465, L. 1983; amd. Sec. 9, Ch. 696, L. 1991; amd. Sec. 190, Ch. 42, L. 1997; amd. Sec. 14, Ch. 516, L. 1997.

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TITLE 41. MINORS
CHAPTER 4. INTERSTATE PLACEMENT OF CHILDREN
Part 1. Text of Compact

Appropriate Public Authorities Defined

41-4-103. Appropriate public authorities defined. The "appropriate public authorities" as used in Article III of the Interstate Compact on the Placement of Children, with reference to this state, means the department of public health and human services, and the department shall receive and act with reference to notices required by Article III.

History: En. 10-1403 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1403; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 189, Ch. 546, L. 1995.

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Appropriate Authority In The Receiving State

41-4-104. Appropriate authority in the receiving state. As used in Article V(1) of the Interstate Compact on the Placement of Children, the phrase "appropriate authority in the receiving state", with reference to this state, means the department of public health and human services.

History: En. 10-1404 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1404; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 190, Ch. 546, L. 1995.

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Agreements

41-4-105. Agreements. The officers and agencies of this state and its subdivisions having authority to place children are hereby empowered to enter into agreements with appropriate officers or agencies of or in other party states pursuant to Article V(2) of the Interstate Compact on the Placement of Children. Any such agreement which contains a financial commitment or imposes a financial obligation on this state or subdivision or agency thereof shall not be binding unless it has the approval in writing of the state treasurer in the case of the state and of the chief local fiscal officer in the case of a subdivision of the state.

History: En. 10-1405 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1405.

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Requirements For Visitation, Inspection, And Supervision

41-4-106. Requirements for visitation, inspection, and supervision. Any requirements for visitation, inspection, or supervision of children, homes, institutions, or other agencies in another party state which may apply under **52-2-113**, **52-2-621**, and **52-2-622** are considered to be met if performed pursuant to an agreement entered into by appropriate officers or agencies of this state or a subdivision thereof as contemplated by Article V(2) of the Interstate Compact on the Placement of Children.

History: En. 10-1406 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1406; amd. Sec. 31, Ch. 465, L. 1983.

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Certain Laws Not Applicable

41-4-107. Certain laws not applicable. The provisions of **52-2-114** shall not apply to placements made pursuant to the Interstate Compact on the Placement of Children.

History: En. 10-1407 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1407.

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Court Jurisdiction Retained

41-4-108. Court jurisdiction retained. Any court having jurisdiction to place delinquent children may place such a child in an institution of or in another state pursuant to Article VI of the Interstate Compact on the Placement of Children and shall retain jurisdiction as provided in Article V thereof.

History: En. 10-1408 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1408.

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Executive Head Defined

41-4-109. Executive head defined. As used in Article VII of the Interstate Compact on the Placement of Children, the term "executive head" means the governor. The governor is hereby authorized to appoint a compact administrator in accordance with the terms of said Article VII.

History: En. 10-1409 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1409.

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a. Montana Code Annotated
iv. Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

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TITLE 40. FAMILY LAW
CHAPTER 7. UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

Part 1. General Provisions

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Short Title

40-7-101. Short title. This chapter may be cited as the "Uniform Child Custody Jurisdiction and Enforcement Act".

History: En. 61-401 by Sec. 1, Ch. 537, L. 1977; R.C.M. 1947, 61-401; amd. Sec. 3, Ch. 91, L. 1999.

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Definitions

40-7-103. Definitions. As used in this chapter, the following definitions apply:

(1) "Abandoned" means left without provision for reasonable and necessary care or supervision.

(2) "Child" means an individual who has not attained 18 years of age.

(3) (a) "Child custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, a temporary, an initial, and a modification order.

(b) The term does not include an order relating to child support or other monetary obligation of an individual.

(4) (a) "Child custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear.

(b) The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under part 3 of this chapter.

(5) "Commencement" means the filing of the first pleading in a proceeding.

(6) "Court" means an entity authorized under the law of a state to establish, enforce, or modify a child custody determination.

(7) "Home state" means the state in which a child lived with a parent or a person acting as parent for at least 6 consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than 6 months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

(8) "Initial determination" means the first child custody determination concerning a particular child.

(9) "Issuing court" means the court that makes a child custody determination for which enforcement is sought under this chapter.

(10) "Issuing state" means the state in which a child custody determination is made.

(11) "Modification" means a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.

(12) "Person" includes a government, a governmental subdivision, an agency, an instrumentality, or any other legal or commercial entity.

(13) "Person acting as a parent" means a person, other than a parent, who:

(a) has physical custody of the child or has had physical custody for a period of 6 consecutive months, including any temporary absence, within 1 year immediately before the commencement of a child custody proceeding; and

(b) has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

(14) "Physical custody" means the physical care and supervision of a child.

(15) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(16) "Tribe" means an Indian tribe or band or Alaskan Native village that is recognized by federal law or formally acknowledged by a state.

(17) "Warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

History: En. 61-403 by Sec. 3, Ch. 537, L. 1977; R.C.M. 1947, 61-403; amd. Sec. 4, Ch. 91, L. 1999.

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Notice -- Opportunity To Be Heard -- Joinder

40-7-105. Notice -- opportunity to be heard -- joinder. (1) Before a child custody determination is made under this chapter, notice and opportunity to be heard in accordance with the standards of **40-7-106** must be given to all persons entitled to notice under the law of this state as in child custody proceedings between residents of this state, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child.

(2) This chapter does not govern the enforceability of a child custody determination made without notice or an opportunity to be heard.

(3) The obligation to join a party and the right to intervene as a party in a child custody proceeding under this chapter are governed by the law of this state as in child custody proceedings between residents of this state.

History: En. 61-405 by Sec. 5, Ch. 537, L. 1977; R.C.M. 1947, 61-405; amd. Sec. 5, Ch. 91, L. 1999.

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Notice To Persons Outside State

40-7-106. Notice to persons outside state. (1) Notice required for the exercise of jurisdiction when a person is outside this state may be given in a manner prescribed by the law of this state for the service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication, if other means are ineffective.

(2) Proof of service may be made in the manner prescribed by the law of this state or by the law of the state in which the service is made.

(3) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court.

History: En. 61-406 by Sec. 6, Ch. 537, L. 1977; R.C.M. 1947, 61-406; amd. Sec. 6, Ch. 91, L. 1999.

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Simultaneous Proceedings

40-7-107. Simultaneous proceedings. (1) Except as otherwise provided in **40-7-204**, a court of this state may not exercise its jurisdiction under **40-7-105**, **40-7-107** through **40-7-110**, **40-7-112**, and **40-7-201** through **40-7-203** if at the time of commencement of the proceeding a proceeding concerning the custody of the child had been previously commenced in a court of another state having jurisdiction substantially in conformity with this chapter unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under **40-7-108**.

(2) Except as otherwise provided in **40-7-204**, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to **40-7-110**. If the court determines that a child custody proceeding was previously commenced in a court in another state having jurisdiction substantially in accordance with this chapter, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(3) In a proceeding to modify a child custody determination, a court of this state shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child custody determination has been commenced in another state, the court may:

(a) stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement;

(b) enjoin the parties from continuing with the proceeding for enforcement; or

(c) proceed with the modification under conditions that it considers appropriate.

History: En. 61-407 by Sec. 7, Ch. 537, L. 1977; R.C.M. 1947, 61-407; amd. Sec. 7, Ch. 91, L. 1999.

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Inconvenient Forum

40-7-108. Inconvenient forum. (1) A court of this state that has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon the court's own motion, request of another court, or motion of a party.

(2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate that a court of another state exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(a) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(b) the length of time that the child has resided outside this state;

(c) the distance between the court in this state and the court in the state that would assume jurisdiction;

(d) the relative financial circumstances of the parties;

(e) any agreement of the parties as to which state should assume jurisdiction;

(f) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(g) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(h) the familiarity of the court of each state with the facts and issues in the pending litigation.

(3) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition that the court considers just and proper.

(4) A court of this state may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

History: En. 61-408 by Sec. 8, Ch. 537, L. 1977; R.C.M. 1947, 61-408; amd. Sec. 8, Ch. 91, L. 1999.

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Jurisdiction Declined By Reason Of Conduct

40-7-109. Jurisdiction declined by reason of conduct. (1) Except as otherwise provided in **40-7-204**, if a court of this state has jurisdiction under this chapter because a person invoking the jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise jurisdiction unless:

(a) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(b) a court of the state otherwise having jurisdiction under **40-7-201** through **40-7-203** determines that this state is a more appropriate forum under **40-7-108**; or

(c) no other state would have jurisdiction under **40-7-201** through **40-7-203**.

(2) If a court of this state declines to exercise its jurisdiction pursuant to subsection (1), it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under **40-7-201** through **40-7-203**.

(3) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection (1), it shall charge the party invoking the jurisdiction of the court with necessary and reasonable expenses, including costs, communication expenses, attorney fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the award would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state except as otherwise provided by law other than this chapter.

History: En. 61-409 by Sec. 9, Ch. 537, L. 1977; R.C.M. 1947, 61-409; amd. Sec. 9, Ch. 91, L. 1999; amd. Sec. 1, Ch. 98, L. 2019.

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Information To Be Submitted To Court

40-7-110. Information to be submitted to court. (1) In a child custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address, the places where the child has lived during the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

(a) has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number of the proceeding, and the date of the child custody determination, if any;

(b) knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions, and, if so, identify the court, the case number, and the nature of the proceeding; and

(c) knows the name and address of any person who is not a party to the proceeding who has physical custody of the child or who claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the party shall provide the names and addresses of those persons.

(2) If the information required by subsection (1) is not furnished, the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished.

(3) If the declaration as to any of the items described in subsections (1)(a) through (1)(c) is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.

(4) Each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding.

History: En. 61-410 by Sec. 10, Ch. 537, L. 1977; R.C.M. 1947, 61-410; amd. Sec. 10, Ch. 91, L. 1999.

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Appearance Of Parties And Child

40-7-112. Appearance of parties and child. (1) A court of this state may order a party to a child custody proceeding who is in this state to appear before the court personally with or without the child. The court may order any person who is in this state and who has physical custody or control of the child to appear physically with the child.

(2) If a party to a child custody proceeding whose presence is desired by the court is outside this state, the court may order that a notice given pursuant to **40-7-106** include a statement directing the party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to the party.

(3) The court may enter any orders necessary to ensure the safety of the child and of any person ordered to appear under this section.

(4) If a party to a child custody proceeding who is outside this state is directed to appear under subsection (2) or desires to appear personally before the court with or without the child, the court may require another party to pay reasonable and necessary travel and other expenses of the party so appearing and of the child.

History: En. 61-412 by Sec. 12, Ch. 537, L. 1977; R.C.M. 1947, 61-412; amd. Sec. 11, Ch. 91, L. 1999.

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Taking Testimony In Another State

40-7-119. Taking testimony in another state. (1) In addition to other procedures available to a party, a party to a child custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(2) A court of this state may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this state shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(3) Documentary evidence that is transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

History: En. 61-419 by Sec. 19, Ch. 537, L. 1977; R.C.M. 1947, 61-419; amd. Sec. 12, Ch. 91, L. 1999.

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Priority

40-7-125. Priority. If a question of existence or exercise of jurisdiction under this chapter is raised in a child custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously.

History: En. 61-425 by Sec. 25, Ch. 537, L. 1977; R.C.M. 1947, 61-425; amd. Sec. 13, Ch. 91, L. 1999.

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Proceedings Governed By Other Law

40-7-134. Proceedings governed by other law. This chapter does not govern an adoption proceeding or a proceeding pertaining to the authorization of emergency medical care for a child.

History: En. Sec. 14, Ch. 91, L. 1999.

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Application To Indian Tribes

40-7-135. Application to Indian tribes. (1) A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. 1901, et seq., is not subject to this chapter to the extent that it is governed by the Indian Child Welfare Act.

(2) A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying **40-7-101**, **40-7-103**, **40-7-105** through **40-7-110**, **40-7-112**, **40-7-119**, **40-7-125**, **40-7-134** through **40-7-140**, and part 2 of this chapter.

(3) A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under part 3 of this chapter.

History: En. Sec. 15, Ch. 91, L. 1999.

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International Application

40-7-136. International application. (1) A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying **40-7-101**, **40-7-103**, **40-7-105** through **40-7-110**, **40-7-112**, **40-7-119**, **40-7-125**, **40-7-134** through **40-7-140**, and part 2 of this chapter.

(2) A child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under part 3 of this chapter.

(3) A court of this state need not apply this chapter if the child custody law of a foreign country violates fundamental principles of human rights.

History: En. Sec. 16, Ch. 91, L. 1999.

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Binding Force Of Child Custody Determination

40-7-137. Binding force of child custody determination. A child custody determination made by a court of this state that had jurisdiction under this chapter binds all persons who have been served in accordance with the laws of this state or notified in accordance with **40-7-106** or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent that the determination is modified.

History: En. Sec. 17, Ch. 91, L. 1999.

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Appearance And Limited Immunity

40-7-138. Appearance and limited immunity. (1) A party to a child custody proceeding who is not subject to personal jurisdiction in this state and who is a responding party under **40-7-105**, **40-7-107** through **40-7-110**, **40-7-112**, and part 2 of this chapter, a party in a proceeding to modify a child custody determination under **40-7-105**, **40-7-107** through **40-7-110**, **40-7-112**, and part 2 of this chapter, or a petitioner in a proceeding to enforce or register a child custody determination under part 3 of this chapter may appear and participate in the proceeding without submitting to personal jurisdiction over the party for another proceeding or purpose.

(2) A party is not subject to personal jurisdiction in this state solely by being physically present for the purpose of participating in a proceeding under this chapter. If a party is subject to personal jurisdiction in this state on a basis other than physical presence, the party may be served with process in this state. If a party present in this state is subject to the jurisdiction of another state, service of process allowable under the laws of that state may be accomplished in this state.

(3) The immunity granted by this section does not extend to civil litigation based on acts unrelated to the participation in a proceeding under this chapter committed by an individual while present in this state.

History: En. Sec. 18, Ch. 91, L. 1999.

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Communication Between Courts

40-7-139. Communication between courts. (1) A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter.

(2) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

(3) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.

(4) Except as otherwise provided in subsection (3), a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.

(5) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. A record includes notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum or an electronic record of the communication between the courts, or a memorandum or an electronic record made by a court after the communication.

History: En. Sec. 19, Ch. 91, L. 1999.

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Cooperation Between Courts -- Preservation Of Records

40-7-140. Cooperation between courts -- preservation of records. (1) A court of this state may request the appropriate court of another state to:

(a) hold an evidentiary hearing;

(b) order a person to produce or give evidence pursuant to procedures of that state;

(c) order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;

(d) forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with the request; and

(e) order a party to a child custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

(2) Upon request of a court of another state, a court of this state may hold a hearing or enter an order described in subsection (1).

(3) Travel and other necessary and reasonable expenses incurred under subsections (1) and (2) may be assessed against the parties according to the law of this state.

(4) A court of this state shall preserve the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child custody proceeding until the child attains 18 years of age. Upon appropriate request by a court or law enforcement official of another state, the court shall forward a certified copy of those records.

History: En. Sec. 20, Ch. 91, L. 1999.

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a. Montana Code Annotated
v. Emancipation

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TITLE 41. MINORS
CHAPTER 1. RIGHTS AND OBLIGATIONS OF MINORS

Part 5. Limited Emancipation

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TITLE 41. MINORS
CHAPTER 1. RIGHTS AND OBLIGATIONS OF MINORS
Part 5. Limited Emancipation

Petition For Limited Emancipation

41-1-501. Petition for limited emancipation. (1) A youth who is 16 years of age or older, the youth's parent, or the department of public health and human services may petition the court for an order granting limited emancipation to the youth.

(2) The petition for limited emancipation must be in writing and must set forth:

(a) the name, age, and address of the youth;

(b) the names and addresses of:

(i) the parents of the youth;

(ii) any legal guardian of the youth; or

(iii) if no parent or guardian can be found, the last-known address of the youth's parent or guardian and the name and address of the youth's nearest known relative residing in the state;

(c) that limited emancipation is in the youth's best interests;

(d) that the youth desires limited emancipation;

(e) that there exists no public interest compelling denial of limited emancipation;

(f) that the youth has, or will reasonably obtain, money sufficient to pay for financial obligations incurred as a result of limited emancipation;

(g) that the youth, as shown by prior conduct and preparation, understands and may be expected to responsibly exercise those rights and responsibilities incurred as a result of limited emancipation;

(h) that the youth has graduated or will continue to diligently pursue graduation from high school, unless circumstances clearly compel deferral of education; and

(i) that, if it is considered necessary by the court, the youth will undergo periodic counseling with an appropriate advisor.

History: En. Sec. 5, Ch. 564, L. 1983; amd. Sec. 8, Ch. 696, L. 1991; amd. Sec. 16, Ch. 458, L. 1995; amd. Sec. 17(3)(b), Ch. 281, L. 2001; Sec. 41-3-408, MCA 1999; redes. 41-1-501 by Sec. 17(3)(b), Ch. 281, L. 2001; amd. Sec. 2, Ch. 179, L. 2009.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 1. RIGHTS AND OBLIGATIONS OF MINORS
Part 5. Limited Emancipation

Hearing And Notice

41-1-502. Hearing and notice. (1) At least 10 days before the petition for limited emancipation is heard, notice that the court determines is reasonable must be given to the youth's parent, guardian, or other person identified in **41-1-501**(2)(b). Service must be waived if proof is made to the court that the address of the parents or legal guardian is unavailable or unascertainable.

(2) The notice must include the date and place of hearing and a form on which the youth's parents, legal guardian, or other person entitled to the custody of the youth may give the person's written consent to the limited emancipation.

History: En. Sec. 3, Ch. 179, L. 2009.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 1. RIGHTS AND OBLIGATIONS OF MINORS
Part 5. Limited Emancipation

Order Of Limited Emancipation

41-1-503. Order of limited emancipation. (1) Limited emancipation may be granted only if the court has found that the youth satisfies the requirements of **41-1-501**(2)(c) through (2)(i).

(2) An order of limited emancipation must specifically set forth the rights and responsibilities that are being conferred upon the youth. These may include but are not limited to one or more of the following:

(a) the right to live independently of in-house supervision;

(b) the right to live in housing of the youth's choice;

(c) the right to directly receive and expend money to which the youth is entitled and to conduct the youth's own financial affairs;

(d) the right to enter into contractual agreements and incur debts;

(e) the right to obtain access to medical treatment and records upon the youth's own authorization; and

(f) the right to obtain a license to operate equipment or perform a service.

(3) An order of limited emancipation must include a provision requiring that the youth make periodic reports to the court subject to terms prescribed by the court.

(4) The court, on its own motion or on the motion of the county attorney or any parties to the dispositional hearing, may modify or revoke the order upon a showing that:

(a) the youth has committed a material violation of the law;

(b) the youth has violated a condition of the limited emancipation order; or

(c) the best interests of the youth are no longer served by limited emancipation.

History: En. Sec. 4, Ch. 179, L. 2009.

I. Montana Resources
a. Montana Code Annotated
vi. Family Policy Act

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 7. MONTANA FAMILY POLICY ACT

Part 1. Family Policy Act

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 7. MONTANA FAMILY POLICY ACT
Part 1. Family Policy Act

Short Title

41-7-101. Short title. Section **41-7-102** and this section may be cited as the "Montana Family Policy Act".

History: En. Sec. 1, Ch. 98, L. 1993.

Montana Code Annotated 2021

TITLE 41. MINORS
CHAPTER 7. MONTANA FAMILY POLICY ACT
Part 1. Family Policy Act

Policy And Guiding Principles

41-7-102. Policy and guiding principles. (1) It is the policy of the state of Montana to support and preserve the family as the single most powerful influence for ensuring the healthy social development and mental and physical well-being of Montana's children.

(2) The following principles must guide the actions of state government, state agencies, and agents of the state that serve children and families:

(a) Family support and preservation must be guiding philosophies when the state, state agencies, or agents of the state plan or implement services for children or families. The state shall promote the establishment of a range of services to children and families, including the following components:

(i) supporting families toward healthy development by providing a community network that offers a range of family support services, activities, and programs designed to promote family well-being, with services that include prenatal care, parenting education, parent aides, and visiting nurses; early childhood screening and developmental services; child care; and family recreation;

(ii) assisting vulnerable families before crises emerge by providing specialized services to strengthen and preserve families experiencing problems before they become acute and by providing early intervention and family support services, such as respite care, health and mental health services, and home-based rehabilitation services linked to services in subsection (2)(a)(i);

(iii) protecting and caring for children in crisis by providing intensive services to protect children who have suffered or are at risk of suffering serious harm from child abuse and neglect, by providing care for children at risk of out-of-home placement for emotional disturbances or behavior problems, and by providing family support services to ensure that reasonable efforts are made to safely maintain children in their own homes or to provide temporary or permanent care for children who are removed from their families. These services include family-based services to avoid removal from the home whenever possible and to provide out-of-home care, reunification services, adoption services, and long-term substitute care.

(b) To maximize resources and establish a range of services driven by the needs of families rather than by a predetermined array of categorical services, the state, state agencies, and agents of the state shall work toward a system of comprehensive and coordinated services to children and families through joint agency planning, joint financing, joint service delivery, common intake and assessment, and other arrangements that promote more effective support for families.

(c) Needed services to children and families should be provided as close as possible to the home community. The state, state agencies, and agents of the state shall encourage community planning and collaboration. State agencies shall cooperate to support collaborative programs.

(d) The state encourages all sectors of society to participate in building the community capacity to meet the needs of children and families.

(3) The family policy objectives described in this section are intended to guide the state's efforts to provide services to children and families. This section may not be construed to require a service or a particular level of service or to grant a right of action to enforce this section or other law.

History: En. Sec. 2, Ch. 98, L. 1993.

I. Montana Resources

a. Montana Code Annotated

vii. Other Private Proceedings

Montana Code Annotated 2021

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS
CHAPTER 5. UPC -- PERSONS UNDER DISABILITY GUARDIANSHIP AND CONSERVATORSHIP

Part 2. Guardians of Minors

Montana Code Annotated 2021

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS
CHAPTER 5. UPC -- PERSONS UNDER DISABILITY GUARDIANSHIP AND CONSERVATORSHIP
Part 2. Guardians of Minors

Status Of Guardian Of Minor -- How Acquired Generally -- Letters To Indicate Means Of Appointment

72-5-201. Status of guardian of minor -- how acquired generally -- letters to indicate means of appointment. (1) A person becomes a guardian of a minor by acceptance of a testamentary appointment or upon appointment by the court.

(2) Letters of guardianship must indicate whether the guardian was appointed by will or by court order.

(3) The guardianship status continues until terminated, without regard to the location from time to time of the guardian and minor ward.

History: En. 91A-5-201, 91A-5-208 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-201, 91A-5-208(part).

Montana Code Annotated 2021

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS
CHAPTER 5. UPC -- PERSONS UNDER DISABILITY GUARDIANSHIP AND CONSERVATORSHIP
Part 2. Guardians of Minors

Consent To Jurisdiction By Acceptance Of Appointment

72-5-202. Consent to jurisdiction by acceptance of appointment. (1) By accepting a testamentary or court appointment as guardian, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person.

(2) Notice of any proceeding must be delivered to the guardian or mailed to the guardian by ordinary mail at the guardian's address as listed in the court records and to the guardian's address as then known to the petitioner.

History: En. 91A-5-208 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-208(part); amd. Sec. 2398, Ch. 56, L. 2009.

Montana Code Annotated 2021

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS
CHAPTER 5. UPC -- PERSONS UNDER DISABILITY GUARDIANSHIP AND CONSERVATORSHIP
Part 2. Guardians of Minors

Testamentary Appointment Of Guardian Of Minor -- When Effective -- Priorities -- Notice Of Appointment

72-5-211. Testamentary appointment of guardian of minor -- when effective -- priorities -- notice of appointment. (1) The parent of a minor may appoint by will a guardian of an unmarried minor. Subject to the right of the minor under **72-5-213**, a testamentary appointment becomes effective upon filing the guardian's acceptance in the court in which the will is probated if before acceptance both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority.

(2) Upon acceptance of an appointment, written notice of acceptance must be given by the guardian to the minor and to the person having the minor's care or to the minor's nearest adult relations.

History: En. 91A-5-202 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-202(part); amd. Sec. 2399, Ch. 56, L. 2009.

Montana Code Annotated 2021

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS
CHAPTER 5. UPC -- PERSONS UNDER DISABILITY GUARDIANSHIP AND CONSERVATORSHIP
Part 2. Guardians of Minors

Recognition Of Appointment Of Guardian By Foreign Will

72-5-212. Recognition of appointment of guardian by foreign will. This state recognizes a testamentary appointment effected by filing the guardian's acceptance under a will probated in another state which is the testator's domicile.

History: En. 91A-5-202 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-202(part).

Montana Code Annotated 2021

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS
CHAPTER 5. UPC -- PERSONS UNDER DISABILITY GUARDIANSHIP AND CONSERVATORSHIP
Part 2. Guardians of Minors

Objection By Minor 14 Years Of Age Or Older To Testamentary Appointment

72-5-213. Objection by minor 14 years of age or older to testamentary appointment. A minor 14 years of age or older may prevent an appointment of the minor's testamentary guardian from becoming effective or may cause a previously accepted appointment to terminate by filing with the court in which the will is probated a written objection to the appointment before it is accepted or within 30 days after notice of its acceptance. An objection may be withdrawn. An objection does not preclude appointment by the court in a proper proceeding of the testamentary nominee or any other suitable person.

History: En. 91A-5-203 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-203; amd. Sec. 2400, Ch. 56, L. 2009.

Montana Code Annotated 2021

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS
CHAPTER 5. UPC -- PERSONS UNDER DISABILITY GUARDIANSHIP AND CONSERVATORSHIP
Part 2. Guardians of Minors

Venue For Proceedings For Court Appointment Of Guardian Of Minor

72-5-221. Venue for proceedings for court appointment of guardian of minor. The venue for guardianship proceedings for a minor is in the place where the minor resides or is present.

History: En. 91A-5-205 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-205.

Montana Code Annotated 2021

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS
CHAPTER 5. UPC -- PERSONS UNDER DISABILITY GUARDIANSHIP AND CONSERVATORSHIP
Part 2. Guardians of Minors

Court Appointment Of Guardian Of Minor -- When Allowed -- Priority Of Testamentary Appointment

72-5-222. Court appointment of guardian of minor -- when allowed -- priority of testamentary appointment. (1) The court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated or if parental rights have been suspended or limited by circumstances or prior court order.

(2) A guardian appointed by will as provided in **72-5-211** and **72-5-212** whose appointment has not been prevented or nullified under **72-5-213** has priority over any guardian who may be appointed by the court, but the court may proceed with an appointment upon a finding that the testamentary guardian has failed to accept the testamentary appointment within 30 days after notice of the guardianship proceeding.

History: En. 91A-5-204 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-204; amd. Sec. 6, Ch. 290, L. 1999.

Montana Code Annotated 2021

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS
CHAPTER 5. UPC -- PERSONS UNDER DISABILITY GUARDIANSHIP AND CONSERVATORSHIP
Part 2. Guardians of Minors

Guardian Of Minor By Court Appointment -- Qualifications -- Nominee Of Minor Preferred

72-5-223. Guardian of minor by court appointment -- qualifications -- nominee of minor preferred. The court may appoint as guardian any person whose appointment would be in the best interests of the minor, including the minor's interest in continuity of care. The court shall appoint a person nominated by the minor if the minor is 14 years of age or older unless the court finds the appointment contrary to the best interests of the minor.

History: En. 91A-5-206 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-206; amd. Sec. 7, Ch. 210, L. 2009.

Montana Code Annotated 2021

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS
CHAPTER 5. UPC -- PERSONS UNDER DISABILITY GUARDIANSHIP AND CONSERVATORSHIP
Part 2. Guardians of Minors

Temporary Guardian Of Minor

72-5-224. Temporary guardian of minor. If necessary, the court may appoint a temporary guardian with the status of an ordinary guardian of a minor, but the authority of a temporary guardian shall not last longer than 6 months.

History: En. 91A-5-207 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-207(3).

Montana Code Annotated 2021

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS
CHAPTER 5. UPC -- PERSONS UNDER DISABILITY GUARDIANSHIP AND CONSERVATORSHIP
Part 2. Guardians of Minors

Procedure For Court Appointment Of Guardian Of Minor -- Notice -- Hearing -- Representation By Attorney

72-5-225. Procedure for court appointment of guardian of minor -- notice -- hearing -- representation by attorney. (1) Notice of the time and place of hearing of a petition for the appointment of a guardian of a minor must be given by the petitioner in the manner prescribed by **72-1-301** to:

(a) the minor, if the minor is 14 years of age or older;

(b) the person who has had the principal care and custody of the minor during the 60 days preceding the date of the petition; and

(c) any living parent of the minor.

(2) Upon hearing, the court shall make the appointment if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of **72-5-222** have been met, and the welfare and best interests of the minor, including the need for continuity of care, will be served by the requested appointment. In other cases, the court may dismiss the proceedings or make any other disposition of the matter that will best serve the interests of the minor.

(3) If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, the court may order the office of state public defender, provided for in **2-15-1029**, to assign counsel pursuant to the Montana Public Defender Act, Title 47, chapter 1, to represent the minor.

History: En. 91A-5-207 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-207(1), (2), (4); amd. Sec. 2, Ch. 93, L. 1979; amd. Sec. 63, Ch. 449, L. 2005; amd. Sec. 8, Ch. 210, L. 2009; amd. Sec. 41, Ch. 358, L. 2017.

Montana Code Annotated 2021

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS
CHAPTER 5. UPC -- PERSONS UNDER DISABILITY GUARDIANSHIP AND CONSERVATORSHIP
Part 2. Guardians of Minors

Powers And Duties Of Guardian Of Minor

72-5-231. Powers and duties of guardian of minor. Unless otherwise limited by the court, a guardian of a minor has the powers and responsibilities of a parent who has not been deprived of custody of the parent's minor and unemancipated child, except that a guardian is not legally obligated to provide from the guardian's own funds for the ward and is not liable to third persons by reason of the parental relationship for acts of the ward. In particular and without qualifying the foregoing, a guardian has the following powers and duties:

(1) The guardian shall take reasonable care of the ward's personal effects and commence protective proceedings if necessary to protect other property of the ward.

(2) The guardian may receive money payable for the support of the ward to the ward's parent, guardian, or custodian under the terms of any statutory benefit or insurance system or any private contract, devise, trust, conservatorship, or custodianship. The guardian also may receive money or property of the ward paid or delivered by virtue of **72-5-104**. Any sums received must be applied to the ward's current needs for support, care, and education. The guardian shall exercise due care to conserve any excess for the ward's future needs unless a conservator has been appointed for the estate of the ward, in which case the excess must be paid at least annually to the conservator. Sums received by the guardian may not be used for compensation for the guardian's services except as approved by an order of the court or as determined by a duly appointed conservator other than the guardian. A guardian may institute proceedings to compel the performance by any person of a duty to support the ward or to pay sums for the welfare of the ward.

(3) The guardian is empowered to facilitate the ward's education, social, or other activities and to authorize medical or other professional care, treatment, or advice. A guardian is not liable by reason of this consent for injury to the ward resulting from the negligence or acts of third persons unless it would have been illegal for a parent to have consented. A guardian may consent to the marriage or adoption of the ward.

(4) A guardian shall report the condition of the ward and of the ward's estate that has been subject to the guardian's possession or control, as ordered by the court on petition of any person interested in the minor's welfare or as required by court rule.

(5) Upon the death of a guardian's ward, the guardian, upon an order of the court and if there is no personal representative authorized to do so, may make necessary arrangements for the removal, transportation, and final disposition, including burial, entombment, or cremation, of the ward's physical

remains and for the receipt and disposition of the ward's clothing, furniture, and other personal effects that may be in the possession of the person in charge of the ward's care, comfort, and maintenance at the time of the ward's death.

History: En. 91A-5-209 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-209; amd. Sec. 2, Ch. 279, L. 1997; amd. Sec. 1, Ch. 238, L. 2003.

Montana Code Annotated 2021

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS
CHAPTER 5. UPC -- PERSONS UNDER DISABILITY GUARDIANSHIP AND CONSERVATORSHIP
Part 2. Guardians of Minors

Termination Of Appointment -- How Effected -- Certain Liabilities And Obligations Not Affected

72-5-233. Termination of appointment -- how effected -- certain liabilities and obligations not affected. (1) A guardian's authority and responsibility terminates upon the death, resignation, or removal of the guardian or upon the minor's death, except as provided in subsection (2), adoption, marriage, or attainment of majority, but termination does not affect a guardian's liability for prior acts or a guardian's obligation to account for funds and assets of the guardian's ward. Resignation of a guardian does not terminate the guardianship until it has been approved by the court. A testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding.

(2) The guardian's authority and responsibility for a minor who dies while the minor is a ward of the guardian terminates when the guardian has completed arrangements for the final disposition of the ward's physical remains and personal effects as provided in **72-5-231**(5).

History: En. 91A-5-210 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-210; amd. Sec. 2, Ch. 238, L. 2003.

Montana Code Annotated 2021

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS
CHAPTER 5. UPC -- PERSONS UNDER DISABILITY GUARDIANSHIP AND CONSERVATORSHIP
Part 2. Guardians of Minors

Procedure For Resignation Or Removal -- Petition, Notice, And Hearing -- Representation By Attorney

72-5-234. Procedure for resignation or removal -- petition, notice, and hearing -- representation by attorney. (1) Any person interested in the welfare of a ward or the ward, if 14 years of age or older, may petition for removal of a guardian on the ground that removal would be in the best interests of the ward. A guardian may petition for permission to resign. A petition for removal or for permission to resign may but need not include a request for appointment of a successor guardian.

(2) After notice and hearing on a petition for removal or for permission to resign, the court may terminate the guardianship and make any further order that may be appropriate.

(3) If at any time in the proceeding the court determines that the interests of the ward are or may be inadequately represented, it may order the office of state public defender, provided for in **2-15-1029**, to assign counsel under the provisions of the Montana Public Defender Act, Title 47, chapter 1, to represent the minor.

History: En. 91A-5-212 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-212; amd. Sec. 64, Ch. 449, L. 2005; amd. Sec. 42, Ch. 358, L. 2017.

Montana Code Annotated 2021

TITLE 40. FAMILY LAW
CHAPTER 9. GRANDPARENT-GRANDCHILD CONTACT

Part 1. General Provisions

Montana Code Annotated 2021

TITLE 40. FAMILY LAW
CHAPTER 9. GRANDPARENT-GRANDCHILD CONTACT
Part 1. General Provisions

Application Of Montana Rules Of Civil Procedure

40-9-101. Application of Montana Rules of Civil Procedure. (1) Except as otherwise provided, the Montana Rules of Civil Procedure apply to all proceedings under this section and **40-9-102**.

(2) A proceeding for grandparent-grandchild contact under this section and **40-9-102** must be entitled, "In re the grandparent-grandchild contact of....."

(3) The initial pleading in all proceedings under this section and **40-9-102** must be denominated a petition. A responsive pleading must be denominated a response. Other pleadings must be denominated as provided in the Montana Rules of Civil Procedure.

History: En. Sec. 1, Ch. 17, L. 1979; amd. Sec. 32, Ch. 343, L. 1997.

Montana Code Annotated 2021

TITLE 40. FAMILY LAW
CHAPTER 9. GRANDPARENT-GRANDCHILD CONTACT
Part 1. General Provisions

Grandparent-Grandchild Contact

40-9-102. Grandparent-grandchild contact. (1) Except as provided in subsection (8), the district court may grant to a grandparent of a child reasonable rights to contact with the child, including but not limited to rights regarding a child who is the subject of, or as to whom a disposition has been made during, an administrative or court proceeding under Title 41 or this title. The department of public health and human services must be given notice of a petition for grandparent-grandchild contact regarding a child who is the subject of, or as to whom a disposition has been made during, an administrative or court proceeding under Title 41 or this title.

(2) Before a court may grant a petition brought pursuant to this section for grandparent-grandchild contact over the objection of a parent whose parental rights have not been terminated, the court shall make a determination as to whether the objecting parent is a fit parent. A determination of fitness and granting of the petition may be made only after a hearing, upon notice as determined by the court. Fitness must be determined on the basis of whether the parent adequately cares for the parent's child.

(3) Grandparent-grandchild contact may be granted over the objection of a parent determined by the court pursuant to subsection (2) to be unfit only if the court also determines by clear and convincing evidence that the contact is in the best interest of the child.

(4) Grandparent-grandchild contact granted under this section over the objections of a fit parent may be granted only upon a finding by the court, based upon clear and convincing evidence, that the contact with the grandparent would be in the best interest of the child and that the presumption in favor of the parent's wishes has been rebutted.

(5) A person may not petition the court under this section more often than once every 2 years unless there has been a significant change in the circumstances of:

(a) the child;

(b) the child's parent, guardian, or custodian; or

(c) the child's grandparent.

(6) The court may appoint an attorney to represent the interests of a child with respect to grandparent-grandchild contact when the interests are not adequately represented by the parties to the proceeding.

(7) The court may appoint a guardian ad litem to represent the best interests of a child with respect to grandparent-grandchild contact.

(8) This section does not apply if the child has been adopted by a person other than a stepparent or a grandparent. Grandparent-grandchild contact granted under this section terminates upon the adoption of the child by a person other than a stepparent or a grandparent.

(9) A determination pursuant to subsection (2) that a parent is unfit has no effect upon the rights of a parent, other than with regard to grandparent-grandchild contact if a petition pursuant to this section is granted, unless otherwise ordered by the court.

History: En. Sec. 2, Ch. 17, L. 1979; amd. Sec. 1, Ch. 616, L. 1983; amd. Sec. 1, Ch. 18, L. 1991; amd. Sec. 158, Ch. 546, L. 1995; amd. Sec. 33, Ch. 343, L. 1997; amd. Sec. 1, Ch. 495, L. 2007; amd. Sec. 1, Ch. 92, L. 2009; amd. Sec. 1, Ch. 112, L. 2015.

Montana Code Annotated 2021

TITLE 40. FAMILY LAW
CHAPTER 9. GRANDPARENT-GRANDCHILD CONTACT
Part 1. General Provisions

Grandparents Include Great-Grandparents

40-9-103. Grandparents include great-grandparents. For purposes of this part, the term "grandparent" includes a great-grandparent.

History: En. Sec. 1, Ch. 220, L. 2009.

Montana Code Annotated 2021

TITLE 40. FAMILY LAW
CHAPTER 9. GRANDPARENT-GRANDCHILD CONTACT

Part 2. Nonexclusive Remedy

Montana Code Annotated 2021

TITLE 40. FAMILY LAW
CHAPTER 9. GRANDPARENT-GRANDCHILD CONTACT
Part 2. Nonexclusive Remedy

Purpose -- Legislative Intent

40-9-201. Purpose -- legislative intent. The legislature finds and declares that a grandparent is not precluded from seeking relief in lieu of or in addition to relief available under this chapter, including relief under Title 40, chapter 4 or 6, Title 41, chapter 3, Title 42, or Title 72, chapter 5, if the grandparent otherwise meets the necessary prerequisites of these statutes.

History: En. Sec. 1, Ch. 199, L. 2019.

Montana Code Annotated 2021

TITLE 40. FAMILY LAW
CHAPTER 9. GRANDPARENT-GRANDCHILD CONTACT
Part 2. Nonexclusive Remedy

Nonexclusive Remedy

40-9-202. Nonexclusive remedy. In addition to or in lieu of seeking reasonable rights to contact with a child under this chapter, a grandparent retains the following rights:

(1) to seek a parental interest, visitation, or parenting plan under Title 40, chapter 4;

(2) to seek authority as a caretaker relative, including authority to consent to medical care, for a child under Title 40, chapter 6;

(3) to seek custody of a child as an extended family member under Title 41, chapter 3;

(4) to seek adoption of a child under Title 42; and

(5) to seek guardianship of a child under Title 72, chapter 5.

History: En. Sec. 2, Ch. 199, L. 2019.

I. Montana Resources
b. CFS Policy Manual

I. Montana Resources
b. CFS Policy Manual
i. Investigation and Child Protective Services

Legal Background

The child's **safety** is the paramount concern of Child Protective Services. The public policy of the State of Montana is to ensure that all children have a right to a healthy and safe childhood in a nurturing permanent family. It is generally recognized that the sanctity of the family will not be violated unless there is some compelling state interest that justifies the state's intervention. That compelling state interest is the safety and health of the child.

The sanctity of the family and the right of an individual to raise his or her children according to his or her personal beliefs has been recognized by the United States Supreme Court and the Montana Supreme Court as a fundamental right which is constitutionally protected. Meyer v. Nebraska, 262 U.S. 390 (1923); In the Matter of J.L.B. 182 Mont. 100, 542 p.2d 1127 (1979). However, the public policy of Montana recognizes that a child is entitled to assert the child's constitutional rights so raising a child according to the parent's personal beliefs cannot conflict with the constitutional rights of that child. [Mont. Code Ann. § 41-3-101(1)(f)].

Montana recognizes the primacy of the family in the child's life by requiring that the Department place with family members whenever possible. When an out-of-home placement becomes necessary, the child protection specialist is required to place the child with the child's noncustodial birth parent or with the child's extended family, including adult siblings, grandparents, great-grandparents, aunts, and uncles prior to placing the child in an alternative protective or residential facility when it is in the child's best interests and the family is approved by the Department.

Given the recognized importance of the family, intrusion into the family unit by the state is justified only when a child has been abused or neglected, or is at substantial risk of being abused or neglected, as defined by Montana law. [Mont. Code Ann. § 41-3-102]. Even then, the intrusion should not go beyond the level necessary to protect the child. The Adoption and Safe Families Act of 1997 states, "in determining reasonable efforts to be made with respect to a child, . . . the child's health and safety shall be the paramount concern." [Section 471(a)(15) of the Social Security Act]

Authority

The Department of Public Health and Human Services, Child and Family Services Division, is designated by statute as the agency responsible for the protection of children who are abandoned, neglected or abused, and is specifically charged with the duty to respond to reports of child abuse or neglect and to provide protective services when necessary, including the authority to take temporary or permanent custody of a child when ordered to do so by the court.

The Department's authority to intervene in people's lives is wholly statutory. Thus, the Department must strictly adhere to the specific requirements of the statutes in providing protective services to children in need of such care.

The Department has statutory authority to provide three categories of protective services: Voluntary protective services, emergency protective services, and court-ordered protective services. The Department and parents may also agree to enter into a Child abuse court diversion pilot project [Mont. Code Ann. § 41-3-305] in jurisdictions where these pilot projects exist.

Voluntary Protective Services

Voluntary protective services must be provided pursuant to a written Voluntary Protective Services Agreement (VPSA) (See CFS-202 attached). A VPSA may include but is not limited to individual and/or family counseling, parenting classes, a family group decision making meeting, temporary relocation of a parent, in-home services, psychological evaluations, chemical dependency evaluations, etc. A VPSA may also include a Voluntary Placement Agreement (VPA) for up to thirty (30) days. If the parent(s) and child protection specialist negotiate a Voluntary Protective Services Agreement, the child protection specialist must inform the parent(s) of the right to have another person of the parent's choice present when the terms of the VPSA are discussed with the parent(s). A VPSA remains in effect for the timeframe indicated; however, it may be revoked at any time by the child protection specialist or parent(s).

Voluntary Placement Agreement

If the department has a VPSA that includes a VPA, CFS cannot place the child outside their home for a time period to exceed 30 days without court approval. **If a VPSA includes temporary, voluntary out-of-home placement of a child, a Protection Plan and Agreement for Foster Care Placement**

(CFS-012) must also be completed per CFSD Policy 402-1. ***For Indian children, voluntary placements must instead use CFS-ICWA-253 and CFS-ICWA-254, which must be signed before a judge (see Policy 402-1).***

Emergency Protective Services

Emergency protective services are those services provided to a child when the child protection specialist determines, based on a thorough investigation, that the child cannot remain safely in the home and the child protection specialist places the child in an out-of-home placement.

The statutes contained in Title 41, Chapter 3, Montana Code Annotated set forth the specific definitions of what constitutes harm to the child's welfare that justifies state intervention into the family, and further provides the legal procedures which must be followed by the Department to fulfill its responsibilities to protect the welfare of the child and to obtain the court's sanction of its activities upon exercising Emergency Protective Services. (See Mont. Code Ann. § 41-3-101, et seq.) \

Child Abuse Court Diversion Pilot Project

If the Department and the parent, guardian, or person having legal custody of the child over whom the Department has exercised Emergency Protective Services agree, then the case shall be referred to a child abuse court diversion pilot project. As set forth in Mont. Code Ann. 41-3-305, the requirements regarding Emergency Protective Services and other relevant statutes shall not apply during the time in which the case remains in the child abuse court diversion pilot project.

References

U.S. Constitution, 9th and 14th Amendments Montana Constitution
Mont. Code Ann. § § 41-3-101, et seq.
Mont. Code Ann. § § 52-1-101, 102, 111, 112, and 113.
Adoption and Safe Families Act of 1997, 42 U.S.C. 671(P. L 105-89)

Rev. 10/01
Rev. 10/02
Rev. 10/03
Rev. 04/04
Rev. 10/04
Rev. 10/07
Rev. 11/15

State of Montana
Department of Public Health & Human Services
Division of Child & Family Services

Voluntary Protective Services Agreement

IMPORTANT INFORMATION

This voluntary protective services agreement is a specific plan to help you make changes that will ensure your child(ren)'s safety and reduce risk of future harm. **You have the right to have another person of your choice present during the discussion of and the signing of this agreement**.

THIS IS NOT A PLACEMENT AGREEMENT. *If a child is being placed voluntarily in out-of home care, the CFS-012, Agreement for Foster Care Placement must also be completed. Voluntary placements of Indian children must be signed in front of a judge using forms CFS-ICWA-253 and CFS-ICWA-254.*

Your decision to sign this agreement is voluntary. Signing this agreement indicates your desire to assure that your child's safety is not threatened in the future. The voluntary protective services agreement will remain in effect until the date indicated below unless:

1. Any participant in the agreement does not or cannot successfully follow through with the activities detailed in the agreement.
2. Another report of child abuse or neglect is received by the agency.

If either or both of the above occur, the child protection specialist will conduct another safety assessment of the children. The safety assessment will determine what if any further action will be taken.

Parent(s) /Guardian(s) Caretakers Initials:

_____ I (We) have read and understand the above information about voluntary protective service agreements.

_____ The above information has been read to me (us) and I (we) understand it.

I. Identifying Information:

Participating caretaker name(s):	**Relationship to child(ren):**

Names of children included in this protective service agreement:

Agreement is in effect from _____ **to** _____

CP Specialist name _____ **Phone number** _____

CPS Supervisor name _____ **Phone number** _____

For after hours emergencies call 1-866-820-5437. **If you cannot follow this agreement, contact your child protection specialist or the above emergency phone number.

II. Voluntary Protective Services Activities:

On {Date} , a child protection specialist made a determination that the above named children were harmed or at substantial risk of harm based on an investigation of a report of child abuse or neglect. The activities of this plan will address the safety factors identified by the child protection specialist, increase protective capacities and or reduce child vulnerability in order to reduce the likelihood that the children will be harmed or will be at substantial risk of harm in the future.

Safety factor(s)

_____

Conditions that make this a threat and how condition can be changed:

Activity(ies) to be conducted, person responsible and completion date for the activity(ies):

Describe how activities will be monitored, how often and by whom**:**

Safety factor(s)

_____

Conditions that make this a threat and how condition can be changed:

Activity(ies) to be conducted, person responsible and completion date for the activity(ies):

Describe how activities will be monitored, how often and by whom**:**

Safety factor(s)

Conditions that make this a threat and how condition can be changed:

Activity(ies) to be conducted, person responsible and completion date for the activity(ies):

Describe how activities will be monitored, how often and by whom**:**

III. Acknowledgement:

I (We) understand this agreement and agree to fully participate in the activities assigned. I (We) understand that I (we) may inform the child protection specialist at any time that I (we) no longer wish to voluntarily participate in this agreement. At that time, the child protection specialist will again assess the safety of my (our) child(ren) and may determine that court action is necessary to protect my (our) child(ren) from further harm. I (We) also understand that any subsequent reports of child abuse or neglect to the agency may void this agreement.

Parent / Guardian:	Date:	Other:	Date:
Parent / Guardian:	Date:	Other:	Date:
Child Protection Specialist:	Date:	CPS Supervisor:	Date:

Philosophy Statement

It is the Division's mission to keep children safe and families strong. Safety of the child takes precedence over all other decisions surrounding child protective services. At the time of investigation, a child may be considered safe when there is an absence of serious threat of harm or when the threat of serious harm to a child is controlled by a response to an unsafe situation; in other words, a child may be considered safe when no present or impending dangers are identified through the investigation/ assessment protocols and policies. It is also important to assess whether or not the response is sufficient to maintain the safety of the child from actual serious harm or substantial risk of harm over time.

The strength of families and their capacity to protect their children is always considered when determining whether a child is safe and what interventions must occur. The family's input must be considered when developing a safety plan for a child.

An investigation/assessment should be respectful, thorough, and timely in accordance with CFSD policy manual section 202-3.

Safety Practice

Safe v. Unsafe: The Montana Safety Assessment and Management System (SAMS) Model

The Department has implemented a safety intervention system. The **Montana Safety Assessment and Management System (SAMS)** is designed to ensure that safety assessment guides decision-making throughout the life of the case.

Key Principles

Excellence in safety intervention systems and practice is contingent upon full appreciation and implementation of key principles.

- A safety intervention system relies on explicit precision in language and application. Consistency of terms and their use in day-to-day work and in all written communications, such as policy, procedure and practice guidelines is critical to creating an effective system of safety for children and families.
- All staff are trained on safety assessment and management and the distinct tasks associated with their

role and are expected to demonstrate these competencies.

- Safety is the primary and essential focus that informs and guides all decisions made from intake through case closure, including removal and reunification decisions. “Safety in placement” is also a priority, guiding placement decisions.
- A safety intervention system is not incident based. That is, the scope of the work is not defined by determining the presence or absence of injuries or incidents. The scope of the work is identifying safety threats, present and/or impending and working with families to mitigate those threats.
- A decision that a child is unsafe does not equate with removal. It directs the department to make informed decisions about safety planning that will control the threats. These plans may be in-home, out-of-home or some combination of the two.
- Safety interventions control safety threats and focus on enhancing caregiver protective capacities rather than ensuring well-being in all domains of life. The department shall not remain involved in a case once safety threats are mitigated or when caregivers’ protective capacity is sufficient.
- A safety intervention system relies on collection and analysis of discrete information sets rather than evaluating every aspect and detail of each family member’s life.
- A safety intervention system is reliant on good social work practice and is congruent with family-centered and strength-based practice. In safety practice, strengths are important when they truly mitigate safety threats or support protective capacities of the parent(s).

SAMS Key Terms and Definitions

Precision in language and application of key terms is essential to effective implementation of a safety intervention system. The following offers clear and precise definitions of terms in the Montana SAMS.

Safe

Children are considered safe when there are no present danger or impending danger threats, or the caregivers’ protective capacities control existing threats.

Unsafe

Children are considered unsafe when they are vulnerable to

present or impending danger, and caregivers are unable or unwilling to provide protection.

Present Danger — Immediate, significant and clearly observable family condition (or threat to child safety) that is/are actively occurring or "in process" of occurring and will likely result in severe (serious) harm to a child, requiring immediate protective response by the child protection specialist.

Immediate (Imminence) — This refers to the belief that family behaviors, conditions or situations will remain active or become active without delay resulting in or contributing to an event or circumstances that reasonably could result in severe harm to a vulnerable child now or within the next several days. Imminence is consistent with a degree of certainty or inevitability that danger and severe harm are possible, even likely outcomes without intervention.

Significant (Severity) — This refers to the effects of maltreatment that have already occurred and/or the potential for harsh effects based on the vulnerability of a child and the family behavior, condition, or situation that is out of control. Severity is consistent with severe harm.

Clearly Observable — This refers to family behaviors, conditions or situations representing a danger to a child that are specific, definite, real, can be seen and understood and are subject to being reported and justified. The connection of these family behaviors, conditions or situations to posing a danger to a child is evidenced in explicit, unambiguous ways. The criterion “observable” does not include suspicion, intuitive or gut feeling, difficulties in worker-family interactions, lack of cooperation, difficulties in obtaining information, or isolated, even provocative information considered exclusive of family behaviors, conditions, or situations.

Impending Danger — This refers to a family circumstance where a child is living in a state of danger, a position of continual danger. Danger may not exist at a particular moment or be an immediate concern (like in present danger), but a state of danger exists. Impending danger to child safety or this state of danger is not always obvious or occurring at the onset of department involvement or in a present context, but these can be identified and understood upon more fully evaluating individual and family conditions and functioning.

Safety Threshold

This refers to the point at which a family condition (or risk factor) reaches the level of a safety threat. The safety threshold is met when the following 5 criteria are assessed to apply.

1. **Severity** is consistent with harm that can result in significant pain, serious injury, disablement, grave or debilitating physical health or physical conditions, acute or grievous suffering, terror, impairment, death.
2. **Will likely occur in the immediate to near future:** A belief that threats to child safety are likely to become active without delay; a certainty about an occurrence within the immediate to near future that could have severe effects.
3. **Observable:** Danger is real; can be seen; can be reported; is evidenced in explicit, unambiguous ways.
4. **A Vulnerable Child:** Dependence on others for protection
5. **Out-of-Control:** Family conditions which can affect a child and are unrestrained; unmanaged; without limits or monitoring; not subject to influence, manipulation or internal power; are out of the family's control.

The Six Assessment Questions

In the use and application of the Montana SAMS, standardized information gathering is crucial. As indicated above, present danger is readily identifiable and likely apparent to the average person on the street. Impending danger is more elusive, however, and requires focused professional information gathering and assessment. The areas of focus are:

1. Maltreatment
2. Circumstances Surrounding the Maltreatment
3. General Adult Functioning:
4. General Child Functioning
5. Parenting: General
6. Parenting: Discipline

It is the information gathering and assessment of the interplay among these 6 areas that further informs the child protection specialist about unseen, yet very real threats. A complete safety assessment cannot be done without this focused assessment.

Present Danger Plan

Present Danger Plans are used when there is the identification of specific present danger to a child based on the results of the Present Danger Assessment. They are designed to control and manage the present danger threats so that the child is safe while an initial assessment/investigation continues in the form of the completion of a Family Functioning Assessment. Present

Danger Plans are short-term in nature and are limited to 30 days, thus making them distinctly different than safety plans and case plans. They are replaced with safety plans when the Family Functioning Assessment is completed. The following areas must be evaluated when considering a Present Danger Plan:

- Parents' willingness to co-operate.
- Description of person(s) responsible for the protective action, check of home for obvious safety threats.
- Confirmation of person responsible for protective action: trustworthiness, reliability, commitment, availability, alliance to plan. Most importantly, does this person believe that the safety threats are real and may result in serious harm to the child? Can the child protection specialist justify that this person can and will protect the child?
- Description of protective action, what it is and the details of how it will work, including communication between the Child Protection Specialist and provider of protective action required by the Present Danger Plan and time frames of protective action and oversight.

Safety Plan

Safety Plans are actions taken that are oriented toward controlling impending danger rather than changing the conditions that cause the impending danger. A safety plan must control or manage impending danger, have an immediate effect, be immediately accessible and available and contain safety services and actions only, not services designed to effect long-term change. It must be sufficient to ensure safety.

Safety Plans are only effective when they meet specified criteria. Safety plans must meet the following criteria:

- They are a written arrangement with the parent(s), those who will help maintain safety and the Child Protection Specialist.
- They clearly specify the impending danger identified from a standardized set of safety threats and individually describe how they are seen within each family.
- Safety Plans identify how each impending danger safety threat will be managed and also specify:
  - Who will perform what types of safety actions?
  - What is the suitability of this person (s)?
  - Under what circumstances will they perform the safety actions (location, who else will be there, for example)?
  - What time frames, (frequency, duration, and exact

times and days) will the safety actions occur?
- Are the safety providers available & accessible at the times the threats are present and need managing?

- Safety Plans are representative of the least intrusive/restrictive intervention. This means the most intrusive options are used only after all least intrusive options have been determined to be insufficient to assure safety.
- The child protection specialist maintains responsibility and accountability for the sufficiency of the safety agreement.
- Specifics related to governance of the safety agreement are stated clearly.
- Oversight and administration of the safety agreement is stated and is the responsibility of the child protection specialist.
- A communication strategy among participants is clearly identified.

Safety Services

Safety services are designed to control and manage safety threats, not to effect long-term change. Safety services may include:

- In-home to out-of-home placement (partial to total);
- Different kinds of placements (kinship, foster, emergency shelter, voluntary, court ordered);
- Protective role of parents needs to be evaluated (non-protective to significant);
- Protective role of others (friends, relatives, others);
- Safety service arrangements can be very limited or quite extensive;
- Types of providers may vary from relatives to neighbors, church members, para professionals to professionals for example;
- Parental access to child must be clarified. It may be that no access is needed to ensure safety, or, perhaps, liberal supervised access is fine; and
- Separation (temporary to permanent).

Sufficiency

Once the safety plan is complete, review with the Child Protection Specialist Supervisor is required to make certain that the plan is sufficient to assure safety and that a prudent judgment is made by the Child Protection Specialist that the degree of intrusiveness and level of effort represented in the safety plan will be reasonably effective in protecting a child.

Protective Capacities

Protective Capacities are personal and parenting behavioral, cognitive and emotional characteristics specifically and directly associated with being protective of one's children. These differ from what we have traditionally identified as strengths or protective factors in their direct relationship to the positive influence they exhibit in controlling or managing safety threats.

Safety Intervention System Processes and Tasks for Investigation/ Assessment

Safety Intervention Systems have two primary components: 1) Safety Assessment and 2) Safety Management. Within these functions, there are distinct tasks that the department must complete as well as specific decisions that are made at each point throughout department involvement with the families.

Safety Assessment

The purpose of safety assessment is to determine if there is present and/or impending danger, i.e., are there safety factors that meet the safety threshold? Assessment of safety is an ongoing process that occurs throughout involvement with each family from intake and initial contact until closure. Safety assessments are precise in focus, in that information is gathered and analyzed according to the 6 questions. Information gathered informs the safety assessment, and then standardized criteria that are known through research and literature to be related to the presence of safety concerns are applied and a safety determination is made. Each safety factor identified must meet the safety threshold defined on pages 2-3 of this section.

Safety Assessment Tasks

1. At initial contact, assess for present danger.
2. If present danger is identified, then implement a Present Danger Plan **for not more than 30 days**.
3. Whether there is present danger or not, continue and complete the Family Functioning Assessment to gather information on the 6 questions and analyze for impending danger according to the safety threshold.
4. Apply standardized safety assessment criteria, i.e., safety assessment tool and make a safety decision. Safety decisions are limited. A child is either safe or unsafe. If there is a child who is unsafe, the next steps we take are to ensure safety through a structured approach to safety management.

Safety Management

Safety management is the identification and implementation of actions intended to control safety threats or threats of harm. Safety actions must match the frequency and duration of the

threat of harm and be in effect for the period of time when relevant caregiver protective capacities are absent. They must also be accessible in time and physical proximity and have immediate effects that control for safety threats. Child Protection Specialists need to perform the following tasks and processes to ensure effective safety management.

Safety Management Tasks

1. Continuously assess for present and impending danger.
2. If present danger emerges, implement immediate Present Danger Plan.
3. Complete Family Functioning Assessment.
4. If impending danger is identified, implement a safety plan in collaboration with the family. Safety plans are developed along a continuum from least to most intrusive/restrictive. This means that removal of the child from the home occurs only after the use of an in-home safety plan has been ruled out as a safety management option. Safety plans may be developed in family group decision-making meetings.
5. Take responsibility for monitoring the safety plan and assuring its continued effectiveness.
6. Continuously evaluate the need to alter the safety plan, either reducing or increasing the intrusiveness/restrictiveness as indicated by continual safety assessment.
7. Assess need for ongoing services.

Substantiation Decision v. Safety Decision

The determination of whether or not a child is safe from immediate threat of harm, or present or impending danger, does not determine the outcome of the decision as to substantiate child abuse and/or neglect. When investigating and assessing a report, if the child protection specialist makes a determination that sufficient evidence exists to substantiate abuse and/or neglect, the child protection specialist shall substantiate such abuse and/or neglect.

References

Mont. Code Ann. § 41-3-101
Mont. Code Ann. § 41-3-102

Rev. 10/03
Rev. 10/07
Rev. 01/12
Rev. 02/13

Child and Family Services Policy Manual: Investigation
Reports of Abuse and Neglect

Source of Reports

Anyone **may** report a suspected incident of child abuse or neglect.

Mandatory Reporters

Professionals and officials **required** to report suspected abuse or neglect are:

- a physician, resident, intern or member of a hospital's staff engaged in the admission, examination, care or treatment of persons;*
- a nurse, osteopath, chiropractor, podiatrist, medical examiner, coroner, dentist, optometrist, or any other health or mental health professional;*

***Note:** A professional listed above involved in the delivery or care of an infant shall report to the department any infant know to the professional to be affected by a dangerous drug.

- religious healers;
- school teachers, other school officials, and employees who work during regular school hours;
- a child protection specialist, operator or employee of any registered or licensed day care or substitute care facility, staff of a resource and referral grant program or a child and adult food care program, or any other operator or employee of a child care facility;
- a foster care, residential or institutional worker;
- a peace officer or other law enforcement official;
- a member of the clergy, as defined in 15-6-201(2)(a); unless information came through confession and the communication is required to be kept confidential by canon, law, church doctrine, or established church practice and the person did not consent to the disclosure;
- a guardian ad litem or a court-appointed advocate who is authorized to investigate a report of alleged child abuse or neglect; or
- an employee of an entity that contracts with the

Department to provide direct services to children.

When a Mandatory Reporter Must Report

A mandatory reporter must report suspected child abuse, neglect, or abandonment when s/he knows or has reasonable cause to suspect, as a result of information s/he receives in his/her official or professional capacity, that a child is being abused or neglected.

Mandatory reporters are only mandatory reporters when they are on the job. When they are not acting in their "official or professional capacity", they are no different than any other person, and are not required to report child abuse or neglect which they suspect or become aware through means other than their official capacity.

This also applies to employees of entities which contract with the Department to provide services directly to children. Employees of these entities are mandatory reporters when they become aware of suspected child abuse/neglect as part of their official duties provided under the terms of the contract with the Division. The same employees are not mandatory reporters of suspected or known child abuse or neglect of which they become aware through any other means, including employment activities which are not connected to a Department contract.

Anonymous Reporters

An initial investigation of alleged abuse or neglect may be conducted when an anonymous report is received. However, the investigation must within 48 hours result in the development of independent, corroborative, and attributable information in order for the investigation to continue. Without the development of independent, corroborative, and attributable information, a child may not be removed from the home. The 48 hours begins at the time that the Child Protection Specialist initiates the investigation according to the response time assigned by Centralized Intake. The 48 hours excludes holidays and weekends.

CAPS

All reports of suspected child abuse and neglect must be made to Centralized Intake to be entered on the CAPS system. Entry of the initial intake information should begin immediately with updates made as information is gathered. Determinations must be completed within 60 days, and CAPS screens need to be completed as soon as the determination is completed. All related documentation, assessment forms, substantiation letters, etc., need to be attached to text and must be in the case

record. Instructions for completing the Report and Request screens are found in this manual at Section 202-2, Taking A Report/Referral.

Confidentiality of Reporters

The identity of the reporter and the identity of any person who provided information on the alleged child abuse or neglect incident must not be revealed to the parent, guardian or other person responsible for the welfare of the child who is the subject of the complaint unless a court requests the information (e.g., in a hearing or by court order).

Information Sharing With Reporters

The department shall, upon request from any reporter of alleged child abuse or neglect, verify whether the report has been received, describe the level of response and timeframe for action that the department has assigned to the report, and confirm that it is being acted upon.

Information Sharing with Mandatory Reporters

When a professional or official required to report under Montana Code Annotated § 41-3-201 makes a report, the department may share information with:

- That professional or official; or
- Other individuals with whom the professional or official works in an official capacity if the individuals are part of a team that responds to matters involving the child or the person about whom the report was made and the professional or official has asked that the information be shared with the individuals.

The department shall, upon request from any mandatory reporter of alleged child abuse or neglect, verify whether the report has been received, describe the level of response and timeframe for action that the department has assigned to the report, and confirm that it is being acted upon.

The department may also share information about the investigation, limited to its outcome and any subsequent action that will be taken on behalf of the child who is the subject of the report.

Individuals who receive information pursuant to this subsection shall maintain the confidentiality of the information as required by 41-3-205.All reports of suspected abuse or neglect must be responded to in accordance with Section 202-3, Investigation of the Report.

Information Sharing with immediate Family

The department shall, upon request from any grandparent, aunt, uncle, brother, or sister who is a reporter of alleged child abuse or neglect, verify whether the report has been received, describe the level of response and timeframe for action that the department has assigned to the report, and confirm that it is being acted upon.

Furthermore, the department may verbally share information with the extended family members for placement and case planning process

Any additional information regarding the child or children shall only be shared with grandparents, aunts, uncles, brothers, and sisters of the child or children upon confirmation of the person's relationship to the child and after a determination that sharing such information would not be harmful or detrimental to the child(ren).

References

Mont. Code Ann. § § 41-3-201 through 41-3-208.
Mont. Admin. R. 37-47-315
Mont. Admin. R. 37-47-602, et. seq.

Rev. 10/03
Rev. 10/04
Rev, 10/07
Rev. 11/15

Response

Reports of suspected child abuse, neglect, or abandonment are received by Centralized Intake as set forth in Section 202-2. All reports indicating reasonable cause to suspect that a child is abused, neglected, or abandoned by a person responsible for the child's care must be assessed and the immediacy of the timeframe for response by the Child Protection Specialist which is deemed appropriate will be determined by Centralized Intake.

In situations where Centralized Intake makes a determination that an immediate response is necessary, the person designated to receive that information in the field will be notified by telephone. The Child Protection Specialist Supervisor may aggravate or mitigate the response time based on their information or knowledge of the situation. In cases involving CFS reports with allegations of third party abuse or neglect, where the alleged perpetrator is not a person responsible for the welfare of a child as defined by Montana law, and therefore require an investigation by law enforcement, the Centralized Intake Specialist shall immediately forward the report to the appropriate law enforcement agency for investigation in accordance with Montana state statute 41-3-205(4)(a)&(b).

Reasonable cause to suspect means cause that would lead a reasonable person to believe that child abuse or neglect may have occurred or is occurring, based on all the facts and circumstances known to the person.

Person responsible for a child's welfare means the child's parent, guardian, foster parent or an adult who resides in the same home in which the child resides; a person providing care in a day-care facility; an employee of a public or private residential institution, facility home, or agency; or any other person responsible for the child's welfare in a residential setting.

Child abuse or neglect means either actual physical or psychological harm to a child **OR** substantial risk of physical or psychological harm to a child **OR** abandonment. The term includes actual harm or substantial risk of harm by the acts or omissions of a person responsible for the child's welfare. The term does not include self-defense, defense of others, or action taken to prevent the child from self-harm that does not constitute physical or psychological harm to a child.
If the Centralized Intake Specialist receives a report of child abuse or neglect for input into the CAPS system and/or the

Mandatory Cross-Reporting

Child Protection Specialist is assigned a report of child abuse or neglect for investigation/assessment, and the Centralized Intake Specialist or Child Protection Specialist believes that there is reasonable cause to suspect any of the following has occurred:

- The death of the child as a result of child abuse or neglect;
- A sexual offense, as defined in 46-23-502, against the child;
- Exposure of the child to an actual and not a simulated violent offense as defined in 46-23-502; or
- Child abuse or neglect, as defined in 41-3-102, due to exposure of the child to circumstances constituting the criminal manufacture or distribution of dangerous drugs.

The Centralized Intake Specialist and/or Child Protection Specialist shall promptly refer these matters to law enforcement for concurrent investigation. If there is an agreement in place, pursuant to Mont. Code Ann. § 52-2-211, for a County Interdisciplinary Child Information Team in that county, cases of suspected child abuse or neglect shall also be referred to this team or to law enforcement, in accordance with the local protocols defining which types of cases the team may review and how referrals shall be made in these jurisdictions.

Under Mont. Code Ann. § 41-3-201, professionals who are mandated to report when they know or have reasonable cause to suspect, as a result of information they receive in their professional or official capacity, that a child is abused or neglected by anyone regardless of whether the person suspected of causing the abuse or neglect is a parent or other person responsible for the child's welfare, must report the information to Centralized Intake. Centralized Intake will assess the report and, if sufficient facts exist to make it reasonable to suspect child abuse or neglect has occurred by a person who is not a person responsible for the welfare of a child, as defined above, then the report shall be entered into CAPS as a CFS or a CFS 8, in accordance with the definitions set forth in section 202-2 of this policy manual, and sent to the appropriate law enforcement agency, school superintendent, or CPS Supervisor or designee for further referral to the appropriate investigating agency.

Although Centralized Intake is legally mandated to receive calls from mandatory reporters who know or have reasonable cause to suspect, as a result of information they receive in their professional or official capacity, that a child is abused or neglected by anyone regardless of whether the person suspected of causing the abuse or neglect is a parent or other person responsible for the child's welfare, **the Division does not have legal authority to investigate alleged abuse or neglect when the alleged perpetrator of the abuse or neglect is not a person responsible for the welfare of the child who is the subject of the alleged abuse or neglect.** In regards to reports of abuse or neglect by persons not responsible for the welfare of the child(ren), the appropriate investigating agency may be law enforcement, the school district, or the Office of Public Instruction depending on the facts set forth in the report.

Documentation of Cross-Reporting

Upon receipt of this type of report, the Centralized Intake Specialist, CPS Supervisor, or designee shall promptly make a referral to the appropriate investigating agency to ensure that an investigation may be completed at the discretion of the appropriate investigating agency within a timeframe that ensures the safety of the child(ren) and that the investigation of the suspected abuse or neglect occurs without the loss of any evidence that may be present at the time of the report.

If the report is cross-reported by a staff member at Centralized Intake, it must be documented on the Intake Assessment and RRD1.

If the report is cross-reported by field staff as part of information obtained during an ongoing investigation, then the Child Protection Specialist or Child Protection Specialist Supervisor shall document the date, time, and information cross-reported in the case file. If a form is used, pursuant to a local protocol, the form and any supporting documentation must be uploaded to Doc Gen under the report number or child's CAPS ID.

CPS History

A search of the CAPS system must be completed to find a person's CAPS identification number; any prior CAPS CPS history; and/or address information. If the person is found in CAPS, the Centralized Intake Specialist will provide the Child Protection Specialist with that information.

The Child Protection Specialist shall also conduct a search in CAPS. To find a person in CAPS, use person search (PERS). If the person is known to the CAPS system, a CAPS number will be displayed. At that time the Child Protection Specialist can search for prior CPS history. By entering the assigned CAPS ID # on RRRL, all reports associated with that person will be displayed. The search of prior history should also indicate if this person is currently involved in an investigation or open CPS case. SEAL (See All Client Information) screen will show which CAPS screens have information on a client.

If it is known that the family has moved from another state, a background check by the Centralized Intake Specialist is extended to other states where the family lived. If the family was a client prior to conversion to the CAPS system, the Child Protection Specialist shall contact the county where the family formerly resided to obtain any information not on the CAPS system.

If the person is also a provider (identified on PERL), the provider number will be added on CID1 by the Centralized Intake Specialist. This will alert the Family Resource Specialist that a referral was received on the provider/provider employee.

The Child Protection Specialist should regularly update the person's address (ADDD) and relationship lists (RELL) with any new information received.

The Child Protection Specialist may also conduct a search in CJIN. CJIN can only be conducted on persons suspected or alleged to be perpetrators of abuse or neglect that could impact the current investigation / case plan

NOTE: The Investigation Start Date is the date and time the call is received by Centralized Intake.

Prioritization of CPS Reports

All CPS reports must be prioritized as one of the following categories defining a timeline for a repose, based on the Intake Assessment of the report completed by the Centralized Intake Specialist and approved by the Centralized Intake Specialist Supervisor:

Priority One:

A priority one report requires that contact be made with the

child(ren) who are alleged to have been abused and/or neglected or at who are alleged to be at substantial risk of abuse and/or neglect by the Child Protection Specialist assigned to the report within a time not to exceed 24 hours from the date of the receipt of the report by Centralized Intake. Any time face to face contact with the child cannot be made within seventy-two hours; the exception to this policy must be approved by a CPS Supervisor and documented in the Family Functioning Assessment.

Priority Two:
A priority two report requires that contact be made with the child(ren) who are alleged to have been abused and/or neglected or at who are alleged to be at substantial risk of abuse and/or neglect by the Child Protection Specialist assigned to the report within a time not to exceed 72 hours from the date of the receipt of the report by Centralized Intake. Any time face to face contact with the child cannot be made within seventy-two hours; the exception to this policy must be approved by a CPS Supervisor and documented in the Family Functioning Assessment.

Priority Three:
A priority three report requires that contact be made with the child(ren) who are alleged to have been abused and/or neglected or at who are alleged to be at substantial risk of abuse and/or neglect by the Child Protection Specialist assigned to the report within a time not to exceed 10 days from the date of the receipt of the report by Centralized Intake. Any time face to face contact with the child cannot be made within 10 days; the exception to this policy must be approved by a CPS Supervisor and documented in the Family Functioning Assessment.

Priority Four:
A priority four report requires that the report be fully investigated and assessed, and a written report documenting the determination, be completed within sixty (60) days from the receipt of the report.

Anonymous Reports

An initial investigation of alleged abuse or neglect may be conducted when an anonymous report is received. However, the investigation must within 48 hours result in the development of independent, corroborative, and attributable information in order for the investigation to continue. Without the development

of independent, corroborative, and attributable information, a child may not be removed from the home. The 48 hours begins at the time that the Child Protection Specialist initiates the investigation according to the response time assigned by Centralized Intake. The 48 hours excludes holidays and weekends.

Persons Contacted

The investigating must follow the SAMS FFA Interview Protocol that is set forth in the FFA field guide.

THIS INTERVIEW PROTOCOL REQUIRES FACE TO FACE CONTACT AND INDIVIDUAL INTERVIEWS WITH ALL MEMBERS OF THE HOUSEHOLD IN WHICH THE ABUSE AND/OR NEGLECT HAS ALLEGEDLY OCCURRED. THE PROTOCOL ALSO DEFINES THE ORDER THAT THESE INTERVIEWS MUST OCCUR. If the interview protocol cannot be followed, then the reason must be documented.

Contact with Child(ren) and Parent(s)

Once contact with the child and/or parent has been made, the FFA interview protocol must be completed unless the report is determined to be unfounded OR it is an anonymous report and if independent, corroborative, and attributable information is not established within 48 hours of initiating the investigation.

Reporter Contact

Contact with the reporter is strongly recommended. If the reporter is a mandatory reporter, the Child Protection Specialist is required to contact the mandatory reporter and document this in the contacts section of the Family Functioning Assessment. This allows the Child Protection Specialist the ability to gather more information that would assist in the investigation. All reporters should be told that their identity will be confidential except in cases where the identity of the reporter may be shared with a county attorney, peace officer, or attorney who is hired by or represents the Department, if necessary for the investigation or prosecution of a case involving child abuse or neglect, or in cases where a court permits disclosure, in accordance with Mont. Code Ann. § 41-3-205.

Collateral Contacts

In the course of an investigation, the Child Protection Specialist must gather information from collateral sources if such sources have information relevant to a safety determination. The Child Protection Specialist may not give information collected in the course of the investigation to collateral sources; however, it is often necessary to ask such sources if they have relevant information to ensure an accurate assessment is completed.

If the Child Protection Specialist makes contact with collateral source(s) and the reporter to confirm the facts set forth in the report **prior to making contact with the child or parent(s) to begin the FFA interview protocol**, and based on the information provided by the collateral source(s) the Child Protection Specialist may request that the report be closed without completing the FFA interview protocol. This request must not exceed 10 days from the date of the report. The CPS Supervisor must then obtain approval from the Regional Administrator to close the investigation without completing the FFA interview protocol and conduct no further investigation. If this occurs, the reasons for closing the investigation, and the approval from the Regional Administrator, must be documented in the "Out of Policy Action" section of the FFA and noted on RRD1. A determination of IIW (Insufficient Information to Warrant an Investigation) will be entered on RRD2. The partially completed FFA must be uploaded to Doc Gen under the report number and signed by the CPS and CPS Supervisor.

Other Professionals

It is helpful for the Child Protection Specialist to request information regarding the family assessment from other professionals. This is usually done with the knowledge and consent of the family. Sometimes the family will not give its consent, or the other person for whom information is being requested will not release information. In such instances, if the Child Protection Specialist believes the information is vital to the assessment, the Specialist will ask the county attorney to file a petition for temporary investigative authority and protective services, asking the court for release of the information to the Department.

Information Sharing with Reporters and Collateral Contacts

Information may be shared with reporters, mandatory reporters, and other collateral contacts in accordance with the provisions set forth in Section 501-1 et seq. of the CFSD Policy Manual.

Home Visits

Home visits are required pursuant to the SAMS Family Functioning Assessment field guide. If circumstances related to the report make it impossible for the Child Protection Specialist to complete a home visit, this must be documented in the Family Functioning Assessment and the CPS Supervisor must note their approval of the absence of a home visit in the Family

Functioning Assessment.

Child Protection Specialist Risk

In cases where Child Protection Specialists are concerned about their safety or safety of others in the home when doing a home visit, law enforcement may be requested to accompany the Child Protection Specialists to the home. However, law enforcement may not conduct the investigation on behalf of the Child Protection Specialist in these cases.

When responding to a methamphetamine lab, the Child Protection Specialists should never enter the contaminated environment. The Child Protection Specialists should refer to the statewide protocol for children found in drug labs for instructions on safely receiving and transporting children removed from methamphetamine labs contained at the end of this policy section on pages 18 and 19.

Consent to Enter

As a general rule, the Child Protection Specialist may not enter the family home without the consent of the parents or the adult who is responsible for the care of the child. Under current Montana law, the following principles apply to the issue of consent:

1) Consent may be limited, for example:
   a) the person giving the consent has the right to not have pictures taken. Unless the Child Protection Specialist has a court order allowing the Child Protection Specialist entry and access to the child's home for the purposes of investigation, the Child Protection Specialist does not have the right to take pictures inside the home if the parent or adult caring for the child(ren) objects;

   b) the person giving the consent has the right to restrict the Child Protection Specialist to one area of the home;

2) consent may be withdrawn at any time meaning that if the person that consented asks the Child Protection Specialist to leave, s/he must do so;

3) consent must be freely and voluntarily given. Consent obtained by coercion or threat (such as a threat to take physical custody of a child) is not considered to be

consent;

4) The only exception to the general rule is when exigent (emergency) circumstances exist. An example of exigent circumstances which would justify a Child Protection Specialist's entry into a private home without a court order or consent would be when the Child Protection Specialist has:

   a) reasonable cause to suspect that abuse or neglect has occurred; **AND**
   b) a reasonable belief that immediate entry is necessary to prevent imminent danger to a child.

NOTE: Assistance from law enforcement personnel should be obtained if the Child Protection Specialist determines that exigent circumstances are present when investigating a report of suspected child abuse or neglect

When Refused Entry

If the Child Protection Specialist conducting the investigation is refused entry by the parent and the Child Protection Specialist has reason to believe the child is in danger of being abused or neglected, the Child Protection Specialist should contact the county attorney and request that he or she seek an order to gain entry into the home.

If there is immediate or apparent danger of harm to the child, see Section 302-1, Immediate Protection and Emergency Protective Services, for procedures to be used for emergency removal of the child from the home.

The Investigation/ Assessment

In conducting the investigation and assessment of a report, the Child Protection Specialist must collect information and proceed in accordance with the SAMS Family Functioning Assessment Field Guide.

The Family Functioning Assessment forms and field guide shall be used as the Child Protection Specialist's guide to the investigation and assessment.

The Child Protection Specialist may not inquire into the financial status of the child's family or custodian except for the purpose of determining eligibility for federal assistance programs.

If the Child Protection Specialist identifies that any child(ren)

is/are in Immediate Danger at any point during the investigation and assessment, a Protection Plan must be put in place before the Child Protection Specialist leaves the location of the child(ren).

The partially completed FFA must be uploaded to the FFA repository on the Division's share point site within three days of the initiation of the investigation/assessment, and at the additional times set forth in the below supervisory review timelines.

Supervisory Review of Investigations/ Assessments

Supervisory consultation must be completed within 24 hours of the first face- to- face contact with all children in the family and documented in the contacts and nature sections of the FFA..

If immediate danger is identified, Supervisory consultation should occur prior to leaving the situation if possible to assure the protection plan is adequate. If legal custody is being sought due to a child being in Immediate Danger, supervisor consultation must occur prior to removal of the child if at all possible. This consultation can be completed by phone or in person.

The Child Protection Specialist Supervisor must also document that supervisory review took place at 3 days, 15 days, and 30 days after initiation of the investigation/assessment. The review must be documented within the FFA repository on the Division's share point site.

Consultations may also be required by the CPS Supervisor at any time during the life of a case and should be recorded in the FFA.

Supervisory Reassignment of Investigations / Assessments

When a Child Protection Specialist leaves during an open investigation/assessment, the Child Protection Specialist Supervisor shall reassign all open investigations prior to the Child Protection Specialist's final day of employment as a Child Protection Specialist. Reports shall be assigned to another Child Protection Specialist or to the Supervisor if the only thing left to do is complete the documentation of the Family Functioning Assessment.

The Child Protection Specialist Supervisor will not assign any new reports to the Child Protection Specialist after receiving

notice of the resignation. Furthermore, the Child Protection Specialist shall develop a report closure plan for all open reports at the time of receiving notice of the resignation.

Protection Plans

A Protection Plan may not be in place for longer than 30 days if a child is placed outside of the home. Therefore, the Child Protection Specialist may be required to complete the Family Functioning Assessment within the 30 days when a protection plan is implemented that requires out-of-home placement of the child(ren) by the department unless Court action has been filed and a Court order sanctioning the placement of the child by the department has been obtained. During the time that the Protection Plan is in place, the Child Protection Specialist shall have weekly consultations with their CPS Supervisor.

Unlicensed Emergency Kinship Placements

If a child is placed out of the home in an unlicensed kinship home or with the noncustodial parent, a home visit must be completed within 48 hours of the placement. If the noncustodial parent refuses to allow access to his or her home, and the parent has no CPS history or relevant criminal history, the Child Protection Specialist shall document on the Protection Plan, Part A, that a home visit was attempted. Refusal to allow a home visit by a noncustodial parent who has no CPS history or relevant criminal history may not be used as a reason to deny placement of the child with the noncustodial parent.

The written FFA must be completed and the written report uploaded to Doc Gen within 6o days of receipt of the report.

When Families Move During the FFA

When a CPS worker begins an investigation in one county and the family relocates to another county while an investigation/assessment is being completed, the CPS Supervisor is required to contact the CPS Supervisor in the county where the family relocates. After discussing the current status of the investigation, the CPS Supervisor in the county where the report originated shall transfer the report to the CPS Supervisor in the county where the family has relocated using the AXED function in CAPS. Any assessments and/or documents, including completed or partially completed, Protection Plans, and Family Functioning Assessments, shall be uploaded into Doc Gen. This includes any documents obtained from collateral sources.

The reasons for transferring the case shall be noted on the partially completed Family Functioning Assessment prior to

uploading it to Doc Gen. The CPS assigned to complete the investigation/assessment shall contact the necessary parties to the investigation upon assignment to confirm that the information in the partially completed Family Functioning Assessment is accurate and complete. The newly assigned CPS worker shall also complete the interview protocol and make a safety determination in order to close the report within 60 days.

Due to the time sensitive nature of investigations, it is required that county offices and CPS Supervisors work cooperatively to ensure that this transfer process occurs without delay to ensure the safety of the children named in the report.

Recorded Interviews

Under Montana law, if the interview is audio or video taped, an unedited audio or video tape with audio track must be made available, upon request, for unencumbered view by the family (subject to Mont. Code Ann. § 41-3-205. Confidentiality). Upon completing the audio or video taped interview, the tape should be given to the county attorney's office or office of the attorney representing the Division when a petition has been filed regarding the case in which the interview was conducted.

Urinalysis

If the Child Protection Specialist suspects that the parent may be using drugs, the Specialist may not:

- absent a court order, require the parent to submit to a urinalysis;
- coerce the parent into submitting to a urinalysis by making the completion of a urinalysis as a condition for not removing the child from the parental home; or
- take action based on the results of an over-the-counter test.

Under Montana law, if interview is audio taped or videotaped, an unedited audiotape or videotape with audio track must be made available, upon request, for unencumbered view by the family [subject to 41-3-205(3), Confidentiality]. Upon completing the audio taped or videotaped interview, the tape should be given to the county attorney's office.

Examination of The

The child should be examined by a physician when there is

Child

reason to believe the child is a victim of serious physical or sexual abuse, has been removed from a methamphetamine lab or there is reason to believe the child may have drugs in their system due to actions by the parent, unless the child is of a mature age and refuses, no evidence of abuse can be gathered because the incident occurred too long ago, or a physician is not available. If child is removed from a meth lab, Child Protection Specialist should follow the statewide protocol for medical evaluation of children found in drug labs.

Developmental Screening and Assessment

The CPS must refer a child who is under age 3 to the local Developmental Disability Part C Program for screening for developmental disabilities within 5 working days of completion of a FFA if the child was:

A. Determined to be unsafe and an in-home or out-of-home safety plan was put into place **OR**

B. The subject of a CA/N substantiation

Children ages 3 and older must receive a developmental assessment through one of the following methods:

- Headstart assessment (preferred for ages 3 to 5)
- Neuro-psychological evaluation
- Educational evaluation
- Assessment by the Developmental Disability contractor for the region.

Request a copy of the assessment of the child for the case file.

If the developmental assessment indicates that the child requires services for a developmental disability or requires further assessment, the CPS is responsible to make referrals to the appropriate services to the local developmental disability provider, and ensure that the child receives the services as available.

Cases Involving Domestic Violence

In cases involving domestic violence, the Child Protection Specialist must consider the situation of the victimized adult in addition to the safety of the child.

If the Child Protection Specialist determines that an adult member of the household is the victim of partner or family member assault, the Specialist shall provide the adult victim with a referral to a domestic violence program. The form of the

referral will depend on the circumstances and will consider the safety of both the child(ren) and the adult victim.

If the Child Protection Specialist determines, after investigation/assessment, 1) that the child is in danger because of the occurrence of partner or family member assault against an adult member of the household; and 2) that the child needs protection as a result of the occurrence of partner or family member assault against an adult member of the household, the Specialist shall take appropriate steps for the protection of the child. The steps taken by the Child Protection Specialist may include:

1. making reasonable efforts to protect the child and prevent the removal of the child from the parent or guardian who is a victim of alleged partner or family member assault;
2. making reasonable efforts to remove the person who allegedly committed the partner or family member assault from the child's residence if it is determined that the child or another family or household member is in danger of partner or family member assault; and
3. provide services to help protect the child from being placed with or having unsupervised visitation with the person alleged to have committed partner or family member assault until the Child Protection Specialist determines that the alleged offender has met conditions considered necessary to protect the safety of the child.

NOTE: See Section 302-1, Immediate Protection and Emergency Protective Services, for procedures to be used for emergency removal of the child from the home.
See Section 402-1 for Placement Procedure

Written Report Required

A written report, in the form of a completed Family Functioning Assessment (FFA), must be completed and approved by the CPS Supervisor **within 60 days** from the date that Centralized Intake received the report. A copy of the FFA shall be furnished to the family, upon request, with the name and identity of the referent deleted. If a court grants Temporary Investigative Authority to the Division, the timeline for completion of the Family Functioning Assessment may follow the timeline established in the order granting Temporary Investigative Authority.

A copy of the completed Family Functioning Assessment must be uploaded to Doc Gen by the Child Protection Specialist Supervisor **within 60 days** from the date that Centralized Intake received the report.

If necessary, the Child Protection Specialists must expedite the completion of an FFA in cases where Immediate Danger is identified, and a Protection Plan that includes an out-of-home placement by the department is implemented as a Protection Plan may be in place for only 30 days if child is outside of his/her home.

Completion of Investigation / Assessment

Upon completion of the Family Functioning Assessment, the Child Protection Specialist must make a determination regarding the safety of the child and the outcome of the report as set forth in policy Section 202-4: Documentation of Investigation and Opening a Case. If a child is determined to be unsafe, further action must be taken by the Child Protection Specialist, in accordance with Montana law and Division policy to ensure the safety and health of the child.

Written documentation must be provided to all parents and/or legal guardians or custodians at the conclusion of an investigation/assessment indicating the final determination made regarding the report, as set forth in policy Section 202-4.

References

Mont. Code Ann. § 41-3-201, 41-3-202, 41-3-204 through 41-3-207, 41-3-302, 41-3-427.
42 U.S.C. §5106a (b)(2)(A)(ii, iii, iv, xviii and xix).

Rev. 10/07
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Rev. 12/15

PROTOCOL FOR CHILDREN FOUND IN DRUG LABS

MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES – CHILD & FAMILY SERVICES SOCIAL WORKER WILL

IMMEDIATELY	WITHIN 24 HOURS	WITHIN 48 HOURS	FOLLOW-UP
Respond to law enforcement referral for Child Protective Services (CPS)	Coordinate with law enforcement to determine if there are other children in the family who were not present at the time of the initial incident and locate their whereabouts	File an abuse and neglect petition through the court system within two working days of placement of children	Ensure that children are seen for follow-up medical examinations as recommended by physician (additional medical testing may be necessary once toxicology results are received
Arrive at the scene but WILL NOT enter a contaminated environment (protective gear required).	Follow the same decontamination process guidelines for the other children who were located and the home where they stayed		Ensure children receive developmental assessments within 30 days
Receive children delivered by law enforcement *after* decontamination has occurred and protective suits put on children (use children clothing packets from law enforcement or social worker). Absolutely **NO** clothing, toys, blankets, food, drink or other items may be taken from the scene due to contamination.	Transport other children to local hospital ER or Children's Advocacy Center. Law enforcement will accompany children and CPS worker. Present ER physician or Children's Advocacy Center with *medical protocol kit.* Law enforcement is responsible to pick up specimens from hospital ER or Children's Advocacy Center (follow *medical protocol).*		Provide mental health referrals as appropriate or recommended
Transport children immediately to local hospital ER or Children's Advocacy Center for medical evaluation. Law enforcement will accompany children and CPS worker. Present ER physician or Children's Advocacy Center with *medical protocol kit.* Law enforcement is responsible to pick up specimens from hospital ER or Children's Advocacy Center (*follow medical protocol).*	Place children in a safe setting. If children are potentially to be placed with unlicensed kin home, conduct a CPS check and sexual and violent offender registry check prior to placement. Follow-up with fingerprints and motor vehicle check within three days. Request law enforcement to conduct a statewide law enforcement background check of the relative home. Provide caregiver with completed CFS 206.		
Place children in a safe setting. If children are potentially to be placed with unlicensed kin home, conduct a CPS check and sexual and violent offender registry check prior to placement. Follow-up with fingerprints and motor vehicle check within three days. Request law enforcement to conduct a statewide law enforcement background check of the relative home. Provide caregiver with completed CFS 206.			

PROTOCOL FOR CHILDREN ENDANGERED BY NATURE OF EXPOSURE TO DRUGS

MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES – CHILD & FAMILY SERVICES SOCIAL WORKER WILL:

IMMEDIATELY AND/OR WITHIN 24 HOURS	WITHIN 48 HOURS	FOLLOW-UP
Respond to Law enforcement referral for Child Protective Services	If required to protect the safety of the child, file the appropriate petition within two working days of placement. If the child is not placed, it may be necessary to file a petition for Temporary Investigative Authority or to provide voluntary protective services.	Ensure that children are seen for follow-up medical examination as recommended by physician (additional medical testing may be necessary once toxicology results are received). Ensure EPSDT screens/services are identified.
Coordinate initial home visit with law enforcement. Investigate potential neglect/abuse of children. Determine if other children in the family are not present during the home visit and locate their whereabouts. Continue investigation and interviews.	Follow-up with fingerprints and motor vehicle check within three days.	Follow medical protocol
Ensure children are evaluated by primary care provider or Children's Advocacy Center (follow medical protocol). Provide primary care provider with medical protocol kit. Law enforcement is responsible to pick up specimens from the primary care provider. (Follow steps outlined in medical protocol).		
Law enforcement alters CPS worker if urinalysis tests positive for drugs. CPPS takes necessary steps to ensure safety of children. If children are removed, provide written notification to parents/guardians.		
If necessary, place children in a safe setting and proved parents or guardian with written notification regarding investigation or placement. If children are potentially to be placed in unlicensed home, conduct a CPS check and sexual and violent offender registry check prior to placement. Request law enforcement to conduct a statewide law enforcement background check of the relative home. Provide caregiver with completed CFS 206.		

CAPS

CAPS is an official case record of the services provided by the Division. Intake information, assessment/investigation results, person information, contacts, services provided, court history, placements and payment information must be recorded on CAPS. A case file in the local office containing documents from contracted providers, service providers, correspondence, court orders, etc. may contain supporting documentation, although this information may also be scanned into the DocGen system.

Frequency of Case Recording

CAPS records should be routinely updated and completed before closure of a report.

Records: Information Included

Records regarding **each** assessment/investigation of a report of child abuse and/or neglect must contain the following information (if available):

1. Report screens (CID1/RRD1 and CID2/RRD2), the Initial Incident from CI and any new or additional information reports;
2. Person Detail screens (PERD - Person Detail, RELD - Relationship Detail, ADDD - Address Detail);
3. Completed Family Functioning Assessment that is uploaded and titled as **Family Functioning Assessment (or FFA)** and stored in DocGen by report number.
4. A determination, e.g., abuse or neglect is indicated, substantiated, unsubstantiated, founded, or unfounded. A summary of the facts supporting the determination should be included on RRD1, and RRD3 if extra space is required.

CAPS Entries & Documentation of Reports

Sixty Day Limitations

The Report/Referral status remains "open" (O) until the Child Protection Specialist has completed the work on the referral/report or assessment. Status must be determined within 60 days of the date the report was received by Centralized Intake. Status is changed by entering a "C" on RRD1.

In addition, all referrals must have a determination completed and entered on CAPS within 60 days of the date the report was received by Centralized Intake.

In regards to CFS and CFS 8 reports, the status remains "open" (O) until the report is sent to the appropriate agency for

CFS and CFS 8s

evaluation and/or investigation. Once the referral has been made, the status of the report shall be changed to "closed" (C) and the referral shall be documented on RRD1 under "Action Taken." The report must be closed within 60 days from the date that Centralized Intake received the report

Category Changes

If the Child Protection Specialist Supervisor determines that a CPS or CFS category change is necessary, the supervisor will contact their Regional Administrator and request the change. If approved by the Regional Administrator, the regional "supertask" person, CPSS, or RA will make the change. If the supervisor determines that a CPI category change is necessary, the supervisor will contact the assigned Centralized Intake Specialist to make the change.

All report category and priority changes must be documented on the CC-002 "**MT Centralized Intake Report Category / Priority Change Form**." The form must be uploaded to Doc Gen under the report number.

Investigation/ Assessment Start Date

The Investigation/Assessment Start Date is the date and time the call is received by Centralized Intake.

Investigation/ Assessment End Date

The Investigation End Date indicates the date on which the Child Protection Specialist ends the investigation/assessment. The Child Protection Specialist Supervisor, after the FFA and Substantiation letter are uploaded into Doc Gen, must close the status on RRD1.

Investigation/ Assessment Summary

The Centralized Intake Specialist will enter the basic referral information/allegations contained in the reported information on CID1. Upon conclusion of the investigation, the investigating Child Protection Specialist will delete information provided by Centralized Intake on RRD1 under this heading and will add a brief summary as to the results of the investigation. Initial information provided by Centralized Intake will remain on CID1 and the information added by the investigating Child Protection Specialist will remain on RRD1. CID1 can be viewed at any time by entering a "V" (inquire CID1) on RRRL for a specific report.

Note: If services are provided to the family after the investigation/assessment determination is made, make the

person a client and record any notes on ACTD.

Action Taken

The Child Protection Specialist enters information as to what services were provided or actions were taken in response to the referral. (An F12 look up is available for these codes.) This portion of RRD1 is completed after the determination(s) is entered on RRD2. Only CPS cases require a determination.

In regards to CFS and CFS 8 reports, the Centralized Intake Specialist or Child Protection Specialist must also enter the date that the referral to the appropriate investigating agency was made on RRD1 under Action Taken.

Report and Request Intake Detail 3 (RRD3)

The Child Protection Specialist can utilize this screen to continue the Investigation Summary from RRD1, if necessary. However, the summary should be kept brief. The information on RRD3 will be saved to the system, but remains modifiable until the Child Protection Specialist Supervisor closes the report on screen RRD1.

Investigation/ Assessment Worksheet

The CAPS system provides the Child Protection Specialist an investigation/assessment worksheet to use throughout their investigation/assessment, DocGen D-100. The worksheet provides information entered on the RRD1 screen, (leaving out the information regarding the identity of the reporter), RRD2, and RRD3.

Client Opening

Persons become clients when they receive intervention services. Intervention services are defined as:

- services received directly from the Division to reduce the risk of further abuse/neglect; and/or
- services which are recommended/required and monitored by the Division in order to reduce the risk of further abuse/neglect.

Persons on CAPS become clients when a Child Protection Specialist assigns that person to their caseload (on AXED - Assignment and Transfer Detail) and completes CLID (Client Detail) and IARD (Initial Assessment and Review) screens. In any CPS case opened beyond the investigation, it is the Child Protection Specialist's responsibility to make the person a client and complete the following CAPS screens:

- IARD, documenting short term and long term goals for the

client;

- SERP (Services Payable - services paid through CAPS) and SERN (Services Non-Payable - non-paid services and services paid by another source), indicating services that are being offered to alleviate the problem;

- CRTD (Court Detail), listing court actions taken (if any);

- ICWD (ICWA Detail) if the child is Native American or Alaskan Native;

- SPND (Special Needs Detail), MEDS (Medications), MDTD (Medical Treatment Detail) and MMHD (Medical/Mental Health Detail), indicating the child's medical and mental health status/needs;

- EMPL (Employment List - optional); and

- EDHL (Education History List)

Report Closure

A report shall be closed on RRD1 when the investigation is complete and the CPS Supervisor has approved the completed FFA. This must be done by the CPS Supervisor, or the Child Protection Specialist at the direction of the CPS Supervisor, within 60 days of the receipt of the report by Centralized Intake.

Case Closure

Closure reviews must be done on IARL. Open cases may be closed when the Child Protection Specialist determines that the child is safe through the Safety Assessment at Case Closure process and the Supervisor agrees to the closure. Reasons for the closure shall be documented on IARD and on the Safety Assessment at Case Closure form. The Child Protection Specialist is encouraged to notify the parent in writing that the agency has terminated services to the family when a case is closed.

Tracking Drug and Alcohol Use/Abuse

Tracking the use of Drugs and /or Alcohol will be completed at three stages of the case.

- Referral Stage: Centralized Intake staff will make an entry in the drug field on CID1 if the reporter indicates that drugs or alcohol are a contributing factor in the alleged abuse/neglect referral.
- Investigation: The Child Protection Specialist will make an entry in the drug field on RRD1 at the completion of the investigation, if the investigation revealed that drugs or alcohol were contributing factors in the abuse/neglect.
- Removal: The Child Protection Specialist will make an entry in the drug field on PLAD when a child is placed into protective custody indicating that drugs or alcohol were a factor in the child maltreatment which resulted in the removal.

Determinations

Supervisor approval is required for ALL types of determinations.

Substantiated Reports

<u>SUP (PENDING DETERMINATION OF SUBSTANTIATED REPORT OF ABUSE, NEGLECT, SEXUAL EXPLOITATION)</u>
Upon investigation, if the Child Protection Specialist determines that the report is substantiated (see below), the Specialist must enter SUP (substantiation pending) on CAPS and close the report. The SUP pending status indicates that the investigation is completed but that the perpetrator of the substantiated abuse has the right to exercise his/her due process rights. (See Due

Process Section below).

SUB (DETERMINATION OF SUBSTANTIATED REPORT OF ABUSE, NEGLECT, SEXUAL EXPLOITATION)
After an investigation, the investigating worker has determined by a preponderance of the evidence that the reported act of child abuse, neglect, or exploitation occurred, and that the perpetrator of the abuse, neglect, or exploitation may pose a danger to children.. SUP should be entered upon making a substantiation determination. After 45 days, the SUP will automatically be changed by the CAPS system to SUB.

The evidence that supports the substantial risk of harm or the abuse, neglect, sexual abuse, or sexual exploitation must meet the definition of abuse, neglect, or sexual exploitation as defined by state law (Mont. Code Ann. § 41-3-102).

NOTE: If the Child Protection Specialist substantiates that abuse or neglect occurred to a child under the age of 3, the Specialist must refer the child to the local Part C Contractor for a developmental assessment.

- FND (FOUNDED REPORT OFABUSE, NEGLECT, SEXUAL ABUSE, OR EXPLOITATION)
  After the investigation, the Child Protection Specialist has determined that there is probable cause to believe that an act of child abuse or neglect occurred.

Other Determinations

- UNS (UNSUBSTANTIATED REPORT OF ABUSE, NEGLECT, SEXUAL ABUSE OR EXPLOITATION)
  After the investigation, the Child Protection Specialist was unable to determine by a preponderance of the evidence that the reported abuse, neglect, sexual abuse or sexual exploitation occurred.

  NOTE: If a report is unsubstantiated, the report and all supporting documentation (electronic and hard-copy) shall be destroyed within 30 days after the end of the 3-year period starting from the date the report was determined to be unsubstantiated unless**:**
  - there has been a previous or subsequent substantiated report concerning the same person**;** or

- a protective services court order has been issued based on the circumstances surrounding the initial allegations.

Upon written request by the perpetrator and review by the supervisor, unsubstantiated reports prior to October 1, 2003 may be destroyed if specified criteria are met. The supertask person will remove the report and all supporting documentation, except medical records per MCA 41-3-202).

- CWF (CLOSED WITHOUT FINDINGS)
  Unable to locate, family left the area before the investigation was completed, investigation began but was never completed due to court order, administrative directive, etc., or unable to make a determination within 60 days due to lack of evidence or information (if services are provided, close the referral and open the person as a client). No determination made.

- IND (INDICATED)
  Maltreatment occurred, but the perpetrator of the maltreatment is not identified under Montana Code Annotated as a 'person legally responsible for the welfare of a child.' For example, an uncle commits an act of sexual abuse while visiting his niece. **Used only when the reported perpetrator is not someone responsible for the welfare of a child or when the perpetrator is unknown**. Indicated reports should be reported to law enforcement, when applicable.

- IIW (INFORMATION INSUFFICIENT TO WARRANT AN INVESTIGATION)
  After speaking to the Reporter and Collateral Contacts, the worker determines there is not enough information to suspect abuse or neglect occurred. RA approval is required for this determination to be used.

- SUD (SUBSTANTIATED OR INDICATED ABUSE/ NEGLECT THAT RESULTS IN THE DEATH OF THE VICTIM)
  Refers to a child fatality resulting from abuse/neglect.

- UNF (UNFOUNDED REPORT OF ABUSE, NEGLECT, SEXUAL ABUSE OR EXPLOITATION)
  After an investigation, the Child Protection Specialist has determined that the reported abuse, neglect, or exploitation has not occurred. If the referral is unfounded, the Child Protection Specialist should indicate so by selecting "UNF." **The Child Protection Specialist must consult with his/her Supervisor prior to finding a report is unfounded.**
  When duplicate reports (reports with the same set of facts involving the same individuals) are entered into CAPS as separate reports, UNF may be used to remove the duplicate from the system.

  NOTE: The CAPS system is designed to automatically destroy unfounded reports every month. All identifying information is destroyed, but the statistics remain a part of CAPS. **Any hard copy information of unfounded reports must also be destroyed.**

- FHR (FAIR HEARING REQUESTED)
  Upon receipt of the substantiation letter, the perpetrator requests a fair hearing in writing within 30 days of the date of the letter. FHR is entered by the Central Office or Regional Supertask person upon receipt of the fair hearing request.

- CCP (CRIMINAL CHARGES PENDING)
  The perpetrator of substantiated abuse or neglect has requested a fair hearing but has criminal charges pending related to the same incident as the substantiation. The fair hearing cannot proceed until the related criminal charges are resolved. If the perpetrator is found guilty of the criminal charges, upon legal review, the request for a fair hearing may be denied. CCP is entered by the Central Office or Regional Supertask person.

- UNX (UNSUBSTANTIATED AFTER REVIEW)
  The substantiation determination has been overturned; either by internal, regional review, by the Substantiation Review Panel or by a decision issued from the Fair Hearings Officer after the fair hearing. UNX is entered

by the Central Office or Regional Supertask person.

Entry of Substantiation Determination in CAPS

When the Child Protection Specialist receives a report of suspected child abuse and neglect and, after investigation, determines that the report is substantiated, the Specialist must enter SUP (substantiation pending) on CAPS and close the report. The investigation is complete at the time the Child Protection Specialist makes the determination. The SUP pending status indicates that the investigation is completed but that the perpetrator of the substantiated abuse has the right to exercise his/her due process rights.

Approximately 45 days after a determination of SUP is entered, if the perpetrator did not request a fair hearing, CAPS will automatically change all SUP determinations to SUB. If the perpetrator requested a fair hearing, the code will be changed by the Central Office or Regional Supertask person to FHR (Fair Hearing Requested) or CCP (Criminal Charges Pending) and will remain so until after the Hearings Officer has rendered an opinion in the case.

If the Hearings Officer upholds the determination, the Central Office or Regional Supertask person will change the determination to SUB. If the Hearings Officer (or the Substantiation Review Committee) overturns the determination, the Central Office or Regional Supertask person will change the determination to UNX (unsubstantiated after review). Only the Central Office or Regional Supertask person can enter the UNX code.

Notice of Determinations

The Child Protection Specialist must notify the person of the determination in writing and document the notification. The Child Protection Specialist will send a Letter addressed to the identified person explaining our determination. Letters may be located on *Ours Forms*. If the report is found to be substantiated or founded, the Child Protection Specialist will send the Substantiation or Founded Letter located on *DocGen.* The Child Protection Specialist will upload a copy of the signed letter documenting the determination of the report to DocGen under the report number.

Due Process Requirements

The right to employment is a constitutionally protected property interest. A substantiation of child abuse/neglect can affect the individual's right to employment. The individual against whom

abuse/neglect is substantiated is entitled to due process. This means the individual must be accorded the right to notice of and the opportunity to respond to the substantiation.

Substantiated Report: Notice & Letter to Perpetrator

If the Child Protection Specialist substantiates the allegations, the Specialist must send a substantiation letter indicating the allegations were substantiated and explaining how he/she came to this conclusion via certified mail. The Child Protection Specialist must provide information regarding the appeal process, providing the address to send an appeal to and the time lines for appeal.

Notice of substantiation of abuse or neglect will be sent **Certified Mail Return Receipt Requested**, or hand delivered to the person or persons named as the perpetrator(s). If hand-delivered, the Child Protection Specialist will attempt to get acknowledgment of receipt of the letter. A signed copy of the notice and the return receipt from the certified mailing must be scanned into DocGen by report number and must be titled as **Letter to Perpetrator**. **The notice must state the following:**

- the allegation, but NOT the name or identity of the person who made the referral;
- that the investigation substantiated abuse or neglect;
- the type of abuse or neglect substantiated;
- the acts or omissions which support the substantiation;
- the possible impact of substantiation on the person's ability to work in certain fields;
- the person's right to request a fair hearing to challenge the substantiation determination if the fair hearing is requested in writing within 30 days of the date of the notice letter; and
- there is no right to a fair hearing if:
  - √ the court has adjudicated the child a "youth in need of care" and the facts upon which the adjudication is based are the same facts as the substantiated

report and named alleged perpetrator upon which the substantiation is based; or,

√ the person has been criminally convicted of an offense related to the same facts of the substantiated report.

Child Protection Specialists must use DocGen D101, Letter to Perpetrator. The letter must be sent by Certified Mail Return Receipt Requested. A copy of the **signed** letter shall be kept in the hard file. Any returned or undeliverable letters shall be kept (with envelope) in the file, as should notice of receipt or notice of undeliverable. When a letter is sent certified but was not picked up or was returned as undeliverable, the Child Protection Specialist should send the letter again through regular mail (delivery confirmation preferred) and document that the letter was re-sent via regular mail.

NOTE: Under extraordinary circumstances, if notice will place the child or client in danger, a delay in sending out notice until the risk of imminent danger to the child or client is diminished may be approved by the community Child Protection Specialist Supervisor in consultation with the Regional Administrator. This exception should be rare and such exception will be documented in case notes.

Fair Hearing Requests

The only time the subject of an investigation has the right to a fair hearing is if the Division substantiated child abuse or neglect against the individual.

All fair hearing requests must be sent to the attention of the Department's Office of Legal Affairs and must be sent within 30 days after the date of mailing of the Division's initial notice of its substantiation determination (ARM 37.47.610). If a fair hearing request is received after the 30 day deadline, the request may be denied although exceptions may be granted on a case by case basis after review by legal staff.

The Administrative Rules of Montana (ARM 37.47.615) provide for exceptions to the right to a fair hearing. If a request for a fair hearing is submitted in which the perpetrator has criminal charges pending or a district court adjudication is pending, the request will be placed in a pending status until the criminal charges or adjudication are resolved. If the perpetrator is

convicted of the criminal charges, upon review of all supporting documentation by legal staff, the request for a fair hearing may be denied. If district court adjudication is issued, upon review of all supporting documentation by legal staff, the request for a fair hearing may be denied. In the above situations, Central Office staff will mail a denial letter to the perpetrator and/or their attorney.

Substantiation Review – Internal Process

The request for a fair hearing will result in an internal review conducted by the Office of Legal Affairs for the Division. The Child Protection Specialist and his/her Supervisor will send the relevant case file information to the Office of Legal Affairs for the internal reivew prior to the fair hearing.

The interal review panel shall consist of the Child Protection Specialist and Child Protection Specialist Supervisor assigned to the case; as well as, the Regional Administrator in the region in which the fair hearing has been requested; the Office of Legal Affairs attorney and paralegal; and a neutral staff member from CFSD if necessary. The neutral CFSD staff member shall be selected by the Field Services Administrator in applicable cases

The review panel will determine whether or not the evidence and case record supports the substantiation. If the Substantiation Review Panel determines the documentation does not support the substantiation, a letter shall be sent to the individual requesting the fair hearing informing him/her of the internal review and the decision regarding whether to reverse the substantiation. The Office of Legal Affairs, Central Office, or Regional Supertask person will change CAPS to UNX (unsubstantiated after review). If the Substantiation Review Panel upholds the substantiation, the fair hearing request will be sent to the Fair Hearings Office.

References

Mont. Code Ann. § 41-3-201 through 205.
Mont. Admin. R. 37-47-315
Mont. Admin. R. 37-47-601, et. seq.

Rev. 10/01
Rev. 10/02
Rev. 10/03
Rev. 10/04
Rev. 10/07
Rev. 10/09
Rev. 01/12
Rev. 03/12

Rev. 08/12
Rev. 02/13
Rev. 07/13
Rev. 01/14
Rev. 11/15

Background

In-Home/Reunification Services may be provided by division personnel ('in-house') or through contracted providers, as available in each region. When In-Home/Reunification Services are provided in-house, the Child Protection Specialist refers a family for services by following regionally established protocols. This policy section applies directly to communication expectations of CFSD staff with contracted providers.

The referring Child Protection Specialist can request a copy of the In-Home/Reunification contract from the In-Home/ Reunification Contract Liaison at Central Office (406) 841-2400.

The requirements of the Adoption and Safe Families Act of 1997 compels states to make concerted efforts to prevent removal of children from their homes and to reunify families in which efforts to prevent removal failed and the children were placed in out-of-home care. Services under the Family Preservation and Support Services grant and in compliance with the Act are:

- Community-based family support services;
- Family preservation services;
- Time-limited family Reunification services; and,
- Adoption promotion and support services. (Provision of this service is outlined in Child and Family Services Policy Manual: Adoption Post-Adoption 603-10)

The State's focus for In-Home/Reunification Services is to divert children from entering the foster care system; reduce the duration of stay in foster care; and, alleviate safety concerns in a family whose children have been removed so children may safely be reunited with their family.

In-Home/Reunification Services are most effective when provision is intense following referral, for example, 60 -100 hours of services provided to the family within the first three months of a family crisis. The Child Protection Specialist should be mindful of this when requesting frequency and intensity of services on referral.

In-Home/Reunification Services are to be provided to a family primarily within the home; the exception is when the contractor is providing Supervised Visitation or participation in a FGDM.

Service Descriptions

Community Based Family Support Services are designed to promote the safety and well-being of children and families; increase the strength and stability of families (including foster, and extended families); increase parents' confidence and competence in their parenting ability; afford children a safe, stable and supportive family environment to strengthen parental relationships and promote healthy marriages; and, to otherwise to enhance child development.

Services are instituted in situations where participation will preserve the family unit. Risk and Safety have been assessed in these instances and there is no imminent risk of removal of the child (ren), however there is cause to believe that abuse and neglect may become a factor the future, and therefore intervention is deemed necessary and appropriate. These children/families generally do not have an open CPS case, and are considered voluntary.

Family Preservation Services are designed to help families (including adoptive and extended families) at risk or in crisis. Service programs are designed to:

- Return the child(ren) to families from which they have been removed; be placed for adoption; be placed with a legal guardian; or, if adoption or legal guardianship is determined not to be safe and appropriate for the child, in some other planned, permanent living arrangement;
- Provide preventative services such as intensive family preservation programs, designed to help children at risk of foster care placement remain safely with their families;
- Provide services designed to provide follow-up care to families to whom a child has been returned after a foster care placement; or,
- Provide services designed to improve parenting skills in such areas as child development, family budgeting, health, nutrition and coping with stress by reinforcing parents' confidence in their strengths, help in the identification of

personal needs and providing skill building activities

Time-limited Family Reunification Services are designed to facilitate the Reunification of the child safely and appropriately in a timely fashion, not to exceed the 15 month period that begins on the date the child is considered to have entered foster care. These services may include the following:

- Individual, group, and family counseling;
- Inpatient, residential, or outpatient substance abuse;
- Treatment services;
- Mental health services;
- Assistance to address domestic violence;
- Family Group Decision Making;
- Supervised visitation;
- Transportation to and from any of the above services.

Family Group Decision Making Meeting Attendance: An invitation can be issued by the Child Protection Specialist at any time to facilitate communication and planning between Child Protection Specialist, the family and In-Home/Reunification providers. A Form CFS-050 does not need to be completed for a FGDM referral.

Supervised Visitation: Means a visit between parent(s) and a child who is in foster care. This may be conducted at the CFSD office, or at the office of the In-Home/Reunification Service provider.

As the monitoring needs of the family change, the Child Protection Specialist works with the In-Home/Reunification provider on other appropriate visitation areas. If children are in different out-of-home placements or if some children are living with the parents, efforts must be made by the referring Child Protection Specialist to arrange for sibling visitations.

Family and Child Assessment: Means an assessment of the client's physical, medical, nutritional, psychosocial, developmental, educational status in the context of the family by the In-Home/Reunification provider. The Child Protection Specialist may request an assessment upon the initial contact and first subsequent visits by the In-Home/Reunification provider with the family or as an ongoing process.

Resource Referral: Means establishing and maintaining needed and appropriate services that have been requested for referred families by the Child Protection Specialist which are completed by the In-Home/Reunification provider. This includes but is not limited to helping the family access parenting classes, housing, anger management classes, assistance in dealing with stress, coping skills, child care services, medical homes, and / or substance abuse counseling.

The Child Protection Specialist should provide information necessary to the In-Home/Reunification provider to enable active participation by the family in attaining these services and avoiding duplication of services.

Parenting Skill Building: Means direct (one on one) training provided for the purpose of improving the client's ability to raise their children. Direct skill building includes but is not limited to appropriate discipline, role modeling, age appropriate expectations, bonding, etc.

Family Behavior Skill Building: Means the provision of direct training to a family in areas such as anger management, preventing conflict, communication, assertiveness, behavior management techniques, crisis management, or providing counseling (non-therapeutic).

Organizational Skills Training: Means training that target assessed areas of weakness in the ability of the client to conduct daily affairs. This training is provided in areas such as basic life skills, including but not limited to shopping for necessary items, meal preparation, household management skills, budgeting, and problem solving.

Educational Classes: Means classes which may be offered by the In-Home/Reunification providers as a supplement to the above services. A family must be receiving other services from an In Home/ Reunification provider to qualify for access to Educational Classes.

Transportation: Means travel with or without a member of client family and conducted on behalf of the families needs. A family must be receiving other services from an In Home/ Reunification provider to qualify for access to transportation services.

Service Availability

Services that are listed may not be available through In-Home/Reunification service providers in your area. Coordination of the service provision, goals, and outcomes are expected as a part of the referral by the Child Protection Specialist.

NOTE: Case management of the families who received these services remains with the Child Protection Specialist or Supervisor who requested services from the In-Home/ Reunification provider.

Child Abuse and Neglect Reporting

An employee who contracts with or works for the Department to provide direct services to children will promptly report knowing or having reasonable cause to suspect that a child is at risk of being abused or neglected to Centralized Intake.

A provider reporting known or suspected child abuse and neglect to the Child Protection Specialist **does not** substitute for the reporting requirements of mandated reporters to Centralized Intake. Any Child Protection Specialist who receives a direct report of child abuse or neglect from a provider should inform the provider that they must also report this to **Centralized Intake, 1-866-820-5437.**

Goals

When services are available and there is no imminent risk of harm to the child(ren) by remaining in the home or by reunifying with the parent(s), the agency goals are:

- To increase the capacity of an at-risk families to nurture their children in healthy environments by providing parents with the knowledge, skills and support to do so; and,
- To decrease the length of time the child remains in foster care.

Eligibility Criteria for In-Home Services

To refer a family to an In-Home/Reunification provider for services, a report from Centralized Intake must first be received and a determination for referral must be made.

Requests for referrals from outside agencies (including In-Home/Reunification contractors) or self referrals from families are not eligible for referral to In-Home/Reunification Services

unless they have been reported to Centralized Intake.

Referral for Services

The following children are eligible for referral to In-Home/ Reunification Services after a report has been received and investigated by CFSD:

- Child(ren) is/are at risk of abuse or neglect but the Child Protection Specialist has **not opened** a child protective services case;
- Child(ren) is/are at risk of abuse or neglect and has recently been referred to the Department, the child has not been removed from the parental home and the Child Protection Specialist **has opened** a child protection services case; or
- Child (ren) has/have been placed in out-of-home care by the Department and the parent(s) are participating in a treatment plan for Reunification.

In addition to the above criteria the family must:

- Demonstrate the ability to provide minimally acceptable safe child care;
- Be willing to accept the service(s) offered; and,
- Live in a home which does not pose an immediate threat to the health or safety of the child or to the service provider.

Prior to a referral, a CFSD Release of Information Authorization For the Use and Disclosure of Information form, DPHHS-CFS-210 must be filled out with the parent, and the In-Home Service provider box must be checked.

To make a initial referral, the Child Protection Specialist must submit the following documents to the In-Home/Reunification Services Provider:

- DPHHS-CFS-050 In-Home/Reunification Services Referral Form (With a copy retained in the case file);
- Current and ongoing Court Ordered Treatment Plan(s)

- Current Family Functioning Assessment (FFA)

The DPHHS-CFS-050's are available on the OURS under CFS Forms/In-Home Services and can be accessed at:

http://ours.hhs.mt.gov/forms/CFSforms/InHomeServices/CFS-050InHomeReunification.docx

The DPHHS-CFS-503 FFA's are available on the OURS under CFS Forms/SAMS Safety Forms and can be accessed at:

http://ours.hhs.mt.gov/forms/CFSforms/Samssafetyforms/CFS-SAMS-503FamilyFunctioningAssessmentFFA.docx

The Child Protection Specialist may refer the family for community based family support services, family preservation services, or time-limited reunification services.

As the service needs of a family change from one category of service to another (e.g. if there is a placement with birth parents), the Child Protection Specialist must submit to the In-Home/Reunification provider an updated CFS-050.

The referring Child Protection Specialist will at the time of referral and on a continual basis as service goals are met by the family, provide the In-Home/Reunification service provider with the following information regarding the family:

a) The basis for Child Protection Specialist involvement and the status of Court action;

b) Expectations of types of services to be provided;

c) The purpose for the services to be provided and whether it is for family preservation, prevention or Reunification services;

d) Frequency and intensity of requested services; e.g. hours per week; The Child Protection Specialist should consult with In-Home/Reunification provider about the frequency and intensity of services after the provider has completed the initial assessment of the family;

e) The anticipated length of time services are to be provided; and

f) Detailed information regarding the family's safety assessment including family dynamics and safety precautions

Communication and Progress Updates

The Child Protection Specialist and In-Home/ Reunification services provider must maintain a close working relationship. The referring Child Protection Specialist can expect that the provider is responsive to families experiencing crisis or concerns that can result in the maltreatment of children. The provider is expected to communicate concerns at the time they are identified to the Child Protection Specialist.

The provider is required to notify the referring Child Protection Specialist at the time of acceptance or denial of the referral in writing. The Child Protection Specialist must update the status of the case in the case file when notification of acceptance or denial occurs. The referring Child Protection Specialist must also indicate if there is a safety concern that would prohibit an appropriate meeting with the family in the home by the provider within established time lines (according to the In-Home/ Reunification contract), before a provider closes an open case the provider must notify the referring Child Protection Specialist.

Supervisors of home visitors must provide updated information regarding current caseloads and available slots to the local Child Protection Specialist Supervisors in their respective service areas.

Child Protection Specialist and In-Home\Reunification Service providers must meet each calendar month to staff cases.

Family Service Plans

The Family Services Plan (FSP) is developed by the In Home/ Reunification Service Providers within 30 days of the acceptance of the referral. The FSP is based on the needs of the family as defined by the referring Child Protection Specialist on the CFS-050. It is individualized for each family and should establish measureable goals and outcomes for referred services. The Child Protection Specialist may participate in the development of the FSP with the provider, family, and other

interested professionals. The focus of the FSP should be on eliminating risk and safety concerns that brought the family to the attention of the Department. If a treatment plan has been established, the FSP should reflect the requirements that are outlined in that plan.

The FSP must have dated signatures from the referring Child Protection Specialist, the family, the In-Home/Reunification worker, and In-Home/Reunification supervising worker except in non open Child Protection Specialist cases where the Child Protection Specialist Supervisor assigned to the case signs off on the FSP.

Over time, services identified in the FSP may change upon approval of the Child Protection Specialist.

Documentation

The following documents are to be maintained in the client's case file if it is an open case, and a family case file if it is a voluntary/non open case:

- The CFSD Release of Information Authorization for the Use and Disclosure of Information form, DPHHS-CFS-210.
- The CFSD Referral form, DPHHS-CFS-050 which reflects the frequency, intensity, and updates on each family's progress, and the family's response to In-Home/Reunification Services;
- In-Home/Reunification provider's monthly written report;
- Form DPHHS-CFS-208, Parent-Child Interaction Plan providing documentation of supervised visits;
- A copy of the initial Family Service Plan and any revisions thereof within two (2) weeks of obtaining all signatures in open CPS cases; and,
- A copy of the termination summary must be submitted to the assigned Child Protection Specialist within 30 days of closure (when the family has an open CPS case).

References

Mont. Code Ann. § 41-3-101
Mont. Code Ann. § 41-3-201
Mont. Code Ann. § 41-3-301
Mont. Code Ann. § 41-7-102 et seq.

Rev. 10/03
Rev. 10/04
Rev. 10-05
Rev. 10/06
Rev. 10/07
Rev. 10/08
Rev. 12/12
Rev. 09/14

I. Montana Resources
b. CFS Policy Manual
ii. Legal Procedure

Legal Basis

The policy of the State of Montana is to provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for their care and protection. To protect children from child maltreatment, the Child and Family Services Division has statutory authority to intervene in the child's life when the child protection specialist determines that the child would be unsafe if the child continued to reside with his/her parents or legal custodian. In making the decision to intervene and place the child in an out-of-home placement, the child's health and safety are of paramount concern.

Emergency Placement

If the child protection specialist determines that a child is in immediate or apparent danger of harm, the child protection specialist may use the authority of emergency protective services to immediately remove the child from the dangerous situation. **A substantiation of child abuse or neglect is not required to initiate emergency protective services or to make an emergency placement.**

Child in Immediate Danger

Examples of cases which might require emergency removal include:

- a child left without appropriate supervision when the child is not physically, mentally, socially, or emotionally mature
- a child who has been physically abused and is in need of medical attention;
- the child protection specialist has reason to believe that retaliation to the child will occur;
- a child who appears to be in need of protection, but whose parents are likely to take the child and flee protective services authority;
- a child who has been physically or sexually assaulted and the child is not safe in the home; or
- a child is in danger because of the occurrence of partner or family member assault.

If the child protection specialist investigating the home is unsure whether or not an immediate removal of the child is necessary, the child protection specialist should contact his or her

immediate supervisor. If the immediate supervisor is not available, another supervisor in that region or the Regional Administrator should be contacted for assistance.

Cases Involving Domestic Violence

In cases involving domestic violence, the child protection specialist must consider the situation of the victimized adult in addition to the safety of the child.

If the child protection specialist determines that an adult member of the household is the victim of partner or family member assault, the child protection specialist shall provide the adult victim with a referral to a domestic violence program. The form of the referral will depend on circumstances and will consider the safety of both the child(ren) and the adult victim.

If the child protection specialist determines, after investigation, 1) that the child is in danger because of the occurrence of partner or family member assault against an adult member of the household; and 2) that the child needs protection as a result of the occurrence of partner or family member assault against an adult member of the household, the child protection specialist shall take appropriate steps for the protection of the child. The steps taken by the child protection specialist may include:

1) making reasonable efforts to protect the child and prevent the removal of the child from the parent or guardian who is a victim of alleged partner of family member assault;
2) making reasonable efforts to remove the person who allegedly committed the partner or family member assault from the child's residence if it is determined that the child or another family or household member is in danger of partner or family member assault; and
3) providing services to help protect the child from being placed with or having unsupervised visitation with the person alleged to have committed partner or family member assault until the child protection specialist determines that the alleged offender has met conditions considered necessary to protect the safety of the child.

Note: See Section 402-1, Placement Procedures.

The Division may locate and contact extended family members upon placement of a child in out-of-home care. The Division my

share information with extended family members for placement and case planning purposes.

Procedure

When the child is removed from the home on an emergency basis, the child protection specialist shall:

- prepare an affidavit and submit it to the county attorney as soon as possible and always within 48 hours, excluding weekends and holidays. The affidavit must allege that the child appears to be at risk of or to have been abused, neglected, or abandoned and must state the basis for the petition (the facts which led the child protection specialist to make the placement and which support the child protection specialist's determination that the child is or appears to be abused, neglected, or abandoned). When drafting the affidavit the child protection specialist should identify the child(ren) by initials. **Note: The child protection specialist must interview the parents of the child to whom the petition pertains, if the parents are reasonably available, before the petition may be filed**;

- provide a copy of the affidavit to the parents, if possible, within 2 working days of the emergency removal;

- the child protection specialist is strongly encouraged to attach a current picture of the child to all affidavits or reports submitted to the court. The exception to this "strongly encouraged" is if the county attorney, deputy county attorney, CPU attorney representing the division or the judge recommends against it;

- if appropriate, obtain a placement agreement from the parent authorizing the Department to place the child in foster care. If the parent is willing to enter into a voluntary foster care placement agreement, the child protection specialist must comply with the following requirements:

  1) the voluntary foster care placement may last no longer than 30 days;

  2) the parent must be informed that s/he may have another person present whenever the terms of the voluntary foster care placement agreement are discussed between the child protection specialist and the parent ; and

3) the voluntary foster care placement agreement must be executed in the presence of the judge of a court of competent jurisdiction if the child is an Indian child as defined by ICWA;

- notify the parent at the time placement is made of the decision to place the child in care. The notification must include the reason for removal, information regarding the show cause hearing and the purpose of the show cause hearing, and notification that the parent having physical custody of the child has a right to have a support person present during any in-person meeting with the child protection specialist (see the Notification to Parents on page 12 of this section). The child protection specialist should make every effort to notify the parents in person or by phone as soon as the child is removed from the home. These efforts must be noted in the case record. A copy of the Notification to Parents must be included in the case record. A copy of the Notification should be submitted to the county attorney with the affidavit;

- provide the parent with a copy of the "What Happens Next" booklet;

- place the child with the child's noncustodial parent or extended family, when it is in the best interest of the child and when the home is approved by the Department. (see Sections 304-1 and 402-4);

- gather information necessary from the parent or caregiver to complete the CFS-206 A & B, Information on Child for Placement Purposes and provide a copy of the CFS-206 A &B to the child's foster care provider;

- ask the parent if the child is an Indian; and

- gather information necessary to complete DPHHS-CFS-107, Part 1, Child's Social and Medical History.

IV-E Responsibility

To protect future eligibility for the child, the child's IV-E eligibility shall be determined for the month in which the parental agreement was signed or the date the petition is filed **even if the child is in unpaid kinship care**. See Section 405-1, IV-E Foster Care.

Legal Procedure
Forward Information to County Attorney

Following emergency removal, the county attorney must file a petition within 5 working days, excluding weekends and holidays. The child protection specialist must forward the necessary information to the county attorney within 2 working days, excluding weekends and holidays. Notification that the parent having physical custody of the child has the right to have a support person present during any in-person meeting with the child protection specialist must also be included in the petition for emergency protective services.

If the child protection specialist has not substantiated child abuse or neglect, the county attorney will file a petition for immediate protection and emergency protective services and/or TIA; if the child protection specialist has substantiated child abuse or neglect, the county attorney will file a petition for immediate protection and emergency protective services and temporary legal custody.

Affidavit

The affidavit is the child protection specialist's facts of the case but must include the parents' statements if any were made.

The affidavit is the document used by the county attorney to determine whether to file a petition with the court. The affidavit contains the facts upon which the county attorney will decide what relief to request of the court. District court filing standards require child protection specialists to refer to the child(ren) by initials.

If the county attorney decides that legal action is necessary, the affidavit is attached to the petition when filed. Preparation of the affidavit alone does not start a legal action. The county attorney starts the legal action by filing a petition with the court and the affidavit provides support for the facts alleged in the petition.

The child protection specialist should identify in the title whether it is an affidavit for TIA, temporary legal custody, guardianship, or permanent legal custody.

The affidavit should only include observations of the child protection specialist and facts determined as a result of the investigation and parents' statements. Only those facts within the personal knowledge of the child protection specialist or any person who will be called as a witness should be contained in the affidavit. Only statements of individuals who are parties,

alleged perpetrators or potential witnesses should be included in the affidavit. Also, the child protection specialist should not include personal or subjective opinions or conclusions such as "I think the child was abused." Only the facts, such as "the child suffered a spiral fracture while in the exclusive care of the father" should be included. The child protection specialist's personal beliefs about the family should not be a part of the affidavit.

The original affidavit is forwarded to the county attorney and a copy retained in the file. The affidavit will be attached to the legal papers which are served on the parents, **so the name(s) of any reporter or individual who provided information on the alleged child abuse/ neglect should not be identified in the affidavit**.

If the child has been removed from the parental home, the affidavit must contain facts to support a judicial finding that continuation of the child's residence in the home would be contrary to the child's welfare or, in the alternative, that placement of the child in out-of-home care is in the child's best interest.

The affidavit must contain information regarding statements made, if any, by the parents about the facts of the case.

The child protection specialist is strongly encouraged to attach a current picture of the child to all affidavits or reports submitted to the court. The exception to this “strongly encouraged” is if the county attorney, deputy county attorney, CPU attorney representing the division or the judge recommends against it.

The child protection specialist must provide a copy of the affidavit to the parents, if possible, within 2 working days of the emergency removal.

Petition for Immediate Protection and Emergency Protective Services

When a child protection specialist removes a child because s/he has reason to believe the child is in immediate or apparent danger or harm and the child protection specialist determines that the placement will be longer than two working days, excluding weekends and holidays, the Department must have a legal basis to continue the placement. The petition filed by the county attorney provides the legal basis for the continued placement.

A petition for immediate protection and emergency protective services will generally be the initial petition filed by the county attorney when the child protection specialist places a child in an emergency protective placement. This petition may be combined with a petition for temporary investigative authority or temporary legal custody, depending on whether the child protection specialist has evidence to show the child is at risk of abuse, neglect, or abandonment or evidence to show the child is abused, neglected or abandoned. The petition for immediate protection and emergency protective services may also be combined with a petition to terminate the parent-child relationship when a petition has been filed requesting a determination that preservation or reunification services need not be provided.

The petition for immediate protection and emergency protective services must contain facts to support a finding, based on probable cause, the child appears to be abused, neglected, or abandoned or the child is in danger of abuse, neglect, or abandonment. The petition must also contain facts establishing that continued residence of the child with the parents is contrary to the welfare of the child.

The petition for immediate protection and emergency protective services must state the specific authority requested. **The authority requested under a petition for immediate protection and emergency protective services does not constitute a court-approved treatment plan.**

The following relief may be requested in a petition for immediate protection and emergency protective services. If the court finds probable cause that the child is at risk or is being abused or neglected, these reliefs may be granted in an Order for Immediate Protection and Emergency Protective Services:

a) the right of entry by a peace officer or child protection specialist;

b) the right to place the child in temporary medical or out-of-home care, including but not limited to care provided by a noncustodial parent, kinship or foster family, group home, or institution;

c) the right for the department to locate, contact, and share

information with any extended family members who may be considered a placement options for the child;

d) a requirement that the parents, guardian, or other person having physical or legal custody furnish information that the court may request and obtain evaluations that may be necessary to determine whether a child is a youth in need of care;

e) a requirement that the perpetrator of the alleged child abuse or neglect be removed from the home to allow the child to remain in the home;

f) a requirement that the parent provide the child protection specialist with the name and address of the other parent if known, unless parental rights to the child have been terminated, including the name and address of a putative father to serve the legal documents;

g) a requirement that the parent provide the child protection specialist with the names and addresses of extended family members who may be considered as placement options for the child who is the subject of the proceeding; and

h) any other temporary disposition that may be required in the best interests of the child that does not require an expenditure of money by the Department unless the court finds after notice and a hearing that the expenditure is reasonable and that resources are available for payment

Other Relief requested in Petition for Immediate Protection and Emergency Protective Services

Relief other than those listed above may be requested in the petition for immediate protection and emergency protective services. However, if the following relief is requested, the court cannot grant the relief until after the show cause hearing:

a) inquire into the financial ability of the parent, guardian, or other person having physical or legal custody to contribute toward the care of the child and order a contribution; and

b) require specified examinations, evaluations, or counseling.

Order for

The order the judge issues based on the filing of the petition for

Immediate Protection and Emergency Protective Services

immediate protection and emergency services is called an "*ex parte*" order. This means the judge issues the order based on the petition and the information contained in the affidavit before a hearing on the facts at issue.

If the court determines that the petition and the affidavit contain facts which establish probable cause that the child has been or is at risk of being abused, neglected, or abandoned, the court may issue an order granting the relief requested in the petition for immediate protection and emergency protective services. The order also must:

a) include a finding that continued residence of the child with the parent is contrary to the welfare of the child or that an out-of-home placement is in the best interests of the child if the *ex parte* is an order for removal; **and**
b) require the person served to comply immediately with the terms of the order and to appear before the court issuing the order on the date specified for a show cause hearing.

Note: In some cases, the child protection specialist has made the determination that the child may safely remain in the home but court intervention is required. In this instance, the court often will grant the child protection specialist the right to place the child if, subsequent to the date of the order, the child protection specialist determines the child may no longer remain safely in the home.

If the child is placed subsequent to receiving an order authorizing the placement, the child protection specialist must obtain from the court a finding that continued residence of the child with the parent is contrary to the child's welfare. This finding must be issued by the court **after** the removal of the child from the home. An order which contains the finding that continued residence of the child with the parent(s) is contrary to the welfare of the child obtained **prior to** removal will not suffice for the "contrary to the welfare" requirement.

In addition, after placement the child protection

specialist must obtain a judicial finding that reasonable efforts were made to prevent the removal of the child from the parent(s) home. Federal regulations require that this judicial finding be made within 60 days of placement. Therefore, even if the court has authorized a placement, after the child is actually placed, a hearing must be held within 60 days of placement to obtain the finding that:

a) placement of the child was in the child's best interests or;
b) continued residence of the child with the parent(s) is contrary to the child's welfare; **AND**
c) reasonable efforts have been made to prevent the placement.

The child protection specialist will obtain a certified copy of the order and copies of any supporting legal documents for the file.

A certified copy of the order, along with a copy of the petition and supporting documents (including a copy of the child protection specialist's affidavit) must be personally served on the person(s) named in the order at least five days before the date set for hearing. If the person(s) cannot be personally served, the person(s) must be served by publication pursuant to Mont. Code Ann. § § 41-3-428 and 429.

Criteria for Case Dismissal

Unless the petition has been previously dismissed, the court **shall** dismiss an abuse and neglect proceeding on the motion of a party, or on its own motion, in any case in which **all** of the following criteria are met:

1) a child who has been placed in foster care is reunited with the child's parents and returned home;

2) the child remains in the home for a minimum of six months with no additional confirmed reports of child abuse/neglect; and

3) the child protection specialist determines and informs the court that the issues that led to the child protection specialist's intervention have been resolved and that no reason exists for further child protection specialist intervention or monitoring.

County Attorney Does Not File

Return Child

If a petition is not filed by the county attorney within 5 working days, a parental agreement is not signed, or a court order obtained, the child must be returned to his or her home.

Advise County Attorney in Writing

If the child protection specialist disagrees with the county attorney's decision not to file, the child protection specialist should, in consultation with his/her supervisor and Regional Administrator, advise the county attorney in writing that the child is being returned to a potentially dangerous situation because the county attorney failed to file. A copy of this notice is placed in the child's file and should be sent to agency legal staff, the child protection specialist supervisor and the Regional Administrator.

Abandoned Newborns

Montana statute allows parents to surrender their newborn babies to an emergency services provider if the newborn is no more than 30 days old. If a parent surrenders a newborn to an emergency services provider, the emergency services provider must deliver the newborn to a hospital.

The hospital must call the local Child and Family Services office within one day of accepting the newborn.

Upon receipt of a call from a hospital regarding an abandoned newborn, the child protection specialist shall, among other things:

a) immediately assume the care, control, and temporary protective custody of the newborn;

b) make a temporary placement of the newborn; and

c) no later than 48 hours after assuming the care, control, and temporary protective custody of the newborn, file a petition with the court (generally a petition for emergency protective services, adjudication, and temporary legal custody based on abandonment with the request for a determination that no reasonable efforts to reunite must be provided) requesting appropriate relief with the goal of achieving permanent placement for the newborn at the earliest possible date;

NOTE: The child protection specialist should work with the county attorney to determine the most appropriate relief to request. The county attorney will probably file a

petition for immediate protection and emergency protective services combined with either temporary investigative authority or temporary legal custody based on abandonment.

Non-Citizens

For specifics regarding child protection specialist responsibilities when a parent voluntarily surrenders a newborn, refer to Section 305-2, Abandoned Newborns.
To place children who are not U.S. citizens or lawful permanent residents of the U.S. the child protection specialist must have permission of the United States Attorney General for the state to be awarded custody.

All non-citizen children in foster care who are not lawful permanent residents of the U.S. are in the legal custody of Immigration and Naturalization Services (INS) unless the U.S. Attorney General gives express consent for custody to be awarded to a state agency. A custody/dependency order issued by a state court regarding such a juvenile would be considered invalid without the consent of the U.S. Attorney General. The law applies as follows:

The youth is an immigrant who is present in the United States and

- has been placed under the custody of an agency or department of a State and been determined to be in need of long term foster care due to abuse, neglect or abandonment;

- has been judicially determined that it is not in his/her best interest to be returned to his/her or parent's previous country of nationality or country of last habitual residence; and

- the U.S. Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status.

State courts do not have jurisdiction to consider the status of an alien in foster care without the consent of the U.S. Attorney General. Birth or adoptive parents do not acquire lawful permanent resident status or any other special status because the status is granted to the youth.

To obtain the U.S. Attorney General's consent send the request to:

District Director or Deputy District Director,
Office of Examinations,
U.S. Bureau of Citizenship and Immigration,
2800 Skyway Drive
Helena, MT 59602.

Enclose the following information:

- Youth's date and place of birth
- Date and manner of entry into the U.S.
- Current immigration status
- Information about the whereabouts and immigration status of the youth's parents and other close family members
- Evidence of abuse, neglect and abandonment of the youth
- The stated reasons why it would not be in the best interests of the youth to be returned to his/her parents' country of nationality or last habitual residence
- The type of court proceedings resulting in the state custody (i.e. juvenile delinquency, temporary care and protection, terminating parental rights)

Once the U.S. Attorney General's consent is received and the youth attains the status of qualified alien, s/he is entitled to federally funded benefits such as Medicaid and IV-E foster care payments if all other eligibility criteria is met.

Indian Child Welfare Act

If there is reasonable belief the child may be an Indian child, ICWA policy must be followed (Section 305-1). The tribe must be sent a letter (DocGen D200) requesting verification of enrollment status. The child protection specialist must also notify the tribe of pending legal proceedings (DocGen D205).

NOTE: Under ICWA, the child protection specialist must make **active efforts** to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family prior to removal. Active efforts should involve and use the available resources of the extended family, the tribe, Indian social services agencies and individual Indian care givers. The child protection

specialist must also have clear and convincing evidence that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

CAPS

Enter the removal service on SERN, using the SERM service code. After completing this screen, CAPS will take you to CREI (Client Removal Eligibility Information) to enter removal information. Also complete CPHL (Client Placement History List). Use PLAD (Placement Detail) for foster care placements and enter the placement service(s) on SERL. All placement services**, including non-paid kinship placements,** must be entered on CAPS no later than 60 days after the actual date of placement (Federal requirement).

To ensure compliance of federal requirements mandating certain dispositional reviews and hearings within strict timeframes after court determinations, after each court hearing (including continuances) the child protection specialist must enter court detail on CRTD as soon as possible. The child protection specialist will need to enter petition date, court hearing date, begin and end dates of the court order, type of hearing (court event), reliefs granted (court dispositions, including those dispositions issued from the bench prior to receiving a signed court order), parties to the hearing, and whether or not the court order has been received. Once a disposition has been entered and confirmed (SHIFT F4), the event, disposition, and dates are not modifiable. The child protection specialist should also enter the court review date to ensure a thirty day advance alert. In addition, CAPS is set up to alert the child protection specialist thirty days after a court date, if the court order has not yet been recorded and when the 12 month permanency reviews are due. CAPS will alert the child protection specialist in advance of the expiration date of each court order, based on the entered end date of the court order.

References

Mont. Code Ann. § 41-3-101
Mont. Code Ann. § 41-3-301
Mont. Code Ann. § 43-3-302
Mont. Code Ann. § 41-3-422
Mont. Code Ann. § 41-3-424
Mont. Code Ann. § 41-3-427
Indian Child Welfare Act, 25 USC 1901, et seq.

MONTANA DPHHS Healthy People. Healthy Communities. Department of Public Health & Human Services

Department of Public Health and Human Services

Child & Family Services Division, Central Office ♦ Centralized Intake Unit ♦ PO Box 8005 ♦

Park Avenue Building ♦ Helena, MT 59604-8005 ♦ Phone: (406) 841-2400 ♦ Fax: (406) 444-4156

Steve Bullock, Governor

Richard H. Opper, Director

DPHHS-CFS-011
Rev. 03/2011

Division of Child & Family Services

NOTIFICATION TO PARENT

If you are the parent having physical custody of your child(ren) you may have a support person present during any in-person meeting with the child protection specialist concerning emergency protective services.

TO:_____ DATE: _____

FROM:_____, Child Protection Specialist PHONE #:_____

Child and Family Services Division Address:_____

Name(s) of Child(ren): 1. _____ 2. _____

3. _____ 4._ _____

REASONS FOR REMOVAL:

On this date, after receiving a report of suspected child abuse, neglect, or abandonment, the Child and Family Services Division (CFSD) investigated the circumstances of the report. CFSD determined that the above-named child(ren) is (are) at risk of child abuse or neglect or is (are) being abused or neglected. After making this determination, CFSD removed your child(ren) from your home and placed him/her/them in emergency foster care. The reason(s) CFSD removed your child(ren) are:

_____
_____
_____
_____
_____

NOTICE OF SHOW CAUSE HEARING:

The next step in the legal process is for a District Court Judge to schedule a Show Cause Hearing. You will be notified of the time, date, and place of the Show Cause Hearing. If you have any questions prior to the hearing, please call the CFSD Child Protection Specialist at the telephone number listed above.

PURPOSE OF SHOW CAUSE HEARING:

The District Court Judge is required to hold a Show Cause Hearing if your child(ren) is (are) removed from your home for longer than 5 working days. At the Show Cause Hearing, the Child Protection Specialist and you will both have the opportunity to provide statements to the Judge. The Child Protection Specialist will explain the reasons that your child(ren) was (were) removed from your home and placed in emergency foster care. You will have the opportunity to tell the Judge why you believe CFSD should not have removed your child(ren). The Judge must consider all the information that you and the Child Protection Specialist present, as well as the statements you make during the hearing.

At the end of the Show Cause Hearing, the Judge will make two decisions:

1) Whether the Child and Family Services Division should have removed your child(ren) from your home; and

2) Whether your child(ren) should remain in temporary foster care.

If the Judge decides that your child(ren) should remain in foster care, the CFSD Child Protection Specialist will work with you to develop a treatment plan. The treatment plan will outline the steps you will need to take for your children to be returned to you.

Guardianship: Definition

A legal guardian is a person who has qualified as a caretaker of a child/youth in the custody of the Department pursuant to court appointment. A legal guardianship is a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the child, custody of the child, and decision-making.

A guardianship is a legally created relationship which can only be dissolved by the court. Guardianship is a permanency option for children from whom a permanency team has made the determination that neither reunification with the child's parents nor adoption is in the best interests of the child.

Who may Petition the Court for Guardianship

A petition for the appointment of a guardian may be filed either by the Department or by the child's Guardian Ad Litem. Because a Guardian Ad Litem may petition the court for appointment of a guardian, the petition for appointment of a guardian is distinguished from the other dispositional options in that only the Department can petition the court for Temporary Investigative Authority, Temporary Legal Custody, Planned Permanent Living Arrangement, or Permanent Legal Custody.

When the Department petitions for guardianship the Child Protection Specialist must file the affidavit in a timely manner to assure the petition is filed and the hearing scheduled within the timeframes applicable to each individual case.

The Child Protection Specialist is strongly encouraged to attach a current picture of the child to all affidavits or reports submitted to the court. The exception to this “strongly encouraged” is if the County Attorney, Deputy County Attorney, CPU Attorney representing the Department or the judge recommends against it.

When a Petition for Guardianship can be Filed

The petition for appointment of a guardian may be filed if the child has been placed in the Temporary or Permanent Legal Custody of the Department. Termination of Parental Rights to the child is not required for the filing of a petition for appointment of a guardian. However, the petition may not be filed prior to a determination by the court that the child has been abused or neglected.

Department Consent

A petition for appointment of a guardian may be filed prior to the Permanency Hearing upon the determination by a permanency team, with approval of the Regional Administrator, that a guardianship is in the best interests of the child and all the conditions precedent exist.

The petition for appointment of a guardian may also be filed in response to the permanency hearing, if the court finds that reunification of the child with the child's parent is not in the best interests of the child. (See Policy Sections 302-3 and 302-7)
https://dphhs.mt.gov/portals/85/cfsd/documents/cfsdmanual/302-3.pdf
https://dphhs.mt.gov/portals/85/cfsd/documents/cfsdmanual/302-7.pdf

Conditions Precedent to Appointment of a Guardian

Before the court can appoint a guardian, the Department must have given written consent. The guardianship may be subsidized or nonsubsidized and the Department must consent to both subsidized and nonsubsidized guardianships.

Before the Department can consent to and petition the court for appointment of a guardian for a child in state custody, the court must make a finding of fact for each of the following conditions:

- the child(ren) have been adjudicated a youth in need of care;
- the Department has made reasonable efforts to reunite the parent and child(ren);
- further efforts to reunite the parent and child by the Department would likely be unproductive;
- reunification of the parent and child(ren) would be contrary to the best interests of the child(ren);
- the guardianship is in the best interests of the child;
- the child(ren) have lived with the potential guardian in a family setting and the potential guardian is committed to providing a long-term relationship with the child(ren);
- it is in the best interests of the child(ren) to remain or be placed with the potential guardian;

- either termination of parental rights to the child(ren) is not in the child's best interests or parental rights to the child(ren) have been terminated, but adoption is not in the child's best interests; and

- if the child(ren) concerning whom the petition for guardianship has been filed is an Indian child(ren), as defined in the Indian Child Welfare Act (See Section 305-1), the child's tribe has received notification from the state of the initiation of the proceedings.

Effect of Decree of Guardianship

The entry of a decree of guardianship terminates the custody of the Department and involvement of the Department with the child, the child's parents, and the guardians except for the provision of a subsidy, if any.

The decree of guardianship awards to the legal guardian the powers and responsibilities of a parent who has not been deprived of custody of the parent's minor child. A guardian has the following powers and duties:

- take reasonable care of the child's personal effects and commence protective proceedings if necessary to protect other property of the child;

- receive money payable for the support of the child from the child's parent, guardian or custodian; and

- facilitate the child's education, social or other activities and authorize medical or other professional care, treatment, or advice; and

- consent to the marriage or adoption of the child.

What if the Guardian wishes to adopt?

Upon finalization of the guardianship, the Department's involvement ceases to exist legally except for the provision of subsidy.

MCA 41-3-444(5) and 72-5-231(3) allows the guardian to pursue and consent to adoption of the child for which it has guardianship. The guardian can pursue the adoption privately without the Department's assistance or intervention by obtaining his/her own counsel. The guardian(s) must have a

court order showing that parental rights were terminated. If rights were not terminated prior to the guardianship finalization, the guardians can pursue termination on their own through voluntary relinquishment or involuntary termination. The guardian will also need a preplacement evaluation approving him or her to adopt.

If the Department provided a guardianship subsidy and the family wishes to pursue an adoption subsidy, the guardian should contact the Department prior to the finalization of the adoption to determine eligibility for an adoption subsidy.

Revocation of the Guardianship

The court may revoke a guardianship if the court finds, after hearing on a petition for removal of the child's guardian, that continuation of the guardianship is not in the best interests of the child. The petition of revocation of the guardianship may be filed by the legal guardian, the Department, a court appointed Guardian Ad Litem, or the child's parents (if the rights of the parents have not been terminated).

Notice of hearing on the petition must be provided by the moving party to the child's legal guardian, the Department, a court appointed guardian ad litem, the child's parent (if rights of the parent have not been terminated) and other persons directly interested in the welfare of the child.

The petition may include a request for appointment of a successor guardian. After notice and hearing on a petition for removal or permission to resign, the court may appoint a successor guardian or may terminate the guardianship and restore Temporary Legal Custody to the Department.

NOTE: The guardianship discussed in this section is established under Title 41, Child Abuse and Neglect. None of the requirements discussed in this section apply to a guardianship appointed pursuant to Title 72, Chapter 5 (guardianships established under the Probate Code) with the exception of the referenced MCA 72-5-321 which establishes powers and duties of the guardian.

References

Mont. Code Ann. § 41-3-422.
Mont. Code Ann. § 41-3-442.
Mont. Code Ann. § 41-3-444.
Mont. Code Ann. § 41-3-445.

Mont. Code Ann. § 41-3-607.
Mont. Code Ann. § 72-5-231.
Mont. Code Ann. § 42-2-301
Mont Code Ann. § 42-3-202
Indian Child Welfare Act, 25 U.S.C. 1901 et seq.

Rev. 10/03
Rev. 10/05
Rev. 10/07
Rev. 06/10
Rev. 10/12
Rev. 02/14
Rev. 09/14

I. Montana Resources
b. CFS Policy Manual
iii. Substitute Care

Definition

SUBSTITUTE CARE is full-time care of a child in an out-of-home setting for the purpose of providing food, shelter, security, safety, guidance and, if necessary, treatment to children who are without the care and supervision of their parents or guardians. Out-of-home care, foster care and substitute care are used interchangeably throughout this section of the manual.

Philosophy

Placement of a child out of his/her home should occur only after careful consideration of the alternatives, and a determination that the safety of the child is threatened due to immediate or apparent danger of maltreatment. The safety of the child is the primary consideration. Every effort should be made to avoid multiple placements.

A child is entitled to a permanent home of his/her own. Generally, the child's home with his/her birth parents is the best home for the child.

When agency intervention into the family becomes necessary in order to protect the child, placement of the child as close as possible to the home of the birth parents provides the child maximum opportunity for visits with his/her birth parents while services are provided to the family.

The goal should be to reunify the family, or if that is not possible, to promptly implement a permanent placement plan. The Division is committed to the expedited permanent placement of children who are placed in substitute care.

Placement Preference

When the decision has been made to place the child, consideration should first be given to a placement with the non-custodial parent, extended family or kinship care home approved by the Division. Placement in a tribally licensed foster family may also be one of the options considered. When selecting an out-of-home placement for the child, the child's safety and well being must be of paramount consideration. Placement should be based upon consideration of the best interests of the child. Factors to be considered in selecting a placement are:

- the services the child will need based on an assessment of the physical, educational and psychological needs of the child;
- the child's race and the role racial identity has played in the child's life;
- the availability and appropriateness of placement with siblings;
- the location of the child's family and the need to maintain contact with family members;

- identification of the child's religion and the role that religion has played in the child's life; and
- other factors particular to the child and the child's circumstances.

If it is necessary to place a child in a setting that is not optimal, consideration should be given to moving the child to a more appropriate placement as soon as possible.

Sibling Placement

Siblings are to be placed together whenever possible. If placement with siblings is determined not to be in the best interests of the child, the reasons must be documented and submitted to the supervisor for approval.

Placement of Indian Children

To ensure compliance with the Indian Child Welfare Act, the placing worker should ask if the parent or the child is of Indian descent. When placing an Indian child, the Child Protection Specialist must follow the order of placement identified in the Indian Child Welfare Act. (Refer to Section 305-1, Indian Child Welfare Act.) Consultation with Tribal Social Services staff regarding ICWA preferred placement options for Indian children is recommended.

Least Restrictive Placement

Children are to be placed in the least restrictive, most appropriate setting necessary to meet the needs of the child. These settings include:

- a member of the child's immediate family;
- other relatives or friends, as appropriate;
- a state licensed youth foster family;
- a tribally licensed youth foster family;
- a licensed youth group home; or
- a licensed child care agency.

Kinship Care

A child will be placed with the child's family (or other kin as defined in Policy Section 402-4, Placement in Unlicensed Kinship Care) when it is in the best interest of the child, and when the home is approved by the Division.

Child Protection Specialist Responsibility

Kinship care is the first option that should be considered and assessed when a child is being placed in out-of-home care. When the child is placed in kinship care, the Division should support both

the birth parents and kinship care providers in their respective roles. It is the responsibility of the placing worker to ensure that a Kinship Care Agreement tailored to meet the specific case is completed and signed as required by Policy Section 402-4, Placement in Unlicensed Kinship Care.

Parental Involvement

Birth parents will be involved to the extent possible in planning for their child's out-of-home placement. This may include family preservation services, family group decision-making meetings, preparing the child for placement, maintaining contact with the child during placement and planning for timely permanency for his/her child.

Child's Involvement

The child should be involved, consistent with age and maturity, in the child's placement process. This includes preparation prior to placement, contact with his/her sibling during placement and development of a life story book.

References

Mont. Code Ann. § 41-3-101
Mont. Code Ann. § 41-7-102
Mont. Code Ann. § 42-2-601
Mont. Admin. R. 37.50.101, et.seq.

Rev. 10/03
Rev. 09/08
Rev. 10/07
Rev. 10/11
Rev. 02/14
Rev. 09/14

Decision to Place
Child Protection Specialist Responsibility

Placement of a child in a setting outside of the home is appropriate when a child's life or health is seriously threatened by remaining in the home. Out-of-home placement may also be used as part of a specific treatment plan. The Child Protection Specialist and his/her supervisor are responsible for placement decisions for abused and neglected children or children adjudicated youth in need of care.

The worker will consult the Family Resource Specialist for assistance in identifying the most appropriate licensed placement available. Other professionals such as probation officers, physicians, nurses and school personnel and Tribal Social Services staff may be consulted when making placement decisions. These decisions include not only placement and type of care, but also what services are needed for the child and the family. Consultation with tribal staff regarding placement options as well as the application of culturally appropriate services should occur in each ICWA case. Appropriate services may be available through tribal programs and such options should be explored fully.

Voluntary Placements

There are some circumstances where a parent may seek to voluntarily place his/her child in foster care. If the Division is involved with the family or is going to make foster care payments, the worker should evaluate whether such care is appropriate before agreeing to place the child at the parent's request. This type of placement should not be accepted unless accompanied by the development of a specific plan for the return of the child to the home. The elements of the plan will depend upon the circumstances leading to the request for placement. The plan should be as extensive as is necessary to reunite the family.

Agreement for Foster Care Placement

The Division may enter into a written agreement with a parent or other person responsible for the child's welfare which allows the Division to place the child for up to 30 days in a temporary out-of–home placement. This agreement is a contract, which authorizes the Division to place the child(ren) in foster care at the request of the parent or legal custodian of the child. The agreement does not give the Division legal custody of the child but merely grants the Division permission to place the child.

A DPHHS-CFS-012, Agreement for Foster Care Placement must be used in conjunction with a DPHHS-CFS-202 Voluntary Protective Services Agreement when the parent(s) or legal custodian of the child and the Child Protection Specialist agree that temporary

placement of not more than 30 days is needed. Refer to policy section 201-1, Investigation, Legal Base.

Voluntary Placement of Indian Children

If a voluntary placement of a child who meets the definition of an Indian child as defined under ICWA is planned, the voluntary agreement for foster care must be signed before a judge and accompanied by the judge's certificate that the terms and consequences were fully explained in detail and were fully understood by the parent. The court must also certify that the parent fully understood the explanation in English or that it was interpreted into a language that the parent understood.

Note: If the child to be placed is an Indian child to whom ICWA applies, the DPHHS-CFS-ICWA-253 Birth Mother's Consent to Foster Care Placement and/or the DPHHS-CFS-ICWA-254, Birth Father's Consent to Foster Care Placement must be used. Refer to policy section 305-1, Indian Child Welfare Act, Voluntary Proceedings, pages 13 and 25-28.

A voluntary placement allows the parent to revoke the agreement at any time. If a parent asks to have the child returned, the child must be returned within two working days of the termination unless the Division files an abuse and neglect petition. If court action is necessary to assure protection of the child and placement is considered vital for the child's protection, the Child Protection Specialist shall seek an appropriate court order.

Voluntary placements may be appropriate when abuse or neglect has taken place, but does not pose a serious threat to the safety of the child and the parent(s) have signed a DPHHS-CFS-202 Voluntary Protective Services Agreement.

A voluntary placement may be appropriate when:

- the parent(s) is temporarily absent from the home (i.e., hospitalized); or
- the parent feels unable to provide adequate care for the child and the parent is willing to work with the agency to address the problems.

Voluntary placement agreements should not be used as legal authority to place a child in a residential treatment facility unless approved by the Regional Administrator.

Even when parents agree to place their children voluntarily, a petition should be filed if any of the following conditions exist:

- the child experienced life threatening abuse, multiple injuries, burns, head or central nervous system injury, sadistic injury, severe neglect, incest, or injuries which imply violent outbursts, or lack of impulse control);
- abuse or neglect has escalated or continued after the initial intervention;
- the parent's behavior is dangerous to the child (e.g., sociopathic, psychotic, suicidal, homicidal);
- the child has been exposed to the criminal production or distribution of dangerous drugs or the operation of an unlawful clandestine laboratory;
- the parents consistently deny problems and/or refuse to negotiate and sign a voluntary protective services agreement; or
- the child is rejected or unwanted.

Involuntary Placement

When a child is in imminent risk of harm and emergency protective services are necessary to protect the child, the criteria and procedures to be followed are contained in Policy Section 302-1, Immediate Protection and Emergency Protective Services. If placement will be made with an unlicensed kinship provider, refer to Policy Section 402-4, Placement in a Kinship Care Home.

Documentation for Legal Authority To Place

All placements must be supported by one of the following:

- an affidavit supporting the need for emergency placement provided to the county attorney within 48 hours, excluding weekends and holidays;
- a petition for immediate protection and emergency protective services, temporary investigative authority, temporary, or

permanent legal custody must be filed with the court within 5 days (excluding weekends and holidays) of placement **and** a certified court order obtained granting the Division the right to place the child in protective custody must be obtained;

- an Affidavit of Waiver of all Parental Rights, Relinquishment of Child and Consent to Adoption (waiver or relinquishment) signed by the parents relinquishing all rights and responsibilities to the Division; or,

- a CFS-12, Parental Agreement for Foster Care Placement DPHHS-CFS-ICWA-253 Birth Mother's Consent to Foster Care Placement or the DPHHS-CFS-ICWA-254, Birth Father's Consent to Foster Care Placement signed by the custodial parent.

CAPS

If the child is not already a client in CAPS, the child must be made a client and the placement entered on CAPS.

The following CAPS screens should also be completed on the child: FINL/FIND for financial information, SPND for special needs, EDHL to record school changes and the appropriate medical screens MEDS, MMHD, MDTD to record relevant medical and mental health information. Refer to Appendix Section in OURS (Screen Flow Charts)

Placement Changes: Notice to Parent

Changes in foster care placements occur for a variety of reasons. The Division's policy is to keep such changes to a minimum.

- if parental rights have not been terminated, whenever possible the parent should be notified within three days of a change in the placement of his/her child. The notification may be made verbally and should be documented in the case record;

- if a parent's whereabouts is unknown, a reasonable effort to notify the parent shall be made and recorded in the case record;

- if parental rights have been terminated, the parents are not notified.

Update placement and school changes in CAPS

Youth Court Probation or Juvenile Parole Responsibility for Youth in Need of Supervision and Delinquent Youth

Following an adjudication of a youth in need of care as a youth in need of intervention or as a delinquent youth, but prior to placement at Pine Hills School, juvenile probation is responsible for supervising the youth, including preparation of eligibility material and completion of forms for placement.

Upon discharge of an adjudicated delinquent youth from Pine Hills School, juvenile parole of the Department of Corrections is responsible for supervision of the youth. If the youth was adjudicated a youth in need of care prior to an adjudication of youth in need of intervention or delinquency, the juvenile parole officer will be responsible for supervision of the youth. The Child Protection Specialist who had the youth on his/her caseload prior to the youth's involvement with juvenile corrections should provide consultation to the parole officer.

References

Mont. Code Ann. § 41-3-101
Mont. Code Ann. § 41-3-302
Mont. Code Ann. § 52-2-601
Mont. Code Ann. § 52-2-603
Mont. Code Ann. § § 52-5-126 and 127.

Rev. 10/01
Rev. 10/03
Rev. 04/04
Rev. 10/05
Rev. 10/07
Rev. 10/09
Rev. 12/09
Rev. 10/11

Child and Family Services Policy Manual: Substitute Care for Children
Concurrent Planning and Placement

Philosophical Basis

The policy of the State of Montana is to achieve a permanent placement for each child in the state foster care system as quickly as possible. Optimally, children are best raised in their birth families. Providing intensive services to the birth family immediately after the child has been placed in out-of-home care enhances the potential for reunification.

Hierarchy of placement should be: reunification with the child's parent; permanent placement with the non-custodial parent, superseding any exiting custodial order; adoption (preference order: kin, foster/resource family), guardianship (preference order: kin, foster/resource family) or other planned permanent living arrangement.

Combining efforts to develop a permanent placement for the child (such as adoption, guardianship or other planned permanent living arrangement following the placement preferences) with efforts to reunite the child with his/her birth parents can be very effective in providing a permanent, life-long family for the child.

Definitions

CONCURRENT PLANNING: A case plan that includes the development and implementation of two or more simultaneous plans, aimed at developing or ensuring a permanent outcome for a child in the shortest possible period of time through reunification, adoption, guardianship or other planned permanent living arrangement.

Plan A: intended to safely reunify the birth parents with their child(ren)

Plan B: permanency for the child through adoption, guardianship, or other planned permanent living arrangement

Note: When reunification is not an option or Termination of Parental Rights has occurred, there still needs to be at least two permanency plans for the child. The plans needs to identify the permanency goal (adoption, guardianship, etc) and the steps being taken to identify a concurrent family if not already identified.

CONCURRENT PLACEMENT: The **planned** placement of a child with a concurrent family. A concurrent placement does not occur by default.

CONCURRENT FAMILY: A family approved by the Division as a kinship or foster family that will support the placing agency and the child's birth family toward the goal of reunification while simultaneously committing to becoming a permanent family for the child if reunification is unsuccessful.

A concurrent family must meet the requirements to become an adoptive or guardianship family and will be given priority for adoption, guardianship, or other planned permanent placement if the child cannot return home and if the permanency team determines that the family is able to meet the best interest criteria of the child.

> **NOTE:** If the child has been placed with a child placing agency and the child placing agency has conducted the adoptive home study, the placing worker **must** obtain a copy of the adoptive home study and the child's permanency team **must** be involved in the permanency placement decision.

Diligent Search: An extensive effort to locate and document the names of relatives, and significant persons in the life of a child who is involved with child protective services and at risk of or placed in out-of-home care.

Parent-Child Interaction Plan (or Visitation Plan): A plan (based on the child's age and developmental level) that insures **frequent, meaningful contact** between the parent(s) and child. This is the DPHHS-CFS 208 form which is available on the OURS site.

Summary of Concurrent Planning Process

Concurrent planning requires that the Child Protection Specialist and/or designee (identified through a supervisory or permanency staffing) identify and work toward developing an alternative permanent plan for the child at the same time the Child Protection Specialist and parents are working toward the child's return to the parents. The steps of the concurrent planning process and placement are:

Step 1. The Child Protection Specialist and/or designee (identified through a supervisory or permanency staffing) conducts a diligent search for the absent parent and other relatives.

Step 2. Immediately upon placement or as soon thereafter as possible, the Child Protection Specialist must discuss **concurrent planning** with the parents and/or family. Concurrent planning requires that the Child Protection Specialist and/or designee (identified through a supervisory or permanency staffing) develop simultaneous plans for the child(which may be part of a treatment plan) and should include identification of:

- short-term goals;
- immediate tasks;
- who does what, when and how;
- specific time lines;
- visitation schedule;
- conditions of return

- frequency of informal reviews; and **must include** an explanation of the circumstances that may prevent the implementation of any of the plans

Note: If child has been in care for 90 days or more, the child must have a concurrent plan.

Diligent Search for Absent Parent and Relatives

(Refer also to policy 304-2)

Immediately upon placement or as soon thereafter as possible, the Child Protection Specialist and/or designee (identified through a supervisory or permanency staffing) **must** initiate a diligent search for relatives of the child on both the paternal and maternal sides of the family. This includes immediate efforts to identify and contact legal and/or putative fathers so the child protection specialist can conduct an objective assessment of the viability of the non-custodial parent as a placement option for the child.

The case record of the child **must** contain documentation of the Child Protection Specialist's and/or designee (identified through a supervisory or permanency staffing) actions to identify and assess the viability of placement with the non-custodial parent and relatives. Tools the Child Protection Specialist and/or designee (identified through a supervisory or permanency staffing) may use to assist in the diligent search for relatives include, but are not limited to:

1. The Child Protection Specialist may use a family group decision-making meeting (FGDM) to obtain names and addresses of other extended family members.

2. Utilize Family Finding process which would include, but is not limited to, mobility mapping, the blended perspective meeting and decision making meeting.

3. Development of a genogram with the family to identify family members and their relationships;

4. Development of an ecomap with the family to identify individuals, agencies, churches, service providers, etc., that serve as a support or source of conflict to the family;

   Contact must be made with the non-custodial parent and relatives named at the FGDM, on the genogram or ecomap, or otherwise reported to the child protection specialist to determine their:

   a) willingness to serve as a respite family for the child;
   b) willingness to serve as a permanent placement for the child; or
   c) knowledge about the existence of other relatives of the child.

Contact must be documented on the ACTD screen in CAPS.

Upon placement of a child in out-of-home care, the Division may share information with extended family members for placement and case planning purposes.

If a relative is not identified as a potential placement for the child, the Child Protection Specialist must work with the Permanency Team to identify other placement options.

NOTE: A diligent search for relatives is also required under ICWA if the child is an Indian child. (See Section 305-1, Indian Child Welfare Act.)

Concurrent Placement Assessment Process

During the initial stages of the case, the Child Protection Specialist must make an overall assessment of the case facts and history utilizing input from the family and significant others. The assessment highlights the family's strengths and problems. The primary issue(s) - the condition(s) that, if not corrected, will prevent reunification - must be identified during the assessment phase.

A major factor in determining whether reunification is likely is the parent(s)' acknowledgment of the need for change in their behavior and their willingness to work with the Child Protection Specialist toward meeting the goals of the treatment plan. Therefore, of primary importance during the assessment phase (and throughout the life of the case) is the Child Protection assessment of the parent(s)' willingness and ability to address those issues which led to the placement of the child and their ability to work as a team member.

The presence of one (or more) of the following could be considered a barrier to reunification and may indicate that concurrent placement may be appropriate for the child:

- substance abuse
- mental, physical, developmental disabilities
- severe family dysfunction (birth and extended family)
- history of multiple placements for the child
- family history of violence and involvement with the agency

Identification and Selection of Concurrent Family

The Child Protection Specialist must work with the Permanency Team and the Family Resource Specialist to identify and select the concurrent family for the child. The concurrent family must acknowledge and accept that the primary goal is to reunite the child with his/her birth parents and must be willing to work with the Child Protection Specialist to achieve that goal. The family must understand

and agree that the child will be permanently placed with them only if reunification with the birth parent(s) is not possible and it is determined that it is in the best interest of the child to remain with the concurrent family. The concurrent family is approved or licensed by the Division as a kin or foster family and meets the requirements to be approved by the Division as an adoptive or guardianship family.

If more than one family is interested in becoming a concurrent family for the child, a Permanency Team consisting of the Child Protection Specialist and the Child Protection Specialist Supervisor, the Family Resource Specialist and Family Resource Specialist Supervisor, and the Permanency Planning Specialist Supervisor will review the families submitted for consideration and will select the family that best meets the child's needs. The FGDM Coordinator and the Regional Administrator may also participate on the Permanency Team. Other people may be included in a permanency staffing if their participation is agreed to by the required team members.

If the child is an Indian child (an ICWA case), a Tribal Social Services representative shall be invited to participate in the Permanency Team.

The selection of the family is based on the family's ability to meet the child's needs and the elements of concurrent planning. Other factors to be considered when selecting a concurrent family for the child include, but are not limited to the:

1. family's ability to understand the conceptual basis for concurrent planning;
2. family's ability to participate as a member of the team;
3. family's ability to accept and relate to birth parent(s);
4. family's willingness to support reunification with the birth parent(s);
5. birth parents' personality match with the resource family;
6. amount and location of expected visits with birth family;
7. if reunification does not occur, the family's willingness to agree to some ongoing communication if the child is adopted or has a guardianship established; and
8. nature of child's legal situation.

Full Disclosure

The Child Protection Specialist must **fully disclose** the assessment results and the case plan including the concurrent plan to the parents, extended family members, resource family, foster family, county attorney, guardian ad litem, and the court.

The Child Protection Specialist must discuss with the parents the negative impact of foster care placement upon the child. It is

recommended that the extended family be included in this discussion through a FGDM or other family meeting with the parent(s)' consent. The discussion should include the:

- need to achieve a safe, stable environment for the child;
- parent(s)'s rights and responsibilities;
- parent(s)' behavior that resulted in the out-of-home placement of their child; and the consequences of that behavior;
- statutory time lines which affect the amount of time the parents can work toward completing the treatment plan established for reunification; and
- notification that, as a general rule, the Division is required to file a petition for termination of parental rights if the child remains in foster care for 15 consecutive months or is in foster care for 15 of the most recent 22 months;
- harmful effects of substitute care on the child which result from the process/impact of multiple moves on attachment and the child's security;
- inability of the child to form secure attachments to a nurturing adult when the child does not have a stable, permanent adult in his/her life;
- occurrence of developmental problems in the child when breaks occur in a child's attachment (e.g., removal from home, multiple moves in foster care, etc.);
- definition of concurrent planning and placement for the birth family;
- importance of what parents **do**, not what parents **say**;
- need to develop a **concurrent plan** to assure the child a permanent home as quickly as possible and to assure the child's proper attachment and development;
- need to begin to implement the **concurrent plans**
- appropriateness of concurrent placement;
- alternatives to reunification available to the parent(s) including placement with non-custodial parent, kinship care placement and the assessment determines that it is appropriate:

  a) a **concurrent placement** will be developed;
  b) a **concurrent family** will be recruited for the child;
  c) the parents and Child Protection Specialist with the support of the concurrent family will work toward reunification of the child(ren) and parents; but
  d) if reunification or placement with kin is not possible, the **concurrent family** will be given priority to become the child's permanent family.

NOTE: The appropriateness of the child/family for concurrent placement is assessed within 90 days of the initial placement and at each subsequent permanency meeting.

Intensive Visitation

During the assessment phase and while the parent(s) are working toward reunification, *maximum* visitation opportunities between the parent(s) and child must be available. Therefore, the Child Protection Specialist should ensure that intensive visitation is available before the child is placed in a concurrent placement.

A Parent-Child Interaction Plan/Visitation Plan (based on the child's age and developmental level) that ensures **frequent, meaningful contact** should be developed. If the child is placed with a concurrent family, a visitation plan must be developed for the parent(s). This plan defines, among other things, the length and frequency of visits between the child and the parent(s). Intensive visitation is defined as at least two times per week (frequency) and no less than two hours per visit (length). The frequency of visits should correlate with the child's age and sense of time; for example, in the case of an infant, parental visitation would ideally occur daily but should occur at least every two or three days.

Intensive visitation between parent(s) and child is necessary for the following reasons:

- frequent visitation increases the chance that the child will return home;
- frequent visitation maintains the parents' and child's attachments to each other;
- frequent visitation keeps the child foremost in the parent's thoughts and concerns. Parents will be more likely to work (and work quickly) toward reunification when visiting frequently with the child.

Concurrent Placement Implementation

Once the Permanency team determines that concurrent placement is appropriate for the child, the Child Protection Specialist may then initiate the concurrent placement.

Throughout the life of the case, the Child Protection Specialist will document the parents' efforts toward meeting the objectives and goals of reunification. If the parent(s) have made significant progress and need more time to complete the treatment plan objectives, the Child Protection Specialist will document the need for more time and obtain court approval for the extension of the plan (if necessary).

Services provided to Concurrent Family

The Child Protection Specialist and/or designee (identified through a supervisory or permanency staffing) should ensure that appropriate support services are available for the concurrent family. These support services may include, but are not limited to, ongoing support services from Child Protection Specialist and Family Resource Specialists, intensive supervision of the placement by the Child

Protection Specialist and provision of support groups for the concurrent family.

Concurrent Planning Review Through-out the Life of the Case

The Child Protection Specialist and/or designee (identified through a supervisory or permanency staffing) will ensure that the concurrent plans are reviewed to assess whether the plans are still appropriate and that all tasks identified are being completed within the appropriate timeframes. Reviews should occur:

- When reunification is no longer an option and the Division has or is filing for Termination of Parental Rights;
- When the child has or will change placements;
- When a concurrent family can no longer be a placement option;
- During permanency staffing;
- During FGDM's;
- When the Absent or Noncustodial Parent is located;
- When Relatives are located and willing to participate in the child's case plan;
- If the child is assigned a new Child Protection Specialist; and
- When the child turns 16 years of age.

References

Mont. Code Ann. § 41-3-301
Mont. Code Ann. § 41-3-423
Mont. Code Ann. § 41-3-443
42 U.S.C. 620 et seq.
(P.L. 105-89), Adoption and Safe Families Act
25 U.S.C. 1901 et seq., Indian Child Welfare Act

Rev. 10/03
Rev. 10/05
Rev. 01/06
Rev. 10/07
Rev. 01/12

Definition

Kinship care is the full-time care, nurturing and protection of a child by:

- a member of the child's extended family;
- a member of the child's or family's tribe;
- the child's godparents;
- the child's stepparents; or,
- a person to whom the child, child's parents and family ascribe a family relationship and with whom the child has had a significant emotional tie that existed prior to the agency's involvement with the child or family.

A kinship home may be unlicensed or licensed.

A child placed in an unlicensed kinship home is not eligible for foster care payments or foster care related Medicaid. The child may be eligible for a TANF child-only grant or Medicaid through OPA.

A child placed in a **licensed kinship foster home** is eligible for foster care payments and foster care related Medicaid.

Family Pre-assessment for Child Placement (CFS-106) is used when multiple relatives are identified through the FGDM or Permanency Team. It is a written home evaluation of the proposed placement(s) which contains a child protective services check, a national fingerprint based criminal records check, an evaluation of the extent to which placement in the home would meet the needs of the child, and a recommendation on the placement of the child and the *family's ability to meet* licensing *requirements.*

Emergency Placements

In emergency removal situations the policy and procedures to be followed are outlined in Section 302-1, Immediate Protection and Emergency Protective Services, of this manual.

Visit to Kinship Home

If at all possible, the Child Protection Specialist should visit the kinship home prior to placement.

If this is not possible, the Child Protection Specialist must make

a visit to the kinship home within 48 hours of the time the child is placed with the kin providers, excluding weekends and holidays. The purpose of the visit is to assess the safety and appropriateness of the home for the child. A visit by the placing worker is required even if the family has been referred to an FRS and is pursuing licensing.

The visit must be documented on ACTD.

Placing Child Protection Specialist Responsibility

When a Child Protection Specialist and his/her supervisor decide a child must be placed, the child will be placed with the child's family (or other kin) **when it is in the best interest of the child and the home is approved by the Division.** The Child Protection Specialist should proceed with the same care s/he takes when placing a child in any foster care placement. Although the decision regarding placement is made by the Child Protection Specialist in conjunction with his/her supervisor, the specialist is encouraged to consult with the child's parent(s) and other family members.

The Division must give preference to kinship caregivers when placement with kin is in the best interests of the child and the caregiver's home meets the requirements for the type of care the kin wishes to provide. Kinship care is intended to:

- preserve the continuity of family relationships and connections for children;
- minimize the loss of family;
- reduce the trauma of placement;
- provide permanency for children within their families; and,
- support families so they can protect and nurture their children.

Best Interests of the Child

The Child Protection Specialist in conjunction with his/her supervisor must determine if placement with kin is in the best interests of the child. The Specialist will document in the case record the reason(s) the worker believes that placement is in the best interests of the child. The best interests should regularly be assessed to determine if the placement continues to be in the best interests of the child. If it is determined that

the placement is not the optimal placement for the child, a more appropriate placement should be sought.

Diligent Search

For specific policy and procedures for ongoing diligent search, refer to section 304-2. https://dphhs.mt.gov/Portals/85/cfsd/documents/cfsdmanual/304-2.pdf

Selection of Family

The process for selecting a kinship provider will vary depending on the situation and local agency practice. The Division encourages the involvement of the birth family, other relatives and interested persons in the selection of the kinship home. A family group decision-making meeting or use of family preservation services may help to determine the best placement for the child.

An FGDM, Permanency Team Meeting or Diligent Search result may locate several kin who express interest in being considered as a placement option for the child. A Family Pre-assessment for Child Placement may be completed by the Family Resource Specialist at the team's request to determine if one or more of the families could be a permanent resource for the child and the family's ability to meet licensing requirements.

The pre-assessments shall then be reviewed by the FGDM or permanency team to select which family(s) should be considered for further licensing assessment.

When selecting a kinship placement for the child, the child's safety and well being must be of paramount consideration. Placement should be based upon consideration of the best interest of the child. Factors to be considered in selecting a placement are:

- an assessment of the services the child will need, based on the physical, educational and psychological needs of the child;
- the child's race and the role racial identity has played in the child's life (if the child is Indian, the requirements of ICWA must be met; refer to section 301-5, Indian Child Welfare Act);
- placement with siblings is based on the needs of the

individual child. If placement with siblings is determined not to be in the best interests of the child, the reasons must be documented and submitted to the supervisor for approval;

- the location of the child's family and the need to maintain contact with other family members;
- identification of the child's religion and the role that religion has played in the child's life; and,
- other factors particular to the child and the child's circumstances.

The Child Protection Specialist should also consider the following factors when determining whether a particular kinship home should be approved for a child:

- the nature and quality of the relationship between the child and the unlicensed kinship provider;
- the ability and desire of the unlicensed kinship provider to protect the child from further abuse or neglect and any family dynamics in the home related to the abuse or neglect of the child;
- the safety of the home and the ability of the unlicensed prospective kinship provider to provide a nurturing environment for the child; including but not limited to whether the kinship provider has a chronic or debilitating medical condition that prevents them from providing a safe and nurturing environment for the child;
- the nature and quality of the relationship between the child and the unlicensed kinship provider;
- the willingness of the kinship family to accept the child into their home;
- the nature and quality of the relationship between the birth parents and the unlicensed kinship provider, including the birth parent's preferences about placement of the child with kin;
- the unlicensed kinship provider's ability and willingness

to cooperate with the Division; and

- the existing support system of the unlicensed kinship family.

If it is determined that the child has been placed in a setting that is determined not to be optimal, consideration should be given to moving the child to a more appropriate placement as soon as possible.

Once selection of the family has taken place, the team shall notify in writing all relative families that have inquired/actively pursued placement of the child with them, explaining the reasons for the determination that their family was not chosen as a placement option for the child.

Review of Options Licensing v. Approval

The Child Protection Specialist must discuss with the kinship family that is selected for placement the options of licensed or unlicensed care, the services to be provided and the financial assistance available.

If the caregiver wishes to pursue licensure as a kinship foster home, a referral must be made to the appropriate FRS within three working days. The referral may be made via e-mail.

If the family chooses to be approved and not licensed, the Child Protection Specialist is responsible for assessing the family's ability to provide for the child's safety and well-being. Consideration must be given to the family's ability to meet the child's needs on both a short and long-term basis. This assessment includes criminal and child protective service background checks.

Required Background Checks

The purpose of the criminal check is to determine whether any adult in the home has been convicted of a crime which might affect the kinship provider's ability to provide safe and appropriate care.

Release of Information and Background Checks

The Child Protection Specialist must obtain a signed **and notarized** copy of the DPHHS-CFS/LIC-018, Release of Information and will ensure that a criminal records, Montana motor vehicle and child protective services check is completed on each adult member of the household for a family under consideration for placement.

CPS Checks

Prior to placing a child in an unlicensed kinship home, the

In-State

placing Child Protection Specialist is responsible for assuring that a thorough CAPS person search has been completed for the applicant and other household members and a determination made as to the existence of CPS history.

Centralized Intake must be contacted if the Child Protection Specialist does not have access to a computer to conduct the CPS check.

Out-of-State

If the unlicensed kinship provider or other household member has lived in a state other than Montana within the past five years, the Child Protection Specialist must request CPS information from those states prior to or within three days of the child's placement in the kinship home. Documentation of the requests and the responses must be maintained in the child's file.

NOTE: If a state does not maintain a CAN registry, the state is not required by Section 471(a)(20)(C)(i) of the Social Security Act to provide information to a requesting State or check further for child abuse and neglect information within the State on a prospective foster parent or other adult living in the home. Once we have verified that another State does not maintain a CAN registry, we are not required to keep making requests to that State to make a registry check. Documentation of that verification (a letter from that receiving state) shall be kept in the file.

Action if CPS History Exists

If the unlicensed kinship provider or other household member has received services for substantiated abuse or neglect or history indicates that the person may pose a risk to the child, the Child Protection Specialist must justify why placement of the child in that particular home is in the child's best interests and that the placement is consistent with the safety plan. The written approval of the Regional Administrator must be obtained in order to continue the placement or to place the child in the home.

Sexual and Violent-Offender Registries

The placing Child Protection Specialist is responsible for completing the checks on the sexual and violent offender registries prior to placement or in cases of emergency placement within three days of that placement.
This can be completed on-line through the Department of Justice (DOJ) Website at www.doj.mt.gov/svor.
Documentation of this check must be conducted in all states in

which the applicant has lived (if such registries are available in states in which adults in the kinship home have lived)

Motor Vehicle Checks

The assigned Child Protection Specialist is also responsible for ensuring that an on line Montana Motor Vehicle check on all adults residing in the home is completed. These checks must be completed prior to the placement of a child in an unlicensed home or in cases of an emergency basis within three days of placement.

Tribal Law Enforcement

If the family lives or has lived on a reservation, a request to tribal law enforcement for criminal history must be made and documentation of the request maintained in the file.

Criminal Checks

In an unlicensed kinship placement, the assigned Child Protection Specialist is responsible for ensuring that a Federal (**national)** fingerprint based criminal records check is completed. This check must be completed prior to the placement of a child in an unlicensed home unless the placement is made on an emergency basis.

If a child is placed with a kinship family prior to the completion of a fingerprint based criminal records, an Emergency Background Federal name based criminal history records check (Purpose Code X) shall be completed through the Division.

Emergency Background Check

This Federal name base check can be completed through **the local law enforcement** when children are placed in an emergency placement with an unlicensed kinship family. The checks must be run on all household members 18 years of age and older. The placing worker at the time of placement must have the family sign the **DOJ Name Based Criminal History Record Background Request for Emergency Child Placement Form** and submit directly to law enforcement for immediate processing. (DOJ release on OURS under Placement Forms)

Purpose Code X

***Note: This DOJ Request Form is specific to the Purpose Code X and does not take the place of* the DPHHS-CFS/LIC-018, Release of Information that is to be signed and notarized by the family members for other background checks as noted on page 5 & 6 of this policy.**

41-3-304 MCA which takes effect October 1, 2013 states that if

an adult refuses consent to the Department's request for a name-based and fingerprint-based background check, the Department may not place the child in a home in which the adult resides, or if the child was already placed in the home, the Department shall immediately remove the child from that home.

Per 41-1-304 MCA*;* If the Department elects to perform an initial name-based background check and a fingerprint-based background check pursuant to this section, the Department may not make an emergency placement or continue an emergency placement in a home in which an adult resident has been convicted of a disqualifying criminal offense.

The Department shall by rule designate those criminal offenses that constitute a disqualifying criminal offense under this section which may include but are not limited to felony convictions for violent crimes, crimes involving children, family members, or the elderly or disabled, and crimes involving drugs in which the conviction occurred within a certain period of time.
See information under Heading **Criminal History Check Results** (page 9&10) for specific convictions.

NOTE: A Federal (national) fingerprint based criminal records check is still required even if this Federal ~~a~~ name based check has been completed. The fingerprint card shall be completed **within 3 business days** of placement.

If an emergency placement is denied as a result of a name based check of a family member and the family member contests the denial, the family member may within 15 calendar days of the denial submit to the Department a complete set of fingerprints with written permission allowing the Department to submit the fingerprint to DOJ for processing the Federal background check. This procedure is explained in the **Noncriminal Justice Applicants Rights letter (Privacy Act Statement**.

Fingerprint Based Checks

Fingerprint cards and a copy of the **Noncriminal Justice Applicants Rights letter** (Privacy Act Statement) http://ours.hhs.mt.gov/forms/CFSforms/ResourceFamilyandLicensingForms/NoncriminalJusticeApplicantRights.pdf must be provided to each kinship provider and adult member or the provider's household. The unlicensed kinship provider should be provided information on the local process for obtaining

fingerprints.

The unlicensed kinship provider and other adults in the home are required to provide completed fingerprint cards to the Division within three days if a child has been placed in a kinship home. The child's assigned Child Protection Specialist will ensure that the returned fingerprint cards are reviewed for accuracy and completeness prior to being sent to DOJ.

Payment for Fingerprint Based Checks

The regional CFSD office will pay the costs incurred in conducting fingerprint based criminal records checks. The Department of Justice (DOJ) will bill the Division for the costs of conducting and providing the criminal history check results if a memo is attached to the fingerprint card instructing DOJ to bill CFSD. The memo must indicate what region should be billed for the cost of the fingerprint check by including the regional billing number. The billing number for each region is available from the regional fiscal officer.

All completed fingerprint cards are sent to:

Department of Justice
Criminal Records and Identification Services
P.O. Box 201403
Helena, MT 59620

Criminal History Check Results

If the unlicensed kinship provider has a criminal history, the Child Protection Specialist must assess the criminal history and determine in consultation with his/her supervisor what action to take.

Felony convictions

A child may not be placed in the home or if a child has already been placed, the child must be removed if the unlicensed kinship provider or other household member has had a **felony conviction** at any time for one of the following crimes:

- Child abuse or neglect
- Child sexual abuse;
- Partner or family member assault;
- A crime against children (including child pornography); or,

- A crime involving violence, including rape, sexual assault, or homicide.

Other serious crimes

A placement must not be made, or a child who has already been placed must be moved if the criminal records check reveals that the prospective placement has been convicted of other serious crimes not listed above including:

- Homicide
- Sexual intercourse without consent
- Aggravated assault, assault on a minor, assault on an officer, assault with a weapon,
- Kidnapping, aggravated kidnapping,
- Prostitution,
- Robbery or burglary,
- Incest, ritual abuse of a minor, child prostitution,
- Internet crimes involving children,
- Felony endangering the welfare or a child,
- Felony unlawful transactions with children and;
- Aggravated interference with parent-child contact.

Abuse and Exploitation of Elderly or Persons with Developmental Disabilities

If the unlicensed kinship provider or household member has been convicted of abuse, sexual abuse, neglect, or exploitation of an elderly person or a person with a developmental disability, approval for placement or continuation of a placement must be obtained from the Regional Administrator.

Felony Convictions within the last five years

Placement must not be made, or a child must be moved if the criminal records check reveals a felony conviction **within the past five years** for any of the following crimes:

- Physical assault;
- Battery; or

- A drug related offense, including alcohol related convictions.

Drug related offenses include use, distribution or possession of controlled substances, criminal possession of precursors to dangerous drugs, criminal manufacture of dangerous drugs, criminal possession of imitation dangerous drugs with purpose to distribute, criminal possession, manufacture or delivery or drug paraphernalia, or driving under the influence of alcohol or other drugs.
If the results of the criminal checks reveal convictions that do not fall into the above categories that does not mean the unlicensed kinship provider must be approved. The Child Protection Specialist must assess the criminal history and the potential effect on the safe and appropriate care of a child.

If the unlicensed kinship provider wishes to pursue licensure, the appropriate FRS and FRS supervisor must be consulted since the criminal and Child Protective Service history may prevent the unlicensed kinship provider from becoming licensed or approved for guardianship or adoption.

FINGERPRINT CARD REJECTIONS

Medical conditions

If a person fingerprinted has a medical condition which has made the person difficult to print, a memo should be attached to the fingerprint card describing the medical condition causing the barrier to successful fingerprinting. This memo should also include a request to Department of Justice (DOJ) to forward **the fingerprint card to the FBI for rejection if it cannot be successfully read**. The fingerprint card and memo should be mailed to the "Lead Worker" at the Criminal Records and Identification Services of DOJ.

If the first fingerprint submitted with the memo is rejected by the FBI, A second fingerprint card needs to be submitted following the same procedure.

Note * Two fingerprint cards will need to be rejected by the FBI in order to obtain a national name based check.

A medical condition circumstance meets the requirement for an exception to fingerprint based results. Other than national fingerprint based check results, a national name based check provides the best criminal history information.

Exceptions

There are occasions when the rejected fingerprints cards are **not due to a medical condition** and may be rejected by DOJ. If the reason for rejection is **not due to poor quality prints, (**Examples of poor quality prints would be smudges, smears, incomplete prints, and other prints that are considered operator error, etc.) the Division may utilize the following exception process.

- If a person cannot be successfully fingerprinted or has had two fingerprint cards rejected by DOJ a name based check may be used for applicants who have not lived anywhere other than Montana.
- If a person who has lived in states other than Montana cannot be successfully fingerprinted or had had two fingerprint cards rejected by DOJ, the following process must be used:
    - a Montana name based check must be completed; and,
    - a criminal history must be requested from every state in which the applicant has lived in the past 15 years.

Affidavit as result of unsuccessful attempts obtaining out of state criminal history checks

If after 45 days, the Division has been unable to obtain criminal history for an unlicensed kinship provider who has lived in other states, but has lived in Montana for at least five years, the kinship provider must sign an affidavit attesting to his/her lack of criminal history or to the details of existing criminal history. The affidavit will be accepted in lieu of results from a criminal history check.

Storing and Destruction of Fingerprint Cards and Criminal Record Background Check Results (CHRI)

NOTE: Fingerprint Cards and results will no longer be scanned into DOCGEN. Results shall be recorded on the Federal Background Check Determination. This completed form shall be scanned into DOCGEN under the Provider ID. Department of Justice, Division of Criminal Investigation, Criminal Records and Identification Services (DOJ) has provided guidelines for storage, dissemination and destruction of criminal background checks including fingerprint cards and the CHRI.

Recording of CHRI

Upon receipt and review of the fingerprint based search received by DOJ, the CHRI shall be recorded on the Federal Background Check Determination. (CFS-LIC-062) The recording shall include:

- the date that results were **completed** by DOJ;
- the purpose of the fingerprint request (check all that apply);
- determination that the results are in compliance or not in compliance with the federal and state standards.

Storage of Results

If there is a possibility that the applicant will pursue licensure, it may be necessary to retain the copy of the CHRI. The documents shall be stored in a locked storage **separately** from the applicant and case file.

Destruction of Fingerprint Cards and Results

Fingerprint cards shall be shredded upon receipt of the results as the prints are not able to be resubmitted.

The CHRI shall be shredded upon determining there is no longer a need to further use.

Kinship Care Agreement

The placing Child Protection Specialist and the family must sign a DPHHS-CFS-055, Kinship Care Agreement. If the Child Protection Specialist and family use an FGDM meeting, the written agreement developed may supplement the Kinship Care Agreement.

It is important that there be written understanding among the kinship care family, the child's parents (and the child when appropriate), the Child Protection Specialist and his/her supervisor as to what will be done by each of the parties to protect and care for the child, resolve concerns, and reunite the family.

In an emergency, a child may be placed in a kinship home pending receipt of the results of a criminal, and Montana motor vehicle check. A child must not be placed in a kinship home unless a thorough CAPS person search has been conducted and a determination made as to whether the applicant or other household members has a substantiated history of abuse or

neglect in Montana.

Due to the uncertainty regarding the law and regulation surrounding the use and possession of medical marijuana, if an unlicensed kinship provider indicates that he/she is prescribed medical marijuana for a debilitating medical condition pursuant to Mont. Code Ann. 50-46-302, the Child Protection Specialist shall require that the DPHHS-CFS-054 Unlicensed Kinship Provider Medical Report be completed by the treating physician of the unlicensed kinship provider who has prescribed medical marijuana, to ensure that the debilitating medical condition does not prevent the provider from safely and adequately caring for the child.

Debilitating medical conditions are defined by Mont. Code Ann. 50-46-302 as

- Cancer;
- Glaucoma;
- positive status for human immunodeficiency virus, or acquired immune deficiency syndrome when the condition or disease results in symptoms that seriously and adversely affect the patient's health status;
- cachexia or wasting syndrome;
- severe chronic pain that is persistent pain of severe intensity that significantly interferes with daily activities as documented by the patient's treating physician and by: objective proof of the etiology of the pain, including relevant and necessary diagnostic tests they may include an x-ray, tomography scan or MRI, or confirmation of that diagnosis from a second physician who is independent of the treating physician and who conducts a physical examination;
- intractable nausea or vomiting;
- epilepsy or an intractable seizure disorder;
- multiple sclerosis;
- Crohn's disease;
- painful peripheral neuropathy;
- a central nervous system disorder resulting in chronic, painful spasticity or muscle spasms;
- admittance into hospice care;
- any other medical condition or treatment for a medical condition approved by the legislature.

Furthermore, if an unlicensed kinship provider is using medical

marijuana in compliance with state law, s/he is prohibited from driving under the influence pursuant to Mont. Code Ann. 50-46-320(1)(a);

Mont. Code. Ann. 50-46-320 (1)(b)(xi) also does not permit the use of marijuana where exposure to the marijuana smoke significantly adversely affects the health, safety or welfare of children.

The unlicensed kinship provider must agree to keep all medical marijuana in a place that is inaccessible to children, pursuant to the signed DPHHS-CFS-055 Kinship Care Agreement.

If all of these conditions are satisfied, the use of medical marijuana, in compliance with state law, is not an automatic prohibition on placement with a kinship provider.

If it is decided that the unlicensed kinship provider should be considered for placement of the specific child, the following documents need to be obtained from the provider, made available in the case file and submitted along with the recommendation of placement to the Regional Administrator to review and determine if this placement will be considered.

- Copy of the Medical Marijuana Registration Card
- Copy of the written certification by the treating physician

The Child Protection Specialist must have the kinship provider complete and sign a DPHHS-CFS-055, Kinship Care Agreement. If the completed and signed DPHHS-CFS-055, Kinship Care Agreement indicates there is not CPS or criminal history which would preclude placement, the worker may proceed with placing the child if the worker determines that the placement is in the best interests of the child. **If the placement is an emergency placement, the Department shall run a Federal Name-based check on all adults residing in the home using the Purpose Code X.**

Mont. Code Ann. § 41-3-101
Mont. Code Ann. § 52-2-102
Mont. Code Ann. § 41-3-304
Mont. Code Ann. § 50-46-302
Mont. Code Ann. § 50-46-320

Rev. 10/03
Rev. 04/04
Rev. 10/04
Rev. 10/05
Rev. 05/07
Rev. 10/09
Rev. 10/11
Rev. 01/12
Rev. 05/12
Rev. 03/13
Rev. 10/13
Rev. 09/14
Rev. 02/15

This agreement is between CFSD and _____ **regarding the**
name of kinship provider(s)
temporary care of _____.
name(s) of child(ren)

We appreciate your willingness to provide kinship care. This agreement is intended to help you understand you responsibilities and the expectations CFSD has of you.

CFSD is responsible to ensure that placement of the child(ren) will meet the child(ren)'s needs for safety and well being and is in the child(ren)'s best interests. CFSD is responsible for decisions and for planning for the child(ren). Placement with you does not transfer custody to you. Please ask the child's Child Protection Specialist for information regarding your specific rights and responsibilities. **CFSD will arrange for contact or visits between _____ and the child(ren). Contact is to occur only with approval from CFSD.**

The Department will be conducting both a criminal records check and a child protective services check on all adults living in the household. If you have been convicted of a crime in the past, are currently charged with a crime, or have been investigated for child abuse or neglect, TELL THE CHILD PROTECTION SPECIALIST IMMEDIATELY.

Have you or anyone living in your household been charged or convicted of:

	Felony	**Misdemeanor**
Child abuse, neglect or endangerment	☐Yes ☐No	☐Yes ☐No
Child sexual abuse	☐Yes ☐No	☐Yes ☐No
Partner or family member assault	☐Yes ☐No	☐Yes ☐No
Any crime against children including child pornography	☐Yes ☐No	☐Yes ☐No
A crime involving violence, including rape sexual assault or homicide	☐Yes ☐No	☐Yes ☐No
A crime involving serious harm to children.	☐Yes ☐No	☐Yes ☐No
Physical assault	☐Yes ☐No	☐Yes ☐No
Battery	☐Yes ☐No	☐Yes ☐No
A drug related offense, including an alcohol related conviction	☐Yes ☐No	☐Yes ☐No

Have you or anyone in your household been the subject of a deferred prosecution or a deferred imposition of sentencing involving one or more of the crimes listed above? ☐ Yes ☐ No

Have you or any person living in your household been investigated for alleged child abuse or neglect in any state?
☐Yes ☐No

Have you or anyone in your household had a substantiated allegation of child abuse or neglect in any state?
☐Yes ☐No

Are you or anyone in your household suffering from a debilitating medical condition for which medical marijuana is being used in compliance with Montana law?
☐Yes ☐No

Explain any "yes" answers below:

_____
_____
_____
_____

PLEASE PROVIDE THE NAMES AND AGES OF EVERYONE LIVING IN YOUR HOUSEHOLD:

_____

_____

_____

_____

Fingerprint based criminal records checks are required for all adults in a kinship provider's household. Completed fingerprint cards must be returned by_____ (**within 3 business days of receipt**). To arrange to be fingerprinted, contact:

_____

FOR EMERGENCY BACKGROUND CHECKS ONLY

***Pursuant to 41-3-304 MCA; if an adult refuses consent to the Department's request for a Federal name base and Fingerprint based criminal background check the Department may not place the child in the home in which the adult resides or if the child was already placed in the home, the Department shall immediately remove the child from that home. Per 41-3-304 MCA; If the Department elects to perform an initial name based background check and a fingerprint-based background check pursuant to this section, the Department may not make an emergency placement or continue an emergency placement in a home in which an adult resident has been convicted of a disqualifying criminal offense.**

IMPORTANT INFORMATION

- A representative of CFSD will conduct a home safety check within 48 hours of placement (excluding weekends and holidays) if not completed at the time of placement.
- CFSD has the discretion to remove the child(ren) from your home. Whenever possible, the Child Protection Specialist will provide advance notice before the child(ren) are removed from a kinship home.
- Unlicensed kinship providers are not eligible for foster care payments. Providers may apply to the Office of Public Assistance (OPA) for financial assistance in meeting the needs of the child(ren).
- **Approval as an unlicensed kinship provider does not mean that the provider/home meets the licensing requirements or that the home will be licensed. Kinship providers may apply to become licensed as a kinship provider to care for a child(ren). Call 1-866 9FOSTER or e-mail askaboutfostercare@mt.gov if you are interested in applying to become licensed.**
- The Child Protection Specialist will provide relevant information about the child, including the expected length of placement.
- Except in rare circumstances, CFSD is mandated to attempt to reunify children with the birth or legal parents.
- If CFSD receives a referral alleging abuse or neglect of a child(ren) placed in a kinship home, CFSD will investigate the allegation and the child(ren) may be removed from your home during the investigation.
- Approval of a kinship home is temporary and placement of a child(ren) in a kinship home is temporary pending ongoing assessment of the placement. If the permanent placement of a child with a family other than the birth or legal parents becomes the plan, continued placement in a kinship home will be reassessed.
- Visitation between the child and parents will be arranged by CFSD.

KINSHIP PROVIDER RESPONSIBILITIES

As a kinship provider caring for a child placed with you by CFSD, you are:

- Responsible for the day-to-day care and safety of the child(ren) placed in your home.
- Expected to notify the Child Protection Specialist of all scheduled medical appointments and school meetings in advance of the appointment. If a child needs medical treatment other than routine care, you must obtain Child Protection Specialist approval. For emergency medical needs, seek immediate treatment and promptly call 1-866-820-KIDS (5437).
- Expected to work cooperatively with CFSD and to support the case plan established by CFSD, whether reunification or other permanent plan.
- Expected to respect and support the child's connection with his/her birth or legal parents and to respect the child's cultural traditions and religious beliefs.
- Expected to attend or otherwise participate in Family Group Decision Making Meetings (FGDM) and Foster Care Review Committee (FCRC) meetings.
- Expected to maintain confidentiality of information pertaining to the child and *the child's* birth or legal parents;
- Expected to notify the Child Protection Specialist within 48 hours (excluding weekends and holidays) of any change of address, major sickness in your family or changes in family composition.
- Expected to notify the Child Protection Specialist immediately if you cannot continue to properly care for the child(ren) placed in your home. You must notify CFSD as soon as this decision is made so CFSD will be able to make other plans for the child. **You may not place the child with someone else.**
- Required to have written authorization before taking the child out of the county, state or country.
- Required to report any known or suspected child abuse or neglect to 1-866-820- KIDS(5437).
- **Expected to obtain approval from CFSD before cutting or coloring** a child's hair, or consenting to piercings, tattoos, etc.
- Expected to apply for Medicaid for the child(ren) at the Office of Public Assistance.
- Expected to notify the Child Protection Specialist immediately if you or anyone in the home is legally using medical marijuana. If someone residing in the home is legally using medical marijuana, the treating physician must complete a report indicating that the debilitating medical condition for which medical marijuana is legally used does not prevent you from safely and adequately caring for the child.
- If a kinship provider is legally using medical marijuana in accordance with state law, the kinship provider is expected not to drive under the influence, not to expose the child to any secondhand marijuana smoke, to store the medication in a place inaccessible to the child, and to sign a safety agreement, if requested by the Child Protection Specialist to ensure that these conditions are met.

The plan for visitation or the next scheduled visit is: _____

_____

I/We have read, understand and agree to perform my/our outlined responsibilities and to abide by the contents of this agreement. I/We agree to report any problems regarding the care of_____ to CFSD at_____ **or if outside working hours, at 1-866-820-KIDS(5437). By signing this I/We attest to the truth and accuracy of the statements made in this agreement.**

_____		_____	
Kinship Provider Signature	Date	Kinship Provider Signature	Date
_____		_____	
Child Protection Specialist Signature	Date	CPS Supervisor Signature	Date

Original - Paper Case file
Copy - Kinship Parent(s)

Placing Worker please complete the following checklist:

☐ Name-Based Criminal History Record Background Request for Emergency Child Placement Form has been completed and signed ***(Purpose Code X only)***

☐ DCFS-LIC-018 Release of Information given to the family for each household member 18 years of age and over

☐ Fingerprint Card(s) for each household member 18 years and over accompanied by the Privacy Act Statement.

The Department of Public Health and Human Services (DPHHS) does not discriminate on the basis of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin. If you believe you have been subjected to discrimination, contact the DPHHS Human Resources Division at (406) 444-3136 or the Montana Human Rights Bureau at 1-(800)-542-0807, or relay service at 711

Purpose

The ICPC is the best means Montana has to ensure protection of and services to children who are placed across state lines. The Compact, a uniform law that has been enacted by all states of the United States, the Virgin Islands, and the District of Columbia, establishes orderly procedures for the interstate placement of children and fixes responsibilities for those involved in placing the child. Montana enacted ICPC in 1975.

Policy

All applicable cases of child placement into or out of the state shall be in compliance with ICPC. **This includes all applicable placements of children in the custody of DPHHS.**

Safeguards Offered by the Compact

In order to safeguard both the child and the parties involved in the child's placement, the ICPC does the following:

- provides the sending agency the opportunity to obtain a home study of the proposed placement **prior** to the placement;
- allows the prospective receiving state to ensure that the placement is not "contrary to the interests of the child" and that its applicable laws and policies have been followed before it approves the placement;
- guarantees the child legal and financial protection by fixing these responsibilities with the sending agency or individual;
- ensures that the sending agency, court, or individual does not lose jurisdiction over the child once he moves to the receiving state; and
- provides the sending agency the opportunity to obtain supervision and regular reports on the child.

ICPC Administrator

Each state party to ICPC has an administrator appointed by the Governor of that state. The Montana ICPC Administrator is located in the DPHHS central office at (406) 841-2400.

Role of Administrator

The compact administrator's office serves as a central clearing point for all referrals for interstate placements. The compact administrator or deputy authorizes the requested investigation

of the proposed placement and determines whether the placement is contrary to the interests of the child.

Type of Placements Covered by ICPC

The Compact applies to the following four situations in which children may be sent to other states:

- placement prior to adoption, including private agency and independent adoptions;
- placement into foster care, such as foster homes, group homes, residential treatment facilities, and institutions, including parental placements into such facilities;
- placements with parents and relatives when a parent or relative is not making the placement; and
- placement of adjudicated delinquent youth in institutions in other states.

The ICPC must be used when considering pre-placement visits. Visits of 30 days or less (i.e., Christmas vacations, spring break) are exempt from ICPC compliance.

Exclusion

Not all placements of children into other states are subject to the Compact. The Compact does not include placements into medical or mental health facilities (non-residential treatment facilities) or into boarding schools. Article VIII (a) also specifically excludes from Compact coverage the placement of a child made by a parent, stepparent, grandparent, adult brother or sister, adult aunt or uncle, or a child's non-agency guardian, when the placement is to another of the persons mentioned in this sentence.

Who Must Use the ICPC

Sending agents are required to use the Compact when they "send, bring, or cause a child to be brought or sent to another party state." These "sending agents" are the following:

- a state which is party to the Compact, or any officer or employee of a party state;

- a subdivision, such as a county or city, or any officer or employee of the subdivision;
- a court of a party state; or
- any person (including parents and relatives), corporation, association, or charitable agency or organization of a party state.

Montana Tribes must use ICPC for placing and receiving children across state lines in accordance with Title IV-E contracts and agreements with the Department.

Requests for home studies in contested divorce custody cases in which the state child protection agency is not involved do not go through ICPC.

Other Compacts

Several other compacts deal with children. The one most frequently encountered and confused with the ICPC is the Interstate Compact on Placement of Juveniles (ICJ), (Mont. Code. Ann. § 41-6-101 et seq.). This deals with the placement of juveniles who are adjudicated delinquents and need probation or parole supervision when placed with a parent or relative in another state and the return of runaways to their state of residency. ICPC is required for the placement of adjudicated delinquents in any type of out-of-state foster care placement, including residential treatment in another state.

Procedures for Making Compact Placement

Sending Agent for Parent, Relative, Foster Care, and Adoption Requests

The sending agent in Montana for parent, relative, foster care, and adoption requests:

1. provides written notice of intent to place to Montana's Compact Administrator by requesting an evaluation of the placement resource on a **signed** ICPC 100-A form (DPHHS-DFS 19C- Interstate Compact Application Request to Place Child or Evaluation of Facility), and
2. sends **three copies** of the following, along with five copies of the ICPC 100-A, to the Montana Compact Administrator:

a. a **signed** cover letter or memo outlining what services are being requested in the receiving state and including the following information:
   (1) confirmation that the proposed placement resource is interested in being a placement resource for the child and is willing to cooperate with the ICPC process;
   (2) the name and physical and mailing addresses and all available telephone numbers and other contact information for the proposed placement resource;
   (3) the number and types of bedrooms in the home of the proposed placement resource to accommodate the child under consideration and the number of people, including children, who will be residing in the home;
   (4) an acknowledgement that the proposed placement resource has sufficient financial resources or will access resources (such as TANF or foster care payments) to feed, clothe, and care for the child, including child care, if needed; and
   (5) an acknowledgement that a criminal record and child abuse check will be completed on any person residing in the home who is required to be screened under the law of the receiving state.

b. social information on the child and family which provides a chronology of court involvement, a description of social dynamics of the family, and a description of any special needs of the child, including a DPHHS-DFS 107 form, affidavit or report to the court, 427 case plan, and recent evaluations and assessments;

c. court documents, if custody is held by someone other than the parent, or, in the case of a parent(s) making an adoptive placement, a document giving parental authority to the receiving agent (i.e., a relinquishment); and

d. a DPHHS-DFS 19E- Financial/Medical Plan, which shows Title IV-E eligibility and the proposed financial and medical arrangements for the child; and

e. a copy of the child's Social Security card or official document verifying the correct Social Security number, if available, and a copy of the child's birth certificate, if available.

Sending Agent for Group Home and Residential Treatment Requests

For group home and residential treatment requests:

1. provides written notice of intent to place to Montana's Compact Administrator on a **signed** ICPC 100-A form (DPHHS-DFS 19C- Interstate Compact Application Request to Place Child or Evaluation of Facility), and

2. sends **three copies** of the following, along with five copies of the ICPC 100-A, to the Montana Compact Administrator:

   a. social information on the child and family which provides a chronology of court involvement, a description of social dynamics of the family, and a description of any special needs of the child, including a DPHHS-DFS 107 form, affidavit or report to the court, 427 case plan, and recent evaluations and assessments;

   b. court documents showing authority to place the child, if custody is held by someone other than the parent;

   c. a DPHHS-DFS 19E- Financial/Medical Plan, which shows Title IV-E eligibility and the proposed financial and medical arrangements for the child; and

   d. a letter of acceptance from the residential facility.

CAPS

When the placing worker has access to CAPS, the DPHHS-DFS 19C (100A) and DPHHS-DFS 19E forms should be produced through the completion of the Interstate Compact Placement Detail (ICPD) screen on CAPS and the generation of the appropriate document by the worker. The 19C form is

produced from DocGen 350 and the 19E form is produced from DocGen 352. These forms should be signed by the worker and submitted with the other required materials to Montana's Compact Administrator.

Sending State

The compact administrator in the sending state:

- reviews the documents for completeness and may return incomplete documents or those with an insufficient number of copies;
- signs the ICPC 100-A; and
- forwards the ICPC 100-A and two copies of the documents to the receiving state compact administrator.

Receiving State

The compact administrator in the receiving state:

1. reviews the material for completeness and compliance with receiving state law;
2. if the application is incomplete or not in compliance, may:
   a. deny the placement;
   b. negotiate a solution to the problem;
   c. return the request to the sending state for completion; or
   d. hold the request and advise the sending state that additional information is needed.
3. if the application is complete, forwards one copy to appropriate party for local action.

CAPS

The Montana Compact Office enters all ICPD screens for new requests when the sending agent does not have access to CAPS. All individuals entered by the Compact Office are entered in CAPS as people and the worker should make the individual a client, when applicable.

Home Evaluation

When requested, the worker in the receiving state completes a written home study of the proposed placement resource, which contains a child protective services check, a criminal records check, an evaluation of the extent to which placement in the home would meet the needs of the child, and a recommendation on the placement of the child, and sends three copies of the home study to the receiving state compact administrator. The SAFE home study format will be used for all foster and adoptive studies completed by DPHHS staff in Montana. The administrator then decides whether the placement request will be approved and forwards the completed application (ICPC 100-A), along with two copies of the home study, to the sending state compact administrator.

The home study should be completed within 60 days of receipt of the request from the sending state by the receiving state ICPC administrator.

Foster and adoptive parent training does not have to be completed within the 60 day window, only the home study.

When appropriate the receiving state may contract with a private agency to conduct the requested home study.

Sending State

When the completed home study and ICPC 100-A are received from the receiving state, the sending compact administrator notifies the sending agent in writing. The sending state shall treat any home study from another state or Indian tribe (or from a private agency under contract with another state) as meeting the state's home study requirements, unless, within 14 days after receipt of the study, the sending state determines, based on grounds that are specific to the contents of the study, that additional information is needed to make a decision about the placement not being contrary to the welfare of the child. If additional information is needed, the sending state shall request an addendum to the home study.

CAPS

The Montana Compact Administrator enters the approval or denial of the 100A form on the Interstate Compact Action Detail (ICAD) screen in CAPS. This is done when the approved or denied 100A form of a Montana child is received from another

state or when the Montana Compact Administrator approves or denies a placement into this state.

NOTE: Placement may not occur until the 100-A is signed by the receiving state compact administrator. The local worker only makes a recommendation about the placement; he cannot legally approve or deny the placement.

The receiving state can refuse to provide services to children placed without ICPC approval and may request that the children be returned to the sending state. Adoptions have been overturned because of failure to comply with ICPC.

Expedited Placement Requests

Under Article VII of the ICPC law the ICPC Administrators have the authority to promulgate rules to carry out the terms and provisions of the Compact. Regulation Seven, which became effective October 1, 1996, and was incorporated into Montana rule on January 21, 1997, provides provisions for obtaining expedited home studies for certain parent and relative placements. Regulation Seven was amended at the 2001 and 2011 meetings of the ICPC Administrators.

Types of Placements

Regulation Seven applies to the following circumstances:

- the proposed placement resource is a parent, step-parent, grandparent, adult brother or sister, or adult uncle or aunt of the child; **and**

- (1) any child in the sibling group sought to be placed with the proposed placement resource is under four (4) years of age;
  (2) the child is in an emergency shelter;
  (3) any child in the sibling group proposed to be placed has a substantial relationship with the proposed placement resource; **or**
  (4) there has been an unexpected dependency due to a sudden or recent incarceration, incapacitation, or death of a parent or guardian.

Procedures for Expedited Placement Requests

The Expedited Placement Request procedure is as follows:

- The Child Protection Specialist will submit to the sending state court either a signed statement of interest from the proposed placement resource or a written statement that s/he had a conversation with the proposed placement resource and confirmed his/her appropriateness for the ICPC expedited placement decision process. The statement shall include the following information regarding the proposed placement resource:
  (1) his/her interest in being a placement resource for the child and willingness to cooperate with the ICPC process;
  (2) that s/he fits the definition of parent, stepparent, grandparent, adult brother or sister, adult aunt or uncle, or his or her guardian;
  (3) the name and address of the proposed placement resource, all available telephone numbers and other contact information for the proposed placement resource, and the dates of birth and Social Security numbers of all adults in the home;
  (4) a detail of the number and types of rooms in the residence of the proposed placement resource to accommodate the child under consideration and the number of people, including children, who will be residing in the home;
  (5) that s/he has financial resources or will access financial resources to feed, clothe, and care for the child;
  (6) if required due to age and/or needs of the child, the plan for child care and how it will be funded;
  (7) an acknowledgement that a criminal record and child abuse history check will be completed on any persons residing in the home who are required to be screened under the law of the receiving state, and that, to the best knowledge of the proposed placement resource, no one residing in the home has a criminal history or child abuse history that would prohibit the placement; and
  (8) whether a request is being made for concurrence to relinquish jurisdiction if placement is sought with a parent from whom the child was not removed;

- The Child Protective Specialist will also submit to the sending state court a statement that, based upon current information known to the sending agent, s/he is unaware of any fact that would prohibit the child being placed with the proposed placement resource and has completed and is prepared to send all required ICPC paperwork to the sending state ICPC office;

- The court shall make a finding that an expedited placement is necessary and, within two (2) business days of the finding, forward the order to the sending agent. The order should include the finding and the name, address, telephone number, and, the fax number of the clerk of court or designated court administrator;

- Within three (3) business days of receiving the court order, the sending agent will transmit the order, a completed ICPC 101 form (located in OURS), and, if not already submitted, a completed ICPC 100-A form (DPHHS-DFS 19C) and supporting documentation to the sending state compact administrator;

- Within two (2) business days after receiving a complete priority home study request, the sending state compact administrator will transmit the request by overnight mail to the receiving state compact administrator. If the sending state compact administrator determines the request to be incomplete, s/he has two (2) business days to request the additional information. At this point the time line does not apply until the additional information is received;

- The receiving state compact administrator shall send the expedited home study request to the local office within two (2) business days of receipt of a complete packet. If the receiving state compact administrator or the local office determines the request to be incomplete, the receiving state compact administrator has two (2) business days, upon making this determination, to contact the sending state compact administrator and request the needed information.

At this point the time line does not apply until the additional information is received. The local office shall return the completed home study to the receiving state compact administrator within fifteen (15) business days of receipt of the packet from the receiving state compact administrator. The receiving state compact administrator shall provide a written report, a 100A approving or denying the placement, and a transmittal of that determination to the sending state compact administrator no later than three (3) business days after receipt of the packet from the local office. The receiving state has a total of twenty (20) business days upon receipt of a complete expedited home study request to finish the home study and return it to the sending state.

- The home study in the receiving state can be completed on the ICPC 102 form (located in OURS), if this is deemed appropriate by the local supervisor;

- If the receiving state compact administrator does not make a decision on the request within the twenty (20) business days, the sending state court may request assistance from the receiving state court in obtaining the home study;

- When DPHHS is the sending agent, the local office is responsible for keeping the court informed of the status of the expedited request; and

- If a receiving state determines that it is unable to complete the home study and make a decision within the time frame, the receiving state compact administrator shall notify the sending state compact administrator of this inability, the date on or before a decision will be reached, and a full explanation of the circumstances which are delaying compliance.

After Placement

After placement occurs, the following procedure is followed:

- the sending agent signs and sends the ICPC 100-B form (DPHHS-DFS 19D - Interstate Compact Report on Date or Placement Status) to the sending state compact

administrator;

- the sending state compact administrator signs the ICPC 100-B form and sends it to the receiving state compact administrator; and

- the receiving state compact administrator arranges for any requested supervision or services to be carried out by the local agency or office.

Supervision

When a state custody child is placed through ICPC into a parent, relative, foster, or adoptive home in another state or in Montana, the child should be seen in the home no later than 30 days after the 100B form is received. Supervision can and should begin prior to receipt of the 100B form if the receiving state has been informed by other means that the child has been placed in an approved placement. After the initial visit, the child should be seen every calendar month, with a majority of the visits occurring in the child's home. Visits should be well-planned and focus on the child's case plan and the delivery of services to ensure the safety, permanency, and well-being of the child. In addition to the visits, the supervising worker shall assist the child's care giver in accessing services and supports for the child, such as health care, mental health services, public assistance, and educational services.

Supervision must continue until one of the following events occurs:

- the child reaches the age of majority or is legally emancipated;

- the child's adoption is finalized;

- legal custody of the child is granted to a caregiver or a parent and jurisdiction is terminated by the sending state;

- the child no longer lives in the approved home;

- jurisdiction over the child is terminated by the sending state;

- legal guardianship is granted to the child's caregiver in the receiving state; or

- the sending state requests in writing that the supervision be discontinued, and the receiving states concurs.

Supervision may continue if one of the above events occurs but the sending and receiving states agree to continue the supervision, such as when a youth turns 18 but agrees to remain in the approved home until graduation.

Reports After Placement

Reports should be provided by the supervising worker at least every 90 days, unless requested more frequently on the child's 100A form. Reports should include the following:

- dates and locations of face-to-face contacts with the child during the supervisory period;

- a summary of the child's current circumstances, including a statement regarding the on-going safety and well-being of the child;

- if the child is attending school, a summary of the child's academic performance along with report cards and education-related evaluations;

- a summary of the child's current health status, including mental health, and the dates of health-related appointments that have occurred since the last supervision report was completed, the identity of any health providers seen, and copies of any available health-related evaluations or reports;

- an assessment of the current placement and caretakers, including physical condition of the home, the caretaker's commitment to the child, and any changes in family composition, health, and financial situation;

- a description of any unmet needs; and

- a recommendation on the permanency plan for the child (i.e., continuing state custody, returning custody to a parent, or finalizing a guardianship or adoption).

Optional formats for the progress report (Forms ICPC-CFS-003 and ICPC-CFS-004) can be located in OURS. Three copies of the progress report should be sent to the receiving state compact administrator. The receiving state compact administrator will send all reports to the sending state compact administrator, and the sending state compact administrator will then forward the reports to the sending agent.

Return of Child to Sending State

Following approval and placement of a child, if the receiving state compact administrator determines that the placement no longer meets the individual needs of the child, including the child's safety, permanency, health, well-being, and mental, emotional, and physical development, then s/he may request that the sending state make arrangements to return the child as soon as possible or propose an alternative placement resource in the receiving state. Return of the child shall occur within five (5) working days from the date of notice for removal unless otherwise agreed upon between the sending and receiving state ICPC offices.

The receiving state's request for removal may be withdrawn if the sending state arranges services to resolve the reason for the requested removal and the sending and receiving state compact administrators mutually agree to the plan.

Child Protection Referrals

The supervising workers and other child protection authorities will act on reports of child abuse and neglect involving children placed from out-of-state in the same manner as they would for receiving state children. The receiving and sending state compact administrators and the worker in the sending state should be notified of the report and any subsequent decisions about the placement.

Upon notification of a concern about safety by the receiving state, the public child placing agency in the sending state should take action to ensure the ongoing safety of a child placed in a receiving state pursuant to an approved ICPC placement, including return of the child to the sending state as soon as possible when return is requested by the receiving state. If a child must be removed from his home in the receiving state and it is not possible for the sending state to immediately return the child, then the receiving state shall place the child in a safe and appropriate setting. The sending state is responsible for the costs incurred by the placement of the child in substitute care.

CAPS

When the placing worker has access to CAPS, the DPHHS-DFS 19D (100B) form should be produced by the worker by entering the placement date or compact closure reason and date on the Interstate Compact Action Detail (ICAD) screen and generating DocGen 351. When a progress report is received in the sending state, the date of the progress report should be entered in the "Progress Report Received Date" field on the ICAD screen.

Sending Party Responsibility

Financial Responsibility

When a compact has been signed by a sending state compact administrator and receiving state compact administrator and a placement occurs, the sending party is then obligated by law (Mont. Code Ann. § 41-4-102) for the costs of sending the child to the receiving state, the costs of returning the child to the sending state, and other costs incurred if the child needs foster care and/or medical care.

Foster Care Payments

When the placement resource is licensed or otherwise approved for foster care by the receiving state, the sending state may make foster care payments to the resource. For a child in the custody of the State of Montana, the current Montana foster care rate based on the child's age and needs will be paid to the resource in the receiving state.

Changes After Placement

When a child moves from one out-of-state placement to another, a new ICPC request is required. When a placement is terminated, the sending agent is responsible for notifying the

sending state compact administrator of the change on a signed ICPC 100-B form.

Correspondence Between Sending Party and Receiving Party

All correspondence should be sent in **triplicate** through the compact office in the state originating the correspondence. If, for reasons of urgency, it is necessary that correspondence be sent directly to the sending or receiving agent, **two** copies should be sent to the compact administrator in the originator's state, with a note that a copy has already been sent to the sending or receiving agent.

Confidentiality

Any information provided to the Montana ICPC Administrator will be handled according to the Department's confidentiality policy.

References

Mont. Code Ann. § 41-4-101, et. seq.
Mont. Admin. R. 37.50.901
Public Law 109-239

Rev. 10/03
Rev. 10/06
Rev. 10/07
Rev. 07/08
Rev. 10/09
Rev. 10/10
Rev. 10/11
Rev. 10/12

Purpose

Montana law provides for the collection of child support when youth in the custody of the department are placed in paid out-of-home settings. Parents are expected to contribute toward the costs of such care to the fullest extent possible without undue hardship on the family.

NOTE: Referrals made on each child in paid placement should not cause undue financial hardship on the family or inhibit their ability to achieve reunification. Families with financial challenges should be encouraged by the CPS Specialist to contact their CSED caseworker to ensure that CSED has accurate up-to-date information about the families' financial situations when calculating their ability to contribute toward the cost of care. CSED utilizes income guidance calculations based on the parent's ability to contribute toward the cost of care. When CSED establishes a case, it is processed as of the CFSD electronic referral date submitted, not retroactive to the initial paid placement date.

Child Support Enforcement Services

The Child Support Enforcement Division will provide the following services:

- Enforce Montana District Court orders for child support entered after 10/01/1993 for IV-E children and court orders entered after 7/1/1997 for non IV-E children;
- Establish an order for child support, if none exists, for IV-E and IV-A children;
- Locate absent parents; and,
- Establish paternity (IV-E and non IV-E, if CSED has jurisdiction

CSED will seek support from each parent on behalf of the eligible children, even when the parents live together or when one parent lives in a state other than Montana. Referrals made for non IV-E/IV-A children may not be pursued by CSED, unless they already have an open child support case or existing order for support.

Roles of CFS Staff

Child Protection Specialists must make an electronic referral by entering the data into the CAPS/SEARCHES interface on all children in paid foster care.

Program Assessment Specialists will act as Child Support enforcement designees who will identify which cases are appropriate for parental contribution, applying policy, and referring to Child Support Enforcement. Program Assessment Specialists are also responsible for monitoring and identifying cases for field staff to refer to Child Support. The Program Assessment Specialist will provide oversight for the referral process and will make decisions regarding good cause claims not to pursue child support. Program Assessment Specialists will provide documentation to the Child Support office to validate good cause claims (as needed).

The appropriate Child Protection Specialist Supervisor will decide good cause claims when there is a disagreement between the Child Protection Specialist and the Program Assessment Specialist. The Child Protection Specialist Supervisor will review the documentation and inform both the Child Protection Specialist and the Program Assessment Specialist of the decision. The decision will be documented on ACTD by the Program Assessment Specialist.

Submitting Child Support Referral

A CSED referral must be made on each child who will be in the paid care and custody of DPHHS for more than 90 days. The Child Protection Specialist will receive an alert that states “Child Support referral must be done by (date)”, but should wait until the IV-E Unit has determined if the child will be IVE eligible. The Child Protection Specialist will receive an alert that states “IV-E eligibility has been added for client.” Once the IV-E unit makes this determination, submit the CSED referral.

When referring a child whose placement is being paid using IV-A Emergency Assistance, the referral must state IV-A funding is being used and the expiration date.

Prior to entering the child support referral, the Child Protection Specialist needs to ensure that the following screens are updated on CAPS for parents, all putative fathers, and the child(ren):

- For the parents/putative parents: PERD, ICWD, EMPL, ADDL, AKAD, and MEDS (height, weight, hair color, and eye color) and,

- For the child: SERL, CELL, RELL, ICWD, MEDS

The child support referral begins on the SIID screen for the child. A separate child support referral will be submitted for each child in

paid foster care. To add an application, enter an "A" on the select line and enter. The next screen that appears is CSED. The information at the top of the screen is defaulted to the current assigned Child Protection Specialist. The relationship information is from the client's RELL screen. The Child Protection Specialist must enter the signature on assignment of rights information at the bottom of the screen. The IV-E field cannot be entered as it is imported from the CELL screen.

Once the signature information is entered, the Child Protection Specialist is brought to the CSCD screen and must answer the series of questions listed with Y (Yes), N (No) or U (Unknown). Certain questions require an answer based on answers to prior questions. If the Child Protection Specialist knows that the parents were married, the date of marriage is required to allow child support to determine paternity.

The next screen(s), CSFD, is information regarding the father/putative fathers that is imported from other screens on CAPS. The information on this page is not correctable from this screen. The Child Protection Specialist would need to refer back to whichever CAPS screen is applicable for the question.

The following screen, CSF2, is additional information about the father(s). The good cause reason field is an F12 lookup and is a required field. If good cause reasons exist for not pursuing the support order against the parent, SEE GOOD CAUSE portion of this policy. The two comment fields at the bottom of the screen are free-form text fields for the Child Protection Specialist to enter additional information about the father(s) situation and general comments such as "potentially dangerous", explanation of good cause reason, or if the family is receiving IV-A with the expiration date. When there is more than one father/putative father listed, the Child Protection Specialist will not be able to press Enter to get to the next screen and must press F8 to go to the next father.

Upon completion of the father(s)' information, the next screen is the mother's screen, CSMD. This is similar to CSFD and is not an updatable screen.

The following screen, CSM2, is the mother's additional information screen. It is identical to the father's CSF2 screen.

The final screen is PRID, which lists medical and life insurance information. The medical information is imported from the MEDS screen and cannot be added on this screen. The life insurance information can be added by pressing F11. Once this screen is complete, the Child Protection Specialist is returned to SIID screen. To electronically send this to Child Support (ELECTR status), the Child Protection Specialist must enter an "E" on the line in front of completed. A referral may be modified or deleted until it is in the ELECTR status. An application cannot be put into ELECTR status until the referral has been approved if good cause reasons of "do not pursue" are entered on either the father or the mother.

Good Cause

Good cause for not pursuing a support order against a parent may be claimed under the following circumstances:

1. It is not in the best interest of the child. Pursuing or collecting child support is reasonably anticipated to result in:

a. physical or emotional harm to the child for whom support is sought; or

b. the child was conceived as a result of incest or forcible rape.

2. The case plan is to return the child home within 90 days from removal.

3. Parental rights have been terminated.

4. Legal proceedings for adoption of the child are pending before a court of law; or the Department is assisting the parent(s) to resolve the issue of whether to keep the child or relinquish him or her for adoption and such discussions have not continued for more than three months.

5. The parent is deceased. Good cause must be claimed on a deceased parent unless an existing order was already established by CSED prior to that parent's death. CSED can not establish a support on a deceased parent. If a support order was established prior to a parent's death but a referral was not sent, CSED could not collect from an estate as notice of collections could not be given to the deceased parent.

Claiming Good Cause

The good cause determination is based on the corroborative evidence provided on behalf of the child's parent(s). The Child Protection Specialist must:

1. State the circumstances upon which the claim is based;

2. Provide corroborative evidence within 20 days from the day the claim was made; and
NOTE: If additional time is required, the Program Assessment Specialist shall allow a reasonable additional period of time.

3. Upon request, the Child Protection Specialist will provide additional corroborative evidence if available. The CSED Liaison may provide assistance.

Proof of Good Cause

A good cause claim may be corroborated with the following types of evidence:

1. Birth certificates or medical or law enforcement records which indicate that the child was conceived as the result of incest or forcible rape;

2. Court documents or other records which indicate that legal proceedings for adoption are pending before a court of competent jurisdiction;

3. Court, medical, criminal, child protective services, social services, psychological, or law enforcement records which indicate that the putative father or absent parent might inflict physical or emotional harm on the child or caretaker relative;

4. Medical records which indicate emotional health history and present emotional health status of the caretaker relative or the child;

5. Written statements from a mental health professional indicating a diagnosis or prognosis concerning the emotional health of the caretaker relative or the child;

6. A written statement from a public or licensed private social agency that the recipient is being assisted by the agency to resolve the issue of whether to keep or relinquish the child for adoption; or

7. Sworn statements from individuals other than the recipient with knowledge of the circumstances which provide the basis for the

good cause claim.

NOTE: In the process of obtaining information to support the good cause claim, it may become necessary to contact the absent parent or putative father. In that case, notify the caretaker relative prior to making the contact.

Determining Good Cause

The Program Assessment Specialist will determine if pursuing child support is against the best interests of the child based on the evidence provided by the Child Protection Specialist. The determination will be made within thirty (30) days from the day the claim is made. This time period may be extended only when the agency documents a need for additional time because information cannot be obtained within the time period or the claimant cannot provide evidence within this time period.

The following guidelines are provided to assist the Program Assessment Specialist in the determination process:

1. A finding of good cause for reasonably anticipated physical or emotional harm to the caretaker relative must be of such nature or degree that it reduces the relative's capacity to adequately care for the child.

Consideration will be given to the following:

a. The present emotional state of the individual subject to emotional harm;

b. The emotional health history of the individual;

c. Intensity and probable duration of the emotional impairment;

d. The degree of cooperation required; and

e. The extent of the involvement of the child in the pursuit of support.

Should the Child Protection Specialist statement, along with the supporting evidence, not provide a sufficient basis for making the determination, the Program Assessment Specialist will contact the Child Protection Specialist to obtain additional information.

Good Cause Decision

The final determination that good cause does or does not exist will be documented by the Program Assessment Specialist:

1. On ACTL for the child, press F11 to add a detail screen. On ACTD screen, enter the date the decision was made, the activity type would be correspondence (COR), the purpose would be decision point and monitor (DPT and MNT), and the goal would be well being (WEL). In the summary, the Program Assessment Specialist should list the findings and the basis for the good cause decision, specifically listing what documents were used and the dates of the documents.

2. If the good cause claim is approved, the Program Assessment Specialist will send the supporting documentation to the servicing Child Support Office.

3. At the time of the 6 month re-evaluation the PAS will verify that good cause continues to exist, with the assistance of the CPS Worker. The PAS will document this in CAPS on ACTD for the good cause determination.

4. A new referral will need to be initiated by the CPS Worker if good cause no longer exists for previous good cause determination.

- If the perpetrator of abuse is in prison after the good cause claim was made, it may no longer be valid.

NOTE: If CSED has an existing case against a parent and receives a referral marked "good cause" for that parent, that case will be closed. CFS must submit a referral to CSED even when claiming good cause, providing CSED with accurate and up-to-date custodial parties relevant to the child.

CSED Offices

Region 2 - This region encompasses Blaine, Cascade, Chouteau, Glacier, Hill, Liberty, Petroleum, Phillips, Pondera, Teton, and Toole Counties.

201 First Street South, Suite 1A
Great Falls, MT 59405
(406) 727-7449
Fax: (406) 454-3106

Region 3 - This region encompasses Big Horn, Carbon, Carter, Custer, Daniels, Dawson, Fallon, Garfield, McCone, Musselshell, Powder River, Prairie, Richland, Roosevelt, Rosebud, Sheridan,

Treasure, Valley, Wibaux, and Yellowstone Counties.

1500 Poly Drive, Suite 200
Billings, MT 59102
(406) 655-5500
Fax: (406) 655-5545

Region 4 - This region encompasses Beaverhead, Broadwater, Deer Lodge, Fergus, Gallatin, Golden Valley, Granite, Jefferson, Judith Basin, Lewis and Clark, Madison, Meagher, Park, Powell, Silver Bow, Stillwater, Sweetgrass, and Wheatland Counties.

17 West Galena
Butte, MT 59701
(406) 497-6600
Fax: (406) 782-9728

Region 5 - This region encompasses Flathead, Lake, Lincoln, Mineral, Missoula, Ravalli, and Sanders Counties.

2675 Palmer Street , Suite C
Missoula, MT 59808
(406) 329-7910
Fax: (406) 329-5468

Region 8 - This region encompasses incoming interstate cases for all counties in Montana.

3075 North Montana Avenue
PO Box 202943
Helena, MT 59620-2943
(406) 444-9767
Fax: (406) 444-9626

OR Contact CSED Foster Care Liaison Melanie Hultin at (406) 444-3801 or by e-mail at mhultin@mt.gov

Change in Circumstances
IV-E Eligibility

An additional referral will need to be made if the child has become IV-E eligible or loses IV-E eligibility since the previous referral was made. The Child Protection Specialist will again return to the SIID screen and add an “A” where the previous “E” was. Then follow the above steps to complete the referral.

Exit Reasons/ Stop Collections	If the referral was sent electronically, CSED receives the Exit/Court reason automatically via the CAPS/SEARCHS interface the day after the code is entered on CAPS. It is important for the Child Protection Specialist to enter the proper exit reason for placements as this allows child support to stop collections. CSED should be notified when a decree of guardianship is issued if there is an open child support case. The Department's child support case will be closed whether or not a subsidy is being provided. If the guardian wishes to pursue child support, the guardian may contact CSED to request services. Exit reasons that let child support know to stop current collections are: AFN, AGE, COR, DED, EMP, JOC, POG, POP, RTH, RUN, and SAD. However, if the code is changed after the initial entry, Child support is not notified or the change. Children placed on Runaway status (RUN) can remain open for 5 days; after 5 days this status must be approved on the PLAD screen by the CPS Supervisor and/or Regional Administrator (per CFSD policy 402-5). Court dispositions that will stop current collections are: AFD, DIS, FRT, MRT, PLC, PRT, and RPA. Arrearages (past contributions owed) will continue to be collected.
Hard Copy Referrals	If the case was referred by hard copy form (as were some of the older foster care cases), CSED does not receive the Exit/Court reason because a link has not been established between CAPS and SEARCHS. In these circumstances, the Child Protection Specialist should advise CSED of the Exit/Closure reason to ensure timely termination of any outstanding actions they have.
Absent Parent	When the Child Protection Specialist receives the alert "Absent parent received from SEARCHS", a new CSED referral will need to be submitted including the absent parent.
Rejected Referrals	If for some reason, the CSED referral is rejected by Child Support, an alert will go to the Child Protection Specialist and the Program Assessment Specialist that states "CSE referral for client has been rejected" and on the SIID screen the status will be reverted to "Inwork". The Child Protection Specialist can make the appropriate changes and resubmit or delete the application if necessary.
Non-paid to Paid Placements	When a child changes from an initial non-paid placement to a paid placement, the Child Protection Specialist will be required to submit

a CSED referral. Again as stated on page 1, wait until the IV-E unit has determined if the child will be IV-E eligible. The Child Protection Specialist will receive an alert that states “IVE eligibility has been added for client.” Once the IVE unit makes this determination, submit the CSED referral.

Payments

All child support payments are payable to the Child Support Enforcement Division, P.O. Box 5955, Helena, MT 59604. Child support is credited to each individual child and used to abate the cost of that child's foster care.

References

Mont. Code Ann. §§ 41-3-446
Mont. Admin. R. 37.49.301
Titles IV-B and IV-E of the Social Security Act
Sections 45 CFR 232.40 thru 45 CFR 232.43, 45 CFR 302.52
DPHHS Child Support Enforcement Division Policy 510.5 (Hardship Adjustments)

Rev. 10/01
Rev. 10/02
Rev. 10/03
Rev. 04/06
Rev. 10/07
Rev. 10/09

I. Montana Resources
c. Montana Cases and Summaries

903 P.2d 207 (1995)

In the Matter of the PATERNITY OF "ADAM," A Minor Child.
"Bob," Petitioner and Appellant, and
"Mary" and "John," Defendants and Respondents.

No. 95-019.

Supreme Court of Montana.

Submitted on Briefs May 25, 1995.
Decided September 29, 1995.
Rehearing Denied October 19, 1995.

Robert G. McCarthy; Hennessey, Joyce, McCarthy & Wing, Butte, for appellant.

John M. Morrison; Meloy & Morrison, Helena, for respondents.

LEAPHART, Justice.

"Bob" appeals from an order of the Eighteenth Judicial District Court, Gallatin County, concluding that it was not in "Adam's," a minor child, best interest to declare paternity in "Bob."[1] We affirm.

BACKGROUND

"Mary" and "John" moved to Bozeman together in 1990 to establish a restaurant and bakery. At that time, Mary and John lived together and their relationship was platonic. Mary met Bob in a business context in 1991 and thereafter they began an intimate relationship. Bob moved into Mary's and John's apartment in the early months of 1992. In April 1992, Bob's and Mary's relationship ended and Bob moved out of Mary's and John's apartment.

In late May of 1992, Mary learned that she was pregnant. In June of 1992, Mary requested that Bob relinquish his parental rights. Bob refused. Mary and John married on September 9, 1992. On December 15, 1992, Bob filed what was titled a "Notice of Intent to Claim Paternity" with the Clerk of Court for the Eighteenth Judicial District, Gallatin County. Mary gave birth to Adam on December 21, 1992. John was listed as Adam's father on the birth certificate.

On January 5, 1993, Bob filed a petition in which he asserted that he was Adam's biological father. Bob sought a determination of Adam's paternity and a determination of child custody, visitation, and child support obligations. The court appointed a guardian ad litem to monitor Adam and report to the court on a monthly basis. The parties agreed to submit the question of Bob's standing for a pre-trial ruling. The court ruled that Bob did have standing to challenge the presumption that John was the father pursuant to § 40-6-107(1), MCA.

The District Court ordered blood drawn from Bob, John and Adam to determine paternity. Mary and John opposed the order for blood samples and sought a writ of supervisory control from this Court. We denied the writ. Without waiving her right to object to a judicial determination of the father/child relationship, Mary stipulated that Bob was Adam's biological father.

After a bench trial, the court issued Findings of Fact and Conclusions of Law in which it determined that it was not in Adam's best interest to declare paternity in Bob and, thus, dismissed Bob's petition. Mary and John raise numerous issues which we do not address because they neither appealed nor cross-appealed. *See* Rule 4, M.R.App.P. Bob's

dispositive issues are summarized as follows:

1. Whether the District Court erred when it used the best interest of the child as the standard for determining whether to make a judicial declaration of paternity.

2. Whether the District Court erred in denying Bob's motion for a continuance.

DISCUSSION

1. Whether the District Court erred when it used the best interest of the child as the standard for determining whether to make a judicial declaration of paternity.

The District Court recognized that Bob was, in all probability, Adam's biological father. However, in its order determining paternity, the District Court stated that "it is not in [Adam's] best interest to determine paternity in [Bob]." In its order denying Bob's motion to reconsider, the District Court stated that "none of the arguments set forth in [Bob's] brief persuade the court that a different decision would be in [Adam's] best interest." Bob argues that the District Court erred in using the "best interest of the child" standard and, for the first time on appeal, that the District Court failed to consider his constitutional rights to equal protection and due process in its balancing of "conflicting presumptions of paternity and legitimacy." We disagree.

This is a case of first impression in Montana. We therefore look to other jurisdictions for guidance in applying the Uniform Parentage Act (UPA). The District Court relied heavily on *Lehr v. Robertson* (1983), 463 U.S. 248, 103 S.Ct 2985, 77 L.Ed.2d 614. Lehr was the putative father of a child born out of wedlock. The mother married another man after the child was born. When the child was about two years old, the husband was granted a decree of adoption. Although he never supported the child or offered to marry the child's mother, Lehr then filed an action to challenge the adoption as violating his rights of due process and equal protection. In rejecting Lehr's arguments, the United States Supreme Court drew a distinction between a "developed parent-child relationship" as opposed to a "potential" relationship.

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," *Caban [v. Mohammed],* 441 U.S. [380], at 392, [99 S.Ct. 1760, 1768, 60 L.Ed.2d 297], his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." Id. at 389, n. 7, [99 S.Ct. at 1766, n. 7]. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. *" [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in `promot[ing] a way of life' through the instruction of children ... as well as from the fact of blood relationship." [Citations omitted; emphasis added.]*

Lehr, 463 U.S. at 261, 103 S.Ct. at 2993. The Court then went on to explain that the biological connection merely gives a natural father the opportunity to become a "parent":

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child

> relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

Lehr, 463 U.S. at 262, 103 S.Ct. at 2993-94.

On December 15, 1992, prior to Adam's birth, Bob filed a "Notice of Intent to Claim Paternity" with the Clerk of the Eighteenth Judicial District Court. Section 40-6-105, MCA, provides in relevant part:

> A man is presumed to be the natural father of a child if:
>
> (a) he and the child's natural mother are or have been married to each other and the child is born during the marriage or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce or after a decree of separation is entered by a court;
>
> ....
>
> (d) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child; or
>
> (e) he acknowledges his paternity of the child in a writing filed with the department of health and environmental sciences or with the district court of the county where he resides, which court or department shall promptly inform the mother of the filing of the acknowledgment, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the department of health and environmental sciences or with the district court of the county where the acknowledgment was filed. If another man is presumed under this section to be the child's father, acknowledgment may be effected only with the written consent of the presumed father or after the presumption has been rebutted.
>
> (2) *A presumption under this section may be rebutted in an appropriate action by a preponderance of the evidence.* [Emphasis added.]

In this case, subsections (a) and (d) favor John as the natural father. These presumptions in John's favor, however, are rebutted by Mary's acknowledgment that Bob is the biological father. See *In re Marriage of Miller* (1992), 251 Mont. 300, 825 P.2d 189, in which a statutory presumption of paternity was rebutted when mother and husband acknowledged under oath that the husband was not the natural father. In addition, subsection (e) supports Bob's claim to paternity since he filed an acknowledgment which the natural mother did not dispute.

Although the UPA utilizes a "best interest" standard in certain contexts, it does not specifically establish that standard for determining whether a court should declare the father/child relationship.[2] The court, therefore, based its decision on case law from other states as well as UPA guidelines which it interpreted as promoting legitimacy.

The California Court of Appeals has held that even if a putative father establishes his biological paternity to a child conceived out of wedlock, but born after the mother married another man, the nature of his relationship to the child is governed by the best interest of the child. *Michael M. v. Giovanna F.* (Cal. Ct. App. 1992), 7 Cal. Rptr.2d 460, 468.

The Washington Supreme Court has held that "[t]he best interest of the child standard does not entitle a court to presume that paternity determination is *automatically* in the child's best interest." *McDaniels v. Carlson* (Wash. 1987), 738 P.2d 254, 261. The court in *McDaniels* set out factors to be considered when determining whether a paternity determination is in the child's best interest:

> [I]n determining whether it is in the child's best interest to allow a paternity action by one outside the present family, the trial court should consider the stability of the present home environment, the existence or lack thereof of an ongoing family unit, the extent to which uncertainty of parentage already exists in the child's mind, and any factors which may be relevant in assessing the potential benefits or detriment to the child.

McDaniels, 738 P.2d at 262. A court must conclude that paternity determination is in the child's best interest based on the facts in the record. *In re Marriage of Ross v. Austin* (Kan. 1990), 783 P.2d 331, 339.

We agree with the District Court's analysis and adopt the "best interest of the child" standard for deciding whether there should be a judicial declaration of the father/child relationship in a paternity dispute under Montana's UPA. In determining whether paternity should be declared in Bob, the District Court considered: the parties' relationships with each other, their lifestyles and incomes; testimony from the parties, testimony from Adam's guardian ad litem, and testimony from a social worker retained by Mary and John. The District Court concluded that based on § 40-6-201, MCA, there is a rebuttable presumption that a child born into wedlock is legitimate. The court further considered the UPA's presumptions that a man is the natural father of a child if the man is married to the child's mother at the time of birth, § 40-6-105(1)(a), MCA; that there is a presumption of paternity when properly acknowledged, § 40-6-105(1)(e), MCA; and that these presumptions of paternity are subject to rebuttal, § 40-6-105(2), MCA.

Through the mother's stipulation that Bob was Adam's father, the statutory presumptions in favor of John as the biological father were rebutted. However, as pointed out by the United States Supreme Court in *Lehr,* that biological determination merely sets the stage for the next question: Is it in the best interest of Adam to judicially declare the father/child relationship and thereby grant Bob the prerogatives of a parent? The probability that Bob is the natural father, although a weighty factor in applying the best interest analysis, is not the controlling consideration in judicially determining the parent/child relationship. As set forth above, the best interest analysis requires the court to look beyond the biological ties. The court must consider: the existence of a home environment; the stability of the present home and family; the extent to which uncertainty of parentage already exists in the child's mind; the efforts and commitments (if any) that the putative father has taken to establish supportive and financial ties with the child; as well as any other factors which may be relevant in assessing the potential benefits or detriments to the child.

In the present case, the District Court considered that Bob is probably Adam's father, a fact essentially conceded by Mary. Further, the court noted that Bob has had no contact with Adam and has demonstrated no personal commitment to or responsibility for Adam; nor has he taken steps to obtain suitable employment or housing or to establish a child support fund. The District Court weighed these facts against the stability of Mary's and John's marital relationship, their care for Adam, and their financial stability. The District Court noted that John's name appears on Adam's birth certificate, that Adam has always lived with Mary and John and they all share a strong emotional relationship, and that Adam is, by all accounts, loved and well cared for in a safe and suitable home environment.

Application of the "best interest of the child" test involves a discretionary decision by the district court. In reviewing discretionary rulings by the district court we apply the abuse of discretion standard. *Montana Rail Link v. Byard* (1993), 260 Mont. 331, 337, 860 P.2d 121, 125. We hold that the District Court did not abuse its discretion in deciding not to declare the father/child relationship in Bob. Rather, it correctly applied the "best interest of the child" test by considering the stability of the family relationship of Mary and John contrasted with Bob's failure to show any commitment towards establishing a "parental" as opposed to a biological role. The court properly concluded that it was not in Adam's best interest to judicially declare paternity in Bob.

Bob did not raise the constitutional issues of equal protection or due process below. We have held that issues not raised before the district court are generally not considered on appeal. *Miller v. Catholic Diocese of Great Falls* (1986), 224 Mont. 113, 116, 728 P.2d 794, 795. We therefore decline to further consider Bob's constitutional issues.

2. Whether the District Court erred in denying Bob's motion for a continuance.

Bob argues that the District Court abused its discretion when it denied his motion for a continuance when the guardian ad litem and the attorney for the guardian ad litem, had not been given notice of the trial and the guardian ad litem had not revised her report to the court. We disagree.

Bob did not subpoena the guardian ad litem, she therefore proceeded with a planned vacation and was out of state at the time of trial. By express agreement of both parties, she testified by telephone. She testified that she relied "on common sense" and that she had not seen Adam in seventeen months. She appears to have made only limited efforts to monitor and report on Adam. Given these facts, we hold that the District Court did not abuse its discretion when it denied Bob's motion for an extension of time so that the guardian ad litem could update her report. To conclude on this issue, we note that the guardian ad litem did not appeal the decision of the District Court.

Affirmed.

TURNAGE, C.J., and GRAY, HUNT and TRIEWEILER, JJ., concur.

[1] Pseudonyms have been used in place of the parties' actual names.

[2] Section 40-6-130, MCA provides that when a child is the subject of an adoption proceeding, the court must determine whether it will be in the best interest of the child to award custody to the putative father. Since Adam is not the subject of an adoption proceeding, this section is inapplicable. Section 40-6-114, MCA, provides for a pretrial recommendation of whether judicial determination of paternity would be in the best interest of the child. If the recommendation is not accepted and the matter goes to trial, the UPA does not provide a standard for resolution of the paternity issue.

Section 40-6-116(3)(a), MCA, allows the judgment of the court determining the existence or nonexistence of the parent/child relationship to address such things as custody, visitation, bond "or any other matter in the best interest of the child."

2004 MT 320

IN THE MATTER OF A.C., T.C., and C.W., Youths in Need of Care.

No. 04-231

Supreme Court of Montana.

Submitted on Briefs: September 14, 2004
Decided: November 16, 2004

For Appellant: Carl Jensen, Attorney at Law, Great Falls, Montana.

For Respondent: Honorable Mike McGrath, Montana Attorney General, Ilka Becker, Assistant Attorney General, Helena, Montana; Brant S. Light, Cascade County Attorney, Sarah, Corbally, Deputy County Attorney, Great Falls, Montana.

Justice James C. Nelson delivered the Opinion of the Court.

¶ 1 P.H., mother of A.C., T.C., and C.W., appeals the judgment of the Eighth Judicial District Court, Cascade County, awarding G.C., the father, custody of A.C. and T.C., while also dismissing her case as it relates to the Department's involvement.

¶ 2 We address the following issue on appeal and affirm: Did the District Court err in awarding G.C. custody of A.C. and T.C.?

FACTUAL AND PROCEDURAL BACKGROUND

¶ 3 P.H. has three children, A.C., T.C., and C.W. G.C. is the father of A.C. and T.C.

¶ 4 On September 3, 2003, the Department of Public Health and Human Services (the Department) filed a Petition for Emergency Services, Adjudication as Youth in Need of Care and Temporary Legal Custody with regard to A.C., T.C., and C.W. after receiving a report that P.H. was using drugs in front of the children; that P.H. and her boyfriend were seen fighting in front of the children; and that the children had been eating only rice.

¶ 5 On September 11, 2003, the District Court held a show cause hearing. Thereafter, the District Court found that probable cause existed to support the Department's concerns that the children were abused and neglected or were in danger of abuse and neglect. The District Court determined that the Department had the authority to move the children to either a foster home or a kinship placement, once such placement was found. After initially being placed with their maternal grandmother, the children entered a receiving home in November 2003.

¶ 6 On December 4, 2003, the District Court held an adjudicatory hearing, wherein the children were adjudicated as youths in need of care. Thereafter, a dispositional hearing was set and rescheduled several times until February 26, 2004. At the dispositional hearing, the

State of Montana (the State) asked that A.C. and T.C. be placed with G.C., since the Department had investigated the placement and had determined that the placement was in the best interests of the children.

¶ 7 The District Court ultimately ordered that A.C. and T.C. be placed with G.C. and that their case be dismissed, with the Department having no further obligation to provide services. Because G.C. is not C.W.'s father, nor could C.W.'s father be located, the District Court found that placement of C.W. with his maternal aunt was in C.W.'s best interests. C.W.'s case is ongoing pending P.H.'s completion of her treatment plan.

¶ 8 P.H. now appeals the District Court's Order placing A.C. and T.C. with G.C.

STANDARD OF REVIEW

¶ 9 We review a district court's findings of fact to determine if those findings are clearly erroneous. *In re J.B.K.*, 2004 MT 202, ¶ 13, 322 Mont. 286, ¶ 13, 95 P.3d 699, ¶ 13. We review a district court's conclusions of law to determine if the district court interpreted them correctly. *In re J.B.K.,* ¶ 13.

DISCUSSION

¶ 10 Did the District Court err in awarding G.C. custody of A.C. and T.C.?

¶ 11 P.H. argues that a due process violation occurred when the State asked the District Court to place A.C. and T.C. with G.C. in Maine, thereby dismissing the case pertaining to A.C. and T.C. under § 41-3-438(3)(b), MCA. P.H. argues that because she assumed that services would be provided to her and that reunification was the State's ultimate goal, the finality of the State's request "virtually preclude[d]" this reunification possibility. As such, P.H. argues that due process requires that she be afforded notice of the State's intent to place A.C. and T.C. with G.C., "in order to adequately address the request and present evidence as to the best interests of the children." In addition, P.H. argues that the treatment plan and P.H.'s completion of that plan are "property rights," that, under the due process clause, "cannot be taken away arbitrarily."

¶ 12 The State responds that because P.H. raises her due process argument here for the first time on appeal, this Court should not review it, given that it does not implicate constitutional magnitude. The State also argues that the District Court properly placed A.C. and T.C. with G.C., under § 41-3-438(3), MCA. P.H. had notice of the dispositional hearing and the options available to the District Court at that hearing. As such, the State maintains that "[s]imply because the district court did not pursue the disposition the mother [P.H.] was expecting, does not mean that she lacked notice." In addition, the State argues that once A.C. and T.C. were adjudicated youths in need of care, the Department had custody of the children. Hence, once the Department ensured that G.C.'s home was a safe placement for the children, the State contends that the Department did all that was necessary "for the district court to place the children under Mont. Code Ann. § 41-3-438(3)(b)." We agree.

¶ 13 Section 41-3-438(3)(b), MCA states:

If a child is found to be a youth in need of care . . . the court may enter its judgment, making any of the following dispositions to protect the welfare of the child:

. . .

(b) order the placement of the child with the noncustodial parent, superseding any existing custodial order, and dismiss the proceeding with no further obligation on the part of the department to provide services to the parent with whom the child is placed or to work toward reunification of the child with the parent or guardian from whom the child was removed in the initial proceeding.

¶ 14 A youth is a "youth in need of care," when that youth "has been adjudicated or determined, after a hearing, to be or to have been abused, neglected, or abandoned." Section 41-3-102(29), MCA.

¶ 15 In addition, under Article III of the Interstate Placement of Children Compact:

The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.

¶ 16 We do not address P.H.'s due process argument here, as she raises that issue for the first time on appeal. We have repeatedly held that we do not consider issues raised for the first time on appeal, as "it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." *In re D.H.*, 2001 MT 200, ¶ 41, 306 Mont. 278, ¶ 41, 33 P.3d 616, ¶ 41.

¶ 17 P.H.'s parental rights have not been terminated. Rather, under its statutory authority, the District Court ordered placement of A.C. and T.C. with their noncustodial parent, G.C., after the Department found that such placement would be in the children's best interests. The Department took the necessary steps to ensure safe placement for the children, as required under the Interstate Placement of Children Compact. In addition, the District Court followed statutory procedure in ordering placement of the children with G.C. and in relieving the Department from any further obligation, as the concern for them being youths in need of care was eliminated by such placement. Accordingly, we hold that the District Court did not err in awarding G.C. custody of A.C. and T.C.

¶ 18 Affirmed.

JUSTICES KARLA M. GRAY, JOHN WARNER, PATRICIA O. COTTER and JIM RICE concur.

No. 05-183

IN THE SUPREME COURT OF THE STATE OF MONTANA

2005 MT 297

IN RE PARENTING OF K.P.:

J.D.,

Petitioner and Respondent,

v.

C.P. and G.P.,

Respondents and Appellants.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and for the County of Flathead, Cause No. DF 2002-003(C)
The Honorable Stewart E. Stadler, Judge presiding.

COUNSEL OF RECORD:

For Appellants:

F. Ron Newbury, Attorney at Law, Helena, Montana

For Respondent:

Lori B. Miller, Attorney at Law, Whitefish, Montana

Submitted on Briefs: September 14, 2005

Decided: November 23, 2005

Filed:

Clerk

Justice Patricia O. Cotter delivered the Opinion of the Court.

¶1 C.P. and G.P., mother and putative father of K.P. (Appellants), appeal the District Court's legal declaration of her biological father's paternity and Order directing the parties to devise a parenting plan for visitation and support. C.P. and G.P. also request a stay of judgment from the District Court Order, while Respondent, J.D., the biological father, requests costs and attorney fees associated with this Appeal. We affirm the District Court, and deny both the Appellants' request for a stay, and Respondent's request for costs and attorney fees.

ISSUES

¶2 The restated issues on appeal are:

1. Did the District Court err when it allowed a rebuttal of G.P.'s presumed paternity?
2. Did the District Court abuse its discretion when it applied Montana's "best interest of the child" standard to recognize J.D.'s paternity?
3. Should this Court issue a stay of the District Court Order?
4. Is J.D. entitled to costs and attorney fees resulting from this appeal?

FACTUAL AND PROCEDURAL BACKGROUND

¶3 K.P., the now three-year old child at the heart of this paternity dispute, was conceived during an extra-marital affair between her mother, C.P., and J.D. The affair occurred while C.P. was temporarily estranged from her husband, G.P. Shortly after finding out she was pregnant, C.P. reconciled with G.P., who with full knowledge of the affair and C.P.'s

pregnancy, forgave his wife and then supported her through her pregnancy. G.P. participated in K.P.'s birth, signed K.P.'s birth certificate as her father, and thereafter held K.P. out as his child. During the eighth month of C.P.'s pregnancy, C.P. and G.P. asked J.D. to relinquish any paternity claim and allow them to raise the baby in their family. J.D. declined, and then fearing C.P. and G.P. would prevent contact between him and the child, on July 12, 2002, J.D. petitioned the District Court for a determination of paternity.

¶4 On August 1, 2002, the District Court held a hearing on J.D.'s Petition for Determination of Paternity. At that time, C.P.'s and G.P.'s attorney acknowledged that under Montana law J.D. had a right to request genetic testing to determine whether he was the biological father of C.P.'s yet unborn child. Neither C.P. nor G.P. objected to testing. Moreover, both knew it was unlikely G.P. was the biological father of the child because he had a vasectomy several years prior. As C.P., G.P., and J.D. all agreed to submit to DNA testing, the District Court ordered them each to provide samples for testing within 30 days of the child's birth.

¶5 DNA testing conclusively showed that J.D. was the biological father of K.P.

¶6 In October 2002, the District Court referred this case to Family Court Services (Family Court). In December 2002, J.D. began weekly visitation with K.P. who was then four months old. Initially J.D. was allowed one 30-minute visit per week supervised by the staff at the Nurturing Center in Kalispell, which supervision J.D. arranged. Gradually the duration of K.P.'s visits increased, and moved to J.D.'s home as approved by Family Court. During the visits observed by Family Court's Director, J.D. was "continually . . . on time[,]

. . . interested in visits, [and] acted appropriately at visits." Then, in May 2003, following an incident between J.D. and C.P., G.P. disallowed subsequent visitation.

¶7 On May 29, 2003, Family Court filed its Parenting Plan Evaluation and Report with the District Court recommending K.P. be given "every opportunity to know, love, and be cared for by her biological father." Family Court's recommendation was based on: interviews, responses to questionnaires, joint meetings, and home visits with the parties; interviews with professionals involved with the case; interviews with the parties' personal references; observation of K.P.'s interactions with the parties; and reviews of criminal and other court information. Given K.P.'s young age, and the loving home provided by C.P. and G.P., Family Court further recommended that K.P. stay in her mother's primary care, so long as she and G.P. did not deny J.D. visitation, with gradual implementation of parenting time for J.D. Family Court emphasized that K.P. was at a "significant stage of her development," and that "to date, the experiences [C.P.] and [G.P.] have provided in regard to [K.P.]'s association with her natural father are distorted and sad." Family Court recommended that should C.P. and G.P. continue to prevent meaningful interaction between J.D. and K.P., K.P. be placed in J.D.'s primary care.

¶8 J.D. then filed a motion for implementation of an interim parenting plan, for which the District Court held a hearing on June 23, 2003. The court then appointed a guardian ad litem (GAL) to prepare a report regarding K.P.'s best interests.

¶9 At the June 2003 hearing, Appellants' pastor and counselor both testified they believed K.P.'s best interests would be served by C.P.'s and G.P.'s plan for K.P.'s

upbringing. They expressed their hope that K.P. would grow up without contact with, nor knowledge of J.D., until she reached an age of maturity when C.P. and G.P. could tell her about the circumstances of her conception, and allow her to decide whether to establish a relationship with J.D. In the interim, C.P. would periodically inform J.D. of K.P.'s well-being through photos, medical records, and letters from C.P.

¶10 The Director of Family Court also testified. On cross-examination, she stated that it is in K.P.'s "best interests to have a relationship with her father, [J.D.]." The Director based her opinion on the investigation she conducted in preparing her written Report, as well as her professional experience and "knowledge of children and their relationships with their parents . . . where children seem to have some need--I would even go so far as to call it an innate need--to know their biological parents. . . . I believe that [K.P.] should be given the opportunity now, rather than to wait until she is 14 and [sic]--or 15 years old and put a decision like that on her. . . ." K.P.'s GAL, after extensive investigation including her own interviews with the parties and others, and observations of K.P. with the parties, agreed with the Director's assessment.

¶11 The District Court, after hearing the evidence, and considering the recommendations of Family Court and K.P.'s GAL, issued Findings of Fact, Conclusions of Law, and Judgment on December 9, 2003, concluding that "the best interests of [K.P.] would be served by recognizing the paternity of [J.D.] and by gradually establishing a parent/child relationship. . . ." Specifically the District Court found: J.D. maintains suitable housing, and acquired appropriate furnishings to care for his young daughter; both K.P.'s mother and

J.D. provide a "stable and healthy home environment" for K.P; since before K.P.'s birth, J.D. demonstrated a "full commitment to the responsibilities of parenting [her];" and J.D. has maintained continuous employment, purchased medical insurance for K.P., and paid child support into a banking account in K.P.'s name. The District Court ordered that a parent-child relationship be established between K.P. and J.D., and that the parties exchange final parenting plans and develop a support plan for K.P.

¶12 Following the District Court's entry of judgment, C.P. and G.P. filed numerous motions, including an untimely motion for new trial, a petition to terminate J.D.'s parental rights, a petition for adoption, and two consecutive motions to stay the District Court's Judgment. J.D. then filed a motion for contempt because C.P. and G.P. repeatedly resisted J.D.'s attempts to exercise visitation. Notably, however, despite the flurry of motions filed by both parties, J.D. failed to file a notice of entry of judgment after the District Court ruled in his favor in December 2003. A year later, on December 13, 2004, C.P. and G.P. filed a Notice of Entry of the December 2003 Judgment, and immediately thereafter filed a Notice of Appeal.

¶13 We require prevailing parties to serve a notice of entry of judgment "before the thirty day deadline for filing notice of appeal begins to run." *Quantum Electric, Inc., v. Schaeffer*, 2003 MT 29, ¶ 29, 314 Mont. 193, ¶ 29, 64 P.3d 1026, ¶ 29 (citations omitted). Moreover, such notice may be filed by either party. Rule 77(d), M.R.Civ.P., *In re Estate of Spencer*, 2002 MT 304, ¶ 18, 313 Mont. 40, ¶ 18, 59 P.3d 1160, ¶ 18. Because C.P. and G.P. filed

a Notice of Entry of Judgment followed by a timely Notice of Appeal, this matter is properly before us. We now turn to the merits of the appeal.

DISCUSSION

¶14 Did the District Court err when it allowed G.P's presumed paternity to be rebutted with genetic testing?

¶15 Appellants failed to preserve this issue for appeal when they did not object to the DNA testing at the hearing on J.D.'s Petition for Determination of Paternity. To properly preserve an issue for appeal, a party must notify the court at the time the objectionable conduct is at issue. *Jenks v. Bertelsen*, 2004 MT 50, ¶ 12, 320 Mont. 139, ¶ 12, 86 P.3d 24, ¶ 12. Untimely objections are not heard on appeal, as the time for correcting the error has passed. *State v. Vandersloot*, 2003 MT 179, ¶ 23, 316 Mont. 405, ¶ 23, 73 P.3d 174. ¶ 23. Failure to make a timely objection constitutes a waiver. *Hunt v. K-Mart Corp.*, 1999 MT 125, ¶ 10, 294 Mont. 444, ¶ 10, 981 P.2d 275, ¶ 10.

¶16 Here, C.P. and G.P. voluntarily waived the presumption of G.P.'s paternity when they failed to object to the District Court's order that the testing take place. Not only did they not object to the DNA testing, but they both agreed to participate, even while they must have known G.P. was not likely the father because he had a vasectomy years prior. Only after the District Court made its final determination in this case did Appellants object for the first time to the rebuttal of G.P.'s presumed paternity. We conclude that their failure to object at the hearing when the District Court ordered DNA testing constituted a waiver of Appellants' rights to appeal this issue.

ISSUE TWO

¶17 Did the District Court abuse its discretion when it determined it was in K.P.'s best interest to recognize J.D.'s paternity?

¶18 We review a district court's application of the "best interest of the child" standard and declaration of paternity for an abuse of discretion. *Matter of Paternity of Adam* (1995), 273 Mont. 351, 358, 903 P.2d 207, 211. A trial court abuses its discretion when it "act[s] arbitrarily without employment of conscientious judgment or exceed[s] the bounds of reason resulting in substantial injustice." *In re Paternity of C.T.E.-H.,* 2004 MT 307, ¶ 16, 323 Mont. 498, ¶ 16, 101 P.3d 254, ¶ 16 (citations omitted).

¶19 In *Paternity of Adam,* this Court explicitly adopted the "best interest of the child" standard for resolving paternity disputes under Montana's Uniform Parentage Act (UPA). 273 Mont. at 357, 903 P.2d at 211. Later, in *Girard v. Williams*, we reviewed the statutory framework set out in Montana's UPA by which the legal parent-child relationship may be established, and recognized that "once a paternity action is initiated under the UPA, a court may determine whether a judicial declaration of a father-child relationship would be in the best interests of a child," which declaration may also provide for visitation, support, and other provisions. 1998 MT 231, ¶ 21, 291 Mont. 49, ¶ 21, 966 P.2d 1155, ¶ 21, outlining §§ 40-6-109, 40-6-111 to 114 and 116, MCA, reiterated in *In re the Parenting of D.A.H.*, 2005 MT 68, ¶ 8, 326 Mont. 296, ¶ 8, 109 P.3d 247, ¶ 8.

¶20 This Court has consistently honored the rights involved in relationships between natural parents and their children. We have also recognized that mere biology does not

automatically warrant the legal rights and responsibilities accompanying a determination of paternity. *Compare Girard*, 1998 MT 231, 291 Mont. 49, 966 P.2d 1155, (where we discussed the "best interest of the child" test's applicability to paternity disputes, and denied to non-parent caretakers the standing to challenge the natural father's request for custody of his two children who lived with the caretakers for an extended period while he was incarcerated), with *Paternity of Adam*, 273 Mont. 351, 903 P.2d 207, (where we affirmed that a judicial declaration of the natural father's paternity was not in the best interest of the child because the natural father did little to establish a parent-child relationship or provide care and support for his son despite financial ability and father's knowledge of paternity). In addition, we have relied on the U.S. Supreme Court's guidance as well. *See Paternity of Adam*, 273 Mont. at 354, 903 P.2d at 209, *Girard*, at ¶ 67 (in dissent), and *In re C.R.O.*, 2002 MT 50, ¶ 66, 309 Mont. 48, ¶ 66, 43 P.3d 913, ¶ 66 (in dissent), citing *Lehr v. Robertson* (1983), 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614.

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

Paternity of Adam, 273 Mont. at 355, 903 P.2d at 209, quoting *Lehr*, 463 U.S. at 262, 103 S.Ct. at 2993-94, 77 L.Ed.2d at 627.

¶21 In Montana, biology is a "weighty factor" in applying the best interest standard, but not the "controlling consideration." *Paternity of Adam,* 273 Mont. at 357, 903 P.2d at 211.

Once a biological connection is established, a court must weigh that factor against other evidence of the parent's commitment to caring for the child, and fulfilling the role of a "parent" acting in the best interests of his child.

¶22 We require courts to evaluate specific criteria when determining the best interests of children in paternity disputes. In these cases, a court must consider: "the existence of a home environment; the stability of the present home and family; the extent to which uncertainty of parentage already exists in the child's mind; the efforts and commitments . . . the putative father has taken to establish supportive and financial ties with the child; as well as any other factors which may be relevant in assessing the potential benefits or detriments to the child." *Paternity of Adam*, 273 Mont. at 357-58, 903 P.2d at 211. A court's conclusion that a paternity declaration is in the best interest of a child must be based on facts in the record. *Paternity of Adam*, 273 Mont. at 357, 903 P.2d at 210-11 (citation omitted).

¶23 Here, the District Court evaluated the criteria sanctioned by this Court for determining a child's best interest, and relying on evidence in the record, determined that recognizing J.D.'s paternity was in K.P.'s best interest. We find no abuse of discretion in this decision. The record reflects that J.D. maintains suitable housing and appropriate furnishings to care for K.P.; J.D. provides a "stable and healthy home environment" for K.P; since before K.P.'s birth, J.D. has demonstrated a "full commitment to the responsibilities of parenting [her];" and J.D. remains employed, provides K.P. with medical insurance, and pays child support into a banking account in K.P.'s name.

¶24 Additionally, the District Court's determination of paternity comports with testimony provided at trial by the Family Court Director and K.P.'s GAL, both of whom opined a parent-child relationship between J.D. and K.P. would best serve her long-term well-being. The Director testified that it is in K.P.'s "best interests to have a relationship with her father, [J.D.]," and that children have an "innate need" to know their natural parents. K.P.'s GAL concluded that legally recognizing J.D.'s paternity, to immediately foster a meaningful relationship between K.P. and him, would serve K.P.'s best interests.

¶25 Further, the record reflects that throughout this dispute, J.D. has made consistent efforts to spend time with K.P. and develop a relationship with her. Despite C.P.'s and G.P.'s repeated efforts to stall and prevent visitation, J.D. consistently made his availability for visits known through counsel, arranged for the supervision of his visits with K.P. with the Nurturing Center when the District Court required it, and according to Family Services has "continually been on time for visits, been interested in visits, [and] acted appropriately at visits."

¶26 This case stands in stark contrast to *Paternity of Adam*, where the district court applied the same criteria for determining the child's best interest but issued the opposite ruling. In *Paternity of Adam,* the blood bond between Adam and the petitioner was undisputed, as here. However, in that case, the natural father "demonstrated no personal commitment to or responsibility for Adam," the father had neither suitable housing nor employment, and he failed to provide support of any kind. Adam's mother and her husband, on the other hand, shared a "strong emotional relationship" with Adam, a stable marital

relationship with each other, and provided Adam with financial stability in a safe and suitable home where Adam was "loved and well cared for." *Paternity of Adam*, 273 Mont. at 358, 903 P.2d at 211. We affirmed that a declaration of paternity in Adam's natural father, who had failed to perform as a parent, was not in Adam's best interest. Here, while C.P. and G.P. unquestionably provide K.P. with an excellent home, we must analyze what J.D. brings to K.P.'s life. J.D. has demonstrated the qualities of parenthood which warrant a judicial declaration of J.D.'s paternity, and which justify giving K.P. the opportunity to know and love her natural father.

¶27 Appellants maintain the U.S. Supreme Court's ruling in *Michael H. v. Gerald D.*, should control this Court. (1989), 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91. We disagree. The seminal question addressed in *Michael H.* was whether the due process provisions of the U.S. Constitution grant a party other than a husband or wife the right to challenge the paternity of a child born to the wife. Appellants here correctly contend that, in keeping with the U.S. Supreme Court's ruling, neither the Constitution, nor the long-held social policy of protecting the legitimacy of children born to unitary families, offers natural fathers a vehicle for asserting paternity *where state law denies that opportunity*. However, the *Michael H.* Court expressly acknowledged that "it is a question of legislative policy and not constitutional law whether [a state] will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted." 491 U.S. at 129-30, 109 S.Ct. at 2345, 105 L.Ed.2d at 110.

¶28 Montana's lawmakers have exercised their prerogative to allow the rebuttal of a husband's presumed paternity by third-parties to the marriage. In Montana, a husband is presumed to be the natural father of children born to his wife during their marriage. Section 40-6-105(1)(a), MCA. However, the husband's presumed paternity may be rebutted by a preponderance of evidence, or by blood test results which disprove his paternity. Section 40-6-105(3). Consequently, the U.S. Supreme Court's ruling upholding a California law, which prevented Michael H. and his natural daughter from challenging the presumed paternity of her mother's husband, has no bearing on this case.

¶29 C.P. and G.P. also contend that, despite the copious evidence relied on by the District Court, recognizing J.D.'s paternity still is not in K.P.'s best interest because J.D. did not pay medical expenses occasioned by K.P.'s delivery. Section 40-4-212(j), MCA, specifies that if a parent knowingly fails to pay birth-related costs the parent is able to pay, it is not in the child's best interest. However, payment of "birth related costs are non-exclusive factors to be considered with all factors when determining the best interests of the child." *Paternity of C.T.E.-H.*, ¶¶ 40-41. In weighing the evidence before it, the District Court determined that, on balance, sufficient evidence was presented to extend to J.D. the opportunity, uniquely afforded him by biology, to parent his child. We find no abuse of discretion by the District Court in making its determination.

ISSUE THREE

¶30 Should this Court issue a stay of the District Court Order?

¶31 Because we conclude the District Court did not abuse its discretion when it declared J.D's paternity, and ordered the parties to devise a parenting plan that would allow for both visitation with, and support for, K.P, Appellants' request for a stay of the District Court Order is denied as moot.

ISSUE FOUR

¶32 Is J.D. entitled to reasonable costs and attorney fees resulting from this appeal?

¶33 J.D. claims this appeal was intended to cause delay, and is an abuse of the judicial system. He therefore seeks sanctions under Rule 32, M.R.App.P. We disagree that Appellants' argument is so frivolous as to indicate bad faith. Costs and attorney fees are therefore denied.

CONCLUSION

¶34 For the foregoing reasons, we affirm the District Court ruling, deny the Appellants' motion for a stay of the District Court Order, and deny Respondent's request for costs and attorney fees on appeal.

/S/ PATRICIA O. COTTER

We Concur:

/S/ KARLA M. GRAY
/S/ W. WILLIAM LEAPHART
/S/ BRIAN MORRIS
/S/ JIM RICE

130 P.3d 619 (2006)
2006 MT 42
331 Mont. 208

In the Matter of Declaring A.N.W., A Youth in Need of Care. J.Q., Appellant.

No. 04-882.

Supreme Court of Montana.

Submitted on Briefs November 15, 2005.
Decided February 28, 2006.

621*621 For Appellant: Robert B. Allison, Attorney at Law, Kalispell, Montana.

For Respondent: Hon. Mike McGrath, Attorney General; Ilka Becker, Assistant Attorney General, Helena, Montana, Ed Corrigan, Flathead County Attorney; Peter Steele, Deputy County Attorney, Kalispell, Montana.

Justice BRIAN MORRIS delivered the Opinion of the Court.

¶ 1 J.Q. appeals from the Eleventh Judicial District Court, Flathead County's order terminating his parental rights to his daughter, A.N.W., and awarding permanent legal custody, with the right to consent to adoption, to the Montana Department of Public Health and Human Services (Department). We affirm.

¶ 2 We address the following issues on appeal:

¶ 3 1. Did District Court Judge Stadler's action in conducting a show cause hearing and entering an order granting the Department emergency protective services and temporary investigative authority (TIA) after he signed an order recusing himself invalidate the subsequent parental termination proceeding?

¶ 4 2. Did the District Court afford J.Q. a fundamentally fair procedure when it ended the youth in need of care hearing before J.Q. could cross-examine the CASA volunteer and present two additional witnesses?

¶ 5 3. Did the District Court's failure to bifurcate the dispositional hearing from the youth in need of care hearing violate J.Q.'s right to a fundamentally fair process?

¶ 6 4. Did the District Court improperly consider documented evidence regarding J.Q.'s parole status that the Department filed after the termination hearing's conclusion when the evidence accurately reflected J.Q.'s parole status and confirmed his parole officer's testimony at the hearing?

¶ 7 5. Do the Department's alleged failures to comply with all of the statutory and court imposed deadlines surrounding J.Q.'s treatment plan affect the disposition of the case absent a showing of prejudice to J.Q.?

¶ 8 6. Did the District Court abuse its discretion when it terminated J.Q.'s parental rights?

PROCEDURAL AND FACTUAL BACKGROUND

¶ 9 J.Q. and his wife, R.W., initiated proceedings to dissolve their marriage in 2000. The custody of their only daughter, A.N.W., represented the major issue in the dissolution. J.Q. revealed during the dissolution proceedings that he had a sexual relationship with a step daughter from a prior marriage from the time the girl was four years old until she was 17. J.Q. admitted also to being sexually attracted to his wife's niece from the time the niece turned 13 until she was 19. J.Q.'s prior deviant sexual behavior toward his young female family members prompted the District Court to order the Department to supervise all of J.Q.'s visitation with A.N.W. during the dissolution process. R.W. died in May of 2000, before the court resolved the parenting plan.

622*622 ¶ 10 The Department placed A.N.W. in the care of her maternal grandmother following R.W.'s death. The Department moved A.N.W. after less than a year, however, based on evidence that her two male cousins had sexually abused the five-year old while she was living with her grandmother. The Department petitioned for TIA in November of 2000, and placed A.N.W. with her maternal uncle and aunt, N.F. and D.F., in Washington state. N.F. and D.F. subsequently petitioned for, and the Department granted them, guardianship over A.N.W. J.Q. challenged the guardianship proceeding and the District Court set aside the guardianship in March of 2002.

¶ 11 The District Court's decision to set aside the guardianship prompted the Department to petition the District Court for emergency protective services and TIA on April 4, 2002. The Department alleged that J.Q.'s prior admissions regarding his long-term sexual relationship with his adopted daughter and his long-time sexual attraction to his young niece left A.N.W. in danger of being abused and neglected without proper protection. District Court Judge Stewart E. Stadler scheduled the show cause hearing for April 12, 2002.

¶ 12 Judge Stadler informed the parties before the hearing that he had presided in the earlier dissolution and guardianship proceedings, and, consequently, he deemed himself disqualified from presiding over the case. He had signed a relinquishment and acceptance order the previous day that disqualified him and had invited Judge Katherine R. Curtis to assume jurisdiction. Judge Curtis also had signed the order.

¶ 13 Judge Curtis was not available to preside at the hearing, however, and the third judge in the Eleventh Judicial District was in trial. Judge Stadler reminded J.Q. that he had a right to a hearing within ten days and then explained J.Q.'s options: either stipulate to an extension or proceed and Judge Stadler would "be the one that makes the . . . probable cause determination." J.Q.'s counsel responded that he had no choice but to proceed because J.Q. would not relinquish his right to a hearing within ten days.

¶ 14 Judge Stadler conducted the hearing and ruled from the bench in granting the Department emergency protective services and TIA. Judge Stadler signed a written order to that effect on April 25, 2002. The clerk of court earlier had filed the relinquishment and acceptance order on April 15, 2002.

¶ 15 The Department next petitioned the District Court to adjudicate A.N.W. a youth in need of care and to grant the Department temporary legal custody (TLC). The District Court, Judge Curtis now presiding, scheduled a one-day hearing on the Department's petition for July 1, 2002. At the end of a full day of testimony, the Court warned the parties that it had limited time for the hearing to continue to the next day. Judge Curtis concluded the hearing the following day for lack of time after A.N.W.'s appointed counsel and the court examined the CASA volunteer. The court did not allow J.Q. or the Department to cross-examine the CASA volunteer and the court did not allow J.Q. to present testimony from his remaining two witnesses.

¶ 16 The District Court entered its order on July 22, 2002, adjudicating A.N.W. a youth in need of care and granting the Department TLC for six months. The court also ordered the Department to prepare a treatment plan for J.Q. and to present the court with a written report by December 2, 2002. The Department filed the report on December 10, 2002.

¶ 17 On November 13, 2002, the Department moved for the District Court to approve its proposed treatment plan for J.Q. The following week the Department also sought to extend its TLC for an additional six months. The District Court held a hearing on the Department's two motions on December 18, 2002. The hearing did not conclude that day, so the court scheduled it to resume on January 16, 2003. The court also granted the Department continued TLC pending the outcome of the hearing.

¶ 18 In the meantime, the state of Wisconsin issued an arrest warrant for J.Q. relating to 24 separate felony offenses of failure to pay child support for another child. The Flathead County Sheriff's Department arrested 623*623 J.Q. pursuant to the Wisconsin warrant on January 3, 2003. The District Court completed the hearing on the treatment plan and TLC extension as scheduled on January 16, 2003. J.Q. appeared in custody with his counsel.

¶ 19 The District Court once more extended the Department's TLC until July 16, 2003, and ordered the Department to file a written report by June 16, 2003. The court's January 29, 2003, order also approved the treatment plan under the condition the Department incorporate eleven specific changes to the plan. The court ordered J.Q. to abide by the amended treatment plan's terms and conditions upon his release from custody.

¶ 20 The Department petitioned the District Court again on June 5, 2003, to extend its TLC for an additional six months. The Department asserted that J.Q. remained incarcerated in Wisconsin and was not expected to be released until October of 2003 at the earliest. The Department further stated that it would support J.Q. in completing his court-approved treatment plan if he were released within a reasonable period of time. If J.Q. remained incarcerated, however, the Department informed the court that it would be compelled to petition for termination of his parental rights. The District Court held a hearing on the petition and again extended TLC on June 20, 2003. Neither J.Q. nor his attorney appeared at the

hearing. The District Court noted in its order extending TLC that J.Q.'s counsel apparently had not been served with notice of the hearing.

¶ 21 A Wisconsin jury convicted J.Q. on August 4, 2003, and the judge sentenced him concurrently to four years in Wisconsin state prison, followed by ten years on probation. J.Q. remained incarcerated in Wisconsin throughout the rest of the termination proceedings in Montana.

¶ 22 The Department finally petitioned the District Court on November 17, 2003, to terminate J.Q.'s parental rights and to grant the Department permanent legal custody of A.N.W. The petition alleged alternative bases for termination. The Department alleged first that the evidence would establish that the statutory grounds for termination contained in § 41-3-609(1)(f), MCA — the child has been adjudicated a youth in need of care, a failed treatment plan, and the condition rendering the parent unfit is unlikely to change — were met. The petition also alleged that § 41-3-609(4)(c), MCA, relieved the Department of its obligation to provide J.Q. with a treatment plan due to J.Q.'s continued incarceration for more than one year. J.Q.'s continued incarceration made him unfit or unable to parent and this impediment was unlikely to change within a reasonable period due to his incarceration and thus termination would be in A.N.W.'s best interest. The Department nevertheless attached a copy of J.Q.'s treatment plan to the petition. The amended treatment plan did not comply with all of the eleven changes the District Court had set forth in its order of January 29, 2003.

¶ 23 The District Court scheduled a hearing on the Department's termination petition for March 11, 2004. J.Q. moved to continue this hearing date on the grounds that the treatment plan appended to the petition to terminate did not reflect accurately the changes upon which the District Court conditioned its January 29, 2003, order. The District Court denied the continuance.

¶ 24 J.Q. appeared via telephone from Wisconsin and his counsel appeared in person on March 11, 2004. J.Q. renewed his motion for a continuance on the same grounds as he argued previously. The Department conceded that the treatment plan attached to the termination petition contained some discrepancies from the changes the District Court had ordered in January 2003. The Department conceded further that J.Q. had not received or signed a copy of the amended treatment plan before it served the petition for termination on J.Q. The Department asserted that these problems with the treatment plan proved inconsequential, however, because § 41-3-609(4)(c), MCA, rendered a treatment plan unnecessary in light of J.Q.'s continued incarceration beyond a one-year term.

¶ 25 The Department then withdrew its objection to J.Q.'s motion for a continuance so it could amend further the treatment plan to comply with the court's January 2003 written order and provide J.Q. a copy. The 624*624 District Court continued the termination hearing until April 13, 2004. The Department filed a revised treatment plan on March 19, 2004, and informed the court that it had mailed a copy of this treatment plan to J.Q. on March 11, 2004.

¶ 26 The District Court proceeded with the rescheduled termination hearing on April 13, 2004. The court entered its findings of fact, conclusions of law and order that terminated

J.Q.'s parental rights on July 7, 2004. The District Court found that J.Q. was incarcerated in Wisconsin on a four-year term of commitment and had been incarcerated for more than one year at the time of the termination hearing. The court further found that J.Q.'s incarceration relieved the Department of its requirement to implement a court-approved treatment plan for J.Q. based upon § 41-3-609(4)(c), MCA.

¶ 27 The District Court further noted that it had approved a treatment plan, subject to certain modifications, in January of 2003. J.Q. "was given ample opportunity to comply with a very reasonable treatment plan," and failed to comply with more than ten different provisions of the plan. The court also found that A.N.W. had been in foster care for over 22 months by the date of the hearing. The District Court concluded that terminating J.Q.'s parental rights was in A.N.W.'s best interests and granted permanent custody, with the right to consent to adoption, to the Department. J.Q. appeals.

STANDARD OF REVIEW

¶ 28 We review a district court's findings of fact to determine whether those findings are clearly erroneous. *In re Custody and Parental Rights of M.A.D.*, 2003 MT 10, ¶ 12, 314 Mont. 38, ¶ 12, 62 P.3d 717, ¶ 12. We review the court's conclusions of law to determine whether the court correctly interpreted and applied the law. *In re M.A.D.,* ¶ 12.

¶ 29 We review a district court's ultimate decision to terminate parental rights to determine whether the court abused its discretion. A district court abused its discretion only if it acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice. *In re M.A.D.,* ¶ 12. This Court should not reweigh conflicting evidence or substitute its judgment regarding the strength of the evidence for that of the district court. *In re A.F.*, 2003 MT 254, ¶ 24, 317 Mont. 367, ¶ 24, 77 P.3d 266, ¶ 24.

DISCUSSION

ISSUE ONE

¶ 30 Did District Court Judge Stadler's action in conducting a show cause hearing and entering an order granting the Department emergency protective services and TIA after he signed an order recusing himself invalidate the subsequent parental termination proceeding?

¶ 31 Judge Stadler informed the parties that he deemed himself disqualified from presiding over the initial show cause hearing because of his involvement in the earlier dissolution proceedings. The previous day he had signed a relinquishment and acceptance order that transferred the case to Judge Curtis. The parties' arguments focus on the procedural consideration of when the recusal order became effective. J.Q. asserts that Judge Stadler's disqualification became effective when Judge Stadler signed it on April 11, 2002. The Department responds that Judge Stadler retained his authority to preside until the recusal order was filed three days after the hearing. We conclude that Judge Stadler's decision to

preside over the hearing does not affect the disposition of this case, however, regardless of when the recusal order became effective.

¶ 32 We have said that "procedural defects in a temporary custody hearing do not invalidate subsequent permanent legal custody proceedings." *Matter of S.P.* (1990), 241 Mont. 190, 196, 786 P.2d 642, 646. The hearing here served to determine whether A.N.W. needed emergency protective services and to determine whether to grant TIA to the Department. The hearing did not affect A.N.W.'s permanent legal custody or J.Q.'s parental rights. The TIA and emergency protective services hearing represents an early step in the process that the Department could have circumvented. For 625*625 example, § 41-3-422(1)(c), MCA, allows the Department to petition immediately for temporary legal custody without first seeking TIA. Thus, we conclude that Judge Stadler's action in conducting the TIA and emergency protective services hearing after he had recused himself does not warrant reversal in light of the fundamentally fair procedures afforded to J.Q. in the youth in need of care and termination proceedings. *See* *In re S.C.*, 2005 MT 241, ¶ 29, 328 Mont. 476, ¶ 29, 121 P.3d 552, ¶ 29.

ISSUE TWO

¶ 33 Did the District Court afford J.Q. a fundamentally fair procedure when it ended the youth in need of care hearing before J.Q. could cross-examine the CASA volunteer and present two additional witnesses?

¶ 34 J.Q. contends that the District Court violated his due process rights when it refused to allow him to cross-examine the CASA volunteer and call two additional witnesses at the youth in need of care hearing. A parent's right to the care and custody of a child represents a fundamental liberty interest, and consequently, the state must provide fundamentally fair procedures at all stages in the proceedings to terminate parental rights. *In re V.F.A.*, 2005 MT 76, ¶ 6, 326 Mont. 383, ¶ 6, 109 P.3d 749, ¶ 6. Proceedings involving the termination of the parent-child relationship must meet due process requisites guaranteed by the Montana and United States Constitutions. *In re A.S.*, 2004 MT 62, ¶ 12, 320 Mont. 268, ¶ 12, 87 P.3d 408, ¶ 12. Fundamental fairness and due process require that a parent not be placed at an unfair disadvantage during the termination proceedings. *In re A.S.*, ¶ 12; *Matter of A.S.A.* (1993), 258 Mont. 194, 198, 852 P.2d 127, 129; *In re A.R.*, 2004 MT 22, ¶ 11, 319 Mont. 340, ¶ 11, 83 P.3d 1287, ¶ 11.

¶ 35 As a practical matter, however, pre-termination hearings entitle the parent to less process than the actual termination proceedings. In *In re A.M.*, 2001 MT 60, ¶ 50, 304 Mont. 379, ¶ 50, 22 P.3d 185, ¶ 50, we refused to extend a parent's right to court-appointed counsel to a pre-termination proceeding. Similarly, in *Matter of A.B.* (1989), 239 Mont. 344, 348-49, 780 P.2d 622, 625, we held that parents do not have a statutory or constitutional right to appointed counsel at every stage of child protective proceedings that result in termination of parental rights. *Compare* § 41-3-607(4), MCA (2003), (requiring appointed counsel whenever the Department actually petitions to terminate parental rights).

¶ 36 In *In re Custody of M.W.*, 2001 MT 78, 305 Mont. 80, 23 P.3d 206, a father appealed the termination of his parental rights on the grounds that the District Court violated his due process rights when it did not allow him to challenge the State's evidence regarding his

daughter's permanency plan. The father appeared without a lawyer and the court did not afford him the opportunity to question *any* witnesses or present *any* evidence concerning his child's placement. We concluded that due process did not require the court to provide the father "an opportunity to scrutinize and challenge the evidence and witnesses presented. . . ." at such a pre-termination hearing. *In re Custody of M.W.,* ¶ 27.

¶ 37 The District Court afforded J.Q. sufficient opportunity to scrutinize and challenge the evidence at the pre-termination hearing to adjudicate A.N.W. a youth in need of care. Although the hearing concluded before J.Q. could cross-examine the CASA volunteer and present two additional witnesses, the transcript demonstrates that J.Q. dominated the day and a half hearing. The court initially scheduled the hearing for July 1, 2002, and extended it by half a day. J.Q. knew the hearing was scheduled for one day and chose to spend his time cross-examining the Department's witnesses at length. In fact, J.Q. cross-examined the witnesses for a period equal to the combined total questioning of these witnesses by the Department's counsel and A.N.W.'s counsel. The District Court did not place J.Q. at a disadvantage during the pre-termination youth in need of care proceedings.

¶ 38 Moreover, J.Q. fails to assert how the District Court's refusal to continue the hearing prejudiced him. He simply alleges that the District Court's action violated his due 626*626 process rights. He does not allege that allowing him to call the additional witnesses or cross-examine the CASA volunteer would provide the court any relevant information that would affect its decision. We conclude the hearing to adjudicate A.N.W. a youth in need of care constituted a fundamentally fair process. *In re V.F.A.,* ¶ 6. The District Court judge's decision to terminate the hearing after a day and a half under these circumstances does not warrant reversal. *In re S.C.,* ¶ 29.

ISSUE THREE

¶ 39 Did the District Court's failure to bifurcate the dispositional hearing from the youth in need of care hearing violate J.Q.'s right to a fundamentally fair process?

¶ 40 J.Q. asserts that the District Court's failure to bifurcate the youth in need of care adjudication and the TLC disposition violated § 41-3-438(2), MCA. The Department does not dispute that District Court failed to bifurcate the proceedings, but maintains that the proceedings satisfied the statutory requirements because the court addressed the dispositional issues apart from adjudicatory issues. The Department asserts further that J.Q.'s failure to object to the lack of bifurcation before the District Court precludes him from raising the issue on appeal. We agree with the Department on this point.

¶ 41 This Court does not consider an issue presented for the first time on appeal. *In re T.E.,* 2002 MT 195, ¶ 20, 311 Mont. 148, ¶ 20, 54 P.3d 38, ¶ 20. We have determined that we will not fault a district court for failing to address statutory deficiencies that are not brought to its attention during the proceedings because doing so would encourage litigants to withhold objections rather than raise the issues appropriately in the district court. *In re T.E.,* ¶ 23. For example, in *In re M.W.,* 2002 MT 126, 310 Mont. 103, 49 P.3d 31, we declined to address the father's argument that the district court's failure to hold a permanency plan hearing within the statutory deadline denied him fundamentally fair procedures when he had not objected in the district court. J.Q. likewise did not object to the

converged hearing in the District Court and we decline to consider the issue for the first time on appeal. *In re M.W.,* ¶¶ 22-23.

ISSUE FOUR

¶ 42 Did the District Court improperly consider documented evidence regarding J.Q.'s parole status that the Department filed after the termination hearing's conclusion when the evidence accurately reflected J.Q.'s parole status and confirmed his parole officer's testimony at the hearing?

¶ 43 The Department filed a document from the Wisconsin parole commission following the conclusion of the termination proceeding that advised that J.Q. had been denied parole. J.Q. alleges that the District Court improperly considered this document in light of the fact the District Court did not "reopen the case."

¶ 44 J.Q.'s Wisconsin parole officer testified telephonically at the April 13, 2004, proceeding. She stated that it was "doubtful" the parole commissioner would grant J.Q. parole that month because J.Q. had not completed a pre-parole plan. The parole commissioner denied J.Q. parole after his April 28, 2004, parole hearing. The Department filed a document from the Wisconsin parole commission on May 5, 2004, reflecting J.Q.'s continued incarceration. The District Court issued its findings of fact and conclusions of law on July 6, 2004, and included in its conclusions that J.Q. "will not be paroled in April [2004]."

¶ 45 We fail to see—and J.Q. fails to allege —how the Department's filing of a document that reflected accurately J.Q.'s parole status in Wisconsin after the April 13, 2004, termination hearing prejudiced J.Q. The fact that J.Q.'s parole officer had provided identical information at the hearing highlights the lack of prejudice to J.Q. Consequently, the District Court's actions do not warrant reversal. *In re S.C.,* ¶ 29.

ISSUE FIVE

¶ 46 Do the Department's alleged failures to comply with all of the statutory and court imposed deadlines surrounding J.Q.'s treatment plan affect the disposition of 627*627 the case absent a showing of prejudice to J.Q.?

¶ 47 J.Q. alleges three errors the Department made regarding the treatment plan involving time delays as set forth in the procedural and factual background. *See* ¶¶ 16, 19, 22-25, supra. J.Q. fails once again to demonstrate how the delays prejudiced him.

¶ 48 The Department did not petition to terminate J.Q.'s parental rights on the lone assertion that J.Q. failed to comply with the treatment plan. The Department premised its petition to terminate alternatively on § 41-3-609(1)(f)(i) and (ii), MCA, and § 41-3-609(4)(c), MCA. The petition to terminate J.Q.'s parental rights included both bases and thus provided J.Q. adequate notice that his prolonged incarceration represented an additional premise by which the Department sought termination.

¶ 49 J.Q.'s situation contrasts with *In re A.T.*, 2003 MT 154, ¶¶ 24-25, 316 Mont. 255, ¶¶ 24-25, 70 P.3d 1247, ¶¶ 24-25, where we reversed the district court's decision to terminate the incarcerated father's parental rights because the Department had failed to include § 41-3-609(4)(c), MCA, in its termination petition. J.Q.'s prolonged incarceration and the Department's inclusion of § 41-3-609(4)(c) in its termination petition provided the District Court with grounds to terminate J.Q.'s parental rights independent of his failure to comply with a treatment plan. Section 41-3-609(4)(c), MCA; see also ¶ 51, infra. As a result, we need not address errors in the treatment plans alleged by J.Q.

ISSUE SIX

¶ 50 Did the District Court abuse its discretion when it terminated J.Q.'s parental rights?

¶ 51 The District Court must address adequately each applicable statutory requirement before it terminates an individual's parental rights. *In re A.M.,* ¶ 34. The Department has the burden of proving by clear and convincing evidence that the statutory criteria for termination have been met. *In re A.M.,* ¶ 34. The Legislature and this Court have held consistently that the best interest of the child standard is paramount and "must take precedence over parental rights" when the District Court considers the criteria for terminating parental rights. *In re R.T.*, 2005 MT 173, ¶ 13, 327 Mont. 498, ¶ 13, 116 P.3d 783, ¶ 13. The court should give primary consideration to the child's physical, mental, and emotional conditions and needs when it addresses the child's best interest. Section 41-3-609(3), MCA.

¶ 52 The Department included § 41-3-609(1)(f), MCA, in its petition to terminate J.Q.'s parental rights to A.N.W. The petition alleged that J.Q.'s continued incarceration satisfied the statutory requirements for termination under this subsection, via application of §§ 41-3-609(4)(c) and 2(d), MCA. The statute provides that the Department may forego a treatment plan if the "parent is or will be incarcerated for more than 1 year" and if reunification is not in the best interest of the child. Section 41-3-609(4)(c), MCA. J.Q. does not dispute that at the time of the termination hearing he had been incarcerated for over a year, and his sentence does not end until January 2007.

¶ 53 J.Q. testified that he had known about the outstanding child support obligation for "almost ten years," but admitted he did nothing to prevent his incarceration. In fact, he stated "[i]f I had it to do over again I would do it exactly as I have." The District Court found in the termination proceeding that "to be available for ANW, [J.Q.] could have taken care of this responsibility in a legal manner, but instead his choice to ignore his responsibility has resulted in his being incarcerated, convicted and imprisoned."

¶ 54 Section 41-3-604(1), MCA, entitled "[w]hen petition to terminate parental rights required" presumes that if a child has been in foster care for 15 of the most recent 22 months, it is in the best interests of the child to terminate parental rights. J.Q. does not dispute that A.N.W. has been in her aunt and uncle's care since May 2001—a period of 56 continuous months to date.

¶ 55 Additional evidence abounds that terminating J.Q.'s parental rights best serves A.N.W.'s interests. J.Q. has not had significant contact with his daughter for more than five and a half years. J.Q. admittedly 628*628 has been incarcerated for almost two of those

years, but he has not written or called A.N.W. since June 2003. J.Q. steadfastly has resisted the Department's attempts to formulate a treatment plan to address the Department's concern regarding his past pedophilic behavior with his former step daughter. J.Q. objected to all of the Department's proposed plans on procedural grounds, even though his prolonged incarceration relieved the Department of the requirement to formulate a treatment plan. Section 41-3-609(4)(c), MCA. And J.Q. made no effort to comply with any of the provisions of the treatment plan that he did not contest.

¶ 56 A.N.W. already has experienced more turmoil than we hope most people suffer in a lifetime. By the time she was six years old, A.N.W. had lived in three households. She has endured her parents' divorce, her mother's death, and her father's incarceration. When she was five years old, A.N.W.'s male cousins further deprived her of her childhood by sexually abusing her. The sexual abuse forced A.N.W. to uproot after she had begun to bond with her maternal grandmother following her mother's death.

¶ 57 Despite these challenges, A.N.W. has found a secure and loving home with her maternal aunt and uncle, D.F. and N.F., in Washington. A.N.W. has integrated herself fully in that family over the past four and a half years. A.N.W. views D.F. and N.F.'s two boys as her brothers, has a half brother (an older son of R.W.) living nearby who is involved in her life, and refers to D.F. and N.F. as "mom and dad." The ten-year-old participates in Girl Scouts, soccer, and basketball. She earns good grades and her teachers' consistent praise. Five people testified at the termination hearing that remaining with her aunt and uncle best serves A.N.W.'s interest.

¶ 58 D.F. and N.F. first employed Dr. Klemetson to counsel A.N.W. following her mother's death. The family requested the counselor's services again around the time when reunification with J.Q. seemed likely (prior to his incarceration) due to A.N.W.'s apparent anxiety surrounding the reunification. Dr. Klemetson expressed her uneasiness at the prospect of reunifying A.N.W. with her father "given her father's past behavior."

¶ 59 A Department supervisor, Diane Piorek, also emphasized the need for stability in A.N.W.'s life. A.N.W.'s CASA representative—a person appointed for sole purpose of furthering A.N.W.'s best interests—similarly advocated for A.N.W. to remain where she is: "What is in [A.N.W.'s] best interests is for her to become well adjusted and maintain the environment she's in and to have some stability."

¶ 60 Mary Widner, a social worker the Department assigned to A.N.W., echoed similar concerns and noted that A.N.W. "is thriving" in her present home. Finally, Kori Taylor, the Department's social worker most recently assigned to the case, emphasized the potential irreparable effects of removing A.N.W. from the life she has made with her new family:

[b]ecause although she has the love, security and stability within this—within this family unit—or the love and stability, the nurturing and the care, she doesn't have the security to know that this is where she's gonna stay. And that—even if he's offered the opportunity to work a treatment plan, we're looking at a considerable period of time before that can even start and take place, and then a considerable amount of time that it would take for him to complete that plan. And she's already waited for this security of permanency for three, four years.

¶ 61 The abundant testimony that maintaining her current placement serves A.N.W.'s physical, mental, and emotional conditions and needs provides substantial evidence that the District Court did not act arbitrarily or without conscientious reason when it terminated J.Q.'s parental rights. Moreover, the uncontroverted facts that J.Q.'s sentence runs until 2007, and that A.N.W. has been in foster care for more 56 consecutive months, provide clear and convincing evidence that the Department has met the statutory criteria for termination. The District Court did not abuse its discretion when it terminated J.Q.'s parental rights.

¶ 62 Affirmed.

629*629 We Concur: PATRICIA COTTER, W. WILLIAM LEAPHART, JOHN WARNER and JIM RICE, JJ.

Justice JIM RICE specially concurring.

¶ 63 I join the Courts opinion and offer the following as additional grounds for affirming the District Court.

¶ 64 Regarding Issue 1, Appellant offered no authority in support of his argument. Appellant advanced about one page of argument and offered as authority only a citation to *Daniels v. Thomas, Dean & Hoskins, Inc.* (1990), 246 Mont. 125, 804 P.2d 359, for the minor point that jurisdiction cannot be conferred by stipulation. This Court has repeatedly held that such briefing is a violation of the appellate rules and has enforced the rules by refusing to take up unsupported arguments. As we recently stated:

[Peterson] advances no authority under which these asserted facts would constitute sufficient prejudice to warrant reversal, however. Rule 23(a)(4), M.R.App.P., requires an appellant to support arguments with citations to the record and to relevant authorities; an appellant cannot meet the burden of establishing error absent such citations. *See* *State v. Bailey*, 2004 MT 87, ¶ 26, 320 Mont. 501, ¶ 26, 87 P.3d 1032, ¶ 26 (citation omitted).

....

Alternatively, Peterson asserts a defendant's constitutional right to due process is violated when the prosecution fails to produce relevant documents that could be used to cross-examine key government witnesses. He cites *Davis v. Alaska* (1974), 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347, and *Kyles v. Whitley* (1995), 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490, in support of this assertion, but neither discusses nor applies those cases to the present case. It is not this Court's obligation to develop parties' arguments for them. *State v. Flowers*, 2004 MT 37, ¶ 44, 320 Mont. 49, ¶ 44, 86 P.3d 3, ¶ 44 (citation omitted).

City of Billings v. Peterson, 2004 MT 232, ¶¶ 36, 45, 322 Mont. 444, ¶¶ 36, 45, 97 P.3d 532, ¶¶ 36, 45. Our criticism of Peterson— failing to cite "relevant authorities . . . an appellant cannot meet the burden of establishing error absent such citations"; "[h]e cites [cases] in support of this assertion, but neither discusses nor applies those cases to the present case"; and "[i]t is not this Court's obligation to develop parties' arguments for them" with

regard to his due process argument—are even more applicable to J.Q. than it was to Peterson.

¶ 65 The same principle applies with regard to Appellant's argument under Issue 2, as Appellant has cited no authority whatsoever, offering only that he "was denied fundamental due process." We have commonly applied Rule 23's requirement of developed arguments supported by authority even more fastidiously to constitutional issues. *See, e.g., Peterson,* ¶ 45; *Estate of Spencer,* 2002 MT 304, ¶ 20, 313 Mont. 40, ¶ 20, 59 P.3d 1160, ¶ 20 (court declined to address "violation of constitutional due process" when the argument was not sufficiently developed). We addressed an almost identical situation in *State v. Fina* (1995), 273 Mont. 171, 902 P.2d 30:

No analysis or authority is presented to support this particular contention. Fina also asserts parenthetically that Anderson's statements were "hardly hearsay;" again, no analysis or authority is advanced for this assertion. *Similarly, Fina's statement that "we believe [the restriction on cross-examination] impairs the due process rights of George Fina" is unsupported by analysis or authority as required by Rule 23(a)(4), M.R.App.P. Counsel's general statement that the District Court erred in this regard, "based upon case decisions cited in this section of our brief," is totally inadequate* to permit this Court to address the issue as raised, given that "this section" of Fina's brief is seventeen pages in length and addresses seven subissues.

Fina, 273 Mont. at 181, 902 P.2d at 36 (emphasis added). J.Q's argument offers no more than *Fina's* passing reference to an impairment of a constitutional right. Thus, the Court would be justified by treating it in the same manner and declining to take up this issue as well, affirming the District Court.

630*630 Chief Justice KARLA M. GRAY, concurring in part and dissenting in part.

¶ 66 I concur in portions of the Court's opinion in this matter, but respectfully dissent from other portions and from the result the Court reaches. Because it is my view that the District Court violated J.Q.'s due process rights at the hearing in July of 2002, I would conclude under Issue Two that the District Court erred in adjudicating A.N.W. a youth in need of care. As a result, I would further conclude in Issue Six that the Department did not establish the § 41-3-609(1)(f), MCA, criteria for terminating parental rights. On that basis, I would hold that the District Court erred in terminating J.Q.'s parental rights and reverse.

¶ 67 I concur in the Court's resolution of Issues Three, Four and Five. With regard to these issues, I write primarily to express my continuing frustration with the Department's—and trial courts'—failures to comply with the explicit statutory mandates set forth by the Montana Legislature for the conduct of abuse and neglect proceedings. At the outset, I observe that the record in this case reveals numerous instances of the Department's failure to abide by court-imposed deadlines for the filing of documents and reports and the District Court's failure to require it to comply. While I am aware that the Department handles a large number of abuse and neglect cases, the timely disposition of these cases is of vital importance in protecting the rights of both children and parents. Timeliness is of special import for parents involved in these cases when viewed in light of § 41-3-604(1), MCA, which provides that, when a child has been in foster care under the custody of the

Department for 15 of the most recent 22 months, "the best interests of the child must be presumed to be served by termination of parental rights." In my view, it is exceedingly unfair to a parent for the Department to drag its feet during pre-termination phases of a case involving an allegedly abused and neglected child, and then rely on § 41-3-604(1), MCA, to argue that termination of parental rights is in the best interests of the child.

¶ 68 Furthermore, the Department does not dispute that it requested—in a single petition—that the District Court adjudicate A.N.W. a youth in need of care and grant it TLC, and that the District Court conducted one hearing on both the adjudicatory and dispositional issues without properly structuring the hearing to address the issues separately. Indeed, the Department implicitly concedes that it and the District Court failed to ensure that "[t]he hearing process [was] scheduled and structured so that dispositional issues are specifically addressed apart from adjudicatory issues," as required by § 41-3-438(2)(a), MCA. It contends, however, that "[a]lthough the court did not specifically bifurcate the hearing on the [Department's] petition ... [,] the hearing addressed those issues relevant to disposition."

¶ 69 Such an argument ignores both the mandatory requirements established by the Montana Legislature for the conduct of hearings on the adjudicatory and dispositional phases of an abuse and neglect proceeding, and the Department's obligation to ensure that these cases are conducted in strict compliance with those statutory requirements. Such an argument also ignores repeated warnings by this Court that the statutory requirements must be met. *See, e.g., Matter of F.H.* (1994), 266 Mont. 36, 40, 878 P.2d 890, 893; *Inquiry into M.M.* (1995), 274 Mont. 166, 174, 906 P.2d 675, 680. Sadly, the Department's argument here continues the same untenable, but apparently intransigent, attitude toward these cases that I have noted in prior cases. *See, e.g., In re S.C.*, 2005 MT 241, ¶ 50, 328 Mont. 476, ¶ 50, 121 P.3d 552, ¶ 50 (Gray, C.J., concurring and dissenting) ("we continue to `caution' [the Department] about compliance with the law. Our cautions apparently fall on deaf ears"); *Inquiry into M.M.,* 274 Mont. at 178, 906 P.2d at 682 (Gray, J., dissenting) ("[o]ne can hardly say that [the Department] has heeded our strong condemnation and stern warning[s]"); *Matter of F.H.,* 266 Mont. at 42, 878 P.2d at 894 (Gray, J., dissenting) ("where we previously have warned [the Department's] predecessor agency regarding its failure to comply with the law, I cannot agree with the Court that it is sufficient to characterize [the Department's] conduct as unconscionable and issue another warning").

631*631 ¶ 70 That said, however, it is clear from the record that J.Q. failed to object in the District Court to the failure to hold a bifurcated hearing and I abide by our well-established rule that we do not address issues on appeal which were not raised in the trial court. Consequently, I join in the Court's refusal to address the substantive merits of Issue Three, adding a fervent hope that the enactment of § 41-3-425, MCA (providing for the right to counsel in all proceedings involving any petition filed pursuant to § 41-3-422, MCA), and the Montana Public Defender Act will result in better representation for parents, thereby finally forcing the Department and the trial courts to follow the law. I also join the Court's opinion on Issues Four and Five, because J.Q. has failed to establish that the alleged errors raised therein resulted in prejudice to him.

¶ 71 With regard to Issue One, however, I would address the parties' arguments relating to whether Judge Stadler had authority to conduct the show cause hearing and enter the subsequent order granting the Department TIA, and conclude that he did not. It is my view

that a discussion of this issue is appropriate in light of the disadvantage placed on parents in such a situation by having to choose between going forward with a hearing before a judge who has expressed a bias or prejudice sufficient to disqualify him or her from presiding over the case or stipulating to a continuance which will further delay resolution of the proceeding. Moreover, while I ultimately agree with the Court that this issue is not dispositive of this case, addressing the issue here will provide guidance to the district courts and counsel in addressing matters of judicial disqualification.

¶ 72 Judge Stadler deemed himself disqualified from presiding over this case and signed a relinquishment and acceptance order the day before the show cause hearing; Judge Curtis also signed the order accepting jurisdiction over the case the day before the hearing. The parties dispute the point at which Judge Stadler's order became effective—upon the signing of the order or upon the filing of the order with the clerk of court.

¶ 73 We have held that, for purposes of commencing time periods in which parties to a case must take further action, a judgment or order takes effect from the date on which it is filed with the clerk of court. *Firefighters, Local No. 8 v. District Court,* 2002 MT 17, ¶ 18, 308 Mont. 183, ¶ 18, 40 P.3d 396, ¶ 18. However, the filing of a judgment or order by the clerk of court is merely a ministerial function and does not affect the validity of the court's ruling. *Firefighters, Local No. 8,* ¶¶ 17-18. As a result, a district court's judgment or order is effective and binding on the parties from the time it is rendered by the court. *Firefighters, Local No. 8,* ¶ 18. As such an order is binding on the parties, so must it be binding on the judge who renders it.

¶ 74 "It is the policy of our system that no judge should be allowed to sit when he is laboring under bias or prejudice toward one or more of the parties litigant." *In re Woodside-Florence Irr. Dist.* (1948), 121 Mont. 346, 353, 194 P.2d 241, 245. In furtherance of this policy, Montana law provides procedures by which a judge may be disqualified from presiding over a case either upon motion of a party or by the judge *sua sponte. See, e.g.,* §§ 3-1-803 through -805, MCA. Where a party moves to disqualify a judge under § 3-1-805, MCA, the judge is without authority to act further in any judicial capacity except to complete certain ministerial duties. We further have stated that "by analogy and by necessity we think that there could be no more power left in the judge who makes the call [to recuse] voluntarily in the one case than if he were deprived of jurisdiction by the filing of an affidavit of prejudice." *State ex rel. Moser v. Dist. Court* (1944), 116 Mont. 305, 314, 151 P.2d 1002, 1007. Thus, where a judge is disqualified from a case— either *sua sponte* or by motion of a party— any subsequent judgment rendered by that judge in the case is null and void. *See Woodside-Florence,* 121 Mont. at 356, 194 P.2d at 246.

¶ 75 I would conclude that Judge Stadler's *sua sponte* recusal was effective when he signed the relinquishment and acceptance order—and another judge assumed jurisdiction—on April 11, 2002. From that point, he 632*632 had no power or authority to sit or act in judgment on the case. I would further conclude, therefore, that Judge Stadler's subsequent order granting the Department emergency protective services and TIA was null and void. However, the absence of a court order granting TIA does not preclude the Department from subsequently petitioning for TLC or termination of parental rights. *See* §§ 41-3-422(1)(c) and (d), MCA. Consequently, I agree with the Court that Judge Stadler's lack

of authority to preside over the show cause hearing and grant the Department TIA is not dispositive of this case.

¶ 76 I strenuously disagree, however, with the Court's statement at the end of ¶ 32 that reversal of this case is not warranted "in light of the fundamentally fair procedures afforded to J.Q. in the youth in need of care and termination proceedings." This leads directly to my fundamental disagreement with the Court's overall resolution of this case. In this regard, I dissent from the Court's determination in Issue Two that J.Q. received fundamentally fair procedures at the hearing to adjudicate A.N.W. a youth in need of care. In my view, the District Court violated J.Q.'s due process rights when it ended the hearing without allowing him to cross-examine the CASA volunteer or present testimony from two of his witnesses, and this due process violation requires reversal of the District Court's youth in need of care adjudication.

¶ 77 I begin by agreeing entirely with the Court's statements in ¶ 34 that a natural parent's right to the care and custody of his or her child is a fundamental liberty interest which must be protected by fundamentally fair procedures during all stages in proceedings involving the termination of the parent/child relationship. *See, e.g., In re A.S.,* 2004 MT 62, ¶ 12, 320 Mont. 268, ¶ 12, 87 P.3d 408, ¶ 12; *In re B.N.Y.,* 2003 MT 241, ¶ 21, 317 Mont. 291, ¶ 21, 77 P.3d 189, ¶ 21. Consequently, proceedings involving the termination of the parent/child relationship must meet the requisites of due process as guaranteed by the Montana and United States Constitutions, which require that a parent not be placed at an unfair disadvantage during the proceedings. *In re A.S.,* ¶ 12; *In re B.N.Y.,* ¶ 21.

¶ 78 I disagree, however, with the remainder of the Court's approach to, and resolution of, Issue Two. The Court begins by observing that we have held a parent has neither a statutory nor constitutional right to appointed counsel during pre-termination phases of abuse and neglect proceedings. While this may be true, J.Q. does not raise an appointment of counsel argument and, thus, the cases cited by the Court have no application here.

¶ 79 The Court also observes that we have held parents do not have a due process right to scrutinize and challenge the evidence presented by the Department at a permanency plan hearing. *See In re M.W.,* ¶ 27. In the same paragraph as cited by the Court for this proposition, however, we further stated that "the issue of a child's placement is separate from the issue of terminating parental rights." *In re M.W.,* ¶ 27. A permanency plan hearing does not relate to, or result in an adjudication on, issues concerning a person's capabilities to parent a child, and does not require the same degree of due process considerations as is required in other phases of a termination proceeding.

¶ 80 Due process requires fundamental fairness which, in turn, requires fair procedures. *In re B.N.Y.,* ¶ 21. Thus, due process requires notice of an action which may deprive a person of a liberty interest and the opportunity to be heard regarding that action. *See State v. Niederklopfer,* 2000 MT 187, ¶ 10, 300 Mont. 397, ¶ 10, 6 P.3d 448, ¶ 10. This includes the opportunity to be heard at a meaningful time and in a meaningful manner. *Smith v. Board of Horse Racing,* 1998 MT 91, ¶ 11, 288 Mont. 249, ¶ 11, 956 P.2d 752, ¶ 11. The due process guarantee requires that a person be given an opportunity to explain, argue and rebut any information which may lead to the deprivation of a liberty interest. *Bauer v. State,* 1999 MT 185, ¶ 22, 295 Mont. 306, ¶ 22, 983 P.2d 955, ¶ 22.

¶ 81 We all agree that, as a parent, J.Q. has a fundamental liberty interest in the care and custody of his child, A.N.W. As a result, he was entitled to procedural due process 633*633 during the course of these abuse and neglect proceedings which involved a potential deprivation of his liberty interest as a parent. In other words, he was entitled to the opportunity to explain, argue and rebut information produced by the Department. When the District Court concluded the youth in need of care proceeding without allowing J.Q. to cross-examine the CASA volunteer or present testimony from two of his witnesses, it denied J.Q. the opportunity to do so, denied him a fundamentally fair procedure and, therefore, denied him his right to due process.

¶ 82 The Department argues that, even if the District Court erred in this regard, the error was harmless in light of the ample evidence that A.N.W. should be adjudicated a youth in need of care, because the error occurred early in the proceeding, and because J.Q. was given the opportunity to examine the Department's witnesses and call his witnesses at the final termination hearing. The Department's arguments constitute yet another sad commentary on its approach to abuse and neglect proceedings, in that they totally ignore the import of a district court's adjudication that a child is a youth in need of care. For example, the Department may not require a parent to complete a treatment plan unless a district court adjudicates the child a youth in need of care. *See* § 41-3-443(1)(c), MCA. Such an adjudication is a prerequisite for granting the Department TLC. *See* § 41-3-442(1), MCA. Additionally, a youth in need of care adjudication is a threshold requirement for a court to terminate parental rights pursuant to § 41-3-609(1)(f), MCA, which is the most common basis on which the Department petitions for termination of parental rights. Clearly, a youth in need of care adjudication is a critical juncture in an abuse and neglect proceeding which requires fundamentally fair procedures. J.Q. did not receive fundamentally fair procedures at the adjudicatory hearing in this case and such error was not harmless.

¶ 83 Furthermore, the Montana Legislature requires district courts to give highest preference to abuse and neglect cases when scheduling hearing dates. *See* § 41-3-422(3), MCA. Thus, notwithstanding other cases on the docket, except perhaps criminal cases subject to speedy trial limits, courts are required to give priority to abuse and neglect proceedings to ensure a parent the opportunity to be heard at a meaningful time and in a meaningful manner with regard to the liberty interest at stake. When the District Court ended the adjudicatory hearing on the second day, the court denied J.Q.'s request to cross-examine the CASA volunteer and present additional witnesses by stating:

Nope. We have used about four more hours for this hearing than we had set aside for it, and [the] Court has another hearing in less than an hour, and the [C]ourt and staff wants lunch, so that's the way it's going to be.

When J.Q. further objected to the District Court ending the hearing before he could present his entire case, the court stated that "the fact of the matter is this hearing was scheduled for a period of one day. The fact of the matter is it's taken a day and a half, and that's all I have." In my view, by denying J.Q. the ability to cross-examine the CASA volunteer and present the testimony of his witnesses, the District Court failed to give the youth in need of care hearing the priority required by law, thereby failing to ensure J.Q. the opportunity to be heard at a meaningful time and in a meaningful manner.

¶ 84 I would conclude that the District Court violated J.Q.'s right to procedural due process at the hearing to adjudicate A.N.W. a youth in need of care. Consequently, I would reverse the District Court's youth in need of care adjudication, and I dissent from the Court's failure to do so.

¶ 85 Finally, because it is my view that the District Court erred in adjudicating A.N.W. a youth in need of care based on its violation of J.Q.'s due process rights at the hearing, I also must dissent from the Court's holding in Issue Six that the District Court did not abuse its discretion in terminating J.Q.'s parental rights.

¶ 86 The Department petitioned to terminate J.Q.'s parental rights based on § 41-3-609(1)(f), MCA, which provides that the district court may order the termination of parental rights upon a finding that 634*634 the child is an adjudicated youth in need of care and both of the following exist:

(i) an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful; and

(ii) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time.

The Department contended that the statutory requirements for termination were met because J.Q. had failed to comply with his court-approved treatment plan and, pursuant to § 41-3-609(2)(d), MCA, the conduct or condition rendering J.Q. unfit to parent was unlikely to change within a reasonable time as a result of his present judicially ordered long-term confinement. The Department also argued, in the alternative, that the treatment plan required by § 41-3-609(1)(f)(i), MCA, was not necessary pursuant to § 41-3-609(4)(c), MCA, because of J.Q.'s continued incarceration in Wisconsin. The District Court agreed and terminated his parental rights on both bases.

¶ 87 It is well-established that "[t]he adjudication of a child as a youth in need of care is a threshold requirement without which a court may not ... terminate a person's parental rights under" § 41-3-609(1)(f), MCA. *In re B.N.Y.,* ¶ 22. This is true even where a treatment plan is not required pursuant to § 41-3-609(4)(c), MCA, because § 41-3-609(4)(c), MCA, negates the treatment plan portion of § 41-3-609(1)(f)(i), MCA, but *not* the threshold requirement that the child be adjudicated a youth in need of care in § 41-3-609(1)(f), MCA.

¶ 88 As stated above, it is my view that the District Court violated J.Q.'s due process rights at the adjudicatory hearing by failing to afford him a full opportunity to be heard and a fundamentally fair procedure. Therefore, the court's order adjudicating A.N.W. a youth in need of care should be reversed. Absent a valid youth in need of care adjudication, the District Court could not terminate J.Q.'s parental rights pursuant to § 41-3-609(1)(f), MCA. As a result, I would conclude that the District Court erred in determining the Department had met its burden of satisfying the criteria for termination set forth in § 41-3-609(1)(f), MCA, and hold that the District Court abused its discretion in terminating J.Q.'s parental rights.

¶ 89 I would reverse. I dissent from the Court's failure to do so.

Justice JAMES C. NELSON joins in the foregoing concurring and dissenting opinion of Chief Justice KARLA M. GRAY.

2008 MT 23
341 Mont. 204

In the Matter of T.S.B., Youth in Need of Care.

No. DA 07-0372.

Supreme Court of Montana.

Submitted on Briefs November 28, 2007.
Decided January 29, 2008.

431*431 For Appellant: Jim Wheelis, Chief Appellate Defender; Joslyn M. Hunt, Assistant Appellate Defender, Helena, Montana.

For Appellee: Honorable Mike McGrath, Attorney General; C. Mark Fowler, Assistant Attorney General, Helena Montana, Brant Light, County Attorney; Sarah Corbally, Assistant Attorney General, Child Protection Unit, Great Falls, Montana, Charlotte Gray, Great Falls, Montana (Guardian ad litem), Vincent Van Der Hagen, Office of the State Public Defender, Great Falls, Montana (Mother).

Justice W. WILLIAM LEAPHART delivered the Opinion of the Court.

¶ 1 C.B. II (hereinafter "C.B."), the father of T.S.B., appeals from the order of the District Court for the Eighth Judicial District, Cascade County, terminating his parental rights to T.S.B. We affirm.

¶ 2 The issues on appeal are as follows:

1. Did the District Court's termination of C.B.'s parental rights to T.S.B., pursuant to §§ 41-3-609(1)(d) and 41-3-423(2)(e), MCA, violate C.B.'s constitutional right to due process?

2. Did the District Court abuse its discretion in terminating C.B.'s parental rights to T.S.B.?

FACTUAL AND PROCEDURAL BACKGROUND

¶ 3 C.B. and J.B. are the parents of seven children: C.B. III, A.B., C.B. V, T.B., K.J.B., T.S.B., and a stillborn son, C.B. IV. J.B., the mother, suffers from a disorder known as velocardiofacial syndrome (VCFS). VCFS can cause a number of conditions including heart defects, poor muscle tone, cleft palate, a curved esophagus, bowel problems, immune deficiency, and impaired vision and hearing. VCFS can also manifest itself in the form of cognitive problems, including learning difficulties. J.B. is cognitively impaired and of limited intellectual capacity. All of C.B. and J.B.'s children, including T.S.B., were born with VCFS.

¶ 4 T.S.B. was born on February 21, 2007. On February 24, 2007, the Department of Public Health and Human Services (DPHHS) placed T.S.B. into protective custody with a foster care provider. On February 26, 2007, Deputy Cascade County Attorney Sarah Corbally, on

behalf of the State and DPHHS, filed a Petition for Emergency Protective Services, Determination that Reasonable Efforts are not Required, Termination of Parental Rights, and Permanent Legal Custody with the District Court.

¶ 5 C.B. and J.B. previously had their parental rights terminated with respect to their five other living children: C.B. III on October 2, 1996; C.B. V and A.B. on January 14, 2000; T.B. on December 4, 2003; and K.J.B. on December 19, 2006. These terminations were grounded in C.B.'s and J.B.'s inability to safely parent. We recently affirmed the termination of C.B.'s and J.B.'s parental rights as to K.J.B. in *In re K.J.B.*, 2007 MT 216, 339 Mont. 28, 168 P.3d 629, and conducted an extensive review of the circumstances that led to that termination, as well as the termination of C.B.'s and J.B.'s parental rights with respect to the other four children.

¶ 6 The District Court issued an order on February 27, 2007, determining that the State established probable cause to believe that T.S.B. was a youth in need of care, and granting DPHHS emergency protective services of T.S.B. on the ground that letting T.S.B. remain with her parents would be contrary to her welfare, based on the involuntary termination of C.B.'s and J.B.'s parental rights with respect to T.S.B.'s five siblings due to inability to safely parent. The District Court also ordered a show cause hearing, which it eventually set for April 19, 2007. The court reserved, for the show 432*432 cause hearing, the State's request for a finding that reasonable efforts for reunification of T.S.B. with her parents not be required, as well as the State's request for termination of parental rights and permanent legal custody of T.S.B. The District Court subsequently appointed a guardian ad litem for T.S.B.

¶ 7 C.B. filed a Motion to Dismiss and for Hearing on this Motion, arguing that the State's petition was unconstitutional for violating the Due Process Clause of the Montana and United States Constitutions. C.B. argued that §§ 41-3-609(1)(d) and 41-3-423(2)(e), MCA, violated due process by impermissibly shifting the burden of proof onto the parents.

¶ 8 The District Court held the show cause hearing on April 19, 2007, but first addressed C.B.'s motion to dismiss. The District Court denied his motion on the ground that §§ 41-3-423(2)(e) and 41-3-609(1)(d), MCA, are constitutional, as the statutes still afforded C.B. and J.B. due process and fundamental fairness by "appointing Counsel, giving them the required notice, an opportunity to be heard, and an opportunity to cross-examine any of the State's witnesses."

¶ 9 The court then addressed the State's petition, and heard testimony from five witnesses for the State: Sahrita Holum; Lee Smith; Dr. Donna Zook, Ph.D.; Dr. Jennifer Hall, M.D.; and Jana Hayes.

¶ 10 Sahrita Holum, a DPHHS social worker, testified that DPHHS removed T.S.B. from her parents' custody due to a high risk of physical neglect based upon the five previous terminations. She remarked that she was concerned about how J.B. and C.B. handled the child and stated that J.B. seemed to rely on C.B. for redirection. Holum also explained that her biggest concern was that the parents never once contacted her to check and see how T.S.B. was doing.

¶ 11 Dr. Donna Zook, a licensed psychologist who evaluated both J.B. and C.B. on several occasions in 2006 after the birth of K.J.B., testified that C.B.'s ability to parent was "quite inadequate" and that his parenting prognosis was extremely poor. Dr. Zook stated that C.B. "presented both in the interview and on the objective instruments that he is the perfect parent, that he has absolutely no problems in life. He has no personality issues, no problems that create stress or distress in his life...." Dr. Zook also remarked that C.B. tended to "lack emotional expression or emotional connectedness with his child" and exclusively referred to K.J.B. as "my kid." Dr. Zook went on to state that C.B.'s "depiction of his life just totally defies the reality of his situation, not having problems, not having any kind of issue, personal issues that need fixing, treatment, whatever." Dr. Zook concluded that these problems would make it difficult for C.B. to recognize, let alone meet, the developmental needs of a child. Dr. Zook seriously doubted whether C.B.'s problems could be remedied, given past failures with parenting services. Dr. Zook opined that even if C.B.'s parenting problems could be remedied, it would take an extremely long time to accomplish.

¶ 12 Dr. Zook stated that J.B. "believes that she is without problems, that she is a perfect person, she doesn't have any issues, doesn't have anything disturbing or distressful in her life." Dr. Zook also stated that J.B. tended to defer to C.B. and believed his parenting to be perfect. Dr. Zook further explained that J.B. "also expects the child to satisfy her needs. [C.B.] expects an ideal child, and [J.B.] expects the child to be ideal to [C.B.] ..." and that "[t]he child is there to support and to gratify [J.B.'s] needs." Dr. Zook believed that this behavior would place a child at risk of abuse and neglect. She ultimately concluded that she did not believe J.B. could benefit from services and be able to safely parent in the reasonable future. She expressed, as to both C.B. and J.B., that it would take a complete rebuilding of their personalities to change their parenting.

¶ 13 Dr. Jennifer Hall, T.S.B.'s pediatrician, testified that T.S.B. suffered from VCFS, had feeding issues due to poor muscle tone in her throat, and that she had a heart defect. Dr. Hall stated that T.S.B. was at risk for learning problems, language delay, and behavioral problems, and that she will require on-going specialized treatment. Dr. Hall stated that as a result of these conditions, T.S.B. will require a higher level of care and that she will suffer from these 433*433 problems for her entire life. On cross-examination, Dr. Hall stated that C.B. did seem interested in parenting T.S.B., and that he expected to be allowed to do so. She also stated that C.B. seemed to have affection and love for T.S.B. and wanted to care for her. Nonetheless, Dr. Hall also testified that she was concerned with C.B.'s and J.B.'s ability to feed T.S.B. and that it was uncommon for parents to have that much difficulty with feeding their baby.

¶ 14 Although these witnesses were crossed-examined, the parents did not call any witnesses of their own. The court also admitted into evidence the previous orders regarding termination of parental rights for C.B. and J.B.'s five other children.

¶ 15 Based on the evidence and testimony presented, the District Court concluded that DPHHS was not required to make reasonable efforts to reunify T.S.B. with her parents, that clear and convincing evidence showed that C.B. and J.B. were unable to safely and adequately care for T.S.B. within a reasonable amount of time, that clear and convincing evidence showed that continuation of the parent-child legal relationship between T.S.B. and her parents would likely result in ongoing abuse and/or neglect, and that the best interest of

T.S.B.'s physical, mental, and emotion condition would be served by terminating the parent-child legal relationship with C.B. and J.B. Accordingly, the District Court terminated the parent-child relationship, and granted permanent legal custody to DPHHS.

¶ 16 The District Court entered its order on April 26, 2007. The District Court held a permanency plan hearing on May 17, 2007, and, that same day, entered an order approving the permanency plan for T.S.B. This appeal followed.

STANDARD OF REVIEW

¶ 17 We review a district court's decision to terminate an individual's parental rights to determine whether the lower court abused its discretion. *In re A.S.*, 2006 MT 281, ¶ 24, 334 Mont. 280, ¶ 24, 146 P.3d 778, ¶ 24. Our review for abuse of discretion is whether the trial court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice. *In re AS.,* ¶ 24.

¶ 18 However, because a parent's right to the care and custody of a child is a fundamental liberty interest, the right must be protected by fundamentally fair procedures. *In re D.B.*, 2007 MT 246, ¶ 17, 339 Mont. 240, ¶ 17, 168 P.3d 691, ¶ 17. Prior to terminating an individual's parental rights, a district court must adequately address each applicable statutory requirement. *In re D.B.,* ¶ 17. "To satisfy the relevant statutory requirements for terminating a parent-child relationship, a district court must make specific factual findings." *In re Custody and Parental Rights of C.J.K.*, 2005 MT 67, ¶ 13, 326 Mont. 289, ¶ 13, 109 P.3d 232, ¶ 13. We review a district court's findings of fact to determine whether the findings are clearly erroneous. *In re L.H.*, 2007 MT 70, ¶ 13, 336 Mont. 405, ¶ 13, 154 P.3d 622, ¶ 13. "A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence or if, upon reviewing the record, this Court is left with the definite and firm conviction that the district court made a mistake." *In re L.H.,* ¶ 13. We review a district court's conclusions of law for correctness. *In re L.H.,* ¶ 13.

¶ 19 "The district court is bound to give primary consideration to the physical, mental and emotional conditions and needs of the children. Consequently, the best interests of the children are of paramount concern in a parental rights termination proceeding and take precedence over the parental rights." *In re C.J.K.,* ¶ 14 (citing § 41-3-609(3), MCA). "Moreover, the party seeking to terminate parental rights must demonstrate by clear and convincing evidence that the statutory requirements for termination have been met." *In re C.J.K.,* ¶ 14.

¶ 20 Whether a person has been denied his or her right to due process is a question of constitutional law, for which our review is plenary. *In re A.S.*, 2004 MT 62, ¶ 9, 320 Mont. 268, ¶ 9, 87 P.3d 408, ¶ 9. We presume that all statutes are constitutional. 434*434 *State v. Trull,* 2006 MT 119, ¶ 30, 332 Mont. 233, ¶ 30, 136 P.3d 551, ¶ 30. A party asserting a constitutional challenge to a statute bears the burden of proving, beyond a reasonable doubt, that the statute is unconstitutional, and any doubt is resolved in favor of the statute. *In re M.H.*, 2006 MT 208, ¶ 22, 333 Mont. 286, ¶ 22, 143 P.3d 103, ¶ 22.

DISCUSSION

¶ 21 *Issue One. Did the District Court's termination of C.B.'s parental rights to T.S.B., pursuant to §§ 41-3-609(1)(d) and 41-3-423(2)(e), MCA, violate C.B.'s constitutional right to due process?*

¶ 22 C.B. argues that the application of §§ 41-3-609(1)(d) and 41-3-423(2)(e), MCA, violated his right to due process because: (1) the statutory scheme does not mandate that the District Court hold an adjudication hearing, and (2) the statutes presume unfitness and do not afford C.B. the opportunity to show that his circumstances have changed.

¶ 23 Sections 41-3-601-612, MCA, provide for the termination of the parent-child relationship. *In re K.J.B.,* ¶ 25. Section 41-3-602, MCA, states:

This part provides procedures and criteria by which the parent-child legal relationship may be terminated by a court if the relationship is not in the best interest of the child. The termination of the parent-child legal relationship provided for in this part is to be used in those situations when there is a determination that a child is abused or neglected, as defined in 41-3-102.

¶ 24 Accordingly, to proceed with a termination under §§ 41-3-601-612, MCA, there must first be a determination that the child is "abused or neglected." Section 41-3-102(3), MCA, defines "abused or neglected" as "the state or condition of a child who has suffered child abuse or neglect." Section 41-3-102(7)(a)(i)-(iii), MCA, then defines "child abuse or neglect" as: "(i) actual physical or psychological harm to a child; (ii) substantial risk of physical or psychological harm to a child; or (iii) abandonment." Section 41-3-102(7)(b)(i)(A), MCA, also notes that the term "child abuse or neglect" includes "actual physical or psychological harm to a child or substantial risk of physical or psychological harm to a child by the acts or omissions of a person responsible for the child's welfare...." A "youth in need of care" means "a youth who has been adjudicated or determined, after a hearing, to be or to have been abused, neglected, or abandoned." Section 41-3-102(34), MCA. An involuntary termination under §§ 41-3-609(1)(d) and 41-3-423(2)(e), MCA, does not require that the child be adjudicated as a youth in need of care, only that it be determined the child was abused or neglected. *In re K.J.B.,* ¶ 31.

¶ 25 In order to terminate the parent-child relationship, the district court must find, by clear and convincing evidence, that any of the criteria enumerated in § 41-3-609(1), MCA, exist. Section 41-3-609(1), MCA; *Matter of M.J.W.,* 1998 MT 142, ¶ 16, 289 Mont. 232, ¶ 16, 961 P.2d 105, ¶ 16. Most relevant to this matter, § 41-3-609(1)(d), MCA, provides that:

The court may order a termination of the parent-child legal relationship upon a finding established by clear and convincing evidence ... that any of the following circumstances exist:

(d) the parent has subjected a child to any of the circumstances listed in 41-3-423(2)(a) through (2)(e)....

¶ 26 Although DPHHS is generally obligated to make reasonable efforts to prevent removal of a child from the child's home and to reunify separated families under § 41-3-423(1), MCA, there are several key exceptions. Section 41-3-423(2)(e), MCA, states:

Except in a proceeding subject to the federal Indian Child Welfare Act, the department may, at any time during an abuse and neglect proceeding, make a request for a determination that preservation or reunification services need not be provided. If an indigent parent is not already represented by counsel, the court shall immediately provide for the appointment or assignment of counsel to represent the indigent parent in accordance with the provisions of 41-3-425. A court may make a finding that the department need not make reasonable efforts to provide preservation 435*435 or reunification services if the court finds that the parent has:

(e) had parental rights to the child's sibling or other child of the parent involuntarily terminated and the circumstances related to the termination of parental rights are relevant to the parent's ability to adequately care for the child at issue.

¶ 27 Under § 41-3-607(1), MCA, "[t]he termination of a parent-child legal relationship may be considered only after the filing of a petition pursuant to 41-3-422 alleging the factual grounds for termination pursuant to 41-3-609." Section 41-3-422, MCA, provides that a petitioner may request the termination of the parent-child relationship in the abuse and neglect petition. Section 41-3-422(1)(a)(v), MCA. "A petition for the termination of the parent-child legal relationship may be the initial petition filed in a case if a request for a determination that preservation or reunification services need not be provided is made in the petition." Section 41-3-422(1)(d), MCA.

¶ 28 With this statutory scheme in mind, we can turn to C.B.'s specific contentions that his right to due process was violated because (1) the statutory scheme does not require that the District Court hold an adjudication hearing, and (2) the statutes presume unfitness and do not afford C.B. the opportunity to show that his circumstances have changed. Each contention can be addressed in turn.

A. Adjudication Hearing

¶ 29 C.B. claims that because there was no adjudication hearing, the District Court did not receive any testimony or evidence that T.S.B. was abused or neglected. C.B. acknowledges that the statutes do not require adjudication of the child as a youth in need of care when the State is proceeding with termination based on prior involuntary terminations. However, C.B. asserts that the statutory scheme violated his constitutional right to due process because it is at the adjudication hearing where the District Court "`must determine the nature of the abuse and neglect and establish facts that resulted in state intervention and upon which disposition, case work, court review, and possible termination are based.'" (Quoting § 41-3-437(2), MCA.) C.B. argues that since the District Court must resolve an evidentiary question at the adjudication hearing, he should be entitled to such a hearing and the State should not get to bypass this stage simply because there are prior terminations that are relevant. C.B.

claims that by not requiring this evidentiary finding, § 41-3-609(1)(d), MCA, violates his right to due process.

¶ 30 A parent's right to the care and custody of a child constitutes a fundamental liberty interest that must be protected by fundamentally fair procedures. *In re D.B.,* ¶ 17. Proceedings involving the termination of the parent-child relationship must meet due process requisites guaranteed by the Montana and United States Constitutions. *In re A.N.W.,* 2006 MT 42, ¶ 34, 331 Mont. 208, ¶ 34, 130 P.3d 619, ¶ 34. Fundamental fairness and due process require that a parent not be placed at an unfair disadvantage during the termination proceedings. *In re A.N.W.,* ¶ 34.

¶ 31 We reject C.B.'s argument that the lack of an adjudication hearing violated his constitutional right to due process. While an adjudication hearing is not required, § 41-3-609(1)(d), MCA, still requires a determination that the child is abused or neglected. *In re K.J.B.,* ¶ 31. Here, DPHHS alleged abuse and neglect in its petition, DPHHS provided an affidavit from social worker Holum detailing the grounds for DPHHS' allegation that T.S.B. was abused or neglected, the District Court heard testimony on the matter from five different witnesses at the hearing, and the District Court issued findings of fact detailing substantial risk of physical or psychological harm to T.S.B.

¶ 32 Even without an adjudication hearing, the statutory scheme did not deprive C.B. of process. The District Court was still required to determine that T.S.B. was at substantial risk of physical or psychological harm (which constitutes child abuse or neglect under § 41-3-102(7), MCA). In addition, the State also had the burden of showing that C.B. had his parental rights to 436*436 T.S.B.'s siblings involuntarily terminated and the circumstances related to those involuntary terminations were relevant to C.B.'s ability to adequately care for T.S.B. That C.B. was not placed at an unfair advantage during the termination proceedings is further evidenced by the fact that he received notice of the termination petition, the District Court held a show cause hearing, he was represented by counsel, and he had the opportunity to present evidence and testimony (though he was not required to do so as the burden was on the State).

¶ 33 C.B. references several cases in which we held that the district court improperly terminated parental rights where the court failed to receive testimony or evidence at an adjudication hearing — *In re B.N.Y.,* 2003 MT 241, 317 Mont. 291, 77 P.3d 189; *In re M.O.,* 2003 MT 4, 314 Mont. 13, 62 P.3d 265; and *In re T.C.,* 2001 MT 264, 307 Mont. 244, 37 P.3d 70. These cases are inapposite to the issue presented here as the terminations all proceeded under § 41-3-609(1)(f), MCA, and can readily be distinguished from the termination of C.B.'s parental rights to T.S.B.

¶ 34 Under § 41-3-609(1)(f), MCA, a district court may terminate the parent-child relationship when the child is an adjudicated youth in need of care and "(i) an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful; and (ii) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time." Section 41-3-609(1)(f), MCA. However, we have held that the parent-child relationship may be terminated *without any adjudication,* under several statutory circumstances, including when parental rights have been terminated as to other children. *In re K.J.B.,* ¶ 37. Under the criteria listed in §

41-3-609(1)(a)-(f), MCA, for termination of parental rights, only one — § 41-3-609(1)(f) — requires adjudication of the child as a youth in need of care. *In re K.J.B.,* ¶ 31. Subsections 609(1)(a)-(e) do not mandate this requirement. C.B. has failed to demonstrate how a determination that a child is abused or neglected, versus an adjudication that a child is abused or neglected, violates due process.

¶ 35 C.B. also asserts that the "prior terminations involving C.B.'s other children should not be used to determine what is an evidentiary question solely about T.S.B." We disagree. "[T]he circumstances of a prior termination continue to be relevant in a later termination of a sibling under §§ 41-3-609(1)(d) and 41-3-423(2)(e), MCA, unless the circumstances have changed." *In re Custody and Parental Rights of A.P.,* 2007 MT 297, ¶ 30, 340 Mont. 39, ¶ 30, 172 P.3d 105, ¶ 30. Furthermore, a termination under § 41-3-609(1)(d), MCA, requires a court to take judicial notice of prior terminations and the facts and circumstances surrounding those orders. *See* M.R. Evid. 201, 202. A district court, by necessity, must take judicial notice of prior terminations if it is to determine whether those terminations are relevant to the parents' ability to care for the child currently at issue.

¶ 36 C.B. has failed to meet his burden of showing that the lack of an adjudication hearing in a § 41-3-609(1)(d), MCA, proceeding is unconstitutional. For the reasons discussed above, C.B. was not placed at an unfair disadvantage during the proceeding as the statutes provide fundamentally fair process. We hold that § 41-3-609(1)(d), MCA, does not violate a person's right to due process for failure to require an adjudication hearing.

B. Presumption of Unfitness

¶ 37 C.B. next argues that even if the due process clause does not require that T.S.B. be adjudicated as a youth in need of care, the statutory scheme allowing the District Court to terminate C.B.'s parental rights is still unconstitutional. Although C.B. acknowledges that he was permitted a hearing and received counsel for that hearing, he nonetheless maintains that he had no opportunity to show changed circumstances with respect to T.S.B. because he was not even provided with a treatment plan. Citing *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), C.B. claims that the statutes create a presumption of unfitness that when combined with an inability to counter the State's evidence, violates his constitutional right to due process.

437*437 ¶ 38 We recently addressed whether §§ 41-3-609(1)(d) and 41-3-423(2)(e), MCA, create a presumption of unfitness that violates a parent's constitutional right to due process in *In re A.P.* We concluded that the statutory scheme did not violate the parent's right to due process because she received notice of the petition to terminate, the District Court held a hearing on the merits, and she was present and represented by counsel at that hearing. *In re A.P.,* ¶ 22. Furthermore, we specifically rejected the contention that §§ 41-3-609(1)(d) and 41-3-423(2)(e), MCA, created a presumption against her. *In re A.P.,* ¶ 23. We explained that DPHHS retained the burden of showing that the circumstances related to the prior termination of parental rights as to A.P.'s siblings were still relevant to the parent's ability to adequately care for A.P., and that DPHHS was required to establish the statutory elements by clear and convincing evidence. *In re A.P.,* ¶ 23.

¶ 39 Like the parent in *In re A.P.,* C.B. received notice of the petition to terminate, the District Court held a hearing on the petition's merits, and C.B. was present and represented by counsel at the hearing. Although C.B. had the opportunity to rebut the State's allegations and show changed circumstances at the hearing, we note that he chose not to present any witnesses or evidence demonstrating changed circumstances. The statutory scheme did not create a presumption against C.B. as the burden remained on the State.

¶ 40 We conclude that the statutory scheme provides fundamentally fair process and we reaffirm our holding that §§ 41-3-609(1)(d) and 41-3-423(2)(e), MCA, do not violate a parent's constitutional right to due process.

¶ 41 *Issue Two. Did the District Court abuse its discretion in terminating C.B.'s parental rights to T.S.B.?*

¶ 42 C.B. next argues that the District Court abused its discretion in terminating C.B.'s parental rights to T.S.B. because the State failed to demonstrate by clear and convincing evidence that C.B. was unable to parent and/or change within a reasonable time. As this issue is analogous to that addressed by this Court in *In re K.J.B.,* we will use that case as a framework for analyzing this issue.

¶ 43 The District Court first had to determine T.S.B. was at substantial risk of physical or psychological harm. *See* §§ 41-3-602, 41-3-102(3), 41-3-102(7)(a)(ii), MCA; *In re K.J.B.,* ¶ 29. Once the District Court made this determination, C.B.'s parental rights to T.S.B. could be terminated if it was established by clear and convincing evidence that C.B. had his parental rights to T.S.B.'s siblings or other child of C.B. involuntarily terminated (*In re K.J.B.,* ¶ 29; §§ 41-3-609(1)(d), 41-3-423(2)(e), MCA), and the circumstances related to those involuntary terminations were relevant to C.B.'s ability to adequately care for T.S.B. (*In re K.J.B.,* ¶ 29; §§ 41-3-609(1)(d), 41-3-423(2)(e), MCA). Moreover, the District Court had to give primary consideration to T.S.B.'s physical, mental and emotional conditions and needs, placing T.S.B.'s best interests over C.B.'s parental rights. *In re K.J.B.,* ¶ 29 (citing *In re V.F.A.,* 2005 MT 76, ¶ 8, 326 Mont. 383, ¶ 8, 109 P.3d 749, ¶ 8).

¶ 44 In its February 26, 2007 petition, DPHHS asserted that it had probable cause to believe that T.S.B. was abused or neglected within the meaning of § 41-3-102, MCA. As grounds for this assertion, the State referenced the previous involuntary terminations of C.B.'s and J.B.'s parental rights to five other children, and attached an affidavit of social worker Sahrita Holum. In her affidavit, Holum discussed the five prior terminations and how they resulted from C.B.'s and J.B.'s difficulties in caring for their special needs children. Holum documented how C.B. had to be constantly prompted to touch or cuddle with one child and that he never adequately grasped how to properly feed the child. Holum further detailed how the parents frequently missed visitations with one child under a previous treatment plan. Holum also discussed how C.B.'s personality and emotional problems would render it difficult for him to adequately parent. Holum described several psychological evaluations that the parents had received, including with Dr. Zook, and the numerous deficiencies that the evaluators 438*438 noted with respect to their parenting abilities.

¶ 45 In its April 25, 2007 order, the District Court determined that C.B.'s and J.B.'s parental rights were involuntarily terminated due to their inability to adequately and safely parent on five previous occasions, that the parents would be unable to safely and adequately care for T.S.B. within a reasonable time, and that continuation of the parent-child relationship between T.S.B. and her parents would likely result in ongoing abuse or neglect. As in *In re K.J.B.,* the District Court here did not abuse its discretion when it determined that T.S.B. was at "substantial risk of physical or psychological harm" by "acts or omissions of a person responsible for the child's welfare." Sections 41-3-102(7)(a)(ii), 41-3-102(7)(b)(i)(A), MCA; *In re K.J.B.,* ¶ 32.

¶ 46 Having concluded that the District Court did not abuse its discretion when it determined that T.S.B. was at substantial risk of abuse or neglect, we now turn to the other requirements for termination of parental rights under § 41-3-609(1)(d), MCA — (1) that C.B. had his parental rights to T.S.B.'s siblings involuntarily terminated, and (2) that the circumstances related to those involuntary terminations were relevant to C.B.'s ability to adequately care for T.S.B. Given that no party contests that C.B. had his parental rights to five of T.S.B.'s siblings involuntarily terminated, we need only address "whether the District Court correctly concluded that the `circumstances related to the termination of parental rights are relevant to the parent's ability to adequately care for the child at issue.'" *In re K.J.B.,* ¶ 34 (quoting § 41-3-423(2)(e), MCA).

¶ 47 C.B. contends that the State failed to show by clear and convincing evidence that he was unable to parent and that he was unable to change within a reasonable time. In support of the contention that he was fit to parent, C.B. notes testimony indicating his affection towards T.S.B., that he helped J.B., and that he asked questions of the hospital staff regarding T.S.B.'s inability to eat. C.B. cites Holum's testimony stating that although J.B. had difficulty holding T.S.B.'s head, C.B. would redirect her, which C.B. asserts was an indication that he did not have difficulties. C.B. also refers to the testimony of Dr. Zook stating that C.B. was not diagnosed with any psychological problems, only that he had personality disorders. The State counters by arguing that DPHHS met its burden of establishing that C.B. remains unable to safely and adequately address T.S.B.'s special needs and provide for her necessary care. The State claims that C.B.'s "circumstances are unchanged from the circumstances surrounding and underlying his previous parental terminations" and that he remains "untreatable."

¶ 48 We agree that DPHHS met its burden of establishing that C.B. remains unable to safely and adequately address T.S.B.'s special needs and provide for her necessary care. In order to terminate C.B.'s parental rights, the State needed to present the District Court with clear and convincing evidence that the circumstances related to those involuntary terminations were relevant to C.B.'s ability to adequately care for T.S.B. The orders for the five previous terminations of C.B.'s parental rights illustrate the numerous difficulties C.B. had in parenting his children. "We have determined that the circumstances of a prior termination continue to be relevant in a later termination of a sibling under §§ 41-3-609(1)(d) and 41-3-423(2)(e), MCA, unless the circumstances have changed." *In re A.P.,* ¶ 30. Furthermore, the testimony at the hearing supports the determination that the circumstances related to the previous terminations are relevant to C.B.'s ability to adequately care for T.S.B. As noted earlier, Holum expressed concern that C.B. never once contacted her to see how T.S.B. was doing. Dr. Zook evaluated C.B. in early 2006 and

testified as to C.B.'s inadequate parenting skills, his personality disorders, his difficulty in meeting the developmental needs of a child, his lack of emotional expression, and his poor prognosis for change. Dr. Hall explained how T.S.B. suffered from the same genetic condition as her five siblings and how she would likewise require a higher level of care. Previous terminations show that C.B. had difficulty with feeding his other children, and Dr. Hall testified that he again had this trouble with 439*439 T.S.B. and that it was uncommon for parents to have that much difficulty. The District Court's findings of fact referenced this testimony. Based on the foregoing evidence and testimony, we conclude, as we did in *K.J.B.,* that "their circumstances are unchanged from the circumstances surrounding and underlying their previous parental terminations." *In re K.J.B.,* ¶ 36.

¶ 49 For the foregoing reasons, we conclude that the District Court did not abuse its discretion in terminating C.B.'s parental rights to T.S.B.

CONCLUSION

¶ 50 We hold that the termination of C.B.'s parental rights to T.S.B. pursuant to §§ 41-3-609(1)(d) and 41-3-423(2)(e), MCA, did not violate C.B.'s constitutional right to due process. Furthermore, we conclude that the District Court did not abuse its discretion in terminating C.B.'s parental rights to T.S.B. as the State established by clear and convincing evidence that C.B. had his parental rights to T.S.B.'s siblings involuntarily terminated, and that the circumstances related to those involuntary terminations were relevant to C.B.'s ability to adequately care for T.S.B.

¶ 51 Affirmed.

We concur: JIM RICE, PATRICIA COTTER, JOHN WARNER, and BRIAN MORRIS, JJ.

Chief Justice KARLA M. GRAY, specially concurring.

¶ 52 I specially concur in the Court's opinion, notwithstanding my strong disagreement with it. I set forth the reasons for that disagreement at some length in my dissent to *In re K.J.B.,* 2007 MT 216, ¶¶ 39-48, 339 Mont. 28, ¶¶ 39-48, 168 P.3d 629, ¶¶ 39-48. The Court's determinations in *In re K.J.B.* are now the law of the State of Montana, however, and I am obliged — like all Montanans — to follow the law. I do so most reluctantly.

Justice JAMES C. NELSON joins in the foregoing specially concurring Opinion.

FILED
April 10 2012
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

DA 11-0664, DA 11-0665

IN THE SUPREME COURT OF THE STATE OF MONTANA

2012 MT 78

IN THE MATTER OF:

S.S. and S.S.,

Youths in Need of Care.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause Nos. BDN 11-015, BDN 11-016
Honorable Julie Macek, Presiding Judge

COUNSEL OF RECORD:

For Appellant (Mother):

Elizabeth Thomas, PLLC, Missoula, Montana

For Appellee:

Steve Bullock, Montana Attorney General; Matthew T. Cochenour, Assistant Attorney General, Helena, Montana

John Parker, Cascade County Attorney; Jennifer Ropp, Deputy Cascade County Attorney, Great Falls, Montana

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Submitted on Briefs: March 14, 2012

Decided: April 10, 2012

Filed:

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Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 T.S. (Mother), mother of S.S. and S.S., appeals from the judgment of the Eighth Judicial District, Cascade County, awarding D.S. (Father) sole custody of the children and dismissing her case as related to the Department of Public Health and Human Services' (State) involvement.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In February 2011, the State initiated abuse and neglect proceedings and removed 12-year-old S.S. and 10-year-old S.S. from Mother's care upon substantiating reports that her alcohol abuse had led to the endangerment and physical neglect of the children. At the time, the marriage of the parents was dissolved and Mother and Father shared legal custody. The State placed the children with Father and established a safety plan that only allowed Mother supervised contact with the children.

¶3 The State filed a petition for emergency protective services pursuant to § 41-3-427, MCA, and temporary investigative authority pursuant to § 41-3-433, MCA. The District Court then appointed separate counsel to Mother, Father and the children pursuant to § 41-3-425, MCA, and the children were also appointed a guardian ad litem. Both parents stipulated that there was probable cause to grant the petition, and the children's attorney did not object to the State's request. The District Court granted the State's petition for emergency services and temporary investigative authority. The court also determined that the children should remain temporarily with Father because continuation in Mother's home would be contrary to their welfare.

¶4 Mother continued to abuse alcohol, resulting in several failed urinalysis tests and an arrest for violating the temporary order of protection Father obtained to limit her excessive phone calls. Accordingly, the State petitioned to have the children adjudicated as youths in need of care. The guardian ad litem reported to the court that the children expressed that they were doing well in Father's home, and that their performance in school had improved. After both parents stipulated, the District Court adjudicated the children as youths in need of care and ordered that the children remain in their current placement with Father. Father also informed the court that he intended to move for dismissal of the case at the time of the subsequent dispositional hearing. Mother indicated her intent to contest his motion.

¶5 After several continuations, a dispositional hearing was held on October 6, 2011. Father moved to dismiss the State's case and grant him full legal custody of the children. He argued that despite finishing treatment, Mother was still using alcohol. There was no objection to Father's motion from the State or the children's attorney. Mother, however, objected and asked to call witnesses. The District Court denied this request, finding that the issue was purely legal and that there were no disputed factual issues. Because Father was constitutionally entitled to parent his children and the court was not aware of any allegations concerning him, the case was dismissed and the children were placed with Father pursuant to § 41-3-438(3)(d), MCA. This appeal followed.

¶6 Because Mother appeals from an abuse and neglect proceeding initiated by the State pursuant to § 41-3-422, MCA, Father is not a party to this appeal.

¶7 We state the dispositive issue as follows:

¶8 *Did the District Court err when it dismissed the State's abuse and neglect proceeding and placed the children with the non-custodial parent pursuant to § 41-3-437(3)(d), MCA?*

STANDARD OF REVIEW

¶9 In a youth in need of care proceeding, we review a district court's conclusions of law to determine if they are correct. *In re A.C.*, 2004 MT 320, ¶ 9, 324 Mont. 58, 101 P.3d 761.

DISCUSSION

¶10 Initially, the State argues that the approval of Father's request was not a final judgment, and is thus not ripe for appeal. To the contrary, this Court has reviewed orders granting placement of children with one parent where the other parent's parental rights have not been terminated. *See e.g. In re A.C.*, ¶ 17; *In re B.P.*, 2008 MT 166, ¶ 26, 343 Mont. 345, 184 P.3d 334 (Leaphart & Morris, dissenting) ("The court's Order giving Father permanent custody of the children is a final order for the purposes of M. R. App. P. 4. . . ."). In regards to abuse and neglect proceedings, the Montana Rules of Appellate Procedure only designate orders of temporary custody among those which are not appealable. M. R. App. P. 6(5)(c). The dismissal in this case had the effect of terminating both the State's and the District Court's jurisdiction over the abuse and neglect proceedings that gave rise to this appeal, thus this is an appealable order.

¶11 *Did the District Court err when it dismissed the State's abuse and neglect proceeding and placed the children with the non-custodial parent pursuant to § 41-3-437(3)(d), MCA?*

¶12 When a child is adjudged a youth in need of care, a dispositional hearing must be held within 20 days unless the petition is dismissed or the parents stipulate to a disposition. Section 41-3-438(1), MCA. This hearing must be separate from the adjudicatory hearing, and "must be scheduled and structured so that dispositional issues are specifically addressed apart from adjudicatory issues." Section 41-3-438(2), MCA.

¶13 Mother argues that a dispositional hearing is intended to address placement issues and treatment plans, and that this necessarily requires the presentation of evidence as to the best interests of the children. Upon Father's motion to dismiss the action and with the concurrence of the State, the District Court concluded there was no factual determination to be made. There were no allegations against Father, and thus no question of fact regarding the best interests of the children in an abuse and neglect proceeding initiated by the State. Recognizing Father's constitutionally-protected interest in parenting his child[1], the District Court placed the children with him pursuant to § 41-3-438(3)(d), MCA, which allows the court to:

> order the placement of the child with the noncustodial parent, superseding any existing custodial order, and dismiss the proceeding with no further obligation on the part of the department to provide services to the parent with whom the child is placed or to work toward reunification of the child with the parent or guardian from whom the child was removed in the initial proceeding. . . .

Section 41-3-438(3)(d), MCA. The court also released the State from further obligation to provide services to Father.

[1] *See e.g. In re T.S.B.*, 2008 MT 23, ¶ 18, 341 Mont. 204, 177 P.3d 429.

¶14 In support of her argument that under § 41-3-438(2), MCA, it was reversible error to deny her an opportunity to present evidence, Mother cites to *In re J.J.G.*, 266 Mont. 274, 880 P.2d 808 (1994), *In re M.L.H.*, 220 Mont. 288, 715 P.2d 32 (1986), and *In re C.L.A.*, 211 Mont. 393, 685 P.2d 931 (1984).

¶15 The above cases are factually inapposite with the present case because the District Court here complied with § 41-3-438(2), MCA, as it pertains to scheduling of the adjudicatory and dispositional hearings. Moreover, all three cases relied upon by Mother involved the removal of children from homes where both parents were being investigated by the State for suspected abuse or neglect, and two of these cases involved petitions to terminate the parent-child relationships of both parents.

¶16 This case arose, on the other hand, from an abuse and neglect proceeding initiated by the State due to the alcohol abuse of Mother, who was divorced from Father. Mother's parental rights were not terminated. Instead, the District Court followed the statutory procedure of § 41-3-438(3)(d), MCA, in ordering placement of the children with Father. This relieved the State from any further obligation to the children, as the concern for them being youths in need of care was eliminated by the placement. *See In re A.C.*, ¶ 17.

¶17 This is not to say that Mother does not have a remedy. Now that the State is no longer a party, Mother has the ability to initiate an action for a parenting plan pursuant to the provisions of Title 40, Chapter 4, MCA. That is the appropriate forum to invoke district court jurisdiction to resolve future disputes between the parents regarding these children.

CONCLUSION

¶18 The District Court did not err when it dismissed the State's abuse and neglect proceeding and placed the children with Father. For the foregoing reasons, we affirm the District Court's order.

/S/ MIKE McGRATH

We concur:

/S/ MICHAEL E WHEAT
/S/ BRIAN MORRIS
/S/ BETH BAKER
/S/ JAMES C. NELSON

296 P.3d 1197 (2013)
2013 MT 60

In the Matter of M.J., A Youth in Need of Care.

No. DA 12-0532.

Supreme Court of Montana.

Submitted on Briefs February 13, 2013.
Decided March 5, 2013.

1198*1198 For Appellant: Elizabeth Thomas, Attorney at Law, Missoula, Montana.

For Appellee: Timothy C. Fox, Montana Attorney General, Micheal S. Wellenstein, Assistant Attorney General, Helena, Montana, Theresa L. Diekhans, Child Protection Unit, Great Falls, Montana John Parker, Cascade County Attorney, Great Falls, Montana.

Justice LAURIE McKINNON delivered the Opinion of the Court.

¶ 1 O.J., M.J.'s mother, appeals the order entered by the Eighth Judicial District Court, Cascade County, finding M.J. to be a youth in need of care and granting custody of M.J. to M.J. Sr., M.J.'s father. We affirm.

¶ 2 O.J. raises the following issues on appeal:

¶ 3 1. Did the District Court err in finding the child a youth in need of care?

¶ 4 2. Did the District Court err when it dismissed the abuse and neglect proceeding and granted custody to the father under § 41-3-438(3)(d), MCA?

Factual and Procedural Background

¶ 5 M.J. was born with numerous medical issues and hospitalized for the first three months of his life. M.J. suffers from liver disease, gastric reflux disease, cycocel trite, cloudy corneas, a partial occipital infarct, hearing and visual impairments, seizures, and brain damage. The suspected cause of M.J.'s medical problems was maternal drug use. At the time of M.J.'s birth, O.J. tested positive for methamphetamine. While O.J. denied methamphetamine use despite the test result, O.J. admitted to marijuana use during the pregnancy.

¶ 6 In addition to being treated in Great Falls, Montana, M.J. has seen a pediatric eye specialist and a gastrointestinal specialist in Billings, Montana, and has been transported to a neo-ICU unit in Seattle, Washington, for treatment, and later to a Seattle hospital for a

biopsy of his liver. M.J.'s prognosis is guarded and M.J. will require ongoing pediatric specialty care beyond what is available in Montana. M.J. will need a parent who can provide constant care and has training by medical professionals in understanding how to care for M.J.

¶ 7 Concerns arose when M.J. was scheduled to be discharged approximately three months after birth. O.J. had not been consistently visiting M.J. and she had indicated that she would not seek follow up medical care for M.J. O.J. was defiant to hospital staff and nurse directives and would not provide her home address to the hospital. When O.J. finally provided her address, she could not be located by Child Protective Service workers, nor could she be reached by phone. M.J. was released into M.J. Sr.'s care the following day.

¶ 8 On April 9, 2012, the Department of Public Health and Human Services (Department) 1199*1199 filed a Petition for Emergency Protective Services, Adjudication as Youth in Need of Care and Temporary Legal Custody. The District Court granted the Department temporary protective services and set a show cause hearing on the Department's petition for June 26, 2012.

¶ 9 O.J. did not appear at the show cause hearing. O.J.'s counsel represented that he had no contact with O.J. The Department indicated that until two weeks prior to the hearing, they had kept in good contact with O.J. O.J.'s counsel acknowledged that O.J. waived her right to contest the show cause hearing as O.J. had not filed a response to the petition; however, counsel objected to the District Court adjudicating M.J. a youth in need of care. M.J. Sr. was present for the show cause hearing, waived his right to a hearing, and stipulated to a finding that M.J. was a youth in need of care. M.J. Sr. wanted the case to move quickly so M.J.'s medical needs could be addressed. M.J. Sr. is an airman in the Air Force. He wanted to obtain custody of M.J. so that he could transfer to a location with medical facilities that could address M.J.'s needs. The District Court set an adjudicatory and dispositional hearing for July 24, 2012.

¶ 10 At the July 24, 2012 hearing, O.J. appeared with counsel. O.J.'s counsel requested a continuance, representing that he had only met O.J. moments before the hearing. M.J. Sr. appeared and again expressed his desire to have things move quickly so he could transfer to an air base with better medical facilities. The District Court reset the adjudication and dispositional hearing for August 7, 2012.

¶ 11 O.J. failed to appear at the August 7, 2012 hearing. The court conducted the hearing and received testimony from Dr. Deborah Garrity, M.J.'s treating physician; Child Protective Specialist Anne Sinnott; and M.J. Sr. Sinnott described the Department's efforts to assist O.J. in her parenting of M.J. Specifically, Sinnott related that O.J. never progressed beyond supervised visits with M.J. because O.J. failed to appreciate the magnitude of M.J.'s medical needs. O.J. disagreed with the opinions of medical staff and did not understand why the Department had to be involved. Sinnott explained that O.J. had not attempted to really understand M.J.'s issues and what it would take to parent M.J. Examples of O.J.'s inability to follow medical directives were O.J. refusing to leave M.J. in the incubator, and refusing to wear a hospital gown.

¶ 12 Dr. Garrity and Sinnott described M.J. Sr.'s involvement with M.J. as very good. M.J. Sr. followed medical staff directions, understood the demands parenting M.J. would require, and displayed competency in dealing with both M.J.'s medical issues and receiving the necessary medical training. M.J. Sr. explained to the District Court that granting custody of M.J. to M.J. Sr. was necessary for M.J. Sr. to be granted a transfer to an air base with appropriate medical facilities. Dr. Garrity concurred that M.J.'s survival depended on appropriate medical services, and that Montana could not provide the type of medical care M.J. needed. Sinnott also believed M.J. Sr. had demonstrated he could appropriately parent M.J. and provide for M.J.'s medical needs.

¶ 13 At the conclusion of the adjudicatory hearing, the District Court found, based upon a preponderance of the evidence, that M.J. was a youth in need of care. The District Court next conducted a disposition hearing, and again Dr. Garrity and Sinnott testified. Dr. Garrity testified to the best interests of M.J. as follows:

I am completely comfortable with recommending that [M.J.'s] dad be the primary caretaker of this baby. He's presented himself to be a complete class act in taking care of this complicated baby from the first day I met him. He's been responsive to any suggestions we have as far as getting him to appointments or things to do to help care for this baby. And so it's my opinion that [M.J.] Sr. be made the primary parent for this baby.

¶ 14 Dr. Garrity testified that it is in the best interest of M.J. to live in Arizona with M.J. Sr. where he can receive adequate medical care. Sinnott concurred in this recommendation, as did the appointed guardian ad litem. The guardian ad litem believed the District Court should grant custody to M.J. Sr. because the Air Force was willing to 1200*1200 assign M.J. Sr. to an air base that had a major medical center that could properly care for M.J. Based upon this testimony, the District Court dismissed the petition and awarded custody of M.J. to M.J. Sr. O.J. appeals.

Standard of Review

¶ 15 The parties have articulated different standards of review in their briefs. O.J. has set forth an abuse of discretion standard citing *In re K.J.B.*, 2007 MT 216, ¶ 22, 339 Mont. 28, 168 P.3d 629, and *In re V.F.A.*, 2005 MT 76, ¶ 6, 326 Mont. 383, 109 P.3d 749. The State argues that this Court should review a district court's findings of fact to determine if they are clearly erroneous and conclusions of law to determine if they are correct. *In re A.R.*, 2005 MT 23, ¶ 15, 326 Mont. 7, 107 P.3d 457.

¶ 16 We recently addressed the standard of review to apply in youth in need of care proceedings in *In re K.H.*, 2012 MT 175, 366 Mont. 18, 285 P.3d 474, and noted that the "standard of review does not depend on whether the district court grants or denies a petition to adjudicate a youth in need of care." *K.H.*, ¶ 19. The standard of review was explained as follows:

We review a district court's decision to terminate parental rights to determine whether the court abused its discretion. We review a district court's specific findings to determine whether they are clearly erroneous. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence or

if, upon reviewing the record, this Court is left with the definite and firm conviction that the district court made a mistake. In reviewing a district court's conclusions of law, we determine if they are correct.

K.H., ¶ 19 (citing *In re E.K.*, 2001 MT 279, ¶ 31, 307 Mont. 328, 37 P.3d 690). Thus, we review the district court's findings for clear error, its conclusions of law for correctness, and the court's ultimate decision regarding adjudication and disposition for abuse of discretion.

¶ 17 A court abuses its discretion when it acts "arbitrarily, without employment of conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice." *K.H.,* ¶ 19 (citing *In re A.J.W.*, 2010 MT 42, ¶ 12, 355 Mont. 264, 227 P.3d 1012; *In re C.J.K.*, 2005 MT 67, ¶ 13, 326 Mont. 289, 109 P.3d 232). Further, "[t]his Court does not substitute its judgment for that of the trial court regarding the credibility or weight to be given to the evidence, nor does this Court review the record to determine whether evidence would support a different finding." *K.H.,* ¶ 19 (citing *In re I.B.*, 2011 MT 82, ¶ 36, 360 Mont. 132, 255 P.3d 56; *K.J.B.,* ¶ 23).

Issue 1.

¶ 18 *Did the District Court err in finding the child a youth in need of care?*

¶ 19 In order to adjudicate a child a youth in need of care, the State must prove, by a preponderance of the evidence, that the child has been abused, neglected or abandoned. Section 41-3-437(2), MCA; *I.B.,* ¶ 20; *In re B.S.*, 2009 MT 98, ¶ 22, 350 Mont. 86, 206 P.3d 565.

¶ 20 O.J. argues that the record does not support a determination that she had minimal involvement with M.J. or that she was unwilling to learn what was required to care for M.J. The District Court, however, found that O.J. abused and neglected M.J. by using drugs during her pregnancy, and that her drug use could have led to the medical complications and special needs of M.J. This was based upon the testimony of Dr. Garrity that the suspected cause of M.J.'s medical problems was maternal drug use. Clearly the origins of M.J.'s medical problems could not definitively be established. However, the use of methamphetamines and marijuana during pregnancy, facts which are supported by a preponderance of the evidence, is evidence of O.J.'s neglect regardless of a definitive correlation being made to M.J.'s medical problems.

¶ 21 The District Court also found that O.J. failed to appreciate the severity of M.J.'s medical needs and that O.J. was unwilling to learn what was required to care for M.J. 1201*1201 Substantial evidence from the adjudicatory hearing exists to support these factual findings. Further, the District Court did not abuse its discretion in finding M.J. a youth in need of care. To the contrary, the District Court employed appropriate discretion in considering competing arguments and making a determination which was supported by the evidence. The record supports the District Court's finding that M.J. was a youth in need of care. O.J. has failed to show that the finding is clearly erroneous or that the District Court abused its discretion in granting the petition.

Issue 2.

¶ 22 *Did the District Court err when it dismissed the abuse and neglect proceeding and granted custody to the father under § 41-3-438(3)(d), MCA?*

¶ 23 A district court has several dispositional options once a child is found to be a youth in need of care. Those options are set forth in § 41-3-438, MCA. The provision invoked in the instant proceedings was § 41-3-438(3)(d), MCA. It provides in pertinent part:

(3) If a child is found to be a youth in need of care under 41-3-437, the court may enter its judgment, making any of the following dispositions to protect the welfare of the child:

. . .

(d) order the placement of the child with the noncustodial parent, superseding any existing custodial order, and dismiss the proceeding with no further obligation on the part of the department to provide services to the parent with whom the child is placed or to work toward reunification of the child with the parent or guardian from whom the child was removed in the initial proceeding....

Section 41-3-438(3)(d), MCA.

¶ 24 O.J. argues that the District Court abused its discretion in placing M.J. out of state. Such a placement, O.J. argues, inhibits her abilities to parent and maintain a continuing relationship with M.J. O.J. argues that it is in the best interests of M.J. to maintain a relationship with his mother.

¶ 25 The District Court was presented with a situation where an infant arguably would not even survive if medical care at a different facility were not secured. Fortunately, M.J. Sr. had the ability to relocate to another air base which would allow access to more advanced medical care and thereby improve M.J.'s chance of survival. The District Court determined that O.J. was unwilling to learn how to care for M.J. or take steps to improve her ability to properly parent M.J. O.J. did not even attend the adjudication and disposition hearing for her child. The record clearly demonstrates that the District Court properly considered the welfare of M.J., and made a conscious, deliberate decision in awarding custody of M.J. to his father. Further, as the District Court dismissed the petition, and thereby terminated the Department's involvement in these proceedings, the proper forum for O.J. to challenge custody of M.J. is in a parenting plan action. *In re S.S.*, 2012 MT 78, ¶ 17, 364 Mont. 437, 276 P.3d 883.

¶ 26 Affirmed.

We Concur: PATRICIA COTTER, MICHAEL E. WHEAT, BETH BAKER, and BRIAN MORRIS.

368 P.3d 722 (2016)
2016 MT 73
383 Mont. 85

In the Matter of K.B., a Youth in Need of Care.

No. DA 15-0549.

Supreme Court of Montana.

Submitted on Briefs February 24, 2016.
Decided March 29, 2016.

APPEAL FROM: District Court of the First Judicial District, In and For the County of Lewis and Clark, Cause No. DDN 2012-73, Honorable James P. Reynolds, Presiding Judge.

723*723 For Appellant: Robin Meguire, Attorney at Law, Great Falls, Montana (Attorney for J.R.B./Father/Appellant), Mark Alan Mackin, Attorney at Law, Helena, Montana (Attorney for K.B.).

For Appellee: Timothy C. Fox, Montana Attorney General, Micheal S. Wellenstein, Assistant Attorney General, Helena, Montana, Leo Gallagher, Lewis and Clark County 724*724 Attorney, Ann Penner, Deputy County Attorney, Helena, Montana.

Justice LAURIE McKINNON delivered the Opinion of the Court.

¶ 1 K.B.'s father, J.B. (Father), appeals from an order entered by the First Judicial District Court, Lewis and Clark County, terminating his parental rights. We affirm.

¶ 2 Father presents the following issues for review:

1. Whether the District Court lacked subject matter jurisdiction over K.B.'s abuse and neglect proceeding.

2. Whether Father received ineffective assistance of counsel.

FACTUAL AND PROCEDURAL BACKGROUND

¶ 3 K.B. was born in 2007 and is the daughter of Father and M.H. (Mother). K.B. was living with Mother when she was removed from Mother's care by the Department of Public Health and Human Services (the Department) on November 26, 2012, due to concerns regarding Mother's ability to care for her and protect her from domestic violence. K.B. was placed in kinship foster care with her Aunt and Uncle, where she has remained. K.B.'s younger sister, T.H., also lives with Aunt and Uncle. K.B. was adjudicated a Youth in Need of Care on May 30, 2013. The Department drafted a treatment plan for Father. Father requested the name

of the treatment plan be changed. The typewritten words "Treatment Plan" were stricken from the title with a pen. Above "Treatment Plan" the handwritten word "Checklist" was inserted. Otherwise, the substance of the document remained unchanged. The District Court referred to the document afterwards as the "non-offending parent checklist." Father signed the document on June 25, 2013, and the District Court approved it. Summarized, its tasks required Father to: 1) remain law abiding; 2) address his substance abuse issues; 3) establish a safe, stable home and obtain employment; 4) maintain visitation with K.B.; and 5) remain in contact with the Department.

¶ 4 The Department filed petitions to terminate Mother and Father's rights on May 12, and September 29, 2014, respectively. On April 15, 2015, the District Court held a termination hearing. At the hearing, Mother consented to termination and relinquished her parental rights to K.B. Father opposed his termination, but did not argue he should be given custody of K.B. Instead, he asked the District Court for an additional six months to accomplish the tasks on his "checklist" before he could become a placement option for K.B.

¶ 5 At the termination hearing, evidence presented to the District Court showed that K.B. flourished while living with Aunt and Uncle during the 29 months preceding the termination hearing. At the time of the hearing, Aunt and Uncle wished to adopt K.B. and T.H. K.B.'s school principal testified that K.B.'s behavior and demeanor had drastically improved since being placed with Aunt and Uncle, who are very active in parenting her. K.B.'s kindergarten and first grade teacher testified that K.B. was initially a very angry and isolated student. Later, she testified, K.B. became a pleasant, eager to please student with vastly improved behavior. K.B.'s current, second grade teacher testified that she had not observed some of K.B.'s initial behavioral issues that others had witnessed and reported to her. She testified K.B. likes to be in control, is a pleasant student, and she enjoys having K.B. in her class. K.B.'s Court Appointed Special Advocate testified that after many attempts, he was never able to get in contact with Father and that Father's termination was in K.B.'s best interests because of her need for permanency. K.B.'s therapist testified that she had worked with K.B. since the beginning of 2013. In that time, she testified, K.B. had made substantial progress in her behavior and self-confidence.

¶ 6 Michelle Silverthorne (Silverthorne), Child Protection Specialist, has been K.B.'s case worker since her removal. At the termination hearing, Silverthorne testified that she initially looked to Father as the "non-offending" parent for K.B.'s placement, as is customary when a child is removed from one custodial parent. However, she did not think 725*725 Father was an appropriate or safe choice because he admitted to her that he could not financially support K.B. or provide her a place to live. Also, Father was on probation as a result of an earlier conviction of partner-family member assault. When asked about the Department's policy with regard to a treatment plan for a non-offending parent, Silverthorne responded:

Well, if the non-offending parent is unable to take care of the child, then we still go forward with trying to get the child adjudicated as a Youth in Need of Care and then developing a treatment plan to get that parent to the point where they can parent the child full time.

She testified that it was under this policy that she proceeded in developing a treatment plan for Father.

¶ 7 As of the termination hearing, Silverthorne testified that Father's treatment plan had not been successful. Father had been incarcerated recently, had stopped visiting K.B., and failed to remain in contact with Silverthorne. Father's visitation rights were suspended because reports alleged, and K.B. confirmed, that he had left K.B., age six, K.B. at a carousel alone while he went to pick up his girlfriend. Also, another report alleged Father was abusing methamphetamines. During the summer of 2014, Silverthorne and Father's attorney each notified Father that his unsupervised visits would be suspended until he underwent urinalysis testing. At the time of the termination hearing, Father had not had contact with K.B. since mid-2014, except for one visit made while K.B. was in the hospital recovering from a tonsillectomy. Silverthorne testified that Father had not called or visited her office to see why his visitation had been suspended, although he knew her phone number, which had not changed, and knew where her office was located. Silverthorne testified that as a result of not being in contact with Father, she had no way to verify whether he had established safe, stable housing or employment. Silverthorne testified that she did not believe Father would be able to turn his situation around in a reasonable amount of time to adequately care for K.B. Silverthorne testified that K.B. is well-bonded and feels safe with Aunt and Uncle. Silverthorne testified that termination of Father's rights was in K.B.'s best interests, especially her need for permanency.

¶ 8 Father testified at the termination hearing and explained he was not allowed to see K.B. from August 2014 until February 2015 and he did not know why. He testified he had been told to call Silverthorne to find out and had tried to on several occasions, but had failed to reach her or get a call back from her. Father testified he had no issue taking a drug test, as he had been tested regularly while on probation. He also testified that he did not believe he should be required to undergo drug testing. Father testified he was employed part-time and was planning on moving to Butte where he believed he would be offered a full-time job.

¶ 9 At the end of the termination hearing, the District Court terminated Father's rights from the bench. On July 23, 2015, the District Court issued its findings of fact, conclusions of law, and order terminating Father's parental rights pursuant to § 41-3-609(1)(f), MCA. In its order, the District Court concluded that clear and convincing evidence established that a treatment plan for Father had been approved, but had not been successful and that the condition rendering Father unfit was unlikely to change within a reasonable amount of time. The District Court also concluded that clear and convincing evidence established that K.B.'s best interests would be served by terminating Father's parental rights and awarding the Department permanent legal custody with the lawful authority to consent to her adoption. Father appeals.

STANDARD OF REVIEW

¶ 10 Whether a district court possesses subject matter jurisdiction is a question of law, which we review de novo. *In re B.W.S.,* 2014 MT 198, ¶ 10, 376 Mont. 43, 330 P.3d 467 (citation omitted). This Court exercises plenary review of whether a parent was denied effective assistance of counsel. *In re B.M.,* 2010 MT 114, ¶ 22, 356 Mont. 327, 233 P.3d 338; *In re J.J.L.,* 2010 MT 4, ¶ 14, 355 Mont. 23, 223 P.3d 921.

726*726 ## DISCUSSION

¶ 11 *1. Whether the District Court lacked subject matter jurisdiction over K.B.'s abuse and neglect proceeding.*

¶ 12 Father argues the District Court lacked subject matter jurisdiction to terminate his parental rights because the court never approved a treatment plan for him under § 41-3-609(1)(f), MCA, and because he was a "non-offending" parent. "Subject-matter jurisdiction is a court's fundamental authority to hear and adjudicate a particular class of cases or proceedings." *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 57, 345 Mont. 12, 192 P.3d 186 (citations omitted). "Subject matter jurisdiction of the district courts is established by the Montana Constitution." *Lorang,* ¶ 56 (internal quotations and citation omitted). Particularly, Article VII, Section 4(1) provides that district courts have "original jurisdiction in ... all civil matters." Therefore, a district court's subject matter jurisdiction is extremely broad and covers "all civil matters," including child abuse and neglect proceedings. A court's subject matter jurisdiction is not affected by a court's failure to follow statutory requirements. *See B.W.S.,* ¶ 13 (citations omitted).

¶ 13 Father argues the District Court lacked subject matter jurisdiction to terminate his parental rights because his "checklist" did not satisfy the requirements of § 41-3-609(1)(f), MCA. However, conformity with the statute is unrelated to a court's authority to hear child abuse and neglect cases. Trial courts have subject matter jurisdiction over child abuse and neglect proceedings because they are "civil matters."

¶ 14 Subject matter jurisdiction over child abuse and neglect proceedings is conferred to the district courts by the Montana Constitution, not by statute. Even if the court failed to follow § 41-3-609(1)(f), MCA, it would nevertheless still have subject matter jurisdiction over the termination proceeding affecting K.B. Pursuant to § 41-3-103(1), MCA, "a person is subject to a proceeding under [the child abuse and neglect statutes] and the district court has jurisdiction over: (a) a youth who is within the state of Montana for any purpose;" and "(d) a youth or a youth's parent ... who resides in Montana...." Therefore, there is no requirement that a parent be an "offending" parent before a court may make decisions regarding the best interests of a child suspected of having been abused or neglected. Jurisdiction is conferred by virtue of the youth being within the state of Montana, and that jurisdiction extends to a parent pursuant to the provisions of § 41-3-103(1), MCA. The District Court correctly concluded it had subject matter jurisdiction over K.B.'s child abuse and neglect proceeding and authority to terminate Father's parental rights.

¶ 15 *2. Whether Father received ineffective assistance of counsel.*

¶ 16 "[P]arents have a due process right to effective assistance of counsel in termination proceedings." *In re A.S.*, 2004 MT 62, ¶ 20, 320 Mont. 268, 87 P.3d 408. Whether assistance was effective requires review of counsel's training, experience, and advocacy. *B.M.,* ¶ 22 (citation omitted). Ineffective assistance of counsel requires reversal only if the parent suffered prejudice. *B.M.,* ¶ 22 (citation omitted).

¶ 17 Father argues he received ineffective assistance of counsel because of his counsel's inadequate advocacy of Father's interests. Specifically, Father believes his counsel rendered ineffective assistance when he failed to object: (1) to K.B. being adjudicated a Youth in Need of Care; (2) to the District Court's characterization of his "checklist" as a treatment plan; and (3) to the District Court exercising subject matter jurisdiction over K.B.'s proceeding. We address each contention in turn.

A. Youth in Need of Care Adjudication

¶ 18 On May 30, 2013, Father stipulated to the District Court's adjudication of K.B. as being a Youth in Need of Care. A Youth in Need of care is a youth who has been determined to be, or have been, abused, neglected, or abandoned. Section 41-3-102(34), MCA. In his stipulation, Father admitted "that the State could prove by a preponderance of evidence that the youth is abused and neglected within the meaning of 727*727 Mont. Code Ann. § 41-3-102 based upon the facts contained in the Affidavit of the Child Protection Specialist." Child Protection Specialist Michelle Young filed an affidavit that included evidence that Mother was subjecting K.B. to domestic violence and drug abuse, by Mother's use of methamphetamines. The affidavit alleged both of Mother's children had fathers who were convicted of partner-family member assault while living with K.B. The affidavit alleged K.B. then "age 5, has had significant exposure to domestic violence her entire young life" and that both K.B.'s father and her sister's father had received at least three charges of partner-family assault, for allegedly assaulting Mother. The affidavit alleged that K.B. had witnessed Mother and T.H., then age three, being beaten, hit, and kicked. The affidavit further stated that T.H.'s father, while incarcerated, accused Mother of physically abusing T.H. by kicking her in the face.

¶ 19 Had Father not stipulated and insisted on a contested hearing, the State was ready, willing, and able to present testimony regarding these allegations. The evidence was substantial and would have established by a preponderance that K.B. was a Youth in Need of Care. Thus, any objection or insistence by Father's counsel to have a contested hearing, even assuming for the sake of argument that it constituted deficient performance by counsel, could not have prejudiced Father. Moreover, Father misunderstands the focus of child abuse and neglect proceedings — the child. He mistakenly argues that K.B. could only have been adjudicated a Youth in Need of Care "as to" Mother and not "as to" him because K.B. was living with Mother when she was removed. A child is not determined to be a Youth in Need of Care "as to" anyone. The child is adjudicated a Youth in Need of Care because he or she is being, or have been, abused, neglected, or abandoned. The District Court had sufficient evidence to adjudicate K.B. a Youth in Need of Care. Father cannot show he suffered prejudice as a result of his counsel's failure to object to that determination.

B. "Checklist" or "Treatment Plan"

¶ 20 On June 25, 2013, Father signed and the District Court approved a document prepared by the Department as a treatment plan. Father asked that the document be renamed. The words "Treatment Plan" were marked through and replaced with the word "Checklist." On appeal, Father contends his counsel was ineffective in failing to object to the

District Court's characterization of this document as a treatment plan. He argues that retitling the document changed its substance. We find Father's argument unpersuasive.

¶ 21 If a child is found to be a Youth in Need of Care, the court may "order the department to evaluate the noncustodial parent as a possible caretaker." Section 41-3-438(3)(b), MCA. The court may order a treatment plan for the child's parent if "the court has made an adjudication under 41-3-437 that the child is a youth in need of care." Section 41-3-443(1)(c), MCA. A treatment plan is a "written agreement between the department and the parent or guardian ... that includes action that must be taken to resolve the condition or conduct of the parent or guardian that resulted in the need for protective services for the child." Section 41-3-102(30), MCA.

¶ 22 Here, the statute authorized the Department, following the court's determination that K.B. was a Youth in Need of Care, to evaluate Father as a noncustodial parent and possible caretaker for K.B. Similarly, the District Court was authorized by statute to order Father to comply with a treatment plan because K.B. was adjudicated a Youth in Need of Care The document in question was prepared for Father as a treatment plan. It specified actions Father must take to resolve the need for protective services to be involved in K.B.'s life, and for Father to become an appropriate placement option for K.B. The document, by whatever name Father chooses to subscribe to it, constituted a treatment plan as defined by statute. Father has not shown he suffered prejudice as a result of his counsel's failure to object to the District Court's characterization of the so-called "non-offending parent checklist" as a treatment plan because the document constituted a treatment plan. As such, the document satisfied one of the requirements of 728*728 § 41-3-609(1)(f), MCA, for termination of Father's rights.

C. Subject Matter Jurisdiction

¶ 23 Father cannot show he suffered prejudice as a result of his counsel's failure to object to the District Court's subject matter jurisdiction because, as shown above, the District Court had subject matter jurisdiction over K.B.'s abuse and neglect proceeding.

CONCLUSION

¶ 24 The District Court appropriately exercised subject matter jurisdiction over K.B.'s abuse and neglect proceeding. Father cannot demonstrate he received ineffective assistance of counsel.

¶ 25 Affirmed.

We Concur: MIKE McGRATH, C.J., JAMES JEREMIAH SHEA, MICHAEL E. WHEAT, PATRICIA COTTER, BETH BAKER and JIM RICE, JJ.

367 P.3d 339 (2016)
2016 MT 35
382 Mont. 214

In the Matter of J.H., A Youth in Need of Care.

No. DA 15-0368.

Supreme Court of Montana.

Submitted on Briefs January 20, 2016.
Decided February 16, 2016.

341*341 APPEAL FROM: District Court of the Tenth Judicial District, In and For the County of Fergus, Cause No. DN 12-07, Honorable Jon A. Oldenburg, Presiding Judge.

For Appellant: Julie Brown, Montana Legal Justice, PLLC; Missoula, Montana.

For Appellee: Timothy C. Fox, Montana Attorney General, Tammy A. Hinderman, Assistant Attorney General; Helena, Montana, Jim Lippert, Jim Lippert Attorney at Law, P.C.; Big Timber, Montana (Guardian Ad Litem), Thomas P. Meissner, Fergus County Attorney; Lewistown, Montana.

Justice JIM RICE delivered the Opinion of the Court.

¶ 1 C.L. appeals from an order entered by the Tenth Judicial District Court, Fergus County, approving the Department of Public Health and Human Service's (Department) proposed permanency plan, and granting the Department long-term custody of J.H.

¶ 2 We address the following issues:

1. *Did the District Court err by finding the Department made reasonable efforts to reunify J.H. with C.L.?*

2. *Did the District Court err by finding that J.H.'s best interests were served by living with E.J., and not C.L.?*

3. *Did the District Court err by approving the permanency plan without first holding an age-appropriate consultation with J.H.?*

PROCEDURAL AND FACTUAL BACKGROUND

¶ 3 J.H., a seven-year-old boy, is the biological child of A.H. (Mother) and C.L. (Father). Mother and Father were never married, a custody order or parenting plan was never entered, and J.H. saw Father only occasionally. When this case originated, J.H. was living

in Lewistown, Montana, with Mother, Mother's boyfriend, J.H.'s half-sister B.S., J.H.'s maternal grandmother, and his grandmother's boyfriend. Father was living in Lancaster, Texas, with his girlfriend, their two children, and two of his girlfriend's children from a prior relationship.

¶ 4 In November 2012, the Department initiated a petition for Emergency Protective Services, for Adjudication of J.H. as a Youth in Need of Care, and for Temporary Legal Custody of J.H. The petition alleged Mother had abused and neglected J.H. by exposing him to illegal drug use and failing to protect him from her abusive boyfriend. Father was served with the Department's petition, and shortly thereafter signed and filed an acknowledgement of service of the petition. Father expressed to Rose McLees (McLees), the Department social worker assigned to J.H.'s case, that he wanted custody of J.H.

¶ 5 At the January 2013 show cause hearing, at which Father was not present, Mother stipulated that J.H. was a Youth in Need of Care. The District Court granted the Department Temporary Legal Custody of J.H. for 180 days, including the initial plan to reunite J.H. with Mother. Shortly after the show cause hearing, Mother and Father participated by telephone in a Family Group Decision Making meeting with the Department. Father stated he wanted custody of J.H., but Mother objected to placing J.H. with Father. McLees stated she would not place J.H. with Father in Texas until Texas child authorities conducted a home study pursuant to the Interstate Compact on the Placement of Children (ICPC) and ensured Father's home was a safe environment for J.H.

¶ 6 The Department returned J.H. to Mother's care in February 2013, but Mother failed to comply with her treatment plan. J.H. was again removed from her care in July 2013 and returned to foster care, and the Department filed a petition to extend temporary legal custody of J.H. At the hearing, McLees stated the Department would continue to provide reunification services to Mother while simultaneously seeking a home study under the ICPC to determine whether J.H. could be placed with Father in Texas. The District Court granted the Department's extension of temporary legal custody.

¶ 7 In September 2013, McLees asked Texas child protective services to conduct, under 342*342 the ICPC, a home study and determine whether placement with Father was viable. After obtaining the results of criminal and child protective services background checks on Father, Texas authorities refused to conduct a home study. The background checks revealed Father had committed multiple crimes from 2006 to 2010, including two charges for selling dangerous drugs and an aggravated assault on his girlfriend involving a knife. Further, an incident involving Father and a girlfriend had resulted in the loss of the custody of two of his children to Texas child protective services.

¶ 8 The Department filed its first permanency plan proposal in January 2014, stating it would continue to attempt reunification of J.H. with Mother but would seek termination of her parental rights if she was noncompliant with her treatment plan. The concurrent plan was to place J.H. with a relative, and if no suitable relative could be found, to petition for long-term custody of J.H. and a permanent living arrangement in Montana. The permanency plan did not include the option of placing J.H. with Father, although that option had apparently not yet been ruled out by the Department. Meanwhile, Father filed a Motion for Disposition and to Dismiss, requesting the District Court place J.H. with Father as the non-custodial and

non-offending parent. The District Court approved the permanency plan, but declined to rule on Father's motion at that time.

¶ 9 In March 2014, the Department petitioned to terminate Mother's parental rights and to extend temporary legal custody of J.H. The Department asserted that an extension of custody was necessary because, although Texas had denied an ICPC placement with Father, the Department needed additional time to determine if placement with Father could still be achieved. Father had commissioned a private home study at his own expense, and both the Department and the guardian ad litem had agreed to consider the results of the private home study. The District Court terminated Mother's parental rights and granted the Department's extension of temporary legal custody, which Father did not contest.

¶ 10 In September 2014, Texas child authorities approved J.H.'s maternal great aunt, E.J., as a kinship placement for J.H., as well as for J.H.'s half-sister B.S., with whom J.H. was very close. E.J. resided in Texas. In October 2014, the Department filed a petition to extend temporary legal custody of J.H. Father's private home study was not yet complete and the Department wanted more time to determine whether placement with Father was viable. In the meantime, the Department planned to move J.H. and B.S. to live with E.J. in Texas, and stated that if the home study was not completed within three months, or if the home study did not recommend placement with Father, the Department would file for long-term custody of J.H. or for termination of Father's parental rights. In December 2014, J.H. and B.S. moved to live with their Great Aunt E.J. in Texas. In January 2015, Father's private home study was received. The study was inconclusive and the evaluator was unable to recommend Father as a viable placement for J.H.

¶ 11 The Department then filed a petition for long-term custody of J.H. and a second permanency plan, which sought placement of J.H. with E.J. under a guardianship. The District Court held a hearing on the permanency plan in February 2015. Michelle Feller (Feller), a licensed clinical professional counselor who counseled J.H. bi-weekly from September 2013 until he moved to Texas, testified J.H. was very close with B.S., and that it would be in J.H.'s best interests to stay with E.J., "for the reason of being with his sister and for the reason of being in a safe, secure, consistent environment." J.H.'s guardian ad litem testified J.H.'s relationship with B.S. was critical to his well-being, that J.H. was "in an ideal place," and that there was no reason why J.H. should not be with E.J. An ICPC social worker in Texas reported J.H.'s placement with E.J. was going well, and that E.J. was providing consistency, structure, and meeting J.H.'s basic needs. The District Court approved the permanency plan but stated the approval did not preclude a later determination that the child should be placed with Father.

343*343 ¶ 12 The District Court later held a hearing on the petition for long-term custody and Father's motion to dismiss. The testimony largely mirrored that of the February 2015 permanency plan hearing. Additionally, E.J. testified she was committed to caring for the children for the long term, explaining "[t]hey are mine. I mean I didn't birth them, but they are attached to me and I'm attached to them. It's like a blessing. They've been through so much." The District Court granted the Department's petition for long-term custody until J.H. reached the age of 18, holding that J.H. remained a youth in need of care, the Department made reasonable efforts to place J.H. with Father, it was contrary to J.H.'s best interests to

be placed with Father, and J.H.'s placement with E.J. was in his best interests, particularly because B.S. also resides there. Father appeals.

STANDARD OF REVIEW

¶ 13 Whether a district court complied with the statutory requirements presents a question of law that this Court reviews for correctness. *In re H.T.*, 2015 MT 41, ¶ 10, 378 Mont. 206, 343 P.3d 159. We review a district court's finding of fact for clear error. *In re R.M.T.*, 2011 MT 164, ¶ 27, 361 Mont. 159, 256 P.3d 935 (citation omitted). A factual finding is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if review of the record convinces the Court a mistake was made. *In re C.J.M.*, 2012 MT 137, ¶ 10, 365 Mont. 298, 280 P.3d 899 (citation omitted). We view the evidence in the light most favorable to the prevailing party when determining whether substantial credible evidence supports the district court's findings. *In re B.D.*, 2015 MT 339, ¶ 5, 381 Mont. 505, 362 P.3d 636. A district court's decision will not be disturbed on appeal unless there is a mistake of law or a finding of fact clearly erroneous that amounts to an abuse of discretion. *In re M.N.*, 2011 MT 245, ¶ 14, 362 Mont. 186, 261 P.3d 1047 (citation omitted).

DISCUSSION

¶ 14 Under § 41-3-445(8)(e)(v), MCA, a district court may approve a permanency plan and grant long-term custody of the child in a planned permanent living arrangement if it is established by a preponderance of the evidence that:

(A) the child has been adjudicated a youth in need of care;

(B) the department has made reasonable efforts to reunite the parent and child, further efforts by the department would likely be unproductive, and reunification of the child with the parent or guardian would be contrary to the best interests of the child;

(C) there is a judicial finding that other more permanent placement options for the child have been considered and found to be inappropriate or not to be in the best interests of the child; and

(D) the child has been in a placement in which the foster parent or relative has committed to the long-term care and to a relationship with the child, and it is in the best interests of the child to remain in that placement.

¶ 15 Father argues the District Court violated the statute in two ways. First, Father argues the Department did not engage in reasonable efforts to reunify J.H. with Father because its efforts consisted solely of the ICPC request. Second, Father argues the District Court's finding that J.H.'s best interests were served by living with E.J., and not Father, was clearly erroneous because it was not supported by substantial evidence.[1]

344*344 ¶ 16 *1. Did the District Court err by finding the Department engaged in reasonable efforts to reunify J.H. with Father?*

¶ 17 The determination of whether the Department made "reasonable efforts" to reunify a family requires that "each case [ ] be evaluated on its own facts." *In re K.L.*, 2014 MT 28, ¶ 41, 373 Mont. 421, 318 P.3d 691. The term is not defined by statute, but "clearly the statute does not require herculean efforts." *In re K.L.,* ¶ 41. Rather, "the child's health and safety are of paramount concern," when determining what efforts are required. Section 41-3-423(1), MCA; *see also In re K.L.,* ¶ 41 (citing "the child's need for permanency and stability" in considering whether the Department's efforts were reasonable).

¶ 18 The parties and the Guardian ad litem also argue concerning the proper application of the ICPC in this case. Under the ICPC, which Montana has joined by statute and for which the Department has adopted by rule the regulations of the Association of Administrators of the ICPC (AAICPC), neither a state court nor a child protective services agency may send a child to another state until the public authorities in the receiving state notify the sending state that "the proposed placement does not appear to be contrary to the interests of the child." Section 41-4-101, MCA, Art. III, § 4; Mont. Admin. R. 37.50.901. An open dependency and neglect case requires compliance with Article III of the ICPC unless (1) the court places the child with a parent from whom the child was not removed, (2) the court has no evidence the parent is unfit and seeks none from the receiving state, and (3) relinquishes jurisdiction over the child immediately upon placement with the parent. AAICPC Reg. 3, §§ 2(b), 3(a). After finding a child is a youth in need of care, a district court may dismiss the proceeding — ending the Department's obligations and the applicability of the ICPC — and order placement with the non-custodial parent to protect the welfare of the child. Section 41-3-438(3)(d), MCA.

¶ 19 The Department argues its efforts were reasonable because as long as the case remained open it was required to follow the ICPC, which precluded placement with Father until Texas approved the placement. Father responds that the Department could have simply agreed to dismiss the case, which would have made the ICPC inapplicable, and placed J.H. with Father pursuant to § 41-3-438(3)(d), MCA. Father further argues the Department did not "set out any goals or objectives that could have resulted in J.H.'s placement with Father." We agree with the Department.

¶ 20 The very goal of the Department's ICPC request to Texas child services was to determine whether placing J.H. with Father was viable. When Texas denied the request after conducting a criminal background check and child protective services background check, the Department was left only two avenues to place J.H. with Father: dismissal of the case under § 41-3-438(3)(d), MCA, to remove the applicability of the ICPC, or establish Father met the exception under AAICPC Reg. 3, § 3(a). That exception could not be satisfied because the District Court had evidence before it that Father was potentially unfit, including that Father had dealt crack cocaine and was party to a domestic violence incident involving a knife.[2] The Department investigated the possibility of placing J.H. with Father — by dismissal under § 41-3-438(3)(d), MCA — when it agreed to consider the results of the private home study commissioned by Father. This effort to reunite J.H. with Father also

proved futile when the examiner of that study could not recommend placement with Father. Although Father had apparently made progress, the Department was understandably reluctant to agree that dismissal and placement with Father would protect the welfare of J.H., given Father's recent criminal history and the failure to be approved by his private home study. At that point, the Department had exhausted the three main avenues to place J.H. with Father, and began seeking an alternative, stable, placement that was in J.H.'s best interests. The Department's efforts 345*345 to reunify J.H. with Father constituted reasonable efforts under these facts.

¶ 21 *2. Did the District Court err by finding that J.H.'s best interests were served by living with E.J., and not Father?*

¶ 22 Father argues the District Court was required to explicitly find he was an "unfit" parent before it could determine whether J.H.'s best interests were served by living with his Great Aunt E.J., and that there was no substantial evidence supporting the District Court's finding that it was in J.H.'s best interests to live with E.J., and not with Father. The Department counters that a finding of "unfitness" is not required in a long-term custody proceeding, and that the District Court's findings were supported by substantial evidence. We agree with the Department.

¶ 23 Nothing in the statutes or our precedents suggests a district court must explicitly find a parent is unfit before it may determine the best interests of the child in a long-term custody proceeding. It is correct that we have adopted the presumption that the best interests of a child are served in the custody of the natural parents. *In re Guardianship of J.R.G.,* 218 Mont. 336, 342, 708 P.2d 263, 267 (1985). Further, § 41-3-445(8)(e)(v)(B), MCA, requires that a district court find "reunification of the child with the parent or guardian would be contrary to the best interests of the child," thus codifying and applying this presumption to long-term custody proceedings. But nowhere is it suggested a district court must find more than this before ordering an alternative placement in a long-term custody proceeding. We reject Father's position that the District Court erred as a matter of law by not explicitly finding that Father was "unfit" before determining it was in J.H.'s best interests to be placed with E.J.

¶ 24 Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion, even if weak and conflicting. *Siebken v. Voderberg,* 2015 MT 296, ¶ 12, 381 Mont. 256, 359 P.3d 1073. It consists of more than a mere scintilla of evidence but may be less than a preponderance. *Marriage of Schmitz,* 255 Mont. 159, 165, 841 P.2d 496, 500 (1992).

¶ 25 There was significantly more than a "scintilla" of evidence supporting the District Court's finding that J.H.'s best interests were served by a placement with E.J. and not Father. Feller testified it was in J.H.'s best interests to stay with E.J., "for the reason of being with his sister and for the reason of being in a safe, secure, consistent environment." The guardian ad litem testified it was critical J.H. reside in the same place as B.S., calling the placement with E.J. an "ideal place" for J.H.'s well-being. E.J. herself testified and committed to the long-term care of J.H. and B.S., stating "they are attached to me, and I'm

attached to them." The Texas social worker reported E.J. was providing consistency, structure, and meeting J.H.'s basic needs. In contrast, the District Court had evidence before it that Father had sold crack-cocaine, been in a domestic violence incident, and had been in a dispute that resulted in two of his children being taken away by Texas child services. A reasonable mind could well weigh these facts and conclude it was in J.H.'s best interests to live with E.J., and not with Father. The District Court's findings were therefore not clearly erroneous.

¶ 26 It is worth noting that Father's parental rights to J.H. were not terminated in this proceeding, that he lives relatively close to where J.H. is residing with E.J. in Texas, and that he may well have an opportunity to further his relationship with J.H. in the future.

¶ 27 *3. Did the District Court err by approving the permanency plan without first holding an age-appropriate consultation, with J.H.?*

¶ 28 Father argues the District Court failed to hold an age-appropriate consultation with J.H. prior to approving the Department's second permanency plan as required by § 41-3-445(4), MCA. However, Father failed to raise this issue before the District Court. "[I]t is well settled that issues raised for the first time on appeal will not be reviewed." *In re Transfer Terr. From Poplar Elem. Sch. Dist. No. 9 to Froid Elem. Sch. Dist. No. 65,* 2015 MT 278, ¶ 18, 346*346 381 Mont. 145, 364 P.3d 1222 (citation omitted). This issue is therefore not properly before us for review. *Poplar,* ¶ 13.

¶ 29 Affirmed.

We concur: MICHAEL E. WHEAT, LAURIE McKINNON, PATRICIA COTTER and BETH BAKER, JJ.

[1] We initially note that the parties do not dispute that the District Court's order approving the permanency plan and granting the Department long-term custody of J.H. is an appealable order. The Montana Rules of Appellate Procedure designate as not appealable orders of *temporary* custody in abuse and neglect proceedings. Mont. R. App. P. 6(5)(c); *see also In re S.S.,* 2012 MT 78, ¶ 10, 364 Mont. 437, 276 P.3d 883. We have defined an appealable order as "one which constitutes a final determination of the rights of the parties; any judgment, order or decree leaving matters undetermined is interlocutory in nature and not a final judgment for purpose of appeal." *In re Matter of D.A.,* 2003 MT 109, ¶ 13, 315 Mont. 340, 68 P.3d 735; *see also* M. R. App. P. 4(1)(a). The long-term custody order and permanency plan entered herein give the State the power to infringe upon Father's fundamental liberty interest in parenting until J.H. reaches 18, and cannot be said to be interlocutory.

[2] Father was still on felony probation for these offenses when this case began.

DA 17-0600

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 234

IN THE MATTER OF:

A.J.C.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Twentieth Judicial District,
In and For the County of Sanders, Cause No. DN 14-06
Honorable James A. Manley, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Tracy Labin Rhodes, Attorney at Law, Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Assistant Attorney General, Helena, Montana

Jean Adele Carter, Attorney at Law, Thompson Falls, Montana
(for Laura Schaefer)

Robert L. Zimmerman, Attorney at Law, Thompson Falls, Montana
(for State of Montana)

Julie Brown, Montana Legal Justice, PLLC, Missoula, Montana
(for A.J.C.)

Submitted on Briefs: June 6, 2018

Decided: September 18, 2018

Filed:

Clerk

acted to gain custody of A.J.C. On October 14, 2014, at the Department's direction, Father petitioned the District Court under an action separate from this DN action for a parenting plan designating him as A.J.C.'s primary residential parent.[1]

¶5 On November 3, 2014, the District Court granted the Department's petition for EPS and TIA. On November 24, 2014, Father moved for directed disposition and dismissal of this action. Father asserted he was prepared to parent A.J.C. and argued that as the non-custodial parent, he was entitled to immediate placement. Father further argued that Grandmother had failed to protect A.J.C. from Mother's neglect. The Department objected, contending Father had an insufficient relationship with A.J.C. and immediate transfer of care would force A.J.C. to change schools in the middle of the school year. The Department further expressed concern that Father had a criminal history and a previous history of child protective services (CPS) involvement. The Department argued that the District Court should allow it to further investigate the appropriateness of placement with Father before removing A.J.C. from Grandmother's care.

¶6 The Department then petitioned for adjudication of A.J.C. as a youth in need of care (YINC) and asked the District Court to grant it temporary legal custody (TLC). On January 13, 2015, the District Court denied Father's motion for directed disposition and dismissal. Shortly thereafter, the District Court adjudicated A.J.C. as a YINC and granted TLC to the Department.

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[1] Both the present DN matter, *In re A.J.C.*, DA 17-0600, and the parenting plan case, *Cromwell v. Schaefer*, DA 17-0667, are before us on appeal. These matters have not been consolidated and this Court has issued a separate Opinion for each, although the facts of these cases overlap.

¶10 On August 11, 2015, the District Court granted the Department extension of TLC. Although Father had already completed his treatment plan's tasks, the court nonetheless found that Father needed additional time to complete his treatment plan. Even though the ICPC home study report had been issued over a week earlier, the court ruled, "In order for the child to be returned home to birth father, the ICPC home study must be completed with no concerns or any concerns in the ICPC must be addressed."

¶11 On September 8, 2015, the District Court conducted a hearing to determine A.J.C.'s placement. The court spoke with A.J.C. alone and off-the-record in chambers. It then heard the parties' arguments. The Department objected to placing A.J.C. with Father even though the ICPC home study had approved placement, asserting it wanted additional time to obtain more information about Father. The Department alleged Father had an anger management issue that required further examination. The Department also urged the court to consider A.J.C.'s opinions in determining his placement.

¶12 Johnathan Nelson, a child protection specialist at the Department, testified he had interviewed A.J.C., and A.J.C. had expressed a preference for living with Grandmother. Nelson testified that the Department's only concern in placing A.J.C. with Father was that the ICPC home study had turned up some "historical stuff" that made Nelson inclined to have Father evaluated for anger management and psychological issues. Nelson indicated the Department preferred A.J.C. remain with Grandmother, but would reassess its recommendations for placement if Father had those evaluations and addressed any issues that were uncovered. Nelson acknowledged, "Traditionally, the Department would try to reunify with the non-offending parent."

¶17 On April 12, 2016, the District Court held a hearing to determine a final parenting plan and a permanency plan for A.J.C. The hearing encompassed not only the Department's pending Motion for Approval of Permanency Plan in this case, but also included argument and testimony regarding a petition to establish a parental interest Grandmother had filed, and proposed parenting plans which Father and Grandmother had filed in other separate but related District Court cases.[3]

¶18 On July 18, 2016, prior to the District Court issuing any rulings on the issues pending at the April hearing, Father filed a motion for an emergency status hearing. Father indicated the Department had advised him that it intended to place A.J.C. with him for a trial home placement, and Father asked the District Court to hold a status hearing prior to issuing its rulings on the issues argued at the April hearing.

¶19 However, prior to responding to Father's motion for emergency status hearing in this matter, on July 20, 2016, the District Court issued findings of fact, conclusions of law. and a parenting plan in the separate District Court case Father had filed. The court awarded Grandmother primary residential custody of A.J.C. and provided Father six weeks of parenting time during the summer.

¶20 On July 27, 2016, the District Court granted Father's motion for emergency status hearing in this matter, and set hearing for August 9, 2016. At hearing, Father argued that under § 40-4-228, MCA, the District Court erred by issuing an order in the parenting plan

[3] Father's and Grandmother's other actions were consolidated into one case by the District Court and are also before this Court on appeal. *See Cromwell v. Schaefer*, DA 17-0667.

Department stated it had no reason to deny placement of A.J.C. with Father. The Department argued Father has a fundamental constitutional right to the care and custody of A.J.C. The Department supported its motion with an affidavit from Scott Warnell, Region VI Administrator for the Department.

¶25 At hearing, the District Court gave the parties additional time to respond to the Department's motion. However, the court further advised, "I've already decided . . . that it is in the best interest of this child that he live with his grandmother."

¶26 After hearing, the parties filed briefs regarding the Department's motion, and Grandmother moved to intervene in this case. The District Court granted Grandmother's motion to intervene over Father's objection.

¶27 After the District Court granted Grandmother's motion to intervene, Grandmother filed a response brief objecting to the Department's motion to approve its Amended Permanency Plan. The District Court thereafter heard argument on the motion on July 11, 2017, after which it denied the Department's motion and dismissed this abuse and neglect action, thus leaving A.J.C. primarily in Grandmother's custody, with Father entitled to six weeks each summer. Father appeals.

STANDARD OF REVIEW

¶28 Whether a parent has been denied his right to due process is a question of constitutional law. Our review of questions of constitutional law is plenary. *In re A.S.*, 2004 MT 62, ¶ 9, 320 Mont. 268, 87 P.3d 408 (citation omitted).

¶29 We review findings of fact for clear error. A factual finding is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the

it must follow to do so. In this case, A.J.C. was in Mother's primary legal care. In response to reports against Mother including drug use, abuse, and distribution, and domestic violence, the Department filed a petition for EPS and TIA. The petition contained no allegations of abuse or neglect on Father's part. Although Father had largely been an absent parent, he immediately began pursuing custody of A.J.C. after the Department intervened and has steadfastly maintained those efforts over the past four years.

¶33 In January 2015, the District Court adjudicated A.J.C. a YINC under § 41-3-437, MCA—a determination Father does not appeal. Once the District Court adjudicated A.J.C. a YINC, it could, and did, order treatment plans for Mother and Father. Section 41-3-443(1), MCA. Pursuant to § 41-3-443(2), MCA, a treatment plan must contain:

> (a) the identification of the problems or conditions that resulted in the abuse or neglect of a child;
>
> (b) the treatment goals and objectives for each condition or requirement established in the plan. If the child has been removed from the home, the treatment plan must include but is not limited to the conditions or requirements that must be established for the safe return of the child to the family;
>
> (c) the projected time necessary to complete each of the treatment objectives;
>
> (d) the specific treatment objectives that clearly identify the separate roles and responsibilities of all parties addressed in the treatment plan; and
>
> (e) the signature of the parent or parents or guardian, unless the plan is ordered by the court.

¶34 When approving Father's treatment plan, the District Court specifically concluded that the plan "explained the problems/conditions related to the abuse/neglect of the child and set forth the goals/objectives that must be demonstrated by [Father] prior [to] the

¶36 There is also no dispute that the July 2015 ICPC report, the October 2015 mental health evaluation, and an updated July 2016 ICPC report[4] all concluded that Father was ready and able to parent A.J.C. However, the District Court then awarded primary custody to Grandmother in July 2016. In February 2017, the Department moved to make that arrangement permanent, but by the time the District Court heard the Department's motion, the Department had changed its position,[5] now recommending Father be awarded primary custody of A.J.C.

¶37 Again, rather than place A.J.C. with Father, the District Court *sua sponte* raised issues not identified by the Department and not mentioned or identified in the original treatment plan approved and ordered by the District Court.[6] These issues were known to the Department, and presumably to the District Court as well, in advance of the development and approval of Father's treatment plan. Had these been concerns which could potentially impede placement of A.J.C. with Father, the Department should have

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[4] Because of the passage of time, the ICPC home study which had been completed in July 2015 was now outdated, and in 2016, Father underwent an updated ICPC home study, which also found him a safe and appropriate placement for A.J.C.

[5] In the District Court's subsequent Order Denying Department's Motion to Amend the Permanency Plan, it characterized the Department's change of position as follows: "The motion is not based on any new facts or change of circumstances, but apparently because the local department social workers, who have done an excellent job in this case, have been overruled by superiors in Helena, based on a new legal position that such children must be placed with the non-offending parent, without regard to the best interests of the child."

[6] According to the District Court: Father had "essentially abandoned" A.J.C. prior to commencement of the DN case (although abandonment was not mentioned or alleged as grounds for the Title 41 proceeding); Father had "provided no financial support" (although Father had provided $5,429 in support since 2005 and had not missed a payment since March 2016); and Father's criminal history and difficulties with his oldest child (although the Department and the Oregon ICPC knew this information).

Department complacently continued placement with Grandmother because she had been a long-time care provider for A.J.C. and A.J.C. expressed a desire to remain with Grandmother. We have previously held:

> There are, however, few invasions by the state into the privacy of the individual that are more extreme than that of depriving a natural parent of the custody of his children. For this reason, the legislature carefully enunciated the procedures the state must follow and the findings which the court must make before custody of a child may legally be taken from his natural parent.

In re Guardianship of Doney, 174 Mont. at 285-86, 570 P.2d at 577. Once Father completed his treatment plan and the Department determined him to be a safe and appropriate placement, the Department failed to provide reasonable efforts to reunify Father with A.J.C.

¶40 Prior to initiation of this proceeding, Father was an absent parent, evidently content to permit Mother to parent so long as she was able. While unfortunate, such situations are not rare and the reasons for such are no doubt varied. When Mother became unable to parent and the State intervened, Father evidently determined it was time for him to parent. Again, it is not uncommon for previously absent parents to engage in parenting when the other parent is no longer able to do so. When the State decided to intervene, rather than rely on Mother to arrange for a third-party caregiver such as Grandmother, the State assumed a good-faith duty to provide reasonable efforts to reunify Father with A.J.C. While Grandmother may have superior care-giving abilities and/or resources as compared to Father, such does not supersede Father's fundamental right to parent.

¶41 Father contends, "It is not the function of the State to choose better or different parents for children whose natural parents pose no safety risk, even where, in the State's

We concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE

2019 MT 188N

IN THE MATTER OF: B.N., A Youth in Need of Care.

No. DA 19-0090.

Supreme Court of Montana.

Submitted on Briefs: July 24, 2019.
Decided: August 6, 2019.

APPEAL FROM: District Court of the Eighth Judicial District, In and For the County of Cascade, Cause No. BDN-18-109, Honorable Elizabeth Best, Presiding Judge.

Julie Brown, Montana Legal Justice, PLLC, Missoula, Montana, for Appellant.

Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Assistant Attorney General, Helena, Montana Joshua Racki, Cascade County Attorney, Valerie Winfield, Deputy County Attorney, Great Falls, Montana, for Appellee.

Justice JAMES JEREMIAH SHEA Delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 J.N. (Father) appeals the Order of the Eighth Judicial District Court, Cascade County, dismissing the dependency and neglect matter involving his son, B.N., and granting full custody of B.N. to B.A.D. (Mother). We affirm in part and reverse in part.

¶3 In March of 2018, the Montana Department of Public Health and Human Services (Department) intervened on behalf of B.N. (born in 2010) and his halfsibling, B.D. (born in 2017) because of concerns that Mother and her boyfriend were using methamphetamine and exposing the children to domestic violence. The Department initiated an investigation and Mother and her boyfriend were arrested for violating conditions of their parole. The Department placed B.D. in foster care. B.N. was allowed to remain in Father's custody where, according to Mother, he had been living since January 2018. On April 6, 2018, the Department petitioned for emergency protective services (EPS) and for temporary legal custody (TLC) of B.D. and B.N.

¶4 On May 3, 2018, the District Court held a show cause hearing. The County Attorney described Father as the non-offending parent and informed the District Court that Father had custody of B.N. Mother did not appear, but her counsel was present. Father appeared and did not state a position and did not move to dismiss the case. Father's counsel later explained that Father specifically asked counsel not to file a motion to dismiss because he wanted Mother to have access to services and receive the help she needed.

¶5 On June 7, 2018, the District Court held an adjudicatory hearing, at which it received evidence of Mother's recent Evaluation. Child Protection Specialists (CPSs) reported to the District Court that Mother was actively participating in all recommended treatment and maintaining good contact with the Department. The District Court also received testimony that B.N. continued to reside with Father. Hearing no objection, the District Court adjudicated both B.D. and B.N. as youths in need of care (YINC) and continued TLC. The District Court then set a dispositional hearing. In the interim, the Department prepared a treatment plan for Mother.

¶6 On June 28, 2018, the District Court held a dispositional hearing during which Mother stipulated to the proposed treatment plan and agreed that the District Court should grant TLC to the Department. Father was not present, but his counsel did not oppose the TLC request. The District Court approved Mother's treatment plan, granted TLC for a period of six months, and set a status hearing and a review hearing.

¶7 On July 24, 2018, following allegations of domestic violence and drug use in Father's home, CPS Deb Dreenan met with Father to obtain a hair sample from him and B.N. to test for exposure to dangerous drugs. In her affidavit, CPS Dreenen stated that Father did not initially comply. CPS Dreenan then called Father's parole officer, who convinced him to cooperate. Father was on probation for several offenses, and B.N. was removed from Father's care and placed with Mother that same day. The hair follicle test results for B.N. were negative, but Father tested positive for methamphetamine. Both children remained with Mother for a trial home visit. The children's guardian ad litem reported to the District Court that Mother was in Drug Treatment Court, that Mother had "taken all the steps she needed to in order to get her children back [and was] following her Treatment Plan and living in a supportive and controlled environment," and Mother exhibited a "very positive attitude." During this time, Father continued to visit B.N.

¶8 On September 27, 2018, the District Court held a status hearing. Father did not appear, and his counsel stated that he had not heard from Father in some time. The Department informed the District Court that B.N. and B.D.'s reunification with their Mother was going well. The Department reported Mother was successfully participating in drug treatment, had obtained employment, and felt she was doing very well. The Department stated that it had given Father a treatment plan to review, and later the Department filed a motion to approve Father's treatment plan, but no proposed plan was attached to the motion. The Department's Motion in Support of Treatment Plan for Father stated that Father should be required to complete chemical dependency and mental health evaluations, an anger management assessment, and participate in the daily parenting of B.N. The Department began screening Father for substance use via his pre-release program, and all test results were negative. Father also received a mental health evaluation and started seeing a counselor at his own expense.

¶9 Over the next three months, Mother continued to successfully address the goals and tasks of her treatment plan, and B.D. and B.N. remained in her care. On January 10, 2019, the District Court held a review hearing, at which CPS Dreenan, Mother, and Mother's counsel were present. Father was not present but was represented by counsel. Mother moved for dismissal of the case with full custody pursuant to § 41-3-424, MCA. The Department did not object. Father, through counsel, objected. Father's counsel stated he had no notice of Mother's plan to move for dismissal or for full custody and asked for additional time to determine Father's position. The District Court indicated it would grant Mother's Motion to Dismiss. CPS Dreenan testified and commended Mother on her progress and cooperation. CPS Dreenan also stated that Father had recently been arrested. The District Court explained that:

From where I'm sitting on this particular case as to these particular kids, if I have a parent who is providing a safe and stable environment for these children, I don't see based upon the reports and based upon the file before me, that I have a basis for continuing this in order to resolve what may end up being a custody dispute that's a civil matter . . . .

. . .

I'm not terminating [Father's] rights, obviously.

. . .

I am not deciding a civil case here.

¶10 On January 11, 2019, the District Court issued an Order granting Mother's oral Motion to Dismiss with Full Custody pursuant to §§ 41-3-438(3)(d), -445(7), (8)(b), MCA.[1] The District Court also ordered that the Department was "no longer obligated to provide services or work toward reunification between [Father] and [B.N.]." Father timely appealed the District Court's Order.

¶11 A district court's grant or denial of a motion to dismiss presents a conclusion of law, which this Court reviews de novo for correctness. *In re K.A.*, 2016 MT 27, ¶ 20, 382 Mont. 165, 365 P.3d 478 (citations omitted). This Court's review of constitutional claims is plenary. *In re L.V.-B.*, 2014 MT 13, ¶ 12, 373 Mont. 344, 317 P.3d 191.

¶12 A district court shall dismiss an abuse and neglect petition on the motion of a party, or on its own motion, when all the following are met:

(1) a child who has been placed in foster care is reunited with the child's parents and returned home;

(2) the child remains in the home for a minimum of [six] months with no additional confirmed reports of child abuse or neglect; and

(3) the department determines and informs the [district] court that the issues that lead to department intervention have been resolved and that no reason exists for further department intervention or monitoring.

Section 41-3-424, MCA.

¶13 Section 41-3-424, MCA, "applies to situations in which an abuse and neglect petition filed against an offending parent (a parent who has had a child removed from the home because of his or her conduct or condition) is dismissed because the offending parent satisfies the three conditions." *In re L.V.-B.,* ¶ 19. Dismissal of an abuse and neglect case "represents the case's final resolution and allows the parents, the Department, and the child to move on." *In re K.B.,* 2019 MT 73, ¶ 17, 395 Mont. 213, 437 P.3d 1042.

¶14 Section 41-3-438(3)(d), MCA, provides:

If a child is found to be a youth in need of care under [§ 41-3-437, MCA,] the court may enter its judgment, making any of the following dispositions to protect the welfare of the child: . . . [including] order the placement of the child with the noncustodial parent, superseding any existing custodial order . . . .

Section 41-3-445(7), (8)(b), MCA, further provides that a district court may hold a permanency hearing and enter any order it determines to be in the best interests of the child and may permanently place a child with the noncustodial parent, superseding any existing custodial order.

¶15 A parent's right to the care and custody of a child is a fundamental liberty interest under the Montana and United States Constitutions and must be protected by fundamentally fair procedures. *In re A.K.,* 2015 MT 116, ¶ 20, 379 Mont. 41, 347 P.3d 711 (citations omitted); *In re A.J.C.,* 2018 MT 234, ¶ 31, 393 Mont. 9, 427 P.3d 59. The "[k]ey components of a fair proceeding are notice and an opportunity to be heard." *In re C.J.,* 2010 MT 179, ¶ 27, 357 Mont. 219, 237 P.3d 1282 (citation omitted). However, "`the process that is due in any given case varies according to the factual circumstances of the case and the nature of the interests involved.'" *In re D.B.J.,* 2012 MT 220, ¶ 27, 366 Mont. 320, 286 P.3d 1201 (quoting *Sage v. Gamble,* 279 Mont. 459, 465, 929 P.2d 822, 825 (1996)). Pre-termination hearings "entitle the parent to less process than the actual termination proceedings." *In re A.N.W.,* 2006 MT 42, ¶ 35, 331 Mont. 208, 130 P.3d 619. To support a due process claim, a parent must establish how the outcome would have been different had the alleged due process violation not occurred. *See In re A.N.W.,* ¶¶ 38, 47.

¶16 Father argues that his due process rights were violated when the District Court dismissed the dependency and neglect matter and granted full custody of B.N. to Mother at the hearing without sufficient notice to Father. Father argues he was further denied notice of the particular statute to respond to when Mother moved for dismissal of the matter and full custody pursuant to § 41-3-424, MCA, and the District Court orally and in its written Order granted Mother's Motion to Dismiss and full custody pursuant to §§ 41-3-438(3)(d), -445(7), (8)(b), MCA. The State responds that the District Court correctly dismissed the matter against Mother but takes no position as to the custody issue.

¶17 Father's due process rights were not violated. As the State correctly points out that, § 41-3-424, MCA, allows the District Court to dismiss an abuse and neglect petition, *sua sponte,* without notice. Further, Father was deemed the non-offending parent, and his right to parent B.N. was not the subject of the matter or proceedings. *See In re A.N.W.,* ¶ 35. Father also failed to attend either the September status hearing or the June review hearing. Father cannot show an outcome other than dismissal of the matter would have occurred

had he received notice of Mother's intention to move for dismissal. *See In re A.N.W.,* ¶¶ 38, 47. We are satisfied Father's due process rights were not violated when the District Court dismissed the dependency and neglect matter against Mother, pursuant to § 41-3-424, MCA.

¶18 Additionally, Father does not challenge on appeal whether the three prongs of § 41-3-424, MCA, were met. Regardless, it is undisputed B.N. and B.D. were returned to Mother's care, that Mother successfully addressed the issues that led to the initial intervention by the Department and no additional reports of abuse or neglect by Mother were reported, and B.N. was returned to Mother's care on July 24, 2018.[2] We conclude that the District Court correctly dismissed the dependency and neglect matter against Mother, despite its reference to the incorrect statute. *See In re K.A.,* ¶ 20.

¶19 Despite the proper dismissal of the matter, the District Court erred when it granted full custody of B.N. to Mother. Section 41-3-424, MCA, grants a district court the authority to dismiss a dependency and neglect matter; however, following a dismissal, the custody arrangement returns to the original pre-Department intervention status. *See* § 41-3-424, MCA. Section 41-3-424, MCA, does not grant a district court the authority to issue an order of full custody to one parent. *See In re L.V.-B.,* ¶ 19. The authority to issue an order of full custody within a dependency and neglect matter is granted via §§ 41-3-438(3)(d), -445(7), (8)(b), MCA, but it only extends to order custody with a noncustodial (and typically non-offending) parent. *See* *In re K.B.,* 2016 MT 73, ¶¶ 21-22, 383 Mont. 85, 368 P.3d 722; *see also* *In re M.J.,* 2013 MT 60, ¶¶ 22-25, 369 Mont. 247, 296 P.3d 1197; *In re S.S.,* 2012 MT 78, ¶¶ 16-17, 364 Mont. 437, 276 P.3d 883. The record in this case is unclear as to who was deemed the custodial parent, but it appears Mother and the Department considered Mother to be the custodial parent by moving to dismiss pursuant to § 41-3-424, MCA. Accordingly, the District Court erred when it relied upon §§ 41-3-438(3)(d), -445(7), (8)(b), MCA, to grant Mother full custody of B.N. We therefore vacate the District Court's order to the extent that it granted full custody of B.N. to Mother.

¶20 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. We affirm the District Court's dismissal of the abuse and neglect petition pursuant to § 41-3-424, MCA. We reverse the District Court's Order to the extent that it granted Mother full custody pursuant to §§ 41-3-438(3)(d), -445(7), (8)(b), MCA.

DIRK M. SANDEFUR, BETH BAKER, INGRID GUSTAFSON and JIM RICE concurs.

[1] The District Court incorrectly stated Mother had moved for dismissal pursuant to § 41-3-438(3)(d), MCA, rather than § 41-3-424, MCA.

[2] Presumably, the six-month benchmark of § 41-3-424(2), MCA, would have been reached on January 24, 2019—two weeks after the review hearing. However, no one raised this two-week shortcoming when the District Court granted Mother's oral motion. *See* *Timis v. Young,* 2001 MT 63, ¶¶ 8, 10-11, 305 Mont. 18, 22 P.3d 1122 (declining to address the merits of an argument not raised or ruled upon below and concluding the party waived its right to raise the argument on appeal).

DA 18-0711

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 189

IN THE MATTER OF:

E.Y.R.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DN 17-003(d)
Honorable Dan Wilson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Meri K. Althauser, Forward Legal, PLLC, Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Assistant Attorney General, Helena, Montana

Travis R. Ahner, Flathead County Attorney, Alex M. Neill, Deputy County Attorney, Kalispell, Montana

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Submitted on Briefs: June 26, 2019

Decided: August 13, 2019

Filed:

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Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 M.R. (Father) appeals from the termination of his parental rights issued December 7, 2018, by the Eleventh Judicial District Court, Flathead County. We reverse and remand for the Department to conduct initial preliminary assessment of Father as the first placement option for E.Y.R. (Child) consistent with its policies and this opinion.

¶2 We restate the issue on appeal as follows:

> *Whether Father's due process rights were infringed by ineffective assistance of counsel resulting in his parental rights being inappropriately terminated.*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 The Montana Department of Public Health and Human Services, Child and Family Services Division (Department), removed Child, along with Child's two half-siblings, in November 2016. They were removed from Mother's care for exposure to domestic violence between Mother and her boyfriend, unstable living conditions, and concerns of substance abuse by Mother. There were no allegations of abuse or neglect by Father. Father was living in California and uninvolved with Mother. Father learned of the Montana proceeding and Child's placement in foster care on December 23, 2016. Father was contacted and told Child was in foster care, but was not advised as to how to get her in his care. Father immediately went to the family court in California to obtain an order to return Child to his care.

¶4 The District Court in Montana held a show cause hearing on January 23, 2017, at which Father appeared telephonically and was represented by Ms. Travis, who sat in for Father's court-appointed counsel, Ms. Marvin. During this hearing, attorney Travis

reported Father stipulated to temporary legal custody (TLC) and advised there was a pending family court action in the Superior Court of California, San Diego County, Case No. D531866, in which a January 18, 2017 court order recognized Mother was in violation of the court's prior parenting plan order and set hearing thereon in May 2017. Ms. Travis further represented "discussions with the Department, and I understand that an ICPC is beginning to be conducted to look at him as a placement for [Child] in California." Ms. Travis further indicated Father did not stipulate to any placement recommendation of the Department and that he was requesting to be the placement for Child. The Department advised all of the children were placed with maternal grandmother and step-grandfather and that it would continue that placement. The District Court then responded, "Very well. There appearing no objection it's so ordered as well. All right. Last call. Anything further from anyone." Ms. Travis, despite previously indicating Father sought to be the placement for Child, did not object to the placement with the maternal grandmother and step-grandfather, did not object or otherwise indicate there was no need for an ICPC to place Child with Father, and did not request the District Court set a placement hearing. Further, she did not advise the court of the provisions of § 40-6-221, MCA, which provide that father and mother are equally entitled to parent and if either is unable to exercise parenting, the other is entitled to parent the child. Counsel also did not advise the court of the Department's policy 304-1 which provides "the non-custodial parent is the first placement option for the child" when the child is removed from the home of the custodial parent. Child and Family Services Policy Manual, § 304-1 (DPHHS 2014), https://perma.cc/95CE-7DBY.

¶5 On February 24, 2017, the District Court held a hearing to approve a treatment plan for Mother. During this hearing, no mention was made as to Father. In May, Father appeared in family court in California to modify the parenting plan between Mother and him. At that time, the California court inquired as to the status of this matter in Montana. Father related that he was previously advised an ICPC was requested but had not occurred and he had not been contacted by anyone in California with regard to this.

¶6 Presumably in response to this proceeding, the judge in California contacted the department in California and learned no ICPC had been requested and that the Department in Montana had not yet contacted the department in California. In July 2017, Judge Braner, a Superior Court Judge in San Diego County working in the Family Law Department sent the District Court a letter. At the outset, Judge Braner asserted, "I believe that the Uniform Child Custody [Jurisdiction] Enforcement Act (UCCJEA), California, and more particularly this Court, has custody jurisdiction over [Child]."[1] The California court expressed concern that Father had been attempting to enforce the California parenting order in California. The California court also related Father's frustration with the Montana dependency action in that Father "maintains he has not seen his daughter in more than six months" and "he has essentially been kept in the dark regarding the Montana proceedings

[1] Unfortunately, no subsequent telephonic conference was held between the judges where the parties and their counsel could have an opportunity to be present and participate. This would have permitted more in-depth discussion as to the issues between the parties in California, each parent's compliance with prior court orders, the UCCJEA requirements, and a clearer picture as to which court should have continuing jurisdiction and how the parties would move forward with the cause.

and that while he has been appointed a State Public Defender, that person has failed to apprise Father of anything in connection with the Montana proceedings."

¶7 In response to the communication from the California court, the District Court issued an Order to Show Cause and Notice of Hearing, setting hearing on August 9, 2017, and advising the parties to appear at that time to show cause as to whether Montana should seek continuing jurisdiction or whether the case should be dismissed and returned to California. Despite the District Court's show cause order advising as to the nature of the hearing, neither the Department's counsel, counsel for Mother, nor Ms. Marvin were prepared for meaningful discussion or legal analysis of the UCCJEA and they provided little, if any, accurate information regarding such. The Department asserted that UCCJEA consideration was not needed, arguing a Title 41 action trumps a parenting plan. The District Court correctly rejected this argument because a Title 41 action must still comply with the UCCJEA. Section 40-7-103, MCA. Father's counsel indicated she had no legal authority to cite but that Father felt the case should be in California. Commendably, the District Court attempted to work through the UCCJEA statutory scheme. It correctly noted Montana had temporary emergency jurisdiction and California was the home state pursuant to § 40-7-204, MCA, such that jurisdiction would need to continue in California unless counsel could point to an exception in the UCCJEA that permitted Montana to continue to exercise jurisdiction. The District Court then concluded Montana could maintain jurisdiction "if this Court were to determine that Montana should be deemed the more convenient forum for determining the custody of [Child]." Although the District Court asked counsel if she had any authority to suggest the court's reading of the statutory scheme

was wrong, Father's counsel did not respond and failed to point out to the court that §§ 40-7-201(1)(b) and -203(1), MCA, require the home state of the child—here, California—to make the determination that the court of another state would be a more convenient forum.[2]

¶8 The District Court then requested the parties argue why Montana was the more convenient forum. For the first time in this case, Mother's attorney asserted Mother came to Montana due to a fear of Father. Father then interjected that he had been attempting to find and serve Mother with a parenting action ever since she left California. He reported Mother was absconding and not permitting him the parenting ordered by the California court. Father also volunteered he had discovered the Department's representation to the court eight months prior that it had made a request for an ICPC was inaccurate. Father explained he had been trying in California to obtain an order to return Child to California and through that process the California court contacted the California department to inquire about the status of the ICPC and learned no such request had been made. Other than expressing Father felt if the case was not retained in California he would lose all of his rights, counsel made no argument advocating Father's position.

¶9 The District Court then reviewed the statutory factors set forth in § 40-7-108, MCA, to determine which jurisdiction—Montana or California—was the most convenient forum. Ultimately, the District Court found Montana to be the more convenient forum as witnesses and Mother, who was working a treatment plan, resided in Montana. In its consideration

[2] This was, however, mentioned by Department's counsel.

of the statutory factors set forth in § 40-7-108, MCA, the District Court specifically considered whether placing Child under Montana's jurisdiction versus California's would place Child at risk for experiencing domestic violence and concluded, "I haven't heard any representation, offer of proof, or evidence today that would suggest that California is a place where there would likely be domestic violence." Further, in its response letter to Judge Braner, the District Court related, "I found no convincing evidence or record-based representation which suggests that [Child] would be subjected to a home life marked by domestic violence were she to reside in California." At this time, eight months into the cause and following the Department's Petition for First Extension of Temporary Legal Custody, the Department had made no allegations regarding Father and the District Court had specifically found no safety issues regarding the Child were she to reside in California. Despite this, and Father's repeated protestations that there were no allegations against him, Father's counsel did not further request hearing or any other action to accomplish placement of Child with Father.

¶10 Father appeared telephonically at the extension of TLC hearing on August 25, 2017. At that hearing, the Department advised California had rejected doing an ICPC regarding Father as Father was the non-custodial parent. The Department stated California would not do an ICPC unless Father had a treatment plan and then asserted the only available option was to give Father a treatment plan. Father related he did not believe he needed to complete a treatment plan as he had previously completed a 52-week domestic violence prevention program in conjunction with prior court proceedings between Mother and him in California and done everything else the court there had required of him. Father's counsel

appeared to acquiesce in the imposition of a treatment plan for Father and did not dispute the Department's claim that there was no other option than to impose a treatment plan on Father. In light of this discussion, Father indicated he would be willing to consider a treatment plan. The Department reported it had not yet developed a treatment plan for Father.[3] Based on the hearing discussion, the District Court indicated it was inclined to grant extension of TLC and set a treatment plan hearing.

¶11 The treatment plan hearing was held November 3, 2017. Father and his counsel voiced objection to the allegation contained in the treatment plan—concern for Father's present ability to safely parent Child based on past drug use, criminal records, and domestic violence—to which the District Court responded its understanding of the allegation was "that Father's ability to provide an appropriate parenting situation and shelter for [Child] is in question." Father again disputed this. The Department then explained, "It's always difficult in these cases when a non-offending parent is living out of state" and iterated a treatment plan to be the only means of getting information regarding Father's housing, income, history, and criminal and child protective services backgrounds. After Father again indicated he did not understand why he was now being required to complete a treatment plan, as well as his concerns he had not been provided resources similar to Mother throughout the case and had not been provided visitation over the past eleven months, the District Court requested his counsel summarize her client's legal position.

[3] Presumably the Department had not developed a treatment plan for Father as there were no allegations of abuse or neglect against Father.

Father's counsel responded, "It's hard for me to tell, Your Honor, because I don't quite understand it."

¶12 The District Court then explained to Father he had heard his objection, "it's a matter of record, I've not been asked to make a ruling based on your objection," explained it was necessary to have a treatment plan to obtain an ICPC, and then asked Father if he would sign the treatment plan. Thereafter, Father relented and agreed to the proposed treatment plan. Throughout this proceeding, Father's counsel did not object to imposition of a treatment plan; did not advocate any other options or means by which the Department could obtain information about Father's history, income, or living environment; and did not object to any of the proposed tasks of the treatment plan or question their appropriateness.

¶13 On February 16, 2018, Father appeared telephonically at a status hearing. At that hearing, the District Court explained to Father that the Department had the impression he was not cooperating with it. Again, Father explained he did not understand the Department's case—Child was removed from Mother's care and the allegations of concern for Father's present ability to safely parent Child underlying the treatment plan were not correct and were never proven. Father further asserted he had previously completed a 52-week domestic violence prevention program which the Department then seemingly accepted as completion of the domestic violence counseling, but indicated Father still needed to complete a mental health evaluation. Father responded that Child Protection Specialist (CPS) Lindal had sent him an email stating he did not have to complete the mental health evaluation. Via telephone, CPS Lindal confirmed she had told Father he did not need to complete a mental health evaluation, but he should do domestic violence

counseling. The Department's attorney then indicated the Department now also wanted Father to complete a mental health evaluation. Throughout the discussion at this hearing, Father's counsel did not object to re-imposition of tasks the Department conceded were completed or unnecessary and did not advocate on Father's behalf to specify any remaining treatment plan tasks.

¶14 Father again appeared telephonically at the hearing on the Department's petition for a second extension of TLC on March 9, 2018. At the outset of the hearing, in response to the District Court's inquiry as to Father's position, Father's counsel admitted she did not know his position. Thereafter, CPS Lindal testified Father had been employed since November 2016 and that he had safe and stable housing. She testified the Department had concerns of domestic violence and chemical dependency, but did not testify as to any recent or current behaviors evidencing these concerns, mentioning only that Father had a remote drug conviction and Mother had obtained a restraining order in 2011.[4] CPS Lindal also explained that California had not started an ICPC as Father had not yet finished his treatment plan. CPS Lindal admitted Father provided her documentation of completing the 52-week domestic violence prevention program with "as expected" mastery of the materials, but she indicated it was from 2012 or 2013 and there was a notation therein that

[4] The fact that Father had a history of a felony drug conviction related to the sale of methamphetamine occurring over 15 years before the Department became involved with this family—and for which Father was released from supervision prior to Child's birth—was known and discussed at the November 3, 2017 hearing where the Department admitted Father was "a non-offending" parent. The fact that Father had previously been restrained from contact with Mother was known and discussed at hearing on August 9, 2017, at the completion of which the District Court concluded it had not heard any representation, offer of proof, or evidence that if Child were placed with Father in California there would likely be domestic violence.

he did not take responsibility for his actions.[5] CPS Lindal admitted, however, that the Department's concerns regarding domestic violence stemmed only from Mother's report as to when she lived with Father approximately six years previously.[6] Father's counsel did not follow up on California's reported demand that Father complete his treatment plan prior to initiating an ICPC, did not request the court issue an order for immediate completion of an ICPC before Father completed all treatment plan tasks, did not advocate any other options for obtaining the information which would be gathered through an ICPC,[7] and did not follow up with CPS Lindal to ascertain what efforts she made to determine what the domestic violence program provider meant when it indicated successful completion of the program despite the notation Father did not admit any "abusive/aggressive" behaviors in the past. At the end of the hearing, the District Court granted the extension of TLC.

[5] No items were noted under "Needs improvement/areas of concern" and the "Comments/Recommendations" at the conclusion of the report states, "Client completed 52 weeks long DVIP program. Client participated in a group discussion and he often offered constructive feedback to other group members. Client however remains firm in his believe [sic] that he does not belong in DVIP program and he does not admit to any abusive/aggressive behavior in the past." The program defined expectations as to participation to be: "Arrives on time, attentive, asks questions, constructive contribution to group discussions, willingness to voluntarily participate, initiates constructive dialogue, appropriately challenges others." It also defined expectations regarding attitude: "Uses respectful language, demonstrates gender respect, respect for group processing and other members, accountability for actions, consistent modeling of positive changes in behavior and attitude, maintains self-confidence and commitment to non-violence." Father's participation and attitude were noted to be "At Expectation."

[6] We note that Mother was determined to be the aggressor in the domestic violence event which prompted the Department's removal of the children from her care.

[7] Such as contacting Father and his identified collateral contacts, contacting Father's employer, contacting Father's landlord, or asking Father to secure a third-party home study.

¶15 On April 23, 2018, the District Court heard the Department's petition to terminate Mother's parental rights. Although Father did not appear, he was represented by newly-appointed counsel, Mr. Hinchy. At the conclusion of the hearing, the District Court terminated Mother's parental rights and the Department stated its intention for Child to remain with the grandparents on a long-term basis.

¶16 In June 2018, the Department requested the District Court adopt a permanency plan which provided for Child to be adopted by her maternal grandparents. Hearing on the permanency plan request was held July 13, 2018. Attorney Larson, filling in for Mr. Hinchy, represented Father. Prior to connecting with Father telephonically, it was disclosed that while Child was residing with her maternal grandmother, Child had been sexually assaulted by her half-brother who had now been removed from the residence.[8] Upon being connected telephonically to the hearing, Father again reiterated his belief that the Department had failed to substantiate any allegations of abuse or neglect against him. Father also outlined his considerable frustration in trying to work with the Department to complete treatment plan tasks. He asserted the Department failed to provide funding for services and sent him for services but when he arrived there was no referral for him to receive the services. He had also been sent to providers who were no longer at the location where he was directed to go. Father also asserted he had recently become aware of some type of incident detrimental to Child occurring while in the maternal grandmother's care but had been unable to get more information as to exactly what occurred. Father became

[8] The Department had earlier taken the position that maintaining Child's relationship with her half-siblings weighed against placing her with Father.

so frustrated during this hearing that the District Court had to terminate his participation in the hearing.

¶17 Hearing on the Department's petition to terminate Father's parental rights was held November 7, 2018, where Father appeared telephonically and was represented by Hinchy. CPS Lindal testified the Department had concerns Father used methamphetamine and engaged in domestic violence. She claimed to have "numerous papers" indicating restraining orders and violations of such by Father. Contrarily, CPS Lindal was then forced to admit the only information she had about Father's purported domestic violence was what Mother had asserted in her restraining order request in 2011 and that she had made no independent investigation with regard to the veracity of Mother's assertions. Further, she admitted she did not undertake any follow-up with Father's prior domestic violence prevention counselor who certified Father's prior successful completion of a 52-week program with above expectation in taking "initiative, consistent presentation/progress in attitude, thought[,] feeling, [and] behavior," but instead concluded from one sentence in his report that Father did not take responsibility, Father's completion was specious and he needed to re-do domestic violence prevention counseling. Father testified again that the restraining order event with Mother in 2011 did not involve violence, but rather he determined it best not to contest her request for a restraining order. He testified he violated the restraining order when he called Mother to check on her and Child when he believed Mother was using drugs and not providing stability for Child. He testified he then successfully completed the 52-week domestic violence counseling program, but did not admit to committing violence as he had not engaged in any violence against Mother.

Throughout this case, the Department has not entered evidence of any domestic violence incident or specific concern arising regarding Father occurring after Father completed the 52-week domestic violence prevention program in May 2013.

¶18 With regard to Father's criminal history, CPS Lindal admitted a background check was not even requested until June 2018, and not received by the Department until July 2018. By the time the background check was requested, the Department had already indicated its permanency plan to be termination of Father's parental rights followed by adoption with the maternal grandparents. Father's background check and CPS history did not demonstrate recent or current dangerous criminal, domestic violence, or child protective history for Father. Rather, Father's criminal background check showed the remote felony drug conviction from 2000, a single restraining order violation in 2012, and a misdemeanor drug possession charge in 2016. Father again testified to the remote nature of the felony drug offense, and that he had completed a prison sentence and discharged probation prior to Child's birth. He further testified he received a misdemeanor drug charge in early 2016 which he did not contest because a passenger in his car had a small amount of an unknown drug in his car. He testified this was resolved by his attendance at some NA classes.

¶19 CPS Lindal also asserted Father did not show a desire to care for Child as he had not seen Child for some months before her removal from Mother, but did not elaborate as to any investigation she did to determine why this may have occurred. Father testified he had been repeatedly attempting to obtain his parenting time with Child through the California court system, but Mother had failed to comply with the California parenting

orders, refusing to bring Child to California and keeping her whereabouts in Montana unknown to him.[9]

¶20 At the conclusion of the termination hearing, the District Court terminated Father's parental rights, finding Father had stipulated to a treatment plan and therefore accepted the allegations contained therein and waived any further right to contest them. The District Court then found Father failed to complete the treatment plan and his excuses for not completing the treatment plan tasks were not credible and further concluded that because of Father's continued insistence that the court lacked jurisdiction, his non-compliance was more willful than circumstantial. Based primarily on the misdemeanor offense from 2016, the District Court concluded Father's behaviors were unlikely to change within a reasonable time. Father appeals.

STANDARD OF REVIEW

¶21 This Court reviews a district court's decision to terminate parental rights for an abuse of discretion. *In re K.A.*, 2016 MT 27, ¶ 19, 382 Mont. 165, 365 P.3d 478. The Department has the burden of proving by clear and convincing evidence that the statutory criteria for termination have been satisfied. In the context of parental rights cases, clear and convincing evidence is the requirement that a preponderance of the evidence be definite, clear, and convincing. *In re K.L.*, 2014 MT 28, ¶ 14, 373 Mont. 421, 318 P.3d 691. This Court reviews a district court's findings of fact for clear error and conclusions of law for correctness. *In re M.V.R.*, 2016 MT 309, ¶ 23, 385 Mont. 448, 384 P.3d 1058. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the court

[9] This testimony is consistent with the information previously provided by the California court.

misapprehended the effect of the evidence, or if review of the record convinces this Court a mistake was made. *In re E.Z.C.*, 2013 MT 123, ¶ 19, 370 Mont. 116, 300 P.3d 1174. "To reverse a district court's evidentiary ruling for an abuse of discretion, this Court must determine the district court either acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." *In re I.M.*, 2018 MT 61, ¶ 13, 391 Mont. 42, 414 P.3d 797 (citation omitted).

¶22 "[P]arents have a due process right to effective assistance of counsel in termination proceedings." *In re A.S.*, 2004 MT 62, ¶ 20, 320 Mont. 268, 87 P.3d 408. Whether assistance was effective requires review of counsel's training, experience, and advocacy. IAC requires reversal only if the parent suffered prejudice. *In re B.M.*, 2010 MT 114, ¶ 22, 356 Mont. 327, 233 P.3d 338 (citation omitted). Effectiveness is evaluated by the non-exclusive factors of training and experience and advocacy. *In re A.S.*, ¶ 26. Effective advocacy requires investigating the case, researching and understanding the law, meeting with the client, and assiduously advocating for the client. *In re A.S.*, ¶ 28.

DISCUSSION

¶23 *Whether Father's due process rights were infringed by ineffective assistance of counsel resulting in his parental rights being inappropriately terminated.*

¶24 Father asserts he received ineffective assistance of counsel when his court-appointed counsel, Ms. Marvin, failed to assiduously advocate for him throughout the entirety of her representation.[10] Father asserts he "was a non-offending parent with no

[10] Father asserts deficiency in investigation, research and knowledge of the law, hearing preparation, and zealous advocacy, rather than lack of specific training or experience. As such,

credible or recent allegations that he was unable to parent [Child]," that California was the proper place for jurisdiction as the family court in California had already entered a parenting plan, and that he was "qualified to have this matter dismissed in favor of custody to him under Title 41, the ICPC, and the UCCJEA." Father asserts his counsel failed to recognize or advocate for placement with him and dismissal and instead "acquiesced in the Department's incorrect assertion that Father was required to have a treatment plan."

¶25 The Department contends Father cannot establish how his counsel failed to advocate for him by not advocating for placement of Child with Father outside the demands of an ICPC as the District Court was presented with sufficient reasons to agree with the Department that Father's capacity to safely parent should be evaluated. Further, the Department asserts that even if Father can establish ineffective assistance of counsel for counsel's failure to pursue placement with Father and dismissal of the case, he cannot establish how the outcome would have been different as the District Court was advised of Father's wishes to have Child placed with him at the show cause hearing.

Legal Framework

¶26 In termination proceedings, § 41-3-609(1)(f), MCA, protects a parent's fundamental right to the care and custody of a child. *In re D.B.*, 2007 MT 246, ¶ 17, 339 Mont. 240, 168 P.3d 691. A district court may only terminate the parent-child relationship of an adjudicated YINC if it finds "by clear and convincing evidence that: (1) an appropriate court-approved treatment plan was not complied with by the parents or was not successful;

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we limit our review to the areas of deficiency addressed in the briefing and do not address counsel's specific training or experience in DN work.

and that (2) the conduct or condition of the parents rendering them unfit was unlikely to change within a reasonable time." *In re X.M.*, 2018 MT 264, ¶ 18, 393 Mont. 210, 429 P.3d 920 (citing § 41-3-609(1)(f)(i), (ii), MCA).

¶27 Since "a natural parent's right to care and custody of a child is a fundamental liberty interest," a district court "must adequately address each applicable statutory requirement" before terminating an individual's parental rights. *In re Matter of A.T.*, 2003 MT 154, ¶ 10, 316 Mont. 255, 70 P.3d 1247 (citation omitted).

¶28 Section 40-6-221, MCA, provides:

> The father and mother of an unmarried minor child are equally entitled to the parenting, services, and earnings of the child. If either parent is dead or unable or refuses to exercise parenting or has abandoned the family, the other parent is entitled to the parenting, services, and earnings of the child, unless care of the child is determined otherwise pursuant to 40-4-221.[11]

Consistent with a parent's fundamental right to parent and § 40-6-221, MCA, the Department has adopted a policy regarding non-custodial parents:

> When a child must be removed from the home of the custodial parent because of child abuse or neglect, **the non-custodial parent is the first placement option for the child considered** by the Child Protection Specialist. In general, placement of the child with the noncustodial parent is more favored than placement with a member of the child's extended family. Placement with a non-custodial parent is presumed to be in the best interests of the child.
>
> **Unless the Department has documented evidence to indicate that the child should not be placed with the non-custodial parent because of safety concerns, the non-custodial parent should be the first placement option considered**.
>
> Legal/birth parents have the right to parent their children unless a court finding or circumstances negate that right. As a corollary, children

[11] Section 40-4-221, MCA, provides for determination of a child's care upon death of a parent and is not applicable to this case.

> have the right to be placed with their legal/birth parents unless that parental authority has been abused.
>
> When the parental rights of one parent are terminated, the parent whose rights have not been terminated has legal custody of the child absent an adjudication of youth in need of care **based upon the parenting behavior of the parent whose rights have not been terminated**.
>
> . . .
>
> **The non-custodial parent is the first placement option for the child** unless the Child Protection Specialist has documented good cause to the contrary exists indicating placement with the non-custodial parent could not assure the child's safety. The Child Protection Specialist must document and provide a written copy to the non-custodial parent as to why such placement is not in the child's best interests.

Child and Family Services Policy Manual, § 304-1 (DPHHS 2014), https://perma.cc/95CE-7DBY (emphasis added).

¶29 Upon removal of a child from a custodial parent, the Department must first consider placement of the child with the non-custodial parent. Of course, prior to doing so, the Department should determine if there are any observable or substantiable imminent safety risks to the child if the child is placed in the care of the non-custodial parent. This determination does not at the outset require full investigation of or implementation of an ICPC or a treatment plan for the non-custodial parent, but rather occurs along a continuum. Typically, this would involve conducting a CPS history and potentially a criminal background check as well as gathering information from the non-custodial parent as to his/her work and earnings, his/her residence and who, if anyone s/he resides with, who is part of his/her support system, and potential collateral contacts who can verify the information provided. If any of the information from the CPS history, the criminal background check, or other information provided by the non-custodial parent raises

objective, demonstrable circumstances indicative of an imminent safety threat to the child, the CPS case worker should follow up with further investigation to confirm the information provided by the non-custodial parent.[12] If objective, demonstrable circumstances indicate a potential imminent safety risk to the child after completing this preliminary investigation, the CPS worker may expand the investigation.[13] If objective, demonstrable circumstances indicate a potential imminent safety risk to the child after completing this more in-depth investigation, the CPS worker may request a court order permitting the Department to further evaluate the noncustodial parent consistent with § 41-3-438(3)(b) and (c), MCA.[14]

¶30 While an ICPC may be indicated if objective, demonstrable circumstances warrant the Department seeking a court order to evaluate the non-custodial parent, an ICPC is not required merely because a non-custodial parent resides in another state. Pursuant to ICPC Regulation No. 3, adopted by Admin. R. M. 37.50.901 (2016), placement may be made without completing an ICPC:

> 3. Placements made without ICPC protection:
>
> (a) A placement with a parent from whom the child was not removed: When the court places the child with a parent from whom the child was not removed, and the court has no evidence that the parent is unfit, does not seek any evidence from the receiving state that the parent is either fit or unfit, and the court relinquishes jurisdiction over the child immediately upon placement with the parent. Receiving state shall have no responsibility for supervision or monitoring for the court having made the placement.

[12] For example, the Department may request documents such as pay stubs, rental agreements, or other housing information, etc. from the non-custodial parent.

[13] Depending on the particular identified circumstance, the CPS worker may, for example, conduct a home visit, or if the non-custodial parent lives outside the jurisdiction, request a courtesy check by the Department serving the non-custodial parent's residential area, request drug testing if there is indication of unstable or erratic behaviors related to current drug use, etc.

[14] Examples of such evaluation may include an in-depth home study or professional evaluation.

> (b) Sending court makes parent placement with courtesy check: When a sending court/agency seeks an independent (not ICPC related) courtesy check for placement with a parent from whom the child was not removed, the responsibility for credentials and quality of the "courtesy check" rests directly with the sending court/agency and the person or party in the receiving state who agree to conduct the "courtesy" check without invoking the protection of the ICPC home study process. This would not prohibit a sending state from requesting an ICPC.

ICPC Regulations, Regulation No. 3 (Association of Administrators of the Interstate Compact on the Placement of Children 2011), https://perma.cc/YC6U-5RTX.

¶31 Although the Department is obligated to initially provide the custodial parent a treatment plan and services designed to ameliorate his/her parenting deficiencies when a child has been adjudicated a youth in need of care, such does not suspend or reduce the non-custodial parent's fundamental right to parent. If there are no objective, demonstrable circumstances of imminent safety risk to the child upon the Department's preliminary investigation, the Department must first look to place the child with the non-custodial parent and document good cause to the contrary indicating how the non-custodial parent could not assure the safety of the child.[15] If the child has been adjudicated a youth in need of care, and no objective, demonstrable circumstances of imminent safety risk to the child have been identified, upon disposition the court may either "order the temporary placement of the child with the noncustodial parent, superseding any existing custodial order, and keep the proceeding open pending completion by the custodial parent of any treatment

[15] This is consistent with modification of a parenting plan in a family law case. If a parenting plan does not find either parent unfit, but allocates more parenting time to one parent such that that parent is the primary custodial parent, if the custodial parent's circumstances change and he or she is no longer able to provide a safe, stable environment for a child, a court may modify the parenting plan to provide such that the previous non-custodial parent becomes the primary custodial parent.

plan" or "order the placement of the child with the noncustodial parent, superseding any existing custodial order, and dismiss the proceeding with no further obligation on the part of the department to provide services to the parent with whom the child is placed or to work toward reunification of the child with the parent or guardian from whom the child was removed in the initial proceeding." Section 41-3-438(3)(c) and (d), MCA.

¶32 This legal framework is consistent with *In re J.B.*, 278 Mont. 160, 923 P.2d 1096 (1996) and *In re S.S.*, 2012 MT 78, 364 Mont. 437, 276 P.3d 883. In *In re J.B.*, J.B. was removed from his mother's care and adjudicated a youth in need of care. His father, who resided out of state, stipulated to the Department's request for TLC, and indicated a desire to obtain custody of J.B. The Department ultimately sought and obtained termination of mother's parental rights. The Department also sought extension of TLC to which father consented. After the extension of TLC was granted and approval of a second treatment plan for father issued, father again sought permanent custody of J.B. Following hearing, the court determined the Department should retain TLC for another year as requested by the Department. Upon father's appeal we reversed as the determination of J.B. as a youth in need of care was not based on evidence of father's abuse or neglect:

> In the present action, there are two parties petitioning for custody of the child: J.B.'s natural father and the State of Montana (through DFS). For a court to have jurisdictional authority to grant custody to a non-parent, certain steps must be followed. When the State is a party to a custody proceeding, it initially must file a petition in a district court alleging the nature of the legal custodian's abuse or neglect. Section 41-3-401, MCA. After the submission of the petition, a court will then hold an adjudicatory hearing to determine if the child is a "youth in need of care." Section 41-3-404, MCA. If the child is determined to be a youth in need of care, the court will then set a date for a dispositional hearing. At the dispositional

hearing, the court has the authority to transfer legal custody of the child. Section 41-3-406, MCA.

In this matter, such a petition was submitted. All five children were declared youths in need of care. However, the allegations of abuse and neglect were made in the context of the termination of parental rights of the then custodial parent, J.B[.]'s mother T.B. In addition to the rights parents may have as a couple, they also have individual rights with respect to their children. *In re Matter of T.E.R.* [, 180 Mont. 340, 346, 590 P.2d 1117, 1121 (1979)].

The State did not petition for the termination of appellant's parental rights. Indeed, upon the termination of the mother's parental and custodial rights, appellant was entitled to custody of J.B. *Babcock* [*v. Wonnacott*, 268 Mont. 149, 152, 885 P.2d 522, 524 (1994)].

. . .

We conclude that when the court terminated T.B.'s parental rights, she was unable to take custody of J.B. Therefore, appellant, the other parent, was entitled to custody. This entitlement is not immune from contest, but the contesting party, here DFS, must follow the proper procedure outlined above in order to obtain custody. A parent's right to custody in this situation is not so fleeting that it can hinge on a court's disposition of a related yet distinct matter. The District Court determined J.B. to be a youth in need of care and granted temporary custody to DFS based on its consideration of T.B.'s conduct toward the child; to relieve appellant of custody, the court was required to consider his conduct as well.

In other words, in order to have the jurisdictional authority to award DFS temporary custody, the court must determine that J.B. is a youth in need of care. The court must make this determination on the basis of evidence of appellant's abuse or neglect.

. . .

DFS's original petition does not allege abuse or neglect on the part of appellant. However, both DFS and the court raised concerns about appellant's prior chemical dependency problems. Appellant stated and various examinations confirmed that he had not used alcohol or drugs for years. The concerns of DFS and the court were based largely on the results of a urinalysis in which appellant tested positive, but the record shows that the test results were incomplete and should properly have been considered inconclusive. In any event, these concerns clearly do not amount to a consideration of allegations of child abuse or neglect on the part of appellant, and do not provide a sufficient basis on which to conclude that J.B. would be in danger of harm or threatened harm. *See* [*In re Matter of M.G.M.*, 201 Mont. 400, 408, 654 P.2d 994, 998 (1992)].

The court failed to address any evidence of appellant's abuse or neglect of the child. "[A] finding of abuse, neglect, or dependency is the

> 'jurisdictional prerequisite for any court ordered transfer of custody.'" [*In re*] *M.G.M.*, 201 Mont. at 407, 654 P.2d at 998. (citations omitted). We hold that the District Court erred in concluding that J.B. was a youth in need of care, and therefore the court erred in granting DFS temporary custody.

In re J.B., 278 Mont. at 162-64, 923 P.2d at 1098-99.

¶33 In *In re S.S.*, S.S. and S.S. were removed from mother's care. Consistent with its policy, the Department placed the children in the temporary care of father. Both parents stipulated to adjudication of the children as youths in need of care. At the dispositional hearing, the district court granted father's motion to dismiss the Department's case and grant him full legal custody. In affirming the district court's dismissal and grant of custody to father we noted the case arose,

> from an abuse and neglect proceeding initiated by the State due to the alcohol abuse of Mother, who was divorced from Father. Mother's parental rights were not terminated. Instead, the District Court followed the statutory procedure of § 41-3-438(3)(d), MCA, in ordering placement of the children with Father. This relieved the State from any further obligation to the children, as the concern for them being youths in need of care was eliminated by the placement. *See In re A.C.*, [2004 MT 320, ¶ 17, 324 Mont. 58, 101 P.3d 761].
>
> This is not to say that Mother does not have a remedy. Now that the State is no longer a party, Mother has the ability to initiate an action for a parenting plan pursuant to the provisions of Title 40, Chapter 4, MCA. That is the appropriate forum to invoke district court jurisdiction to resolve future disputes between the parents regarding these children.

In re S.S., ¶¶ 16-17.

¶34 Finally, the provisions of the UCCJEA pertinent to this cause provide:

> (1) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.
>
> . . .

> (3) If there is a previous child custody determination that is entitled to be enforced under this chapter or a child custody proceeding has been commenced in a court of a state having jurisdiction under 40-7-201 through 40-7-203, any order issued by a court of this state under this section must specify in the order a period of time that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under 40-7-201 through 40-7-203. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or until the period expires.

Section 40-7-204(1) and (3), MCA.

> Except as otherwise provided in 40-7-204, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under 40-7-201(1)(a) or (1)(b) and:
>
> (1) **the court of the other state determines** it no longer has exclusive, continuing jurisdiction under 40-7-202 or that a court of this state would be a more convenient forum under 40-7-108; or
>
> (2) a court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

Section 40-7-203, MCA (emphasis added).

> Except as otherwise provided in 40-7-204, a court of this state has jurisdiction to make an initial child custody determination only if:
>
> . . .
>
> (b) a court of another state does not have jurisdiction under subsection (1)(a), **or a court of the home state of the child** has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under 40-7-108 or 40-7-109[.]

Section 40-7-201(1)(b), MCA (emphasis added).

¶35 To provide effective assistance of counsel, attorneys representing parties and entities involved in abuse and neglect proceedings involving a non-offending, non-custodial parent must understand and assiduously advocate the legal framework set forth above.

Ineffective Assistance of Counsel

¶36 From the adjudication until her replacement shortly before Father's termination hearing, Father's initial counsel failed to render effective assistance which caused Father prejudice—termination of his parental rights to Child. At the outset, Father's counsel did not assiduously advocate for placement with Father despite the provisions of § 40-6-221, MCA, and the Department's policy that "the non-custodial parent is the first placement option for the child." Child and Family Services Policy Manual, § 304-1 (DPHHS 2014), https://perma.cc/95CE-7DBY. From the record, it appears Father had no issue with the Department working with Mother but it is clear he wanted Child placed in his care. The petition for emergency protective services, adjudication, and TLC contained no allegations of abuse or neglect against Father. At the adjudication in January 2017, although Father's counsel advised the District Court Father desired placement of Child with him, she did not assiduously advocate for this placement but instead acquiesced to the representations and position of the Department that immediate placement with Father was not possible. Counsel voiced no opposition to the Department's representation that an ICPC was required to place Child with Father. Counsel evidenced no knowledge or understanding of ICPCs, including Regulation No. 3, which provides exceptions to the need for an ICPC for placement with a parent from whom the child was not removed. At the time the Department claimed it had requested an ICPC, the Department had presented no evidence that Father was unfit or expressed any valid reason the exceptions under Regulation No. 3 did not apply. From the record before us, when the Department indicated it had requested an ICPC, the Department did not appear to have conducted any preliminary inquiry

whatsoever into Father's situation, yet Father's counsel did not advocate the Department conduct a CPS history or criminal background check on Father. Counsel did not advocate for a courtesy check of Father's residence. Counsel did not advocate the Department take even minimal preliminary steps to ascertain Father's situation such as contact Father to obtain information regarding his employment, his residence and any individuals who resided with him in his home, his support system, his daycare/school plan, and collateral contacts; contact his employer to confirm his employment; contact identified individuals, if any, residing with Father; conduct a video chat with Father in order to see his residence; contact daycare/school personnel to confirm Father's plan; and the like. Counsel did not educate the court regarding exceptions to obtaining an ICPC with regard to placement of a child with a parent from whom the child was not removed (a non-offending parent). Counsel did not object to the ICPC, or advocate for a 30-day visitation with Father while sorting out the ICPC issue.[16] Upon stipulating to adjudication of Child as a YINC, counsel did not advocate for an immediate placement order with Father, superseding any existing custodial order and either dismissal of the proceeding with no further obligation on the part of the Department to work toward reunification with Mother or to keep the proceeding open pending Mother's completion of her treatment plan. Counsel did not request a placement hearing to require the Department to meet its burden to present documented

[16] Pursuant to Department policy 402-7, no ICPC is required to effectuate a visitation of 30 or fewer days. *See* Child and Family Services Policy Manual, § 402-7 (DPHHS 2014), https://perma.cc/YK4Q-4VJS.

evidence that Child should not be placed with Father because of safety concerns consistent with § 41-3-438, MCA, *In re S.S.*, and Department policy 304-1.

¶37 Even after acquiescing to an ICPC, Father's counsel did not further follow up regarding the status of the ICPC and did not learn the Department had not requested the ICPC as it previously claimed. Although the Department indicated in January 2017 it had already requested California do an ICPC, as of May 2017 when the California court queried its department, no request had been received by California. This issue, along with issues related to the UCCJEA, were discussed at hearing on August 9, 2017.

¶38 Upon receiving correspondence from the California court asserting jurisdiction was properly in California, the District Court issued an order to show cause for the parties to appear and "show cause why this Court should be vested with jurisdiction under the UCCJEA to determine the custody of [Child] or, in the alternative, why this action should not be dismissed in favor of the proceeding in the Superior Court of the State of California, San Diego County." Despite being placed on notice as to the jurisdictional issue, Father's counsel did not address any assertions made by the Department's counsel[17] and did not provide the court with any legal analysis of the UCCJEA supporting Father's desire that California retain jurisdiction. The District Court rightly expressed its frustration with counsel's lack of preparedness and valiantly attempted to go through the various provisions

[17] For example, Department's counsel asserted the UCCJEA was trumped because of the Title 41 DN filing. Father's counsel did not contest this assertion despite the clear provision of § 40-7-103(4), MCA, which defines child custody proceeding to include any "neglect, abuse, [or] dependency" proceeding.

of the UCCJEA in open court. In doing so, the District Court concluded California was the home state with initial jurisdiction and then determined jurisdiction should be transferred to Montana as the most convenient forum. Although the UCCJEA clearly contemplates that the state having initial jurisdiction—here, California—is the state that determines if it no longer has exclusive, continuing jurisdiction or that another state would be a more convenient forum, Father's counsel did not educate the District Court in this regard and failed to object when the Montana court, rather than the California court, determined that Montana was the most convenient forum.[18]

¶39 More concerning, after the District Court considered the factors set forth in § 40-7-108, MCA, to determine the most convenient forum, Father's counsel again failed to advocate for the immediate placement of Child with Father when the District Court concluded, "I haven't heard any representation, offer of proof, or evidence today that would suggest that California is a place where there would likely be domestic violence. . . . I found no convincing evidence or record-based representation which suggests that [Child] would be subjected to a home life marked by domestic violence were she to reside in California."

¶40 On August 25, 2017, at hearing on the Department's petition for extension of TLC, Father and his counsel learned that California had rejected doing an ICPC because Father was the noncustodial parent and did not have a treatment plan. The Department then

[18] This lack of legal knowledge and advocacy likely would not have resulted in California maintaining jurisdiction given the California court's initial communication indicating, "If in fact Montana is exercising a more permanent jurisdiction under the UCCJEA, I would appreciate knowing that and I would be happy to transfer jurisdiction to Montana."

suggested the best course of action would be development of a treatment plan for Father. Father's counsel did not inform the District Court that the representation from the California department may have meant that California understood that, pursuant to ICPC Regulation No. 3, no ICPC was required for placement with a non-offending parent rather than an affirmative request by California that Father be required to complete a treatment plan. Again, counsel did not request immediate placement with Father or even request a placement hearing and did not object to requiring Father to be subject to a treatment plan which, by its nature, would delay reunification; result in time, expense, and inconvenience to Father; and risk termination of his parental rights if not completed to the Department's satisfaction.

¶41 At the treatment plan hearing on November 3, 2017, Father expressed opposition to the necessity of a treatment plan and the District Court questioned Father's counsel, asking "given the position just stated by your client, [counsel], how do you believe it's best appropriate to proceed?" Counsel responded, "I'm not sure." The Department's counsel explained to the court that if Father had a treatment plan, then an ICPC could be obtained and advised the court that lack of a treatment plan had been the hold up to the ICPC. The Department's counsel admitted Father was a non-offending parent explaining, "It's always difficult when a non-offending parent is living out of state, but there are things which have to be done to ensure the child can be safely placed with that parent. We don't have the authority to do it through Montana, it has to come from the home state, and until we can assure stable housing, stable income, no mental health issues or concerns or drug concerns that's the purpose of the ICPC and that's the purpose of the treatment plan, is to gain the

information that we lack." Father's counsel completely failed to address these inaccurate assertions. Again, Father's counsel failed to educate the District Court that an ICPC was not required pursuant to ICPC Regulation No. 3, and that the Department was fully capable of conducting and should have already conducted preliminary inquiry to gain information regarding Father's CPS history and criminal background, housing, and employment to determine if further inquiry or investigation was indicated. Father's counsel failed to advocate that the court had already determined the Department had failed to present any evidence indicating a safety issue for Child were she to reside with Father in California. Having been misled to believe the only way the Department was able to obtain any information about Father and his living situation or to place Child with Father was for Father to have a treatment plan so that California would do an ICPC, the District Court advised Father that this was the only way to proceed and then asked Father if he would sign the treatment plan. Faced with this Hobson's choice, with no objection or contrary information provided by his counsel, Father agreed to the treatment plan. At this point in time, other than asserting a remote history of a drug conviction over 15 years prior, the Department had presented no evidence which would reasonably indicate any current or ongoing drug use requiring further investigation or treatment and had presented no evidence which would indicate a mental health issue or ongoing domestic violence issue requiring treatment. Despite this, Father's counsel not only failed to object to imposition

of a treatment plan but then failed to even object to any of the tasks proposed in the treatment plan.[19]

¶42 Having permitted Father to agree to the treatment plan proposed by the Department, Father's counsel then had an obligation to assist Father in working with the Department to accomplish the tasks of a treatment plan. Despite this, Father's counsel did not follow up with the Department regarding its referrals for services, did not regularly maintain contact with Father to facilitate his timely compliance with the treatment plan, and did not seek an order or confirmation of task completion or confirmation of such when Father received email and verbal communication from Father's CPS that certain tasks were no longer being required.

¶43 At the status hearing of February 16, 2018, when the District Court explained to Father the Department believed he was not cooperating, Father again reiterated he did not understand the Department's case as he did not believe the Department had established any abuse or neglect on his part and also expressed his belief that he had already completed the treatment plan tasks as they were originally required by the court in California in connection to his parenting case. During the hearing, the Department appeared to accept that Father's prior domestic violence prevention program satisfied the treatment plan's

[19] For example, given the representations of the Department's counsel as to the information the Department needed, Father's counsel could have appropriately advocated for tasks such as providing the Department, in both Montana and California, with copies of his pay stubs, bank or financial statements, and rental agreement within a designated time period; requiring Father to physically go to the Department in California to set up an in-person meeting; or requiring Father to obtain an independent home study from an agreed upon private provider; and the like—tasks designed to obtain the information the Department indicated it did not have and secure Father's cooperation with an ICPC as opposed to tasks requiring chemical dependency, mental health, and domestic violence interventions.

requirement that Father complete domestic violence counseling, but then faulted Father for not obtaining a mental health evaluation. Father then reported CPS Lindal had previously sent him an email stating he did not have to complete the mental health evaluation. This was confirmed by CPS Lindal. Despite this discussion and lack of presentation of any new evidence indicating mental health concerns, the Department's attorney asserted the Department wanted Father to complete a mental health evaluation. Following which, the District Court noted that hearing no more objections from Father, Father should do domestic violence counseling and a mental health evaluation. Throughout nearly the entirety of this hearing, Father's counsel was silent and non-participatory. She failed to advocate Father's completion of tasks, failed to clarify the confusion from the discussion as to exactly which tasks the Department believed Father had successfully completed and which tasks it believed he had not completed, and failed to clarify which tasks remained incomplete and what was needed to certify their completion.

¶44 Throughout the various proceedings in this case, Father's counsel provided little advocacy or input, which was understandably frustrating to the District Court.[20] The majority of discussion as to Father's position at hearings occurred between the court and Father directly without much input or participation from Father's counsel.

[20] On one occasion, after Father expressed his objection to the delay in requesting the ICPC, that he did not understand how a treatment plan was necessary for him when there were no allegations of abuse or neglect pertaining to him in the court paperwork, he felt his rights had been violated, and he was not afforded the same opportunities as Mother had been afforded since the beginning of the proceedings, the District Court expressed its concern, "[Counsel] do you wish to encapsulate your client's objections? I mean when he's sitting here with counsel it leaves me at a loss to understand why I should be taking his legal arguments from him and not from you." After briefly consulting her client, Father's counsel replied, "It's hard for me to tell, Your Honor, because I don't quite get it."

Counsel's Ineffective Assistance Prejudiced Father

¶45 Counsel's lack of investigation of the case, lack of research and understanding of the law, lack of regular contact with Father, and lack of assiduous advocacy for Father prejudiced Father. Father was prejudiced by counsel's lack of early investigation into his history and circumstances as counsel was unable to provide information to the Department to expeditiously make initial inquiry into Father's background, work situation, and living arrangements and then failed to request the Department make an early preliminary investigation into Father's circumstances or assiduously advocate for immediate placement of Child with Father. Father was prejudiced by counsel's lack of advocacy for immediate placement and, at a minimum, to advocate for a placement hearing where Father could require the Department meet its burden to present documented evidence that his recent or current behavior and situation presented an imminent, observable safety risk to Child precluding immediate placement with him. Father was prejudiced by counsel's lack of research or understanding of the law related to his right to parent and ICPC regulations and lack of advocacy regarding the ICPC and exceptions thereto which led the District Court to erroneously believe Child could not be placed with Father without imposition of a treatment plan. Father was prejudiced by the imposition of a treatment plan as at the time it was ordered the Department had not presented evidence of recent or current abuse or neglect on Father's part or current behaviors or living situation demonstrating need for imposition of a treatment plan. Father was further prejudiced upon imposition of the treatment plan by his counsel's failure to object to tasks Father believed he had already accomplished or were not warranted by the documented evidence presented by the

Department and by counsel's failure to advocate for tasks designed to provide the Department with the information it asserted it lacked regarding Father. Finally, Father was prejudiced throughout the case by counsel's failure to regularly follow up with Father and the Department to determine Father's progress, to address the Department's stated concerns, to assure ongoing visitation and contact between Child and Father, to request increased contact between Child and Father and address any issues regarding visitation prior to a termination hearing, to request mediations, or to request an alternative to termination such as guardianship. Given the importance of Father's constitutional liberty interest to parent, counsel's investigation of the case, research and understanding of the law, interaction with Father, and overall advocacy fell short and did not constitute effective assistance of counsel.

¶46 It is appropriate to reverse Father's termination of parental rights and rewind proceedings in this case. At the time of adjudication, given Mother's parental rights remained intact, and in light of *In re S.S.*, it was appropriate for Father to stipulate to adjudication as he and his counsel would have at that time had a reasonable belief the Department would look to placing Child with him and the court would look to disposing of the cause pursuant to § 41-3-438(c) or (d), MCA. Thereafter, counsel's advocacy fell short as outlined above.[21] Therefore, we conclude it appropriate to rewind this case to the point where the District Court accepted Father's stipulation for adjudication and

[21] As we have concluded Father's initially appointed counsel did not render effective assistance throughout the proceedings through to her replacement shortly before the termination hearing such that reversal and remand is appropriate, we do not address IAC issues asserted with regard to Father's subsequent counsel.

adjudicated Child as a YINC. However, as Mother's parental rights were terminated in the interim, consistent with our holding in *In re J.B.*, to maintain TLC the court must determine that Child is a youth in need of care on the basis of evidence of Father's abuse or neglect. To make that determination, the Department will need to conduct investigation of Father along a continuum, if necessary, as outlined in ¶¶ 29-31 above.

¶47 As we did in *In re R.J.F.*, 2019 MT 113, 395 Mont. 454, 443 P.3d 387, we recognize there are no easy decisions in child dependency cases. *In re R.J.F.*, ¶ 47. Courts struggle with balancing the child's interest in permanency and stability against the parent's fundamental rights to parent. Many times, these struggles are inadvertently compounded by general uncertainty and apprehension toward a non-offending or non-custodial parent who has not historically had regular and continuous contact with the subject child.[22] While we understand this, we cannot, based on generalized apprehensions, ignore or eliminate a parent's fundamental liberty interest to parent when the parent has not received what the law guarantees. Given the unique circumstances herein, the amount of time Child has resided with grandmother, and Child's history of stress and instability, we encourage the parties to engage in mediation and work collaboratively to establish a positive living arrangement for Child.

CONCLUSION

[22] Placement with such a parent would be no more disruptive to a child than placement in a foster care setting—a practice in which the Department regularly engages.

¶48 Father's initial appointed counsel did not render effective assistance of counsel. Because of counsel's IAC, Father was prejudiced and his parental rights were terminated. We reverse the termination of Father's parental rights, rewind this case to the point where the District Court accepted Father's stipulation for adjudication and adjudicated Child as a YINC, and remand to the District Court for further proceedings consistent with this opinion.

¶49 Reversed and remanded.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ JIM RICE

DA 19-0231

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 64

IN THE MATTER OF:

A.B.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DN-16-159
Honorable John W. Larson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Shannon Hathaway, Montana Legal Justice, PLLC, Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Assistant Attorney General, Helena, Montana

Kirsten Pabst, Missoula County Attorney, Diane Conner, Deputy County Attorney, Missoula, Montana

Submitted on Briefs: January 22, 2020

Decided: March 24, 2020

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 R.B. ("Mother") appeals the order of the Fourth Judicial District Court, Missoula County, terminating her parental rights to her son, A.B. Mother argues that the District Court erred in concluding that her conduct was unlikely to change within a reasonable time and in finding that termination of parental rights, rather than guardianship, was in A.B.'s best interests. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On October 5, 2016, probation officers arrived at the house of A.B.'s birth father ("Father") to arrest him for a probation violation. The officers reported to the Department of Child and Family Services ("Department") that Father[1] and Mother's infant son, A.B., was present during drug use, that Mother had used morphine that day, and that Mother had a loaded syringe on the bathroom counter. The Department determined that A.B. was in immediate danger due to both parents demonstrating "out of control behavior due to their addictive drug use" and because A.B. was an "extremely vulnerable child due to his age and dependence on his caregivers to meet all of his basic needs." A.B. was eleven months old at the time. Mother stated that her mother, D.F. ("Grandmother"), could care for A.B. and that she had left A.B. with Grandmother in the past. The Department implemented a 30-day voluntary out-of-home protection plan that placed A.B. with his Grandmother and required Mother to submit to weekly urinalysis ("UA") testing, obtain a

[1] Father relinquished and the District Court terminated his parental rights on February 6, 2019. Because termination of Father's parental rights is not at issue in this appeal, we discuss the facts relevant to the termination of Mother's parental rights.

chemical dependency evaluation, and maintain contact with the investigating Child Protection Specialist ("CPS").

¶3 On November 4, 2016, the Department filed a petition for adjudication of youth in need of care and a petition for temporary legal custody. Mother was admitted to Family Drug Treatment Court ("Treatment Court"). The Treatment Court ordered Mother to obtain a chemical dependency evaluation; abstain from using alcohol or unprescribed drugs; and submit to random UA testing. The District Court adjudicated A.B. a youth in need of care, granted the Department temporary legal custody, approved interim treatment plans, and ordered Mother to complete UA testing. Mother obtained a chemical dependency evaluation on December 27, 2016. The evaluator recommended inpatient treatment due to Mother's long-term use of morphine and methamphetamine. The Treatment Court assisted Mother in applying to Recovery Center Missoula, a chemical dependency center.

¶4 At a status hearing in January 2017, Grandmother reported that Mother was doing well and that A.B. interacted very well with her. The court noted that Mother had missed several UAs and that those she provided were consistently positive for methamphetamine. At a status hearing in April 2017, Grandmother reported that Mother was undergoing inpatient treatment, had detoxed, and was actively participating in the treatment. Grandmother also reported that A.B. was doing well.

¶5 The District Court approved Mother's treatment plan on May 3, 2017. The treatment plan required Mother to complete parenting classes; regularly attend supervised and unsupervised visits with A.B.; attend addictions counseling and follow the

recommendations of the chemical dependency evaluator; not use or possess any alcohol or unprescribed drugs; submit to random substances testing; and avoid exposing A.B. to any alcohol or drugs.

¶6 The court extended temporary legal custody to the Department and would do so throughout the proceedings. Between May and July 2017, Mother was discharged from inpatient treatment for noncompliance. She began using methamphetamine again and missed UAs. The District Court emphasized that it was important for Mother to visit A.B. despite her relapse. Mother then began another outpatient treatment program but stopped participating within a month. Mother was suspended from Treatment Court due to missed UA testing and failure to appear for a hearing. In mid-August 2017, Mother stopped seeing Diane McLaverty, her therapist at Courage to Change Missoula. In September 2017, Mother reported she had reengaged in treatment and was visiting A.B. However, Mother had not submitted to UAs and the District Court warned her that she needed to commit to treatment and visits by the end of October 2017. A.B.'s Court Appointed Special Advocate ("CASA") reported that Grandmother believed Mother was still using illegal drugs. Grandmother continued facilitating visits with Mother and A.B. for some time, but by late September, Mother stopped attending visits.

¶7 The Department filed a Motion to Approve Permanency Plan on November 9, 2017. In the motion, the Department indicated that A.B. was placed with Grandmother, that he was well-bonded, had no special needs, and was happy and excited when he saw Mother. The Department also stated that Mother no longer was completing UAs, was still using substances, and saw A.B. only occasionally. The Permanency Plan called for reunification

with Mother if she successfully completed the treatment plan within a reasonable time and if reunification was in A.B.'s best interests. It simultaneously called for adoption if reunification was not in the best interests of A.B. The Permanency Plan did not mention guardianship as an option.

¶8 On January 11, 2018, the Department reported that Mother was again visiting A.B. regularly. The Department informed the court that A.B. had been out of his parents' care for over fifteen months, giving rise to a presumption that termination was in A.B.'s best interests, but the Department requested an exception to the presumption for "two or, at most, three months to see if we can work with the mother and see if we can give some additional time to work on reunification." The District Court granted the exception and acknowledged that A.B. was doing well in his placement, was not suffering, and that the extension would give Mother an "extra opportunity" for reunification.

¶9 Mother continued to test positive for methamphetamine. Mother's counselor again recommended she attend inpatient treatment. At a March 2018 status hearing, the District Court encouraged Mother to engage in her treatment plan and consider all inpatient treatment opportunities. Grandmother stated that she believed Mother was using drugs but was doing well with her visits and had continued to participate in parenting coaching. The District Court stated at the status hearing that its inclination was to "go to a guardianship in this thing" and that guardianship would be an incentive for Mother to "fully perform all of the parenting obligations that are outlined."

¶10 Mother continued to test positive for methamphetamine through July 2018. A second chemical dependency evaluation observed that despite Department intervention and

the offered outpatient treatment, Mother continued to use drugs. The evaluation concluded that if Mother did not participate in a structured treatment environment, she would remain at high risk to continue using. The counselor recommended that Mother complete inpatient treatment, which she did not do.

¶11 On August 22, 2018, the Department filed a petition to terminate parental rights ("Termination Petition") requesting permanent legal custody of A.B. with the right to consent to adoption. The Department asserted that Mother had continued to use methamphetamine and failed to seek inpatient chemical dependency treatment; that Mother's conduct or condition rendered her unfit or unwilling to provide adequate parental care to A.B.; and that the conduct or condition was unlikely to change in a reasonable amount of time. It requested that A.B.'s Permanency Plan be amended to include adoption by Grandmother and stated that the amended plan would be in A.B.'s best interests. The Department asserted that adoption would ensure that A.B.'s physical, emotional, and medical needs would be met in the future. The Department did not support guardianship, stating it would "undermine the idea of permanency for [A.B.], given his very young age and circumstances." All other parties voiced objections to the Termination Petition, as well as to the Department's proposed amended plan.

¶12 In October 2018, the CASA reported that A.B. continued to do well in Grandmother's care and that there were no concerns for A.B.'s physical or mental development. The CASA stated, "This CASA believes reunification with the child is not in the child's best interest." The CASA reported concern that the Department would terminate Mother's parental rights and believed it was in A.B.'s best interests to remain

with his Grandmother under guardianship, noting it would mean "hope" for Mother's recovery.

¶13 Mother continued to avoid UAs and test positive for methamphetamine throughout the following months. Her counselor again upgraded her level of recommended chemical dependency treatment from outpatient to inpatient. She was placed on probationary status with the Treatment Court due to noncompliance and ultimately did not attend inpatient treatment.

¶14 Mother, Father, and Grandmother filed a joint brief in support of a private guardianship, asserting that Grandmother could maintain a positive and safe relationship between A.B. and Mother as she had done for two years.

¶15 The District Court conducted the termination hearing on February 6, 2019. The court heard testimony from Mother; Darren Ashby, a licensed addictions counselor; CPS Kate Larcom, Child and Family Services Child Welfare Manager; Candace Miera, Licensed Addictions Counselor with the Recovery Center; Rylie Shade, visit coach with Evolution Services; CPS Miranda Sanderson; Mother's sister; and Grandmother.

¶16 Mother testified that A.B. had been living and doing well in Grandmother's care for two years and that she signed a consent for Grandmother to have guardianship of A.B. She acknowledged that she continued to use methamphetamine and only submitted one clean UA sample in May 2018. She stated that she did not "believe inpatient [treatment] would be the right fit" for her; she was doing the work she was supposed to do, just "not in the time frame that was allotted." Mother stated that she preferred guardianship over

termination, that she and Grandmother co-parented very well, and that if Grandmother was unavailable to parent, then Mother's sister would fill in that role as co-guardian.

¶17 Rylie Shade, a visit coach at Evolution Services who worked with Mother to improve her parenting skills, stated that Mother attended nearly all of her supervised visits with A.B. and showed great progress with her parenting. Shade believed that Mother was able to meet A.B.'s emotional and physical needs and that they had a "very special bond." She testified that if Mother reported that she was using, she would not go to Grandmother's house to be around A.B. She testified that she and Mother had many conversations regarding her use of methamphetamine and how that could affect A.B. She testified that a large concern for her was that Mother needed to see A.B. more consistently, and that when Mother was using, she would not visit her son. She believed a guardianship would be in A.B.'s best interests instead of termination. She testified that A.B. and Grandmother had a strong bond and that Grandmother would put A.B.'s needs first, even if that contrasted with Mother's wishes.

¶18 Regional CPS Supervisor Kate Larcom testified that she had supervised the social workers assigned to Mother's case since December 2016 and participated in ongoing decision-making meetings concerning A.B.'s Permanency Plan. Based on her experience and discussions with the CPSs, the Department determined that it was in the best interests of A.B. to proceed with adoption in the Permanency Plan. CPS Larcom testified that when the Department determined that adoption was preferable to guardianship, it assessed substantial relationships, A.B.'s age, A.B.'s wishes, the parents' wishes, the need for a subsidy, and the needs of A.B., as outlined in the CFS manual. According to CPS Larcom,

adoptions are more permanent than guardianships and do not leave A.B.'s placement open to litigation to dissolve a guardianship, thus providing A.B. with stability. Adoptions also have the potential to provide financial assistance that guardianships do not. CPS Larcom testified that she had experience where youths were involved in guardianships. She stated that she had seen how litigation surrounding guardianships impacts children and that foster children often feel they have little voice in their permanency plans. CPS Larcom testified that if proceedings to dissolve a guardianship are initiated, the Department comes back into the picture and further disrupts the children's lives with renewed evaluations and interference.

¶19 The Department believed that adoption was in A.B.'s best interests because Mother had ample opportunities to complete her treatment plan and had not been successful. CPS Larcom testified that the parents' and Grandmother's focus for requesting guardianship was based on Mother's needs and not necessarily A.B.'s best interests. CPS Larcom explained that Grandmother expressed that she was concerned that termination, rather than guardianship, would impact Mother's mental health and she feared Mother would overdose. According to the Department, "what's in the child's best interests is different than what the family feels is in the child's best interests. And I believe it's – they're looking out for what's in the family's best interests, which is absolutely within their role and that's where the – discrepancy is." According to CPS Larcom, if the Department had the facts to support a guardianship, it already would have done so.

¶20 CPS Miranda Sanderson, the social worker assigned to A.B.'s case since 2017, also testified at the termination hearing and agreed with CPS Larcom. CPS Sanderson

explained that Mother failed to complete her treatment plan and, in her opinion, would not make the required changes in a reasonable period of time to address her methamphetamine use and to safely parent A.B. She also believed that the motivation behind guardianship was concern for Mother and not for A.B.'s best interests. She further testified that granting a guardianship would continue to enable Mother and reward her for not following the treatment plan. She testified that she saw no motivation from Mother to parent full-time because of her drug use. She testified that she believed A.B. needed permanency, and adoption by Grandmother was the only form of permanency she recommended because there were too many unknowns with guardianship.

¶21 Grandmother and Mother's sister testified in favor of guardianship. Grandmother stated that it was important for Mother to continue to try to parent, and that was why guardianship was preferable to termination of Mother's parental rights. Grandmother testified that Mother and A.B. were absolutely bonded and Mother "truly has A.B.'s best interests at heart despite the fact that she is encompassed with addiction." She did not think that Mother would subject A.B. to litigation in a guardianship. She testified that she had already provided A.B. with a sense of permanency and would continue to do so. She said that she was financially capable of supporting him, and she wanted a guardianship instead of termination of Mother's rights.

¶22 On March 18, 2019, the District Court issued its findings of fact, conclusions of law, and order terminating Mother's parental rights and granting the Department permanent legal custody with the right to consent to adoption. The court found that the Department made reasonable efforts to finalize the Permanency Plan, including developing treatment

plans for Mother and offering her evaluations and services. The court found that Mother was still using methamphetamine, had twenty-one months to comply with her court-approved treatment plan, and did not comply. The court found that the excessive use of methamphetamine affected Mother's ability to care and provide for the child and that it was unlikely to change within a reasonable time.

STANDARDS OF REVIEW

¶23 This Court reviews a district court's termination of parental rights for an abuse of discretion. *In re R.J.F.*, 2019 MT 113, ¶ 20, 395 Mont. 454, 443 P.3d 387 (citing *In re A.S.*, 2016 MT 156, ¶ 11, 384 Mont. 41, 373 P.3d 848). This Court will not disturb a district court's decision on appeal unless "there is a mistake of law or a finding of fact not supported by substantial evidence that would amount to a clear abuse of discretion." *In re D.B.*, 2012 MT 231, ¶ 17, 366 Mont. 392, 288 P.3d 160. An abuse of discretion occurs when the district court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice. *In re D.B. & D.B.*, 2007 MT 246, ¶ 16, 339 Mont. 240, 168 P.3d 691. A district court has abused its discretion if its findings of fact are clearly erroneous or its conclusions of law are incorrect. *In re D.B.*, ¶ 16. "A factual finding is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if review of the record convinces the Court a mistake was made." *In re J.B.*, 2016 MT 68, ¶ 10, 383 Mont. 48, 368 P.3d 715.

DISCUSSION

¶24 A district court may order the termination of the parent-child legal relationship if there is clear and convincing evidence that the child was adjudicated a youth in need of care, that the parent failed to comply with an appropriate treatment plan, and if the condition or conduct that rendered the parent unfit is unlikely to change within a reasonable time. Section 41-3-609(1)(f), MCA. When considering any of the relevant factors in determining the likelihood of that change, the court must give primary consideration to the physical, mental, and emotional conditions and needs of the child. Section 41-3-609(3), MCA.

¶25 Mother argues that the District Court erred in terminating her parental rights because the Department failed to prove by clear and convincing evidence that every requirement of the termination statute has been satisfied. She argues that: (1) the District Court erroneously concluded that Mother's conduct was unlikely to change within a reasonable time; and (2) it was not in A.B.'s best interests to terminate Mother's parental rights because substantial evidence showed that guardianship was in A.B.'s best interests.

¶26 *1. Did the District Court err when it found that the conduct or condition rendering Mother unfit to parent was unlikely to change within a reasonable time?*

¶27 To determine that the condition or conduct that rendered a parent unfit is unlikely to change within a reasonable time, thus supporting termination, the court must find that the parent's conduct or condition renders the parent unfit, unable, or unwilling to give the child adequate parental care. Section 41-3-609(2), MCA. The court should consider the excessive use of a narcotic or dangerous drug that affects the parent's ability to care and

provide for the child. Section 41-3-609(2)(c), MCA. Under this statute, the question is not merely whether a parent has made progress or would make some progress in the future, but whether the parent is likely to make enough progress within a reasonable time to overcome the circumstances rendering her unfit to parent. *In re D.F.*, 2007 MT 147, ¶ 43, 337 Mont. 461, 161 P.3d 825 (citing § 41-3-609(1)(f)(ii), MCA). To determine whether the conduct or condition is likely to change, the court is "required to assess the past and present conduct of the parent. We do not have a crystal ball to look into to make this determination, so it must, to some extent, be based on a person's past conduct." *In re S.C.L.*, 2019 MT 61, ¶ 9, 395 Mont. 127, 437 P.3d 122 (citations omitted).

¶28 Mother had many conversations with the court and with her counselors regarding her methamphetamine use and how it affected her ability to parent. Mother stated that when she was using, she would not visit A.B., and other testimony confirmed this. She admits that although she continued to struggle with relapse, she was honest about her relapses and showed that she wanted to continue to try to parent. Shade, Mother's parenting coach from Evolution Services, testified that Mother was successful in her parenting abilities, and Grandmother testified that Mother and A.B. had a good bond and that Mother would visit frequently.

¶29 The District Court found that Mother continued to use methamphetamine and did not successfully attend inpatient treatment as recommended by her counselors. The District Court granted an extension to allow Mother to work on her treatment, noting "we're giving Mother an extra opportunity." However, Mother had only one clean UA in over two years of Department involvement despite the various evaluations, counseling, and

inpatient treatment offered to her. The evidence showed that when Mother was using, she avoided visiting A.B. The District Court did not clearly err by finding clear and convincing evidence that the conduct or condition rendering Mother unfit to parent was unlikely to change within a reasonable time.

¶30 *2. Did the District Court abuse its discretion when it found that Mother did not overcome the presumption that termination was in A.B.'s best interests and terminated her parental rights instead of granting guardianship?*

¶31 If a child is out of the home for fifteen of the most recent twenty-two months, the Department must file a petition for termination unless a specific exception applies. Sections 41-3-604(1)(a)-(c), MCA. Mother argues that she is entitled to the exception in (1)(a), which eliminates the mandatory filing if the child is being cared for by a relative. But as the Department argues and we have held, it retains discretion to file even when an exception applies. *See In re C.W.E.*, 2016 MT 2, ¶¶ 14-15, 382 Mont. 65, 364 P.3d 1238.

¶32 There is a presumption that termination is in the child's best interests if the child has been in an out-of-home placement for fifteen out of the most recent twenty-two months. Section 41-3-604(1), MCA. The parties do not dispute that the presumption has arisen. A.B. was in out-of-home placement with Grandmother for almost all of the most recent twenty-two months when the Department filed its Termination Petition.

¶33 The District Court found that Mother did not overcome the presumption that termination of her parental rights was in A.B.'s best interests based on Mother's extensive history of drug use and her failure to make sufficient progress in her treatment plan. The court found, based on the testimony presented, that Mother was unwilling to address her addiction and its impact on her ability to parent A.B. The court found that Mother failed

to complete the recommended inpatient chemical dependency treatment and did not achieve and maintain sobriety. The Court considered A.B.'s need for a stable, consistent, and safe primary caregiver and determined that Mother could not provide that role for A.B. within a reasonable time, and it was not persuaded that guardianship was in A.B.'s best interests.

¶34 The District Court found that it was in A.B.'s best interests to terminate Mother's parental rights. It considered CPS Larcom's testimony that adoption grants greater stability to the child because there is no future risk of litigation over guardianship. It found further that Mother had not given priority to A.B.'s stability and permanency and concluded that A.B. should not be left subject to Mother's right to challenge his placement in the future. The court weighed the evidence before it and found that granting guardianship without terminating Mother's parental rights would "subordinate the child's needs for permanency to meet the mother's timeline of becoming able to parent sometime in the next 15 years, which is not reasonable."

¶35 Mother asserts that overwhelming evidence showed that termination was not in A.B.'s best interests because he was in a stable, safe placement with Grandmother; Mother maintained consistent visits with A.B.; Mother and A.B. had a significant bond; and the family and other witnesses testified against termination. Mother argues that the Department failed to present testimony or evidence demonstrating her substance use negatively impacted A.B. She asserts that the court failed to consider this evidence, instead focusing on Mother's failure to maintain sobriety and engage in treatment. Mother argues

that the District Court erred when it found that the only form of permanency was through adoption and instead asserts that A.B.'s best interests would be served by guardianship.

¶36 Finally, Mother asserts that the District Court failed to consider the credible testimony in support of guardianship presented by the CASA, Shade, and the family. Mother asserts that the Department's witnesses who testified that termination was in A.B.'s best interests based their testimony on generalities regarding Mother's methamphetamine use, the general possibility that A.B. may need financial support in the future, and the possibility that a guardianship may subject A.B. to future litigation. She points to the testimony that A.B.'s health and safety needs were being met by Grandmother and that the family desired guardianship.

¶37 The Department contends that the District Court correctly applied the presumption in favor of termination and that Mother did not overcome that presumption. The Department argues that the request for guardianship was really an argument that guardianship was better for Mother, not for A.B. CPSs Larcom and Sanderson both testified that the Department discussed guardianship and termination as options, ultimately deciding to pursue termination because, in their view, the parties were seeking guardianship for Mother's best interests, not for A.B.'s. The Department asserted that it was in A.B.'s best interests to terminate parental rights because of Mother's continued drug use and failure to make sufficient progress in her treatment plan. It asserted that Mother was not able to meet A.B.'s basic needs. The Department's role is to determine what is best for the child, not what is best for the family, and the Department believed that adoption was more in A.B.'s best interests based on the CPSs' experience.

¶38 "Children cannot always afford to wait for their parents to be able to parent." *In re L.S.*, 2003 MT 12, ¶ 15, 314 Mont. 42, 63 P.3d 497. We have held that if a district court finds the statutory criteria supporting termination are met, "no limitation requires the district court to consider other options prior to terminating parental rights." *In re T.S.*, 2013 MT 274, ¶ 30, 372 Mont. 79, 310 P.3d 538. "[T]he statute's permissive language gives district courts discretion in deciding whether to terminate parental rights." *In re C.M.*, 2015 MT 292, ¶ 35, 381 Mont. 230, 359 P.3d 1081. A child's need for a permanent, stable, and loving home supersedes a parent's right to parent the child. *In re D.A.*, 2008 MT 247, ¶ 21, 344 Mont. 513, 189 P.3d 631 (citing *In re A.T.*, 2006 MT 35, ¶ 20, 331 Mont. 155, 130 P.3d 1249).

¶39 The District Court thoughtfully considered guardianship as well as termination and ultimately determined that termination and adoption were in A.B.'s best interests. This was supported by the court's experience with Mother for the prior three years, testimony regarding guardianship and its challenges, and its determination that Mother and Grandmother sought guardianship for Mother's needs, not for A.B.'s. This determination, based on the record before it, was within the court's discretion.

¶40 Based on its history with the case, its familiarity with the family through the years of court proceedings, and the testimony it received at the termination hearing, the District Court found that the reasons for guardianship were not in A.B.'s best interests and that the evidence supported termination. Reviewing the testimony and evidence presented in the District Court in the light most favorable to the prevailing party, we cannot conclude that the court abused its discretion when it found that Mother failed to overcome the

presumption that termination was in A.B.'s best interests and that adoption was preferable to guardianship. We are not in a position to evaluate the evidence for a different outcome; we determine only whether the court abused its discretion. *Woerner v. Woerner*, 2014 MT 134, ¶ 29, 375 Mont. 153, 325 P.3d 1244 (citations omitted). The court did not act arbitrarily, without employment of conscientious judgment, or exceed the bounds of reason resulting in substantial injustice. *In re D.B. & D.B.*, ¶ 16. It had substantial, credible evidence which it did not misapprehend to support its determination that it was in A.B.'s best interests to terminate Mother's parental rights.

CONCLUSION

¶41 The District Court did not err when it determined that Mother's condition or conduct rendering her unfit to parent was unlikely to change within a reasonable time. It did not abuse its discretion when it determined that termination was in A.B.'s best interests and that Mother did not overcome the presumption in favor of termination. We affirm.

/S/ BETH BAKER

We concur:

/S/ MIKE McGRATH
/S/ JIM RICE
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR

Justice Ingrid Gustafson, concurring.

¶42 Based on the standard of review—abuse of discretion—I concur with the majority's opinion that the District Court did not abuse its discretion in terminating Mother's parental rights. I write, however, to point out my concerns regarding this case and to provide information as to myths surrounding guardianships in child dependency cases.

¶43 While under our standard of review, I concur the District Court did not abuse its discretion in terminating Mother's rights, I do believe the circumstances of this case would have been more appropriately resolved through a guardianship as was advocated for by Grandmother (the adoptive placement), Mother, Father, the guardian ad litem, and the CASA worker.

¶44 There is little debate that children generally do better when they maintain regular, ongoing contact with their family of origin. Montana's own child dependency policy supports this. It is the policy of the state of Montana to "provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for the children's care and protection" and to "achieve these purposes in a family environment and *preserve the unity and welfare of the family* whenever possible." Section 41-3-101(1)(a)-(b), MCA (emphasis added). The loss a child experiences when separated from a parent is profound and can last into adulthood. *See* Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 Marq. L. Rev. 1161, 1165-69 (2019); *see also* Erin Sugrue, Alia Innovations, *Evidence Base for Avoiding*

Family Separation in Child Welfare Practice: An Analysis of Current Research – July 2019 (2019), https://perma.cc/CU4D-JTM6. The factor most closely associated with positive outcomes for children is when they remain safely connected to their families. Logically then, it is counterproductive to terminate a parent's rights when such does not increase the overall safety or stability of the child and is not in the best interest of the child's family.

¶45 Montana has long included guardianship as a permanency option, which advances its overarching policy of preserving the unity and welfare of the family in child dependency cases. Sections 41-3-444, -445(8), MCA. In 1999, HB 180—a bill requested by the Department to authorize guardianship as a permanency option—was adopted. *See* 1999 Mont. Laws ch. 428. Pursuant to the legislative history, the primary purposes of HB 180, initially codified at § 41-3-421, MCA (1999), and now renumbered as § 41-3-444, MCA, was to increase permanent placement options for a child; promote reunification; provide an alternative for children for whom there is no compelling reason to terminate parental rights, yet cannot live at home; provide for situations where a child has strong bonds with the parent or other reasons when parental rights are not terminated, but permanent placement with the parents is not possible; allow children to stay in families when relationships have been formed; look at placement through the eyes of a child; and to ensure those becoming permanent guardians are committed to a long-term relationship with the child.

¶46 In 1994 with the passage of the Social Security Act Amendments of 1994, Pub. L. No. 103-432, § 208, 108 Stat. 4398, 4457-59—and later expanded in 1997 through the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 301, 111 Stat. 2115,

2127-28—States were able to conduct child welfare demonstration projects involving the waiver of certain requirements of Titles IV-B and IV-E of the Social Security Act. The waivers granted States flexibility in using Federal funding for alternate services and supports—including subsidized guardianships—that promote safety, permanence, and well-being for children within the child protection system. Unfortunately, since becoming one of eleven original states to have implemented a subsidized guardianship demonstration and thereafter opting to continue with its guardianship assistance program (GAP) [1] under the Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 101, 122 Stat. 3949, 3950-53, *see* Children's Bureau, U.S. Dep't of Health & Human Servs., *Synthesis of Findings: Subsidized Guardianship Child Welfare Waiver Demonstrations* 2 (2011), https://perma.cc/CNC6-CYER, it appears Montana has underutilized guardianships as an effective permanency option.

¶47 As partially demonstrated in this case, a variety of myths and misconceptions exist regarding the safety, permanency, and effectiveness of guardianships. These myths and misconceptions include but are not necessarily limited to: guardianships are not permanent and have higher re-entry rates in the child welfare system; guardianships result in worse outcomes for children; Montana will not approve subsidy payments for guardianships;

[1] GAPs provide financial support for children exiting foster care to permanent guardianships with kin. They have steadily expanded such that as of September 2017, 36 states and the District of Columbia had approved GAPs. Assistant Sec'y for Planning & Evaluation, U.S. Dep't of Health & Human Servs., *Title IV-E GAP Programs: A Work in Progress* 1 (2017), https://perma.cc/R5CQ/BMQL.

guardianships can be easily undone; and guardianships are only appropriate for older children.

Guardianships Are as Permanent as Adoption.

¶48 Research has shown the availability of guardianships increases overall family permanence. Research relating to subsidized guardianships has found no appreciable differences in stability among comparable groups of children exiting to adoption as compared to those exiting to guardianship. Children's Bureau, U.S. Dep't of Health & Human Servs., *Synthesis of Findings: Subsidized Guardianship Child Welfare Waiver Demonstrations* 19-20 (2011), https://perma.cc/CNC6-CYER.

¶49 The Department's most recent Reports Oriented Management (ROM) data[2] is consistent with these research findings in that re-entry rates into the child dependency system were lower for children exiting to guardianship than those for children exiting to adoption over the last five years. The ROM data shows children exiting to guardianship on average spent 348 days less time in foster care prior to guardianship finalization than those in foster care prior to adoption finalization. Resoundingly, the research suggests permanency is more closely tied to the child's relationship with his/her placement than to an ultimate legal designation. Children's Bureau, U.S. Dep't of Health & Human Servs., *Synthesis of Findings: Subsidized Guardianship Child Welfare Waiver Demonstrations* 18-20 (2011), https://perma.cc/CNC6-CYER.

[2] Available through the Department and soon to be available on the Department's website.

Guardianships Do Not Result in Worse Outcomes for Children.

¶50 Research relating to subsidized guardianships has found no appreciable differences in child well-being—school performance, safety, engagement in risky behaviors, access to and satisfaction with services and supports, and overall quality of life—among comparable groups of adopted and guardianship children. *See* Children's Bureau, U.S. Dep't of Health & Human Servs., *Synthesis of Findings: Subsidized Guardianship Child Welfare Waiver Demonstrations* 20 (2011), https://perma.cc/CNC6-CYER. Further, research shows subsequent abuse and neglect—re-entry into the child welfare system—is lower among children discharged to guardianship as compared to adopted children. Leslie Cohen & Mark Testa, Children & Family Research Ctr., *Subsidized Guardianship and Permanence* (2004), https://perma.cc/28FD-W626. In subsidized guardianship waiver demonstrations, research indicates guardianship significantly decreases the time to permanency, *see* Children's Bureau, U.S. Dep't of Health & Human Servs., *Synthesis of Findings: Subsidized Guardianship Child Welfare Waiver Demonstrations* 18 (2011), https://perma.cc/CNC6-CYER, an area identified by federal audit of the Montana Department as needing substantial improvement. The Department has not demonstrated outcomes for children exiting to guardianship to be any worse than those exiting to adoption in Montana. In fact, evidence from Montana demonstrated children who exited care to adoption are not safer nor do they have better well-being outcomes than children who exited care to guardianship. James Bell Assocs., Children's Bureau, U.S. Dep't of Health & Human Servs., *Profiles of the Title IV-E Child Welfare Waiver Demonstration*

Projects: Volume 1: Demonstrations Active between Federal Fiscal Years 1996 and 2012 113 (2013), https://perma.cc/5KEU-5BNF.

Montana Will Subsidize Guardianships.

¶51 As discussed above, Montana was one of eleven states to have originally implemented a subsidized guardianship waiver demonstration, following which it elected to continue with a GAP post the initial demonstration period. Contrary to CPS Larcom's testimony, the Department has not, under its current Child and Family Services Division Administrator, denied any request for a guardianship subsidy, even if the child is not IV-E eligible, nor has the idea that adoptions are more permanent than guardianships been a "hot topic" of Montana's federal review as intimated to by CPS Larcom.[3] As discussed above, the legislative history of § 41-3-421, MCA (1999), now § 41-3-444, MCA, indicates guardianship was added to promote safety, permanence, and well-being for children within the child protection system, and to this end, the Legislature also provided a means for subsidizing guardianships.

Guardianships Are Not Only Appropriate for Older Children.

¶52 Pursuant to § 41-3-445(8), MCA, Montana's permanency options include: reunification, permanent placement with the noncustodial parent, adoption, guardianship, and long-term custody in a planned permanent living arrangement. While there is statutory preference for reunification with a parent, there is no statutory preferred permanency option

[3] While it is accurate Montana's federal review identified deficiencies in meeting timely permanency standards, the deficiencies relate to the average time a child spends in care prior to adoption, rather than a conclusion that adoption in Montana is more permanent than guardianship.

between guardianships and adoptions. When initially adopted, § 41-3-421, MCA (1999), now § 41-3-444, MCA, permitted a guardianship only if the child was at least 12 years old or in a group of siblings at least one of whom was at least 12 years old. Recognizing a child's age should not preclude the safety, permanency, and well-being a guardianship could offer, this age limitation, at the request of the Department, was eliminated nearly twenty years ago in 2001. *See* 2001 Mont. Laws ch. 281, § 15 (codified as § 41-3-444, MCA).

Guardianship Are Not Easily Undone.

¶53 With some frequency CPS workers express the idea that guardianships are easily undone merely by a parent filing a request to terminate the guardianship after dismissal of the child dependency case. In this case, CPS Larcom testified her main objection to a guardianship in this case was that it "would leave the child open to continued litigation for the next 15 years" as a parent could potentially seek to dissolve a guardianship.[4] The incidence of termination of guardianships is very rare, and the incidence of termination of guardianships not supported by the Department are even more rare. It does not appear the Department has even been involved in any contested legal actions over the past five years involving a parent petitioning to dissolve a previously ordered guardianship. CPS Larcom's testimony actually highlighted the infrequency and unlikelihood of this occurring. CPS Larcom, who has worked for the Department as a social worker, a CPS

[4] It is noted this idea is incongruous with the Department's offering Mother a guardianship earlier in the case. When Mother was earlier offered the option of guardianship, no concern was expressed that she would engage in years of litigation to undo the guardianship in the future.

supervisor, and now as a regional child welfare manager—working a total of 11 years for the Department—testified she had *never* seen a scenario where a parent attempted to undo a guardianship, was denied by the court, and then came back again. The risk of 15 years of litigation in this case seems far exaggerated. CPS Larcom, after considerable prompting by the State, did testify about one particular guardianship termination action in which the Department took no position. From this isolated case, it is not possible to conclude with any reliability that A.B. was at risk of 15 years of future litigation or that future litigation would actually be contrary to A.B.'s best interests. Here, Mother and Grandmother are co-parenting, and it is clear their intention is to continue to do so. Mother has a strong bond with A.B., and if Mother and Grandmother believe Mother is able to appropriately parent in the future, it is likely A.B. will return to Mother's care regardless of the legal designation of his adoption by Grandmother. While not an abuse of discretion, termination of Mother's parental rights to avoid the very remote chance of future litigation in this case did little, if anything, to improve A.B.'s safety, permanency, or well-being.

¶54 On a broader basis though, guardianships granted pursuant to § 41-3-444, MCA, are not easily revoked. A parent would have to file a petition to revoke the guardianship. The court must hold a hearing on the request and the Department, the guardian, and other persons directly interested in the welfare of the child must be provided notice of the hearing. § 41-3-444(6), MCA. The parent petitioner would then have to establish at hearing that it is in the child's best interest to revoke the guardianship. This, by its nature, would require not only that the parent petitioner demonstrate she or he had successfully addressed the condition rendering him or her unable to parent when the guardianship was

established, but also that at the time of the hearing, it is in the child's best interests to revoke the guardianship and restore custody to the parent rather than to the Department. Section 41-3-444, MCA. If the parent is able to meet this high evidentiary hurdle, why would the Department desire the child to be maintained in a situation that no longer meets his or her best interests?

¶55 Further, I believe the Opinion, to some extent, misconstrues Mother's argument on appeal. Mother does not assert she is capable of parenting A.B. on a full-time basis, nor does she seriously contest the District Court's finding that the condition rendering her unable to parent on a full-time basis is not expected to resolve in a reasonable period of time. Rather, Mother argues that given the particular circumstances here—her strong bond with A.B., her near daily interaction with A.B., her current and expected co-parenting of A.B., and the overall family dynamic—granting Grandmother's petition for a guardianship, rather than terminating her parental rights and Grandmother then adopting A.B., is in A.B.'s best interests.

¶56 In this case, A.B. resides with Grandmother and has done so for over two years. Despite this, A.B. has a strong, close bond with Mother, who provides significant parenting to A.B. When asked about the impact on A.B. if his ties to his mother were permanently severed, CPS Larcom admitted "mother should have continued contact with A.B."—yet the Department advocated for a disposition, which is arguably designed to eliminate a relationship between A.B. and his Mother. Grandmother and Mother testified they have been co-parenting A.B. and CPS Larcom testified Grandmother is assertive enough to challenge Mother and look out for A.B.'s best interests. Grandmother has, throughout the

duration of the case, proven she is able to keep A.B. safe, while maintaining a positive and safe relationship with Mother, and she undoubtedly would continue to do so whether the legal relationship be that of guardian or adoptive parent. It is unrefuted Mother has participated in the care of A.B. and made substantial gains in parenting skills. Mother and Grandmother—who is the Department's identified adoptive placement and who the Department believes has the capacity to determine A.B.'s best interest and to act to meet those interests—agree that given time, Mother could regain her ability to parent A.B. and that, if she does so, it would be in A.B.'s best interest to return to Mother's care. While Grandmother expressed concern for her daughter that termination of Mother's parental rights was not in Mother's best interests, there was no evidence Grandmother would forego A.B.'s best interests merely because she also has concerns for her own daughter. All members of A.B.s family, including Grandmother, Mother, and Father, as well as A.B.'s visit coach, the Guardian Ad Litem, and the CASA worker believe guardianship, rather than termination, is in A.B.'s best interest.

¶57 The testimony of CPS Larcom and CPS Sanderson expressing a preference for adoption over guardianship seems related to a generalized belief—which is now being shown to be unfounded by the emerging research—that adoption is the preferred permanency option to a guardianship, rather than to an individualized consideration of A.B.'s best interests under the circumstances of this case. CPS Larcom testified that in her professional opinion adoption is the best permanency option, "All my training and experience, in the child welfare systems, says that the primary consideration, as an alternative plan [to reunification], should be adoption." Unfortunately, the testimony of

the CPS workers also demonstrates a desire to sanction Mother for failing to adequately address her substance use disorder. CPS Larcom admitted guardianship would have been available to Mother a year prior because she was "far more engaged in her treatment" but was now not being offered. CPS Sanderson actually testified that not terminating Mother's rights would "almost reward [Mother], in a way, for not following her treatment plan. That her - - she would continue to still have her rights." This testimony not only discounts the concept that what is in this family's best interest is quite likely in A.B.'s best interests, it also shows a fundamental lack of understanding of the disease of addiction.

¶58 With very little to no risk Mother would ever seek to dissolve the guardianship,[5] termination of Mother's parental rights—such that Grandmother is now his mother and Mother is now his sister—provided no real benefit to A.B. in terms of stability, permanency, and well-being, while simultaneously disrupting the best interests of his family. Further, in the event of Grandmother's death or incapacity, the termination of Mother's parental rights would eliminate Mother as a future placement option—even if at that time, she continues to have a strong parental bond with A.B., is a safe and appropriate caregiver, and is the Department's preferred placement.[6]

[5] CPS Larcom identified Father as her primary concern for future litigation to dissolve the guardianship. Father's parental rights have been terminated and he has not appealed the termination. Mother and Grandmother both testified Mother would not file in court to regain custody of A.B.

[6] Department policy precludes placement with individuals whose parental rights to their children have been terminated.

¶59 It is, at best, incongruous for the Department to assert Grandmother is the primary caregiver best suited for making decisions on behalf of A.B. and determining A.B.'s best interests and providing for them, but then not defer determination of what is in A.B.'s best interest—preservation of his Mother's parental rights—to her and instead force an adoption upon her. Here, there is no doubt Mother will continue to be engaged in A.B.'s life as she has been over the duration of this case. In the event Mother regains the ability to parent on a full-time basis, Grandmother will most likely return A.B. to her care, regardless of the legal termination of Mother's parental rights. Under the circumstances created by the Department here, it is unlikely Grandmother will seek further assistance from the Department, even if she were in need of such. Rather than seek termination of Mother's parental rights, I believe it would have been far more prudent for the Department to work *with* A.B.'s family, *not against them*, to accomplish the guardianship.

/S/ INGRID GUSTAFSON

Justice Dirk Sandefur and Justice Laurie McKinnon join in the concurring Opinion of Justice Gustafson.

/S/ DIRK M. SANDEFUR
/S/ LAURIE McKINNON

DA 19-0494

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 66N

IN THE MATTER OF:

K.M.V. and D.R.V.,

Youths in Need of Care.

APPEAL FROM: District Court of the Twenty-First Judicial District,
In and For the County of Ravalli, Cause Nos. DN 17-14 and DN 17-15
Honorable Jennifer B. Lint, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Katy Stack, Attorney at Law, Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Mardell Ployhar, Assistant Attorney General, Helena, Montana

William E. Fulbright, Ravalli County Attorney, Hamilton, Montana

Submitted on Briefs: February 12, 2020

Decided: March 24, 2020

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 M.V. (Mother) appeals from the Findings of Fact, Conclusions of Law[,] and Order Terminating Parental Rights issued by the Twenty-First Judicial District Court, Ravalli County, on March 4, 2019. On appeal, Mother argues the District Court erred when it relied on her continued relationship with S.V. (Father) in terminating her parental rights to K.M.V. and D.R.V. (Children). She maintains, first, that her right to due process was violated because she was never given notice that she was required to separate from Father in order to reunify with Children and, second, that her treatment plan was not appropriate because it did not require her to separate from Father. She further challenges the District Court's findings that the conduct or condition rendering her unfit is unlikely to change within a reasonable time as unsupported by substantial evidence. She finally challenges the admission of hearsay testimony at the termination hearing.

¶3 On August 10, 2017, the Department of Public Health and Human Services, Child and Family Services Division (Department), removed Children from Mother and Father's home, following years of reported neglect, squalid living conditions, bruises on Children, and domestic violence in the home. On October 5, 2017, Mother stipulated to adjudication

of Children as Youths in Need of Care (YINC) and to temporary legal custody (TLC) by the Department. On October 18, 2017, the District Court issued its written order adjudicating Children as YINC and granting the Department TLC.

¶4 On November 30, 2017, the court approved a stipulated treatment plan for Mother which identified two conditions, resulting in the abuse and neglect of Children. First, Mother was unwilling or unable to perform parental duties and responsibilities, evidenced by Children's exposure to domestic violence, Mother's failure to provide for Children's hygiene and basic needs, her inability to recognize Children's emotional and cognitive needs, and her failure to recognize Children are in need of a higher level of care. Second, Mother participated in violent altercations with Father and did not apply basic safety measures to keep Children safe. The treatment plan required Mother to complete a parenting class; participate in monitored visitation; complete an anger management assessment and follow recommendations; participate in individual and family therapy and follow recommendations; complete a child-parent assessment and follow recommendations; complete a psychological evaluation and follow recommendations; register for Medicaid; and participate in family-based therapy and parent coaching prior to reunification. Mother largely completed the tasks laid out in the treatment plan but was terminated from parent-child interaction therapy shortly before the Department filed for termination.

¶5 On November 2, 2018, the Department petitioned for termination of Mother's parental rights. The termination hearing was held February 12, 2019. At the hearing,

Father's counsel represented that Father wished to relinquish his parental rights and then filed Father's written relinquishment on February 14, 2019. Because of Father's relinquishment, the Department only presented evidence against Mother. On March 4, 2019, the court issued its order terminating Mother's and Father's parental rights. The District Court found Children to have significant special needs and require exceptional skilled parenting.[1] The court found Mother failed to successfully complete her treatment plan and the conditions that led to child abuse and neglect had not been successfully corrected. The court held that although Mother completed a parenting class, participated in monitored visitation, completed an anger management assessment, participated in individual therapy and family therapy, and completed a parent-child assessment and psychological evaluation, Mother did not successfully complete any of her treatment plan tasks because she was not able to demonstrate an understanding and ability to effectively meet Children's needs or protect them from domestic violence. The court concluded the conduct or condition rendering Mother unfit to parent was unlikely to change in a reasonable time as evidenced by her "diagnosed personality profile" and her failure to complete her treatment plan.

[1] One child has been diagnosed with Autism Spectrum Disorder and receives services through school and attends individual therapy to address behavioral outbursts. The other child has been diagnosed with Reactive Attachment Disorder, Attention Deficit Hyperactivity Disorder, and Disruptive Mood Dysregulation Disorder and also receives services through school and attends individual therapy to address inappropriate behavior. Both suffer from enuresis and encopretic accidents.

¶6 We review a district court's order terminating parental rights for an abuse of discretion. *In re T.D.H.*, 2015 MT 244, ¶ 18, 380 Mont. 401, 356 P.3d 457.

¶7 A court may terminate parental rights when (1) a child had been adjudicated as a YINC; (2) an appropriate treatment plan approved by the court has not been complied with by the parent or has not been successful; and (3) the conduct or condition of the parent rendering him or her unfit is unlikely to change within a reasonable time. Section 41-3-609(1)(f), MCA. Each factor must be supported by clear and convincing evidence. Section 41-3-609(1), MCA. A natural parent's right to the care and custody of a child is a fundamental liberty interest which courts must protect with fundamentally fair procedures at all stages of termination proceedings. *In re C.J.*, 2010 MT 179, ¶ 26, 357 Mont. 219, 237 P.3d 1282.

¶8 Upon review of the record and the District Court's order terminating Mother's parental rights, we are unconvinced Mother's due process rights were violated or that her treatment plan was not appropriate. We disagree that under the District Court's decision separating from Father was a "key task" required of Mother to reunify her with Children. Although the District Court found Father remained in the home, making it unsafe, the court's decision to terminate Mother's parental rights relied on her own unchanged conduct and conditions to terminate her parental rights. While Mother was compliant with treatment plan tasks, Mother did not successfully complete her treatment plan as she failed to address the treatment plan's two identified underlying issues. Mother continued to minimize or deny the domestic violence between her and Father and psychological

evaluators concluded Mother had antisocial personality traits and continued to lack empathy for her children.

¶9 Further, the District Court did not abuse its discretion in determining the conduct or condition rendering Mother unfit was unlikely to change within a reasonable time. After months of therapy and other services, Mother continued to minimize or deny any domestic violence in her relationship with Father and failed to demonstrate understanding of the higher level of care needed for her special needs Children. This, combined with Mother's difficult-to-treat antisocial personality traits and resistance to change, provided substantial evidence supporting the District Court's determination the conditions rendering Mother unfit were unlikely to change in a reasonable time. The District Court did not abuse its discretion in terminating Mother's rights.[2]

¶10 Finally, we decline to address Mother's hearsay arguments because she failed to object to the admission of the statements at trial and thus waived her objection. *See In re H.T.*, 2015 MT 41, ¶ 14, 378 Mont. 206, 343 P.3d 159.

[2] While we find the District Court did not abuse its discretion given the very high parenting needs of Children and Mother's inability to recognize and meet those needs, the Department could and should have been more direct and transparent in developing Mother's treatment plan to assist her in recognizing the implications of the domestic violence issues. The Department could have better informed Mother about the potential issues her continued relationship with Father could have for her reunification with Children and better prepared her for the potential she would need to be able to parent alone. Here, the Department should have directly advised Mother that choosing to stay in a relationship with Father, an abusive partner, would likely put her own parental rights at risk should Father fail to successfully address the domestic violence issues and complete his treatment plan. Her treatment plan's requirement to maintain appropriate housing with "no one residing in the home [who] is considered by [the Department] to be a threat to her children" somewhat obscured the risks to Mother's own parental rights of a continued relationship with Father.

¶11 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. The District Court's order was not an abuse of discretion.

¶12 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ JIM RICE
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR

I. Montana Resources
d. Montana Judicial District Parenting Guidelines

MONTANA FOURTH JUDICIAL DISTRICT
PARENTING GUIDELINES

A powerful cause of stress, suffering, and maladjustment in children of dissolution is not simply the dissolution itself, but continuing conflict between the parents before, during and after the dissolution. To minimize conflict over the children, the parents should agree on a parenting arrangement that is most conducive to the children's having frequent and meaningful contact with both parents with as little conflict as possible. When parents' maturity, personality and communication skills are adequate, the ideal arrangement is reasonable parental contact upon reasonable notice, since that provides the greatest flexibility. The next best arrangement is a detailed parenting agreement made by the parents to fit their particular needs and, more importantly, the needs of the children. If the parents are unable to agree, however, the following guidelines will help the parents in knowing what the presiding Judge in the Fourth Judicial District believes are generally reasonable, unless special circumstances require a different arrangement. (See Paragraph 1.17 below.) Unless these guidelines are incorporated in a court order, they are not compulsory rules, only a general direction for parents. In the event parental contact becomes an issue in court, the Judge reserves the right to set whatever parenting schedule best meets the needs of the children in that case.

1. GENERAL RULES

Parents should always avoid speaking negatively about the other and should firmly discourage such conduct by relatives or friends. In fact, the parents should speak in positive terms about the other parent in the presence of the children. Each parent should encourage the children to respect the other. Children should never be used by one parent to spy on the other. Parents should establish the basic rules of conduct and discipline to be observed by both parents and step-parents, so that the children do not receive mixed signals.

Children will benefit from continued contact with all relatives and family friends on both sides of the family for whom they feel affection. Such relationships should be protected and encouraged. But relatives, like, parents, need to avoid being critical of either parent in front of the children. Parents should have their children maintain ties with both the maternal and paternal relatives. In Montana, grandparents have a legal right to reasonable contact with their grandchildren, if it is in their best interests. Usually the children will visit with the paternal relatives during times the children are with their father and with the maternal relatives during times they are with their mother.

Parents should be discouraged from making residential changes that are disruptive to a child's lifestyle, where the parents have been or are going through a contentious dissolution/parenting case.

When the parents are sharing in the parenting of a child, or at any time prior to the entry of a decree, and both parents reside in the Fourth Judicial District, the Court will consider a change of the child's residence to a location outside the Fourth Judicial District as having a significant effect upon the child's relationship to family members and others and adjustment to his/her home, school, and community. The Court will also consider and balance the Constitutional right of the parent to travel. When the custodial parent moves out of the Fourth Judicial District, the child's residence shall not be moved outside the Fourth Judicial District without an order from the Court after hearing or upon written stipulation of the parties that is approved by the Court. The Court will consider keeping the child in the Fourth Judicial District as a positive development for the child based upon legitimate, case-specific circumstances which must be presented to the Court at a hearing with all parties present.

In cases where both parents resided in the same community at the time of separation, and then one parent left the area, thus changing the pattern of parental contact, the court will consider imposing the travel costs for the children necessary to facilitate future contact, on the parent who moved. The court will also consider other factors, however, such as the economic circumstances of the parents and the reasons prompting the move.

1.1 **Parental Communication**. Parents should always keep each other advised of their home and work addresses and telephone numbers. As far as possible, all communication concerning the children shall be conducted between the parents themselves in person, or by telephone at their residences and not at their places of employment. Consistent with our emphasis on improved parental communication, it is suggested that parents communicate well in advance about moves that will impact schooling or visitation.

1.2 **Grade Reports and Medical Information**. Parents shall provide one another with grade reports and notices from school as they are received. Parents shall communicate independently with the school and with the children's doctors and other professionals regarding the children. Each parent shall immediately notify the other of any medical emergencies or serious illnesses of the children. Each parent shall notify the other of all school or other events (like Church or Scouts) involving parental participation. If the child is taking medications, each parent shall provide or be provided with a sufficient amount of medication and the appropriate instructions.

1.3 **Clothing**. Parents shall send an appropriate supply of children's clothing with them, which shall be returned clean (when reasonably possible), with the children. Parents shall advise, as far in advance as possible, of any special activities so that the appropriate clothing may be sent.

1.4 **Withholding Support or Parental Contact**. Neither parental contact nor child support is to be withheld because of either parent's failure to comply with a court order. Only the court may enter sanctions for non-compliance. Children have a right both to support and parental contact, neither of which is dependent upon the other. In other words, no support does not mean no parental contact and no parental contact does not mean no support. If there is a violation of either a parenting or a support order, the exclusive remedy is to apply to the court for appropriate sanctions.

1.5 **Adjustments in Parental Contact Schedule**. Although there is or there may be a specific schedule, the parties are expected to fairly modify parental contact when family necessities, illnesses or commitments reasonably so require. The requesting parent shall act in good faith and give as much notice as circumstances permit.

1.6 **Parent's Vacation**. Unless otherwise specified in a court order or agreed by the parties, each parent is entitled to a reasonable period of vacation time, usually equal to that of the other parent. In the instance of extended vacation periods, i.e., summer vacations, the parents shall communicate in writing on or before May 1 of each year their choices of vacation periods.

1.7 **Insurance Forms**. The parent who has medical insurance coverage on the children shall supply, as applicable, insurance forms and a list of insurer-approved or HMO-qualified health care providers in the area where the other parent is residing. A parent who, except in an emergency, takes the children to a doctor, dentist or other provider not so approved or qualified should pay the additional cost thus created. However, when there is a change in insurance which requires a change in medical care providers and a child has a chronic illness, thoughtful consideration should be given by the parties to what is more important: allowing the child to remain with the original provider or the economic consequences of changing. When there is an obligation to pay medical expenses, the parent responsible therefore shall be promptly furnished with the bill by the other. The parents shall cooperate in submitting bills to the appropriate insurance carrier. Thereafter, the parent responsible for paying the balance of the bill shall make arrangements directly with the health care provider and shall inform the other parent of such arrangements. Insurance refunds should be promptly turned over to the parent who paid the bill for which the refund was paid.

1.8 **Child Support Abatement**. Child support, once ordered shall not abate unless a court order otherwise provides. The only way child support can be changed is by Court Order. Parents cannot agree to a change in support without Court approval. The purchase of clothing, food or other necessities do not constitute a deduction from Court-ordered child support.

1.9 **Missed Parental Contact**. When scheduled parental contact cannot occur due to events beyond either parents' control, such as illness of the child or of the parent exercising contact with the child, a mutually agreeable substituted parental contact date shall be arranged, as quickly as possible. Each parent shall timely advise the other when parental contact cannot be exercised. Missed parental contact should not be unreasonably accumulated.

1.10 **Parental Contact a Shared Experience.** Because it is intended that parental contact be a shared experience between siblings and, unless these Guidelines, a court order, or circumstances, such as age, illness, or the particular event, suggest otherwise, all of the children shall participate in any particular contact.

1.11 **Telephone Communication.** Telephone calls between parent and child shall be liberally permitted at reasonable hours and at the expense of the calling parent. Parents may call the children at reasonable hours during those periods the children are with the other parent. The children may, of course, call either parent, though at reasonable hours, frequencies and at the cost of the parent called if it is a long distance call. During long vacations the parent with whom the child is on vacation is only required to make the child available to telephone calls every five days. At all other times the parent the child is with shall not refuse to answer the phone or turn off the phone in order to deny the other parent telephone contact. If a parent uses an answering machine, messages left on the machine for the child should be returned. Parents should agree on a specified time for calls to the children so that the children will be made available.

1.12 **Mail Contact**. Parents have an unrestricted right to send cards, letters and packages to their children. The children also have the same right with their parents. Neither parent should interfere with this right.

1.13 **Privacy of Residence.** A parent may not enter the residence of the other except by express invitation of the resident parent, regardless of whether a parent retains a property interest in the residence of the other. Accordingly, the children shall be picked up and returned to the front entrance of the appropriate residence. The parent dropping the children off should not leave until the children are safely inside. Parents should refrain from surprise visits to the other parent's home. A parent's time with the children is their own, and the children's time with that parent is equally private.

TERMINOLOGY IN THE FOLLOWING SECTIONS INCLUDES PRIMARY CARETAKER, DESIGNATING THAT PERSON WITH WHOM THE CHILD SPENDS THE GREATER PROPORTION OF TIME AND SECONDARY CARETAKER, DESIGNATING THAT PERSON WITH WHOM THE CHILD SPENDS A LESSER AMOUNT OF TIME.

1.14 **Children Under Age Five.** Infants (children under eighteen months of age) and toddlers (eighteen months to three years) have a great need for continuous contact with the primary caretaker who provides a sense of security, nurturing and predictability. Generally overnight visits for infants and toddlers are not recommended unless the secondary caretaker is very closely attached to the child and is able to provide primary care. Older preschool age children (three to five) are able to tolerate limited separations from the primary caretaker. The following guidelines for children under age five are designed to take into account the child's developmental milestones as a basis for visitation. Since children mature at different rates these may need to be adjusted to fit the child's unique circumstances. These guidelines may not apply to those instances where the parents are truly sharing equally all the caretaking responsibilities for the child and the child is equally attached to both parents. Yet in the majority of situations where there is a primary caretaker and a secondary caretaker who has maintained a continuous relationship with the child but has not shared equally in child caretaking the following guidelines should generally apply:

A. **Infants ¨ Birth to Six Months.** Children need to have affectionate bonds with both parents. Overnight visits are not recommended. Time with the secondary caretaker should be spent where the child lives, as going back and forth between homes causes tension for the child. The infant's eating and sleeping routine should not be interrupted. Alternate parenting plans: (1) Three two-hour visits per week, with one weekend day for six hours; or (2) Three two-hour visits per week, with one overnight on a weekend for no longer than a twelve

hour period, if the child is not breast feeding and the secondary caretaker is capable of providing primary care.

B. **Infants ¨ Six to Eighteen Months.** Predictability and routine are important at this age. Overnight visits are still not recommended, but can be considered if the infant is going with older brothers or sisters the infant knows and trusts. Alternate parenting plans: (1) Three, three-hour visits per week with one weekend day for six hours; or (2) Same as (1), but with one overnight not to exceed twelve hours, if the child is not breast feeding and the secondary caretaker is capable of providing primary care; or (3) Child spends time in alternate homes, but spends significantly more time at one of them and no more than two twelve-hour overnights per week at the other. This arrangement should be considered only for mature, adaptable children and very cooperative parents.

C. **Toddlers ¨ Eighteen to Thirty-Six Months**. Children start to learn that things and people continue to exist even when the child can't see them. A common fear is that the primary caretaker will disappear and they may cry when a parent leaves them. Longer periods with the secondary caretaker can begin. Short visits (2-4 hours) away from the child's home are permissible; however, the child needs to take favorite things with him/her (blanket or stuffed animal or pacifier, etc.). At this age children do not understand time, or days of the week, or that they will see mother or father "tomorrow" or in "two days" or on "Sunday." When away from the primary caretaker they may feel anger and a powerful sense of loss and often do not understand why mother or father isn't there. Alternate parenting plans: (1) The secondary caretaker has the child up to three times per week for a few hours on each visit, on a predictable schedule: or (2) Same as (1) but with one overnight per week; or (3) Child spends time in alternate homes, but with more time in one than the other with two or three overnights spaced regularly throughout the week. This requires an adaptable child and cooperative parents.

D. **Preschoolers ¨ Three to Five Years Old**. The most important thing is predictability. Children can usually tolerate two days away from the primary caretaker and they should see the secondary caretaker at least once each week. Children still have a strong need to take familiar things with them. Alternate parenting plans: (1) One overnight visit (i.e. Saturday morning to Sunday evening) on alternate weekends and one midweek visit with the child returning to the primary caretaker's home at least one-half hour before bedtime; or (2) Two or three nights at one home, spaced throughout the week, the remaining time at the other home. In addition, for preschoolers, a vacation of no longer than two weeks with the secondary caretaker

1.15 **Pre-Teens and Teenagers.**

A. **Six to Twelve Years**. School age children need to see the secondary caretaker one or more times each week, and seem happiest with several visits each week. Children this age will want their own things at each home, but will wish to take some things back and forth with them for their own security. At about age seven, a child can cope better with longer periods of parental contact during summer months because they understand about time and can count and can understand what a week or month is.

B. **Thirteen Years and Up**. Friends and social activities are very important at this age. A decrease in the number of parental exchanges may be helpful. Teenagers have no need for long visits and once or twice a week for a few hours may be sufficient. One of the things teenagers need to do is learn to "separate" from parents and to achieve autonomy. They still need predictability and routine for their visits. Teens should be consulted in deciding on time-sharing plans. Teenagers tend to want one home base.

1.16. **Children in Day Care**. In families where a child has been in day care prior to the parental separation, the child may be able to tolerate flexible visits earlier because the child is more accustomed to separations from both parents. The secondary caretaker who exercises contact of a child under age five should not during the period of parental contact place the child with a baby-sitter or day care provider. If the secondary caretaker cannot be with the child personally, the child should be returned to the primary caretaker. Visiting for short periods with relatives may be appropriate, if the relatives are not merely serving as baby-sitters.

1.17. **Parental Contact with Adolescents**. Within reason the parents should honestly and fairly consider their teenager's wishes regarding parental contact. Neither parent should attempt to pressure their teenager to make a parental contact decision adverse to the other parent. Teenagers should explain the reasons for their wishes directly to the affected parent, without intervention by the other parent.

1.18. **Day Care Providers**. When parents reside in the same community, they should use the same day care provider. To the extent possible the parents should rely on each other to care for the children when the other parent is unavailable.

1.19. **Special Circumstances**.

A. **Child Abuse**. When child abuse has been established and a continuing danger is shown to exist, all parental contact with the perpetrator of said abuse should cease or only be allowed under supervision, depending on the circumstances. Court intervention is usually required in child abuse cases.

B. **Spouse Abuse**. Witnessing spouse abuse has long-term, emotionally detrimental effects on children. Furthermore, a person who loses control and acts impulsively with a spouse, may be capable of doing so with children as well. Depending on the nature of the spouse abuse and when it occurred, the court may require an abusive spouse to successfully complete appropriate counseling before being permitted unsupervised parental contact.

C. **Substance Abuse**. Parental contact should not occur when a parent is abusing drugs/alcohol.

D. **Long Interruption of Contact**. In those situations where a parent has not had an ongoing relationship for an extended period, parental contact should begin with brief visits and a very gradual transition to the parental contact in these guidelines.

E. **Kidnapping/Threats**. Parents who have kidnapped or hidden the children or threatened to do so should have no parental contact or only supervised parental contact.

F. **Breast Feeding Child**. Forcibly weaning a child, whether breast feeding or bottle feeding, during the upheaval of parental separation is not appropriate for the physical health or emotional well-being of the child. Until weaning has occurred without forcing, a nursing infant should have parental contact of only a few hours each. A parent should not use breast feeding beyond the normal weaning age as a means to deprive the other parent of parental contact.

G. **A Parent's New Relationship**. Parents should be sensitive to the danger of exposing the children too quickly to new relationships while they are still adjusting to the trauma of their parent's separation and dissolution.

H. **Religious Holidays and Native American Ceremonies.** Parents should respect their children's needs to be raised in their faith and in keeping with their cultural heritage and cooperate with each other on parental contact to achieve these goals. These goals should not be used to deprive a parent of parental contact.

I. **Other**. The Court may limit or deny parental contact to parents who show neglectful, impulsive, immoral, criminal, assaultive or risk-taking behavior with or in the presence of the children.

2. PARENTAL CONTACT WITH CHILDREN OVER AGE FIVE WHEN THERE IS SOLE PARENTING OR SHARED PARENTING AND PARENTS RESIDE NO MORE THAN 200 MILES APART

2.1 **Weekends**. Alternate weekends from Friday at 5:30 P.M. to Sunday at 7 P.M.; the starting and ending times may change to fit the parents' schedules. Or an equivalent period of time if the secondary caretaker is not available on weekends and the child does not miss school. In addition, if time and distance allow, one or two midweek visits of two to three hours. All transportation for the midweek visits are the responsibility of the secondary caretaker.

2.2 **Mother's Day - Father's Day.** The alternate weekends will be shifted, exchanged or arranged so that the children are with their mother each Mother's Day weekend and with their father each Father's Day weekend. Conflicts between these special weekends and regular parental contact shall be resolved pursuant to Paragraph 1.9.

2.3 **Extended Parental Contact.** One-half of the school summer vacation. At the option of the secondary caretaker, the time may be consecutive or it may be split into two blocks of time. If the child goes to summer school and it is impossible for the secondary caretaker to schedule this contact time other than during summer school, that parent may elect to take the time when the child is in summer school and transport the child to the summer school session at the child's school or an equivalent summer school session in the secondary caretaker's community.

2.4 **Winter (Christmas) Vacation.** One-half the school winter vacation, a period which begins the evening the child is released from school and continues to the evening of the day before the child will return to school. If the parents cannot agree on the division of this period, the secondary caretaker shall have the first half in even-number years. If the parents live in the same community, in those years when Christmas does not fall in a parent's week, that parent shall have from Noon to 9 P.M. on Christmas Day. For toddlers and preschool age children, when the parents live in the same community, the parents should alternate each year Christmas Eve and Christmas Day so that the children spend equal time with each parent during this holiday period.

2.5 **Holidays**. Parents shall alternate the following holiday weekends: Easter, Memorial Day, the 4th of July, Labor Day and Thanksgiving. Thanksgiving will begin on Wednesday evening and end on Sunday evening; Memorial Day and Labor Day Weekends will begin on Friday and end on Monday evening; Easter weekend will begin on Thursday evening and end on Sunday evening: while the 4th of July, when it does not fall on a weekend, shall include the weekend closest to the 4th. Holiday weekends begin at 5:30 P.M. and end at 7 P.M. on the appropriate days.

2.6. **Children's Birthdays.** Like the holidays, a child's birthday shall be alternated annually between the parents. If the birthday falls on a weekend, it shall extend to the full weekend, and any resulting conflict with regular visitation shall be resolved pursuant to Paragraph 1.9. If the birthday falls on a weekday, it shall be celebrated from 3 P.M. to 9 P.M. (or so much of that period as the secondary caretaker elects to use).

2.7. **Parents' Birthdays**. The children should spend the day with the parent who is celebrating their birthday, unless it interferes with a secondary caretaker's extended visitation during vacation.

2.8. **Conflicts Between Regular and Holiday Weekends.** When there is a conflict between a holiday weekend and the regular weekend visitation, the holiday takes precedence. Thus, if the secondary caretaker misses a regular weekend because it is the primary caretaker's holiday, the regular alternating visitation schedule will resume following the holiday. If the secondary caretaker receives two consecutive weekends because of a holiday, regular alternating visitation will resume the following weekend with the primary caretaker. The parents should agree to make up missed weekends due to holiday conflicts.

2.9. **Parental Contact Before and During Vacations.** There will be no parental contact the weekend(s) before the beginning of the secondary caretaker's summer vacation visitation period(s), regardless of whose weekend it may be. Similarly, that parent's alternating weekend visitation(s) shall resume the second weekend after each period of summer vacation that year. Weekend visitation "missed" during the summer vacation period will not be "made up." During any extended summer visitation of more than three consecutive weeks, it will be the secondary caretaker's duty to arrange, for a time mutually convenient, a 48-hour continuous period of visitation for the primary caretaker unless impracticable because of distance.

2.10. **Notice of Canceled Parental Contact.** Whenever possible, the secondary caretaker shall give a minimum of three days' notice of intent not to exercise all or part of the scheduled parental contact. When such notice is not reasonably possible, the maximum notice permitted by the circumstances, and the reason therefor, shall be given. The primary caretaker shall give the same type of notice when events beyond their control make the cancellation or modification of scheduled parental contact necessary. If the primary caretaker cancels or modifies a visit because the child has a schedule conflict, the secondary caretaker should be given the opportunity to take the child to the scheduled event or appointment.

2.11. **Pick Up and Return of Children.** When the parents live in the same community, the responsibility of picking up and returning the children should be shared. Usually the secondary caretaker will pick up and the primary caretaker will return the children to that parent's residence. The person picking up or returning the children during times of parental contact has an obligation to be punctual: to arrive at the agreed time¨not substantially earlier or later. Repeated, unjustified, violations of this provision may subject the offender to court sanctions.

2.12. **Additional Parental Contact.** Parental contact should be liberal and flexible. For many parents these guidelines should be considered as only a minimum direction for interaction with the children. These guidelines are not meant to foreclose the parents from agreeing to such additional parental contact as they find reasonable at any given time.

3. PARENTAL CONTACT OF CHILDREN OVER AGE FIVE WHEN SOLE PARENTING OR SHARED PARENTING AND PARENTS RESIDE MORE THAN 200 MILES APART

3.1 **Extended Parental Contact.** All but three weeks of the school summer vacation period and, on an alternating basis, the school Winter (Christmas) vacation and Spring Break.

3.2 **Priority of Summer Break.** Summer break with the secondary caretaker takes precedence over summer activities (such as Little League) when the parental contact cannot be reasonably scheduled around such events. Even so, the conscientious secondary caretaker will often be able to enroll the child in a similar activity.

3.3 **Notice.** At least 60 days notice should be given of the date for commencing extended parental contact, so that the most efficient means of transportation may be obtained and the parties and the children may arrange their schedules. Failure to give the precise number of days notice does not entitle the primary caretaker the right to deny visitation.

3.4 **Additional Parental Contact.** Where distance and finances permit additional parental contact, such as for holiday weekends or special events, are encouraged. When the secondary caretaker is in the area where the child resides, or the child is in the area where the secondary caretaker resides, liberal visitation shall be allowed and because the secondary caretaker does not get regular visitation, the child can miss some school during the visits so long as it does not substantially impair the child's scholastic progress.

MONTANA FIFTH JUDICIAL DISTRICT
Parenting Plan Guidelines

1. A powerful cause of stress and suffering for children is not simply the divorce itself, but continuing conflict between the parents before, during and after the divorce. The parents should agree on a parenting arrangement for frequent and meaningful contact with both parents with as little conflict as possible. The ideal arrangement is for the parents to develop their own parenting plan. In the event the parenting plan becomes an issue in court, the judge will order whatever parenting plan best meets the needs of the children. Parents may be required to attend information sessions on the impact of their divorce upon children.

   Parents always should avoid speaking negatively about the other and should firmly discourage such conduct by others. Each parent should encourage the children to respect the other. Children should never be used by one parent to spy on the other. The basic rules of conduct and discipline established by the custodial parent should be the minimum standard for both parents and step-parents and should be consistently enforced by all so that the children do not receive mixed signals.

   Children benefit from continued contact with relatives and friends on both sides of the family. Such relationships should be protected and encouraged. Relatives must avoid being critical of either parent in the presence of the children. In Montana, grandparents have a legal right to reasonable visitation. Usually the children will visit with the paternal relatives during times the children are with their father and with maternal relatives during times they are with their mother.

   Where both parents resided in the same community at the time of separation and then one parent left the area, the Court may, in a proper case, consider imposing the travel costs on the parent who moved.

2. Parental Communication - Parents should always keep each other advised of their home and work addresses and telephone numbers. As far as possible, all communication concerning the children should be conducted between the parents themselves at their residences and not at their places of employment.
3. School and Medical Information - Each parent shall provide the other parent with grade reports and notices from school as they are received. School(s) shall be notified of the split households and advised to send children's school documents to each parent. Each parent shall immediately notify the other of any medical emergencies or serious illnesses of the children. Each parent shall notify the other parent of all events involving parental participation. If a child is taking medication, each parent shall provide a sufficient amount and instructions during time with the other parent.
4. Parenting Time Clothing - Each parent shall send an appropriate supply of clothing with the children for their time with the other parent. These clothes are the children's clothes, and shall be returned clean (when reasonably possible) with the children. Each parent shall advise, as far in advance as possible, of any special activities so that the appropriate clothing may be sent.
5. Withholding Support or Scheduled Parenting Time - Neither parenting time nor child support shall be withheld because of the other parent's failure to comply with a court order. Children have a right both to support and time with each parent, neither of which is dependent upon the other. <u>No support does not mean no parenting time and no parenting time does not mean no support.</u> If there is a violation of either parenting time or a support order, the exclusive remedy is to apply to the Court for sanctions.

6. Adjustments in the Parenting Time Schedule - Parents should modify parenting time when family necessities, illnesses, or commitments reasonably require. The requesting party shall give as much notice as circumstances permit.
7. Each Parent's Vacation - Unless otherwise specified in a court order or agreed to by the parents, each parent is entitled to a vacation with the children, usually equal to the vacation time spent with the other parent.
8. Medical Care and Insurance - The parent who has medical insurance coverage for the children shall supply insurance forms and a list of approved health care providers in the area where the other parent is residing. A parent who, except in an emergency, takes the children to an unapproved provider should pay the additional cost created. When there is an obligation to pay medical expenses, the parent responsible shall be promptly furnished with the bill by the other. The parents shall cooperate in submitting bills to insurance carriers. The parent responsible for paying the balance of the bill shall make arrangements directly with the provider and shall inform the other parent of such arrangements. Insurance refunds should be delivered promptly to the parent who is entitled to it.
9. Missed Parenting Time - Each parent shall notify the other parent when a scheduled parenting time cannot occur. Missed parenting time shall not be replaced unless mutually agreed upon by the parties.
10. Parenting Time with Siblings - Unless a court order or circumstances such as age, illness, or the particular event suggest otherwise, all the children shall participate in parenting time.
11. Telephone Communication - Telephone calls between parent and child shall be liberally permitted at all reasonable hours and at the expense of the calling parent. The children may call at the long distance cost of the parent called. A parent shall not refuse to answer the telephone or turn off the telephone to deny the other parent telephone contact. Messages left for the child should be returned promptly. Parents should agree on a specified time for calls so that the children will be available.
12. Mail Contact - Parents have an unrestricted right to send cards, letters, and packages to their children. The children also have the same right with their parents.
13. Privacy of Residence - A parent may not enter the residence of the other except by invitation. Parents should refrain from surprise visits to the other parent's home.
14. Infants and Toddlers - Infants (children under eighteen months of age) and toddlers (eighteen months to three years) have a great need for continuous contact with parents who provide a sense of security, nurturing, and predictability.
15. Children in Day Care - In families where a child has been in day care prior to the parental separation, the child may be able to tolerate flexible visits earlier because the child is more accustomed to separations from both parents. The parent who exercises non-residential parenting time with a child under five should be present the whole time. If the parent cannot be with the child personally, the child should be returned to the other parent.
16. Day Care Providers - When parents reside in the same community, they should use the same day care provider. To the extent possible the parents should rely on each other to care for the children when the other parent is unavailable.
17. Special Circumstances
    a. Substance abuse - Parenting time shall not occur when the parent is abusing drugs/alcohol.
    b. Long Interruption of Contact - In those situations where one parent has not had an ongoing relationship for an extended period, parenting time should begin with brief visits and a gradual transition to the parenting time schedules suggested in these guidelines.
    c. A Parent's New Relationship - Parents should not expose the children too quickly to new relationships while they are still adjusting to the trauma of separation and divorce.
    d. Religion and Culture - Parents should respect their children's needs to be raised in their faith and in keeping with their cultural heritage.

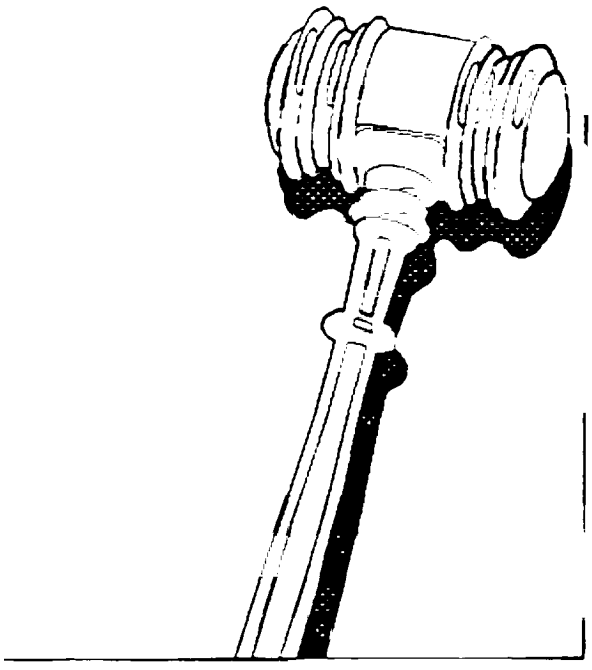
Parenting Time

1. Weekends - From Friday at 5:30 p.m to Sunday at 7:00 p.m. (The starting and ending times may change by stipulation to fit the parents' schedules) or an equivalent period of time if the parent exercising parenting time is not available on weekends and the child does not miss school. In addition, if time and distance allow, one or two midweek visits.
2. Mother's Day/Father's Day - The children are with their mother each Mother's Day and with their father each Father's Day.
3. Extended Parenting Time - One-half of the school summer vacation. If the children go to summer school and it is impossible for the other parent to schedule parenting time other than during summer school, that parent may elect to take the time when the children are in summer school and transport the children to the summer school session at the children's school or an equivalent summer school session in that parent's community. Summer parenting time supersedes children's summer activities.
4. Christmas Vacation - A period which begins the evening the child is released from school and continues to the evening of the day before the child will return to school.
5. Holidays - Parents should alternate the following holiday weekends: Easter, Memorial Day, the 4th of July, Labor Day and Thanksgiving. Thanksgiving will begin on Wednesday evening and end on Sunday evening. Memorial Day and Labor Day weekends will begin on Friday and end on Monday evening. Easter weekend begins on Thursday evening and ends on Sunday evening. The 4th of July, when it does not fall on a weekend, shall include the weekend closest to the 4th. Holiday weekends begin at 5:30 p.m. and end at 7:00 p.m. on the appropriate days.
6. Children's Birthdays - A child's birthday should be alternated annually between the parents. If the birthday falls on a school day, it should be celebrated 3:00 p.m. to 9:00 p.m.
7. Conflicts between Regular and Holiday Weekends - When there is a conflict between a holiday weekend and a regular weekend parenting time, the holiday takes precedence. If a parent receives two consecutive weekends because of a holiday, alternating parenting time resumes the following weekend with the other parent.
8. Parenting Time Before and During Vacations - There is no alternate parenting time the weekend(s) before the beginning of a parent's summer visitation scheduled parenting time, regardless of whose weekend it may be. Similarly, alternating weekend parenting time(s) shall resume the second weekend after each period of summer vacation. Weekend parenting time "missed" during the summer vacation period will not be "made up."
9. Notice of Canceled Parenting Time - Whenever possible, the parent unable to exercise parenting time, shall give three days notice to the other.
10. Pick Up and Return of Children - The responsibility of picking up and returning the children should be shared. Both parents have an obligation to be punctual.
11. Additional Parenting Time - Parenting time should be liberal and flexible.
12. Adolescents - Parents should honestly and fairly consider their teenager's wishes regarding parenting time. Neither parent should attempt to pressure their teenager to make a parenting time decision adverse to the other parent. Teenagers should explain the reasons for their wishes directly to the affected parent without intervention by the other parent.

MONTANA TENTH JUDICIAL DISTRICT

Shared Parenting Guidelines

Revised January 2015



MONTANA TENTH JUDICIAL DISTRICT
SHARED PARENTING GUIDELINES

A powerful cause of stress, suffering, and maladjustment in children of parenting actions is not simply the separation of households itself, but continuing conflict between the parents before, during, and after a family separation. To minimize conflict over the children, the parents should agree on a parenting arrangement that is most conducive to the children having frequent and meaningful contact with both parents with as little conflict as possible. When parents' maturity, personality, and communication skills are adequate, the ideal arrangement is reasonable parental contact upon reasonable notice, since that provides the greatest flexibility. The next best arrangement is a detailed parenting agreement made by the parents to fit their particular needs and, more importantly, the needs of the children. If the parents are unable to agree, however, the following guidelines will help the parents in knowing what the Judge in the Tenth Judicial District believes is generally reasonable, unless special circumstances require a different arrangement. (See Paragraph 1.5 below.) Unless these guidelines are incorporated in a court order, they are not compulsory rules, only a general direction for parents. In the event parental contact becomes an issue in court, the Judge reserves the right to set whatever parenting schedule best meets the needs of the children in that case.

1. GENERAL RULES

Upon the filing of a Petition for Dissolution or Legal Separation where there are minor children or the filing of a Petition for Parenting Plan between two unmarried individuals, the parties will be required to undertake an orientation to parenting and divorce class at UpToParents.org. Completion of the class is mandatory prior to the Court's adoption of a Parenting Plan or signing of a Decree of Dissolution, unless properly waived by order of the Court. The Certificate of Completion must be filed with the Clerk of District Court.

In addition, the Court may refer parents and parents are encouraged to access additional web-based education programs and resources, including:

CHILDREN IN BETWEEN:	**http://online.divorce-education.com**
CHILDREN IN MIDDLE:	**http://www.childreninthemiddle.com**
PARENTING WISELY:	**http://parentingwisely.com**
MY CHILD COMES FIRST:	**http://www.mychildcomesfirst.com**

Parents should always avoid speaking negatively about the other and should firmly discourage such conduct by relatives or friends. In fact, the parents should speak in positive terms about the other parent in the presence of the children. Each parent should encourage the children to respect the other. Children should never be used by one parent to spy on the other. Parents should establish basic rules of conduct and discipline to be observed by both parents and step-parents, so that the children do not receive mixed signals.

Children will benefit from continued contact with all relatives and family friends on both sides of the family for whom the children feel affection. Such relationships should be protected and encouraged. But relatives, like, parents, need to avoid being critical of either parent in front of the children. Parents should have their children maintain ties with both the maternal and paternal relatives. In Montana, grandparents have a legal right to reasonable contact with their

grandchildren, over the objection of a fit parent, if it is in the children's best interests. Usually the children will visit with the paternal relatives during times the children are with their father and with the maternal relatives during times they are with their mother.

Parents should be discouraged from making residential changes that are disruptive to a child's lifestyle.

When the parents are sharing in the parenting of a child, or at any time prior to the entry of a decree, and both parents reside in the Tenth Judicial District, the court will consider a change of the child's residence to a location outside the Tenth Judicial District as having a significant effect upon the child's relationship to family members and others and adjustment to the child's home, school, and community. The Court also will consider and balance, against the effect on the child, the Constitutional right of the parent to travel. When a parent moves out of the Tenth Judicial District, the child's residence shall not be moved outside the Tenth Judicial District without an order from the court after hearing or upon written stipulation of the parties that is approved by the court. The court will consider keeping the child in the Tenth Judicial District as a positive development for the child based upon legitimate, case-specific circumstances which must be presented to the court at a hearing with all parties present.

In cases where both parents resided in the same community at the time of separation, and then one parent left the area, thus changing the pattern of parental contact, the court will consider imposing the travel costs for the children necessary to facilitate future contact on the parent who moved. The court will also consider other factors, however, such as the economic circumstances of the parents and the reasons prompting the move.

1.1 **Parental Communication**. Unless excused from doing so by the Court, parents should always keep each other advised of their home and work addresses and telephone numbers. As far as possible, all communication concerning the children shall be conducted between the parents themselves in person or by telephone outside of their place of employment. Consistent with this emphasis on improved parental communication, it is suggested that parents communicate well in advance about matters that will impact schooling or parenting.

If the parties are unable to communicate effectively, the court or the parties may limit the communication and set forth specific methods of communication, such as using text messages only or by trading notes during pick-ups and drop-offs of the children.

1.2 Grade Reports and Medical Information. Parents shall provide one another with grade reports and notices from school as they are received. Parents may communicate independently with the school and with the children's doctors and other professionals regarding the children, and are encouraged to do so. Each parent shall immediately notify the other of any medical emergencies or serious illnesses of the children. Each parent shall notify the other of school or other events (like church or scouts) involving parental participation.

If the child has received medical care or undergone a medical procedure that requires special physical care, the parents shall inform each other of the child's special needs prior to an exchange. In addition, if the child is ill or requires special medications, each parent shall provide or be provided with a sufficient amount of medication, for his/her parenting time and the appropriate instructions.

1.3 **Clothing**. Parents shall send an appropriate supply of children's clothing with the children when going to the other parent's home, which clothing shall be returned clean (when reasonably possible) with the children. Parents shall advise, as far in advance as possible, of any special activities so that appropriate clothing may be sent.

1.4 **Withholding Support or Parental Contact**. Neither parental contact nor child support is to be withheld because of either parent's failure to comply with a court order. Only the court may determine sanctions for non-compliance. Children have a right both to support and parental contact, neither of which is dependent upon the other. In other words, non-payment of support does not justify withholding of parental contact and no parental contact does not justify not paying support. If there is a violation of either a parenting plan or a support order, the exclusive remedy is to apply to the court for appropriate sanctions.

1.5 **Adjustments in Parental Contact Schedule**. Even if a specific parenting schedule exists, the parties are expected to fairly modify parental contact when family necessities, illnesses, or commitments reasonably so require. The requesting parent shall act in good faith and give as much notice as circumstances permit to the other party.

Missed Parental Contact: When scheduled parental contact cannot occur due to events beyond either parent's control, such as illness of the child or of the parent exercising contact with the child, a mutually agreeable substituted parental contact date shall be arranged, as quickly as possible. Each parent shall timely advise the other when parental contact cannot be exercised. Missed parental contact should not be unreasonably accumulated.

1.6 **Parent's Vacation**. Unless otherwise specified in a court order or agreed by the parties, each parent is entitled to a reasonable period of vacation time, usually equal to that of the other parent. In the instance of extended vacation periods, i.e., summer vacations, and in the absence of a specific vacation schedule in the parenting plan, the parents shall communicate in writing on or before May 1st of each year their choices of vacation periods.

1.7 **Insurance Forms**. The parent who carries medical insurance coverage for the children shall supply, as applicable, insurance forms and a list of insurer-approved or HMO-qualified health care providers in the area where the other parent is residing. A parent who, except in an emergency, takes the children to a doctor, dentist, or other provider not so approved or qualified should pay the additional cost thus created. However, when there is a change in insurance which requires a change in medical care providers and a child has a chronic illness, thoughtful consideration should be given by the parties to what is more important: allowing the child to remain with the original provider or the economic consequences of changing. When there is an obligation to pay medical expenses, the parent carrying the insurance shall promptly furnish the other parent with the bill and any explanation of benefits from the insurance with the bill by the other. The parents shall cooperate in submitting bills to the appropriate insurance carrier. Thereafter, each parent shall make arrangements directly with the health care provider to pay his/her share and shall inform the other parent of such arrangements. Insurance refunds should be promptly turned over to the parent who paid the bill for which the refund was paid.

1.8 **Child Support**. Child support, once ordered, shall not stop, unless a court order otherwise provides (i.e., a minor child is emancipated). The only way child support can be changed is by court order or by proper documentation through Montana Child Support Enforcement Division (CSED). Parents cannot agree to a change in support without court approval. The purchase of

clothing, food, or other necessities does not constitute an allowable deduction from court-ordered child support.

If the parties have contacted the Montana Child Support Enforcement Division (CSED), the Court shall defer discretion to CSED for continued calculation and enforcement of support.

1.9 **Parental Contact a Shared Experience.** Because it is intended that parental contact be a shared experience between siblings and unless these Guidelines, a court order, or circumstances such as age, illness, or the particular even suggest otherwise, all of the children shall participate in any particular contact.

1.10 **Telephone Communication.** Telephone calls between parent and child shall be liberally permitted at reasonable hours and at the expense of the calling parent. Parents may call the children at reasonable hours during those periods the children are with the other parent. The children may, of course, call either parent, though at reasonable hours, frequencies, and at the cost of the parent called if it is a long distance call. During long vacations, the parent with whom the child is on vacation is only required to make the child available to telephone calls every five days. At all other times, the parent the child is with shall not refuse to answer the phone or turn off the phone in order to deny the other parent telephone contact. If a parent uses an answering machine or voice message on a cell phone, messages left for the child on an answering machine/message cell phone should be returned. The Court also encourages and may order that parents agree on a specified time and days for calls to the children so that the children will be made available. The court also encourages the use of computer-based communication between the parents and children, such as with email, “skype” or “iChat.”

1.11 **Mail Contact**. Parents have an unrestricted right to send cards, letters, and packages to their children. The children also have the same right with their parents. Neither parent should interfere with this right.

1.12 **Privacy of Residence.** A parent may not enter the residence of the other except by express invitation of the resident parent, regardless of whether a parent retains a property interest in the residence of the other. Accordingly, the children shall be picked up and returned to the front entrance of the appropriate residence. The parent dropping the children off should not leave until the children are safely inside. Parents should refrain from surprise visits to the other parent's home. A parent's time with the children is their own, and the children's time with that parent is equally private.

<u>TERMINOLOGY IN THE FOLLOWING SECTIONS INCLUDES PRIMARY CARETAKER, DESIGNATING THAT PERSON WITH WHOM THE CHILD SPENDS THE GREATER PORTION OF TIME, AND SECONDARY CARETAKER, DESIGNATING THAT PERSON WITH WHOM THE CHILD SPENDS A LESSER AMOUNT OF TIME.</u>

1.13 **Children Under Age Five.** Infants (children under eighteen months of age) and toddlers (eighteen months to three years) have a great need for continuous contact with the primary caretaker who provides a sense of security, nurturing, and predictability. Generally overnight visits for infants and toddlers are not recommended unless the secondary caretaker is very closely attached to the child and is able to provide primary care. Older preschool age children (three to five) are able to tolerate limited separations from the primary caretaker. The following guidelines for children under age five are designed to take into account the child's developmental milestones

as a basis for division of parenting time. Since children mature at different rates, these may need to be adjusted to fit the child's unique circumstances. These guidelines may not apply to those instances where the parents are truly sharing equally all of the caretaking responsibilities for the child and the child is equally attached to both parents. Yet in the majority of situations where there are a primary caretaker and a secondary caretaker who has maintained a continuous relationship with the child but has not shared equally in child caretaking, the following guidelines apply:

A. **Infants--Birth to Six Months.** Children need to have affectionate bonds with both parents. Overnight parenting time with the secondary caretaker is not recommended. Time with the secondary caretaker should be spent at the primary caretaker's home, as going back and forth between homes causes tension for the child. The infant's eating and sleeping routine should not be interrupted. Alternate parenting plans: (1) Three two-hour parenting time sessions per week and one weekend day for six hours; or (2) three two-hour parenting time sessions per week and one overnight on a weekend for no longer than a twelve-hour period, if the child is not breast feeding and the secondary caretaker is capable of providing primary care.

B. **Infants--Six to Eighteen Months.** Predictability and routine are important at this age. Overnight parenting time is still not recommended, but can be considered if the infant is going with older brothers or sisters the infant knows and trusts. Alternate parenting plans: (1) Three, three-hour parenting time sessions per week and one weekend day for six hours; or (2) same as (1), but with one overnight not to exceed twelve hours, if the child is not breast feeding and the secondary caretaker is capable of providing primary care; or (3) Child spends time in alternate homes, but spends significantly more time at the primary caretaker's home and no more than two twelve-hour overnights per week at the secondary caretaker's home. This arrangement should be considered only for adaptable infants and very cooperative parents.

C. **Toddlers--Eighteen to Thirty-Six Months**. Toddlers start to learn that things and people continue to exist even when the child can't see them. A common fear is that the primary caretaker will disappear, and the toddler may cry when a parent leaves them. Longer periods with the secondary caretaker can begin. Short visits (2-4 hours) away from the primary caretaker's home are permissible; however, the child needs to take favorite things with him/her (blanket, stuffed animal, pacifier, etc.). At this age children do not understand time, days of the week, or that they will see mother or father "tomorrow" or in "two days" or on "Sunday." When away from the primary caretaker, the toddler may feel anger and a powerful sense of loss and often does not understand why mother or father isn't there. Alternate parenting plans: (1) The secondary caretaker has the child up to three times per week for 2-4 hours on each visit, on a predictable schedule; or (2) Same as (1) but with one overnight per week; or (3) Child spends time in alternate homes, but with more time in the primary caretaker's home with two or three overnights with the secondary caretaker spaced regularly throughout the week. This requires an adaptable child and cooperative parents.

D. **Preschoolers--Three to Five Years Old**. The most important thing is predictability. Preschoolers can usually tolerate two days away from the primary caretaker, and they should see the secondary caretaker at least once each week. Children still have a strong need to take familiar things with them. Alternate parenting plans: (1) One overnight visit (i.e., Saturday morning to Sunday evening) on alternate weekends and one midweek visit with the child returning to the primary caretaker's home at least one-half hour before bedtime; or (2) Two or three nights at the secondary caretaker's home, spaced throughout the week; the remaining time at the primary caretaker's home. In addition, for preschoolers, a parent's vacation of no longer than two weeks away from the other parent should be taken.

E. **Educational Resources—**For additional information on the above age range, please refer to **www.zerotothree.org.**

1.14 **Pre-Teens and Teenagers.**

A. **Six to Twelve Years**. School-age children need to see the secondary caretaker one or more times each week and seem happiest with several visits each week. Children this age will want their own things at each home, but will wish to take some things back and forth with them for their own security. At about age seven, children can cope better with longer periods of parental contact during summer months because they understand about time and can count and can understand what a week or month is.

B. **Thirteen Years and Up**. Friends, social, school and sports activities are very important at this age. A decrease in the number of parental exchanges may be helpful. One of the things teenagers need to do is learn to "separate" from parents and achieve autonomy. They still need predictability and routine for their visits. Teens should be consulted in deciding on time-sharing plans. Teenagers tend to want one home base. Within reason the parents should honestly and fairly consider their teenager's wishes regarding parental contact. Neither parent should attempt to pressure their teenager to make a parental contact decision adverse to the other parent. Teenagers should explain the reasons for their wishes directly to the affected parent, without intervention by the other parent.

1.16. **Children in Day Care**. In families where a child has been in day care prior to the parental separation, the child may be able to tolerate flexible visits earlier because the child is more accustomed to separations from both parents. The secondary caretaker who exercises contact of a child under age five should not during the period of parental contact place the child with a babysitter or day care provider. If the secondary caretaker cannot be with the child personally, the child should be returned to the primary caretaker. Visiting for short periods with relatives may be appropriate, if the relatives are not merely serving as babysitters.

1.17 **Day Care Providers**. When parents reside in the same community, they should use the same day care provider. To the extent possible the parents should rely on each other to care for the children when the other parent is unavailable.

1.18 **Special Circumstances**.

A. **Child Abuse**. When child abuse has been established and a continuing danger is shown to exist, all parental contact with the perpetrator of the abuse should cease or only be allowed under supervision, depending on the circumstances. Court intervention is usually required in child abuse cases.

B. **Partner or Family Member Abuse**. Witnessing partner or family member abuse has long-term, emotionally detrimental effects on children. Furthermore, a person who loses control and acts impulsively with a partner or family member may be capable of doing so with children, as well. Depending on the nature of the spouse abuse and when it occurred, the court may require an abusive spouse to successfully complete appropriate counseling before being permitted unsupervised parental contact.

C. **Substance Abuse**. Parental contact should not occur when a parent is abusing drugs/alcohol.

D. **Long Interruption of Contact**. In those situations where a parent has not had an ongoing relationship with a child for an extended period, parent-child contact should begin with brief visits, followed by a very gradual transition to the parental contact in these guidelines.

E. **Kidnapping/Threats**. Parents who have kidnapped or hidden the children or threatened to do so should have no parental contact or only supervised parental contact.

F. **Breast Feeding Child**. Forcibly weaning a child, whether breast feeding or bottle feeding, during the upheaval of parental separation is not appropriate for the physical health or emotional well-being of the child. Until weaning has occurred without forcing, a nursing infant should have parental contact with the other parent of only a few hours each day. A parent should not use breast feeding beyond the normal weaning age as a means to deprive the other parent of parental contact. The mother may send breast milk in bottles with the father.

G. **A Parent's New Relationship**. Parents should be sensitive to the danger of exposing the children too quickly to new relationships while they are still adjusting to the trauma of their parent's separation.

H. **Religious Holidays and Native American Ceremonies.** Parents should respect their children's needs to be raised in the faith and cultural traditions of each parent and cooperate with each other on parental contact to achieve these goals. These goals should not be used to deprive a parent of parental contact.

I. **School and Sports Activities.** Parents should make reasonable accommodations for their children's scheduled school and sports activities and may alter the parenting schedule accordingly.

J. **Other**. The court may limit or deny parental contact to parents who show neglectful, impulsive, immoral, criminal, assaultive, or risk-taking behavior with or in the presence of the children.

2. PARENTAL CONTACT FOR THE SECONDARY CARETAKER WITH CHILDREN OVER AGE FIVE WHEN THERE IS SOLE CUSTODY OR SHARED PARENTING AND PARENTS RESIDE IN DIFFERENT COMMUNITIES BUT NO MORE THAN 200 MILES APART

2.1 **Weekends**. Alternate weekends from Friday at 5:30 p.m. to Sunday at 7:00 p.m.; the starting and ending times may change to fit the parents' schedules, or an equivalent period of time if the secondary caretaker is not available on weekends and the child does not miss school. In addition, if time and distance allow, one or two mid-week visits of two to three hours. All transportation for the mid-week visits are the responsibility of the secondary caretaker.

2.2 **Mother's Day - Father's Day.** The alternate weekends will be shifted, exchanged or arranged so that the children are with their mother each Mother's Day weekend and with their father each Father's Day weekend. Conflicts between these special weekends and regular parental contact shall be resolved pursuant to Paragraph 1.9.

2.3 **Extended Parental Contact.** One-half of the school summer vacation, at the option of the

secondary caretaker, the time may be consecutive, in the absence of agreement to the contrary if the child is age 8 or older, or it may be split into two blocks of time. If the child goes to summer school and it is impossible for the secondary caretaker to schedule this contact time other than during summer school, the secondary caretaker may elect to take the time when the child is in summer school and transport the child to the summer school session at the child's school or an equivalent summer school session in the secondary caretaker's community.

2.4 **Winter (Christmas) Vacation.** The Court favors that during the Winter Break, that each parent have one-half the school winter vacation—a period which begins the evening the child is released from school and continues to the evening of the day before the child will return to school. If the parents cannot agree on the division of this period, the secondary caretaker shall have the first half, including Christmas Eve and Christmas day in even-numbered years and the second half, including New Year's Eve and New Year's Day, in odd-numbered years. Although not preferred by the Court, if the parents live in the same community and mutually agree, in those years when Christmas does not fall in a parent's week, that parent may have from noon to 9:00 p.m. on Christmas Day. For toddlers and preschool age children, when the parents live in the same community and mutually agree, the parents may alternate each year Christmas Eve and Christmas Day so that the children spend equal time with each parent during this holiday period.

2.5 **Holidays**. In the absence of agreement to the contrary, parents shall alternate the following holiday weekends: Fall MEA Convention break, Easter or Spring School Break, and Thanksgiving. Thanksgiving will begin on Wednesday evening and end on Sunday evening. Fall MEA Convention break, Easter, and Spring Break will begin the evening School lets out for the break and ends Sunday Evening. All other Holiday weekends begin at 5:30 p.m. and end at 7:00 p.m. on the appropriate days.

2.6 **Children's Birthdays.** If the parents reside in the same location, a child's birthday shall be alternated annually between the parents. If the birthday falls on a weekend, it shall extend to the full weekend. If the birthday falls on a weekday, it shall be celebrated from 3:00 p.m. to 9:00 p.m. (or so much of that period as the secondary caretaker elects to use).

2.7 **Parents' Birthdays**. The children should spend the day with the parent who is celebrating his/her birthday, unless it interferes with a secondary caretaker's extended parenting time during a vacation or holiday, or is impractical due to the location of the parents.

2.8 **Conflicts Between Regular and Holiday Weekends.** When there is a conflict between a holiday weekend and the regular weekend parenting period, the holiday takes precedence. Thus, if the secondary caretaker misses a regular weekend because it is the primary caretaker's holiday, the regular alternating parenting schedule will resume following the holiday. If the secondary caretaker receives two consecutive weekends because of a holiday, regular alternating parenting time will resume the following weekend with the primary caretaker. The parents should agree to make up missed weekends due to holiday conflicts.

2.9 **Parental Contact Before and During Vacations.** The secondary caretaker will not be entitled to parental contact the weekend before the beginning of the secondary caretaker's summer vacation parenting period(s). Similarly, the secondary caretaker's alternating weekend parenting shall resume the second weekend after each of his/her periods of summer parenting contact that year. Weekend parenting time "missed" during the summer vacation period will not be "made up." During any extended summer parenting time of more than three consecutive weeks, it will be the

secondary caretaker's duty to arrange, for a time mutually convenient, a 48-hour continuous period of parenting time for the primary caretaker unless impracticable because of distance and cost.

2.10 **Notice of Canceled Parental Contact.** Whenever possible, the secondary caretaker shall give a minimum of three days' notice of intent not to exercise all or part of any scheduled parental contact. When such notice is not reasonably possible, the maximum notice permitted by the circumstances, and the reason therefor, shall be given. The primary caretaker shall give the same type of notice when events beyond his/her control make the cancellation or modification of scheduled parental contact necessary, giving the reason therefor. If the primary caretaker cancels or modifies a parenting period for secondary caretaker because the child has a schedule conflict, the secondary caretaker should be given the opportunity to take the child to the scheduled event or appointment in lieu of missing parenting time.

2.11 **Pick Up and Return of Children.** When the parents live in the same community, the responsibility of picking up and returning the children should be shared. Usually the secondary caretaker will pick up from the primary caretaker's residence and the primary caretaker will pick the children up from the secondary caretaker's residence. The parents have an obligation to be punctual: to arrive at the agreed time not substantially earlier or later. Repeated, unjustified violations of this provision may subject the offender to court sanctions. When parents do not live in the same community, this responsibility shall be shared as well. The parents, or the Court if necessary, shall agree upon a convenient exchange plan and point of exchange.

2.12 **Additional Parental Contact.** Parental contact should be liberal and flexible. For many parents these guidelines should be considered as only a minimum direction for interaction with the children. These guidelines are not meant to foreclose the parents from agreeing to such additional parental contact as they find reasonable at any given time.

3. PARENTAL CONTACT OF CHILDREN OVER AGE FIVE WHEN SOLE CUSTODY OR SHARED PARENTING AND PARENTS RESIDE MORE THAN 200 MILES APART

3.1 **Extended Parental Contact.** All but three weeks of the school summer vacation period and, on an alternating basis, the school Winter (Christmas) vacation, Thanksgiving, and Spring Break.

3.2 **Priority of Summer Break.** Summer break with the secondary caretaker takes precedence over summer activities (such as Little League, swimming lessons, etc.) when parental contact cannot be reasonably scheduled around such events. Even so, the conscientious secondary caretaker will often be able to enroll the child in a similar activity.

3.3 **Notice.** At least 60 days' notice should be given of the date for commencing extended parental contact, so that the most efficient and cost-effective means of transportation may be obtained and the parties and the children may arrange their schedules. Failure to give the precise number of days' notice does not entitle the primary caretaker the right to deny parenting to the secondary caretaker.

3.4 **Additional Parental Contact.** Where distance and finances permit, additional parental contact for the secondary caretaker, such as for holiday weekends or special events, are encouraged. When the secondary caretaker is in the area where the child resides, or the child is in the area where the secondary caretaker resides, liberal parenting time shall be allowed and because the secondary caretaker does not get regular parenting time, the child can miss some school so long as doing so does not substantially impair the child's scholastic progress.

ADOPTED BY THE TENTH JUDICIAL DISTRICT COURT
March 2015

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Hon. Jon A. Oldenburg, District Court Judge

II. Federal Resources

II. Federal Resources
a. Indian Child Welfare Act (ICWA)

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25 USC Ch. 21: INDIAN CHILD WELFARE

From Title 25—INDIANS

CHAPTER 21—INDIAN CHILD WELFARE

Sec.

Quick Reference Sheet for State Court Personnel

U.S. Department of the Interior, Bureau of Indian Affairs
Final Rule: Indian Child Custody Proceedings
25 CFR 23

All Child Custody Proceedings

Inquiry. Ask in every child custody proceeding (emergency, involuntary, and voluntary): *"Do you know, or is there a reason to know, the child is an 'Indian child' under the Indian Child Welfare Act (ICWA)?"*

An "**Indian child**" is:

- A member of a federally recognized Tribe or
- Eligible for membership in a federally recognized Tribe and has a biological parent who is a member.

Indications of "reason to know" include—

- Anyone, including the child, tells the court the child is an Indian child or there is information indicating the child is an Indian child;
- The domicile or residence of the child or parent/Indian custodian is on a reservation or in an Alaska Native village;
- The child is, or has been, a ward of Tribal court; or
- Either parent or the child has an ID indicating Tribal membership.

Whether a child is an "Indian child" does not consider factors outside the definition, such as:

- Participation of the parents or child in Tribal activities;
- Relationship between the child and his or her parents;
- Whether the parent ever had custody of the child, or
- The child's blood quantum.

Pending verification. If there is reason to know the child is an Indian child, treat the child as an Indian child, unless and until it is determined on the record that the child is not an "Indian child."

Verification with Tribe and identification of "Indian child's Tribe." Confirm, on the record, that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible), to verify whether the child is a member **or** a biological parent is a member and the child is eligible. Determine **the Indian child's Tribe** for purposes of the Act.

Determine jurisdiction. The Indian child's Tribe has exclusive jurisdiction over the case if the Indian child's domicile or residence is on a reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings **or** the child is a ward of Tribal court. A parent or Indian custodian and the Indian child's Tribe may request a transfer of a foster-care or termination-of-parental-rights (TPR) proceeding to Tribal jurisdiction, at any stage and at any time, orally on the record or in writing. Upon such a request, the court **must** transfer unless:

- Either parent objects to such transfer;
- The Tribal court declines the transfer; or
- Good cause exists for denying the transfer.

The reasons for denial must be on the record.

A determination that good cause exists to deny transfer may **not** include the considerations listed at § 23.118(c).

Placement preferences. ICWA's placement preferences apply in any preadoptive, adoptive, or foster-care placement (voluntary or involuntary) of an Indian child.[1] Or, if the Indian child's Tribe has established, by resolution, a different order of preference, the Tribe's placement preferences apply instead. Deviations from the placement preferences are permitted only for *good cause*. Good cause must be on the record and should be shown by clear and convincing evidence and be based only on one or more of the considerations listed at § 23.132(c).

A placement may not depart from the preferences:

- Based on the socioeconomic status of any placement relative to another
- Based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

[1] *See* ICWA's placement preferences at 25 U.S.C. 1915 or 25 CFR §§ 23.129-131.

IMPORTANT NOTE: This quick reference guide is not comprehensive and highlights only some of the requirements of the statute at 25 U.S.C 1901 *et seq.* and regulations at 25 CFR 23. To the extent there are any discrepancies, the statute and regulations govern.

Involuntary Proceedings

Notice. The record must include proof that clear and understandable notice was provided to the parents (and/or Indian custodian, if any) and Tribe, by registered or certified mail, return receipt requested, of the involuntary proceeding. No foster-care-placement or TPR proceeding may be held until at least **10 days after receipt** of the notice of that particular proceeding (with extensions allowed at option of parent or Tribe).

Active Efforts. Before ordering an involuntary foster care placement or TPR, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and those efforts have been unsuccessful. Active efforts must be documented in detail in the record.

> **Active efforts** are affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. *See* § 23.2 for the more expansive definition and examples.

Standards of Evidence.

Foster-care placement and TPR may be ordered only if there is:

- ***Clear and convincing evidence*** *(for foster-care placement) or* ***evidence beyond a reasonable doubt*** *(for TPR)*,
- Including the testimony of qualified expert witness(es),
- That the child's continued custody by the child's parent or Indian custodian is likely to result in "serious emotional or physical damage" to the child.

The evidence must show a *causal relationship* between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.

> Without a causal relationship, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself meet the standard of evidence.

The *qualified expert witness* must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. The qualified expert witness may not be the social worker regularly assigned to the Indian child.

Emergency Proceedings

An emergency removal or placement is any removal/placement of an Indian child under State law without the full suite of ICWA protections, regardless of the label used for the removal or placement; the emergency removal or placement must terminate immediately when the removal or placement is no longer necessary to prevent "imminent physical damage or harm" to the child and **cannot last more than 30 days** unless the court makes the determinations at § 23.113(e). An emergency proceeding can be terminated by one or more of the following actions:

(1) Initiation of a child-custody proceeding subject to the provisions of ICWA;
(2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or
(3) Restoring the child to the parent or Indian custodian.

Voluntary Proceedings

A voluntary proceeding must be truly voluntary (of the parent or custodian's free will, without a threat of removal by a State agency). The provisions summarized in "All Child Custody Proceedings" on p. 1 of this guide (including, e.g., placement preferences) apply. In addition, the court must ensure the safeguards for the parent or custodian's consent and withdrawal of consent are followed. *See* §§ 23.125 - 23.128.

Guidelines for

Implementing the Indian Child Welfare Act

December 2016

U.S. Department of the Interior
Office of the Assistant Secretary – Indian Affairs
Bureau of Indian Affairs

GUIDELINES FOR
IMPLEMENTING THE
INDIAN CHILD WELFARE ACT

Purpose of These Guidelines

These guidelines are intended to assist those involved in child custody proceedings in understanding and uniformly applying the Indian Child Welfare Act (ICWA) and U.S. Department of the Interior (Department) regulations (also referred to as a "rule"). All such parties – including the courts, state child welfare agencies, private adoption agencies, Tribes, and family members – have a stake in ensuring the proper implementation of this important Federal law designed to protect Indian children, their parents, and Indian Tribes.

ICWA is a statute passed by Congress and codified in the United States Code (U.S.C.). The Department promulgated ICWA regulations to implement the statute; the regulations were published in the Federal Register and will be codified in the Code of Federal Regulations (CFR).

ICWA, the statute: Codified in the United State Code (U.S.C.) at 25 U.S.C. 1901 *et seq.*
ICWA regulations: Published at 81 FR 38864 (June 14, 2016) and codified at 25 CFR part 23.

The regulations apply to any child custody proceeding initiated on or after December 12, 2016, even if the child has already undergone child custody proceedings prior to that date to which the regulation did not apply. The statute defines a "child-custody proceeding" as a foster-care placement, a termination of parental rights (TPR), a preadoptive placement, or an adoptive placement; so, if any one of these types of proceedings is initiated on or after December 12, 2016, the rule applies to that proceeding.[1]

While not imposing binding requirements, these guidelines provide a reference and resource for all parties involved in child custody proceedings involving Indian children. These guidelines explain the statute and regulations and also provide examples of best practices for the implementation of the statute, with the goal of encouraging greater uniformity in the application of ICWA. These guidelines replace the 1979 and 2015 versions of the Department's guidelines.

Reader's Tip: Under each heading of these guidelines is a regulatory provision (if there is one) and then guidelines to provide guidance, recommended practices, and suggestions for implementation. The text of the regulation is included as part of these guidelines for ease of reference and also because it reflects the Department's guidance on ICWA's requirements.

[1] *See* 25 U.S.C. 1903(1); 25 CFR § 23.2.

Context for ICWA, the Regulations, and These Guidelines

Congress enacted ICWA in 1978 to address the Federal, State, and private agency policies and practices that resulted in the ''wholesale separation of Indian children from their families.''[2] Congress found ''that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions . . . . ''[3] Although the crisis flowed from multiple causes, Congress found that non-Tribal public and private agencies had played a significant role, and that State agencies and courts had often failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.[4] To address this failure, ICWA establishes minimum Federal standards for the removal of Indian children from their families and the placement of these children in foster or adoptive homes, and confirms Tribal jurisdiction over child-custody proceedings involving Indian children.[5]

Following ICWA's enactment, the Department issued regulations in July 1979 addressing notice procedures for involuntary child custody proceedings involving Indian children, as well as governing the provision of funding for and administration of Indian child and family service programs as authorized by ICWA.[6] Those regulations did not address the specific requirements and standards that ICWA imposes upon State court child custody proceedings, beyond the requirements for contents of the notice. Also, in 1979, the Department published guidelines for State courts to use in interpreting many of ICWA's requirements in Indian child custody proceedings.[7] In 2014, the Department invited public comments to determine whether to update its guidelines to address inconsistencies in State-level ICWA implementation that had arisen since 1979 and, if so, what changes should be made. The Department held several listening sessions, including sessions with representatives of federally recognized Indian Tribes, State-court representatives (e.g., the National Council of Juvenile and Family Court Judges (NCJFCJ) and the National Center for State Courts' Conference of Chief Justices Tribal Relations Committee), the National Indian Child Welfare Association, and the National Congress of American Indians. The Department received comments from those at the listening sessions and also received written comments, including comments from individuals and additional organizations. The Department considered these comments and subsequently published updated Guidelines (2015 Guidelines) in February 2015.[8]

Many commenters on the 2015 Guidelines requested not only that the Department update its ICWA guidelines but that the Department also issue binding regulations addressing the requirements and standards that ICWA provides for State-court child-custody proceedings. Recognizing the need for such regulations, the Department engaged in a notice-and-comment process to promulgate formal ICWA regulations. The Department issued a proposed rule on March 20, 2015.[9] After gathering and reviewing comments on the

[2] H.R. Rep. No. 95-1386, at 9 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7531.
[3] 25 U.S.C. 1901(4).
[4] 25 U.S.C. 1901(4)-(5).
[5] 25 U.S.C. 1902.
[6] See 25 CFR part 23.
[7] 44 FR 67584 (Nov. 26, 1979).
[8] See 80 FR 10146 (Feb. 25, 2015).
[9] 80 FR 14480 (Mar. 20, 2015).

proposed rule, the Department issued a final rule on June 14, 2016.[10] When it issued those regulations, the Department noted that it planned to issue updated guidelines, which it is doing with these guidelines.[11] These guidelines replace both the 2015 and the 1979 versions of the Department's guidelines.

The Department has found that, since ICWA's passage in 1978, implementation and interpretation of the Act has been inconsistent across States and sometimes can vary greatly even within a State. This has led to significant variation in applying ICWA's statutory terms and protections. This variation means that an Indian child and her parents in one State can receive different rights and protections under Federal law than an Indian child and her parents in another State. This disparate application of ICWA based on where the Indian child resides creates significant gaps in ICWA protections and is contrary to the uniform minimum Federal standards intended by Congress.

The need for consistent minimum Federal standards to protect Indian children, families, and Tribes still exists today. The special relationship between the United States and the Indian Tribes and their members upon which Congress based the statute continues in full force, as does the United States' direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian Tribe.[12] Native American children, however, are still disproportionately more likely to be removed from their homes and communities than other children.[13] In addition, some State court interpretations of ICWA have essentially voided Federal protections for groups of Indian children to whom ICWA clearly applies. And commenters provided numerous anecdotal accounts where Indian children were unnecessarily removed from their parents and extended families; where the rights of Indian children, their parents, or their Tribes were not protected; or where significant delays occurred in Indian child-custody proceedings due to disputes or uncertainty about the interpretation of the Federal law.

For these reasons, and to promote the consistent application of ICWA across the United States, the Department issued the June 2016 regulations and is issuing these guidelines.

[10] 81 FR 38778 (June 14, 2016).
[11] Id. at 38780.
[12] 25 U.S.C. 1901, 1901(2).
[13] See, e.g., Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence, Ending Violence So Children Can Thrive 87 (Nov. 2014); National Council of Juvenile and Family Court Judges, Disproportionality Rates for Children of Color in Foster Care, Fiscal Year 2013 (June 2015).

A. General Provisions

A.1 Federal ICWA and ICWA regulations and other Federal and State law

Regulation:

§ 23.106 How does this subpart interact with State and Federal laws?

(a) The regulations in this subpart provide minimum Federal standards to ensure compliance with ICWA.

(b) Under section 1921 of ICWA, where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard.

Guidelines:

ICWA establishes the minimum procedural and substantive standards that must be met, regardless of State law. The regulations provide a binding, consistent, nationwide interpretation of ICWA's minimum standards. ICWA displaces State laws and procedures that are less protective.[14]

Many States have their own laws applying to child welfare proceedings involving Indian children that establish protections beyond the minimum Federal standards. In those instances, the more protective State law applies. For example, the Federal ICWA does not require notice requirements in voluntary child custody proceedings (although such notice is a recommended practice). Some States have passed laws that do require notice in voluntary proceedings and that higher standard of protection would apply.

A.2 Tribal-State ICWA agreements

Regulation:

(The statute (at 25 U.S.C 1919) specifies that the Tribe and State may enter into an agreement. The regulation makes clear that the mandatory dismissal provisions in § 23.110 are "[s]ubject to 25 U.S.C. 1919 (Agreements between States and Indian Tribes).")

Guidelines:

Some States and Tribes have entered into negotiated Tribal-State agreements that establish specific procedures to follow in Indian child custody proceedings. The Department strongly encourages both Tribes and States to enter into these cooperative agreements. The statute makes clear these agreements can address the "care and custody of Indian children and jurisdiction over child custody proceedings" and specifically can

[14] *See, e.g., In re Adoption of M.T.S., 489 N.W. 2d 285, 288 (Minn. Ct. App. 1992) (ICWA preempted Minnesota State law because State law did not provide higher standard of protection to the rights of the parent or Indian custodian of Indian child).*

include agreements that provide for the orderly transfer of jurisdiction on a case-by-case basis and agreements that provide for concurrent jurisdiction between States and Indian tribes. 25 U.S.C. 1919. The regulation provides, for example, that the mandatory dismissal provisions in § 23.110 do not apply if the State and Tribe have an agreement regarding the jurisdiction whereby the Tribes choose to refrain from asserting jurisdiction. Such agreements can also address how States notify Tribes in emergency removal and initial State hearings, financial arrangements between the Tribe and State regarding care of children, mechanisms for identifying and recruiting appropriate placements and other similar topics.

A.3 Considerations in providing access to State court ICWA proceedings

Regulation:

§ 23.133 Should courts allow participation by alternative methods?

If it possesses the capacity, the court should allow alternative methods of participation in the State-court child custody proceedings involving an Indian child, such as participation by telephone, videoconferencing, or other methods.

Guidelines:

Section 23.133 encourages State courts to permit alternative means of participation in Indian child-custody proceedings, such as by phone or video. This enables the court to receive all relevant information regarding the child's circumstances, and also minimizes burdens on Tribes and other parties. Several State court systems permit the use of video-conferencing in various types of proceedings.[15] The Department notes that requesting statements under oath, even by teleconference, as to who is present may provide sufficient safeguards to maintain control over who is present on the teleconference for the purposes of confidentiality. A service such as Skype would be included in "other methods."

This issue may be particularly relevant to a Tribe's participation in a case. A Tribe's members may live far from the Tribal reservation or headquarters and the Indian child's Tribe may not necessarily be located near the State court Indian child custody proceeding. As such, it may be difficult for many Tribes to participate in State court proceedings, particularly where those actions take place outside of the Tribe's State. Allowing alternative methods of participation in a court proceeding can help alleviate that burden.

Another barrier to Tribal participation in State court proceedings is that the Tribe may not have an attorney licensed to practice law in the State in which the Indian child custody proceeding is being held. Many tribes have limited funds to hire local counsel. The Department encourages all State courts to permit Tribal representatives to present before the court in ICWA proceedings regardless of whether they are attorneys or attorneys licensed in that State, as a number of State courts have already done.[16]

[15] *See, e.g.*, National Center for State Courts Video Technologies Resource Guide (available at www.ncsc.org/Topics/Technology/Video-Technologiesw/Resource-Guide.aspx).
[16] *See, e.g., J.P.H. v. Fla. Dep't of Children & Families*, 39 So.3d 560 (Fla. Dist. Ct. App.2010)(per curiam); *State v. Jennifer M. (In re Elias L.)*, 767 N.W.2d 98, 104 (Neb. 2009); *In re N.N.E.*, 752 N.W. 2d 1, 12 (Iowa 2008); *State ex rel. Juvenile Dep't of Lane Cty. v. Shuey*, 850 P.2d 378 (Or. Ct. App. 1993).

B. Applicability & Verification

It is important to determine at the outset of any State court child custody proceeding whether ICWA applies. Doing so promotes stability for Indian children and families and conserves resources by reducing the need for delays, duplication, appeals, and attendant disruptions. There are two questions to ask in determining whether ICWA applies:

1. Does ICWA apply to this child?
2. Does ICWA apply to the proceeding?

B.1 Determining whether the child is an "Indian child" under ICWA

Regulation:

§ 23.2 *Indian child* means any unmarried person who is under age 18 and either:

(1) Is a member or citizen of an Indian Tribe; or

(2) Is eligible for membership or citizenship in an Indian Tribe and is the biological child of a member/citizen of an Indian Tribe.

§ 23.107 How should a State court determine if there is reason to know the child is an Indian child?

(a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

(b) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an "Indian child," the court must:

(1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and

(2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child" in this part.

(c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;

(2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

(3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;

(4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;

(5) The court is informed that the child is or has been a ward of a Tribal court; or

(6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

(d) In seeking verification of the child's status in a voluntary proceeding where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal. A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an "Indian child." A Tribe receiving information related to this inquiry must keep documents and information confidential.

Guidelines:

Definition of "Indian child"

The rule reflects the statutory definition of "Indian child," which is based on the child's political ties to a federally recognized Indian Tribe, either by virtue of the child's own citizenship in the Tribe, or through a biological parent's citizenship and the child's eligibility for citizenship. ICWA does not apply simply based on a child or parent's Indian ancestry. Instead, there must be a political relationship to the Tribe.

Most Tribes require that individuals apply for citizenship and demonstrate how they meet that Tribe's membership criteria. Congress recognized that there may not have been an opportunity for an infant or minor child to become a citizen of a Tribe prior to the child-custody proceeding, and found that Congress had the power to act for those children's protection given the political tie to the Tribe through parental citizenship and the child's own eligibility.[17]

[17] See, e.g., H.R. Rep. No. 95-1386, at 17. This is consistent with other contexts in which the citizenship of a parent is relevant to the child's political affiliation to that sovereign. See, e.g., 8 U.S.C. 1401 (providing for U.S. citizenship for persons born outside of the United States when one or both parents are citizens and certain other conditions are met); id. 1431 (child born outside the United States automatically becomes a citizen when at least one parent of the child is a citizen of the United States and certain other conditions are met).

Inquiry

Even if a party fails to assert that ICWA may apply, the court has a duty to inquire as to ICWA's applicability to the proceeding.

Timing of inquiry. The applicability of ICWA to a child-custody proceeding turns on the threshold question of whether the child in the case is an "Indian child." It is, therefore, critically important that there be inquiry into that threshold issue by courts, State agencies, and participants to the proceedings as soon as possible. If this inquiry is not timely, a child-custody proceeding may not comply with ICWA and thus may deny ICWA protections to Indian children and their families or, at the very least, cause inefficiencies. The failure to timely determine if ICWA applies also can generate unnecessary delays, as the court and the parties may need to redo certain processes or findings under the correct standard. This is inefficient for courts and parties, and can create delays and instability in placements for the Indian child.

Subsequent discovery of information. Recognizing that facts change during the course of a child-custody proceeding, courts must instruct the participants to inform the court if they subsequently learn information that provides "reason to know" the child is an "Indian child." Thus, if the State agency subsequently discovers that the child is an Indian child, for example, or if a parent enrolls the child in an Indian Tribe, they will need to inform the court so that the proceeding can move forward in compliance with the requirements of ICWA.

Inquiry each proceeding. The rule does not require an inquiry at each hearing within a proceeding; but, if a new child-custody proceeding (such as a proceeding to terminate parental rights or for adoption) is initiated for the same child, the court must make a finding as to whether there is "reason to know" that the child is an Indian child. In situations in which the child was not identified as an Indian child in the prior proceeding, the court has a continuing duty to inquire whether the child is an Indian child.[18]

Reason to Know

If the court has "reason to know" that a child is a member of a Tribe, then certain obligations under the statute and regulations are triggered (specifically, the court must confirm that due diligence was used to: (1) identify the Tribe; (2) work with the Tribe to verify whether the child is a citizen or a biological parent is a citizen and the child is eligible for citizenship; and (3) treat the child as an Indian child, unless and until it is determined that the child is not an Indian child).

The regulation lists factors that indicate a "reason to know" the child is an "Indian child." State courts and agencies are encouraged to interpret these factors expansively. When in doubt, it is better to conduct further investigation into a child's status early in the case; this establishes which laws will apply to the case and minimizes the potential for delays or disrupted placements in the future. States or courts may choose to require additional investigation into whether there is a reason to know the child is an Indian child.

When one or more factors is present. If there is "reason to know" the child is an "Indian child," the court needs to ensure that due diligence was used to identify and work with all of the Tribes of which there is a reason to know the child may be a member or eligible for membership, to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership). In order to provide the information that the court needs, the State agency or other party seeking placement should ask the child, parents, and potentially extended family which Tribe(s) they have an affiliation with and obtain genealogical information from the family, and contact the Tribe(s) with that information.

[18] *See, e.g., In re Isaiah W.*, 1 Cal.5th 1 (2016).

When none of the factors is present. If there is no "reason to know" the child is an "Indian child," the State agency (or other party seeking placement) should document the basis for this conclusion in the case file.

Verification or documentation of a factor. The rule provides that the court has a "reason to know" the child is an "Indian child" if it is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe. This provision reflects that there may already be sufficient documentation available to demonstrate that the Tribe has concluded that a parent or child is a citizen of the Tribe. However, for the court's determination as to whether the child is an Indian child, the best source is a contemporaneous communication from the Tribe.

Due Diligence to Work with Tribes to Verify

The determination of whether a child is an "Indian child" turns on Tribal citizenship or eligibility for citizenship. The rule recognizes that these determinations are ones that Tribes make in their sovereign capacity and requires courts to defer to those determinations. The best source for a court to use to conclude that a child or parent is a citizen of a Tribe (or that a child is eligible for citizenship)[19] is a contemporaneous communication from the Tribe documenting the determination.

See section B.7 of these guidelines for more information on verification and when a State court determination is appropriate.

Treating the Child as an Indian Child, Unless and Until Determined Otherwise

This requirement (triggered by a "reason to know" the child is an "Indian child") ensures that ICWA's requirements are followed from the early stages of a case and that harmful delays and duplication resulting from the potential late application of ICWA are avoided. For example, it makes sense to place a child that the court has reason to know is an Indian child in a placement that complies with ICWA's placement preferences from the start of a proceeding, rather than having to consider a change a placement later in the proceeding once the court confirms that the child actually is an Indian child. Notably, the early application of ICWA's requirements—which are designed to keep children, when possible, with their parents, family, or Tribal community—should benefit children regardless of whether it turns out that they are Indian children as defined by the statute. If, based on feedback from the relevant Tribe(s) or other information, the court determines that the child is not an "Indian child," then the State may proceed under its usual standards.

B.2 Determining whether ICWA applies

Regulation:

§ 23.103 When does ICWA apply?

(a) ICWA includes requirements that apply whenever an Indian child is the subject of:

(1) A child-custody proceeding, including:

(i) An involuntary proceeding;

(ii) A voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand; and

[19] These guidelines use the terms "member" and "citizen" interchangeably.

(iii) A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, preadoptive, or adoptive placement, or termination of parental rights.

(2) An emergency proceeding.

(b) ICWA does not apply to:

(1) A Tribal court proceeding;

(2) A proceeding regarding a criminal act that is not a status offense;

(3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding; or

(4) A voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

(c) If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of "Indian child," then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.

(d) If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.

Guidelines:

ICWA has provisions that apply to "child-custody proceedings." *See* the definition of "child-custody proceeding" and associated guidelines in section L of these guidelines. Child-custody proceedings include both involuntary proceedings and voluntary proceedings involving an "Indian child," regardless of whether individual members of the family are themselves Indian. Thus, for example, a non-Indian parent may avail himself or herself of protections provided to parents by ICWA if her child is an "Indian child."

Involuntary Proceedings

If the child may be involuntarily removed from the parents or Indian custodian or the child may be involuntarily placed, then ICWA applies to the proceeding. If the parent or Indian custodian does not agree to the removal or placement, or agrees only under threat of the child's removal, then the proceeding is involuntary.

Voluntary Proceedings

If the parents or Indian custodian voluntarily agrees to removal or placement of the Indian child, then certain provisions of ICWA still apply. Voluntary proceedings require a determination of whether the child is an

Indian child and compliance with ICWA and the regulation's provisions relating to the placement preferences. *See* section B.3 of these guidelines for a list of which regulatory provisions apply to each type of proceeding.

A proceeding is voluntary only if the parent or Indian custodian voluntarily agrees to placement, of his or her own free will, without threat of removal.

Voluntary Placements Where Custody of the Child Can Be Regained "Upon Demand"

If the parent or Indian custodian has voluntarily placed the child (upon his or her own free will without threat of removal) and can regain custody "upon demand," meaning without any formalities or contingencies, then ICWA does not apply. These excepted voluntary placements are typically done without the assistance of a child welfare agency. An example is where a parent arranges for a relative or neighbor to care for their child while they are out of town for a period of time. If a child welfare agency is involved, it is recommended that placement intended to last for an extended period of time be memorialized in written agreements that explicitly state the right of the parent or Indian custodian to regain custody of the child upon demand without any formalities or contingencies.

The distinction between a voluntary and involuntary placement can be nuanced and depends on the facts. For example:

- If parent wishes to enter a drug treatment and places the child while in treatment, but can get the child back upon demand even if treatment is not completed, then that is likely a voluntary placement.
- If parent is told they will lose the child unless they enter a drug treatment program during which child is placed elsewhere, that is not a voluntary placement.
- If a parent wishes to enter drug treatment and places the child while in treatment, and is told that they can only get child back if treatment is successfully completed, that is not a voluntary placement.

Placements Resulting from a Child's Status Offense

ICWA also applies to placements resulting from a child's status offense. Status offenses are offenses that would not be considered criminal if committed by an adult, and are prohibited only because of a person's status as a minor (such as truancy or incorrigibility). If the child is being removed because he or she committed a status offense, then ICWA applies.

Guardianships/Conservatorships

ICWA also applies to placements with a guardian or conservator, because ICWA includes guardianships in the definition of "foster care placement."

Intra-Family Custody Disputes

The statute and rule exclude custody disputes between parents, but can apply to other types of intra-family disputes—including disputes with grandparents, step-parents, or other family members—assuming that such disputes otherwise meet the statutory and regulatory definitions.

Placement with Parent

Placement with a parent is generally not an "Indian child-custody proceeding" because it is not included as a "foster-care placement." While the Act specifically exempts from ICWA's applicability awards of custody to one of the parents "in divorce proceedings," the exemption necessarily includes awards of custody to one of the parents in other types of proceedings as well. However, if a proceeding seeks to terminate the parental rights of one parent, that proceeding falls within ICWA's definition of "child-custody proceeding" even if the child will remain in the custody of the other parent or a step-parent.

Factors that May Not Be Considered

If a child-custody proceeding concerns a child who meets the statutory definition of "Indian child," then the court may not determine that ICWA does not apply based on factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum (sometimes known as the "Existing Indian Family" exception). These factors are not relevant to the inquiry of whether the statute applies. Rather, ICWA applies whenever an "Indian child" is the subject of a "child-custody proceeding," as those terms are defined in the statute. In addition, Congress expressly recognized that State courts and agencies often failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. A standard that requires the evaluation of the strength of these social or cultural ties frustrates ICWA's purpose to provide more objective standards for Indian child-custody proceedings.[20]

Application Even if Child Reaches Age 18

Where State and/or Federal law provides for a child-custody proceeding to extend beyond an Indian child's 18th birthday, ICWA would not stop applying to the proceeding simply because of the child's age. This is to ensure that a set of laws apply consistently throughout a proceeding, and also to discourage strategic behavior or delays in ICWA compliance in circumstances where a child's 18th birthday is near.

B.3 Determining which requirements apply based on type of proceeding

Regulation:

§ 23.104 What [rule] provisions…apply to each type of child-custody proceeding?

The following table lists what sections of this subpart apply to each type of child-custody proceeding identified in § 23.103(a):

Regulatory Section	Type of Proceeding
23.101 - 23.106 (General Provisions)	Emergency, Involuntary, Voluntary
Pretrial Requirements	
23.107 (How should a State court determine if there is reason to know the child is an Indian child?)	Emergency, Involuntary, Voluntary
23.108 (Who makes the determination as to whether a child is a member whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?)	Emergency, Involuntary, Voluntary
23.109 (How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?)	Emergency, Involuntary, Voluntary
23.110 (When must a State court dismiss an action?)	Involuntary,

[20] *See* 81 FR 38801-38802 (June 14, 2016).

	Voluntary
23.111 (What are the notice requirements for a child-custody proceeding involving an Indian child?)	Involuntary (foster-care placement and TPR)
23.112 (What time limits and extensions apply?)	Involuntary (foster-care placement and TPR)
23.113 (What are the standards for emergency proceedings involving an Indian child?)	Emergency
23.114 (What are the requirements for determining improper removal?)	Involuntary
Petitions to Transfer to Tribal Court	
23.115 (How are petitions for transfer of a proceeding made?)	Involuntary, Voluntary (foster-care placement and TPR)
23.116 (What happens after a petition for transfer is made?)	Involuntary, Voluntary (foster-care placement and TPR)
23.117 (What are the criteria for ruling on transfer petitions?)	Involuntary, Voluntary (foster-care placement and TPR)
23.118 (How is a determination of "good cause" to deny transfer made?)	Involuntary, Voluntary (foster-care placement and TPR)
23.119 (What happens after a petition for transfer is granted?)	Involuntary, Voluntary (foster-care placement and TPR)
Adjudication of Involuntary Proceedings	
23.120 (How does the State court ensure that active efforts have been made?)	Involuntary (foster-care placement and TPR)
23.121 (What are the applicable standards of evidence?)	Involuntary (foster-care placement and TPR)
23.122 (Who may serve as a qualified expert witness?)	Involuntary (foster-care placement and TPR)
23.123 Reserved.	N/A
Voluntary Proceedings	
23.124 (What actions must a State court undertake in voluntary proceedings?)	Voluntary
23.125 (How is consent obtained?)	Voluntary
23.126 (What information must a consent document contain?)	Voluntary
23.127 (How is withdrawal of consent to a foster-care placement achieved?)	Voluntary
23.128 (How is withdrawal of consent to a termination of parental rights or adoption achieved?)	Voluntary
Dispositions	
23.129 (When do the placement preferences apply?)	Involuntary, Voluntary
23.130 (What placement preferences apply in adoptive placements?)	Involuntary, Voluntary
23.131 (What placement preferences apply in foster-care or preadoptive placements?)	Involuntary, Voluntary

23.132 (How is a determination of "good cause" to depart from the placement preferences made?)	Involuntary, Voluntary
Access	
23.133 (Should courts allow participation by alternative methods?)	Emergency, Involuntary
23.134 (Who has access to reports and records during a proceeding?)	Emergency, Involuntary
23.135 Reserved.	N/A
Post-Trial Rights & Responsibilities	
23.136 (What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?)	Involuntary (if consent given under threat of removal), Voluntary
23.137 (Who can petition to invalidate an action for certain ICWA violations?)	Emergency (to extent it involved a specified violation), Involuntary, Voluntary
23.138 (What are the rights to information about adoptees' Tribal affiliations?)	Emergency, Involuntary, Voluntary
23.139 (Must notice be given of a change in an adopted Indian child's status?)	Involuntary, Voluntary
Recordkeeping	
23.140 (What information must States furnish to the Bureau of Indian Affairs?)	Involuntary, Voluntary
23.141 (What records must the State maintain?)	Involuntary, Voluntary
23.142 (How does the Paperwork Reduction Act affect this subpart?)	Emergency, Involuntary, Voluntary
Effective Date	
23.143 (How does this rule apply to pending proceedings?)	Emergency, Involuntary, Voluntary
Severability	
23.144 (What happens if some portion of this rule is held to be invalid by a court of competent jurisdiction?)	Emergency, Involuntary, Voluntary

Note: For purposes of this table, status-offense child-custody proceedings are included as a type of involuntary proceeding.

Guidelines:

As discussed above, ICWA has provisions that apply to both involuntary proceedings and voluntary proceedings involving an "Indian child," regardless of whether individual members of the family are themselves Indian. ICWA also includes a separate category for "emergency" proceedings, which are described in section C of these guidelines, below.

This chart is intended as a quick-reference tool to provide an overview of what regulatory provisions apply to what types of proceedings. For specifics on how each regulatory provision applies, please refer directly to the regulatory provision and appropriate section of these guidelines.

B.4 Identifying the Tribe

Guidelines:

Sometimes, the child or parent may not be certain of their citizenship status in an Indian Tribe, but may indicate they are somehow affiliated with a Tribe or group of Tribes. In these circumstances, State agencies and courts should ask the parent and, potentially, extended family what Tribe or Tribal ancestral group the parent may be affiliated with.

If a specific Tribe is indicated, determine if that Tribe is listed as a federally recognized Indian Tribe on the BIA's annual list, viewable at www.bia.gov. Some Tribes are recognized by States but not recognized by the Federal Government. The Federal ICWA applies only if the Tribe is a federally recognized Indian Tribe and therefore listed on the BIA list.

If only the Tribal ancestral group (e.g., Cherokee) is indicated, then we recommend State agencies or courts contact each of the Tribes in that ancestral group (*see* section B.6 of these guidelines regarding the published list of ICWA designated agents) to identify whether the parent or child is a member of any such Tribe. If the State agency or court is unsure that it has contacted all the relevant Tribes, or needs other assistance in identifying the appropriate Tribes, it should contact the BIA Regional Office. Ideally, State agencies or courts should contact the BIA Regional Office for the region in which the Tribe is located, but if the State agency or court is not aware of the appropriate BIA Regional Office, it may contact any BIA Regional Office for direction.

B.5 Identifying the Tribe when there is more than one Tribe

Regulation:

§ 23.109 How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?

(a) If the Indian child is a member or eligible for membership in only one Tribe, that Tribe must be designated as the Indian child's Tribe.

(b) If the Indian child meets the definition of "Indian child" through more than one Tribe, deference should be given to the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes.

(c) If an Indian child meets the definition of "Indian child" through more than one Tribe because the child is a member in more than one Tribe or the child is not a member of but is eligible for membership in more than one Tribe, the court must provide the opportunity in any involuntary child-custody proceeding for the Tribes to determine which should be designated as the Indian child's Tribe.

(1) If the Tribes are able to reach an agreement, the agreed-upon Tribe should be designated as the Indian child's Tribe.

(2) If the Tribes are unable to reach an agreement, the State court designates, for the purposes of ICWA, the Indian Tribe with which the Indian child has the more significant contacts as the Indian child's Tribe, taking into consideration:

(i) Preference of the parents for membership of the child;

(ii) Length of past domicile or residence on or near the reservation of each Tribe;

(iii) Tribal membership of the child's custodial parent or Indian custodian; and

(iv) Interest asserted by each Tribe in the child-custody proceeding;

(v) Whether there has been a previous adjudication with respect to the child by a court of one of the Tribes; and

(vi) Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

(3) A determination of the Indian child's Tribe for purposes of ICWA and the regulations in this subpart do not constitute a determination for any other purpose.

Guidelines:

If a child meets the definition of "Indian child" through more than one Tribe, it is a best practice to communicate with both (or all) of the Tribes regarding any upcoming actions regarding the child. The Tribes must be informed that the child may be a member or eligible for membership in multiple Tribes, and must be given reasonable opportunity to agree on which Tribe will be designated as the Indian child's Tribe for the purposes of the child-custody proceeding. If the Tribes are unable to reach an agreement, the State court will designate a Tribe, after considering the factors identified in the regulation. It is a best practice to conduct a hearing regarding designation of the Indian child's Tribe so that the court can gather the information about the factors identified in the regulation.

B.6 Contacting the Tribe

Regulation:

§ 23.105 How do I contact a Tribe under the regulations in this subpart?

To contact a Tribe to provide notice or obtain information or verification under the regulations in this subpart, you should direct the notice or inquiry as follows:

(a) Many Tribes designate an agent for receipt of ICWA notices. The BIA publishes a list of Tribes' designated Tribal agents for service of ICWA notice in the Federal Register each year and makes the list available on its website at www.bia.gov.

(b) For a Tribe without a designated Tribal agent for service of ICWA notice, contact the Tribe to be directed to the appropriate office or individual.

(c) If you do not have accurate contact information for a Tribe, or the Tribe contacted fails to respond to written inquiries, you should seek assistance in contacting the Indian Tribe from the BIA local or regional office or the BIA's Central Office in Washington, D.C. (see www.bia.gov).

Guidelines:

Although the regulation focuses on written contact, it is recommended that, in addition, State agencies contact, by telephone and/or email, the Tribal ICWA agent, as listed in BIA's most recent list of designated Tribal agents for service of ICWA notice (available on www.bia.gov and published annually in the Federal Register). This facilitates open communication and enables the State and Tribal social workers to coordinate on services that may be available to support the family. State agencies should document their conversations with Tribal agents. If, for some reason, the State agency cannot reach the Tribal agent listed in the most recent list on www.bia.gov or in the Federal Register, we recommend contacting the BIA.

B.7 Verifying Tribal membership

Regulation:

§ 23.108 Who makes the determination as to whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?

(a) The Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe, except as otherwise provided by Federal or Tribal law.

(b) The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law. The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe.

(c) The State court may rely on facts or documentation indicating a Tribal determination of membership or eligibility for membership in making a judicial determination as to whether the child is an "Indian child." An example of documentation indicating membership is a document issued by the Tribe, such as Tribal enrollment documentation.

***See, also,* § 23.107(b)(1) in section B.1 of these guidelines, above.**

Guidelines:

Tribes, as sovereign governments, have the exclusive authority to determine their political citizenship and their eligibility requirements. A Tribe is, therefore, the authoritative and best source of information regarding who is a citizen (or member) of that Tribe and who is eligible for citizenship of that Tribe. Thus, the rule defers to Tribes in making such determinations and makes clear that a court may not substitute its own determination for that of a Tribe regarding a child's citizenship or eligibility for citizenship in a Tribe.

If the court has "reason to know" the child is an "Indian child" (*see* section B.1 of these guidelines, above), agencies must use due diligence to work with the relevant Tribe(s) to obtain verification regarding whether the child is a citizen or a biological parent is a citizen and the child is eligible for citizenship. The Department encourages agencies to contact Tribes informally, in addition to providing written notice, to seek such verification. The regulation requires that the agency's efforts to identify and work with those Tribes be documented in the court record. It is a best practice for these efforts to be maintained in agency files as well.

Form of Verification

While written verification from the Tribe(s) is an appropriate method for such verification, other methods may be appropriate. A Tribal representative's testimony at a hearing regarding whether the child is a citizen (or a biological parent is a citizen and the child is eligible for citizenship) is an appropriate method of verification by the Tribe.

Information in Request for Tribe's Verification

The Department encourages State courts and agencies to include enough information in the requests for verification to allow the Tribes to readily determine whether the child is a Tribal citizen (or whether the parent is a Tribal citizen and the child is eligible for citizenship). The request for verification is a meaningful request only if it provides sufficient information to the Tribe to make the determination as to whether the child is a citizen (or the parent is a citizen and the child is eligible for citizenship). Providing as much information as possible facilitates earlier identification of an Indian child and helps prevents delays and disruptions. Section 23.111(d) includes categories of information that must be provided in the notice to a Tribe in involuntary foster-care placement or TPR proceedings. Such information may be helpful to provide a Tribe to assist in verification of whether the child an Indian child. It is also important that names, birthdates, and other relevant information be reported accurately to the Tribe, as misspellings or other incorrect information can generate inaccurate or delayed responses.

A primary reason for courts mistakenly not being aware that a child is an Indian child is that the request for verification lacks the information necessary (or lacks accurate information) for the Tribe to make a determination as to membership or eligibility for membership. We therefore recommend parties include as much information as is available regarding the child in order to help the Tribe identify whether the child or the child's parent is a member. If possible, include the following information:

- ✓ Genograms or ancestry/family charts for both parents;
- ✓ All known names of both parents (maiden, married and former names or aliases), including possible alternative spellings;
- ✓ Current and former addresses of the child's parents and any extended family;
- ✓ Birthdates and places of birth (and death, if applicable) of both parents;

- ✓ All known Tribal affiliation (or Indian ancestry if Tribal affiliation not known) for individuals listed on the ancestry/family charts; and
- ✓ The addresses for the domicile and residence of the child, his or her parents, or the Indian custodian and whether this is on an Indian reservation or in an Alaska Native village.

Court's Determination

While a Tribe is the authoritative and best source regarding Tribal citizenship information, the court must ultimately determine whether the child is an Indian child for purposes of the child-custody proceeding. Ideally, that determination would be based on information provided by the Tribe, but may need to be based on other information if, for example, the Tribe(s) fail(s) to respond to verification requests.

The Department encourages prompt responses by Tribes, but if a Tribe fails to respond to multiple requests for verification regarding whether a child is in fact a citizen (or a biological parent is a citizen and the child is eligible for citizenship), and the agency has sought the assistance of the Bureau of Indian Affairs (BIA) in contacting the Tribe, a court may make a determination regarding whether the child is an Indian child for purposes of the child-custody proceeding based on the information it has available. A finding that a child is an "Indian child" applies only for the purposes of the application of ICWA to that proceeding, and does not establish that child's membership in a Tribe or eligibility for any Federal programs or benefits for any other purpose. If new evidence later arises, the court will need to consider it and should alter the original determination if appropriate.

It is recommended the agency document the requests to the Tribe to obtain information or verification of a child's or parent's Tribal citizenship and provide this information for the court file.

BIA Assistance

BIA does not make determinations as to Tribal citizenship or eligibility for Tribal citizenships except as otherwise provided by Federal or Tribal Law, but BIA can help route the notice to the right place.

B.8 Facilitating Tribal membership

Guidelines:

In many cases, Tribal citizenship would make more services and programs available to the child. Even where it is not clear that Tribal services and programs would assist the child, there are both immediate and long-term benefits to being a Tribal citizen. It is thus a recommended practice for the social worker (or party seeking placement in a voluntary adoption) to facilitate the child becoming a member, such as by assisting with the filing of a Tribal membership application or otherwise.

C. Emergency Proceedings

C.1 Emergency proceedings in the ICWA context

Regulation:

§ 23.2 *Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

Guidelines:

The statute and regulations recognize that emergency proceedings may need to proceed differently from other proceedings under ICWA.[21] Specifically, section 1922 of ICWA was designed to "permit, under applicable State law, the emergency removal of an Indian child from his parent or Indian custodian or emergency placement of such child in order to prevent imminent physical harm to the child notwithstanding the provisions of" ICWA.[22] While States use different terminology (e.g., preliminary protective hearing, shelter hearing) for emergency hearings, the regulatory definition of emergency proceedings is intended to cover such proceedings as may be necessary to prevent imminent physical damage or harm to the child.

Both the legislative history and the decisions of multiple courts support the conclusion that ICWA's emergency proceedings provisions apply to both: (1) Indian children who are domiciled off of the reservation and (2) Indian children domiciled on the reservation, but temporarily off of the reservation.[23]

C.2 Threshold for removal on an emergency basis

Regulation:

…necessary to prevent imminent physical damage or harm to the child. *See* § 23.113(b)(1), above.

Guidelines:

ICWA allows for removal of a child from his or her parents or Indian custodian, as part of an emergency proceeding only if the child faces "imminent physical damage or harm." The Department interprets this standard as mirroring the constitutional standard for removal of *any* child from his or her parents without providing due process.

As a general rule, before any parent may be deprived of the care or custody of their child without their consent, due process—ordinarily a court proceeding resulting in an order permitting removal—must be provided.[24] A child may, however, be taken into custody by a State official without court authorization or

[21] *See* 25 U.S.C. 1922.
[22] H.R. Rep. No. 9501386; 25 U.S.C. 1922.
[23] *See* 81 FR 38794-38795 (June 14, 2016).
[24] *See, e.g., Tenenbaum v. Williams,* 193 F.3d 581 (2d Cit. 1999); *Doe v. Kearney*, 329 F.3d 1286 (11th Cir. 2003).

parental consent only in emergency circumstances. Courts have defined emergency circumstances as "circumstances in which the child is immediately threatened with harm," including when there is an immediate threat to the safety of the child, when a young child is left without care or adequate supervision, or where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence.[25] The same standards and protections apply when an Indian child is involved. And those standards and protections are reflected in section 1922 of ICWA, which addresses emergency proceedings involving Indian children.

C.3 Standards and processes for emergency proceedings

Regulation:

§ 23.113 What are the standards for emergency proceedings involving an Indian child?

(a) Any emergency removal or placement of an Indian child under State law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(b) The State court must:

(1) Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;

(2) Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended; and

(3) At any court hearing during the emergency proceeding, determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(4) Immediately terminate (or ensure that the agency immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(c) An emergency proceeding can be terminated by one or more of the following actions:

(1) Initiation of a child-custody proceeding subject to the provisions of ICWA;

(2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or

(3) Restoring the child to the parent or Indian custodian.

…

[25] *Hurlman v. Ric*, 927 F.2d 74, 80-81 (2d Cir. 1991 (citing cases).

Guidelines:

Timing of hearing. If any child (including a non-Indian child) is removed from her parents by State officials without court authorization or parental consent, the State must generally provide a meaningful hearing promptly after removal.[26] States may call these proceedings by different names, such as "protective custody," "emergency custody," "shelter care," or "probable cause," among others, but they typically take place within a short time frame after the removal, such as 48 or 72 hours. These hearings should provide parents with a meaningful opportunity to be heard. If the agency determines the emergency has ended, State procedures will dictate whether the agency may return the child without the need for a hearing.

Termination of Emergency Removal. If a child was removed from the home on an emergency basis because of a temporary threat to his or her safety, but the threat has been removed and the child is no longer at risk, the State should terminate the removal, either by returning the child to the parent or transferring the case to Tribal jurisdiction. This comports with standards that apply to all child-welfare cases, and protects the "fundamental liberty interest" that parents have in the care and custody of their children.[27] If circumstances warrant, however, the State agency may instead initiate a child-custody proceeding to which the full set of ICWA protections would apply.

- **Restoring the child to the parent or Indian custodian.** If the agency determines the emergency has ended, State procedures will dictate whether the agency may return the child without the need for a hearing. A safety plan may be a solution to mitigate the situation that gave rise to the need for emergency removal and placement and allow the State to terminate the emergency proceeding. If the State court finds that the implementation of a safety plan means that emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child, the child should be returned to the parent or custodian. The State may still choose to initiate a child-custody proceeding, or may transfer the case to the jurisdiction of the Tribe.

- **Transferring the proceeding to Tribal jurisdiction.** The agency may terminate the emergency proceeding by transferring the child to the jurisdiction of the Tribe. Transfer of a proceeding is discussed below in section F of these guidelines.

- **Initiating a "child custody proceeding."** To initiate a full "child custody proceeding" (as defined in 25 CFR § 23.2), the State agency should set the hearing date and send out notice by registered or certified mail, return receipt requested, to the parent or Indian custodian and Tribe in accordance with ICWA's required timeframes (see section D.7 of these guidelines).

Termination of the emergency proceeding does not necessarily mean that the actual placement of the child must change. If an Indian child cannot be safely returned to the parents or custodian, the child must either be transferred to the jurisdiction of the appropriate Indian Tribe, or the State must initiate a child-custody proceeding to which the full set of ICWA protections would apply. Under this scenario, the child may end up staying in the same placement, but such placement will not be under the emergency proceeding provisions authorized by section 1922. Instead, that placement would need to be pursuant to Tribal law (if the child is

[26] *Swipies v. Kofka*, 419 F.3d 709, 715 (8th Cir. 2005).
[27] *See Troxel v. Granville*, 530 U.S. 57 (2000).

transferred to the jurisdiction of the Tribe) or comply with the relevant ICWA statutory and rule provisions for a child-custody proceeding (if the State retains jurisdiction)

ICWA and the rule emphasize that an emergency proceeding under ICWA section 1922 needs to be as short as possible and include provisions that are designed to achieve that result. ICWA requires that State officials "insure" that Indian children are returned home (or transferred to their Tribe's jurisdiction) as soon as the threat of imminent physical damage or harm has ended, or that State officials "expeditiously" initiate a child-custody proceeding subject to all ICWA protections.[28] The rule requires that an emergency removal or placement of an Indian child must "terminate immediately" when it is no longer necessary to prevent imminent physical damage or harm to the child.

C.4 Contents of petition for emergency removal

Regulation:

§ 23.113 What are the standards for emergency proceedings involving an Indian child?

…(d) A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child. The petition or its accompanying documents should also contain the following information:

(1) The name, age, and last known address of the Indian child;

(2) The name and address of the child's parents and Indian custodians, if any;

(3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;

(4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see www.bia.gov);

(5) The residence and the domicile of the Indian child;

(6) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the Tribe affiliated with that reservation or village;

(7) The Tribal affiliation of the child and of the parents or Indian custodians;

(8) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;

[28] 25 U.S.C. 1922.

(9) If the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the Tribe and transfer the child to the Tribe's jurisdiction; and

(10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.

…

Guidelines:

The contents listed in this section of the regulation are strongly recommended, but not required (as indicated by the word "should" rather than "must"). A failure to include any of the listed information should not result in denial of the petition if the child faces imminent physical damage or harm.

C.5 Outer limit on length of emergency removal

Regulation:

§ 23.113 What are the standards for emergency proceedings involving an Indian child?

…(e) An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:

(1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;

(2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and

(3) It has not been possible to initiate a "child-custody proceeding" as defined in § 23.2.

Guidelines:

Emergency proceedings—which generally do not include the full suite of due process or ICWA protections for parents and children—must not extend for longer than necessary to prevent imminent physical damage or harm to the child. If there is sufficient evidence of abuse or neglect, the State should promptly initiate a proceeding that provides the full suite of due process and ICWA protections. State laws vary in their handling of emergency proceedings and the initiation of foster-care proceedings, and it may not always be easy to ascertain when the "emergency proceeding" is concluded. The intent of the presumptive outer bound on the length of an emergency proceeding (30 days) is to ensure the safeguards of the Act cannot be evaded by use of long-term emergency proceedings.

States should adapt the regulation to their own procedures, with the goal of ensuring that proceedings (beyond the emergency custody, shelter care, or otherwise named initial hearing) that include the full suite of due process and ICWA protections are commenced within 30 days of any emergency removal. While there may be State-specific types of emergency proceedings with separate timeframes, all of the State requirements may be followed, so long as a proceeding with the full suite of due process and ICWA protections is underway within 30 days, absent extenuating circumstances.

Should the court need the emergency proceeding of an Indian child to last longer than 30 days, however, it may extend the emergency proceeding if it makes all three of the specific findings listed at § 23.113(e). Allowing a court to extend an emergency proceeding if it makes those findings provides appropriate flexibility for a court that finds itself facing unusual circumstances.[29]

C.6 Emergency placements

Regulation:

See § 23.113, above.

Guidelines:

As a matter of general best practice in child welfare, State agencies should try to identify extended family or other individuals with whom the child is already familiar as possible emergency placements. If the child is an Indian child, agencies should strive to provide an initial placement for the child that meets ICWA's (or the Tribe's) placement preferences. This will help prevent subsequent disruptions if the child needs to be moved to a preferred placement once a child-custody proceeding is initiated.

State agencies should also determine if there are available emergency foster homes already licensed by the State or the child's Tribe.

If the Indian child is placed on an emergency basis in a non-preferred placement because a preferred placement is unavailable or has not yet met background check or licensing requirements, State agencies should have a concurrent plan for placement as soon as possible with a preferred placement.

C.7 Identifying Indian children in emergency situations

Regulation:

See § 23.113, above.

Guidelines:

It is recommended that the State agency ask the family and extended family whether the child is a Tribal member or whether a parent is a Tribal member and the child is eligible for membership as part of the emergency removal and placement process. If the State agency believes that the child may be an Indian child, it

[29] *See* 81 FR 38817 (June 14, 2016).

is recommended that it let the Tribe know the child has been removed on an emergency basis, and begin coordination with the Tribe regarding services and placements. If there is still uncertainty regarding who is the Indian child's Tribe, it is recommended that the State agency continue to investigate the applicability of ICWA and document findings.

C.8 Active efforts in emergency situations

Guidelines:

We recommend that State agencies work with Tribes, parents, and other parties as soon as possible, even in an emergency situation, to begin providing active efforts to reunite the family.

C.9 Notice in emergency situations

Regulation:

No regulatory requirements for notice by registered or certified apply in emergency proceedings; however, § 23.113(c) requires agencies to report to the court on their efforts to contact the parents, Indian custodian, and Tribe for the emergency proceeding.

Guidelines:

Neither the statute nor rule requires notice prior to an emergency removal because of the short timeframe in which emergency proceedings are conducted to secure the safety of the child (although there may be relevant State or due process requirements). In order to protect the parents', Indian custodians', and Tribes' due process and other rights in these situations, however, it is a recommended practice for the agency to take all practical steps to contact them. This likely includes contact by telephone or in person and may include email or other written forms of contact.

D. Notice

D.1 Requirement for notice

Regulation:

§ 23.11 Notice.

(a) In any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child's parent or Indian custodian or Tribe is known, the party seeking the foster-care placement of, or termination of parental rights to, an Indian child must directly notify the parents, the Indian custodians, and the child's Tribe by registered or certified mail with return receipt requested, of the pending child-custody proceedings and their right of intervention. Notice must include the requisite information identified in § 23.111, consistent with the confidentiality requirement in § 23.111(d)(6)(ix). Copies of these notices must be sent to the appropriate Regional Director listed in paragraphs (b)(1) through (12) of this section by registered or certified mail with return receipt requested or by personal delivery and must include the information required by § 23.111.

(b) [See Appendix 1]

(c) Upon receipt of the notice, the Secretary will make reasonable documented efforts to locate and notify the child's Tribe and the child's parent or Indian custodian. The Secretary will have 15 days, after receipt of the notice, to notify the child's Tribe and parents or Indian custodians and to send a copy of the notice to the court. If within the 15-day period the Secretary is unable to verify that the child meets the criteria of an Indian child as defined in § 23.2, or is unable to locate the parents or Indian custodians, the Secretary will so inform the court and state how much more time, if any, will be needed to complete the verification or the search. The Secretary will complete all research efforts, even if those efforts cannot be completed before the child-custody proceeding begins.

(d) Upon request from a party to an Indian child-custody proceeding, the Secretary will make a reasonable attempt to identify and locate the child's Tribe, parents, or Indian custodians to assist the party seeking the information.

§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

(a) When a court knows or has reason to know that the subject of an involuntary foster-care-placement or termination-of-parental-rights proceeding is an Indian child, the court must ensure that:

> (1) The party seeking placement promptly sends notice of each such child-custody proceeding (including, but not limited to, any foster-care placement or any termination of parental or custodial rights) in accordance with this section; and

(2) An original or a copy of each notice sent under this section is filed with the court together with any return receipts or other proof of service.

(b) Notice must be sent to:

(1) Each Tribe where the child may be a member (or eligible for membership if a biological parent is a member) (see § 23.105 for information on how to contact a Tribe);

(2) The child's parents; and

(3) If applicable, the child's Indian custodian.

Guidelines:

Prompt notice of a child-custody proceeding is vitally important because it gives the parent, Indian custodian, and Tribe the opportunity to respond to any allegations in the case, to intervene, or to seek transfer jurisdiction to the Tribe. In addition, prompt notice facilitates the early identification of preferred placements as well as the provision of Tribal services to the family.

Notice by registered or certified mail, return receipt requested, to the parents, Indian custodian(s), and Indian child's Tribe is required for:

- ✓ Any involuntary foster-care proceeding; or
- ✓ Any TPR proceeding.

Notice is required for a TPR proceeding, even if notice has previously been given for the child's foster-care proceeding.

This notice is required in addition to the informal contacts made with the Tribe, such as those to verify Tribal membership and open the lines of communication.

Notice by registered or certified mail, return receipt requested is not required for voluntary proceedings, pre-adoptive proceedings, or adoptive proceedings (all of which are defined by the rule), but is a recommended practice.

While not required by the Act or rule, we recommend that State agencies and/or courts provide notice to Tribes and parents or Indian custodians of:

- Each individual hearing within a proceeding;
- Any change in placement – the statute provides rights to parents, Indian custodians and Tribes (e.g., right to intervene) and a change in circumstances resulting from a change in placement may prompt an individual or Tribe to invoke those rights, even though they did not do so before;
- Any change to the child's permanency plan or concurrent plan – a change in the ultimate goal may prompt an individual or Tribe to invoke their rights, even though they did not do so before;
- Any transfer of jurisdiction to another State or receipt of jurisdiction from another State.

D.2 Method of notice (registered or certified mail, return receipt requested)

Regulation:

§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

…(c) Notice must be sent by registered or certified mail with return receipt requested. Notice may also be sent via personal service or electronically, but such alternative methods do not replace the requirement for notice to be sent by registered or certified mail with return receipt requested.

Guidelines:

The Act requires notice be provided by registered mail, return receipt requested. The regulation also allows for notice to be provided by certified mail, return receipt requested, as a less expensive option that better meets the underlying goal of effecting notice.[30]

If State law requires actual notice or personal service, that may be a higher standard for protection of the rights of the parent or Indian custodian of an Indian child than is provided for in ICWA. In that case, meeting that higher standard would be required.[31] Even in this case, it is a best practice to also provide notice by registered or certified mail, return receipt requested, because the return receipt provides documentation for the record that notice was received.

We encourage States to act proactively in contacting parents, custodians, and Tribes by phone, email, and through other means, in addition to sending registered or certified mail, so parties can begin gathering documents and making necessary decisions as early as practicable in the process. Tribes may agree to waive their right to challenge the adequacy of notice if the notice to the Tribe was sent by a means other than registered or certified mail (e.g., by e-mail), but may not waive or affect the statutory rights of parents or other parties to the case.

The statute and regulations require notice to the parents; a "parent" includes an unwed father that has established or acknowledged paternity. If, at any point, it is discovered that someone is a "parent," as that term is defined in the regulations, that parent would be entitled to notice.

D.3 Contents of notice

Regulation:

§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

… (d) Notice must be in clear and understandable language and include the following:

(1) The child's name, birthdate, and birthplace;

[30] *See* 81 FR 38810-38811 (June 14, 2016).
[31] *See* 25 U.S.C. 1921.

(2) All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;

(3) If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;

(4) The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member);

(5) A copy of the petition, complaint, or other document by which the child-custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing;

(6) Statements setting out:

(i) The name of the petitioner and the name and address of petitioner's attorney;

(ii) The right of any parent or Indian custodian of the child, if not already a party to the child-custody proceeding, to intervene in the proceedings.

(iii) The Indian Tribe's right to intervene at any time in a State-court proceeding for the foster-care placement of or termination of parental rights to an Indian child.

(iv) That, if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court-appointed counsel.

(v) The right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings.

(vi) The right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster-care-placement or termination-of-parental-rights proceeding to Tribal court as provided by 25 U.S.C. 1911 and § 23.115.

(vii) The mailing addresses and telephone numbers of the court and information related to all parties to the child-custody proceeding and individuals notified under this section.

(viii) The potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian.

(ix) That all parties notified must keep confidential the information contained in the notice and the notice should not be handled by anyone not needing the information to exercise rights under ICWA.

Guidelines:

The rule specifies the information to be contained in the notice in order for the recipients of a notice to be able to exercise their rights in a timely manner.

While notice and verification of Tribal membership are separate concepts (see section B.7 for verification), they can be accomplished through the same communication or separate communications. The BIA has a sample notice form posted at www.bia.gov as an example for States to consider if they are combining their notice and verification.

Confidentiality

While a petition may contain confidential information, providing a copy of the petition with notice to Tribes is a government-to-government exchange of information necessary for the government agencies' performance of duties. *See* 81 FR 38811. The petition is necessary to provide sufficient information to allow the parents, Indian custodian and Tribes to effectively participate in the proceeding.

D.4 Notice to the Bureau of Indian Affairs

Regulation:

§ 23.11 Notice

(a)…. Copies of these notices must be sent to the appropriate Regional Director listed in paragraphs (b)(1) through (12) of this section by registered or certified mail with return receipt requested or by personal delivery and must include the information required by § 23.111.

Guidelines:

Notice to the BIA may be provided by personal delivery in lieu of registered or certified mail with return receipt requested. To determine the appropriate BIA office to send the copy to, see the list of regional offices at § 23.11(b) (available at Appendix 1). A copy of the notice must be sent to the BIA Regional Director even when the identity of the child's parents, Indian custodian, and Tribes can be ascertained. No notices, except for final adoption decrees, are required to be sent to the BIA Central Office in Washington, DC.

D.5 Documenting the notice with the court

Regulation:

§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

(a)….

…(2) An original or a copy of each notice sent under this section is filed with the court together with any return receipts or other proof of service.

Guidelines:

If the agency or other party seeking placement voluntarily chooses to provide notice in other Indian child welfare proceedings where notice is not required by law, it is helpful to file a copy of the notice with the court so that the court record is as complete as possible.

D.6 Unascertainable identity or location of the parents, Indian custodian, or Tribes

Regulation:

§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

…(e) If the identity or location of the child's parents, the child's Indian custodian, or the Tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, notice of the child-custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director (see www.bia.gov). To establish Tribal identity, as much information as is known regarding the child's direct lineal ancestors should be provided. The Bureau of Indian Affairs will not make a determination of Tribal membership but may, in some instances, be able to identify Tribes to contact.

§ 23.11 Notice.

…(c) Upon receipt of the notice, the Secretary will make reasonable documented efforts to locate and notify the child's Tribe and the child's parent or Indian custodian. The Secretary will have 15 days, after receipt of the notice, to notify the child's Tribe and parents or Indian custodians and to send a copy of the notice to the court. If within the 15-day period the Secretary is unable to verify that the child meets the criteria of an Indian child as defined in § 23.2, or is unable to locate the parents or Indian custodians, the Secretary will so inform the court and state how much more time, if any, will be needed to complete the verification or the search. The Secretary will complete all research efforts, even if those efforts cannot be completed before the child-custody proceeding begins.

(d) Upon request from a party to an Indian child-custody proceeding, the Secretary will make a reasonable attempt to identify and locate the child's Tribe, parents, or Indian custodians to assist the party seeking the information.

Guidelines:

The party seeking foster-care placement or TPR has responsibility for providing notice. If that party cannot ascertain the identity or location of the parents, Indian custodian, or Tribes, it should contact the BIA Region and provide BIA with as much information as possible regarding potential Tribal affiliations. If the Region cannot assist the party, it can also contact the BIA's central office in Washington, DC. *See* Appendix 1 for a list of BIA regional offices.

D.7 Time limits for notice

Regulation:

§ 23.112 What time limits and extensions apply?

(a) No foster-care-placement or termination-of-parental-rights proceeding may be held until at least 10 days after receipt of the notice by the parent (or Indian custodian) and by the Tribe (or the Secretary). The parent, Indian custodian, and Tribe each have a right, upon request, to be granted up to 20 additional days from the date upon which notice was received to prepare for participation in the proceeding.

(b) Except as provided in 25 U.S.C. 1922 and § 23.113, no child-custody proceeding for foster-care placement or termination of parental rights may be held until the waiting periods to which the parents or Indian custodians and to which the Indian child's Tribe are entitled have expired, as follows:

(1) 10 days after each parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111;

(2) 10 days after the Indian child's Tribe (or the Secretary if the Indian child's Tribe is unknown to the party seeking placement) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111;

(3) Up to 30 days after the parent or Indian custodian has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111, if the parent or Indian custodian has requested up to 20 additional days to prepare for the child-custody proceeding as provided in 25 U.S.C. 1912(a) and § 23.111; and

(4) Up to 30 days after the Indian child's Tribe has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111, if the Indian child's Tribe has requested up to 20 additional days to prepare for the child-custody proceeding.

(c) Additional time beyond the minimum required by 25 U.S.C. 1912 and § 23.111 may also be available under State law or pursuant to extensions granted by the court.

Guidelines:

These time limitations ensure that parents, Indian custodians, and the Tribe have time to determine whether a child is an Indian child and respond to and prepare for the proceeding.

Minimum time limit. As the rule states, no foster-care-placement or termination-of-parental-rights proceeding may be held until at least 10 days after receipt of the notice by the parent (or Indian custodian) and by the Tribe (or the Secretary).

Extensions. The parent, Indian custodian, and Indian child's Tribe are entitled to one extension of up to 20 days for each proceeding. Any extension beyond the initial extension up to 20 days is subject to the State court's rules and discretion.

Informal notification. Although the rule sets out the required elements of an ICWA notice, in order to ensure that the proceeding is held promptly, we encourage agencies to contact the Tribe and the parents as soon as there is sufficient information to identify a child who may be a member of or eligible for membership in that Tribe. While the timelines set out in the rule do not begin to run until the service of formal notice as required by the rule, the initial notification may nevertheless be helpful to allow the Tribe to confirm that the child is an Indian child and begin to gather information about the case.

D.8 Translation or interpretation

Regulation:

§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

…(f) If there is a reason to know that a parent or Indian custodian possesses limited English proficiency and is therefore not likely to understand the contents of the notice, the court must provide language access services as required by Title VI of the Civil Rights Act and other Federal laws. To secure such translation or interpretation support, a court may contact or direct a party to contact the Indian child's Tribe or the local BIA office for assistance in locating and obtaining the name of a qualified translator or interpreter.

Guidelines:

If the parent or Indian custodian requires translation or interpretation in a Native language, it is recommended that the court or party contact the Indian child's Tribe or BIA for assistance.

D.9 Right to an attorney

Regulation:

§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

…(g) If a parent or Indian custodian of an Indian child appears in court without an attorney, the court must inform him or her of his or her rights, including any applicable right to appointed counsel, right to request that the child-custody proceeding be transferred to Tribal court, right to object to such transfer, right to request additional time to prepare for the child-custody proceeding as provided in § 23.112, and right (if the parent or Indian custodian is not already a party) to intervene in the child-custody proceedings.

Guidelines:

This provision recognizes that parents may not have appointed counsel at early hearings in the case, and helps ensure that parents are notified of their rights under Federal law.

It is a recommended practice, where possible, to appoint the same counsel for the entirety of the trial court case (throughout all proceedings), to ensure parents' rights are addressed consistently throughout the trial court case, rather than appointing different representatives at each stage.

D.10 Lack of response to notice

Regulation:

See § 23.11 and § 23.111 requiring notice of each proceeding.

Guidelines:

If the Tribe does not respond to the notice, or responds that it is not interested in participating in the proceeding, the court or agency must still send the Tribe notices of subsequent proceedings for which notice is required (i.e., a subsequent TPR proceeding). In cases where the Tribe does not confirm receipt of the required notice or otherwise does not respond, the Department recommends following up telephonically. The Tribe may decide to intervene or otherwise participate at a later point even if it has previously indicated it is not interested in participating.

E. Active Efforts

E.1 Meaning of "active efforts"

Regulation:

§ 23.2 *Active efforts* means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family…

Guidelines:

ICWA requires the use of "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.[32] The statute does not define "active efforts," but the regulation does in § 23.2. The "active efforts" requirement in ICWA reflects Congress' recognition of the particular history of the treatment of Indian children and families. Many Indian children were removed from their homes because of poverty, joblessness, substandard housing, and other situations that could be remediated through the provision of social services. The "active efforts" requirement helps ensure that parents receive the serves that they need so that they can be safely reunified with their children. The "active efforts" requirement is designed primarily to ensure that services are provided that would permit the Indian child to remain or be reunited with her parents, whenever possible, and helps protect against unwarranted removals by ensuring that parents who are, or may readily become, fit parents are provided with services necessary to retain or regain custody of their child. This is viewed by some child-welfare organizations as part of the "gold standard" of what services should be provided in all child-welfare proceedings, not just those involving an Indian child.[33]

Other Federal and State laws require that child-welfare agencies make at least "reasonable efforts" to provide services that will help families remedy the conditions that brought the child and family into the child-welfare system. And some courts and States understand "active efforts" and "reasonable efforts" as relative to each other, where "active efforts" is higher on the continuum of efforts required and "reasonable efforts" is lower on that continuum.[34] Some courts and States consider "active efforts" to be essentially the same as "reasonable efforts."[35] Instead of focusing on such a comparison, the rule defines "active efforts" by focusing on the quality of the actions necessary to constitute "active efforts" (affirmative, active, thorough, and timely) and providing examples and clarification as to what constitutes "active efforts."

ICWA requires "active efforts" prior to foster-care placement of or TPR to an Indian child, regardless of whether the agency is receiving Federal funding.

What constitutes sufficient "active efforts" will vary from case-to-case, and courts have the discretion to consider the facts and circumstances of the particular case before it when determining whether the definition of "active efforts" is met.

Active efforts should be:

- Affirmative;
- Active;

[32] 25 U.S.C. 1912(d).
[33] *See* 81 FR 38813-388-14.
[34] *See, e.g., In re Nicole B.*, 927 A.2d 1194, 1206-07 (Md. Ct. Spec. App. 2007)
[35] *See, e.g., In re C.F.*, 230 Ca. App. 4th 227 (2014); *In re Michael G.*, 63 Cal. App. 4th 700 (1998).

- Thorough; and
- Timely.

E.2 Active efforts and the case plan

Regulation:

§ 23.2 … Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.

Guidelines:

Because active efforts must involve assisting the parents or Indian custodian through the steps of the case plan, and with accessing or developing resources necessary to satisfy the case plan, the State agency may need to take an active role in connecting the parent or Indian custodian with resources. By its plain and ordinary meaning, "active" cannot be merely "passive."

E.3 Active efforts consistent with prevailing social and cultural conditions of Tribe

Regulation:

§ 23.2… To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe.

Guidelines:

The rule indicates that, to the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions of the Indian child's Tribe, and in partnership with the child, parents, extended family, and Tribe. This is consistent with congressional direction in ICWA to conduct Indian child-custody proceedings in a way that reflects the cultural and social standards prevailing in Indian communities and families. There is also evidence that services that are adapted to the client's cultural backgrounds are better.[36]

Determining the appropriate active efforts may entail discussions with Tribal leadership, elders, or religious figures or academics with expertise concerning a given Tribe as to the type of culturally appropriate services that could be provided to the family.

Culturally appropriate services in the child welfare context could include trauma-informed therapy that incorporates best practices in addressing Native American historical and intergenerational trauma, pastoral

[36] *See* 81 FR 38790-38791 (June 14, 2016).

counseling that incorporates a Native American holistic approach and focus on spirituality, and Tribal/Native faith healers or medicine/holy men or women within the Tribe who utilize prayers, ceremonies, sweat lodge and other interventions. Another example is the use of Positive Indian Parenting curriculum, which is based on Native American beliefs and customs, and provided to clients to improve their parenting skills with a strong culture-based background. These are examples only and not an exhaustive list.

E.4 Examples of active efforts

Regulation:

§ 23.2… Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

(1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;

(2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;

(3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;

(4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;

(9) Monitoring progress and participation in services;

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;

(11) Providing post-reunification services and monitoring.

Guidelines:

The examples of active efforts provided in the ICWA regulations reflect best practices in the field of Indian child welfare, but are not meant to be an exhaustive list. Active efforts must be tailored to each child and family within each ICWA case and could include additional efforts by the agency working with the child and family. The minimum actions required to meet the "active efforts" threshold will depend on unique circumstances of the case. It is recommended that the State agency determine which active efforts will best address the specific issues facing the family and tailor those efforts to help keep the family together. This will help active efforts to respond to the unique facts and circumstances of the case. For example, if one of the child's parents has a problem with alcohol abuse, active efforts might include assisting that parent with enrollment in an alcohol treatment program and helping to coordinate transportation to and from meetings. If substance abuse is not an issue, active efforts would not need to include this kind of assistance.

As the examples illustrate, the State agency should actively connect Indian families with substantive services and not merely make the services available. Agency workers and courts should ask whether they have truly taken "active" steps (i.e., affirmative, proactive, thorough, and timely efforts) to provide services and programs to the family, recognizing that resource constraints will always exist.

E.5 Providing active efforts

Regulation:

§ 23.120 How does the State court ensure that active efforts have been made?

(a) Prior to ordering an involuntary foster-care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.…

Guidelines:

The statute and rule provide that the State court must conclude that active efforts were provided and were unsuccessful prior to ordering an involuntary foster-care placement or TPR.[37] Thus, if a detention, jurisdiction, or disposition hearing in an involuntary child-custody proceeding includes a judicial determination that the Indian child must be placed in or remain in foster care, the court must first be satisfied that the active-efforts requirement has been met. In order to satisfy this requirement, active efforts should be provided at the earliest point possible.

[37] *See* 25 U.S.C. 1912(d); 25 CFR § 23.120.

If reunification with one parent is not possible (e.g., where the parent has severely abused a child or will be incarcerated for a long period of time), the court should still consider whether active efforts could permit reunification of the Indian child with the other parent.

Active efforts are required to prevent the breakup of the Indian child's family, regardless of whether individual members of the family are themselves Indian. The child's family is an "Indian family" because the child meets the definition of an "Indian child."

Checking on status of active efforts. The regulations reflect that the court must conclude that active efforts were made prior to ordering foster-care placement or TPR, but does not require such a finding at each hearing.[38] It is, however, a recommended practice for a court to inquire about active efforts at every court hearing and actively monitor compliance with the active efforts requirement. This will help avoid unnecessary delays in achieving reunification with the parent, or other permanency for the child. The court should not rely solely on past findings regarding the sufficiency of active efforts, but rather should routinely ask as part of a foster-care or TPR proceeding whether circumstances have changed and whether additional active efforts have been or should be provided.

How long to provide active efforts. There are no specific time limits on active efforts, and what is required will depend on the facts of each case. State agencies should keep in mind that the State court must make a finding that active efforts were provided in order to make a foster-care placement or order TPR to an Indian child. Even if a finding was made that sufficient active efforts were made to support the foster-care placement, circumstances may have changed such that the court may require additional active efforts prior to ordering TPR. For example, if a parent initially refused alcohol treatment despite an agency's active efforts to provide services, a court could find that these efforts satisfied the requirement for purposes of the foster-care placement. But, if the parent subsequently completes alcohol treatment and needs additional services to regain custody (such as parenting skills training), the court will need to consider whether active efforts were made to provide these services. The requirement to conduct active efforts necessarily ends at the TPR because, after that point, there is no service or program that would prevent the breakup of the Indian family. If a child-custody proceeding is ongoing, even after return of the child, then active efforts would be required before there may be a subsequent foster-care placement or TPR.

Applying for Tribal membership. There is no requirement to conduct active efforts to apply for Tribal citizenship for the child. In any particular case, however, it may be appropriate to assist the child or parents in obtaining Tribal citizenship for the child, as this may make more services and programs available to the child. Securing Tribal citizenship may have long-term benefits for an Indian child, including access to programs, services, benefits, cultural connections, and political rights in the Tribe. It may be appropriate, for example, to assist in obtaining Tribal citizenship where it is apparent that the child or its biological parent would become enrolled in the Tribe during the course of the proceedings, thereby aiding in ICWA's efficient administration.

E.6 Documenting active efforts

Regulation:

§ 23.120 How does the State court ensure that active efforts have been made?

…(b) Active efforts must be documented in detail in the record.

[38] *See* 25 CFR § 23.120.

Guidelines:

The active-efforts requirement is a key protection provided by ICWA, and it is important that compliance with the requirement is documented in the court record. The rule therefore requires the court to document active efforts in detail in the record.

State agencies also need to help ensure that there is sufficient documentation available for the court to use in reaching its conclusions regarding the provision of active efforts. Although the court itself determines what level of documentation it will require, the Department recommends that the State agency include the following in its documentation of active efforts, among any other relevant information:

- The issues the family is facing that the State agency is targeting with the active efforts (these should be the same issues that are threatening the breakup of the Indian family or preventing reunification);
- A list of active efforts the State agency determines would best address the issues and the reasoning for choosing those specific active efforts;
- Dates, persons contacted, and other details evidencing how the State agency provided active efforts;
- Results of the active efforts provided and, where the results were less than satisfactory, whether the State agency adjusted the active efforts to better address the issues.

While ICWA does not establish a standard of evidence for review of whether active efforts have been provided, the Department favorably views cases that apply the same standard of proof for the underlying action to the question of whether active efforts were provided (i.e., clear and convincing evidence for foster care placement and beyond a reasonable doubt for TPR).

F. Jurisdiction

F.1 Tribe's exclusive jurisdiction

Regulation:

§ 23.110 When must a State court dismiss an action?

Subject to 25 U.S.C. 1919 (Agreements between States and Indian Tribes) and § 23.113 (emergency proceedings), the following limitations on a State court's jurisdiction apply:

(a) The court in any voluntary or involuntary child-custody proceeding involving an Indian child must determine the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings, the State court must expeditiously notify the Tribal court of the pending dismissal based on the Tribe's exclusive jurisdiction, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

(b) If the child is a ward of a Tribal court, the State court must expeditiously notify the Tribal court of the pending dismissal, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

Guidelines:

With limited exceptions, ICWA provides for Tribal jurisdiction "exclusive as to any State" over child-custody proceedings involving an Indian child who resides or is domiciled within the reservation of such Tribe.[39] ICWA also provides for exclusive Tribal jurisdiction over an Indian child who is a ward of a Tribal court, notwithstanding the residence or domicile of the child. If the child's domicile[40] or residence is on an Indian reservation or the child is a ward of Tribal court, then the Tribe has exclusive jurisdiction over the proceeding, unless "such jurisdiction is otherwise vested in the State by existing Federal law."[41] To ensure the well-being of the child, State officials should continue to work on the case until the State court officially dismisses the case from State jurisdiction.[42]

The mandatory dismissal provisions in § 23.110 apply "subject to" § 23.113 (emergency proceedings) so that the State may take action through an emergency proceeding when necessary to prevent imminent physical damage or harm to the child. Likewise, the mandatory dismissal provisions do not apply if the State

[39] 25 U.S.C. 1911(a).
[40] *See* definition of "domicile"
[41] 25 U.S.C. 1911(a); Certain courts have interpreted the 'existing federal law' clause as granting state courts in Public Law 280 states concurrent jurisdiction over cases in which jurisdiction would otherwise remain exclusively with the tribe. *See, e.g., Doe v. Mann*, 415 F.3d 1038(9th Cir. 2005).
[42] *See* 25 CFR § 23.110 at Appendix 6.

and Tribe have an agreement regarding jurisdiction because, in some cases, Tribes choose to refrain from asserting jurisdiction. *See* section A.5 of these guidelines.

Contacting court prior to determining whether dismissal is necessary. In determining whether dismissal is necessary, the State court may need to contact the Tribal court and/or Tribal child-welfare agency to:

- Confirm the child's status as a ward of that court; and
- Determine whether jurisdiction over child-custody proceedings for that Tribe is otherwise vested in the State by existing Federal law.[43]

If the State court does not have contact information for the Tribal court, the Tribe's designated ICWA agent may provide that information. The BIA publishes, on an annual basis, a list of contacts designated by each Tribe for receipt of ICWA notices in the Federal Register and makes the list available at www.bia.gov. Each Tribe's ICWA designated contact will have information on whether the Tribe exercises exclusive jurisdiction.

Coordination of dismissal and transfer. State and Tribal courts and State and Tribal child-welfare agencies are encouraged to work cooperatively to ensure that dismissal and transfer of information proceeds expeditiously and that the welfare of the Indian child is protected. The rule requires the court to transmit all information in its possession regarding the Indian child-custody proceeding to the Tribal court. Such information would include all the information within the court's possession regarding the Indian child-custody proceeding, including the pleadings and any court record.[44] In order to best protect the welfare of the child, State agencies should also work to share information that is not contained in the State court's records but that would assist the Tribe in understanding and meeting the Indian child's needs.

Safety investigative services. The rule does not affect State authority to provide safety investigative services when a child is domiciled on reservation but located off reservation.

See also the definition of "reservation."

F.2 State's and Tribe's concurrent jurisdiction

Regulation:

§ 23.115 How are petitions for transfer of a proceeding made?

(a) Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe.

(b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.

Guidelines:

Section 1911(b) of ICWA provides for the transfer of any State court proceeding for the foster-care placement, or TPR to, an Indian child not domiciled or residing within the reservation of the Indian child's

[43] *See* 25 U.S.C. 1911(a).
[44] *See* 25 CFR § 23.110.

Tribe. This provision and § 23.115 recognize that Indian Tribes maintain concurrent jurisdiction over child-welfare matters involving Tribal children, even off of the reservation.

Applicable proceedings. Provisions addressing transfer apply to both involuntary and voluntary foster-care and TPR proceedings. This includes TPR proceedings that may be handled concurrently with adoption proceedings.

Other proceedings. Parties may request transfer of preadoptive and adoptive placement proceedings, but the standards for addressing such motions are not dictated by ICWA or the regulations. Tribes possess inherent jurisdiction over domestic relations, including the welfare of child citizens of the Tribe, even beyond that authority confirmed in ICWA. Thus, it may be appropriate to transfer preadoptive and adoptive proceedings involving children residing outside of a reservation to Tribal jurisdiction in particular circumstances.[45]

Availability at any stage. The rule provides that the right to request a transfer is available at any stage in each foster-care or TPR proceeding. Transfer to Tribal jurisdiction, even at a late stage of a proceeding, will not necessarily entail unwarranted disruption of an Indian child's placement. The Tribe or parent may have reasons for not immediately moving to transfer the case (e.g., because of geographic considerations, maintaining State-court jurisdiction appears to hold out the most promise for reunification of the family). [46]

F.3 Contact with Tribal court on potential transfer.

Regulation:

§ 23.116 What happens after a petition for transfer is made?

Upon receipt of a transfer petition, the State court must ensure that the Tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.

Guidelines:

It is important for the State court to contact the Tribal court upon receipt of the transfer petition to alert the Tribal court (usually reachable by first contacting the Tribe's designated ICWA agent) and provide it with the opportunity to determine whether it wishes to decline jurisdiction. It is recommended that, in addition to the required written notification, State court personnel contact the Tribe by phone as well.

[45] *See* 81 FR 38821 for additional information on how Congress has repeatedly sought to strengthen Tribal courts.

[46] *See* 81 FR 38823 for information on why the rule does not establish a deadline or time limit for requesting transfer.

F.4 Criteria for ruling on a transfer petition.

Regulation:

§ 23.117 What are the criteria for ruling on transfer petitions?

Upon receipt of a transfer petition from an Indian child's parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:

(a) Either parent objects to such transfer;

(b) The Tribal court declines the transfer; or

(c) Good cause exists for denying the transfer.

Guidelines:

A keystone of ICWA is its recognition of a Tribe's exclusive or concurrent jurisdiction over child-custody proceedings involving Indian children. When the State and Tribe have concurrent jurisdiction, ICWA establishes a presumption that a State must transfer jurisdiction to the Tribe upon request. The rule reflects ICWA section 1911(b)'s requirement that a child-custody proceeding be transferred to Tribal court upon petition of either parent or the Indian custodian or the Indian child's Tribe, except in three circumstances: (1) where either parent objects; (2) where the Tribal court declines the transfer; or (3) where there is good cause for denying the transfer.

Either Parent Objects

The rule mirrors the statute in respecting a parent's objection to transfer of the proceeding to Tribal court. As Congress noted, "[e]ither parent is given the right to veto such transfer."[47] However, if a parent's parental rights have been terminated and this determination is final, they would no longer be considered a "parent" with a right under these rules to object.

While, this criterion addresses the objection of either parent, nothing prohibits the State court from considering the objection of the guardian ad litem or child himself under the third criteria (good cause to deny transfer), where appropriate.

Tribe Declines

If the Tribal court explicitly states that it declines jurisdiction, the State court may deny a transfer motion. It is recommended that the State court obtain documentation of the Tribal court's declination to include in the record.

Good Cause Exists

This exception is not defined in the statute, and in the Department's experience, has in the past been used to deny transfer for reasons that frustrate the purposes of ICWA. The legislative history indicates that this provision is intended to permit a State court to apply a modified doctrine of forum non conveniens, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the

[47] H.R. Rep. No. 95-1386, at 21.

Tribe are fully protected. State courts may exercise case-by-case discretion regarding the "good cause" finding, but this discretion should be limited and animated by the Federal policy to protect the rights of the Indian child, parents, and Tribe, which can often best be accomplished in Tribal court. Exceptions cannot be construed in a manner that would swallow the rule.

F.5 Good cause to deny transfer.

Regulation:

§ 23.118 How is a determination of "good cause" to deny transfer made?

(a) If the State court believes, or any party asserts, that good cause to deny transfer exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child-custody proceeding.

(b) Any party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.

(c) In determining whether good cause exists, the court must not consider:

(1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;

(2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;

(3) Whether transfer could affect the placement of the child;

(4) The Indian child's cultural connections with the Tribe or its reservation; or

(5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

(d) The basis for any State-court decision to deny transfer should be stated orally on the record or in a written order.

Guidelines:

While the statute and the rule provide State courts with the discretion to determine "good cause" based on the specific facts of a particular case, the rule does mandate certain procedural protections if a court is going to conduct a good cause analysis. It also identifies a limited number of considerations that should not be part of the good-cause analysis because there is evidence Congress did not wish them to be considered, they have been shown to frustrate the purposes of ICWA, or would otherwise work a fundamental unfairness. The regulation's limitations on what may be considered in the "good cause" determination do not limit State judges from considering some exceptional circumstance as the basis of good cause. However, the "good cause" determination whether to deny transfer to Tribal court should address which court is best positioned to adjudicate the child-custody proceeding, not predictions about the outcome of that proceeding.

Standard of Evidence

Neither the statute nor the rule establishes a Federal standard of evidence for the determination of whether there is good cause to transfer a proceeding to Tribal court. There is, however, a strong trend in State

courts to apply a clear and convincing standard of evidence.[48] The Department notes that the strong trend in State court decisions on this issue is compelling and recommends that State courts follow that trend.

Prohibited Considerations

Advanced stage if notice was not received until an advanced stage. The rule prohibits a finding of good cause based on the advanced stage of the proceeding, if the parent, Indian custodian, or Indian child's Tribe did not receive notice of the proceeding until an advanced stage. This protects the rights of the parents and Tribe to seek transfer where ICWA's notice provisions were not complied with, and thus will help to promote compliance with these provisions. It also ensures that parties are not unfairly advantaged or disadvantaged by noncompliance with the statute. Parents, custodians, and Tribes who were disadvantaged by noncompliance with ICWA's notice provisions should still have a meaningful opportunity to seek transfer.

The rule also clarifies that "advanced stage" refers to the proceeding, rather than the case as a whole. Each individual proceeding will culminate in an order, so "advanced stage" is a measurement of the stage within each proceeding. This allows Tribes to wait until the TPR proceeding to request a transfer to Tribal court, because the parents, Indian custodian, and Tribe must receive notice of each proceeding. It is often at the TPR stage that factors that may have dissuaded a Tribe from taking an active role in the case (such as the State's efforts to reunite a child with her nearby parent) change in ways that may warrant reconsidering transfer of the case.

Prior proceedings for which no petition to transfer was filed. As just discussed, the rule clarifies that "advanced stage" refers to the proceeding, rather than the case as a whole. ICWA clearly distinguishes between foster-care and TPR proceedings, and these proceedings have significantly different implications for the Indian child's parents and Tribe. There may be compelling reasons to not seek transfer for a foster-care proceeding, but those reasons may not be present for a TPR proceeding.

Effect on placement of the child. The rule provides that the State court must not consider, in its decision as to whether there is good cause to deny transfer to the Tribal court, whether the Tribal court could change the child's placement. This is not an appropriate basis for good cause because the State court cannot know or accurately predict which placement a Tribal court might consider or ultimately order. A transfer to Tribal court does not automatically mean a change in placement; the Tribal court will consider each case on and individualized basis and determine what is best for that child. Like State courts, Tribal courts and agencies seek to protect the welfare of the Indian child, and would consider whether the current placement best meets that goal.

Cultural connections to the Tribe or reservation. The regulations prohibit a finding of good cause based on the Indian child's perceived cultural connections with the Tribe or reservation. Congress enacted ICWA in express recognition of the fact that State courts and agencies were generally ill-equipped to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.[49] As such, State courts must not evaluate the sufficiency of an Indian child's cultural connections with a Tribe or reservation in evaluating a motion to transfer.

Negative perceptions of Tribal or BIA social services or judicial systems. The regulations prohibit consideration of any perceived inadequacy of Tribal or BIA social services or judicial systems. This is consistent with ICWA's strong recognition of the competency of Tribal fora to address child-custody matters

[48] *See* 81 FR 38827 (June 14, 2016) for additional information on States' application of this standard of evidence.
[49] 25 U.S.C. 1901(5).

involving Tribal children. It is also consistent with section 1911(d)'s requirement that States afford full faith and credit to public acts, records, and judicial proceedings of Tribes to the same extent as any other entity.

Socioeconomic conditions within the Tribe or reservation. The regulations prohibit consideration of the perceived socioeconomic conditions within a Tribe or reservation. Congress found that misplaced concerns about low incomes, substandard housing, and similar factors on reservations resulted in the unwarranted removal of Indian children from their families and Tribes. These factors can introduce bias into decision-making and should not come into play in considering whether transfer is appropriate.

State courts retain the ability to determine "good cause" based on the specific facts of a particular case, so long as they do not base their good cause finding on one or more of these prohibited considerations. If a State court considers the distance of the parties from the Tribal court, it must also weigh any available accommodations that may address the potential hardships caused by the distance.

For additional information on the basis for the parameters for "good cause," *see* 81 FR 38821-38822 (June 14, 2016).

F.6 Transferring to Tribal court.

Regulation:

§ 23.119 What happens after a petition for transfer is granted?

(a) If the Tribal court accepts the transfer, the State court should expeditiously provide the Tribal court with all records related to the proceeding, including, but not limited to, the pleadings and any court record.

(b) The State court should work with the Tribal court to ensure that the transfer of the custody of the Indian child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption of services to the family.

Guidelines:

Once the State court determines that it must transfer to Tribal court, the State court and Tribal court should communicate to agree to procedures for the transfer to ensure that the transfer of the proceeding minimizes disruptions to the child and to services provided to the family.

If the State court does not have contact information for the Tribal court, the court should contact the Tribe's ICWA officer. If this occurs, State court personnel should work with the Tribal court and agency to transfer or provide copies of all records in the Indian child's case file so that the Tribal court and agency may best meet the child's needs. State agencies should share records with Tribal agencies as they would other governmental jurisdictions, presumably at no charge.

G. Adjudication of Involuntary Proceedings

G.1 Standard of evidence for foster-care placement and TPR proceedings

Regulation:

§ 23.121 What are the applicable standards of evidence?

(a) The court must not order a foster-care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.

(d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

Guidelines:

ICWA and the rule require that a court may not order a foster-care placement of an Indian child or a TPR unless there is a showing that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The court's determination must be supported by clear and convincing evidence, in the case of a foster-care placement, or by evidence beyond a reasonable doubt, in the case of a TPR. The evidence supporting the determination must also include the testimony of a qualified expert witness.

The rule requires there be a causal relationship between the particular conditions in the home and risk of serious emotional or physical damage to the child. Put differently, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding.

The rule prohibits relying on **any one** of the factors listed in paragraph (d), **absent the causal connection** identified in (c), **as the sole basis** for determining that clear and convincing evidence or evidence beyond a reasonable doubt support a conclusion that continued custody is likely to result in serious emotional or physical damage to the child. This provision addresses the types of situations identified in the statute's legislative history where Indian children are removed from their home based on subjective assessments of home conditions that, in fact, are not likely to cause the child serious emotional or physical damage.

"Nonconforming social behavior" may include behaviors that do not comply with society's norms, such as dressing in a manner that others perceive as strange, an unusual or disruptive manner of speech, or discomfort in or avoidance of social situations.

These provisions recognize that children can thrive when they are kept with their parents, even in homes that may not be ideal in terms of cleanliness, access to nutritious food, or personal space, or when a parent is single, impoverished, or a substance abuser. Rather, there must be a demonstrated correlation between the conditions of the home and a threat to the specific child's emotional or physical well-being.

G.2 Qualified expert witness

Regulation:

§ 23.122 Who may serve as a qualified expert witness?

(a) A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.

(b) The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.

(c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

Guidelines:

Qualified expert witnesses must have particular expertise. The rule requires that the qualified expert witness must be qualified to testify regarding whether the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. This requirement flows from the language of the statute requiring a determination, supported by evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in

serious emotional or physical damage to the child.[50] Congress noted that "[t]he phrase 'qualified expert witness' is meant to apply to expertise beyond normal social worker qualifications."[51]

Qualified expert witness should have knowledge of prevailing social and cultural standards of the Tribe. In addition, the qualified expert witness should have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe. In passing ICWA, Congress wanted to make sure that Indian child-welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family."[52] Congress recognized that States have failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.[53] Accordingly, expert testimony presented to State courts should reflect and be informed by those cultural and social standards. This ensures that relevant cultural information is provided to the court and that the expert testimony is contextualized within the Tribe's social and cultural standards. Thus, the question of whether the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child is one that should be examined in the context of the prevailing cultural and social standards of the Indian child's Tribe.

The rule does not, however, strictly limit who may serve as a qualified expert witness to only those individuals who have particular Tribal social and cultural knowledge. The rule recognizes that there may be certain circumstances where a qualified expert witness need not have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe in order to meet the statutory standard. For example, a leading expert on issues regarding sexual abuse of children may not need to know about specific Tribal social and cultural standards in order to testify as a qualified expert witness regarding whether return of a child to a parent who has a history of sexually abusing the child is likely to result in serious emotional or physical damage to the child. Thus, while a qualified expert witness should normally be required to have knowledge of Tribal social and cultural standards, that may not be necessary if such knowledge is plainly irrelevant to the particular circumstances at issue in the proceeding. A more stringent standard may, of course, be set by State law.

Separate expert witnesses may be used to testify regarding potential emotional or physical damage to the child and the prevailing social and cultural standards of the Tribe.

A person testifying to the prevailing social and cultural standards of the Indian child's Tribe must be knowledgeable and experienced in the Tribe's society and culture. The Indian child's Tribe may designate a person as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.

Assistance in locating a qualified expert witness. The rule encourages the court or any party to request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses. The rule also allows a Tribe to designate a person as being qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe.

Social worker regularly assigned to the child. The qualified expert witness should be someone who can provide a culturally informed, outside opinion to the court regarding whether the continued custody by the parent is likely to result in serious emotional or physical harm to the child. By imposing the requirement for a qualified expert witness, Congress wanted to ensure that State courts heard from experts other than State social workers seeking the action before placing an Indian child in foster care or ordering the TPR. Therefore, the

[50] 25 U.S.C. 1912(e), (f).
[51] H.R. Rep. No. 95-1386, at 22.
[52] *Holyfield,* 490 U.S. at 36 (citing H.R. Rep. No. 95-1386, at 24).
[53] *See* 25 U.S.C. 1901(5).

regulation provides that the social worker regularly assigned to the Indian child (i.e., the State agency seeking the action) may not serve as a qualified expert witness in child-custody proceedings concerning the child. If another social worker, Tribal or otherwise, serves as the qualified expert witness, that person must have expertise beyond the normal social worker qualifications. [54]

Citizen of Tribe. There is no requirement that the qualified expert witness be a citizen of the child's Tribe. The witness should be able to demonstrate knowledge of the prevailing social and cultural standards of the Indian child's Tribe or be designated by a Tribe as having such knowledge. In some instances, it may be appropriate to accept an expert with knowledge of the customs and standards of closely related Tribes. Parties may also contact the BIA for assistance.

Number of expert witnesses. ICWA and the rule do not limit the number of expert witnesses that may testify. The court may accept expert testimony from any number of witnesses, including from multiple qualified expert witnesses.

Familiarity with the child. It is also recommended that the qualified expert witness be someone familiar with that particular child. If the expert makes contact with the parents, observes interactions between the parent(s) and child, and meets with extended family members in the child's life, the expert will be able to provide a more complete picture to the court.

See 81 FR 38829-38832 (June 14, 2016) for additional information on qualified expert witnesses.

[54] *See* H.R. Rep. No. 95-1386, at 22.

H. Placement Preferences

H.1 Adoptive placement preferences

Regulation:

§ 23.130 What placement preferences apply in adoptive placements?

(a) In any adoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (b) of this section, preference must be given in descending order, as listed below, to placement of the child with:

(1) A member of the Indian child's extended family;

(2) Other members of the Indian child's Tribe; or

(3) Other Indian families.

(b) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply.

(c) The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.

Guidelines:

In ICWA, Congress expressed a strong Federal policy in favor of keeping Indian children with their families and Tribes whenever possible, and established preferred placements that it believed would help protect the needs and long-term welfare of Indian children and families, while providing the flexibility to ensure that the particular circumstances faced by individual Indian children can be addressed by courts.

Order. Each placement should be considered (without being skipped) in that order; the preferences are in the order of most preferred to least preferred.

Tribe's order of preference. State agencies should determine if the child's Tribe has established, by resolution, an order of preference different from that specified in ICWA. If so, then apply the Tribe's placement preferences. Otherwise, apply ICWA's placement preferences as set out in § 23.131.

The statute requires that a Tribal order of preference be established by "resolution." While different Tribes act through different types of actions and legal instruments, the Department understands that a Tribal "resolution," for this purpose, would be a legally binding statement by the competent Tribal authority that lays out an objective order of placement preferences.

If a Tribal-State agreement on ICWA establishes the order of preference, that would constitute an order of preference established by "resolution," as required by the rule. Such a document would be a legally binding statement by the competent Tribal authority that lays out an objective order of placement preferences. In addition, the statute specifically authorizes Tribal-State agreements respecting care and custody of Indian children.

Consideration of child's or parent's preference. The rule reflects the language of the statute. This language does not require a court to follow a child's or parent's preference, but rather requires that it be considered where appropriate.

H.2. Foster-care placement preferences

Regulation:

§ 23.131 What placement preferences apply in foster-care or preadoptive placements?

(a) In any foster-care or preadoptive placement of an Indian child under State law, including changes in foster-care or preadoptive placements, the child must be placed in the least-restrictive setting that:

(1) Most approximates a family, taking into consideration sibling attachment;

(2) Allows the Indian child's special needs (if any) to be met; and

(3) Is in reasonable proximity to the Indian child's home, extended family, or siblings.

(b) In any foster-care or preadoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (c) of this section, preference must be given, in descending order as listed below, to placement of the child with:

(1) A member of the Indian child's extended family;

(2) A foster home that is licensed, approved, or specified by the Indian child's Tribe;

(3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

(c) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child, as provided in paragraph (a) of this section.

(d) The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent.

Guidelines:

The placement preferences included in ICWA and the rule codify the generally accepted best practice to favor placing the child with extended family. Congress recognized that this generally applicable preference for placing children with family is even more important for Indian children and families, given that one of the

factors leading to the passage of ICWA was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society. In many cases, the placement preferences have special force and effect for Indian children, since, as Congress recognized, there are harms to individual children and parents caused by disconnection with their Tribal communities and culture, and also harms to Tribes caused by the loss of their children.

While it may be the practice in some jurisdictions for judges to defer to State agencies to issue placement orders, the statute contemplates court review of placements of Indian children. For this reason, there must be a court determination of the placement and, if applicable, an examination of whether good cause exists to depart from the placement preferences.

Least restrictive setting. The foster-care placement includes the additional requirement that the placement be the least restrictive setting, which means the setting that most approximates a family. The placement decision must take into consideration sibling attachment and the proximity to the child's home, extended family, and/or siblings. If for some reason it is not possible to place the siblings together, then the Indian child should be placed, if possible, in a setting that is within a reasonable proximity to the sibling. In addition, if the sibling is age 18 or older, that sibling is extended family and would qualify as a preferred placement. The placement should also be one that allows the Indian child's special needs, if any, to be met.

Order. Each placement should be considered (without being skipped) in that order; the preferences are in the order of most preferred to least preferred.

Tribe's order of preference. *See* section H.1 of these guidelines on how to account for the Tribe's order of preference, but note that, for foster-care placements, the Tribe's placement preferences should be applied as long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child.

Consideration of child's or parent's preference. The rule reflects the language of the statute. This language does not require a court to follow a child or parent's preference, but rather requires that it be considered where appropriate.

See 81 FR 38838-38843 for additional information on placement preferences.

H.3 Finding preferred placements

Regulation:

[*See* §§ 23.130 and 23.131, above].

Guidelines:

The Department recommends that the State agency or other party seeking placement conduct a diligent search for placements that comply with the placement preferences. The diligent search should be thorough, on-going and in compliance with child welfare best practices. A diligent search should also involve:

- ✓ Asking the parents for information about extended family, whether members of an Indian Tribe or not;
- ✓ Contacting all known extended family, whether members of an Indian Tribe or not;
- ✓ Contacting all Tribes with which the child is affiliated for assistance in identifying placements;

- ✓ Conducting diligent follow-up with all potential placements;
- ✓ Contacting institutions for children approved or operated by Indian Tribes if other preferred placements are not available.

It is recommended that the State agency (or other party seeking placement) document the search, so that it is reflected in the record.

Guidance and assistance for families wishing to serve as placements. As a recommended practice for State agencies, the State agency should provide the preferred placements with enough information about the proceeding so they can avail themselves of the preference. As a recommended practice, State courts should treat any individual who falls into a preferred placement category and who has expressed a desire to adopt (or provide foster care to) the Indian child as a potential preferred placement. The courts should not find that no preferred placement is available simply because the individual has not timely completed the formal steps required, such as filing a petition for adoption. Agencies and courts should be aware that a family member may wish to be a foster-care or adoptive placement for an Indian child but may not know how to file a petition for adoption, may have language or education barriers, or may live far from the State court. As a best practice, States may establish that actions such as testifying in court regarding the desire to adopt, or sending a statement to that effect in writing, may substitute for a formal petition for adoption for purposes of applying the placement preferences. If a State does not have formal requirements regarding how to qualify as a preferred placement, these should be made clear to potential placements.

Availability of preferred placements. The Department encourages States and Tribes to collaborate to increase the availability of Indian foster homes. Organizations such as the National Resource Center for Diligent Recruitment at AdoptUSKids provide tools and resources for recruiting Indian homes. See, e.g., National Resource Center for Diligent Recruitment, For Tribes: Tool and Resources (last visited Apr. 27, 2016), www.nrcdr.org/for-tribes/tools-and-resources.

Preferred placements in State. The fact that a no federally recognized Tribe is located within a State where the proceeding is occurring does not mean that there are no family members or members of Tribes residing or domiciled in that State. It is also important to note that a preferred placement may not be excluded from consideration merely because the placement is not located in the State where the proceeding is occurring.

Cooperation with the Tribe. The State agency should cooperate with the Tribe in identifying placement preferences. If a child is ultimately placed in a non-preferred placement, the Tribe may request that the foster or adoptive parent take actions, such as securing membership for the child, to maintain the child's Tribal affiliation.

H.4 Good cause to depart from the placement preferences

Regulation:

§ 23.129 When do the placement preferences apply?

…(c) The placement preferences must be applied in any foster-care, preadoptive, or adoptive placement unless there is a determination on the record that good cause under § 23.132 exists to not apply those placement preferences.

§ 23.132 How is a determination of "good cause" to depart from the placement preferences made?

(a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court.

(b) The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is "good cause" to depart from the placement preferences.

(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:

(1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;

(2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;

(3) The presence of a sibling attachment that can be maintained only through a particular placement;

(4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;

(5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

Guidelines:

Congress determined that a placement with the Indian child's extended family or Tribal community will serve the child's best interest in most cases. A court may deviate from these preferences, however, when good cause exists.

A determination that good cause exists to deviate from the placement preferences must be made on the record by the court. It is recommended that the court state the reasons for finding good cause and incorporate agency documentation (required by § 23.141) of its search for placement preferences and other information regarding the child's needs and available placements.

This good cause standard applies to requests to deviate from both the Federal placement preferences and any applicable Tribal-specific preferences being applied in lieu of the Federal preferences.

If a party believes that good cause not to comply with the placement preferences exists because one of the factors in § 23.132(c) applies, the party must provide documentation of the basis for good cause.

Standard of evidence for "good cause" determination. While not mandatory, it is recommended that the documentation meet the "clear and convincing" standard of proof. Courts that have grappled with the issue have almost universally concluded that application of the clear and convincing evidence standard is required as it is most consistent with Congress's intent in ICWA to maintain Indian families and Tribes intact. Widespread application of this standard will promote uniformity of the application of ICWA. It will also prevent delays in permanency that would otherwise result from protracted litigation over what the correct burden of proof should be.

A court evidentiary hearing may not be required to effect a placement that departs for good cause from the placement preferences, if such a hearing is not required under State law and if the requirements of 25 U.S.C. 1912(d)-(e) have been met. Regardless of the level of court involvement in the placement, however, the basis for an assertion of good cause must be stated in the record or in writing and a record of the placement must be maintained.

Where a party to the proceeding objects to the placement, however, the rule establishes the parameters for a court's review of whether there is good cause to deviate from the placement preferences and requires the basis for that determination to be on the record. While the agency may place a child prior to or without any determination by the court, the agency does so knowing that the court reviews the placement to ensure compliance with the statute.

Congress established preferred placements in ICWA that it believed would help protect the long-term health and welfare of Indian children, parents, families, and Tribes. ICWA must be interpreted as providing meaningful limits on the discretion of agencies and courts to remove Indian children from their families and Tribes, since this is the very problem that ICWA was intended to address. Accordingly, the rule identifies specific factors that should provide the basis for a finding of good cause to deviate from the placement preferences.

Paragraph (c) of § 23.132 provides specific factors that can support a "good cause determination. Congress intended "good cause" to be a limited exception to the placement preferences, rather than a broad category that could swallow the rule.

Factors that may form the basis for good cause. The rule's list of is not exhaustive. The State court has the ultimate authority to consider evidence provided by the parties and make its own judgment as to whether the moving party has met the statutory "good cause" standard. In this way, the rule recognizes that there may be extraordinary circumstances where there is good cause to deviate from the placement preferences based on some reason outside of the five specifically-listed factors. The rule thereby retains discretion for courts and agencies to consider any unique needs of a particular Indian child in making a good cause determination.

Flexibility to find there is no good cause even when one or more factors are present. The court retains the discretion to find that good cause does not exist (and apply the placement preferences) even where one or more of the listed factors for good cause is present. Such a finding may be appropriate if other circumstances lead the court to conclude that there is not good cause. For example, if one parent consents and one does not, the court is not mandated to deviate from the preferences – rather it should be able to listen to the arguments of both sides and then decide.

Request of parent. The statute provides that, where appropriate, preference of the parent must be considered.[55] The rule therefore reflects that the request of the parent may provide a basis for a "good cause"

[55] *See* 25 U.S.C. 1915(c).

determination, if the court agrees. The rule requires that the parent or parents making such a request must attest that they have reviewed the placement options that comply with the order of preference. The rule uses the term "placement options" to refer to the actual placements, rather than just the categories.

Request of child. The statute provides that, where appropriate, preference of the Indian child must be considered.[56] The rule adds that the child must be of "sufficient age and capacity to understand the decision that is being made" but leaves it to the fact-finder to make the determination as to age and capacity.

Sibling attachment. The rules governing placement preferences recognize the importance of maintaining biological sibling connections. The sibling placement preference makes clear that good cause can appropriately be found to depart from ICWA's placement preferences where doing so allows the "Indian child" to remain with his or her sibling. This allows biological siblings to remain together, even if only one is an "Indian child" under the Act.

Extraordinary needs. The rule retains discretion for courts and agencies to consider any extraordinary physical, mental, or emotional needs of a particular Indian child.

Unavailability of suitable placement. The rule provides that the unavailability of a suitable placement may be the basis for a good cause determination. It also requires that, in order to determine that there is good cause to deviate from the placement preferences based on unavailability of a suitable placement, the court must determine that a diligent search was conducted to find placements meeting the preference criteria. This provision is required because the Department understands ICWA to require proactive efforts to determine if there are extended family or Tribal community placements available. It is also consistent with the Federal policy for all children—not just Indian children—that States are to exercise "due diligence" to identify, locate, and notify relatives when children enter the foster care system. *See* 81 FR 38839 (June 14, 2016) for additional explanation for why the State must provide documented efforts to comply with the preferences. *See* section H.3 of these guidelines for additional guidance on what a diligent search involves.

The rule requires that, if the agency relies on unavailability of placement preferences as good cause for deviating from the placement preferences, it must be able to demonstrate to the court on the record that it conducted a diligent search. This showing would occur at the hearing in which the court determines whether a placement or change in placement is appropriate.

The determination of whether a "diligent search" has been completed is left to the fact-finder and will depend on the facts of each case. As a best practice, a diligent search will require a showing that the agency made good-faith efforts to contact all known family members to inquire about their willingness to serve as a placement, as well as whether they are aware of other family members that might be willing to serve as a placement. A diligent search will also generally require good-faith efforts to work with the child's Tribe to identify family-member and Tribal-community placements. If placements were identified but have not yet completed a necessary step for the child to be placed with them (such as filing paperwork or completing a background check), the fact-finder will need to determine whether sufficient time and assistance has been provided.

Safety of placement. While the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community, nothing in the rule eliminates other requirements under State or Federal law for ensuring that placements will protect the safety of the Indian child.

[56] *See* 25 U.S.C. 1915(c).

H.5 Limits on good cause

Regulation:

§ 23.132 How is a determination of "good cause" to depart from the placement preferences made?

…(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.

(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

Guidelines:

The rule identifies certain factors that may not be the basis for a finding of good cause to depart from the preferences. These limits focus on those factors that there is evidence Congress did not wish to be considered, or that have been shown to frustrated the application of 25 U.S.C. 1911(b). State courts retain discretion to determine "good cause," so long as they do not base their good cause finding on one or more of these prohibited considerations.

Socioeconomic status. The fact that a preferred placement may be of a different socioeconomic status than a non-preferred placement may not serve as the basis for good cause to depart from the placement preferences.

Ordinary bonding with a non-preferred placement that flowed from time spent in a non-preferred placement that was made in violation of ICWA. If a child has been placed in a non-preferred placement in violation of ICWA and the rule, the court should not base a good-cause determination solely on the fact that the child has bonded with that placement.

A placement is "made in violation of ICWA" if the placement was based on a failure to comply with specific statutory or regulatory mandates. The determination of whether there was a violation of ICWA will be fact-specific and tied to the requirements of the statute and this rule. For example, failure to provide the required notice to the Indian child's Tribe for a year, despite the Tribe having been identified earlier in the proceeding, would be a violation of ICWA. By comparison, placing a child in a non-preferred placement would not be a violation of ICWA if the State agency and court followed the statute and applicable rules in making the placement, including by properly determining that there was good cause to deviate from the placement preferences.

As a best practice, in all cases, State agencies and courts should carefully consider whether the fact that an Indian child has developed a relationship with a non-preferred placement outweighs the long-term benefits to a child that can arise from maintaining connections to family and the Tribal community. Where a child is in a non-preferred placement, it is a best practice to facilitate connections between the Indian child and extended family and other potential preferred placements. For example, if a child is in a non-preferred placement due to geographic considerations and to promote reunification with the parent, the agency or court should promote connections and bonding with extended family or other preferred placements who may live further away. In this way, the child has the opportunity to develop additional bonds with these preferred placements that could ease a transition to that placement.

I. Voluntary Proceedings

I.1 Inquiry and verification in voluntary proceedings

Regulation:

§ 23.124 What actions must a State court undertake in voluntary proceedings?

(a) The State court must require the participants in a voluntary proceeding to state on the record whether the child is an Indian child, or whether there is reason to believe the child is an Indian child, as provided in § 23.107.

(b) If there is reason to believe the child is an Indian child, the State court must ensure that the party seeking placement has taken all reasonable steps to verify the child's status. This may include contacting the Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) to verify the child's status. As described in § 23.107, where a consenting parent requests anonymity, a Tribe receiving such information must keep relevant documents and information confidential.

…

Guidelines:

The rule provides minimum requirements for State courts to determine whether a child in a voluntary proceeding is an "Indian child" as defined by statute. That determination is essential in order to assess the State court's jurisdiction and what law applies in voluntary proceedings. The determination of whether the child is an "Indian child" is a threshold inquiry; it affects the jurisdiction of the State court and what law applies to the matter before it.

In some cases, it may be undisputed that the child is an Indian child, such as where the parents attest to this fact. If, however, there is reason to believe (i.e., reason to know) that the child is an "Indian child," but this cannot be confirmed based on the evidence before the State court, it must ensure that the party seeking placement has taken all reasonable steps to confirm the child's status. This includes seeking verification of the Indian child's status with the Tribes of which the child might be a citizen. Tribes, like other governments, are equipped to keep such inquiries confidential, and the rule requires this of Tribes.

The regulation's use of the language "reason to believe" echoes, and is intended to be substantively the same as, the statutory language "reason to know."

I.2 Placement preferences in voluntary proceedings

Regulation:

§ 23.124 What actions must a State court undertake in voluntary proceedings?

…(c) State courts must ensure that the placement for the Indian child complies with §§ 23.129 - 23.132.

Guidelines:

This provision explains that the regulatory provisions addressing the application of the placement preferences apply with equal force to voluntary proceedings. The Act and rule require application of the placement preferences in both voluntary and involuntary placements.

As discussed in section H.4 of these guidelines, above, the judge may consider as a basis for good cause to depart from the placement preferences the request of one or both of the parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference. This good cause provision allows birth parents to express their preference for an adoptive family that does not fall within ICWA's placement preferences. It is important, however, for birth parents to be made aware of ICWA's preferences and whether there are available placements within the extended family or Tribal community. This balances the interest of the parent with the other interests protected by ICWA.

Situations in which a step-parent seeks to adopt the child would fall within the first placement preference because step-parents are included in the definition of "extended family member."

I.3 Notice in voluntary proceedings

Guidelines:

The Department recommends that the Indian child's Tribe be provided notice of voluntary proceedings involving that child to allow the Tribe's participation in identifying preferred placements and to promote the child's continued connections to the Tribe. As discussed above, communication with the Tribe may be required in order to verify the child's status as an Indian child. States may choose to require notice to Tribes and other parties in voluntary proceedings.

I.4 Effect of a request for anonymity on verification

Regulation:

§ 23.107 How should a State court determine if there is reason to know the child is an Indian child?

…(d) In seeking verification of the child's status in a voluntary proceeding where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal. A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an "Indian child." A Tribe receiving information related to this inquiry must keep documents and information confidential.

Guidelines:

In voluntary proceedings where the consenting parent requests, in writing, to remain anonymous, it is recommended that the party seeking placement notify the Tribe of the request for anonymity; the Tribe is required to keep information related to the verification inquiry confidential.

I.5 Effect of a request for anonymity on placement preferences

Regulation:

§ 23.129 When do the placement preferences apply?

…(b) Where a consenting parent requests anonymity in a voluntary proceeding, the court must give weight to the request in applying the preferences.

Guidelines:

If the consenting parent requests anonymity, it is recommended that the agency work with the Tribe to identify placement preferences that protect the parent's anonymity. The rule does not mandate contacting extended family members to identify potential placements.

I.6 Parent's or Indian custodian's consent

Regulation:

§ 23.125 How is consent obtained?

(a) A parent's or Indian custodian's consent to a voluntary termination of parental rights or to a foster-care, preadoptive, or adoptive placement must be executed in writing and recorded before a court of competent jurisdiction.

(b) Prior to accepting the consent, the court must explain to the parent or Indian custodian:

(1) The terms and consequences of the consent in detail; and

(2) The following limitations, applicable to the type of child-custody proceeding for which consent is given, on withdrawal of consent:

(i) For consent to foster-care placement, the parent or Indian custodian may withdraw consent for any reason, at any time, and have the child returned; or

(ii) For consent to termination of parental rights, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of termination and have the child returned; or

(iii) For consent to an adoptive placement, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of adoption, and have the child returned.

(c) The court must certify that the terms and consequences of the consent were explained on the record in detail in English (or the language of the parent or Indian custodian, if English is not the primary language) and were fully understood by the parent or Indian custodian.

(d) Where confidentiality is requested or indicated, execution of consent need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.

(e) A consent given prior to, or within 10 days after, the birth of an Indian child is not valid.

Guidelines:

An individual parent's consent is valid only as to himself or herself.

The rule provides that the consent must be "recorded" before a court; this must be accomplished by providing a written document to the court.

I.7 Contents of consent document

Regulation:

§ 23.126 What information must a consent document contain?

(a) If there are any conditions to the consent, the written consent must clearly set out the conditions.

(b) A written consent to foster-care placement should contain, in addition to the information specified in paragraph (a) of this section, the name and birthdate of the Indian child; the name of the Indian child's Tribe; the Tribal enrollment number for the parent and for the Indian child, where known, or some other indication of the child's membership in the Tribe; the name, address, and other identifying information of the consenting parent or Indian custodian; the name and address of the person or entity, if any, who arranged the placement; and the name and address of the prospective foster parents, if known at the time.

Guidelines:

A State may choose to include or require the inclusion of additional information, beyond what is required in § 23.126.

The BIA has a sample form for consent posted at www.bia.gov as an example for States to consider.

I.7 Withdrawal of consent

Regulation:

§ 23.127 How is withdrawal of consent to a foster-care placement achieved?

(a) The parent or Indian custodian may withdraw consent to voluntary foster-care placement at any time.

(b) To withdraw consent, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(c) When a parent or Indian custodian withdraws consent to a voluntary foster-care placement, the court must ensure that the Indian child is returned to that parent or Indian custodian as soon as practicable.

§ 23.128 How is withdrawal of consent to a termination of parental rights or adoption achieved?

(a) A parent may withdraw consent to voluntary termination of parental rights at any time prior to the entry of a final decree of termination.

(b) A parent or Indian custodian may withdraw consent to voluntary adoption at any time prior to the entry of a final decree of adoption.

(c) To withdraw consent prior to the entry of a final decree of adoption, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(d) The court in which the withdrawal of consent is filed must promptly notify the person or entity who arranged any voluntary preadoptive or adoptive placement of such filing, and the Indian child must be returned to the parent or Indian custodian as soon as practicable.

Guidelines:

A parent may withdraw consent to a TPR any time before the final decree for that TPR is entered, and a parent may withdraw consent to an adoption any time before the final decree of adoption is entered. However, note that if a parent's or Indian custodian's parental rights have already been terminated, then the parent or Indian custodian may no longer withdraw consent to the adoption, because they no longer legally qualify as a parent or Indian custodian.

The written withdrawal of consent filed with the court (or testimony before the court) is not intended to be an overly formalistic requirement. Parents involved in pending TPR or adoption proceedings can be reasonably expected to know that there are court proceedings concerning their child, and the rule balances the need for a clear indication that the parent wants to withdraw consent with the parent's interest in easily withdrawing consent. States may have additional methods for withdrawing consent that are more protective of a parent's rights that would then apply.

Under the rule, whenever consent has been withdrawn, court must contact the party by or through whom any preadoptive or adoptive placement has been arranged. In most cases this will be the agency, whether public or private. The agency is expected to have the contact information for the placement.

The BIA has a sample form for withdrawal of consent posted at www.bia.gov as an example for States to consider.

J. Recordkeeping & Reporting

J.1 Record of every placement

Regulation:

§ 23.141 What records must the State maintain?

(a) The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary.

(b) The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences.

(c) A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency.

Guidelines:

The statute and the rule require that the State maintain a record of each placement, under State law, of an Indian child. The files may be originals or may be true copies of the originals.

The rule ensures States have the flexibility to determine the best way to maintain their records to ensure that they can comply with the 14-day timeframe.

Paragraph (b) of § 23.141 directly addresses only court records because the court records must include all evidence justifying the placement determination. States may require that additional records be maintained.

It is recommended that the record include any documentation of preferred placements contacted and, if any were found ineligible as a placement, an explanation as to the ineligibility.

It is recommended that State agencies coordinate with State courts and private agencies to identify who is best positioned to fulfill this duty.

J.2 Transmission of every final adoption decree

Regulation:

§ 23.140 What information must States furnish to the Bureau of Indian Affairs?

(a) Any State court entering a final adoption decree or order in any voluntary or involuntary Indian-child adoptive placement must furnish a copy of the decree or order within 30 days to the Bureau of Indian Affairs, Chief, Division of Human

Services, 1849 C Street NW., Mail Stop 4513 MIB, Washington, DC 20240, along with the following information, in an envelope marked “Confidential”:

(1) Birth name and birthdate of the Indian child, and Tribal affiliation and name of the Indian child after adoption;

(2) Names and addresses of the biological parents;

(3) Names and addresses of the adoptive parents;

(4) Name and contact information for any agency having files or information relating to the adoption;

(5) Any affidavit signed by the biological parent or parents asking that their identity remain confidential; and

(6) Any information relating to Tribal membership or eligibility for Tribal membership of the adopted child.

(b) If a State agency has been designated as the repository for all State-court adoption information and is fulfilling the duties described in paragraph (a) of this section, the State courts in that State need not fulfill those same duties.

Guidelines:

Providing the information to BIA for each final adoption decree and order allows BIA to serve as a resource for Indian children who, when they become adults, seek information on their adoption.

It is recommended that State agencies coordinate with State courts and private agencies to identify who is best positioned to fulfill this duty.

J.3 Adoptions that are vacated or set aside

Regulation:

§ 23.139 Must notice be given of a change in an adopted Indian child’s status?

(a) If an Indian child has been adopted, the court must notify, by registered or certified mail with return receipt requested, the child’s biological parent or prior Indian custodian and the Indian child’s Tribe whenever:

(1) A final decree of adoption of the Indian child has been vacated or set aside; or

(2) The adoptive parent has voluntarily consented to the termination of his or her parental rights to the child.

(b) The notice must state the current name, and any former name, of the Indian child, inform the recipient of the right to petition for return of custody of the child, and provide sufficient information to allow the recipient to participate in any scheduled hearings.

(c) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice and filing the waiver with the court.

(1) Prior to accepting the waiver, the court must explain the consequences of the waiver and explain how the waiver may be revoked.

(2) The court must certify that the terms and consequences of the waiver and how the waiver may be revoked were explained in detail in English (or the language of the parent or Indian custodian, if English is not the primary language), and were fully understood by the parent or Indian custodian.

(3) Where confidentiality is requested or indicated, execution of the waiver need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.

(4) The biological parent or Indian custodian may revoke the waiver at any time by filing with the court a written notice of revocation.

(5) A revocation of the right to receive notice does not affect any child-custody proceeding that was completed before the filing of the notice of revocation.

Guidelines:

If an adoption is vacated or set aside, or the adoptive parent voluntarily consents to TPR, then the State agency should work with the State court to ensure that the notice requirements of § 23.139 are fulfilled.

This notice is required because, in the particular circumstances where an adoption is vacated or set aside, or the adoptive parent voluntarily consents to TPR, the statute provides certain rights to the biological parent or prior Indian custodian.[57] The notice enables the biological parent or prior Indian custodian to avail himself or herself of those rights.

This section of the rule addresses waiver of notice for two particular situations:

- Where an adoption of an Indian child is subsequently vacated or set aside; or
- Where the adoptive parents decide to voluntarily terminate their parental rights.

In those cases, the biological parent or prior Indian custodian may waive notice of these actions.

J.4 Adult adoptees' access to information about their Tribal affiliation

Regulation:

§ 23.138 What are the rights to information about adoptees' Tribal affiliations?

Upon application by an Indian who has reached age 18 who was the subject of an adoptive placement, the court that entered the final decree of adoption must inform such individual of the Tribal affiliations, if any, of the individual's biological parents

[57] *See* 25 U.S.C. 1916(a).

and provide such other information necessary to protect any rights, which may include Tribal membership, resulting from the individual's Tribal relationship.

Guidelines:

ICWA provides Indian adult adoptees with specific rights to information on Tribal, as reflected in the above rule provision. States may provide additional rights to adoptees.

Some States have registries that allow individuals to obtain information on siblings for purposes of reunification.

It is recommended that the State agency work with the State court to ensure that, with each adoptive placement, there is sufficient information in the record regarding the individual's Tribal relationship to allow the court to meet its requirements under § 23.138 for the protection of any rights that may result from the individual's Tribal membership.

BIA is also adding information to its website (www.bia.gov) to assist adult adoptees who are looking to reconnect with their Tribes.

J.5 Parties' access to the case documents

Regulation:

§ 23.134 Who has access to reports and records during a proceeding?

Each party to an emergency proceeding or a foster-care-placement or termination-of-parental-rights proceeding under State law involving an Indian child has a right to timely examine all reports and other documents filed or lodged with the court upon which any decision with respect to such action may be based.

Guidelines:

Parties to emergency, foster-care-placement, or TPR proceedings are entitled to receipt of documents upon which a decision may be based.

States cannot refuse to provide a party to an ICWA proceeding, including a Tribe that is a party, access to information about the proceedings.

K. Improper Removal, Consent Obtained through Fraud or Duress, Other ICWA Violations

Both the State agency and the court have an independent responsibility under Federal law to follow ICWA. The following addresses regulatory provisions setting out how an Indian child, parent, Indian custodian, or the Tribe can seek redress for certain actions made in violation of ICWA.

K.1 Improper removal

Regulation:

§ 23.114 What are the requirements for determining improper removal?

(a) If, in the course of any child-custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained (such as after a visit or other temporary relinquishment of custody), the court must expeditiously determine whether there was improper removal or retention.

(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.

Guidelines:

This regulatory provision implements section 1920 of the statute. It requires that, where a court determines that a child has been improperly removed from custody of the parent or Indian custodian or has been improperly retained in the custody of a petitioner in a child-custody proceeding, the court should return the child to his/her parent or Indian custodian unless returning the child to his/her parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

K.2 Consent obtained through fraud or duress

Regulation:

§ 23.136 What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?

(a) Within two years after a final decree of adoption of any Indian child by a State court, or within any longer period of time permitted by the law of the State, the State court may invalidate the voluntary adoption upon finding that the parent's consent was obtained by fraud or duress.

(b) Upon the parent's filing of a petition to vacate the final decree of adoption of the parent's Indian child, the court must give notice to all parties to the adoption proceedings and the Indian child's Tribe and must hold a hearing on the petition.

(c) Where the court finds that the parent's consent was obtained through fraud or duress, the court must vacate the final decree of adoption, order the consent revoked, and order that the child be returned to the parent.

Guidelines:

The two-year statute of limitations applies only to invalidation of adoptions based on parental consent having been obtained through fraud or duress. If a State's statute of limitations exceeds two years, then the State statute of limitations may apply; the two-year statute of limitations is a minimum timeframe.

K.3 Other ICWA violations

Regulation:

§ 23.137 Who can petition to invalidate an action for certain ICWA violations?

(a) Any of the following may petition any court of competent jurisdiction to invalidate an action for foster-care placement or termination of parental rights under state law where it is alleged that 25 U.S.C. 1911, 1912, or 1913 has been violated:

(1) An Indian child who is or was the subject of any action for foster-care placement or termination of parental rights;

(2) A parent or Indian custodian from whose custody such child was removed; and

(3) The Indian child's Tribe.

(b) Upon a showing that an action for foster-care placement or termination of parental rights violated any provision of 25 U.S.C. 1911, 1912, or 1913, the court must determine whether it is appropriate to invalidate the action.

(c) To petition for invalidation, there is no requirement that the petitioner's rights under ICWA were violated; rather, a petitioner may challenge the action based on any violations of 25 U.S.C. 1911, 1912, or 1913 during the course of the child-custody proceeding.

Guidelines:

The court of competent jurisdiction referenced in this rule provision may be a different court from the court where the original proceedings occurred.

A party may assert violations of ICWA requirements that may have impacted the ICWA rights of other parties (e.g., a parent can assert a violation of the requirement for a Tribe to receive notice under section

1912(a)). One party cannot waive another party's right to seek to invalidate such an action. Additionally, parties may have other appeal rights under State or other Federal law in addition to the rights established in ICWA.

A petition to invalidate an action does not necessarily affect only the action that is currently before the court. For example, an action to invalidate a TPR may affect an adoption proceeding.

The rule does not require the court to invalidate an action, but requires the court to determine whether it is appropriate to invalidate the action under the standard of review under applicable law.

L. Definitions

L.1 Active Efforts

Regulation:

§ 23.2

…*Active efforts* means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

(1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;

(2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;

(3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;

(4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and

actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;

(9) Monitoring progress and participation in services;

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;

(11) Providing post-reunification services and monitoring.

Guidelines:

See section E of these guidelines.

L.2 Agency

Regulation:

§ 23.102

…*Agency* means a private State-licensed agency or public agency and their employees, agents or officials involved in and/or seeking to place a child in a child custody proceeding.

Guidelines:

The rule defines "agency" as an organization that performs, or provides services to biological parents, foster parents, or adoptive parents to assist in, the administrative and social work necessary for foster, preadoptive, or adoptive placements. The definition includes non-profit, for-profit, or governmental organizations including those who may assist in the administrative or social work aspects of seeking placement. An "agency" may also be assisting in the legal aspects of seeking placement, but the definition does not include attorneys or law firms, standing alone, because as used in the rule, "agencies" are presumed to have some capacity to provide social services. Attorneys and others involved in court proceedings are addressed separately in various provisions in the rule. This comports with the statute's broad language imposing requirements on "any party" seeking placement of a child or TPR.

L.3 Child-custody proceeding

Regulation:

§ 23.2

…*Child-custody proceeding.*

(1) "Child custody proceeding" means and includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes:

(i) Foster-care placement, which is any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) Termination of parental rights, which is any action resulting in the termination of the parent-child relationship;

(iii) Preadoptive placement, which is the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; or

(iv) Adoptive placement, which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

(2) An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes. There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings. If a child is placed in foster care or another out-of-home placement as a result of a status offense, that status offense proceeding is a child-custody proceeding.

Guidelines:

ICWA requirements apply to an action that may result in one of the placement outcomes, even if it ultimately does not. For example, ICWA would apply to an action where a court was considering a foster-care placement of a child, but ultimately decided to return the child to his parents. Thus, even though the action did not result in a foster-care placement, it may have culminated in such a placement and, therefore, should be considered a "child-custody proceeding" under the statute. The definition further makes clear that a child-custody proceeding that may culminate in one outcome (e.g., a foster-care placement) would be a separate child-custody proceeding from one that may culminate in a different outcome (e.g., a TPR), even though the same child may be involved in both proceedings.

This definition explicitly excludes emergency proceedings from the scope of a child-custody proceeding, as emergency proceedings are addressed separately.

This definition includes proceedings involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child.

Adoptions that do not involve TPR, for example, Tribal customary adoptions, are included within the definition of "child-custody proceeding" as either a "foster-care placement" or an "adoptive placement," because these terms, as defined, do not require TPR. *See* 25 U.S.C. 1903.

See § 23.103 and section B.2 of these guidelines. *See, also,* 81 FR 38799 (June 14, 2016) for additional information on this definition.

L.4 Continued custody and custody

Regulation:

§ 23.2

…*Continued custody* means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law, that a parent or Indian custodian already has or had at any point in the past. The biological mother of a child has had custody of a child.

Custody means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law. A party may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law.

Guidelines:

The definition of "continued custody" includes custody the parent or Indian custodian "has or had at any point in the past" as there is no evidence that Congress intended temporary disruptions (e.g., surrender of the child to another caregiver for a period) not to be included in "continued custody." The definition also clarifies that the parent or custodian may have physical and/or legal custody under any applicable Tribal law or Tribal custom or State law.

These definitions clarify that physical and/or legal custody may be defined by applicable Tribal law or custom, or by State law, but do not establish an order of preference among Tribal law, Tribal custom, and State law because custody may be established under any one of the three sources.

L.5 Domicile

Regulation:

§ 23.2

…*Domicile* means:

(1) For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.

(2) For an Indian child, the domicile of the Indian child's parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent.

Guidelines:

This definition reflects the common-law definition, which acknowledges that a person may reside in one place but be domiciled in another.

Note that, while the rule does not define "residing" or "residence," the Department interprets "residence" to mean the location where an individual is currently living but which is not their permanent, fixed home to which they intend to return – for example, a child might be domiciled with his or her parents but residing at a boarding school or university, or with family members while his or her parents are away for an extended period of time.

L.6 Emergency proceeding

Regulation:

§ 23.2

…*Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

Guidelines:

See section C of these guidelines.

L.7 Extended family member

Regulation:

§ 23.2

…*Extended family member* is defined by the law or custom of the Indian child's Tribe or, in the absence of such law or custom, is a person who has reached age 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

Guidelines:

Additional categories of individuals may be included in the meaning of the term if the law or custom of the Indian child's Tribe includes them.

"Extended family member" is not limited to Tribal citizens or Native American individuals.

L.8 Hearing

Regulation:

§ 23.2

…*Hearing* means a judicial session held for the purpose of deciding issues of fact, of law, or both.

Guidelines:

In order to demonstrate the distinction between a hearing and a child-custody proceeding, the definition of "child-custody proceeding" explains that there may be multiple hearings involved in a single child-custody proceeding.

L.9 Indian

Regulation:

§ 23.2

…*Indian* means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1606.

Guidelines:

Note that this term includes only those individuals who are members of "Indian Tribes" (i.e., federally recognized Tribes) and members of Alaska Native Claims Settlement Act regional corporations.

L.10 Indian child's Tribe

Regulation:

§ 23.2

…*Indian child's Tribe* means:

(1) The Indian Tribe in which an Indian child is a member or eligible for membership; or

(2) In the case of an Indian child who is a member of or eligible for membership in more than one Tribe, the Indian Tribe described in § 23.109.

Guidelines:

Note that while a child may meet the definition of "Indian" through more than one Tribe, ICWA establishes that one Tribe must be designated as the "Indian child's Tribe" for the purposes of the Act.

L.11 Indian custodian

Regulation:

§ 23.2

… *Indian custodian* means any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary

physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law.

Guidelines:

This definition allows for consideration of Tribal law or custom.

L.12 Indian foster home

Regulation:

§ 23.2

…*Indian foster home* means a foster home where one or more of the licensed or approved foster parents is an "Indian" as defined in 25 U.S.C. 1903(3).

Guidelines:

Note that a foster home does not meet the definition of an "Indian foster home" merely by virtue of an Indian child being present in the home; rather, one of the foster parents must meet the definition of "Indian."

L.13 Indian organization

Regulation:

§ 23.102

… *Indian organization* means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians or a tribe, or a majority of whose members are Indians.

Guidelines:

This term is used in § 23.107(c), regarding reason to know the child is an Indian child, and § 23.131, regarding foster-care placement preferences (the last preferred placement is an institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs).

L.14 Indian tribe

Regulation:

§ 23.2

…*Indian tribe* means any Indian tribe, band, nation, or other organized group or community of Indians federally recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602(c).

Guidelines:

Note that "Indian Tribe" under ICWA includes only federally recognized Tribes. States may have a more inclusive definition of "Indian Tribe" that includes State-recognized or other groups; however, the Federal ICWA statute and rule do not apply to those groups.

L.15 Involuntary proceeding

Regulation:

§ 23.2

… *Involuntary proceeding* means a child-custody proceeding in which the parent does not consent of his or her free will to the foster-care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster-care, preadoptive, or adoptive placement under threat of removal of the child by a State court or agency.

Guidelines:

See discussion in section B of these guidelines regarding ICWA's applicability to involuntary proceedings.

L.16 Parent or parents

Regulation:

§ 23.2

…*Parent or parents* means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established.

Guidelines:

Note that the rule does not provide a Federal standard for acknowledgment or establishment of paternity. Many State courts have held that, for ICWA purposes, an unwed father must make reasonable efforts to establish paternity, but need not strictly comply with State laws.[58]

L.17 Reservation

Regulation:

§ 23.2

…*Reservation* means Indian country as defined in 18 U.S.C 1151 and any lands, not covered under that section, title to which is held by the United States in trust for the benefit of any Indian Tribe or individual or held by any Indian Tribe or individual subject to a restriction by the United States against alienation.

Guidelines:

Note that this definition includes land that is held in trust but not officially proclaimed a "reservation."

Indian country generally includes lands within the boundaries of an Indian reservation, dependent Indian communities, Indian allotments, and any lands that are either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation. This definition does not include Alaska Native Villages unless they fall within one of these categories.

L.18 Status offenses

Regulation:

§ 23.2

…*Status offenses* mean offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person's status as a minor (e.g., truancy, incorrigibility).

Guidelines:

See also the definition of "child custody proceeding," which includes proceedings where a child is placed in foster care or another out-of-home placement as a result of a status offense.

If the placement is based upon a status offense, ICWA provisions apply, regardless of whether the State is a PL-280 State.

[58] *See* 81 FR 38796 (June 14, 2016) for a discussion of case law articulating a constitutional standard regarding the rights of unwed fathers.

A placement, including juvenile detention, resulting from status offense proceedings meets the statutory definition of "foster-care placement" and such placement is therefore subject to ICWA.

L.19 Tribal court

Regulation:

§ 23.2

…*Tribal court* means a court with jurisdiction over child-custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of a Tribe vested with authority over child-custody proceedings.

Guidelines:

Note that the definition includes any other administrative body of a tribe vested with authority over child-custody proceedings in recognition that a Tribe may have other mechanisms for making child-custody decisions (e.g., the Tribal council may preside over child-custody proceedings).

L.20 Upon demand

Regulation:

§ 23.2

…*Upon demand* means that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies.

Guidelines:

This definition is important for determining whether a placement is a "foster-care placement" (because the parent cannot have the child returned upon demand) under § 23.2, and therefore subject to requirements for involuntary proceedings for foster-care placement. Placements where the parent or Indian custodian can regain custody of the child upon demand are not subject to ICWA.

Examples of formalities or contingencies are formal court proceedings, the signing of agreements, and the repayment of the child's expenses.

L.21 Voluntary proceeding

Regulation:

§ 23.2

…*Voluntary proceeding* means a child-custody proceeding that is not an involuntary proceeding, such as a proceeding for foster-care, preadoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights.

Guidelines:

The rule refers to "both parents" to allow for situations where both parents are known and reachable. If a parent refuses to consent to the foster-care, preadoptive, or adoptive placement or TPR, the proceeding would meet the definition of an "involuntary proceeding." Nothing in the statute indicates that the consent of one parent eliminates the rights and protections provided by ICWA to a non-consenting parent.

The definition specifies that placements where the parent agrees to the placement only under threat of losing custody is not "voluntary," by including the phrase "without a threat of removal by a State agency." The rule also specifies that a voluntary proceeding must be of the parent's or Indian custodian's free will to clarify that a proceeding in which the parent agrees to an out-of-home placement of the child under threat that the child will otherwise be removed is not "voluntary."

The distinguishing factor for a "voluntary proceeding" is the parent(s) or Indian custodian's consent, not whether they personally "chose" the placement for their child.

L.22 Other definitions

Regulation:

§ 23.2

… *Act* means the Indian Child Welfare Act (ICWA), Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901 et seq.

Assistant Secretary means the Assistant Secretary – Indian Affairs, the Department of the Interior.

Bureau of Indian Affairs (BIA) means the Bureau of Indian Affairs, the Department of the Interior.

Secretary means the Secretary of the Interior or the Secretary's authorized representative acting under delegated authority.

State court means any agent or agency of a state, including the District of Columbia or any territory or possession of the United States, or any political subdivision empowered by law to terminate parental rights or to make foster care placements, preadoptive placements, or adoptive placements.

Tribal government means the federally recognized governing body of an Indian tribe.

Guidelines:

Note that while the regulation often refers to the "Secretary" of the Interior, generally, the Secretary has delegated authority for day-to-day matters arising under ICWA to BIA officials (e.g., BIA ICWA Specialist, BIA social services workers).

M. Additional Context for Understanding ICWA

M.1 ICWA's standards and the "best interests of the child" standard

In a child-custody proceeding, a party might argue that an aspect of ICWA or the rule is in tension with what is in the "best interests of the child." In most cases, this argument lacks merit. First, ICWA was specifically designed by Congress to protect the best interests of Indian children. In order to achieve that general goal, Congress established specific minimum Federal standards for the removal of Indian children from their families that are designed to protect children and their relationship with their parents, extended family, and Tribe.

One of the most important ways that ICWA protects the best interests of Indian children is by ensuring that, if possible, children remain with their parents and that, if they are separated, that support for reunification is provided. This is entirely consistent with the "best interests" standard applied in state courts, which recognizes the importance of family integrity and the preference for avoiding removal of a child from his or her home. If a child does need to be removed from her home, ICWA's placement preferences continue to protect her best interests by favoring placements within her extended family and Tribal community. Other ICWA provisions also serve to protect a child's best interests by, for example, ensuring that a child's parents have sufficient notice about her child-custody proceeding and an ability to fully participate in the proceeding (25 U.S.C. 1912(a),(b),(c)) and helping an adoptee access information about her Tribal connections (25 U.S.C. 1917).

Congress enacted ICWA specifically to address the problems that arose out of the application of subjective value judgments about what is "best" for an Indian child. Congress found that the unfettered subjective application of the "best interests" standard often failed to consider Tribal cultural practices or recognize the long-term advantages to children of remaining with their families and Tribes.[59] By providing courts with objective rules that operate above the emotions of individual cases, Congress was facilitating better State-court practice on these issues and the protection of Indian children, families, and Tribes.[60]

ICWA and the regulations provide objective standards that are designed to promote the welfare and short- and long-term interests of Indian children. However, the regulations also provide flexibility for courts to appropriately consider the particular circumstances of the individual children and to protect those children.

[59] H.R. Rep. No. 95-1386 at 19.
[60] See National Council of Juvenile and Family Court Judges, Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases 14 (2000).

N. Additional Resources

The Department encourages States and Tribes to collaborate to advance ICWA implementation and suggests looking to some of the tools developed by States to aid in implementation of ICWA. For example:

- New York has published a State guide to ICWA (see A Guide to Compliance with the Indian Child Welfare Act published by the New York Office of Children and Family Services at *http://ocfs.ny.gov/main/publications/pub4757guidecompliance.pdf*)
- Washington has established a State evaluation of ICWA implementation, which it performs in partnership with Tribes (see 2009 Washington State Indian Child Welfare Case Review at *https://www.dshs.wa.gov/sites/default/files/SESA/oip/documents/Region%202%20ICW%20CR%20report.pdf*)
- Michigan has established a "bench card" as a tool for judges implementing ICWA and the State counterpart law (see 2014 Michigan Indian Family Preservation Act (MIFPA) Bench Card (last visited Apr. 27, 2016), *http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/CWSToolkit/Documents/BC_ICWA_MIFPA.pdf*)
- Several States have established State-Tribal forums to discuss child-welfare policy and practice issues (see Montana, North Dakota, Oklahoma, Oregon, Utah, and Washington)
- Several States have established State-Tribal court forums where court system representatives meet regularly to improve cooperation between their jurisdictions (see California, Michigan, New Mexico, New York, and Wisconsin).

In addition, several non-governmental entities offer tools for ICWA implementation, such as the National Council of Juvenile and Family Court Justices, National Indian Child Welfare Association, and Native American Rights Fund.

Appendix 1: BIA regional office addresses

§ 23.11 Notice.

(b)(1) For child-custody proceedings in Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, or any territory or possession of the United States, notices must be sent to the following address: Eastern Regional Director, Bureau of Indian Affairs, 545 Marriott Drive, Suite 700, Nashville, Tennessee 37214.

(2) For child-custody proceedings in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, or Wisconsin, notices must be sent to the following address: Minneapolis Regional Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401-2241.

(3) For child-custody proceedings in Nebraska, North Dakota, or South Dakota, notices must be sent to the following address: Aberdeen Regional Director, Bureau of Indian Affairs, 115 Fourth Avenue, SE, Aberdeen, South Dakota 57401.

(4) For child-custody proceedings in Kansas, Texas (except for notices to the Ysleta del Sur Pueblo of El Paso County, Texas), or the western Oklahoma counties of Alfalfa, Beaver, Beckman, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods or Woodward, notices must be sent to the following address: Anadarko Regional Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005. Notices to the Ysleta del Sur Pueblo must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6).

(5) For child-custody proceedings in Wyoming or Montana (except for notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana), notices must be sent to the following address: Billings Regional Director, Bureau of Indian Affairs, 316 N. 26th Street, Billings, Montana 59101. Notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11).

(6) For child-custody proceedings in the Texas counties of El Paso and Hudspeth or in Colorado or New Mexico (exclusive of notices to the Navajo Nation from the New Mexico counties listed in paragraph (b)(9)), notices must be sent to the following address: Albuquerque Regional Director, Bureau of Indian Affairs, 615 First Street, P.O. Box 26567, Albuquerque, New Mexico 87125. Notices to the Navajo Nation must be sent to the Navajo Regional Director at the address listed in paragraph (b)(9).

(7) For child-custody proceedings in Alaska (except for notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska), notices must be sent to the following address: Juneau Regional Director, Bureau of Indian Affairs, 709 West 9th Street, Juneau, Alaska 99802-1219. Notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11).

(8) For child-custody proceedings in Arkansas, Missouri, or the eastern Oklahoma counties of Adair, Atoka, Bryan, Carter, Cherokee, Craig, Creek, Choctaw, Coal, Delaware, Garvin, Grady, Haskell, Hughes, Jefferson, Johnson, Latimer, LeFlore, Love, Mayes, McCurtain, McClain, McIntosh, Murray, Muskogee, Nowata, Okfuskee, Okmulgee, Osage, Ottawa, Pittsburg, Pontotoc, Pushmataha, Marshall, Rogers, Seminole, Sequoyah, Stephens, Tulsa, Wagoner, or Washington, notices must be sent to the following address: Muskogee Regional Director, Bureau of Indian Affairs, 101 North Fifth Street, Muskogee, Oklahoma 74401.

(9) For child-custody proceedings in the Arizona counties of Apache, Coconino (except for notices to the Hopi Tribe of Arizona and the San Juan Southern Paiute Tribe of Arizona) or Navajo (except for notices to the Hopi Tribe of Arizona); the New Mexico counties of McKinley (except for notices to the Zuni Tribe of the Zuni Reservation), San Juan, or Socorro; or the Utah county of San Juan, notices must be sent to the following address: Navajo Regional Director, Bureau of Indian Affairs, P.O. Box 1060, Gallup, New Mexico 87301. Notices to the Hopi and San Juan Southern Paiute Tribes of Arizona must be sent to the Phoenix Regional Director at the address listed in paragraph (b)(10). Notices to the Zuni Tribe of the Zuni Reservation must be

sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6).

(10) For child-custody proceedings in Arizona (exclusive of notices to the Navajo Nation from those counties listed in paragraph (b)(9)), Nevada, or Utah (exclusive of San Juan County), notices must be sent to the following address: Phoenix Regional Director, Bureau of Indian Affairs, 1 North First Street, P.O. Box 10, Phoenix, Arizona 85001.

(11) For child-custody proceedings in Idaho, Oregon, or Washington, notices must be sent to the following address: Portland Regional Director, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland, Oregon 97232. All notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, located in the Montana counties of Flathead, Lake, Missoula, and Sanders, must also be sent to the Portland Regional Director.

(12) For child-custody proceedings in California or Hawaii, notices must be sent to the following address: Sacramento Regional Director, Bureau of Indian Affairs, Federal Office Building, 2800 Cottage Way, Sacramento, California 95825.

* * *

II. Federal Resources
b. CFR

Displaying title 45, up to date as of 4/20/2022. Title 45 was last amended 3/17/2022.

Title 45 - Public Welfare
Subtitle B - Regulations Relating to Public Welfare
Chapter XIII
- Administration for Children and Families, Department of Health and Human Services
Subchapter G
- The Administration on Children, Youth and Families, Foster Care Maintenance Payments, Adoption Assistance, and Child and Family Services
Part 1355 - General

§ 1355.25 Principles of child and family services.

The following principles, most often identified by practitioners and others as helping to assure effective services for children, youth, and families, should guide the States and Indian Tribes in developing, operating, and improving the continuum of child and family services.

(a) The safety and well-being of children and of all family members is paramount. When safety can be assured, strengthening and preserving families is seen as the best way to promote the healthy development of children. One important way to keep children safe is to stop violence in the family including violence against their mothers.

(b) Services are focused on the family as a whole; service providers work with families as partners in identifying and meeting individual and family needs; family strengths are identified, enhanced, respected, and mobilized to help families solve the problems which compromise their functioning and well-being.

(c) Services promote the healthy development of children and youth, promote permanency for all children and help prepare youth emancipating from the foster care system for self-sufficiency and independent living.

(d) Services may focus on prevention, protection, or other short or long-term interventions to meet the needs of the family and the best interests and need of the individual(s) who may be placed in out-of-home care.

(e) Services are timely, flexible, coordinated, and accessible to families and individuals, principally delivered in the home or the community, and are delivered in a manner that is respectful of and builds on the strengths of the community and cultural groups.

(f) Services are organized as a continuum, designed to achieve measurable outcomes, and are linked to a wide variety of supports and services which can be crucial to meeting families' and children's needs, for example, housing, substance abuse treatment, mental health, health, education, job training, child care, and informal support networks.

(g) Most child and family services are community-based, involve community organizations, parents and residents in their design and delivery, and are accountable to the community and the client's needs.

(h) Services are intensive enough and of sufficient duration to keep children safe and meet family needs. The actual level of intensity and length of time needed to ensure safety and assist the family may vary greatly between preventive (family support) and crisis intervention services (family preservation), based on the changing needs of children and families at various times in their lives. A family or an individual does not need to be in crisis in order to receive services.

[61 FR 58654, Nov. 18, 1996]

Displaying title 45, up to date as of 4/20/2022. Title 45 was last amended 3/17/2022.

Title 45 - Public Welfare
Subtitle B - Regulations Relating to Public Welfare
Chapter XIII
- Administration for Children and Families, Department of Health and Human Services
Subchapter G
- The Administration on Children, Youth and Families, Foster Care Maintenance Payments, Adoption Assistance, and Child and Family Services

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PART 1356 - REQUIREMENTS APPLICABLE TO TITLE IV-E

Authority: 42 U.S.C. 620 *et seq.,* 42 U.S.C. 670 *et seq.;* 42 U.S.C. 1302.

§ 1356.10 Scope.

This part applies to title IV-E agency programs for foster care maintenance payments, adoption assistance payments, related foster care and adoption administrative and training expenditures, and the independent living services program under title IV-E of the Act.

[77 FR 946, Jan. 6, 2012]

§ 1356.20 Title IV-E plan document and submission requirements.

(a) To be in compliance with the title IV-E plan requirements and to be eligible to receive Federal financial participation (FFP) in the costs of foster care maintenance payments and adoption assistance under this part, a title IV-E agency must have a plan approved by the Secretary that meets the requirements of this part, part 1355, section 471(a) of the Act and for Tribal title IV-E agencies, section 479B(c) of the Act. The title IV-E plan must be submitted to the appropriate Regional Office, ACYF, in a form determined by the title IV-E agency.

(b) Failure by a title IV-E agency to comply with the requirements and standards for the data reporting system for foster care and adoption (§ 1355.40 of this chapter) shall be considered a substantial failure by the title IV-E agency in complying with the plan.

(c) The following procedures for approval of plans and amendments apply to the title IV-E program:

(1) ***Plan.*** The plan consists of written documents furnished by the title IV-E agency to cover its program under part E of title IV. After approval of the original plan by the Commissioner, ACYF, all relevant changes, required by new statutes, rules, regulations, interpretations, and court decisions, are required to be submitted currently so that ACYF may determine whether the plan continues to meet Federal requirements and policies.

(2) ***Submittal.*** Plans and revisions of the plans are submitted first to the State governor or his/her designee, or the Tribal leader or his/her designee for review and then to the regional office, ACYF. Title IV-E agencies are encouraged to obtain consultation of the regional staff when a plan is in process of preparation or revision.

(3) ***Review.*** Staff in the regional offices are responsible for review of plans and amendments. They also initiate discussion with the title IV-E agency on clarification of significant aspects of the plan which come to their attention in the course of this review. Plan material on which the regional staff has questions concerning the application of Federal policy is referred with recommendations as required to the central office for technical assistance. Comments and suggestions, including those of consultants in specified areas, may be prepared by the central office for use by the regional staff in negotiations with the title IV-E agency.

(4) ***Action.*** ACYF has the authority to approve plans and amendments thereto which provide for the administration of foster care maintenance payments and adoption assistance programs under section 471 of the Act. The Commissioner, ACYF, retains the authority to determine that proposed plan material is not approvable, or that a previously approved plan no longer meets the requirements for approval. The Regional Office, ACYF, formally notifies the title IV-E agency of the actions taken on plans or revisions.

(5) ***Basis for approval.*** Determinations as to whether plans (including plan amendments and administrative practice under the plans) originally meet or continue to meet, the requirements for approval are based on relevant Federal statutes and regulations.

(6) ***Prompt approval of plans.*** The determination as to whether a plan submitted for approval conforms to the requirements for approval under the Act and regulations issued pursuant thereto shall be made promptly and not later than the 45th day following the date on which the plan submittal is received in the regional office, unless the Regional Office, ACYF, has secured from the title IV-E agency a written agreement to extend that period.

(7) ***Prompt approval of plan amendments.*** Any amendment of an approved plan may, at the option of the title IV-E agency, be considered as a submission of a new plan. If the title IV-E agency requests that such amendment be so considered, the determination as to its conformity with the requirements for approval shall be made promptly and not later than the 45th day following the date on which such a request is received in the regional office with respect to an amendment that has been received in such office, unless the Regional Office, ACYF, has secured from the title IV-E agency a written agreement to extend that period. In absence of request by a title IV-E agency that an amendment of an approved plan shall be considered as a submission of a new plan, the procedures under § 201.6(a) and (b) shall be applicable.

(8) ***Effective date.*** The effective date of a new plan may not be earlier than the first day of the calendar quarter in which an approvable plan is submitted, and with respect to expenditures for assistance under such plan, may not be earlier than the first day on which the plan is in operation on a statewide basis or, in the case of a Tribal title IV-E agency, in operation in the Tribal title IV-E agency's entire service area. The same applies with respect to plan amendments.

(d) Once the title IV-E plan has been submitted and approved, it shall remain in effect until amendments are required. An amendment is required if there is any significant and relevant change in the information or assurances in the plan, or the organization, policies or operations described in the plan.

[77 FR 946, Jan. 6, 2012]

§ 1356.21 Foster care maintenance payments program implementation requirements.

(a) ***Statutory and regulatory requirements of the Federal foster care program.*** To implement the foster care maintenance payments program provisions of the title IV-E plan and to be eligible to receive Federal financial participation (FFP) for foster care maintenance payments under this part, a title IV-E agency must meet the requirements of this section, 45 CFR 1356.22, 45 CFR 1356.30, and sections 472, 475(1), 475(4), 475(5), 475(6), and for a Tribal title IV-E agency section 479(B)(c)(1)(C)(ii)(II) of the Act.

(b) ***Reasonable efforts.*** The title IV-E agency must make reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child from his/her home, as long as the child's safety is assured; to effect the safe reunification of the child and family (if temporary out-of-home placement is necessary to ensure the immediate safety of the child); and to make and finalize alternate permanency plans in a timely manner when reunification is not appropriate or possible. In order to satisfy the "reasonable efforts" requirements of section 471(a)(15) (as implemented through section 472(a)(2) of the Act), the title IV-E agency must meet the requirements of paragraphs (b) and (d) of this section. In determining reasonable efforts to be made with respect to a child and in making such reasonable efforts, the child's health and safety must be the paramount concern.

(1) ***Judicial determination of reasonable efforts to prevent a child's removal from the home.***

(i) When a child is removed from his/her home, the judicial determination as to whether reasonable efforts were made, or were not required to prevent the removal, in accordance with paragraph (b)(3) of this section, must be made no later than 60 days from the date the child is removed from the home pursuant to paragraph (k)(1)(ii) of this section.

(ii) If the determination concerning reasonable efforts to prevent the removal is not made as specified in paragraph (b)(1)(i) of this section, the child is not eligible under the title IV-E foster care maintenance payments program for the duration of that stay in foster care.

(2) ***Judicial determination of reasonable efforts to finalize a permanency plan.***

(i) The title IV-E agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect (whether the plan is reunification, adoption, legal guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement) within twelve months of the date the child is considered to have entered foster care in accordance with the definition at § 1355.20 of this part, and at least once every twelve months thereafter while the child is in foster care.

(ii) If such a judicial determination regarding reasonable efforts to finalize a permanency plan is not made in accordance with the schedule prescribed in paragraph (b)(2)(i) of this section, the child becomes ineligible under title IV-E at the end of the month in which the judicial determination was required to have been made, and remains ineligible until such a determination is made.

(3) ***Circumstances in which reasonable efforts are not required to prevent a child's removal from home or to reunify the child and family.*** Reasonable efforts to prevent a child's removal from home or to reunify the child and family are not required if the title IV-E agency obtains a judicial determination that such efforts are not required because:

(i) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances (as defined in State, or for a Tribal title IV-E agency, Tribal law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);

(ii) A court of competent jurisdiction has determined that the parent has been convicted of:

(A) Murder (which would have been an offense under section 1111(a) of title 18, United States Code, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

(B) Voluntary manslaughter (which would have been an offense under section 1112(a) of title 18, United States Code, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

(C) Aiding or abetting, attempting, conspiring, or soliciting to commit such a murder or such a voluntary manslaughter; or

(D) A felony assault that results in serious bodily injury to the child or another child of the parent; or,

(iii) The parental rights of the parent with respect to a sibling have been terminated involuntarily.

(4) ***Concurrent planning.*** Reasonable efforts to finalize an alternate permanency plan may be made concurrently with reasonable efforts to reunify the child and family.

(5) ***Use of the Federal Parent Locator Service.*** The State agency may seek the services of the Federal Parent Locator Service to search for absent parents at any point in order to facilitate a permanency plan.

(c) ***Contrary to the welfare determination.*** Under section 472(a)(2) of the Act, a child's removal from the home must have been the result of a judicial determination (unless the child was removed pursuant to a voluntary placement agreement) to the effect that continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interest, of the child. The contrary to the welfare determination must be made in the first court ruling that sanctions (even temporarily) the removal of a child from home. If the determination regarding contrary to the welfare is not made in the first court ruling pertaining to removal from the home, the child is not eligible for title IV-E foster care maintenance payments for the duration of that stay in foster care.

(d) ***Documentation of judicial determinations.*** The judicial determinations regarding contrary to the welfare, reasonable efforts to prevent removal, and reasonable efforts to finalize the permanency plan in effect, including judicial determinations that reasonable efforts are not required, must be explicitly documented and must be made on a case-by-case basis and so stated in the court order.

(1) If the reasonable efforts and contrary to the welfare judicial determinations are not included as required in the court orders identified in paragraphs (b) and (c) of this section, a transcript of the court proceedings is the only other documentation that will be accepted to verify that these required determinations have been made.

(2) Neither affidavits nor nunc pro tunc orders will be accepted as verification documentation in support of reasonable efforts and contrary to the welfare judicial determinations except for a Tribal title IV-E agency for the first 12 months that agency's title IV-E plan is in effect as provided for in section 479B(c)(1)(C)(ii)(I) of the Act.

(3) Court orders that reference State or Tribal law to substantiate judicial determinations are not acceptable, even if such law provides that a removal must be based on a judicial determination that remaining in the home would be contrary to the child's welfare or that removal can only be ordered after reasonable efforts have been made.

(e) ***Trial home visits.*** A trial home visit may not exceed six months in duration, unless a court orders a longer trial home visit. If a trial home visit extends beyond six months and has not been authorized by the court, or exceeds the time period the court has deemed appropriate, and the child is subsequently returned to foster care, that placement must then be considered a new placement and title IV-E eligibility must be newly established. Under these circumstances the judicial determinations regarding contrary to the welfare and reasonable efforts to prevent removal are required.

(f) ***Case review system.*** In order to satisfy the provisions of section 471(a)(16) of the Act regarding a case review system, each title IV-E agency's case review system must meet the requirements of sections 475(5) and 475(6) of the Act.

(g) ***Case plan requirements.*** In order to satisfy the case plan requirements of sections 471(a)(16), 475(1) and 475(5)(A) and (D) of the Act, the title IV-E agency must promulgate policy materials and instructions for use by staff to determine the appropriateness of and necessity for the foster care placement of the child. The case plan for each child must:

(1) Be a written document, which is a discrete part of the case record, in a format determined by the title IV-E agency, which is developed jointly with the parent(s) or guardian of the child in foster care; and

(2) Be developed within a reasonable period, to be established by the title IV-E agency, but in no event later than 60 days from the child's removal from the home pursuant to paragraph (k) of this section;

(3) Include a discussion of how the case plan is designed to achieve a safe placement for the child in the least restrictive (most family-like) setting available and in close proximity to the home of the parent(s) when the case plan goal is reunification and a discussion of how the placement is consistent with the best interests and special needs of the child. (FFP is not available when a court orders a placement with a specific foster care provider);

(4) Include a description of the services offered and provided to prevent removal of the child from the home and to reunify the family; and

(5) Document the steps to finalize a placement when the case plan goal is or becomes adoption or placement in another permanent home in accordance with sections 475(1)(E) and (5)(E) of the Act. When the case plan goal is adoption, at a minimum, such documentation shall include child-specific recruitment efforts such as the use of State, Tribal, regional, and national adoption exchanges including electronic exchange systems.

(This requirement has been approved by the Office of Management and Budget under OMB Control Number 0980-0140. In accordance with the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.)

(h) ***Application of the permanency hearing requirements.***

(1) To meet the requirements of the permanency hearing, the title IV-E agency must, among other requirements, comply with section 475(5)(C) of the Act.

(2) In accordance with paragraph (b)(3) of this section, when a court determines that reasonable efforts to return the child home are not required, a permanency hearing must be held within 30 days of that determination, unless the requirements of the permanency hearing are fulfilled at the hearing in which the court determines that reasonable efforts to reunify the child and family are not required.

(3) If the title IV-E agency concludes, after considering reunification, adoption, legal guardianship, or permanent placement with a fit and willing relative, that the most appropriate permanency plan for a child is placement in another planned permanent living arrangement, the title IV-E agency must document to the court the compelling reason for the alternate plan. Examples of a compelling reason for establishing such a permanency plan may include:

(i) The case of an older teen who specifically requests that emancipation be established as his/her permanency plan;

(ii) The case of a parent and child who have a significant bond but the parent is unable to care for the child because of an emotional or physical disability and the child's foster parents have committed to raising him/her to the age of majority and to facilitate visitation with the disabled parent; or,

(iii) the Tribe has identified another planned permanent living arrangement for the child.

(4) When an administrative body, appointed or approved by the court, conducts the permanency hearing, the procedural safeguards set forth in the definition of *permanency hearing* must be so extended by the administrative body.

(i) ***Application of the requirements for filing a petition to terminate parental rights at section 475(5)(E) of the Social Security Act.***

(1) Subject to the exceptions in paragraph (i)(2) of this section, the title IV-E agency must file a petition (or, if such a petition has been filed by another party, seek to be joined as a party to the petition) to terminate the parental rights of a parent(s):

(i) Whose child has been in foster care under the responsibility of the title IV-E agency for 15 of the most recent 22 months. The petition must be filed by the end of the child's fifteenth month in foster care. In calculating when to file a petition for termination of parental rights, the title IV-E agency:

(A) Must calculate the 15 out of the most recent 22 month period from the date the child is considered to have entered foster care as defined at section 475(5)(F) of the Act and § 1355.20 of this part;

(B) Must use a cumulative method of calculation when a child experiences multiple exits from and entries into foster care during the 22 month period;

(C) Must not include trial home visits or runaway episodes in calculating 15 months in foster care; and,

(D) Need only apply section 475(5)(E) of the Act to a child once if the title IV-E agency does not file a petition because one of the exceptions at paragraph (i)(2) of this section applies;

(ii) Whose child has been determined by a court of competent jurisdiction to be an abandoned infant (as defined under State or for a Tribal title IV-E agency, Tribal law). The petition to terminate parental rights must be filed within 60 days of the judicial determination that the child is an abandoned infant; or,

(iii) Who has been convicted of one of the felonies listed at paragraph (b)(3)(ii) of this section. Under such circumstances, the petition to terminate parental rights must be filed within 60 days of a judicial determination that reasonable efforts to reunify the child and parent are not required.

(2) The title IV-E agency may elect not to file or join a petition to terminate the parental rights of a parent per paragraph (i)(1) of this section if:

(i) At the option of the title IV-E agency, the child is being cared for by a relative;

(ii) The title IV-E agency has documented in the case plan (which must be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the individual child. Compelling reasons for not filing a petition to terminate parental rights include, but are not limited to:

(A) Adoption is not the appropriate permanency goal for the child; or,

(B) No grounds to file a petition to terminate parental rights exist; or,

(C) The child is an unaccompanied refugee minor as defined in 45 CFR 400.111; or

(D) There are international legal obligations or compelling foreign policy reasons that would preclude terminating parental rights; or

(iii) The title IV-E agency has not provided to the family, consistent with the time period in the case plan, services that the title IV-E agency deems necessary for the safe return of the child to the home, when reasonable efforts to reunify the family are required.

(3) When the title IV-E agency files or joins a petition to terminate parental rights in accordance with paragraph (i)(1) of this section, it must concurrently begin to identify, recruit, process, and approve a qualified adoptive family for the child.

(j) ***Child of a minor parent in foster care.*** Foster care maintenance payments made on behalf of a child placed in a foster family home or child care institution, who is the parent of a son or daughter in the same home or institution, must include amounts which are necessary to cover costs incurred on behalf of the child's son or daughter. Said costs must be limited to funds expended on items listed in the definition of *foster care maintenance payments* in § 1355.20 of this part.

(k) ***Removal from the home of a specified relative.***

(1) For the purposes of meeting the requirements of section 472(a)(1) of the Act, a removal from the home must occur pursuant to:

(i) A voluntary placement agreement entered into by a parent or guardian which leads to a physical or constructive removal (i.e., a non-physical or paper removal of custody) of the child from the home; or

(ii) A judicial order for a physical or constructive removal of the child from a parent or specified relative.

(2) A removal has not occurred in situations where legal custody is removed from the parent or relative and the child remains with the same relative in that home under supervision by the title IV-E agency.

(3) A child is considered constructively removed on the date of the first judicial order removing custody, even temporarily, from the appropriate specified relative or the date that the voluntary placement agreement is signed by all relevant parties.

(l) ***Living with a specified relative.*** For purposes of meeting the requirements for living with a specified relative prior to removal from the home under section 472(a)(1) of the Act, all of the conditions under section 472(a)(3), and for Tribal title IV-E agencies section 479B(c)(1)(C)(ii)(II) of the Act, one of the two following situations must apply:

(1) The child was living with the parent or specified relative, and was AFDC eligible in that home in the month of the voluntary placement agreement or initiation of court proceedings; or

(2) The child had been living with the parent or specified relative within six months of the month of the voluntary placement agreement or the initiation of court proceedings, and the child would have been AFDC eligible in that month if s/he had still been living in that home.

(m) ***Review of payments and licensing standards.*** In meeting the requirements of section 471(a)(11) of the Act, the title IV-E agency must review at reasonable, specific, time-limited periods to be established by the agency:

(1) The amount of the payments made for foster care maintenance and adoption assistance to assure their continued appropriateness; and

(2) The licensing or approval standards for child care institutions and foster family homes.

(n) ***Foster care goals.*** The specific foster care goals required under section 471(a)(14) of the Act must be incorporated into State law or Tribal law by statute, code, resolution, Tribal proceedings or administrative regulation with the force of law.

(o) ***Notice and right to be heard.*** The title IV-E agency must provide the foster parent(s) of a child and any preadoptive parent or relative providing care for the child with timely notice of and the opportunity to be heard in any proceedings held with respect to the child during the time the child is in the care of such foster parent, preadoptive parent, or relative caregiver. Notice of and opportunity to be heard does not include the right to standing as a party to the case.

[65 FR 4088, Jan. 25, 2000, as amended at 66 FR 58677, Nov. 23, 2001; 77 FR 947, Jan. 6, 2012]

§ 1356.22 Implementation requirements for children voluntarily placed in foster care.

(a) As a condition of receipt of Federal financial participation (FFP) in foster care maintenance payments for a dependent child removed from his home under a voluntary placement agreement, the title IV-E agency must meet the requirements of:

(1) Section 472 of the Act, as amended;

(2) Sections 422(b)(8) and 475(5) of the Act;

(3) 45 CFR 1356.21(e), (f), (g), (h), and (i); and

(4) The requirements of this section.

(b) Federal financial participation is available only for voluntary foster care maintenance expenditures made within the first 180 days of the child's placement in foster care unless there has been a judicial determination by a court of competent jurisdiction, within the first 180 days of such placement, to the effect that the continued voluntary placement is in the best interests of the child.

(c) The title IV-E agency must establish and maintain a uniform procedure or system, consistent with State or Tribal law, for revocation by the parent(s) of a voluntary placement agreement and return of the child.

[65 FR 4090, Jan. 25, 2000, as amended at 66 FR 58677, Nov. 23, 2001; 77 FR 949, Jan. 6, 2012]

§ 1356.30 Safety requirements for foster care and adoptive home providers.

(a) The title IV-E agency must provide documentation that criminal records checks have been conducted with respect to prospective foster and adoptive parents.

(b) The title IV-E agency may not approve or license any prospective foster or adoptive parent, nor may the title IV-E agency claim FFP for any foster care maintenance or adoption assistance payment made on behalf of a child placed in a foster home operated under the auspices of a child placing agency or on behalf of a child placed in an adoptive home through a private adoption agency, if the title IV-E agency finds that, based on a criminal records check conducted in accordance with paragraph (a) of this section, a court of competent jurisdiction has determined that the prospective foster or adoptive parent has been convicted of a felony involving:

(1) Child abuse or neglect;

(2) Spousal abuse;

(3) A crime against a child or children (including child pornography); or,

(4) A crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault or battery.

(c) The title IV-E agency may not approve or license any prospective foster or adoptive parent, nor may the title IV-E agency claim FFP for any foster care maintenance or adoption assistance payment made on behalf of a child placed in a foster home operated under the auspices of a child placing agency or on behalf of a child placed in an adoptive home through a private adoption agency, if the title IV-E agency finds, based on a criminal records check conducted in accordance with paragraph (a) of this section, that a court of competent jurisdiction has determined that the prospective foster or adoptive parent has, within the last five years, been convicted of a felony involving:

(1) Physical assault;

(2) Battery; or,

(3) A drug-related offense.

(d) [Reserved]

(e) In all cases where the State opted out of the criminal records check requirement, as permitted prior to the amendments made by section 152 of Public Law 109-248, the licensing file for that foster or adoptive family must contain documentation which verifies that safety considerations with respect to the caretaker(s) have been addressed.

(f) In order for a child care institution to be eligible for title IV-E funding, the licensing file for the institution must contain documentation which verifies that safety considerations with respect to the staff of the institution have been addressed.

[65 FR 4090, Jan. 25, 2000, as amended at 77 FR 949, Jan. 6, 2012]

§ 1356.40 Adoption assistance program: Administrative requirements to implement section 473 of the Act.

(a) To implement the adoption assistance program provisions of the title IV-E plan and to be eligible for Federal financial participation in adoption assistance payments under this part, the title IV-E agency must meet the requirements of this section and section 471(a), applicable provisions of section 473, and section 475(3) of the Act.

(b) The adoption assistance agreement for payments pursuant to section 473(a)(2) must meet the requirements of section 475(3) of the Act and must:

(1) Be signed and in effect at the time of or prior to the final decree of adoption. A copy of the signed agreement must be given to each party; and

(2) Specify its duration; and

(3) Specify the nature and amount of any payment, services and assistance to be provided under such agreement and, for purposes of eligibility under title XIX of the Act, specify that the child is eligible for Medicaid services; and

(4) Specify, with respect to agreements entered into on or after October 1, 1983, that the agreement shall remain in effect regardless of the place of residence of the adoptive parents at any given time.

(c) There must be no income eligibility requirement (means test) for the prospective adoptive parent(s) in determining eligibility for adoption assistance payments.

(d) In the event an adoptive family moves from one place of residence to another, the family may apply for social services on behalf of the adoptive child in the new place of residence. If a needed service(s) specified in the adoption assistance agreement is not available in the new place of residence, the title IV-E agency making the original adoption assistance payment remains financially responsible for providing the specified service(s).

(e) A title IV-E agency may make an adoption assistance agreement with adopting parent(s) who reside in another State or a Tribal service area. If so, all provisions of this section apply.

(f) The title IV-E agency must actively seek ways to promote the adoption assistance program.

[48 FR 23116, May 23, 1983, as amended at 53 FR 50220, Dec. 14, 1988; 77 FR 949, Jan. 6, 2012]

§ 1356.41 Nonrecurring expenses of adoption.

(a) The amount of the payment made for nonrecurring expenses of adoption shall be determined through agreement between the adopting parent(s) and the title IV-E agency administering the program. The agreement must indicate the nature and amount of the nonrecurring expenses to be paid.

(b) The agreement for nonrecurring expenses may be a separate document or a part of an agreement for either State, Tribal, or Federal adoption assistance payments or services.

(c) There must be no income eligibility requirement (means test) for adopting parents in determining whether payments for nonrecurring expenses of adoption shall be made. However, parents cannot be reimbursed for out-of-pocket expenses for which they have otherwise been reimbursed.

(d) For purposes of payment of nonrecurring expenses of adoption, the title IV-E agency must determine that the child is a "child with special needs" as defined in section 473(c) of the Act, and that the child has been placed for adoption in accordance with applicable laws; the child need not meet the categorical eligibility requirements at section 473(a)(2).

(e)

(1) The title IV-E agency must notify all appropriate courts and all public and licensed private nonprofit adoption agencies of the availability of funds for the nonrecurring expenses of adoption of children with special needs as well as where and how interested persons may apply for these funds. This information should routinely be made available to all persons who inquire about adoption services.

(2) The agreement for nonrecurring expenses must be signed at the time of or prior to the final decree of adoption. Claims must be filed with the title IV-E agency within two years of the date of the final decree of adoption.

(f)

(1) Funds expended by the title IV-E agency under an adoption assistance agreement, with respect to nonrecurring adoption expenses incurred by or on behalf of parents who adopt a child with special needs, shall be considered an administrative expenditure of the title IV-E Adoption Assistance Program. Federal reimbursement is available at a 50 percent matching rate, for title IV-E agency expenditures up to $2,000, for any adoptive placement.

(2) Title IV-E agencies may set a reasonable lower maximum which must be based on reasonable charges, consistent with State, Tribal, and local practices, for special needs adoptions within the State or Tribal service area. The basis for setting a lower maximum must be documented and available for public inspection.

(3) In cases where siblings are placed and adopted, either separately or as a unit, each child is treated as an individual with separate reimbursement for nonrecurring expenses up to the maximum amount allowable for each child.

(g) Federal financial participation for nonrecurring expenses of adoption is limited to costs incurred by or on behalf of adoptive parents that are not otherwise reimbursed from other sources. Payments for nonrecurring expenses shall be made either directly by the title IV-E agency or through another public or licensed nonprofit private agency.

(h) When the adoption of the child involves a placement outside the State or Tribal service area, the title IV-E agency that enters into an adoption assistance agreement under section 473(a)(1)(B)(ii) of the Act or under a State or Tribal subsidy program will be responsible for paying the nonrecurring adoption expenses of the child. In cases where there is placement outside the State or Tribal service area but no agreement for other Federal, Tribal, or State adoption assistance, the title IV-E agency in the jurisdiction in which the final adoption decree is issued will be responsible for reimbursement of nonrecurring expenses if the child meets the requirements of section 473(c).

(i) The term "nonrecurring adoption expenses" means reasonable and necessary adoption fees, court costs, attorney fees and other expenses which are directly related to the legal adoption of a child with special needs, which are not incurred in violation of State, Tribal or Federal law, and which have not been reimbursed from other sources or other funds. "Other expenses which are directly related to the legal adoption of a child with special needs" means the costs of the adoption incurred by or on behalf of the parents and for which parents carry the ultimate liability for payment. Such costs may include the adoption study, including health and psychological examination, supervision of the placement prior to adoption, transportation and the reasonable costs of lodging and food for the child and/or the adoptive parents when necessary to complete the placement or adoption process.

(j) Failure to honor all eligible claims will be considered non-compliance by the title IV-E agency with title IV-E of the Act.

(k) A title IV-E expenditure is considered made in the quarter during which the payment was made by a title IV-E agency to a private nonprofit agency, individual or vendor payee.

[53 FR 50220, Dec. 14, 1988, as amended at 77 FR 949, Jan. 6, 2012]

§ 1356.50 Withholding of funds for non-compliance with the approved title IV-E plan.

(a) To be in compliance with the title IV-E plan requirements, a title IV-E agency must meet the requirements of the Act and 45 CFR 1356.20, 1356.21, 1356.30, and 1356.40 of this part.

(b) To be in compliance with the title IV-E plan requirements, a title IV-E agency that chooses to claim FFP for voluntary placements must meet the requirements of the Act, 45 CFR 1356.22 and paragraph (a) of this section; and

(c) For purposes of this section, the procedures in § 1355.39 of this chapter apply.

[48 FR 23117, May 23, 1983, as amended at 65 FR 4091, Jan. 25, 2000; 66 FR 58677, Nov. 23, 2001; 77 FR 950, Jan. 6, 2012]

§ 1356.60 Fiscal requirements (title IV-E).

(a) ***Federal matching funds for foster care maintenance and adoption assistance payments.***

(1) Effective October 1, 1980, Federal financial participation (FFP) is available to States under an approved title IV-E State plan for allowable costs in expenditures for:

(1) Federal financial participation (FFP) is available to title IV-E agencies under an approved title IV-E plan for allowable costs in expenditures for:

(i) Foster care maintenance payments as defined in section 475(4) of the Act, made in accordance with 45 CFR 1356.20 through 1356.30, section 472 of the Act, and for a Tribal title IV-E agency, section 479B of the Act;

(ii) Adoption assistance payments made in accordance with 45 CFR 1356.20 and 1356.40, applicable provisions of section 473, section 475(3) and, for a Tribal title IV-E agency, section 479B of the Act.

(2) Federal financial participation is available at the rate of the Federal medical assistance percentage as defined in section 1905(b), 474(a)(1) and (2) and 479B(d) of the Act as applicable, definitions, and pertinent regulations as promulgated by the Secretary, or his designee.

(b) ***Federal matching funds for title IV-E agency training for foster care and adoption assistance under title IV-E.***

(1) Federal financial participation is available at the rate of seventy-five percent (75%) in the costs of:

(i) Training personnel employed or preparing for employment by the title IV-E agency administering the plan, and;

(ii) Providing short-term training (including travel and per diem expenses) to current or prospective foster or adoptive parents and the members of the state licensed or approved child care institutions providing care to foster and adopted children receiving title IV-E assistance.

(2) All training activities and costs funded under title IV-E shall be included in the agency's training plan for title IV-B.

(3) Short and long term training at educational institutions and in-service training may be provided in accordance with the provisions of §§ 235.63 through 235.66(a) of this title.

(c) ***Federal matching funds for other title IV-E agency administrative expenditures for foster care and adoption assistance under title IV-E.*** Federal financial participation is available at the rate of fifty percent (50%) for administrative expenditures necessary for the proper and efficient administration of the title IV-E plan. The State's cost allocation plan shall identify which costs are allocated and claimed under this program.

(1) The determination and redetermination of eligibility, fair hearings and appeals, rate setting and other costs directly related only to the administration of the foster care program under this part are deemed allowable administrative costs under this paragraph. They may not be claimed under any other section or Federal program.

(2) The following are examples of allowable administrative costs necessary for the administration of the foster care program:

(i) Referral to services;

(ii) Preparation for and participation in judicial determinations;

(iii) Placement of the child;

(iv) Development of the case plan;

(v) Case reviews;

(vi) Case management and supervision;

(vii) Recruitment and licensing of foster homes and institutions;

(viii) Rate setting; and

(ix) A proportionate share of related agency overhead.

(x) Costs related to data collection and reporting.

(3) Allowable administrative costs do not include the costs of social services provided to the child, the child's family or foster family which provide counseling or treatment to ameliorate or remedy personal problems, behaviors or home conditions.

(d) ***Cost of the data collection system.***

(1) Costs related to data collection system initiation, implementation and operation may be charged as an administrative cost of title IV-E at the 50 percent matching rate subject to the restrictions in paragraph (d)(2) of this section

(2) For information systems used for purposes other than those specified by section 479 of the Act, costs must be allocated and must bear the same ratio as the foster care and adoption population bears to the total population contained in the information system as verified by reports from all other programs included in the system.

(e) ***Federal matching funds for CCWIS and Non-CCWIS.*** Federal matching funds are available at the rate of fifty percent (50%). Requirements for the cost allocation of CCWIS and non-CCWIS project costs are at § 1355.57 of this chapter.

[47 FR 30925, July 15, 1982, as amended at 48 FR 23117, May 23, 1983; 53 FR 50221, Dec. 14, 1988; 58 FR 67938, 67947, Dec. 22, 1993; 65 FR 4091, Jan. 25, 2000; 66 FR 58677, Nov. 23, 2001; 77 FR 950, Jan. 6, 2012; 81 FR 35482, June 2, 2016]

§§ 1356.65-1356.66 [Reserved]

§ 1356.67 Procedures for the transfer of placement and care responsibility of a child from a State to a Tribal title IV-E agency or an Indian Tribe with a title IV-E agreement.

(a) Each State with a title IV-E plan approved under section 471 of the Act must establish and maintain procedures, in consultation with Indian Tribes, for the transfer of responsibility for the placement and care of a child under a State title IV-E plan to a Tribal title IV-E agency or an Indian Tribe with a title IV-E agreement in a way that does not affect a child's eligibility for, or payment of, title IV-E and the child's eligibility for medical assistance under title XIX of the Act.

(b) The procedures must, at a minimum, provide for the State to:

(1) Determine, if the eligibility determination is not already completed, the child's eligibility under section 472 or 473 of the Act at the time of the transfer of placement and care responsibility of a child to a Tribal title IV-E agency or an Indian Tribe with a title IV-E agreement.

(2) Provide essential documents and information necessary to continue a child's eligibility under title IV-E and Medicaid programs under title XIX to the Tribal title IV-E agency, including, but not limited to providing:

(i) All judicial determinations to the effect that continuation in the home from which the child was removed would be contrary to the welfare of the child and that reasonable efforts described in section 471(a)(15) of the Act have been made;

(ii) Other documentation the State has that relates to the child's title IV-E eligibility under sections 472 and 473 of the Act;

(iii) Information and documentation available to the agency regarding the child's eligibility or potential eligibility for other Federal benefits;

(iv) The case plan developed pursuant to section 475(1) of the Act, including health and education records of the child pursuant to section 475(1)(C) of the Act; and

(v) Information and documentation of the child's placement settings, including a copy of the most recent provider's license or approval.

[77 FR 950, Jan. 6, 2012]

§ 1356.68 Tribal title IV-E agency requirements for in-kind administrative and training contributions from third-party sources.

(a) ***Option to claim in-kind expenditures from third-party sources for non-Federal share of administrative and training costs.*** A Tribal title IV-E agency may claim allowable in-kind expenditures from third-party sources for the purpose of determining the non-Federal share of administrative or training costs subject to paragraphs (b) through (d) of this section.

(b) ***In-kind expenditures for fiscal years 2010 and 2011*** -

(1) ***Administrative costs.*** A Tribal title IV-E agency may claim allowable in-kind expenditures from third-party sources of up to 25 percent of the total administrative funds expended during a fiscal quarter pursuant to section 474(a)(3)(C), (D) or (E) of the Act.

(2) ***Training costs.*** A Tribal title IV-E agency may claim in-kind training expenditures of up to 12 percent of the total training funds expended during a fiscal year quarter pursuant to section 474(a)(3)(A) and (B) of the Act, but only from the following sources:

(i) A State or local government;

(ii) An Indian Tribe, Tribal organization, or Tribal consortium other than the Indian Tribe, organization, or consortium submitting the title IV-E plan;

(iii) A public institution of higher education;

(iv) A Tribal College or University (as defined in section 316 of the Higher Education Act of 1965 (20 U.S.C. 1059c)); and

(v) A private charitable organization.

(c) ***In-kind expenditures for fiscal years 2012 and thereafter*** -

(1) ***Administrative costs.*** A Tribal title IV-E agency may claim in-kind expenditures from third-party sources of up to 50 percent of the total administrative funds expended during a fiscal quarter pursuant to section 474(a)(3)(C), (D) or (E) of the Act.

(2) ***Training costs.*** A Tribal title IV-E agency may claim in-kind training expenditures of up to 25 percent (or 30 percent consistent with section 203(b) of Pub. L. 110-351) of the total training funds expended during each quarter of fiscal year 2012 pursuant to section 474(a)(3)(A) and (B) of the Act. For fiscal year 2013 and thereafter, a Tribal title IV-E agency may claim in-kind training expenditures of up to 25 percent of the total training funds expended during a fiscal quarter pursuant to section 474(a)(3)(A) and (B) of the Act.

(3) ***Third-party sources.*** A Tribal title IV-E agency may claim in-kind training expenditures for training funds from any allowable third-party source.

[77 FR 950, Jan. 6, 2012]

§§ 1356.69-1356.70 [Reserved]

§ 1356.71 Federal review of the eligibility of children in foster care and the eligibility of foster care providers in title IV-E programs.

(a) ***Purpose, scope and overview of the process.***

(1) This section sets forth requirements governing Federal reviews of compliance with the title IV-E eligibility provisions as they apply to children and foster care providers under paragraphs (a) and (b) of section 472 of the Act.

(2) The requirements of this section apply to title IV-E agencies that receive Federal payments for foster care under title IV-E of the Act.

(3) The review process begins with a primary review of foster care cases for the title IV-E eligibility requirements.

(i) ***Title IV-E agencies in substantial compliance.*** Title IV-E agencies determined to be in substantial compliance based on the primary review will be subject to another review in three years.

(ii) ***Title IV-E agencies not in substantial compliance.*** Title IV-E agencies that are determined not to be in substantial compliance based on the primary review will develop and implement a program improvement plan designed to correct the areas of noncompliance. A secondary review will be conducted after the completion of the program improvement plan. A subsequent primary review will be held three years from the date of the secondary review.

(b) ***Composition of review team and preliminary activities preceding an on-site review.***

(1) The review team must be composed of representatives of the title IV-E agency, and ACF's Regional and Central Offices.

(2) The title IV-E agency must provide ACF with the complete payment history for each of the sample and oversample cases prior to the on-site review.

(c) ***Sampling guidance and conduct of review.***

(1) The list of sampling units in the target population (*i.e.,* the sampling frame) will be drawn by ACF statistical staff from the Adoption and Foster Care Analysis and Reporting System (AFCARS) data which are transmitted by the title IV-E agency to ACF. The sampling frame will consist of cases of children who were eligible for foster care maintenance payments during the reporting period reflected in a title IV-E agency's most recent AFCARS data submission. For the initial primary review, if these data are not available or are deficient, an alternative sampling frame, consistent with one AFCARS six-month reporting period, will be selected by ACF in conjunction with the title IV-E agency.

(2) A sample of 80 cases (plus a 10 percent oversample of eight cases) from the title IV-E foster care program will be selected for the primary review utilizing probability sampling methodologies. Usually, the chosen methodology will be simple random sampling, but other probability samples may be utilized, when necessary and appropriate.

(3) Cases from the oversample will be substituted and reviewed for each of the original sample of 80 cases which is found to be in error.

(4) At the completion of the primary review, the review team will determine the number of ineligible cases. When the total number of ineligible cases does not exceed eight, ACF can conclude with a probability of 88 percent that in a population of 1000 or more cases the population ineligibility case error rate is less than 15 percent and the title IV-E agency will be considered in substantial compliance.For primary reviews held subsequent to the initial primary reviews, the acceptable population ineligibility case error rate threshold will be reduced from less than 15 percent (eight or fewer ineligible cases) to less than 10 percent (four or fewer ineligible cases)). A title IV-E agency which meets this standard is considered to be in "substantial compliance" (see paragraph (h) of this section). A disallowance will be assessed for the ineligible cases for the period of time the cases are ineligible.

(5) A title IV-E agency which has been determined to be in "noncompliance" (*i.e.,* not in substantial compliance) will be required to develop a program improvement plan according to the specifications discussed in paragraph (i) of this section, as well as undergo a secondary review. For the secondary review, a sample of 150 cases (plus a 10 percent oversample of 15 cases) will be drawn from the most recent AFCARS submission. Usually, the chosen methodology will be simple random sampling, but other probability samples may be utilized, when necessary and appropriate. Cases from the oversample will be substituted and reviewed for each of the original sample of 150 cases which is found to be in error.

(6) At the completion of the secondary review, the review team will calculate both the sample case ineligibility and dollar error rates for the cases determined ineligible during the review. An extrapolated disallowance equal to the lower limit of a 90 percent confidence interval for the population total dollars in error for the amount of time corresponding to the AFCARS reporting period will be assessed if both the child/provider (case) ineligibility and dollar error rates exceed 10 percent. If neither, or only one, of the error rates exceeds 10 percent, a disallowance will be assessed for the ineligible cases for the period of time the cases are ineligible.

(d) ***Requirements subject to review.*** Title IV-E agencies will be reviewed against the requirements of title IV-E of the Act regarding:

(1) The eligibility of the children on whose behalf the foster care maintenance payments are made (section 472(a)(1)-(4) of the Act) to include:

(i) Judicial determinations regarding "reasonable efforts" and "contrary to the welfare" in accordance with § 1356.21(b) and (c), respectively;

(ii) Voluntary placement agreements in accordance with § 1356.22;

(iii) Responsibility for placement and care vested with the title IV-E or other public agency per section 472(a)(2)(B) of the Act;

(iv) Placement in a licensed foster family home or child care institution; and,

(v) Eligibility for AFDC under such State plan as it was in effect on July 16, 1996 per section 472(a)(3) or 479B(c)(1)(C)(ii)(II) of the Act, as appropriate.

(2) Allowable payments made to foster care providers who comport with sections 471(a)(10), 471(a)(20), 472(b) and (c), and 479B(c)(2) of the Act and § 1356.30.

(e) ***Review instrument.*** A title IV-E foster care eligibility review checklist will be used when conducting the eligibility review.

(f) ***Eligibility determination - child.*** The case record of the child must contain sufficient documentation to verify a child's eligibility in accordance with paragraph (d)(1) of this section, in order to substantiate payments made on the child's behalf.

(g) ***Eligibility determination - provider.***

(1) For each case being reviewed, the title IV-E agency must make available a licensing file which contains the licensing history, including a copy of the certificate of licensure/approval or letter of approval, for each of the providers in the following categories:

(i) Public child care institutions with 25 children or less in residence;

(ii) Private child care institutions;

(iii) Group homes; and

(iv) Foster family homes, including relative homes.

(2) The licensing file must contain documentation that the title IV-E agency has complied with the safety requirements for foster and adoptive placements in accordance with § 1356.30.

(3) If the licensing file does not contain sufficient information to support a child's placement in a licensed facility, the title IV-E agency may provide supplemental information from other sources (*e.g.,* a computerized database).

(h) ***Standards of compliance.***

(1) Disallowances will be taken, and plans for program improvement required, based on the extent to which a title IV-E agency is not in substantial compliance with recipient or provider eligibility provisions of title IV-E, or applicable regulations in 45 CFR parts 1355 and 1356.

(2) Substantial compliance and noncompliance are defined as follows:

(i) ***Substantial compliance*** - For the primary review (of the sample of 80 cases), no more than eight of the title IV-E cases reviewed may be determined to be ineligible. (This critical number of allowable "errors," *i.e.,* ineligible cases, is reduced to four errors or less in primary reviews held subsequent to the initial primary review). For the secondary review (if required), *substantial compliance* means either the case ineligibility or dollar error rate does not exceed 10 percent.

(ii) ***Noncompliance*** - means not in substantial compliance. For the primary review (of the sample of 80 cases), nine or more of the title IV-E cases reviewed must be determined to be ineligible. (This critical number of allowable "errors," *i.e.,* ineligible cases, is reduced to five or more in primary reviews subsequent to the initial primary review). For the secondary review (if required), *noncompliance* means both the case ineligibility and dollar error rates exceed 10 percent.

(3) ACF will notify the title IV-E agency in writing within 30 calendar days after the completion of the review of whether the title IV-E agency is, or is not, operating in substantial compliance.

(4) Title IV-E agencies which are determined to be in substantial compliance must undergo a subsequent review after a minimum of three years.

(i) ***Program improvement plans.***

(1) Title IV-E agencies which are determined to be in noncompliance with recipient or provider eligibility provisions of title IV-E, or applicable regulations in 45 CFR Parts 1355 and 1356, will develop a program improvement plan designed to correct the areas determined not to be in substantial compliance. The program improvement plan will:

(i) Be developed jointly by title IV-E agency and Federal staff;

(ii) Identify the areas in which the title IV-E agency's program is not in substantial compliance;

(iii) Not extend beyond one year. A title IV-E agency will have a maximum of one year in which to implement and complete the provisions of the program improvement plan unless State/Tribal legislative action is required. In such instances, an extension may be granted with the title IV-E agency and ACF negotiating the terms and length of such extension that shall not exceed the last day of the first legislative session after the date of the program improvement plan; and

(iv) Include:

(A) Specific goals;

(B) The action steps required to correct each identified weakness or deficiency; and,

(C) a date by which each of the action steps is to be completed.

(2) Title IV-E agencies determined not to be in substantial compliance as a result of a primary review must submit the program improvement plan to ACF for approval within 90 calendar days from the date the title IV-E agency receives written notification that it is not in substantial compliance. This deadline may be extended an additional 30 calendar days when a title IV-E agency submits additional documentation to ACF in support of cases determined to be ineligible as a result of the on-site eligibility review.

(3) The ACF Regional Office will intermittently review, in conjunction with the title IV-E agency, the title IV-E agency's progress in completing the prescribed action steps in the program improvement plan.

(4) If a title IV-E agency does not submit an approvable program improvement plan in accordance with the provisions of paragraphs (i)(1) and (2) of this section, ACF will move to a secondary review in accordance with paragraph (c) of this section.

(j) ***Disallowance of funds.*** The amount of funds to be disallowed will be determined by the extent to which a title IV-E agency is not in substantial compliance with recipient or provider eligibility provisions of title IV-E, or applicable regulations in 45 CFR parts 1355 and 1356.

(1) Title IV-E agencies which are found to be in substantial compliance during the primary or secondary review will have disallowances (if any) determined on the basis of individual cases reviewed and found to be in error. The amount of disallowance will be computed on the basis of payments associated with ineligible cases for the entire period of time that each case has been ineligible.

(2) Title IV-E agencies which are found to be in noncompliance during the primary review will have disallowances determined on the basis of individual cases reviewed and found to be in error, and must implement a program improvement plan in accordance with the provisions contained within it. A secondary review will be conducted no later than during the AFCARS reporting period which immediately follows the program improvement plan completion date on a sample of 150 cases drawn from the title IV-E agency's most recent AFCARS data. If both the case ineligibility and dollar error rates exceed 10 percent, the title IV-E agency is not in compliance and an additional disallowance will be determined based on extrapolation from the sample to the universe of claims paid for the duration of the AFCARS reporting period (*i.e.,* all title IV-E funds expended for a case during the quarter(s) that case is ineligible, including administrative costs). If either the case ineligibility or dollar rate does not exceed 10 percent, the amount of disallowance will be computed on the basis of payments associated with ineligible cases for the entire period of time the case has been determined to be ineligible.

(3) The title IV-E agency will be liable for interest on the amount of funds disallowed by the Department, in accordance with the provisions of 45 CFR 30.18.

(4) Title IV-E agencies may appeal any disallowance actions taken by ACF to the HHS Departmental Appeals Board in accordance with regulations at 45 CFR part 16.

[65 FR 4091, Jan. 25, 2000, as amended at 66 FR 58677, Nov. 23, 2001; 77 FR 951, Jan. 6, 2012]

§ 1356.80 Scope of the National Youth in Transition Database.

The requirements of the National Youth in Transition Database (NYTD) §§ 1356.81 through 1356.86 of this part apply to the agency in any State, the District of Columbia, or Territory, that administers, or supervises the administration of the Chafee Foster Care Independence Program (CFCIP) under section 477 of the Social Security Act (the Act).

[73 FR 10365, Feb. 26, 2008]

§ 1356.81 Reporting population.

The reporting population is comprised of all youth in the following categories:

(a) ***Served population.*** Each youth who receives an independent living service paid for or provided by the State agency during the reporting period.

(b) ***Baseline population.*** Each youth who is in foster care as defined in 45 CFR 1355.20 and reaches his or her 17th birthday during Federal fiscal year (FFY) 2011, and such youth who reach a 17th birthday during every third year thereafter.

(c) ***Follow-up population.*** Each youth who reaches his or her 19th or 21st birthday in a Federal fiscal year and had participated in data collection as part of the baseline population, as specified in section 1356.82(a)(2) of this part. A youth has participated in the outcomes data collection if the State agency reports to ACF a valid response (*i.e.*, a response option other than "declined" and "not applicable") to any of the outcomes-related elements described in section 1356.83(g)(37) through (g)(58) of this part.

[73 FR 10365, Feb. 26, 2008]

§ 1356.82 Data collection requirements.

(a) The State agency must collect applicable information as specified in section 1356.83 of this part on the reporting population defined in section 1356.81 of this part in accordance with the following:

(1) For each youth in the served population, the State agency must collect information for the data elements specified in section 1356.83(b) and 1356.83(c) of this part on an ongoing basis, for as long as the youth receives services.

(2) For each youth in the baseline population, the State agency must collect information for the data elements specified in section 1356.83(b) and 1356.83(d) of this part. The State agency must collect this information on a new baseline population every three years.

(i) For each youth in foster care who turns age 17 in FFY 2011, the State agency must collect this information within 45 days following the youth's 17th birthday, but not before that birthday.

(ii) Every third Federal fiscal year thereafter, the State agency must collect this information on each youth in foster care who turns age 17 during the year within 45 days following the youth's 17th birthday, but not before that birthday.

(iii) The State agency must collect this information using the survey questions in appendix B of this part entitled "Information to collect from all youth surveyed for outcomes, whether in foster care or not."

(3) For each youth in the follow-up population, the State agency must collect information on the data elements specified in sections 1356.83(b) and 1356.83(e) of this part within the reporting period of the youth's 19th and 21st birthday. The State agency must collect the information using the appropriate survey questions in appendix B of this part, depending upon whether the youth is in foster care.

(b) The State agency may select a sample of the 17-year-olds in the baseline population to follow over time consistent with the sampling requirements described in section 1356.84 of this part to satisfy the data collection requirements in paragraph (a)(3) of this section for the follow-up population. A State that samples must identify the youth at age 19 who participated in the outcomes data collection as part of the baseline population at age 17 who are not in the sample in accordance with 45 CFR 1356.83(e).

[73 FR 10365, Feb. 26, 2008]

§ 1356.83 Reporting requirements and data elements.

(a) ***Reporting periods and deadlines.*** The six-month reporting periods are from October 1 to March 31 and April 1 to September 30. The State agency must submit data files that include the information specified in this section to ACF on a semi-annual basis, within 45 days of the end of the reporting period (*i.e.*, by May 15 and November 14).

(b) ***Data elements for all youth.*** The State agency must report the data elements described in paragraphs (g)(1) through (g)(13) of this section for each youth in the entire reporting population defined in section 1356.81 of this part.

(c) ***Data elements for served youth.*** The State agency must report the data elements described in paragraphs (g)(14) through (g)(33) of this section for each youth in the served population defined in section 1356.81(a) of this part.

(d) ***Data elements for baseline youth.*** The State agency must report the data elements described in paragraphs (g)(34) through (g)(58) of this section for each youth in the baseline population defined in section 1356.81(b) of this part.

(e) ***Data elements for follow-up youth.*** The State agency must report the data elements described in paragraphs (g)(34) through (g)(58) of this section for each youth in the follow-up population defined in section 1356.81(c) of this part or alternatively, for each youth selected in accordance with the sampling procedures in section 1356.84 of this part. A State that samples must identify in the outcomes

reporting status element described in paragraph (g)(34), the 19-year-old youth who participated in the outcomes data collection as a part of the baseline population at age 17, who are not in the sample.

(f) ***Single youth record.*** The State agency must report all applicable data elements for an individual youth in one record per reporting period.

(g) ***Data element descriptions.*** For each element described in paragraphs (g)(1) through (58) of this section, the State agency must indicate the applicable response as instructed.

(1) ***State.*** State means the State responsible for reporting on the youth. Indicate the first two digits of the State's Federal Information Processing Standard (FIPS) code for the State submitting the report to ACF.

(2) ***Report date.*** The report date corresponds with the end of the current reporting period. Indicate the last month and the year of the reporting period.

(3) ***Record number.*** The record number is the encrypted, unique person identification number for the youth. The State agency must apply and retain the same encryption routine or method for the person identification number across all reporting periods. The record number must be encrypted in accordance with ACF standards. Indicate the record number for the youth.

(i) If the youth is in foster care as defined in 45 CFR 1355.20 or was during the current or previous reporting period, the State agency must use and report to the NYTD the same person identification number for the youth the State agency reports to AFCARS. The person identification number must remain the same for the youth wherever the youth is living and in any subsequent NYTD reports.

(ii) If the youth was never in the State's foster care system as defined in 45 CFR 1355.20, the State agency must assign a person identification number that must remain the same for the youth wherever the youth is living and in any subsequent reports to NYTD.

(4) ***Date of birth.*** The youth's date of birth. Indicate the year, month, and day of the youth's birth.

(5) ***Sex.*** The youth's sex. Indicate whether the youth is male or female as appropriate.

(6) ***Race: American Indian or Alaska Native.*** In general, a youth's race is determined by the youth or the youth's parent(s). An American Indian or Alaska Native youth has origins in any of the original peoples of North or South America (including Central America), and maintains tribal affiliation or community attachment. Indicate whether this racial category applies for the youth, with a “yes” or “no.”

(7) ***Race: Asian.*** In general, a youth's race is determined by the youth or the youth's parent(s). An Asian youth has origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam. Indicate whether this racial category applies for the youth, with a “yes” or “no.”

(8) ***Race: Black or African American.*** In general, a youth's race is determined by the youth or the youth's parent(s). A Black or African American youth has origins in any of the black racial groups of Africa. Indicate whether this racial category applies for the youth, with a “yes” or “no.”

(9) ***Race: Native Hawaiian or Other Pacific Islander.*** In general, a youth's race is determined by the youth or the youth's parent(s). A Native Hawaiian or Other Pacific Islander youth has origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands. Indicate whether this racial category applies for the youth, with a “yes” or “no.”

(10) ***Race: White.*** In general, a youth's race is determined by the youth or the youth's parent(s). A White youth has origins in any of the original peoples of Europe, the Middle East, or North Africa. Indicate whether this racial category applies for the youth, with a “yes” or “no.”

(11) ***Race: unknown.*** The race, or at least one race of the youth is unknown, or the youth and/or parent is not able to communicate the youth's race. Indicate whether this category applies for the youth, with a “yes” or “no.”

(12) ***Race: declined.*** The youth or parent has declined to identify a race. Indicate whether this category applies for the youth, with a “yes” or “no.”

(13) ***Hispanic or Latino ethnicity.*** In general, a youth's ethnicity is determined by the youth or the youth's parent(s). A youth is of Hispanic or Latino ethnicity if the youth is a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race. Indicate which category applies, with “yes,” “no,” “unknown” or “declined,” as appropriate. “Unknown” means that the youth and/or parent is unable to communicate the youth's ethnicity. “Declined” means that the youth or parent has declined to identify the youth's Hispanic or Latino ethnicity.

(14) ***Foster care status - services.*** The youth receiving services is or was in foster care during the reporting period if the youth is or was in the placement and care responsibility of the State title IV-B/IV-E agency in accordance with the definition of foster care in 45 CFR 1355.20. Indicate whether the youth is or was in foster care at any point during the reporting period, with a “yes” or “no” as

appropriate. If the youth is not in the served population this element must be left blank.

(15) ***Local agency.*** The local agency is the county or equivalent jurisdictional unit that has primary responsibility for placement and care of a youth who is in foster care consistent with the definition in 45 CFR 1355.20, or that has primary responsibility for providing services to a youth who is not in foster care. Indicate the five-digit Federal Information Processing Standard (FIPS) code(s) that corresponds to the identity of the county or equivalent unit jurisdiction(s) that meets these criteria during the reporting period. If a youth who is not in foster care is provided services by a centralized unit only, rather than a county agency, indicate "centralized unit." If the youth is not in the served population this element must be left blank.

(16) ***Federally recognized tribe.*** The youth is enrolled in or eligible for membership in a federally recognized tribe. The term "federally recognized tribe" means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation, as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C 1601 *et seq.*), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians pursuant to the Indian Self-Determination and Educational Assistance Act (25 U.S.C. 450 *et seq.*). Indicate "yes" or "no" as appropriate. If the youth is not in the served population this element must be left blank.

(17) ***Adjudicated delinquent.*** Adjudicated delinquent means that a State or Federal court of competent jurisdiction has adjudicated the youth as a delinquent. Indicate "yes," or "no" as appropriate. If the youth is not in the served population this element must be left blank.

(18) ***Educational level.*** Educational level means the highest educational level completed by the youth. For example, for a youth currently in 11th grade, "10th grade" is the highest educational level completed. Post-secondary education or training refers to any post-secondary education or training, other than an education pursued at a college or university. College refers to completing at least a semester of study at a college or university. Indicate the highest educational level completed by the youth during the reporting period. If the youth is not in the served population this element must be left blank.

(19) ***Special education.*** The term "special education," means specifically designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. Indicate whether the youth has received special education instruction during the reporting period with a "yes" or "no" as appropriate. If the youth is not in the served population this element must be left blank.

(20) ***Independent living needs assessment.*** An independent living needs assessment is a systematic procedure to identify a youth's basic skills, emotional and social capabilities, strengths, and needs to match the youth with appropriate independent living services. An independent living needs assessment may address knowledge of basic living skills, job readiness, money management abilities, decision-making skills, goal setting, task completion, and transitional living needs. Indicate whether the youth received an independent living needs assessment that was paid for or provided by the State agency during the reporting period with a "yes" or "no" as appropriate. If the youth is not in the served population this element must be left blank.

(21) ***Academic support.*** Academic supports are services designed to help a youth complete high school or obtain a General Equivalency Degree (GED). Such services include the following: Academic counseling; preparation for a GED, including assistance in applying for or studying for a GED exam; tutoring; help with homework; study skills training; literacy training; and help accessing educational resources. Academic support does not include a youth's general attendance in high school. Indicate whether the youth received academic supports during the reporting period that were paid for or provided by the State agency with a "yes" or "no" as appropriate. If the youth is not in the served population this element must be left blank.

(22) ***Post-secondary educational support.*** Post-secondary educational support are services designed to help a youth enter or complete a post-secondary education and include the following: Classes for test preparation, such as the Scholastic Aptitude Test (SAT); counseling about college; information about financial aid and scholarships; help completing college or loan applications; or tutoring while in college. Indicate whether the youth received post-secondary educational support during the reporting period that was paid for or provided by the State agency with a "yes" or "no" as appropriate. If the youth is not in the served population this element must be left blank.

(23) ***Career preparation.*** Career preparation services focus on developing a youth's ability to find, apply for, and retain appropriate employment. Career preparation includes the following types of instruction and support services: Vocational and career assessment, including career exploration and planning, guidance in setting and assessing vocational and career interests and skills, and help in matching interests and abilities with vocational goals; job seeking and job placement support, including identifying potential employers, writing resumes, completing job applications, developing interview skills, job shadowing, receiving job referrals, using career resource libraries, understanding employee benefits coverage, and securing work permits; retention support, including job coaching; learning how to work with employers and other employees; understanding workplace values such as timeliness and appearance; and understanding authority and customer relationships. Indicate whether the youth received career preparation services during the reporting period that was paid for or provided by the State agency with a "yes" or "no" as appropriate. If the youth is not in the served population this element must be left blank.

(24) ***Employment programs or vocational training.*** Employment programs and vocational training are designed to build a youth's skills for a specific trade, vocation, or career through classes or on-site training. Employment programs include a youth's participation in an apprenticeship, internship, or summer employment program and do not include summer or after-school jobs secured by the

youth alone. Vocational training includes a youth's participation in vocational or trade programs and the receipt of training in occupational classes for such skills as cosmetology, auto mechanics, building trades, nursing, computer science, and other current or emerging employment sectors. Indicate whether the youth attended an employment program or received vocational training during the reporting period that was paid for or provided by the State agency, with a “yes” or “no” as appropriate. If the youth is not in the served population this element must be left blank.

(25) ***Budget and financial management.*** Budget and financial management assistance includes the following types of training and practice: Living within a budget; opening and using a checking and savings account; balancing a checkbook; developing consumer awareness and smart shopping skills; accessing information about credit, loans and taxes; and filling out tax forms. Indicate whether the youth received budget and financial management assistance during the reporting period that was paid for or provided by the State agency with a “yes” or “no” as appropriate. If the youth is not in the served population this element must be left blank.

(26) ***Housing education and home management training.*** Housing education includes assistance or training in locating and maintaining housing, including filling out a rental application and acquiring a lease, handling security deposits and utilities, understanding practices for keeping a healthy and safe home, understanding tenants rights and responsibilities, and handling landlord complaints. Home management includes instruction in food preparation, laundry, housekeeping, living cooperatively, meal planning, grocery shopping and basic maintenance and repairs. Indicate whether the youth received housing education or home management training during the reporting period that was paid for or provided by the State agency with a “yes” or “no” as appropriate. If the youth is not in the served population this element must be left blank.

(27) ***Health education and risk prevention.*** Health education and risk prevention includes providing information about: Hygiene, nutrition, fitness and exercise, and first aid; medical and dental care benefits, health care resources and insurance, prenatal care and maintaining personal medical records; sex education, abstinence education, and HIV prevention, including education and information about sexual development and sexuality, pregnancy prevention and family planning, and sexually transmitted diseases and AIDS; substance abuse prevention and intervention, including education and information about the effects and consequences of substance use (alcohol, drugs, tobacco) and substance avoidance and intervention. Health education and risk prevention does not include the youth's actual receipt of direct medical care or substance abuse treatment. Indicate whether the youth received these services during the reporting period that were paid for or provided by the State agency with a “yes” or “no” as appropriate. If the youth is not in the served population this element must be left blank.

(28) ***Family support and healthy marriage education.*** Such services include education and information about safe and stable families, healthy marriages, spousal communication, parenting, responsible fatherhood, childcare skills, teen parenting, and domestic and family violence prevention. Indicate whether the youth received these services that were paid for or provided by the State agency during the reporting period with a “yes” or “no” as appropriate. If the youth is not in the served population this element must be left blank.

(29) ***Mentoring.*** Mentoring means that the youth has been matched with a screened and trained adult for a one-on-one relationship that involves the two meeting on a regular basis. Mentoring can be short-term, but it may also support the development of a long-term relationship. While youth often are connected to adult role models through school, work, or family, this service category only includes a mentor relationship that has been facilitated, paid for or provided by the State agency or its staff. Indicate whether the youth received mentoring services that were paid for or provided by the State agency during the reporting period with a “yes” or “no” as appropriate. If the youth is not in the served population this element must be left blank.

(30) ***Supervised independent living.*** Supervised independent living means that the youth is living independently under a supervised arrangement that is paid for or provided by the State agency. A youth in supervised independent living is not supervised 24 hours a day by an adult and often is provided with increased responsibilities, such as paying bills, assuming leases, and working with a landlord, while under the supervision of an adult. Indicate whether the youth was living in a supervised independent living setting that was paid or provided by the State agency during the reporting period with a “yes” or “no” as appropriate. If the youth is not in the served population this element must be left blank.

(31) ***Room and board financial assistance.*** Room and board financial assistance is a payment that is paid for or provided by the State agency for room and board, including rent deposits, utilities, and other household start-up expenses. Indicate whether the youth received financial assistance for room and board that was paid for or provided by during the reporting period with a “yes” or “no” as appropriate. If the youth is not in the served population this element must be left blank.

(32) ***Education financial assistance.*** Education financial assistance is a payment that is paid for or provided by the State agency for education or training, including allowances to purchase textbooks, uniforms, computers, and other educational supplies; tuition assistance; scholarships; payment for educational preparation and support services (i.e., tutoring), and payment for GED and other educational tests. This financial assistance also includes vouchers for tuition or vocational education or tuition waiver programs paid for or provided by the State agency. Indicate whether the youth received education financial assistance during the reporting period that was paid for or provided by the State agency with a “yes” or “no” as appropriate. If the youth is not in the served population this element must be left blank.

(33) ***Other financial assistance.*** Other financial assistance includes any other payments made or provided by the State agency to help the youth live independently. Indicate whether the youth received any other financial assistance that was paid for or provided by the State agency during the reporting period with a "yes" or "no" as appropriate. If the youth is not in the served population this element must be left blank.

(34) ***Outcomes reporting status.*** The outcomes reporting status represents the youth's participation, or lack thereof, in the outcomes data collection. If the State agency collects and reports information on any of the data elements in paragraphs (g)(37) through (g)(58) of this section for a youth in the baseline or follow-up sample or population, indicate that the youth participated. If a youth is in the baseline or follow-up sample or population, but the State agency is unable to collect the information, indicate the reason and leave the data elements in paragraph (g)(37) through (g)(58) of this section blank. If a 19-year old youth in the follow-up population is not in the sample, indicate that the youth is not in the sample. If the youth is not in the baseline or follow-up population this element must be left blank.

(i) ***Youth participated.*** The youth participated in the outcome survey, either fully or partially.

(ii) ***Youth declined.*** The State agency located the youth successfully and invited the youth's participation, but the youth declined to participate in the data collection.

(iii) ***Parent declined.*** The State agency invited the youth's participation, but the youth's parent/guardian declined to grant permission. This response may be used only when the youth has not reached the age of majority in the State and State law or policy requires a parent/guardian's permission for the youth to participate in information collection activities.

(iv) ***Incapacitated.*** The youth has a permanent or temporary mental or physical condition that prevents him or her from participating in the outcomes data collection.

(v) ***Incarcerated.*** The youth is unable to participate in the outcomes data collection because of his or her incarceration.

(vi) ***Runaway/missing.*** A youth in foster care is known to have run away or be missing from his or her foster care placement.

(vii) ***Unable to locate/invite.*** The State agency could not locate a youth who is not in foster care or otherwise invite such a youth's participation.

(viii) ***Death.*** The youth died prior to his participation in the outcomes data collection.

(ix) ***Not in sample.*** The 19-year-old youth participated in the outcomes data collection as a part of the baseline population at age 17, but the youth is not in the State's follow-up sample. This response option applies only when the outcomes data collection is required on the follow-up population of 19-year-old youth.

(35) ***Date of outcome data collection.*** The date of outcome data collection is the latest date that the agency collected data from a youth for the elements described in paragraphs (g)(38) through (g)(58) of this section. Indicate the month, day and year of the outcomes data collection. If the youth is not in the baseline or follow-up population this element must be left blank.

(36) ***Foster care status - outcomes.*** The youth is in foster care if the youth is under the placement and care responsibility of the State title IV-B/IV-E agency in accordance with the definition of foster care in 45 CFR 1355.20. Indicate whether the youth is in foster care on the date of outcomes data collection with a "yes" or "no" as appropriate. If the youth is not in the baseline or follow-up population this element must be left blank.

(37) ***Current full-time employment.*** A youth is employed full-time if employed at least 35 hours per week, in one or multiple jobs, as of the date of the outcome data collection. Indicate whether the youth is employed full-time, with a "yes" or "no" as appropriate. If the youth does not answer this question indicate "declined." If the youth is not in the baseline or follow-up population this element must be left blank.

(38) ***Current part-time employment.*** A youth is employed part-time if employed between one and 34 hours per week, in one or multiple jobs, as of the date of the outcome data collection. Indicate whether the youth is employed part-time, with a "yes" or "no." If the youth does not answer this question, indicate "declined." If the youth is not in the baseline or follow-up population this element must be left blank.

(39) ***Employment-related skills.*** A youth has obtained employment-related skills if the youth completed an apprenticeship, internship, or other on-the-job training, either paid or unpaid, in the past year. The experience must help the youth acquire employment-related skills, such as specific trade skills such as carpentry or auto mechanics, or office skills such as word processing or use of office equipment. Indicate whether the youth has obtained employment-related skills, with a "yes" or "no" as appropriate. If the youth does not answer this question, indicate "declined." If the youth is not in the baseline or follow-up population this element must be left blank.

(40) ***Social Security.*** A youth is receiving some form of Social Security if receiving Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI), either directly or as a dependent beneficiary as of the date of the outcome data collection. SSI payments are made to eligible low-income persons with disabilities. SSDI payments are made to persons with a certain amount of

work history who become disabled. A youth may receive SSDI payments through a parent. Indicate whether the youth is receiving a form of Social Security payments, with a “yes” or “no” as appropriate. If the youth does not answer this question, indicate “declined.” If the youth is not in the baseline or follow-up population this element must be left blank.

(41) ***Educational aid.*** A youth is receiving educational aid if using a scholarship, voucher (including education or training vouchers pursuant to section 477(h)(2) of the Social Security Act), grant, stipend, student loan, or other type of educational financial aid to cover educational expenses as of the date of the outcome data collection. Scholarships, grants, and stipends are funds awarded for spending on expenses related to gaining an education. “Student loan” means a government-guaranteed, low-interest loan for students in post-secondary education. Indicate whether the youth is receiving educational aid with a “yes” or “no” as appropriate. If the youth does not answer this question, indicate “declined.” If the youth is not in the baseline or follow-up population this element must be left blank.

(42) ***Public financial assistance.*** A youth is receiving public financial assistance if receiving ongoing cash welfare payments from the government to cover some of his or her basic needs, as of the date of the outcome data collection. Public financial assistance does not include government payments or subsidies for specific purposes, such as unemployment insurance, child care subsidies, education assistance, food stamps or housing assistance. Indicate whether the youth is receiving public financial assistance, with “yes” or “no” as appropriate, and “not applicable” for a youth still in foster care. If the youth does not answer this question, indicate “declined.” If the youth is not in the baseline or follow-up population this element must be left blank.

(43) ***Public food assistance.*** A youth is receiving public food assistance if receiving food stamps in any form (i.e., government-sponsored checks, coupons or debit cards) to buy eligible food at authorized stores as of the date of the outcome data collection. This definition includes receiving public food assistance through the Women, Infants, and Children (WIC) program. Indicate whether the youth is receiving some form of public food assistance with “yes” or “no,” and “not applicable” for a youth still in foster care. If the youth does not answer this question, indicate “declined.” If the youth is not in the baseline or follow-up population this element must be left blank.

(44) ***Public housing assistance.*** A youth is receiving public housing assistance if the youth is living in government-funded public housing, or receiving a government-funded housing voucher to pay for part of his/her housing costs as of the date of the outcome data collection. CFCIP room and board payments are not included in this definition. Indicate whether the youth is receiving housing assistance with “yes” or “no” and “not applicable” for a youth still in foster care. If the youth does not answer this question, indicate “declined.” If the youth is not in the baseline or follow-up population this element must be left blank.

(45) ***Other financial support.*** A youth has other financial support if receiving any other periodic and/or significant financial resources or support from another source not listed in the elements described in paragraphs (g)(41) through (g)(44) of this section as of the date of outcome data collection. Such support can include payments from a spouse or family member (biological, foster or adoptive), child support that the youth receives for him or herself, or funds from a legal settlement. This definition does not include occasional gifts, such as birthday or graduation checks or small donations of food or personal incidentals, child care subsidies, child support for a youth's child, or other financial support which does not benefit the youth directly in supporting himself or herself. Indicate whether the youth is receiving any other financial support with a “yes” or “no.” If the youth does not answer this question, indicate “declined.” If the youth is not in the baseline or follow-up population this element must be left blank.

(46) ***Highest educational certification received.*** A youth has received an education certificate if the youth has a high school diploma or general equivalency degree (GED), vocational certificate, vocational license, associate's degree (e.g., A.A.), bachelor's degree (e.g., B.A. or B.S.), or a higher degree as of the date of the outcome data collection. Indicate the highest degree that the youth has received. If the youth does not answer this question, indicate “declined.” If the youth is not in the baseline or follow-up population this element must be left blank.

(i) A vocational certificate is a document stating that a person has received education or training that qualifies him or her for a particular job, e.g., auto mechanics or cosmetology.

(ii) A vocational license is a document that indicates that the State or local government recognizes an individual as a qualified professional in a particular trade or business.

(iii) An associate's degree is generally a two-year degree from a community college.

(iv) A bachelor's degree is a four-year degree from a college or university.

(v) A higher degree indicates a graduate degree, such as a Master's Degree or a Juris Doctor (J.D.).

(vi) None of the above means that the youth has not received any of the above educational certifications.

(47) ***Current enrollment and attendance.*** Indicate whether the youth is enrolled in and attending high school, GED classes, or postsecondary vocational training or college, as of the date of the outcome data collection. A youth is still considered enrolled in and attending school if the youth would otherwise be enrolled in and attending a school that is currently out of session. Indicate whether the youth is currently enrolled and attending school with a “yes” or “no.” If the youth does not answer this question, indicate “declined.” If the youth is not in the baseline or follow-up population this element must be left blank.

(48) ***Connection to adult.*** A youth has a connection to an adult if, as of the date of the outcome data collection, the youth knows an adult who he or she can go to for advice or guidance when there is a decision to make or a problem to solve, or for companionship when celebrating personal achievements. The adult must be easily accessible to the youth, either by telephone or in person. This can include, but is not limited to adult relatives, parents or foster parents. The definition excludes spouses, partners, boyfriends or girlfriends and current caseworkers. Indicate whether the youth has such a connection with an adult with a "yes" or "no." If the youth does not answer this question, indicate "declined." If the youth is not in the baseline or follow-up population this element must be left blank.

(49) ***Homelessness.*** A youth is considered to have experienced homelessness if the youth had no regular or adequate place to live. This definition includes situations where the youth is living in a car or on the street, or staying in a homeless or other temporary shelter. For a 17-year-old youth in the baseline population, the data element relates to a youth's lifetime experiences. For a 19- or 21-year-old youth in the follow-up population, the data element relates to the youth's experience in the past two years. Indicate if the youth has been homeless with a "yes" or "no." If the youth does not answer this question, indicate "declined." If the youth is not in the baseline or follow-up population this element must be left blank.

(50) ***Substance abuse referral.*** A youth has received a substance abuse referral if the youth was referred for an alcohol or drug abuse assessment or counseling. For a 17-year-old youth in the baseline population, the data element relates to a youth's lifetime experience. For a 19-or 21-year-old youth in the follow-up population, the data element relates to the youth's experience in the past two years. This definition includes either a self-referral or referral by a social worker, school staff, physician, mental health worker, foster parent, or other adult. Alcohol or drug abuse assessment is a process designed to determine if someone has a problem with alcohol or drug use. Indicate whether the youth had a substance abuse referral with a "yes" or "no." If the youth does not answer this question, indicate "declined." If the youth is not in the baseline or follow-up population this element must be left blank.

(51) ***Incarceration.*** A youth is considered to have been incarcerated if the youth was confined in a jail, prison, correctional facility, or juvenile or community detention facility in connection with allegedly committing a crime (misdemeanor or felony). For a 17-year-old youth in the baseline population, the data element relates to a youth's lifetime experience. For a 19-or 21-year-old youth in the follow-up population, the data element relates to the youth's experience in the past two years. Indicate whether the youth was incarcerated with a "yes" or "no". If the youth does not answer this question, indicate "declined." If the youth is not in the baseline or follow-up population this element must be left blank.

(52) ***Children.*** A youth is considered to have a child if the youth has given birth herself, or the youth has fathered any children who were born. For a 17-year-old youth in the baseline population, the data element relates to a youth's lifetime experience. For a 19-or 21-year-old youth in the follow-up population, the data element refers to children born to the youth in the past two years only. This refers to biological parenthood. Indicate whether the youth had a child with a "yes" or "no." If the youth does not answer this question, indicate "declined." If the youth is not in the baseline or follow-up population this element must be left blank.

(53) ***Marriage at child's birth.*** A youth is married at the time of the child's birth if he or she was united in matrimony according to the laws of the State to the child's other parent. Indicate whether the youth was married to the child's other parent at the time of the birth of any child reported in the element described in paragraph (g)(52) of this section with a "yes" or "no". If the youth does not answer this question, indicate "declined." If the answer to the element described in paragraph (g)(52) of this section is "no," indicate "not applicable." If the youth is not in the baseline or follow-up population this element must be left blank.

(54) ***Medicaid.*** A youth is receiving Medicaid if the youth is participating in a Medicaid-funded State program, which is a medical assistance program supported by the Federal and State government under title XIX of the Social Security Act as of the date of outcomes data collection. Indicate whether the youth receives Medicaid with "yes," "no," or "don't know" as appropriate. If the youth does not answer this question, indicate "declined." If the youth is not in the baseline or follow-up population this element must be left blank.

(55) ***Other health insurance coverage.*** A youth has other health insurance if the youth has a third party pay (other than Medicaid) for all or part of the costs of medical care, mental health care, and/or prescription drugs, as of the date of the outcome data collection. This definition includes group coverage offered by employers, schools or associations, an individual health plan, self-employed plans, or inclusion in a parent's insurance plan. This also could include access to free health care through a college, Indian Health Service, or other source. Medical or drug discount cards or plans are not insurance. Indicate "yes", "no", or "don't know" as appropriate. If the youth does not answer this question, indicate "declined."

(56) ***Health insurance type: Medical.*** If the youth has indicated that he or she has health insurance coverage in the element described in paragraph (g)(55) of this section, indicate whether the youth has insurance that pays for all or part of medical health care services. Indicate "yes", "no", or "don't know" as appropriate, or "not applicable" if the youth did not indicate any health insurance coverage. If the youth does not answer this question, indicate "declined." If the youth is not in the baseline or follow-up population this element must be left blank.

(57) ***Health insurance type: Mental health.*** If the youth has indicated that he or she has medical health insurance coverage as described in paragraph (g)(56) of this section, indicate whether the youth has insurance that pays for all or part of the costs for mental health care services, such as counseling or therapy. Indicate "yes", "no", or "don't know" as appropriate, or "not applicable" if the youth did

not indicate having medical health insurance coverage. If the youth does not answer this question, indicate “declined.” If the youth is not in the baseline or follow-up population this element must be left blank.

(58) ***Health insurance type: Prescription drugs.*** If the youth has indicated that he or she has medical health insurance coverage as described in paragraph (g)(56) of this section, indicate whether the youth has insurance coverage that pays for part or all of the costs of some prescription drugs. Indicate “yes”, “no”, or “don't know” as appropriate, or “not applicable” if the youth did not indicate having medical health insurance coverage. If the youth does not answer this question, indicate “declined.” If the youth is not in the baseline or follow-up population this element must be left blank.

(h) ***Electronic reporting.*** The State agency must report all data to ACF electronically according to ACF's specifications and appendix A of this part.

(This requirement has been approved by the Office of Management and Budget under OMB Control Number OMB 0970-0340. In accordance with the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.)

[73 FR 10365, Feb. 26, 2008, as amended at 77 FR 952, Jan. 6, 2012]

§ 1356.84 Sampling.

(a) The State agency may collect and report the information required in section 1356.83(e) of this part on a sample of the baseline population consistent with the sampling requirements described in paragraphs (b) and (c) of this section.

(b) The State agency must select the follow-up sample using simple random sampling procedures based on random numbers generated by a computer program, unless ACF approves another sampling procedure. The sampling universe consists of youth in the baseline population consistent with 45 CFR 1356.81(b) who participated in the State agency's data collection at age 17.

(c) The sample size is based on the number of youth in the baseline population who participated in the State agency's data collection at age 17.

(1) If the number of youth in the baseline population who participated in the outcome data collection at age 17 is 5,000 or less, the State agency must calculate the sample size using the formula in appendix C of this part, with the Finite Population Correction (FPC). The State agency must increase the resulting number by 30 percent to allow for attrition, but the sample size may not be larger than the number of youth who participated in data collection at age 17.

(2) If the number of youth in the baseline population who participated in the outcome data collection at age 17 is greater than 5,000, the State agency must calculate the sample size using the formula in appendix C of this part, without the FPC. The State agency must increase the resulting number by 30 percent to allow for attrition, but the sample size must not be larger than the number of youth who participated in data collection at age 17.

[73 FR 10365, Feb. 26, 2008]

§ 1356.85 Compliance.

(a) ***File submission standards.*** A State agency must submit a data file in accordance with the following file submission standards:

(1) ***Timely data.*** The data file must be received in accordance with the reporting period and timeline described in section 1356.83(a) of this part;

(2) ***Format.*** The data file must be in a format that meets ACF's specifications; and

(3) ***Error-free information.*** The file must contain data in the general and demographic elements described in section 1356.83(g)(1) through (g)(5), (g)(14), and (g)(36) of this part that is 100 percent error-free as defined in paragraph (c) of this section.

(b) ***Data standards.*** A State agency also must submit a file that meets the following data standards:

(1) ***Error-free.*** The data for the applicable demographic, service and outcomes elements defined in section 1356.83(g)(6) through (13), (g)(15) through (35) and (g)(37) through (58) of this part must be 90 percent error-free as described and assessed according to paragraph (c) of this section.

(2) ***Outcomes universe.*** In any Federal fiscal year for which the State agency is required to submit information on the follow-up population, the State agency must submit a youth record containing at least outcomes data for the outcomes status element described in section 1356.83(g)(34) of this part on each youth for whom the State agency reported outcome information as part of the baseline population. Alternatively, if the State agency has elected to conduct sampling in accordance with section 1356.84 of

this part, the State agency must submit a record containing at least outcomes data for the outcomes status element described in section 1356.83(g)(34) of this part on each 19-year-old youth in the follow-up population, inclusive of those youth who are not in the sample, and each 21-year-old youth in the follow-up sample.

(3) ***Outcomes participation rate.*** The State agency must report outcome information on each youth in the follow-up population at the rates described in paragraphs (b)(3)(i) through (iii) of this section. A youth has participated in the outcomes data collection if the State agency collected and reported a valid response (i.e., a response option other than "declined" or "not applicable") to any of the outcomes-related elements described in section 1356.83(g)(37) through (g)(58) of this part. ACF will exclude from the calculation of the participation rate any youth in the follow-up population who is reported as deceased, incapacitated or incarcerated in section 1356.83(g)(34) at the time information on the follow-up population is required.

(i) ***Foster care youth participation rate.*** The State agency must report outcome information on at least 80 percent of youth in the follow-up population who are in foster care on the date of outcomes data collection as indicated in section 1356.83(g)(35) and (g)(36) of this part.

(ii) ***Discharged youth participation rate.*** The State agency must report outcome information on at least 60 percent of youth in the follow-up population who are not in foster care on the date of outcomes data collection as indicated in section 1356.83(g)(35) and (g)(36) of this part.

(iii) ***Effect of sampling on participation rates.*** For State agencies electing to sample in accordance with section 1356.84 and appendix C of this part, ACF will apply the outcome participation rates in paragraphs (b)(2)(i) and (ii) of this section to the required sample size for the State.

(c) ***Errors.*** ACF will assess each State agency's data file for the following types of errors: Missing data, out-of-range data, or internally inconsistent data. The amount of errors acceptable for each reporting period is described in paragraphs (a) and (b) of this section.

(1) Missing data is any element that has a blank response when a blank response is not a valid response option as described in section 1356.83(g) of this part.

(2) Out-of-range data is any element that contains a value that is outside the parameters of acceptable responses or exceeds, either positively or negatively, the acceptable range of response options as described in section 1356.83(g) of this part; and

(3) Internally inconsistent data is any element that fails an internal consistency check designed to evaluate the logical relationship between elements in each record. The evaluation will identify all elements involved in a particular check as in error.

(d) ***Review for compliance.***

(1) ACF will determine whether a State agency's data file for each reporting period is in compliance with the file submission standards and data standards in paragraphs (a) and (b) of this section.

(i) For State agencies that achieve the file submission standards, ACF will determine whether the State agency's data file meets the data standards.

(ii) For State agencies that do not achieve the file submission standards or data standards, ACF will notify the State agency that they have an opportunity to submit a corrected data file by the end of the subsequent reporting period in accordance with paragraph (e) of this section.

(2) ACF may use monitoring tools or assessment procedures to determine whether the State agency is meeting all the requirements of section 1356.81 through 1356.85 of this part.

(e) ***Submitting corrected data and noncompliance.*** A State agency that does not submit a data file that meets the standards in section 1356.85 of this part will have an opportunity to submit a corrected data file in accordance with paragraphs (e)(1) and (e)(2) of this section.

(1) A State agency must submit a corrected data file no later than the end of the subsequent reporting period as defined in section 1356.83(a) of this part (i.e., by September 30 or March 31).

(2) If a State agency fails to submit a corrected data file that meets the compliance standards in section 1356.85 of this part and the deadline in paragraph (e)(1) of this section, ACF will make a final determination that the State is out of compliance, notify the State agency, and apply penalties as defined in section 1356.86 of this part.

[73 FR 10365, Feb. 26, 2008]

§ 1356.86 Penalties for noncompliance.

(a) ***Definition of Federal funds subject to a penalty.*** The funds that are subject to a penalty are the CFCIP funds allocated or reallocated to the State agency under section 477(c)(1) of the Act for the Federal fiscal year that corresponds with the reporting period for which the State agency was required originally to submit data according to section 1356.83(a) of this part.

(b) ***Assessed penalty amounts.*** ACF will assess penalties in the following amounts, depending on the area of noncompliance:

(1) ***Penalty for not meeting file submission standards.*** ACF will assess a penalty in an amount equivalent to two and one half percent (2.5%) of the funds subject to a penalty for each reporting period in which ACF makes a final determination that the State agency's data file does not comply with the file submission standards defined in section 1356.85(a) of this part.

(2) ***Penalty for not meeting certain data standards.*** ACF will assess a penalty in an amount equivalent to:

(i) One and one quarter percent (1.25%) of the funds subject to a penalty for each reporting period in which ACF makes a final determination that the State agency's data file does not comply with the data standard for error-free data as defined in section 1356.85(b)(1) of this part.

(ii) One and one quarter percent (1.25%) of the funds subject to a penalty for each reporting period in which ACF makes a final determination that the State agency's data file does not comply with the outcome universe standard defined in section 1356.85(b)(2) of this part.

(iii) One half of one percent (0.5%) of the funds subject to a penalty for each reporting period in which ACF makes a final determination that the State agency's data file does not comply with the participation rate for youth in foster care standard defined in section 1356.85(b)(3)(i) of this part.

(iv) One half of one percent (0.5%) of the funds subject to a penalty for each reporting period in which ACF makes a final determination that the State agency's data file does not comply with the participation rate for discharged youth standard defined in section 1356.85(b)(3)(ii) of this part.

(c) ***Calculation of the penalty amount.*** ACF will add together any assessed penalty amounts described in paragraphs (b)(1) or (b)(2) of this section to determine the total calculated penalty result. If the total calculated penalty result is less than one percent of the funds subject to a penalty, the State agency will be penalized in the amount of one percent.

(d) ***Notification of penalty amount.*** ACF will advise the State agency in writing of a final determination of noncompliance and the amount of the total calculated penalty as determined in paragraph (c) of this section.

(e) ***Interest.*** The State agency will be liable for interest on the amount of funds penalized by the Department, in accordance with the provisions of 45 CFR 30.18.

(f) ***Appeals.*** The State agency may appeal, pursuant to 45 CFR part 16, ACF's final determination to the HHS Departmental Appeals Board.

[73 FR 10365, Feb. 26, 2008, as amended at 77 FR 952, Jan. 6, 2012]

Appendix A to Part 1356 - NYTD Data Elements

Element No.	Element name	Responses options	Applicable population
1	State	2 digit FIPS code	
2	Report date	CYYMM	
		CC = century year (i.e., 20)	
		YY = decade year (00-99)	
		MM = month (01-12)	
3	Record number	Encrypted, unique person	

		identification number	
4	Date of birth	CCYYMMDD	
		CC = century year (i.e., 20)	
		YY = decade year (00-99)	
		MM = month (01-12)	
		DD= day (01-31)	
5	Sex	Male	
		Female	
6	Race - American Indian or Alaska Native	Yes	All youth in served, baseline and follow-up populations.
		No	
7	Race - Asian	Yes	
		No	
8	Race - Black or African American	Yes	
		No	
9	Race - Native Hawaiian or Other Pacific Islander	Yes	
		No	
10	Race - White	Yes	
		No	
11	Race - Unknown	Yes	
		No	
12	Race - Declined	Yes	
		No	
13	Hispanic or	Yes	

	Latino Ethnicity		
		No	
		Unknown	
		Declined	
14	Foster care status - services	Yes	Served population only.
		No	
15	Local agency	FIPS code(s)	
		Centralized unit	
16	Federally-recognized tribe	Yes	
		No	
17	Adjudicated delinquent	Yes	
		No	
18	Education level	Less than 6th grade	Served population only.
		6th grade	
		7th grade	
		8th grade	
		9th grade	
		10th grade	
		11th grade	
		12th grade	
		Postsecondary education or training	
		College, at least one semester	
19	Special education	Yes	
		No	

20	Independent living needs assessment	Yes	
		No	
21	Academic support	Yes	
		No	
22	Post-secondary educational support	Yes	
		No	
23	Career preparation	Yes	
		No	
24	Employment programs or vocational training	Yes	
		No	
25	Budget and financial management	Yes	
		No	
26	Housing education and home management training	Yes	
		No	
27	Health education and risk prevention	Yes	
		No	
28	Family Support/Healthy Marriage Education	Yes	

		No	
29	Mentoring	Yes	
		No	
30	Supervised independent living	Yes	
		No	
31	Room and board financial assistance	Yes	
		No	
32	Education financial assistance	Yes	
		No	
33	Other financial assistance	Yes	
		No	
34	Outcomes reporting status	Youth Participated Youth Declined. Parent Declined. Youth Incapacitated. Incarcerated. Runaway/Missing. Unable to locate/invite. Death. Not in sample.	Baseline and follow-up populations (with the exception of the response option “not in sample” which is applicable to 19-year olds in the follow-up only).
35	Date of outcome data collection	CCYYMMDD	Baseline and follow-up populations.
		CC = century year (i.e., 20)	
		YY = decade year (00-99)	
		MM = month (01-12)	

		DD = day (01-31)	
36	Foster care status-outcomes	Yes	
		No	
37	Current full-time employment	Yes	
		No	
		Declined	
38	Current part-time employment	Yes	
		No	
		Declined	
39	Employment-related skills	Yes	
		No	
		Declined	
40	Social Security	Yes	
		No	
		Declined	
41	Educational aid	Yes	
		No	
		Declined	
42	Public financial assistance	Yes	Follow-up population not in foster care.
		No	
		Not applicable	
		Declined	
43	Public food assistance	Yes	
		No	
		Not applicable	

		Declined	
44	Public housing assistance	Yes	
		No	
		Not applicable	
		Declined	
45	Other financial support	Yes	Baseline and follow-up population.
		No	
		Declined	
46	Highest educational certification received	High school diploma/GED	
		Vocational certificate	
		Vocational license	
		Associate's degree	
		Bachelor's degree	
		Higher degree	
		None of the above	
		Declined	
47	Current enrollment and attendance	Yes	
		No	
		Declined	
48	Connection to adult	Yes	
		No	
		Declined	
49	Homelessness	Yes	

		No	
		Declined	
50	Substance abuse referral	Yes	
		No	
		Declined	
51	Incarceration	Yes	
		No	
		Declined	
52	Children	Yes	
		No	
		Declined	
53	Marriage at child's birth	Yes	
		No	
		Not applicable	
		Declined	
54	Medicaid	Yes	
		No	
		Don't know	
		Declined	
55	Other health insurance	Yes	Baseline and follow-up population.
		No	
		Don't know	
		Declined	
56	Health insurance type - medical	Yes	
		No	
		Don't know	

		Not Applicable	
		Declined	
57	Health insurance type - mental health	Yes	
		No	
		Don't know	
		Not applicable	
		Declined	
58	Health insurance type - prescription drugs	Yes. No. Don't know. Not applicable. Declined.	

[77 FR 952, Jan. 6, 2012]

Appendix B to Part 1356 - NYTD Youth Outcome Survey

Topic/element No.	Question to youth and response options	Definition
INFORMATION TO COLLECT FROM ALL YOUTH SURVEYED FOR OUTCOMES, WHETHER IN FOSTER CARE OR NOT		
Current full-time employment (37)	Currently are you employed full-time?	"Full-time" means working at least 35 hours per week at one or multiple jobs.
	_Yes	
	_No	
	_Declined	
Current part-time employment (38)	Currently are you employed part-time?	"Part-time" means working at least 1-34 hours per week at one or multiple jobs.
	_Yes	
	_No	

	_Declined	
Employment-related skills (39)	In the past year, did you complete an apprenticeship, internship, or other on-the-job training, either paid or unpaid? _Yes _No _Declined	This means apprenticeships, internships, or other on-the-job trainings, either paid or unpaid, that helped the youth acquire employment-related skills (which can include specific trade skills such as carpentry or auto mechanics, or office skills such as word processing or use of office equipment).
Social Security (40)	Currently are you receiving social security payments (Supplemental Security Income (SSI, Social Security Disability Insurance (SSDI), or dependents' payments)?	These are payments from the government to meet basic needs for food, clothing, and shelter of a person with a disability. A youth may be receiving these payments because of a parent or guardian's disability, rather than his/her own.
	_Yes	
	_No	
	_Declined	
Educational Aid (41)	Currently are you using a scholarship, grant, stipend, student loan, voucher, or other type of educational financial aid to cover any educational expenses?	Scholarships, grants, and stipends are funds awarded for spending on expenses related to gaining an education. “Student loan” means a government-guaranteed, low-interest loan for students in post-secondary education.
	_Yes	
	_No	

	_Declined	
Other financial support (45)	Currently are you receiving any periodic and/or significant financial resources or support from another source not previously indicated and excluding paid employment? _Yes _No _Declined	This means periodic and/or significant financial support from a spouse or family member (biological, foster or adoptive), child support that the youth receives or funds from a legal settlement. This does not include occasional gifts, such as birthday or graduation checks or small donations of food or personal incidentals, child care subsidies, child support for a youth's child or other financial help that does not benefit the youth directly in supporting himself or herself.
Highest educational certification received (46)	What is the highest educational degree or certification that you have received? _High school diploma/GED _Vocational certificate _Vocational license _Associate's degree (e.g., A.A.) _Bachelor's degree (e.g., B.A. or B.S.) _Higher degree _None of the above _Declined	“Vocational certificate” means a document stating that a person has received education or training that qualifies him or her for a particular job, e.g., auto mechanics or cosmetology. “Vocational license” means a document that indicates that the State or local government recognizes an individual as a qualified professional in a particular trade or business. An Associate's degree is generally a two-year degree from a community college, and a Bachelor's degree is a four-year degree from a college or university. “Higher degree” indicates a graduate degree, such as a Masters or Doctorate degree. “None of the above” means that the youth has not received any of the above educational certifications.
Current enrollment and attendance (47)	Currently are you enrolled in and attending high school, GED classes, post-high school	This means both enrolled in and attending high school, GED classes, or postsecondary vocational training or college. A youth is still considered enrolled in and attending school if the youth would otherwise be enrolled in and attending a school that is currently out of session (e.g., Spring break, summer vacation, etc.).

	vocational training, or college? _Yes _No _Declined	
Connection to adult (48)	Currently is there at least one adult in your life, other than your caseworker, to whom you can go for advice or emotional support? _Yes _No _Declined	This refers to an adult who the youth can go to for advice or guidance when there is a decision to make or a problem to solve, or for companionship to share personal achievements. This can include, but is not limited to, adult relatives, parents or foster parents. The definition excludes spouses, partners, boyfriends or girlfriends and current caseworkers. The adult must be easily accessible to the youth, either by telephone or in person.
Homelessness (49)	Have you ever been homeless? OR _In the past two years, were you homeless at any time? _Yes _No _Declined	"Homeless" means that the youth had no regular or adequate place to live. This includes living in a car, or on the street, or staying in a homeless or other temporary shelter.
Substance abuse referral (50)	Have you ever referred yourself or has someone else referred you for an alcohol or drug abuse assessment or counseling? OR	This includes either self-referring or being referred by a social worker, school staff, physician, mental health worker, foster parent, or other adult for an alcohol or drug abuse assessment or counseling. Alcohol or drug abuse assessment is a process designed to determine if someone has a problem with alcohol or drug use.
	In the past two years, did you refer yourself, or had someone else referred you for an alcohol or drug	

	abuse assessment or counseling?	
	_Yes	
	_No	
	_Declined	
Incarceration (51)	Have you ever been confined in a jail, prison, correctional facility, or juvenile or community detention facility, in connection with allegedly committing a crime? OR	This means that the youth was confined in a jail, prison, correctional facility, or juvenile or community detention facility in connection with a crime (misdemeanor or felony) allegedly committed by the youth.
	In the past two years, were you confined in a jail, prison, correctional facility, or juvenile or community detention facility, in connection with allegedly committing a crime?	
	_Yes	
	_No	
	_Declined	
Children (52)	Have you ever given birth or fathered any children that were born? OR	This means giving birth to or fathering at least one child that was born. If males do not know, answer “No.”

	In the past two years, did you give birth to or father any children that were born?	
	_Yes	
	_No	
	_Declined	
Marriage at Child's Birth (53)	If you responded yes to the previous question, were you married to the child's other parent at the time each child was born?	This means that when every child was born the youth was married to the other parent of the child.
	_Yes	
	_No	
	_Declined	
Medicaid (54)	Currently are you on Medicaid [or use the name of the State's medical assistance program under title XIX]?	Medicaid (or the State medical assistance program) is a health insurance program funded by the government.
	_Yes	
	_No	
	_Don't know	
	_Declined	
Other Health insurance Coverage (55)	Currently do you have health insurance, other than Medicaid? _Yes _No	“Health insurance” means having a third party pay for all or part of health care. Youth might have health insurance such as group coverage offered by employers or schools, or individual policies that cover medical and/or mental health care and/or prescription drugs, or youth might be covered under parents' insurance. This also could include access to free health care through a college,

	_Don't know _Declined	Indian Tribe, or other source.
Health insurance type - medical (56)	Does your health insurance coverage include coverage for medical services? _Yes _No _Don't know _Not Applicable _Declined	This means that the youth's health insurance covers at least some medical services or procedures. This question is for only those youth who responded “yes” to having health insurance.
Health insurance type - mental health (57)	Does your health insurance include coverage for mental health services? _Yes _No _Don't know Not Applicable _Declined	This means that the youth's health insurance covers at least some mental health services. This question is for only those youth who responded “yes” to having health insurance with medical coverage.
Health insurance type - prescription drugs (58)	Does your health insurance include coverage for prescription drugs? _Yes _No _Don't know _Declined	This means that the youth's health insurance covers at least some prescription drugs. This question is for only those youth who responded “yes” to having health insurance with medical coverage.
ADDITIONAL OUTCOMES INFORMATION TO COLLECT FROM YOUTH OUT OF FOSTER CARE		
Public financial assistance (42)	Currently are you receiving ongoing welfare payments from the government to support your basic needs?	This refers to ongoing welfare payments from the government to support your basic needs. Do not consider payments or subsidies for specific purposes, such as unemployment insurance, child care subsidies, education assistance, food stamps or housing assistance in this category.

	[The State may add and/or substitute the name(s) of the State's welfare program].	
	_Yes	
	_No	
	_Declined	
Public food assistance (43)	Currently are you receiving public food assistance? _Yes _No _Declined	Public food assistance includes food stamps, which are government-issued coupons or debit cards that recipients can use to buy eligible food at authorized stores. Public food assistance also includes assistance from the Women, Infants and Children (WIC) program.
Public housing assistance (44)	Currently are you receiving any sort of housing assistance from the government, such as living in public housing or receiving a housing voucher? _Yes _No _Declined	Public housing is rental housing provided by the government to keep rents affordable for eligible individuals and families, and a housing voucher allows participants to choose their own housing while the government pays part of the housing costs. This does not include payments from the child welfare agency for room and board payments.

[77 FR 952, Jan. 6, 2012]

Appendix C to Part 1356 - Calculating Sample Size for NYTD Follow-Up Populations

1. Using Finite Population Correction

The Finite Population Correction (FPC) is applied when the sample is drawn from a population of one to 5,000 youth, because the sample is more than five percent of the population.

• (Py)(Pn), an estimate of the percent of responses to a dichotomous variable, is (.50)(.50) for the most conservative estimate.

• Acceptable level of error = .05 (results are plus or minus five percentage points from the actual score)

• Z = 1.645 (90 percent confidence interval)

• N = number of youth from whom the sample is being drawn

2. Not Using Finite Population Correction

The FPC is not applied when the sample is drawn from a population of over 5,000 youth.

[73 FR 10372, Feb. 26, 2008]

II. Federal Resources
c. Adoption and Safe Families Act (ASFA)

Adoption and Safe Families Act
42 U.S.C. § 601, et seq.
Accessible at
https://www.law.cornell.edu/uscode/text/42/601

II. Federal Resources
d. U.S. Supreme Court Cases and Summaires

530 U.S. 57 (2000)

TROXEL et vir
v.
GRANVILLE

No. 99-138.

United States Supreme Court.

Argued January 12, 2000.
Decided June 5, 2000.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

O'Connor, J., announced the judgment of the Court and delivered an opinion, in which Rehnquist, C. J., and Ginsburg and Breyer, JJ., joined. Souter, J., *post,* p. 75, and Thomas, J., *post,* p. 80, filed opinions concurring in the judgment. Stevens, J., *post,* p. 80, Scalia, J., *post,* p. 91, and Kennedy, J., *post,* p. 93, filed dissenting opinions.

Mark D. Olson argued the cause for petitioners. With him on the briefs was *Eric Schnapper.*

Catherine W. Smith argued the cause for respondent. With her on the brief was *Howard M. Goodfriend*.[*]

Justice O'Connor announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Ginsburg, and Justice Breyer join.

Section 26.10.160(3) of the Revised Code of Washington permits "[a]ny person" to petition a superior court for visitation rights "at any time," and authorizes that court to grant such visitation rights whenever "visitation may serve the best interest of the child." Petitioners Jenifer and Gary Troxel petitioned a Washington Superior Court for the right to visit their grandchildren, Isabelle and Natalie Troxel. Respondent Tommie Granville, the mother of Isabelle and Natalie, opposed the petition. The case ultimately reached the Washington Supreme Court, which held that § 26.10.160(3) unconstitutionally interferes with the fundamental right of parents to rear their children.

I

Tommie Granville and Brad Troxel shared a relationship that ended in June 1991. The two never married, but they had two daughters, Isabelle and Natalie. Jenifer and Gary Troxel are Brad's parents, and thus the paternal grandparents of Isabelle and Natalie. After Tommie and Brad separated in 1991, Brad lived with his parents and regularly brought his daughters to his parents' home for weekend visitation. Brad committed suicide in May 1993. Although the Troxels at first continued to see Isabelle and Natalie on a regular basis after their son's death, Tommie Granville informed the Troxels in October 1993 that she wished to limit their visitation with her daughters to one short visit per month. *In re Smith,* 137 Wash. 2d 1,6, 969 P. 2d 21, 23-24 (1998); *In re Troxel,* 87 Wash. App. 131, 133, 940 P. 2d 698, 698-699 (1997).

In December 1993, the Troxels commenced the present action by filing, in the Washington Superior Court for Skagit County, a petition to obtain visitation rights with Isabelle and Natalie. The Troxels filed their petition under two Washington statutes, Wash. Rev. Code §§ 26.09.240 and 26.10.160(3) (1994). Only the latter statute is at issue in this case. Section 26.10.160(3) provides: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best

interest of the child whether or not there has been any change of circumstances." At trial, the Troxels requested two weekends of overnight visitation per month and two weeks of visitation each summer. Granville did not oppose visitation altogether, but instead asked the court to order one day of visitation per month with no overnight stay. 87 Wash. App., at 133-134, 940 P. 2d, at 699. In 1995, the Superior Court issued an oral ruling and entered a visitation decree ordering visitation one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays. 137 Wash. 2d, at 6, 969 P. 2d, at 23; App. to Pet. for Cert. 76a—78a.

Granville appealed, during which time she married Kelly Wynn. Before addressing the merits of Granville's appeal, the Washington Court of Appeals remanded the case to the Superior Court for entry of written findings of fact and conclusions of law. 137 Wash. 2d, at 6, 969 P. 2d, at 23. On remand, the Superior Court found that visitation was in Isabelle's and Natalie's best interests:

> "The Petitioners [the Troxels] are part of a large, central, loving family, all located in this area, and the Petitioners can provide opportunities for the children in the areas of cousins and music.
>
> ". . . The court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefitted from spending quality time with the Petitioners, provided that that time is balanced with time with the childrens' *[sic]* nuclear family. The court finds that the childrens' *[sic]* best interests are served by spending time with their mother and stepfather's other six children." App. 70a.

Approximately nine months after the Superior Court entered its order on remand, Granville's husband formally adopted Isabelle and Natalie. *Id.,* at 60a—67a.

The Washington Court of Appeals reversed the lower court's visitation order and dismissed the Troxels' petition for visitation, holding that nonparents lack standing to seek visitation under § 26.10.160(3) unless a custody action is pending. In the Court of Appeals' view, that limitation on nonparental visitation actions was "consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the care, custody, and management of their children." 87 Wash. App., at 135, 940 P. 2d, at 700 (internal quotation marks omitted). Having resolved the case on the statutory ground, however, the Court of Appeals did not expressly pass on Granville's constitutional challenge to the visitation statute. *Id.,* at 138, 940 P. 2d, at 701.

The Washington Supreme Court granted the Troxels' petition for review and, after consolidating their case with two other visitation cases, affirmed. The court disagreed with the Court of Appeals' decision on the statutory issue and found that the plain language of § 26.10.160(3) gave the Troxels standing to seek visitation, irrespective of whether a custody action was pending. 137 Wash. 2d, at 12, 969 P. 2d, at 26-27. The Washington Supreme Court nevertheless agreed with the Court of Appeals' ultimate conclusion that the Troxels could not obtain visitation of Isabelle and Natalie pursuant to § 26.10.160(3). The court rested its decision on the Federal Constitution, holding that § 26.10.160(3) unconstitutionally infringes on the fundamental right of parents to rear their children. In the court's view, there were at least two problems with the nonparental visitation statute. First, according to the Washington Supreme Court, the Constitution permits a State to interfere with the right of parents to rear their children only to prevent harm or potential harm to a child. Section 26.10.160(3) fails that standard because it requires no threshold showing of harm. *Id.,* at 15-20, 969 P. 2d, at 28-30. Second, by allowing "`any person' to petition for forced visitation of a child at `any time' with the only requirement being that the visitation serve the best interest of the child," the Washington visitation statute sweeps too broadly. *Id.,* at 20, 969 P. 2d, at 30. "It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a `better' decision." *Ibid.,* 969 P. 2d, at 31. The Washington Supreme Court held that "[p]arents have a right to limit visitation of their children with third persons," and that between parents and judges, "the parents should be the ones to choose whether to expose their children to certain people or ideas." *Id.,* at 21, 969 P. 2d, at 31. Four justices dissented from the Washington Supreme Court's holding on the constitutionality of

the statute. *Id.,* at 23-43, 969 P. 2d, at 32-42.

We granted certiorari, 527 U. S. 1069 (1999), and now affirm the judgment.

II

The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. While many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households. In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States. U. S. Dept. of Commerce, Bureau of Census, Current Population Reports, 1997 Population Profile of the United States 27 (1998). Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role. For example, in 1998, approximately 4 million children—or 5.6 percent of all children under age 18—lived in the household of their grandparents. U. S. Dept. of Commerce, Bureau of Census, Current Population Reports, Marital Status and Living Arrangements: March 1998 (Update), p. *i* (1998).

The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of these changing realities of the American family. Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties. The States' nonparental visitation statutes are further supported by a recognition, which varies from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons—for example, their grandparents. The extension of statutory rights in this area to persons other than a child's parents, however, comes with an obvious cost. For example, the State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship. Contrary to Justice Stevens' accusation, our description of state nonparental visitation statutes in these terms, of course, is not meant to suggest that "children are so much chattel." *Post,* at 89 (dissenting opinion). Rather, our terminology is intended to highlight the fact that these statutes can present questions of constitutional import. In this case, we are presented with just such a question. Specifically, we are asked to decide whether § 26.10.160(3), as applied to Tommie Granville and her family, violates the Federal Constitution.

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." *Washington* v. *Glucksberg,* 521 U. S. 702, 719 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.,* at 720; see also *Reno* v. *Flores,* 507 U. S. 292, 301-302 (1993).

The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children— is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer* v. *Nebraska,* 262 U. S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534-535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.,* at 535. We returned to the subject in *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor

hinder." *Id.,* at 166.

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, *e. g., Stanley* v. *Illinois,* 405 U. S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children `come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); *Wisconsin* v. *Yoder,* 406 U. S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Quilloin* v. *Walcott,* 434 U. S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham* v. *J. R.,* 442 U. S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Santosky* v. *Kramer,* 455 U. S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Glucksberg, supra,* at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the `liberty' specially protected by the Due Process Clause includes the righ[t] . . . to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

Section 26.10.160(3), as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right. The Washington nonparental visitation statute is breathtakingly broad. According to the statute's text, "*[a]ny person* may petition the court for visitation rights *at any time,* " and the court may grant such visitation rights whenever "visitation may serve *the best interest of the child.* " § 26.10.160(3) (emphases added). That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests. The Washington Supreme Court had the opportunity to give § 26.10.160(3) a narrower reading, but it declined to do so. See, *e. g.,* 137 Wash. 2d, at 5, 969 P. 2d, at 23 ("[The statute] allow[s] any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm"); *id.,* at 20, 969 P. 2d, at 30 ("[The statute] allow[s] `any person' to petition for forced visitation of a child at `any time' with the only requirement being that the visitation serve the best interest of the child").

Turning to the facts of this case, the record reveals that the Superior Court's order was based on precisely the type of mere disagreement we have just described and nothing more. The Superior Court's order was not founded on any special factors that might justify the State's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters. To be sure, this case involves a visitation petition filed by grandparents soon after the death of their son—the father of Isabelle and Natalie—but the combination of several factors here compels our conclusion that § 26.10.160(3), as applied, exceeded the bounds of the Due Process Clause.

First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children. As this Court explained in

Parham:

> "[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." 442 U. S., at 602 (alteration in original) (internal quotation marks and citations omitted).

Accordingly, so long as a parent adequately cares for his or her children (*i. e.,* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. See, *e. g., Flores,* 507 U. S., at 304.

The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption. In reciting its oral ruling after the conclusion of closing arguments, the Superior Court judge explained:

> "The burden is to show that it is in the best interest of the children to have some visitation and some quality time with their grandparents. I think in most situations a commonsensical approach [is that] it is normally in the best interest of the children to spend quality time with the grandparent, unless the grandparent, *[sic]* there are some issues or problems involved wherein the grandparents, their lifestyles are going to impact adversely upon the children. That certainly isn't the case here from what I can tell." Verbatim Report of Proceedings in *In re Troxel,* No. 93-3—00650-7 (Wash. Super. Ct., Dec. 14, 19, 1994), p. 213 (hereinafter Verbatim Report).

The judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be "impact[ed] adversely." In effect, the judge placed on Granville, the fit custodial parent, the burden of *disproving* that visitation would be in the best interest of her daughters. The judge reiterated moments later: "I think [visitation with the Troxels] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children." *Id.,* at 214.

The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. See *Parham, supra,* at 602. In that respect, the court's presumption failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters. Cf., *e. g.,* Cal. Fam. Code Ann. § 3104(e) (West 1994) (rebuttable presumption that grandparent visitation is not in child's best interest if parents agree that visitation rights should not be granted); Me. Rev. Stat. Ann., Tit. 19A, § 1803(3) (1998) (court may award grandparent visitation if in best interest of child and "would not significantly interfere with any parent-child relationship or with the parent's rightful authority over the child"); Minn. Stat. § 257.022(2)(a)(2) (1998) (court may award grandparent visitation if in best interest of child and "such visitation would not interfere with the parent-child relationship"); Neb. Rev. Stat. § 43-1802(2) (1998) (court must find "by clear and convincing evidence" that grandparent visitation "will not adversely interfere with the parent-child relationship"); R. I. Gen. Laws § 15-5—24.3(a)(2)(v) (Supp. 1999) (grandparent must rebut, by clear and convincing evidence, presumption that parent's decision to refuse grandparent visitation was reasonable); Utah Code Ann. § 30-5—2(2)(e) (1998) (same); *Hoff* v. *Berg,* 595 N. W. 2d 285, 291-292 (N. D. 1999) (holding North Dakota grandparent visitation statute unconstitutional because State has no "compelling interest in presuming visitation rights of grandparents to an unmarried minor are in the child's best interests and forcing parents to accede to court-ordered grandparental visitation unless the parents are first able to prove such visitation is not in the best interests of their minor child"). In an ideal

world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.

Finally, we note that there is no allegation that Granville ever sought to cut off visitation entirely. Rather, the present dispute originated when Granville informed the Troxels that she would prefer to restrict their visitation with Isabelle and Natalie to one short visit per month and special holidays. See 87 Wash. App., at 133, 940 P. 2d, at 699; Verbatim Report 12. In the Superior Court proceedings Granville did not oppose visitation but instead asked that the duration of any visitation order be shorter than that requested by the Troxels. While the Troxels requested two weekends per month and two full weeks in the summer, Granville asked the Superior Court to order only one day of visitation per month (with no overnight stay) and participation in the Granville family's holiday celebrations. See 87 Wash. App., at 133, 940 P. 2d, at 699; Verbatim Report 9 ("Right off the bat we'd like to say that our position is that grandparent visitation is in the best interest of the children. It is a matter of how much and how it is going to be structured") (opening statement by Granville's attorney). The Superior Court gave no weight to Granville's having assented to visitation even before the filing of any visitation petition or subsequent court intervention. The court instead rejected Granville's proposal and settled on a middle ground, ordering one weekend of visitation per month, one week in the summer, and time on both of the petitioning grandparents' birthdays. See 87 Wash. App., at 133-134, 940 P. 2d, at 699; Verbatim Report 216-221. Significantly, many other States expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party. See, *e. g.,* Miss. Code Ann. § 93-16-3(2)(a) (1994) (court must find that "the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child"); Ore. Rev. Stat. § 109.121(1)(a)(B) (1997) (court may award visitation if the "custodian of the child has denied the grandparent reasonable opportunity to visit the child"); R. I. Gen. Laws §§ 15-5— 24.3(a)(2)(iii)—(iv) (Supp. 1999) (court must find that parents prevented grandparent from visiting grandchild and that "there is no other way the petitioner is able to visit his or her grandchild without court intervention").

Considered together with the Superior Court's reasons for awarding visitation to the Troxels, the combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters. The Washington Superior Court failed to accord the determination of Granville, a fit custodial parent, any material weight. In fact, the Superior Court made only two formal findings in support of its visitation order. First, the Troxels "are part of a large, central, loving family, all located in this area, and the [Troxels] can provide opportunities for the children in the areas of cousins and music." App. 70a. Second, "[t]he children would be benefitted from spending quality time with the [Troxels], provided that that time is balanced with time with the childrens' *[sic]* nuclear family." *Ibid.* These slender findings, in combination with the court's announced presumption in favor of grandparent visitation and its failure to accord significant weight to Granville's already having offered meaningful visitation to the Troxels, show that this case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests. The Superior Court's announced reason for ordering one week of visitation in the summer demonstrates our conclusion well: "I look back on some personal experiences . . . . We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out." Verbatim Report 220-221. As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made. Neither the Washington nonparental visitation statute generally—which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted—nor the Superior Court in this specific case required anything more. Accordingly, we hold that § 26.10.160(3), as applied in this case, is unconstitutional.

Because we rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court —whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." *Post,* at 101 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.[*] See, *e. g., Fair- banks* v. *McCarter,* 330 Md. 39, 49-50, 622 A. 2d 121, 126-127 (1993) (interpreting best-interest standard in grandparent visitation statute normally to require court's consideration of certain factors); *Williams* v. *Williams,* 256 Va. 19, 501 S. E. 2d 417, 418 (1998) (interpreting Virginia nonparental visitation statute to require finding of harm as condition precedent to awarding visitation).

Justice Stevens criticizes our reliance on what he characterizes as merely "a guess" about the Washington courts' interpretation of § 26.10.160(3). *Post,* at 82 (dissenting opinion). Justice Kennedy likewise states that "[m]ore specific guidance should await a case in which a State's highest court has considered all of the facts in the course of elaborating the protection afforded to parents by the laws of the State and by the Constitution itself." *Post,* at 102 (dissenting opinion). We respectfully disagree. There is no need to hypothesize about how the Washington courts *might* apply § 26.10.160(3) because the Washington Superior Court *did* apply the statute in this very case. Like the Washington Supreme Court, then, we are presented with an actual visitation order and the reasons why the Superior Court believed entry of the order was appropriate in this case. Faced with the Superior Court's application of § 26.10.160(3) to Granville and her family, the Washington Supreme Court chose not to give the statute a narrower construction. Rather, that court gave § 26.10.160(3) a literal and expansive interpretation. As we have explained, that broad construction plainly encompassed the Superior Court's application of the statute. See *supra,* at 67.

There is thus no reason to remand the case for further proceedings in the Washington Supreme Court. As Justice Kennedy recognizes, the burden of litigating a domestic relations proceeding can itself be "so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated." *Post,* at 101. In this case, the litigation costs incurred by Granville on her trip through the Washington court system and to this Court are without a doubt already substantial. As we have explained, it is apparent that the entry of the visitation order in this case violated the Constitution. We should say so now, without forcing the parties into additional litigation that would further burden Granville's parental right. We therefore hold that the application of § 26.10.160(3) to Granville and her family violated her due process right to make decisions concerning the care, custody, and control of her daughters.

Accordingly, the judgment of the Washington Supreme Court is affirmed.

It is so ordered.

Justice Souter, concurring in the judgment.

I concur in the judgment affirming the decision of the Supreme Court of Washington, whose facial invalidation of its own state statute is consistent with this Court's prior cases addressing the substantive interests at stake. I would say no more. The issues that might well be presented by reviewing a decision addressing the specific application of the state statute by the trial court, *ante,* at 68-73, are not before us and do not call for turning any fresh furrows in the "treacherous field" of substantive due process. *Moore* v. *East Cleveland,* 431 U. S. 494, 502 (1977) (opinion of Powell, J.).

The Supreme Court of Washington invalidated its state statute based on the text of the statute alone, not its application to any particular case.[1] Its ruling rested on two independently sufficient grounds: the failure of the statute to require harm to the child to justify a disputed visitation order, *In re Smith,* 137 Wash. 2d 1, 17, 969 P. 2d 21, 29 (1998), and the statute's authorization of "any person" at "any time" to petition for and to receive visitation rights subject only to a free-ranging best-interests-of-the-child standard, *id.,* at 20-21, 969 P. 2d, at 30-31. *Ante,* at 63. I see no error in the second reason, that because the state statute authorizes any person at any time to request (and a judge to award) visitation rights, subject only to the State's particular bestinterests standard, the state statute sweeps too broadly and is unconstitutional on its face. Consequently, there is no need to decide whether harm is required or to consider the precise scope of the parent's right or its necessary protections.

We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment. See, *e. g., Meyer* v. *Nebraska,* 262 U. S. 390, 399, 401 (1923); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925); *Stanley* v. *Illinois,* 405 U. S. 645, 651 (1972); *Wisconsin* v. *Yoder,* 406 U. S. 205, 232 (1972); *Quilloin* v. *Walcott,* 434 U. S. 246, 255 (1978); *Parham* v. *J. R.*, 442 U. S. 584, 602 (1979); *Santosky* v. *Kramer,* 455 U. S. 745, 753 (1982); *Washington* v. *Glucksberg,* 521 U. S. 702, 720 (1997). As we first acknowledged in *Meyer,* the right of parents to "bring up children," 262 U. S., at 399, and "to control the education of their own" is protected by the Constitution, *id.,* at 401. See also *Glucksberg, supra,* at 761 (Souter, J., concurring in judgment).

On the basis of this settled principle, the Supreme Court of Washington invalidated its statute because it authorized a contested visitation order at the intrusive behest of any person at any time subject only to a best-interests-of-the-child standard. In construing the statute, the state court explained that the "any person" at "any time" language was to be read literally, 137 Wash. 2d, at 10-11, 969 P. 2d, at 25-27, and that "[m]ost notably the statut[e] do[es] not require the petitioner to establish that he or she has a substantial relationship with the child," *id.,* at 20-21, 969 P. 2d, at 31. Although the statute speaks of granting visitation rights whenever "visitation may serve the best interest of the child," Wash. Rev. Code § 26.10.160(3) (1994), the state court authoritatively read this provision as placing hardly any limit on a court's discretion to award visitation rights. As the court understood it, the specific best-interests provision in the statute would allow a court to award visitation whenever it thought it could make a better decision than a child's parent had done. See 137 Wash. 2d, at 20, 969 P. 2d, at 31 ("It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a `better' decision").[2] On that basis in part, the Supreme Court of Washington invalidated the State's own statute: "Parents have a right to limit visitation of their children with third persons." *Id.,* at 21, 969 P. 2d, at 31.

Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child, but *Meyer'* s repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by "any party" at "any time" a judge believed he "could make a `better' decision"[3] than the objecting parent had done. The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. Whether for good or for ill, adults not only influence but may indoctrinate children, and a choice about a child's social companions is not essentially different from the designation of the adults who will influence the child in school. Even a State's considered judgment about the preferable political and religious character of schoolteachers is not entitled to prevail over a parent's choice of private school. *Pierce, supra,* at 535 ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"). It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent.[4] To say the

least (and as the Court implied in *Pierce*), parental choice in such matters is not merely a default rule in the absence of either governmental choice or the government's designation of an official with the power to choose for whatever reason and in whatever circumstances.

Since I do not question the power of a State's highest court to construe its domestic statute and to apply a demanding standard when ruling on its facial constitutionality,[5] see *Chicago* v. *Morales,* 527 U. S. 41, 55, n. 22 (1999) (opinion of Stevens, J.), this for me is the end of the case. I would simply affirm the decision of the Supreme Court of Washington that its statute, authorizing courts to grant visitation rights to any person at any time, is unconstitutional. I therefore respectfully concur in the judgment.

Justice Thomas, concurring in the judgment.

I write separately to note that neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision. As a result, I express no view on the merits of this matter, and I understand the plurality as well to leave the resolution of that issue for another day.[*]

Consequently, I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case. Our decision in *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them. The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties. On this basis, I would affirm the judgment below.

Justice Stevens, dissenting.

The Court today wisely declines to endorse either the holding or the reasoning of the Supreme Court of Washington. In my opinion, the Court would have been even wiser to deny certiorari. Given the problematic character of the trial court's decision and the uniqueness of the Washington statute, there was no pressing need to review a State Supreme Court decision that merely requires the state legislature to draft a better statute.

Having decided to address the merits, however, the Court should begin by recognizing that the State Supreme Court rendered a federal constitutional judgment holding a state law invalid on its face. In light of that judgment, I believe that we should confront the federal questions presented directly. For the Washington statute is not made facially invalid either because it may be invoked by too many hypothetical plaintiffs, or because it leaves open the possibility that someone may be permitted to sustain a relationship with a child without having to prove that serious harm to the child would otherwise result.

I

In response to Tommie Granville's federal constitutional challenge, the State Supreme Court broadly held that Wash. Rev. Code § 26.10.160(3) (Supp. 1996) was invalid on its face under the Federal Constitution.[1] Despite the nature of this judgment, Justice O'Connor would hold that the Washington visitation statute violated the Due Process Clause of the Fourteenth Amendment only as applied. *Ante,* at 65, 67, 73 (plurality opinion). I agree with Justice Souter, *ante,* at 75-76, and n. 1 (opinion concurring in judgment), that this approach is untenable.

The task of reviewing a trial court's application of a state statute to the particular facts of a case is one that should be

performed in the first instance by the state appellate courts. In this case, because of their views of the Federal Constitution, the Washington state appeals courts have yet to decide whether the trial court's findings were adequate under the statute.[2] Any as-applied critique of the trial court's judgment that this Court might offer could only be based upon a guess about the state courts' application of that State's statute, and an independent assessment of the facts in this case—both judgments that we are ill-suited and ill-advised to make.[3]

While I thus agree with Justice Souter in this respect, I do not agree with his conclusion that the State Supreme Court made a definitive construction of the visitation statute that necessitates the constitutional conclusion he would draw.[4] As I read the State Supreme Court's opinion, *In re Smith,* 137 Wash. 2d 1, 19-20, 969 P. 2d 21, 30-31 (1998), its interpretation of the Federal Constitution made it unnecessary to adopt a definitive construction of the statutory text, or, critically, to decide whether the statute had been correctly applied in this case. In particular, the state court gave no content to the phrase, "best interest of the child," Wash. Rev. Code § 26.10.160(3) (Supp. 1996)—content that might well be gleaned from that State's own statutes or decisional law employing the same phrase in different contexts, and from the myriad other state statutes and court decisions at least nominally applying the same standard.[5] Thus, I believe that Justice Souter's conclusion that the statute unconstitutionally imbues state trial court judges with "`too much discretion in *every* case,' " *ante,* at 78, n. 3 (opinion concurring in judgment) (quoting *Chicago* v. *Morales,* 527 U. S. 41, 71 (1999) (Breyer, J., concurring)), is premature.

We are thus presented with the unconstrued terms of a state statute and a State Supreme Court opinion that, in my view, significantly misstates the effect of the Federal Constitution upon any construction of that statute. Given that posture, I believe the Court should identify and correct the two flaws in the reasoning of the state court's majority opinion, and remand for further review of the trial court's disposition of this specific case.

II

In my view, the State Supreme Court erred in its federal constitutional analysis because neither the provision granting "any person" the right to petition the court for visitation, 137 Wash. 2d, at 20, 969 P. 2d, at 30, nor the absence of a provision requiring a "threshold . . . finding of harm to the child," *ibid.,* provides a sufficient basis for holding that the statute is invalid in all its applications. I believe that a facial challenge should fail whenever a statute has "a `plainly legitimate sweep,' " *Washington* v. *Glucksberg,* 521 U. S. 702, 739-740, and n. 7 (1997) (Stevens, J., concurring in judgment).[6] Under the Washington statute, there are plainly any number of cases—indeed, one suspects, the most common to arise—in which the "person" among "any" seeking visitation is a once-custodial caregiver, an intimate relation, or even a genetic parent. Even the Court would seem to agree that in many circumstances, it would be constitutionally permissible for a court to award some visitation of a child to a parent or previous caregiver in cases of parental separation or divorce, cases of disputed custody, cases involving temporary foster care or guardianship, and so forth. As the statute plainly sweeps in a great deal of the permissible, the State Supreme Court majority incorrectly concluded that a statute authorizing "any person" to file a petition seeking visitation privileges would invariably run afoul of the Fourteenth Amendment.

The second key aspect of the Washington Supreme Court's holding—that the Federal Constitution requires a showing of actual or potential "harm" to the child before a court may order visitation continued over a parent's objections—finds no support in this Court's case law. While, as the Court recognizes, the Federal Constitution certainly protects the parent-child relationship from arbitrary impairment by the State, see *infra* this page and 87-88, we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm.[7] The presumption that parental decisions generally serve the best interests of their children is sound, and clearly in the normal case the parent's interest is paramount. But even a fit parent is capable of treating a child like a mere possession.

Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child.

It has become standard practice in our substantive due process jurisprudence to begin our analysis with an identification of the "fundamental" liberty interests implicated by the challenged state action. See, *e. g., ante,* at 65-66 (opinion of O'Connor, J.); *Washington* v. *Glucksberg,* 521 U. S. 702 (1997); *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833 (1992). My colleagues are of course correct to recognize that the right of a parent to maintain a relationship with his or her child is among the interests included most often in the constellation of liberties protected through the Fourteenth Amendment. *Ante,* at 65-66 (opinion of O'Connor, J.). Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest—absent exceptional circumstances—in doing so without the undue interference of strangers to them and to their child. Moreover, and critical in this case, our cases applying this principle have explained that with this constitutional liberty comes a presumption (albeit a rebuttable one) that "natural bonds of affection lead parents to act in the best interests of their children." *Parham* v. *J. R.*, 442 U. S. 584, 602 (1979); see also *Casey,* 505 U. S., at 895; *Santosky* v. *Kramer,* 455 U. S. 745, 759 (1982) (State may not presume, at factfinding stage of parental rights termination proceeding, that interests of parent and child diverge); see also *ante,* at 68-69 (opinion of O'Connor, J.).

Despite this Court's repeated recognition of these significant parental liberty interests, these interests have never been seen to be without limits. In *Lehr* v. *Robertson,* 463 U. S. 248 (1983), for example, this Court held that a putative biological father who had never established an actual relationship with his child did not have a constitutional right to notice of his child's adoption by the man who had married the child's mother. As this Court had recognized in an earlier case, a parent's liberty interests "`do not spring fullblown from the biological connection between parent and child. They require relationships more enduring.' " *Id.,* at 260 (quoting *Caban* v. *Mohammed,* 441 U. S. 380, 397 (1979)).

Conversely, in *Michael H.* v. *Gerald D.*, 491 U. S. 110 (1989), this Court concluded that despite both biological parenthood and an established relationship with a young child, a father's due process liberty interest in maintaining some connection with that child was not sufficiently powerful to overcome a state statutory presumption that the husband of the child's mother was the child's parent. As a result of the presumption, the biological father could be denied even visitation with the child because, as a matter of state law, he was not a "parent." A plurality of this Court there recognized that the parental liberty interest was a function, not simply of "isolated factors" such as biology and intimate connection, but of the broader and apparently independent interest in family. See, *e. g., id.,* at 123; see also *Lehr,* 463 U. S., at 261; *Smith* v. *Organization of Foster Families For Equality & Reform,* 431 U. S. 816, 842-847 (1977); *Moore* v. *East Cleveland,* 431 U. S. 494, 498-504 (1977).

A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae,* see, *e. g., Reno* v. *Flores,* 507 U. S. 292, 303-304 (1993); *Santosky* v. *Kramer,* 455 U. S., at 766; *Parham,* 442 U. S., at 605; *Prince* v. *Massachusetts,* 321 U. S. 158, 166 (1944), and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection, *Santosky,* 455 U. S., at 760.

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, 491 U. S., at 130 (reserving the question), it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.[8] At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel. See *ante,* at 64-65 (opinion of O'Connor,

J.) (describing States' recognition of "an independent third-party interest in a child"). The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.[9]

This is not, of course, to suggest that a child's liberty interest in maintaining contact with a particular individual is to be treated invariably as on a par with that child's parents' contrary interests. Because our substantive due process case law includes a strong presumption that a parent will act in the best interest of her child, it would be necessary, were the state appellate courts actually to confront a challenge to the statute as applied, to consider whether the trial court's assessment of the "best interest of the child" incorporated that presumption. Neither would I decide whether the trial court applied Washington's statute in a constitutional way in this case, although, as I have explained, n. 3, *supra,* I think the outcome of this determination is far from clear. For the purpose of a facial challenge like this, I think it safe to assume that trial judges usually give great deference to parents' wishes, and I am not persuaded otherwise here.

But presumptions notwithstanding, we should recognize that there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation by a "person" other than a parent. The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily. It is indisputably the business of the States, rather than a federal court employing a national standard, to assess in the first instance the relative importance of the conflicting interests that give rise to disputes such as this.[10] Far from guaranteeing that parents' interests will be trammeled in the sweep of cases arising under the statute, the Washington law merely gives an individual—with whom a child may have an established relationship—the procedural right to ask the State to act as arbiter, through the entirely well-known best-interests standard, between the parent's protected interests and the child's. It seems clear to me that the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child.

Accordingly, I respectfully dissent.

Justice Scalia, dissenting.

In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all men . . . are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.

Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children[1]—two of them from an era rich in substantive due process holdings that have since been repudiated. See *Meyer* v. *Nebraska,* 262 U. S. 390, 399, 401 (1923); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534-535 (1925); *Wisconsin* v. *Yoder,* 406 U. S. 205, 232-233 (1972). Cf. *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379 (1937) (overruling *Adkins* v. *Children's Hospital of D. C.,* 261 U. S. 525 (1923)). The sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare*

decisis protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.

Judicial vindication of "parental rights" under a Constitution that does not even mention them requires (as Justice Kennedy's opinion rightly points out) not only a judicially crafted definition of parents, but also—unless, as no one believes, the parental rights are to be absolute—judicially approved assessments of "harm to the child" and judicially defined gradations of other persons (grandparents, extended family, adoptive family in an adoption later found to be invalid, long-term guardians, etc.) who may have some claim against the wishes of the parents. If we embrace this unenumerated right, I think it obvious—whether we affirm or reverse the judgment here, or remand as Justice Stevens or Justice Kennedy would do—that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.[2]

For these reasons, I would reverse the judgment below.

Justice Kennedy, dissenting.

The Supreme Court of Washington has determined that petitioners Jenifer and Gary Troxel have standing under state law to seek court-ordered visitation with their grandchildren, notwithstanding the objections of the children's parent, respondent Tommie Granville. The statute relied upon provides:

> "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." Wash. Rev. Code § 26.10.160(3) (1994).

After acknowledging this statutory right to sue for visitation, the State Supreme Court invalidated the statute as violative of the United States Constitution, because it interfered with a parent's right to raise his or her child free from unwarranted interference. *In re Smith*, 137 Wash. 2d 1, 969 P. 2d 21 (1998). Although parts of the court's decision may be open to differing interpretations, it seems to be agreed that the court invalidated the statute on its face, ruling it a nullity.

The first flaw the State Supreme Court found in the statute is that it allows an award of visitation to a nonparent without a finding that harm to the child would result if visitation were withheld; and the second is that the statute allows any person to seek visitation at any time. In my view the first theory is too broad to be correct, as it appears to contemplate that the best interests of the child standard may not be applied in any visitation case. I acknowledge the distinct possibility that visitation cases may arise where, considering the absence of other protection for the parent under state laws and procedures, the best interests of the child standard would give insufficient protection to the parent's constitutional right to raise the child without undue intervention by the State; but it is quite a different matter to say, as I understand the Supreme Court of Washington to have said, that a harm to the child standard is required in every instance.

Given the error I see in the State Supreme Court's central conclusion that the best interests of the child standard is never appropriate in third-party visitation cases, that court should have the first opportunity to reconsider this case. I would remand the case to the state court for further proceedings. If it then found the statute has been applied in an unconstitutional manner because the best interests of the child standard gives insufficient protection to a parent under the circumstances of this case, or if it again declared the statute a nullity because the statute seems to allow any person at all to seek visitation at any time, the decision would present other issues which may or may not warrant further

review in this Court. These include not only the protection the Constitution gives parents against state-ordered visitation but also the extent to which federal rules for facial challenges to statutes control in state courts. These matters, however, should await some further case. The judgment now under review should be vacated and remanded on the sole ground that the harm ruling that was so central to the Supreme Court of Washington's decision was error, given its broad formulation.

Turning to the question whether harm to the child must be the controlling standard in every visitation proceeding, there is a beginning point that commands general, perhaps unanimous, agreement in our separate opinions: As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the State, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment. See, *e. g., Meyer* v. *Nebraska,* 262 U. S. 390, 399, 401 (1923); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534-535 (1925); *Prince* v. *Massachusetts,* 321 U. S. 158, 166 (1944); *Stanley* v. *Illinois,* 405 U. S. 645, 651-652 (1972); *Wisconsin* v. *Yoder,* 406 U. S. 205, 232-233 (1972); *Santosky* v. *Kramer,* 455 U. S. 745, 753—754 (1982). *Pierce* and *Meyer,* had they been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion. Their formulation and subsequent interpretation have been quite different, of course; and they long have been interpreted to have found in Fourteenth Amendment concepts of liberty an independent right of the parent in the "custody, care and nurture of the child," free from state intervention. *Prince, supra,* at 166. The principle exists, then, in broad formulation; yet courts must use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to the right.

The State Supreme Court sought to give content to the parent's right by announcing a categorical rule that third parties who seek visitation must always prove the denial of visitation would harm the child. After reviewing some of the relevant precedents, the Supreme Court of Washington concluded "`[t]he requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process.' " 137 Wash. 2d, at 19-20, 969 P. 2d, at 30 (quoting *Hawk* v. *Hawk,* 855 S. W. 2d 573, 580 (Tenn. 1993)). For that reason, "[s]hort of preventing harm to the child," the court considered the best interests of the child to be "insufficient to serve as a compelling state interest overruling a parent's fundamental rights." 137 Wash. 2d, at 20, 969 P. 2d, at 30.

While it might be argued as an abstract matter that in some sense the child is always harmed if his or her best interests are not considered, the law of domestic relations, as it has evolved to this point, treats as distinct the two standards, one harm to the child and the other the best interests of the child. The judgment of the Supreme Court of Washington rests on that assumption, and I, too, shall assume that there are real and consequential differences between the two standards.

On the question whether one standard must always take precedence over the other in order to protect the right of the parent or parents, "[o]ur Nation's history, legal traditions, and practices" do not give us clear or definitive answers. *Washington* v. *Glucksberg,* 521 U. S. 702, 721 (1997). The consensus among courts and commentators is that at least through the 19th century there was no legal right of visitation; court-ordered visitation appears to be a 20thcentury phenomenon. See, *e. g.,* 1 D. Kramer, Legal Rights of Children 124, 136 (2d ed. 1994); 2 J. Atkinson, Modern Child Custody Practice § 8.10 (1986). A case often cited as one of the earliest visitation decisions, *Succession of Reiss,* 46 La. Ann. 347, 353, 15 So. 151, 152 (1894), explained that "the obligation ordinarily to visit grandparents is moral and not legal"—a conclusion which appears consistent with that of American common-law jurisdictions of the time. Early 20th-century exceptions did occur, often in cases where a relative had acted in a parental capacity, or where one of a child's parents had died. See *Douglass* v. *Merriman,* 163 S. C. 210, 161 S. E. 452 (1931) (maternal grandparent awarded visitation with child when custody was awarded to father; mother had died); *Solomon* v. *Solomon,* 319 Ill. App. 618, 49 N. E. 2d 807 (1943) (paternal grandparents could be given visitation with child in custody of his mother when their son was stationed abroad; case remanded for fitness hearing); *Consaul* v. *Consaul,* 63 N. Y. S. 2d 688 (Sup. Ct. Jefferson

Cty. 1946) (paternal grandparents awarded visitation with child in custody of his mother; father had become incompetent). As a general matter, however, contemporary state-court decisions acknowledge that "[h]istorically, grandparents had no legal right of visitation," *Campbell* v. *Campbell,* 896 P. 2d 635, 642, n. 15 (Utah App. 1995), and it is safe to assume other third parties would have fared no better in court.

To say that third parties have had no historical right to petition for visitation does not necessarily imply, as the Supreme Court of Washington concluded, that a parent has a constitutional right to prevent visitation in all cases not involving harm. True, this Court has acknowledged that States have the authority to intervene to prevent harm to children, see, *e. g., Prince, supra,* at 168-169; *Yoder, supra,* at 233-234, but that is not the same as saying that a heightened harm to the child standard must be satisfied in every case in which a third party seeks a visitation order. It is also true that the law's traditional presumption has been "that natural bonds of affection lead parents to act in the best interests of their children," *Parham* v. *J. R.*, 442 U. S. 584, 602 (1979); and "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state," *id.,* at 603. The State Supreme Court's conclusion that the Constitution forbids the application of the best interests of the child standard in any visitation proceeding, however, appears to rest upon assumptions the Constitution does not require.

My principal concern is that the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. As we all know, this is simply not the structure or prevailing condition in many households. See, *e. g., Moore* v. *East Cleveland,* 431 U. S. 494 (1977). For many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood. This may be so whether their childhood has been marked by tragedy or filled with considerable happiness and fulfillment.

Cases are sure to arise—perhaps a substantial number of cases—in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto. See *Michael H.* v. *Gerald D.*, 491 U. S. 110 (1989) (putative natural father not entitled to rebut state-law presumption that child born in a marriage is a child of the marriage); *Quilloin* v. *Walcott,* 434 U. S. 246 (1978) (best interests standard sufficient in adoption proceeding to protect interests of natural father who had not legitimated the child); see also *Lehr* v. *Robertson,* 463 U. S. 248, 261 (1983) ("`[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship' " (quoting *Smith* v. *Organization of Foster Families For Equality & Reform,* 431 U. S. 816, 844 (1977), in turn quoting *Yoder,* 406 U. S., at 231-233)). Some pre-existing relationships, then, serve to identify persons who have a strong attachment to the child with the concomitant motivation to act in a responsible way to ensure the child's welfare. As the State Supreme Court was correct to acknowledge, those relationships can be so enduring that "in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child," 137 Wash. 2d, at 20, 969 P. 2d, at 30; and harm to the adult may also ensue. In the design and elaboration of their visitation laws, States may be entitled to consider that certain relationships are such that to avoid the risk of harm, a best interests standard can be employed by their domestic relations courts in some circumstances.

Indeed, contemporary practice should give us some pause before rejecting the best interests of the child standard in all third-party visitation cases, as the Washington court has done. The standard has been recognized for many years as a basic tool of domestic relations law in visitation proceedings. Since 1965 all 50 States have enacted a third-party visitation statute of some sort. See *ante,* at 73-74, n. (plurality opinion). Each of these statutes, save one, permits a

court order to issue in certain cases if visitation is found to be in the best interests of the child. While it is unnecessary for us to consider the constitutionality of any particular provision in the case now before us, it can be noted that the statutes also include a variety of methods for limiting parents' exposure to third-party visitation petitions and for ensuring parental decisions are given respect. Many States limit the identity of permissible petitioners by restricting visitation petitions to grandparents, or by requiring petitioners to show a substantial relationship with a child, or both. See, *e. g.,* Kan. Stat. Ann. § 38-129 (1993 and Supp. 1998) (grandparent visitation authorized under certain circumstances if a substantial relationship exists); N. C. Gen. Stat. §§ 50-13.2, 50-13.2A, 50-13.5 (1999) (same); Iowa Code § 598.35 (Supp. 1999) (same; visitation also authorized for great-grandparents); Wis. Stat. § 767.245 (Supp. 1999) (visitation authorized under certain circumstances for "a grandparent, great grandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child"). The statutes vary in other respects—for instance, some permit visitation petitions when there has been a change in circumstances such as divorce or death of a parent, see, *e. g.,* N. H. Rev. Stat. Ann. § 458:17—d (1992), and some apply a presumption that parental decisions should control, see, *e. g.,* Cal. Fam. Code Ann. §§ 3104(e)—(f) (West 1994); R. I. Gen. Laws § 15-5—24.3(a)(2)(v) (Supp. 1999). Georgia's is the sole state legislature to have adopted a general harm to the child standard, see Ga. Code Ann. § 19-7— 3(c) (1999), and it did so only after the Georgia Supreme Court held the State's prior visitation statute invalid under the Federal and Georgia Constitutions, see *Brooks* v. *Parkerson,* 265 Ga. 189, 454 S. E. 2d 769, cert. denied, 516 U. S. 942 (1995).

In light of the inconclusive historical record and case law, as well as the almost universal adoption of the best interests standard for visitation disputes, I would be hard pressed to conclude the right to be free of such review in all cases is itself "`implicit in the concept of ordered liberty.' " *Glucksberg,* 521 U. S., at 721 (quoting *Palko* v. *Connecticut,* 302 U. S. 319, 325 (1937)). In my view, it would be more appropriate to conclude that the constitutionality of the application of the best interests standard depends on more specific factors. In short, a fit parent's right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a *de facto* parent may be another. The protection the Constitution requires, then, must be elaborated with care, using the discipline and instruction of the case law system. We must keep in mind that family courts in the 50 States confront these factual variations each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise. Cf. *Ankenbrandt* v. *Richards,* 504 U. S. 689, 703-704 (1992).

It must be recognized, of course, that a domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated. The best interests of the child standard has at times been criticized as indeterminate, leading to unpredictable results. See, *e. g.,* American Law Institute, Principles of the Law of Family Dissolution 2, and n. 2 (Tent. Draft No. 3, Mar. 20, 1998). If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future. Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required; and I do not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship. We owe it to the Nation's domestic relations legal structure, however, to proceed with caution.

It should suffice in this case to reverse the holding of the State Supreme Court that the application of the best interests of the child standard is always unconstitutional in thirdparty visitation cases. Whether, under the circumstances of this case, the order requiring visitation over the objection of this fit parent violated the Constitution ought to be reserved for further proceedings. Because of its sweeping ruling requiring the harm to the child standard, the Supreme Court of Washington did not have the occasion to address the specific visitation order the Troxels obtained. More specific guidance should await a case in which a State's highest court has considered all of the facts in the course of elaborating the protection afforded to parents by the laws of the State and by the Constitution itself. Furthermore, in my view, we need not address whether, under the correct constitutional standards, the Washington statute can be invalidated on its face. This question, too, ought to be addressed by the state court in the first instance.

In my view the judgment under review should be vacated and the case remanded for further proceedings.

[*] Briefs of *amici curiae* urging reversal were filed for the State of Washington et al. by *Christine O. Gregoire,* Attorney General of Washington, and *Maureen A. Hart,* Senior Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Mark Pryor* of Arkansas, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Earl I. Anzai* of Hawaii, *Carla J. Stovall* of Kansas, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *John J. Farmer, Jr.,* of New Jersey, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, and *Paul G. Summers* of Tennessee; for AARP et al. by *Rochelle Bobroff, Bruce Vignery,* and *Michael Schuster;* for Grandparents United for Children's Rights, Inc., by *Judith Sperling Newton* and *Carol M. Gapen;* for the National Conference of State Legislatures et al. by *Richard Ruda* and *James I. Crowley;* and for the Grandparent Caregiver Law Center of the Brookdale Center on Aging.

Briefs of *amici curiae* urging affirmance were filed for the American Academy of Matrimonial Lawyers by *Barbara Ellen Handschu* and *Sanford K. Ain;* for the American Center for Law and Justice by *Jay Alan Sekulow, Colby May, Vincent McCarthy,* and *John P. Tuskey;* for the American Civil Liberties Union et al. by *Matthew A. Coles, Michael P. Adams, Catherine Weiss,* and *Steven R. Shapiro;* for the Coalition for the Restoration of Parental Rights by *Karen A. Wyle;* for the Institute for Justice et al. by *William H. Mellor, Clint Bolick,* and *Scott G. Bullock;* for the Center for the Original Intent of the Constitution by *Michael P. Farris;* for the Christian Legal Society et al. by *Kimberlee Wood Colby, Gregory S. Baylor,* and *Carl H. Esbeck;* for the Lambda Legal Defense and Education Fund et al.by *Patricia M. Logue, Ruth E. Harlow,* and *Beatrice Dohrn;* for the Society of Catholic Social Scientists by *Stephen M. Krason* and *Richard W. Garnett;* and for Debra Hein by *Stuart M. Wilder.*

Briefs of*amici curiae* were filed for the Center for Children's Policy Practice & Research at the University of Pennsylvania by *Barbara Bennett Woodhouse;* for the Domestic Violence Project, Inc./Safe House (Michigan) et al. by *Anne L. Argiroff* and *Ann L. Routt;* for the National Association of Counsel for Children by *Robert C. Fellmeth* and *Joan Hollinger;* and for the Northwest Women's Law Center et al. by *Cathy J. Zavis.*

[*] All 50 States have statutes that provide for grandparent visitation in some form. See Ala. Code § 30-3—4.1 (1989); Alaska Stat. Ann. § 25.20.065 (1998); Ariz. Rev. Stat. Ann. § 25-409 (1994); Ark. Code Ann. § 9-13-103 (1998); Cal. Fam. Code Ann. § 3104 (West 1994); Colo. Rev. Stat. § 19-1—117 (1999); Conn. Gen. Stat. § 46b—59 (1995); Del. Code Ann., Tit. 10, § 1031(7) (1999); Fla. Stat. § 752.01 (1997); Ga. Code Ann. § 19-7—3 (1991); Haw. Rev. Stat. § 571-46.3 (1999); Idaho Code § 32-719 (1999); Ill. Comp. Stat., ch. 750, § 5/607 (1998); Ind. Code § 31-17-5—1 (1999); Iowa Code § 598.35 (1999); Kan. Stat. Ann. § 38-129 (1993); Ky. Rev. Stat. Ann. § 405.021 (Baldwin 1990); La. Rev. Stat. Ann. § 9:344 (West Supp. 2000); La. Civ. Code Ann., Art. 136 (West Supp. 2000); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Md. Fam. Law Code Ann. § 9-102 (1999); Mass. Gen. Laws § 119:39D (1996); Mich. Comp. Laws Ann. § 722.27b (West Supp. 1999); Minn. Stat. § 257.022 (1998); Miss. Code Ann. § 93-16-3 (1994); Mo. Rev. Stat. § 452.402 (Supp. 1999); Mont. Code Ann. § 40-9—102 (1997); Neb. Rev. Stat. § 43-1802 (1998); Nev. Rev. Stat. § 125C.050 (Supp. 1999); N. H. Rev. Stat. Ann. § 458:17—d (1992); N. J. Stat. Ann. § 9:2-7.1 (West Supp. 1999-2000); N. M. Stat. Ann. § 40-9—2 (1999); N. Y. Dom. Rel. Law § 72 (McKinney 1999); N. C. Gen. Stat. §§ 50-13.2, 50-13.2A (1999); N. D. Cent. Code § 14-09-05.1 (1997); Ohio Rev. Code Ann. §§ 3109.051, 3109.11 (Supp. 1999); Okla. Stat., Tit. 10, § 5 (Supp. 1999); Ore. Rev. Stat. § 109.121 (1997); 23 Pa. Cons. Stat. §§ 5311-5313 (1991); R. I. Gen. Laws §§ 15-5—24 to 15-5—24.3 (Supp. 1999); S. C. Code Ann. § 20-7—420(33) (Supp. 1999); S. D. Codified Laws § 25-4—52 (1999); Tenn. Code Ann. §§ 36-6—306, 36-6—307 (Supp. 1999); Tex. Fam. Code Ann. § 153.433 (Supp. 2000); Utah Code Ann. § 30-5—2 (1998); Vt. Stat. Ann., Tit. 15, §§ 1011-1013 (1989); Va. Code Ann. § 20-124.2 (1995); W. Va. Code §§ 48-2B-1 to 48-2B-7 (1999); Wis. Stat. §§ 767.245, 880.155 (1993-1994); Wyo. Stat. Ann. § 20-7—101 (1999).

[1] The Supreme Court of Washington made its ruling in an action where three separate cases, including the Troxels', had been consolidated. *In re Smith,* 137 Wash. 2d 1, 6-7, 969 P. 2d 21, 23-24 (1998). The court also addressed two statutes, Wash. Rev. Code § 26.10.160(3) (Supp. 1996) and former Wash. Rev. Code § 26.09.240 (1994), 137 Wash. 2d, at 7, 969 P. 2d, at 24, the latter of which is not even at issue in this case. See Brief for Petitioners 6, n. 9; see also *ante,* at 61. Its constitutional analysis discussed only the statutory language and neither mentioned the facts of any of the three cases nor reviewed the records of their trial court proceedings below. 137 Wash. 2d, at 13-21, 969 P. 2d, at 27-31. The decision invalidated both statutes without addressing their application to particular facts: "We conclude petitioners have standing but, *as written,* the statutes violate the parents' constitutionally protected interests. These statutes allow any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm." *Id.,* at 5, 969 P. 2d, at 23 (emphasis added); see also *id.,* at 21, 969 P. 2d, at 31 ("RCW 26.10.160(3) and former RCW 26.09.240 impermissibly interfere with a parent's fundamental interest in the care, custody and companionship of the child" (citations and internal quotation marks omitted)).

[2] As Justice O'Connor points out, the best-interests provision "contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge." *Ante,* at 67.

[3] Cf. *Chicago* v. *Morales,* 527 U. S. 41, 71 (1999) (Breyer, J., concurring in part and concurring in judgment) ("The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications").

[4] The Supreme Court of Washington invalidated the broadly sweeping statute at issue on similarly limited reasoning: "Some parents and judges will not care if their child is physically disciplined by a third person; some parents and judges will not care if a third person teaches the child a religion inconsistent with the parents' religion; and some judges and parents will not care if the child is exposed to or taught racist or sexist beliefs. But many parents and judges will care, and, between the two, the parents should be the ones to choose whether to expose their children to certain people or ideas." 137 Wash. 2d, at 21, 969 P. 2d, at 31 (citation omitted).

[5] This is the pivot between Justice Kennedy's approach and mine.

[*] This case also does not involve a challenge based upon the Privileges and Immunities Clause and thus does not present an opportunity to reevaluate the meaning of that Clause.See *Saenz* v. *Roe,* 526 U. S. 489, 527-528 (1999) (Thomas, J., dissenting).

[1] The State Supreme Court held that, "as written, the statutes violate the parents' constitutionally protected interests." *In re Smith,* 137 Wash. 2d 1, 5, 969 P. 2d 21, 23 (1998).

[2] As the dissenting judge on the state appeals court noted, "[t]he trial court here was not presented with any guidance as to the proper test to be applied in a case such as this." *In re Troxel,* 87 Wash. App. 131, 143, 940 P. 2d 698, 703 (1997) (opinion of Ellington, J.). While disagreeing with the appeals court majority's conclusion that the state statute was constitutionally infirm, Judge Ellington recognized that despite this disagreement, the appropriate result would not be simply to affirm. Rather, because there had been no definitive guidance as to the proper construction of the statute, "[t]he findings necessary to order visitation over the objections of a parent are thus not in the record, and I would remand for further proceedings." *Ibid.*

[3] Unlike Justice O'Connor, *ante,* at 69-70, I find no suggestion in the trial court's decision in this case that the court was applying any presumptions at all in its analysis, much less one in favor of the grandparents. The first excerpt Justice O'Connor quotes from the trial court's ruling, *ante,* at 69, says nothing one way or another about *who* bears the burden under the statute of demonstrating "best interests." There is certainly no indication of a presumption *against* the parents' judgment, only a "`commonsensical' " estimation that, usually but not always, visiting with grandparents can be good for children. *Ibid.* The second quotation, "`I think [visitation] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children,' " *ibid.,* sounds as though the judge has simply concluded, based on the evidence before him, that visitation in this case would be in the best interests of both girls. Verbatim Report of Proceedings in *In re Troxel,* No. 93-3—00650-7 (Wash. Super. Ct., Dec. 14, 1994), p. 214. These statements do not provide us with a definitive assessment of the law the court applied regarding a "presumption" either way. Indeed, a different impression is conveyed by the judge's very next comment: "That has to be balanced, of course, with Mr. and Mrs. Wynn [a.k.a. Tommie Granville], who are trying to put together a family that includes eight children, . . . trying to get all those children together at the same time and put together some sort of functional unit wherein the children can be raised as brothers and sisters and spend lots of quality time together." *Ibid.* The judge then went on to reject the Troxels' efforts to attain the same level of visitation that their son, the girls' biological father, would have had, had he been alive. "[T]he fact that Mr. Troxel is deceased and he was the natural parent and as much as the grandparents would maybe like to step into the shoes of Brad, under our law that is not what we can do. The grandparents cannot step into the shoes of adeceased parent, per say *[sic],* as far as whole gamut of visitation rights are concerned." *Id.,* at 215. Rather, as the judge put it, "I understand your desire to do that as loving grandparents. Unfortunately that would impact too dramatically on the children and their ability to be integrated into the nuclear unit with the mother." *Id.,* at 222-223.

However one understands the trial court's decision—and my point is merely to demonstrate that it is surely open to interpretation—its validity under the state statute as written is a judgment for the state appellate courts to make in the first instance.

[4] Justice Souter would conclude from the state court's statement that the statute "do[es] not require the petitioner to establish that he or she has a substantial relationship with the child," 137 Wash. 2d, at 21, 969 P. 2d, at 31, that the state court has

"authoritatively read [the `best interests'] provision as placing hardly any limit on a court's discretion to award visitation rights," *ante,* at 77 (opinion concurring in judgment). Apart from the question whether one can deem this description of the statute an "authoritative" construction, it seems to me exceedingly unlikely that the state court held the statute unconstitutional because it believed that the "best interests" standard imposes "hardly any limit" on courts' discretion. See n. 5, *infra.*

[5] The phrase "best interests of the child" appears in no less than 10 current Washington state statutory provisions governing determinations from guardianship to termination to custody to adoption. See, *e. g.,* Wash. Rev. Code § 26.09.240(6) (Supp. 1996) (amended version of visitation statute enumerating eight factors courts may consider in evaluating a child's best interests); § 26.09.002 (in cases of parental separation or divorce "best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care"; "best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm"); § 26.10.100 ("The court shall determine custody in accordance with the best interests of the child"). Indeed, the Washington state courts have invoked the standard on numerous occasions in applying these statutory provisions—just as if the phrase had quite specific and apparent meaning. See, *e. g., In re McDoyle,* 122 Wash. 2d 604, 859 P. 2d 1239 (1993) (upholding trial court "best interest" assessment in custody dispute); *McDaniels* v. *Carlson,* 108 Wash. 2d 299, 310, 738 P. 2d 254, 261 (1987) (elucidating "best interests" standard in paternity suit context). More broadly, a search of current state custody and visitation laws reveals fully 698 separate references to the "best interest of the child" standard, a number that, at a minimum, should give the Court some pause before it upholds a decision implying that those words, on their face, may be too boundless to pass muster under the Federal Constitution.

[6] It necessarily follows that under the far more stringent demands suggested by the majority in *United States* v. *Salerno,* 481 U. S. 739, 745 (1987) (plaintiff seeking facial invalidation "must establish that no set of circumstances exists under which the Act would be valid"), respondent's facial challenge must fail.

[7] The suggestion by Justice Thomas that this case may be resolved solely with reference to our decision in *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925), is unpersuasive. *Pierce* involved a parent's choice whether to send a child to public or private school. While that case is a source of broad language about the scope of parents' due process rights with respect to their children, the constitutional principles and interests involved in the schooling context do not necessarily have parallel implications in this family law visitation context, in which multiple overlapping and competing prerogatives of various plausibly interested parties are at stake.

[8] This Court has on numerous occasions acknowledged that children are in many circumstances possessed of constitutionally protected rights and liberties. See *Parham* v. *J. R.,* 442 U. S. 584, 600 (1979) (liberty interest in avoiding involuntary confinement); *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights"); *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U. S. 503, 506-507 (1969) (First Amendment right to political speech); *In re Gault,* 387 U. S. 1, 13 (1967) (due process rights in criminal proceedings).

[9] Cf., *e. g., Wisconsin* v. *Yoder,* 406 U. S. 205, 244-246 (1972) (Douglas, J., dissenting) ("While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition. It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. . . . It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny"). The majority's disagreement with Justice Douglas in that case turned not on any contrary view of children's interest in their own education, but on the impact of the Free Exercise Clause of the First Amendment on its analysis of schoolrelated decisions by the Amish community.

[10] See *Palmore* v. *Sidoti,* 466 U. S. 429, 431 (1984) ("The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court"); cf. *Collins* v. *Harker Heights,* 503 U. S. 115, 128 (1992) (matters involving competing and multifaceted social and policy decisions best left to local decisionmaking); *Regents of Univ. of Mich.* v. *Ewing,* 474 U. S. 214, 226 (1985) (emphasizing our "reluctance to trench on the prerogatives of state and local educational institutions" as federal courts are ill-suited to "evaluate the substance of the multitude of academic decisions that are made daily by" experts in the field evaluating cumulative information). That caution is never more essential than in the realm of family and intimate relations. In part, this principle is based on long-established, if somewhat arbitrary, tradition in allocating responsibility for

resolving disputes of various kinds in our federal system. *Ankenbrandt* v. *Richards*, 504 U. S. 689 (1992). But the instinct against over regularizing decisions about personal relations is sustained on firmer ground than mere tradition. It flows in equal part from the premise that people and their intimate associations are complex and particular, and imposing a rigid template upon them all risks severing bonds our society would do well to preserve.

[1] Whether parental rights constitute a "liberty" interest for purposes of procedural due process is a somewhat different question not implicated here. *Stanley* v. *Illinois*, 405 U. S. 645 (1972), purports to rest in part upon that proposition, see *id.,* at 651-652; but see *Michael H.* v. *Gerald D.*, 491 U. S. 110, 120-121 (1989) (plurality opinion), though the holding is independently supported on equal protection grounds, see *Stanley, supra*, at 658.

[2] I note that respondent is asserting only, *on her own behalf,* a substantive due process right to direct the upbringing of her own children, and is not asserting, *on behalf of her children,* their First Amendment rights of association or free exercise.I therefore do not have occasion to consider whether, and under what circumstances, the parent could assert the latter enumerated rights.

III. Practice Standards

III. Practice Standards

a. Representation of Parents in Dependent/Neglect Cases

Section XVII, Representation of Parents in Dependent/Neglect Cases

XVII. REPRESENTATION OF PARENTS IN DEPENDENT/NEGLECT CASES

GOALS:

A. To actively, professionally, and competently advocate for parents whose children are the subject of actions under the Child Abuse and Neglect laws of Montana and afford them every legal opportunity to preserve their parental rights.

B. To serve the stated interest of the client and be independent from the court and other participants in the litigation, including the client's parents or guardians, and be unprejudiced and uncompromised in representing the client. Attorneys representing parents shall comply with the general standards for public defenders as well as these specific standards.

Practice Standards

September 26, 2018

Section XVII, Representation of Parents in Dependent/Neglect Cases

1. TRAINING:

A. To be eligible for assignment to represent parents in these court proceedings, counsel shall demonstrate proficiency or receive training in representing parents and the Indian Child Welfare Act.

B. Counsel shall be knowledgeable in the following areas:

a. Legislation and case law on abuse and neglect, termination of parental rights, and adoption of children with special needs;
b. The causes and available treatments of child abuse;
c. Child welfare and family preservation services available in the community and the problems they are designed to address;
d. Services the State will and won't routinely pay for;
e. The structure and functioning of Child and Family Services of the Department of Public Health and Human Services;
f. Local experts who can provide attorneys with consultation and testimony on the reasonableness and appropriateness of efforts to maintain or return the child to the home;
g. Local and state experts who can provide attorneys with consultation and testimony of the special needs of Indian children and cultural differences;
h. Child and adolescent development;
i. Brain development and the effect of trauma on brain development;
j. Substance abuse issues;
k. Mental health issues; and
l. Disability issues.

Section XVII, Representation of Parents in Dependent/Neglect Cases

2. CASE PREPARATION:

A. Counsel shall solicit the support of social workers that understand the public defender's advocacy role to investigate the various health and social services that may be available to the parent in the community.

B. Counsel shall advise the parent of all available options, as well as the practical and legal consequences of those options.

C. If the client is a parent whose location is unknown, all standard means, such as telephone book, internet, and putative father registry, shall be used to locate the parent. Other parents who are available shall be consulted as to the location of the missing parent.

D. Counsel shall actively represent the client at all stages of the proceeding up to and including termination of parental rights as well as any appeal. When the public defender becomes aware of the assignment, the public defender shall meet with the client as soon as possible and sufficiently before any scheduled hearing or proceeding, including the show cause hearing, to permit effective preparation.

E. When meeting with the parent for the first time, counsel shall identify himself or herself by name and affiliation, if appropriate. If the first meeting takes place in a detention, mental health, or other healthcare facility, counsel shall make it clear to the client that he or she is not a member of the facility staff. Counsel shall inform the parent that their conversation is confidential and that the matters they discuss should not be revealed to facility staff or others in order to preserve that attorney-client confidentiality. Counsel shall also inform the parent that he or she has a right to remain silent.

F. During the conference, counsel shall:

a. Explain the issues and possible dispositions;
b. Explain the court process, timelines, and the role of all the parties involved, such as judge, prosecutor, child protection specialist, guardian ad-litem, and parent;
c. Inform the parent of the risk of making inculpatory statements to anyone concerning the case without prior consultation with counsel;
d. Obtain signed releases for medical and mental health records, employment records, and other necessary records. Counsel should advise the client of the potential use of this information and the privileges that attach to this information;
e. Obtain information from the client concerning the facts and whether there were any statements made, witnesses, and other relevant information.

G. If counsel is unable to communicate with the client because of language or disability, counsel shall use the experts necessary to ensure the ability to communicate with the client.

Section XVII, Representation of Parents in Dependent/Neglect Cases

3. HANDLING THE CASE:

A. Counsel should seek the most expedient and timely resolution of the proceeding possible while providing effective and competent advocacy for the client. Counsel should only seek the continuance of any phase of the proceedings if it is necessary to effectively advocate for the client.

B. Counsel must be familiar with the applicable court rules and local customs in practice regarding the admissibility of evidence commonly offered in such proceedings, such as reports from agency employees, as well as substantive law in these proceedings.

C. In preparation for any proceedings such as show cause, adjudicatory or termination, counsel should:

a. Review the petition and all other evidence;
b. Prepare the client for the proceeding, explain the issues involved, and the alternatives open to the judge;
c. If the child has already been removed from the home, determine the basis for the removal;
d. Determine the actions taken by the State to investigate other possible actions to protect the child without removal, such as locating a non-custodial parent or relative, identifying services to address the needs of the parent and child, including intensive home-based services, and other services, such as disability support services.
e. Review all statements, documents, reports, and documentary evidence, including medical records, if any, and discuss these documents with the client;
f. Familiarize himself or herself with relevant law; and,
g. Interview all witnesses, favorable and adverse.

D. During any proceedings, counsel shall, where it benefits the client:

a. Examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence;
b. Offer evidence favorable to the client's case, if available; and,
c. Determine whether an expert is needed to assist in preparation of the parent's case.

E. During the show cause hearing, counsel shall examine witnesses as to:

a. Whether the agency has made all reasonable efforts to explore services that will allow the child to remain safely at home and avoid protective placement of the child;
b. Whether there are other responsible relatives or adults available who may be able to care for the child or provide additional supervision;

c. The accuracy of the facts contained in the petition or affidavit in support of intervention; and,
d. If the court grants the State's request and orders the child to be removed from the home, counsel shall challenge unnecessary supervision and restrictions on visitation.

F. In preparation for an adjudicatory hearing, counsel shall:
a. Determine what actions the client has taken since the preliminary proceeding, if there was one, to address the concerns of the state as to the safety of the child, and discuss with the client the treatment or other services to which the client would voluntarily agree;
b. Investigate whether the agency made reasonable efforts to prevent the need for placement and safely reunify the family, such as identifying services available to protect the child without removal, in-home baby sitters, intensive home-based services, and other services that address the needs of the parent and child, including disability support services, and whether the agency has taken prompt steps to evaluate relatives as possible caretakers.

G. At the adjudicatory hearing, counsel shall, where it benefits the client, examine and cross-examine adverse lay and expert witnesses, and challenge other non-testimonial evidence regarding:
a. The accuracy of the facts presented by the State to prove abuse or neglect of the child;
b. Factual basis of opinions presented by the State to prove abuse or neglect of the child;
c. Whether the agency failed to provide services that would have allowed the child to stay safely in the home;
d. If the court grants the State's request and orders the child to be removed from the home, counsel shall challenge unnecessary supervision and restrictions on visitation. In addition, after consultation with the client, counsel shall consider offering evidence to the court of treatment or services in which the client would voluntarily participate to obviate the need for a treatment plan or, if a treatment plan is ordered, to include in the treatment plan. Counsel shall challenge conditions in the treatment plan that are not justified or supported by the record.

H. Prior to making admissions or stipulations or agreeing to voluntarily place the child or relinquish any right to visitation with the child, counsel must:
a. Ensure that the client understands the consequences of such a decision;
b. Make it clear to the client that the ultimate decision to make the admission or voluntarily place the child has to be made by the client;
c. Investigate and candidly explain to the client the prospective strengths and weaknesses of the case, including the availability of the State's witnesses,

concessions and benefits which are subject to negotiation, and the possible consequences of any adjudication;

d. Be satisfied that the admission is voluntary, that there is a factual basis for the admission, and that the client understands the right being waived; and,
e. Be aware of the effect the client's admission will have on any other court proceedings or related issues.

I. Counsel's recommendation on the advisability of an admission should be based on a review of the complete circumstances of the case and the client's situation.

J. Where counsel believes that the client's desires are not in the client's best interest, counsel may attempt to persuade the client to change his or her position. If the client remains unpersuaded, however, counsel should assure the client he or she will defend the client vigorously.

K. Notwithstanding the existence of ongoing negotiations with the State, counsel should continue to prepare and investigate the case in the same manner as if it were going to proceed to a hearing on the merits.

L. In preparation for a disposition hearing, counsel should:
a. Determine what actions the client has taken since the adjudicatory proceedings to address the concerns of the State as to the safety of the child;
b. Investigate what the agency has done to explore services that will allow the child to remain safely at home; and,
c. Determine what sort of disruption that the removal of the child has caused the child and the family.

M. In the disposition hearing, counsel shall, where it benefits the client, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence regarding:
a. Whether, if the agency objects to placing the child with the parent, the agency sufficiently explored and provided services that would have allowed the child to reside safely in the parent's home;
b. Whether the agency appropriately considered the non-custodial parent or other family members as caretakers; and,
c. The factual basis of the agency's recommendations for placement outside of the home.

N. If the court grants the State's request and orders the child to be removed from the home, counsel shall challenge unnecessary supervision and restrictions on visitation.

Section XVII, Representation of Parents in Dependent/Neglect Cases

O. In preparation for a permanency hearing, and, if parental rights have not been terminated, counsel should:

a. Keep in contact with the client and determine what actions the client has taken to address the concerns of the State as to the safety of the child;
b. Investigate what the agency has done to explore services that will allow the child to live safely with the parent; and,
c. Determine what sort of disruption the removal of the child has caused the child and the family.

P. In preparation for a parental rights termination proceeding, counsel should:

a. Determine what actions the client has taken to address the concerns of the State as to the safety of the child;
b. Investigate what the agency has done to explore services that will allow the child to remain safely in the home; and,
c. Determine what sort of disruption that the removal of the child has caused the child and the family.

Q. In a parental rights termination proceeding, counsel shall, where it benefits the client, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence regarding:

a. Whether the statutory grounds for termination have been met;
b. Whether termination is in the best interest of the child;
c. Whether the agency made reasonable efforts to prevent the need for termination and safely reunify the family, such as identifying services available to protect the child without removal, in-home baby sitters, intensive home-based services, and other services that address the needs of the parent and child, including disability support services;
d. Whether the treatment plan, if one was required, was appropriate.

American Bar Association

Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases

Introduction

These standards promote quality representation and uniformity of practice throughout the country for parents' attorneys in child abuse and neglect cases. The standards were written with the help of a committee of practicing parents' attorneys and child welfare professionals from different jurisdictions in the country. With their help, the standards were written with the difficulties of day-to-day practice in mind, but also with the goal of raising the quality of representation. While local adjustments may be necessary to apply these standards in practice, jurisdictions should strive to meet their fundamental principles and spirit.

The standards are divided into the following categories:

1. Summary of the Standards
2. Basic Obligations of Parents' Attorneys
3. Obligations of Attorney Manager
4. The Role of the Court

The standards include "black letter" requirements written in bold. Following the black letter standards are "actions." These actions further discuss how to fulfill the standard; implementing each standard requires the accompanying action. After the action is "commentary" or a discussion of why the standard is necessary and how it should be applied. When a standard does not need further explanation, no action or commentary appears. Several standards relate to specific sections of the Model Rules of Professional Conduct, and the Model Rules are referenced in these standards. The terms "parent" and "client" are used interchangeably throughout the document. These standards apply to all attorneys who represent parents in child abuse and neglect cases, whether they work for an agency or privately.

As was done in the *Standards of Practice for Attorneys Representing Child Welfare Agencies,* ABA 2004, a group of standards for attorney managers is included in these standards. These standards primarily apply to parents' attorneys who work for an agency or law firm – an institutional model of representation. Solo practitioners, or attorneys who individually receive appointments from the court, may wish to review this part of the standards, but may find some do not apply. However, some standards in this section, such as those about training and caseload, are relevant for all parents' attorneys.

As was done in the *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases,* ABA 1996, a section of the standards concerns the Role of the Court in

implementing these *Standards*. The ABA and the National Council of Juvenile and Family Court Judges have policies concerning the importance of the court in ensuring that all parties in abuse and neglect cases have competent representation.

Representing a parent in an abuse and neglect case is a difficult and emotional job. There are many responsibilities. These standards are intended to help the attorney prioritize duties and manage the practice in a way that will benefit each parent on the attorney's caseload.

SUMMARY: ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases

Basic Obligations**:** The parent's attorney shall:

General:

1. Adhere to all relevant jurisdiction-specific training and mentoring requirements before accepting a court appointment to represent a parent in an abuse or neglect case.

2. Acquire sufficient working knowledge of all relevant federal and state laws, regulations, policies, and rules.

3. Understand and protect the parent's rights to information and decision making while the child is in foster care.

4. Actively represent a parent in the pre-petition phase of a case, if permitted within the jurisdiction.

5. Avoid continuances (or reduce empty adjournments) and work to reduce delays in court proceedings unless there is a strategic benefit for the client.

6. Cooperate and communicate regularly with other professionals in the case.

Relationship with the Client:

7. Advocate for the client's goals and empower the client to direct the representation and make informed decisions based on thorough counsel.

8. Act in accordance with the duty of loyalty owed to the client.

9. Adhere to all laws and ethical obligations concerning confidentiality.

10. Provide the client with contact information in writing and establish a message system that allows regular attorney-client contact.

11. Meet and communicate regularly with the client well before court proceedings. Counsel the client about all legal matters related to the case, including specific allegations against the client, the service plan, the client's rights in the

pending proceeding, any orders entered against the client and the potential consequences of failing to obey court orders or cooperate with service plans.

12. Work with the client to develop a case timeline and tickler system.

13. Provide the client with copies of all petitions, court orders, service plans, and other relevant case documents, including reports regarding the child except when expressly prohibited by law, rule or court order.

14. Be alert to and avoid potential conflicts of interest that would interfere with the competent representation of the client.

15. Act in a culturally competent manner and with regard to the socioeconomic position of the parent throughout all aspects of representation.

16. Take diligent steps to locate and communicate with a missing parent and decide representation strategies based on that communication.

17. Be aware of the unique issues an incarcerated parent faces and provide competent representation to the incarcerated client.

18. Be aware of the client's mental health status and be prepared to assess whether the parent can assist with the case.

<u>Investigation</u>:

19. Conduct a thorough and independent investigation at every stage of the proceeding.

20. Interview the client well before each hearing, in time to use client information for the case investigation.

<u>Informal Discovery</u>:

21. Review the child welfare agency case file.

22. Obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties, and information from the caseworker and providers.

<u>Formal Discovery:</u>

23. When needed, use formal discovery methods to obtain information.

<u>Court Preparation</u>:

24. Develop a case theory and strategy to follow at hearings and negotiations.

25. Timely file all pleadings, motions, and briefs. Research applicable legal issues and advance legal arguments when appropriate.

26. Engage in case planning and advocate for appropriate social services using a multidisciplinary approach to representation when available.

27. Aggressively advocate for regular visitation in a family-friendly setting.

28. With the client's permission, and when appropriate, engage in settlement negotiations and mediation to resolve the case.

29. Thoroughly prepare the client to testify at the hearing.

30. Identify, locate and prepare all witnesses.

31. Identify, secure, prepare and qualify expert witness when needed. When permissible, interview opposing counsel's experts.

<u>Hearings</u>:

32. Attend and prepare for all hearings, including pretrial conferences.

33. Prepare and make all appropriate motions and evidentiary objections.

34. Present and cross-examine witnesses, prepare and present exhibits.

35. In jurisdictions in which a jury trial is possible, actively participate in jury selection and drafting jury instructions.

36. Request closed proceedings (or a cleared courtroom) in appropriate cases.

37. Request the opportunity to make opening and closing arguments.

38. Prepare proposed findings of fact, conclusions of law and orders when they will be used in the court's decision or may otherwise benefit the client.

<u>Post Hearings/Appeals</u>:

39. Review court orders to ensure accuracy and clarity and review with client.

40. Take reasonable steps to ensure the client complies with court orders and to determine whether the case needs to be brought back to court.

41. Consider and discuss the possibility of appeal with the client.

42. If the client decides to appeal, timely and thoroughly file the necessary post-hearing motions and paperwork related to the appeal and closely follow the jurisdiction's Rules of Appellate Procedure.

43. Request an expedited appeal, when feasible, and file all necessary paperwork while the appeal is pending.

44. Communicate the results of the appeal and its implications to the client.

Obligations of Attorney Managers:

Attorney Managers are urged to:

1. Clarify attorney roles and expectations.

2. Determine and set reasonable caseloads for attorneys.

3. Advocate for competitive salaries for staff attorneys.

4. Develop a system for the continuity of representation.

5. Provide attorneys with training and education opportunities regarding the special issues that arise in the client population.

6. Establish a regular supervision schedule.

7. Create a brief and forms bank.

8. Ensure the office has quality technical and support staff as well as adequate equipment, library materials, and computer programs to support its operations.

9. Develop and follow a recruiting and hiring practice focused on hiring highly qualified candidates.

10. Develop and implement an attorney evaluation process.

11. Work actively with other stakeholders to improve the child welfare system, including court procedures.

Role of the Court

The Court is urged to:

1. Recognize the importance of the parent attorney's role.

2. Establish uniform standards of representation for parents' attorneys.

3. Ensure the attorneys who are appointed to represent parents in abuse and neglect cases are qualified, well-trained, and held accountable for practice that complies with these standards.

4. Ensure appointments are made when a case first comes before the court, or before the first hearing, and last until the case has been dismissed from the court's jurisdiction.

5. Ensure parents' attorneys receive fair compensation.

6. Ensure timely payment of fees and costs for attorneys.

7. Provide interpreters, investigators and other specialists needed by the attorneys to competently represent clients. Ensure attorneys are reimbursed for supporting costs, such as use of experts, investigation services, interpreters, etc.

8. Ensure that attorneys who are receiving appointments carry a reasonable caseload that would allow them to provide competent representation for each of their clients.

9. Ensure all parties, including the parent's attorney, receive copies of court orders and other documentation.

10. Provide contact information between clients and attorneys.

11. Ensure child welfare cases are heard promptly with a view towards timely decision making and thorough review of issues.

Basic Obligations: The parent's attorney shall:

General[1]

1. **Adhere to all relevant jurisdiction-specific training and mentoring requirements before accepting a court appointment to represent a parent in an abuse or neglect case.**

Action: The parent's attorney must participate in all required training and mentoring before accepting an appointment.

Commentary: As in all areas of law, it is essential that attorneys learn the substantive law as well as local practice. A parent's fundamental liberty interest in the care and custody of his or her child is at stake, and the attorney must be adequately trained to protect this interest. Because the stakes are so high, the standards drafting committee recommends all parents' attorneys receive a minimum of 20 hours of relevant training before receiving an appointment and a minimum of 15 hours of related training each year. Training should directly relate to the attorney's child welfare practice.[2] This is further detailed in Attorney Managers Standard 5 below. In addition, the parent's attorney should actively participate in ongoing training opportunities. Even if the attorney's jurisdiction does not require training or mentoring, the attorney should seek it. Each state should make comprehensive training available to parents' attorneys throughout the state. Training may include relevant online or video training.

2. **Acquire sufficient working knowledge of all relevant federal and state laws, regulations, policies, and rules.**

Action: Parents' attorneys may come to the practice with competency in the various aspects of child abuse and neglect practice, or they need to be trained on them. It is essential for the parent's attorney to read and understand all state laws, policies and procedures regarding child abuse and neglect. In addition, the parent's attorney must be familiar with the following laws to recognize when they are relevant to a case and should be prepared to research them when they are applicable:

- Titles IV-B and IV-E of the Social Security Act, including the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 620-679 and the ASFA Regulations, 45 C.F.R. Parts 1355, 1356, 1357
- Child Abuse Prevention Treatment Act (CAPTA), P.L.108-36
- Indian Child Welfare Act (ICWA) 25 U.S.C. §§ 1901-1963, the ICWA Regulations, 25 C.F.R. Part 23, and the Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67, 584 (Nov. 26, 1979)
- State Indian Child Welfare Act laws

- Multi-Ethnic Placement Act (MEPA), as amended by the Inter-Ethnic Adoption Provisions of 1996 (MEPA-IEP) 42 U.S.C. § 622 (b)(9) (1998), 42 U.S.C. § 671(a)(18) (1998), 42 U.S.C. § 1996b (1998).
- Interstate Compact on Placement of Children (ICPC)
- Foster Care Independence Act of 1999 (FCIA), P.L. 106-169
- Individuals with Disabilities Education Act (IDEA), P.L. 91-230
- Family Education Rights Privacy Act (FERPA), 20 U.S.C. § 1232g
- Health Insurance Portability and Accountability Act of 1996 (HIPPA), P. L., 104-192 § 264, 42 U.S.C. § 1320d-2 (in relevant part)
- Public Health Act, 42 U.S.C. Sec. 290dd-2 and 42 C.F.R. Part 2
- Immigration laws relating to child welfare and child custody
- State laws and rules of evidence
- State laws and rules of civil procedure
- State laws and rules of criminal procedure
- State laws concerning privilege and confidentiality, public benefits, education, and disabilities
- State laws and rules of professional responsibility or other relevant ethics standards
- State laws regarding domestic violence
- State domestic relations laws

Commentary: Although the burden of proof is on the child welfare agency, in practice the parent and the parent's attorney generally must demonstrate that the parent can adequately care for the child. The parent's attorney must consider all obstacles to this goal, such as criminal charges against the parent, immigration issues, substance abuse or mental health issues, confidentiality concerns, permanency timelines, and the child's individual service issues. To perform these functions, the parent's attorney must know enough about all relevant laws to vigorously advocate for the parent's interests. Additionally, the attorney must be able to use procedural, evidentiary and confidentiality laws and rules to protect the parent's rights throughout court proceedings.

3. Understand and protect the parent's rights to information and decision making while the child is in foster care.

Action: The parent's attorney must explain to the parent what decision-making authority remains with the parent and what lies with the child welfare agency while the child is in foster care. The parent's attorney should seek updates and reports from any service provider working with the child/family or help the client obtain information about the child's safety, health, education and well-being when the client desires. Where decision-making rights remain, the parent's attorney should assist the parent in exercising his or her rights to continue to make decisions regarding the child's medical, mental health and educational services. If necessary, the parent's attorney should intervene with the child welfare agency, provider agencies, medical providers and the school to ensure the parent

has decision-making opportunities. This may include seeking court orders when the parent has been left out of important decisions about the child's life.

Commentary: Unless and until parental rights are terminated, the parent has parental obligations and rights while a child is in foster care. Advocacy may be necessary to ensure the parent is allowed to remain involved with key aspects of the child's life. Not only should the parent's rights be protected, but continuing to exercise as much parental responsibility as possible is often an effective strategy to speed family reunification. Often, though, a parent does not understand that he or she has the right to help make decisions for, or obtain information about, the child. Therefore, it is the parent's attorney's responsibility to counsel the client and help the parent understand his or her rights and responsibilities and try to assist the parent in carrying them out.

4. **Actively represent a parent in the prepetition phase of a case, if permitted within the jurisdiction.**

Action: The goal of representing a parent in the prepetition phase of the case is often to deter the agency from deciding to file a petition or to deter the agency from attempting to remove the client's child if a petition is filed. The parent's attorney should counsel the client about the client's rights in the investigation stage as well as the realistic pros and cons of cooperating with the child welfare agency (i.e., the parent's admissions could be used against the client later, but cooperating with services could eliminate a petition filing). The parent's attorney should acknowledge that the parent may be justifiably angry that the agency is involved with the client's family, and help the client develop strategies so the client does not express that anger toward the caseworker in ways that may undermine the client's goals. The attorney should discuss available services and help the client enroll in those in which the client wishes to participate. The attorney should explore conference opportunities with the agency. If it would benefit the client, the attorney should attend any conferences. There are times that an attorney's presence in a conference can shut down discussion, and the attorney should weigh that issue when deciding whether to attend. The attorney should prepare the client for issues that might arise at the conference, such as services and available kinship resources, and discuss with the client the option of bringing a support person to a conference.

Commentary: A few jurisdictions permit parents' attorneys to begin their representation before the child welfare agency files a petition with the court. When the agency becomes involved with the families, it can refer parents to attorneys so that parents will have the benefit of counsel throughout the life of the case. During the prepetition phase, the parent's attorney has the opportunity to work with the parent and help the parent fully understand the issues and the parent's chances of retaining custody of the child. The parent's attorney also has the chance to encourage the agency to make reasonable efforts to work with the family, rather than filing a petition. During this phase, the attorney should work intensively with the parent to explore all appropriate services.

5. **Avoid continuances (or reduce empty adjournments) and work to reduce delays in court proceedings unless there is a strategic benefit for the client.[3]**

Action: The parent's attorney should not request continuances unless there is an emergency or it benefits the client's case. If continuances are necessary, the parent's attorney should request the continuance in writing, as far as possible in advance of the hearing, and should request the shortest delay possible, consistent with the client's interests. The attorney must notify all counsel of the request. The parent's attorney should object to repeated or prolonged continuance requests by other parties if the continuance would harm the client.

Commentary: Delaying a case often increases the time a family is separated, and can reduce the likelihood of reunification. Appearing in court often motivates parties to comply with orders and cooperate with services. When a judge actively monitors a case, services are often put in place more quickly, visitation may be increased or other requests by the parent may be granted. If a hearing is continued and the case is delayed, the parent may lose momentum in addressing the issues that led to the child's removal or the parent may lose the opportunity to prove compliance with case plan goals. Additionally, the Adoption and Safe Families Act (ASFA) timelines continue to run despite continuances.

6. Cooperate and communicate regularly with other professionals in the case.[4]

Action: The parent's attorney should communicate with attorneys for the other parties, court appointed special advocates (CASAs) or guardians ad litem (GALs). Similarly, the parent's attorney should communicate with the caseworker, foster parents and service providers to learn about the client's progress and their views of the case, as appropriate. The parent's attorney should have open lines of communication with the attorney(s) representing the client in related matters such as any criminal, protection from abuse, private custody or administrative proceedings to ensure that probation orders, protection from abuse orders, private custody orders and administrative determinations do not conflict with the client's goals in the abuse and neglect case.

Commentary: The parent's attorney must have all relevant information to try a case effectively. This requires open and ongoing communication with the other attorneys and service providers working with the client and family. Rules of professional ethics govern contact with represented and unrepresented parties. In some states, for instance, attorneys may not speak with child welfare caseworkers without the permission of agency counsel. The parent's attorney must be aware of local rules on this issue and seek permission to speak with represented parties when that would further the client's interests.

Relationship with the Client[5]

7. Advocate for the client's goals and empower the client to direct the representation and make informed decisions based on thorough counsel.[6]

Action: Attorneys representing parents must understand the client's goals and pursue them vigorously. The attorney should explain that the attorney's job is to represent the client's interests and regularly inquire as to the client's goals, including ultimate case

goals and interim goals. The attorney should explain all legal aspects of the case and provide comprehensive counsel on the advantages and disadvantages of different options. At the same time, the attorney should be careful not to usurp the client's authority to decide the case goals.

Commentary: Since many clients distrust the child welfare system, the parent's attorney must take care to distinguish him or herself from others in the system so the client can see that the attorney serves the client's interests. The attorney should be mindful that parents often feel disempowered in child welfare proceedings and should take steps to make the client feel comfortable expressing goals and wishes without fear of judgment. The attorney should clearly explain the legal issues as well as expectations of the court and the agency, and potential consequences of the client failing to meet those expectations. The attorney has the responsibility to provide expertise, and to make strategic decisions about the best ways to achieve the parent's goals, but the client is in charge of deciding the case goals and the attorney must act accordingly.

8. Act in accordance with the duty of loyalty owed to the client.

Action: Attorneys representing parents should show respect and professionalism towards their clients. Parents' attorneys should support their clients and be sensitive to the client's individual needs. Attorneys should remember that they may be the client's only advocate in the system and should act accordingly.

Commentary: Often attorneys practicing in abuse and neglect court are a close knit group who work and sometimes socialize together. Maintaining good working relationships with other players in the child welfare system is an important part of being an effective advocate. The attorney, however, should be vigilant against allowing the attorney's own interests in relationships with others in the system to interfere with the attorney's primary responsibility to the client. The attorneys should not give the impression to the client that relationships with other attorneys are more important than the representation the attorney is providing the client. The client must feel that the attorney believes in him or her and is actively advocating on the client's behalf.

9. Adhere to all laws and ethical obligations concerning confidentiality.[7]

Action: Attorneys representing parents must understand confidentiality laws, as well as ethical obligations, and adhere to both with respect to information obtained from or about the client. The attorney must fully explain to the client the advantages and disadvantages of choosing to exercise, partially waive, or waive a privilege or right to confidentiality. Consistent with the client's interests and goals, the attorney must seek to protect from disclosure confidential information concerning the client.

Commentary: Confidential information contained in a parent's substance abuse treatment records, domestic violence treatment records, mental health records and medical records is often at issue in abuse and neglect cases. Improper disclosure of confidential information early in the proceeding may have a negative impact on the manner in which

the client is perceived by the other parties and the court. For this reason, it is crucial for the attorney to advise the client promptly as to the advantages and disadvantages of releasing confidential information, and for the attorney to take whatever steps necessary to protect the client's privileges or rights to confidentiality.

10. Provide the client with contact information in writing and establish a message system that allows regular attorney-client contact.[8]

Action: The parent's attorney should ensure the parent understands how to contact the attorney and that the attorney wants to hear from the client on an ongoing basis. The attorney should explain that even when the attorney is unavailable, the parent should leave a message. The attorney must respond to client messages in a reasonable time period. The attorney and client should establish a reliable communication system that meets the client's needs. For example, it may involve telephone contact, email or communication through a third party when the client agrees to it. Interpreters should be used when the attorney and client are not fluent in the same language.

Commentary: Gaining the client's trust and establishing ongoing communication are two essential aspects of representing the parent. The parent may feel angry and believe that all of the attorneys in the system work with the child welfare agency and against that parent. It is important that the parent's attorney, from the beginning of the case, is clear with the parent that the attorney works for the parent, is available for consultation, and wants to communicate regularly. This will help the attorney support the client, gather information for the case and learn of any difficulties the parent is experiencing that the attorney might help address. The attorney should explain to the client the benefits of bringing issues to the attorney's attention rather than letting problems persist. The attorney should also explain that the attorney is available to intervene when the client's relationship with the agency or provider is not working effectively. The attorney should be aware of the client's circumstances, such as whether the client has access to a telephone, and tailor the communication system to the individual client.

11. Meet and communicate regularly with the client well before court proceedings. Counsel the client about all legal matters related to the case, including specific allegations against the client, the service plan, the client's rights in the pending proceeding, any orders entered against the client and the potential consequences of failing to obey court orders or cooperate with service plans.[9]

Action: The parent's attorney should spend time with the client to prepare the case and address questions and concerns. The attorney should clearly explain the allegations made against the parent, what is likely to happen before, during and after each hearing, and what steps the parent can take to increase the likelihood of reuniting with the child. The attorney should explain any settlement options and determine whether the client wants the attorney to pursue such options. The attorney should explain courtroom procedures. The attorney should write to the client to ensure the client understands what happened in court and what is expected of the client.

The attorney should ensure a formal interpreter is involved when the attorney and client are not fluent in the same language. The attorney should advocate for the use of an interpreter when other professionals in the case who are not fluent in the same language as the client are interviewing the client as well.

The attorney should be available for in-person meetings or telephone calls to answer the client's questions and address the client's concerns. The attorney and client should work together to identify and review short and long-term goals, particularly as circumstances change during the case.

The parent's attorney should help the client access information about the child's developmental and other needs by speaking to service providers and reviewing the child's records. The parent needs to understand these issues to make appropriate decisions for the child's care.

The parent's attorney and the client should identify barriers to the client engaging in services, such as employment, transportation, and financial issues. The attorney should work with the client, caseworker and service provider to resolve the barriers.

The attorney should be aware of any special issues the parents may have related to participating in the proposed case plan, such as an inability to read or language differences, and advocate with the child welfare agency and court for appropriate accommodations.

Commentary: The parent's attorney's job extends beyond the courtroom. The attorney should be a counselor as well as litigator. The attorney should be available to talk with the client to prepare for hearings, and to provide advice and information about ongoing concerns. Open lines of communication between attorneys and clients help ensure clients get answers to questions and attorneys get the information and documents they need.

12. Work with the client to develop a case timeline and tickler system.

Action: At the beginning of a case, the parent's attorney and client should develop timelines that reflect projected deadlines and important dates and a tickler/calendar system to remember the dates. The timeline should specify what actions the attorney and parent will need to take and dates by which they will be completed. The attorney and the client should know when important dates will occur and should be focused on accomplishing the objectives in the case plan in a timely way. The attorney should provide the client with a timeline/calendar, outlining known and prospective court dates, service appointments, deadlines and critical points of attorney-client contact. The attorney should record federal and state law deadlines in the system (e.g., the 15 of 22 month point that would necessitate a termination of parental rights (TPR), if exceptions do not apply).

Commentary: Having a consistent calendaring system can help an attorney manage a busy caseload. Clients should receive a hard copy calendar to keep track of appointments and important dates. This helps parents stay focused on accomplishing the service plan goals and meeting court-imposed deadlines.

13. **Provide the client with copies of all petitions, court orders, service plans, and other relevant case documents, including reports regarding the child except when expressly prohibited by law, rule or court order.[10]**

Action: The parent's attorney should provide all written documents to the client or ensure that they are provided in a timely manner and ensure the client understands them. If the client has difficulty reading, the attorney should read the documents to the client. In all cases, the attorney should be available to discuss and explain the documents to the client.

Commentary: The parent's attorney should ensure the client is informed about what is happening in the case. Part of doing so is providing the client with written documents and reports relevant to the case. If the client has this information, the client will be better able to assist the attorney with the case and fulfill his or her parental obligations. The attorney must be aware of any allegations of domestic violence in the case and not share confidential information about an alleged or potential victim's location.

14. **Be alert to and avoid potential conflicts of interest that would interfere with the competent representation of the client.[11]**

Action: The parent's attorney must not represent both parents if their interests differ. The attorney should generally avoid representing both parents when there is even a potential for conflicts of interests. In situations involving allegations of domestic violence the attorney should never represent both parents.

Commentary: In most cases, attorneys should avoid representing both parents in an abuse or neglect case. In the rare case in which an attorney, after careful consideration of potential conflicts, may represent both parents, it should only be with their informed consent. Even in cases in which there is no apparent conflict at the beginning of the case, conflicts may arise as the case proceeds. If this occurs, the attorney might be required to withdraw from representing one or both parents. This could be difficult for the clients and delay the case. Other examples of potential conflicts of interest that the attorney should avoid include representing multiple fathers in the same case or representing parties in a separate case who have interests in the current case.

In analyzing whether a conflict of interest exists, the attorney must consider "whether pursuing one client's objectives will prevent the lawyer from pursuing another client's objectives, and whether confidentiality may be compromised."[12]

15. **Act in a culturally competent manner and with regard to the socioeconomic position of the parent throughout all aspects of representation.**

Action: The parent's attorney should learn about and understand the client's background, determine how that has an impact on the client's case, and always show the parent respect. The attorney must understand how cultural and socioeconomic differences impact interaction with clients, and must interpret the client's words and actions accordingly.

Commentary: The child welfare system is comprised of a diverse group of people, including the clients and professionals involved. Each person comes to this system with his or her own set of values and expectations, but it is essential that each person try to learn about and understand the backgrounds of others. An individual's race, ethnicity, gender, sexual orientation and socioeconomic position all have an impact on how the person acts and reacts in particular situations. The parent's attorney must be vigilant against imposing the attorney's values onto the clients, and should, instead, work with the parents within the context of their culture and socioeconomic position. While the court and child welfare agency have expectations of parents in their treatment of children, the parent's advocate must strive to explain these expectations to the clients in a sensitive way. The parent's attorney should also try to explain how the client's background might affect the client's ability to comply with court orders and agency requests.

16. Take diligent steps to locate and communicate with a missing parent and decide representation strategies based on that communication.[13]

Action: Upon accepting an appointment, the parent's attorney should communicate to the client the importance of staying in contact with the attorney. While the attorney must communicate regularly with the client, and be informed of the client's wishes before a hearing, the client also must keep in contact with the attorney. At the beginning of the representation, the attorney should tell the client how to contact the attorney, and discuss the importance of the client keeping the attorney informed of changes in address, phone numbers, and the client's current whereabouts.

The parent's attorney should attempt to locate and communicate with missing parents to formulate what positions the attorney should take at hearings, and to understand what information the client wishes the attorney to share with the child welfare agency and the court. If, after diligent steps, the attorney is unable to communicate with the client, the attorney should assess whether the client's interests are better served by advocating for the client's last clearly articulated position, or declining to participate in further court proceedings, and should act accordingly. After a prolonged period without contact with the client, the attorney should consider withdrawing from representation.

Commentary:

Diligent Steps to Locate: To represent a client adequately, the attorney must know what the client wishes. It is, therefore, important for parents' attorneys to take diligent steps to locate missing clients. Diligent steps can include speaking with the client's family, the caseworker, the foster care provider and other service providers. It should include contacting the State Department of Corrections, Social Security Administration, and

Child Support Office, and sending letters by regular and certified mail to the client's last known address. The attorney should also visit the client's last known address and asking anyone who lives there for information about the client's whereabouts. Additionally, the attorney should leave business cards with contact information with anyone who might have contact with the client as long as this does not compromise confidentiality.

Unsuccessful Efforts to Locate: If the attorney is unable to find and communicate with the client after initial consultation, the attorney should assess what action would best serve the client's interests. This decision must be made on a case-by-case basis. In some cases, the attorney may decide to take a position consistent with the client's last clearly articulated position. In other cases the client's interests may be better served by the attorney declining to participate in the court proceedings in the absence of the client because that may better protect the client's right to vacate orders made in the client's absence.

17. Be aware of the unique issues an incarcerated parent faces and provide competent representation to the incarcerated client.

Action:

Adoption and Safe Families Act (ASFA) Issues: The parent's attorney must be particularly diligent when representing an incarcerated parent. The attorney must be aware of the reasons for the incarceration. If the parent is incarcerated as a result of an act against the child or another child in the family, the child welfare agency may request an order from the court that reasonable efforts toward reunification are not necessary and attempt to fast-track the case toward other permanency goals. If this is the case, the attorney must be prepared to argue against such a motion, if the client opposes it. Even if no motion is made to waive the reasonable efforts requirement, in some jurisdictions the agency may not have the same obligations to assist parents who are incarcerated. Attorneys should counsel the client as to any effects incarceration has on the agency's obligations and know the jurisdiction's statutory and case law concerning incarceration as a basis for TPR. The attorney should help the client identify potential kinship placements, relatives who can provide care for the child while the parent is incarcerated. States vary in whether and how they weigh factors such as the reason for incarceration, length of incarceration and the child's age at the time of incarceration when considering TPR. Attorneys must understand the implications of ASFA for an incarcerated parent who has difficulty visiting and planning for the child.

Services: Obtaining services such as substance abuse treatment, parenting skills, or job training while in jail or prison is often difficult. The parent's attorney may need to advocate for reasonable efforts to be made for the client, and assist the parent and the agency caseworker in accessing services. The attorney must assist the client with these services. Without services, it is unlikely the parent will be reunified with the child upon discharge from prison.

If the attorney practices in a jurisdiction that has a specialized unit for parents and children, and especially when the client is incarcerated for an offense that is unrelated to the child, the attorney should advocate for such a placement. The attorney must learn about available resources, contact the placements and attempt to get the support of the agency and child's attorney.

Communication: The parent's attorney should counsel the client on the importance of maintaining regular contact with the child while incarcerated. The attorney should assist in developing a plan for communication and visitation by obtaining necessary court orders and working with the caseworker as well as the correctional facility's social worker.

If the client cannot meet the attorney before court hearings, the attorney must find alternative ways to communicate. This may include visiting the client in prison or engaging in more extensive phone or mail contact than with other clients. The attorney should be aware of the challenges to having a confidential conversation with the client, and attempt to resolve that issue.

The parent's attorney should also communicate with the parent's criminal defense attorney. There may be issues related to self-incrimination as well as concerns about delaying the abuse and neglect case to strengthen the criminal case or vice versa.

Appearance in Court: The client's appearance in court frequently raises issues that require the attorney's attention in advance. The attorney should find out from the client if the client wants to be present in court. In some prisons, inmates lose privileges if they are away from the prison, and the client may prefer to stay at the prison. If the client wants to be present in court, the attorney should work with the court to obtain a writ of habeas corpus/bring-down order/order to produce or other documentation necessary for the client to be transported from the prison. The attorney should explain to any client hesitant to appear, that the case will proceed without the parent's presence and raise any potential consequences of that choice. If the client does not want to be present, or if having the client present is not possible, the attorney should be educated about what means are available to have the client participate, such as by telephone or video conference. The attorney should make the necessary arrangements for the client. Note that it may be particularly difficult to get a parent transported from an out-of-state prison or a federal prison.

18. Be aware of the client's mental health status and be prepared to assess whether the parent can assist with the case.

Action: Attorneys representing parents must be able to determine whether a client's mental status (including mental illness and mental retardation) interferes with the client's ability to make decisions about the case. The attorney should be familiar with any mental health diagnosis and treatment that a client has had in the past or is presently undergoing (including any medications for such conditions). The attorney should get consent from the client to review mental health records and to speak with former and current mental

health providers. The attorney should explain to the client that the information is necessary to understand the client's capacity to work with the attorney. If the client's situation seems severe, the attorney should also explain that the attorney may seek the assistance of a clinical social worker or some other mental health expert to evaluate the client's ability to assist the attorney because if the client does not have that capacity, the attorney may have to ask that a guardian ad litem be appointed to the client. Since this action may have an adverse effect on the client's legal claims, the attorney should ask for a GAL only when absolutely necessary.

Commentary: Many parents charged with abuse and neglect have serious or long-standing mental health challenges. However, not all of those conditions or diagnoses preclude the client from participating in the defense. Whether the client can assist counsel is a different issue from whether the client is able to parent the children, though the condition may be related to ability to parent. While the attorney is not expected to be a mental health expert, the attorney should be familiar with mental health conditions and should review such records carefully. The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the client seems unable to assist the attorney in case preparation, the attorney should seek an assessment of the client's capacity from a mental health expert. If the expert and attorney conclude that the client is not capable of assisting in the case, the attorney should inform the client that the attorney will seek appointment of a guardian ad litem from the court. The attorney should be careful to explain that the attorney will still represent the client in the child protective case. The attorney must explain to the client that appointment of a GAL will limit the client's decision-making power. The GAL will stand in the client's shoes for that purpose.

Investigation[14]

19. Conduct a thorough and independent investigation at every stage of the proceeding.

Action: The parent's attorney must take all necessary steps to prepare each case. A thorough investigation is an essential element of preparation. The parent's attorney can not rely solely on what the agency caseworker reports about the parent. Rather, the attorney should contact service providers who work with the client, relatives who can discuss the parent's care of the child, the child's teacher or other people who can clarify information relevant to the case. If necessary, the attorney should petition the court for funds to hire an investigator.

Commentary: In some jurisdictions, parents' attorneys work with social workers or investigators who can meet with clients and assist in investigating the underlying issues that arise as cases proceed. The drafting committee recommends such a model of representation. However, if the attorney is not working with such a team, the attorney is still responsible for gaining all pertinent case information.

20. Interview the client well before each hearing, in time to use client information for the case investigation.[15]

Action: The parent's attorney should meet with the parent regularly throughout the case. The meetings should occur well before the hearing, not at the courthouse just minutes before the case is called before the judge. The attorney should ask the client questions to obtain information to prepare the case, and strive to create a comfortable environment so the client can ask the attorney questions. The attorney should use these meetings to prepare for court as well as to counsel the client concerning issues that arise during the course of the case. Information obtained from the client should be used to propel the investigation.

Commentary: Often, the client is the best source of information for the attorney, and the attorney should set aside time to obtain that information. Since the interview may involve disclosure of sensitive or painful information, the attorney should explain attorney-client confidentiality to the client. The attorney may need to work hard to gain the client's trust, but if a trusting relationship can be developed, the attorney will have an easier time representing the client. The investigation will be more effective if guided by the client, as the client generally knows firsthand what occurred in the case.

Informal Discovery[16]

21. Review the child welfare agency case file.

Action: The parent's attorney should ask for and review the agency case file as early during the course of representation as possible. The file contains useful documents that the attorney may not yet have, and will instruct the attorney on the agency's case theory. If the agency case file is inaccurate, the attorney should seek to correct it. The attorney must read the case file periodically because information is continually being added by the agency.

Commentary: While an independent investigation is essential, it is also important that the parent's attorney understands what information the agency is relying on to further its case. The case file should contain a history about the family that the client may not have shared, and important reports and information about both the child and parent that will be necessary for the parent's attorney to understand for hearings as well as settlement conferences. Unless the attorney also has the information the agency has, the parent's attorney will walk into court at a disadvantage.

22. Obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties, and information from the caseworker and providers.

Action: As part of the discovery phase, the parent's attorney should gather all relevant documentation regarding the case that might shed light on the allegations, the service plan and the client's strengths as a parent. The attorney should not limit the scope as information about past or present criminal, protection from abuse, private custody or

administrative proceedings involving the client can have an impact on the abuse and neglect case. The attorney should also review the following kinds of documents:

- social service records
- court records
- medical records
- school records
- evaluations of all types

The attorney should be sure to obtain reports and records from service providers.

Discovery is not limited to information regarding the client, but may include records of others such as the other parent, stepparent, child, relative and non-relative caregivers.

Commentary: In preparing the client's case, the attorney must try to learn as much about the parent and the family as possible. Various records may contradict or supplement the agency's account of events. Gathering documentation to verify the client's reports about what occurred before the child came into care and progress the parent is making during the case is necessary to provide concrete evidence for the court. Documentation may also alert the attorney to issues the client is having that the client did not share with counsel. The attorney may be able to intercede and assist the client with service providers, agency caseworkers and others.

Formal Discovery[17]

23. When needed, use formal discovery methods to obtain information.

Action: The parent's attorney should know what information is needed to prepare for the case and understand the best methods of obtaining that information. The attorney should become familiar with the pretrial requests and actions used in the jurisdiction and use whatever tools are available to obtain necessary information. The parent's attorney should consider the following types of formal discovery: depositions, interrogatories (including expert interrogatories), requests for production of documents, requests for admissions, and motions for mental or physical examination of a party. The attorney should file timely motions for discovery and renew these motions as needed **t**o obtain the most recent records.

The attorney should, consistent with the client's interests and goals, and where appropriate, take all necessary steps to preserve and protect the client's rights by opposing discovery requests of other parties.

Court Preparation[18]

24. Develop a case theory and strategy to follow at hearings and negotiations.

Action: Once the parent's attorney has completed the initial investigation and discovery, including interviews with the client, the attorney should develop a strategy for representation. The strategy may change throughout the case, as the client makes or does not make progress, but the initial theory is important to assist the attorney in staying focused on the client's wishes and on what is achievable. The theory of the case should inform the attorney's preparation for hearings and arguments to the court throughout the case. It should also help the attorney decide what evidence to develop for hearings and the steps to take to move the case toward the client's ultimate goals (e.g., requesting increased visitation when a parent becomes engaged in services).

25. Timely file all pleadings, motions, and briefs. Research applicable legal issues and advance legal arguments when appropriate.

Action: The attorney must file petitions, motions, discovery requests, and responses and answers to pleadings filed by other parties that are appropriate for the case. These pleadings must be thorough, accurate and timely.

When a case presents a complicated or new legal issue, the parent's attorney should conduct the appropriate research before appearing in court. The attorney must have a solid understanding of the relevant law, and be able to present it to the judge in a compelling and convincing way. The attorney should be prepared to distinguish case law that appears to be unfavorable. If the judge asks for memoranda of law, the attorney will already have done the research and will be able to use it to argue the case well. If it would advance the client's case, the parent's attorney should present an unsolicited memorandum of law to the court.

Commentary: Actively filing motions, pleadings and briefs benefits the client. This practice puts important issues before the court and builds credibility for the attorney. In addition to filing responsive papers and discovery requests, the attorney should proactively seek court orders that benefit the client, e.g., filing a motion to enforce court orders to ensure the child welfare agency is meeting its reasonable efforts obligations. When an issue arises, it is often appropriate to attempt to resolve it informally with other parties. When out-of-court advocacy is not successful, the attorney should not wait to bring the issue to the court's attention if that would serve the client's goals.

Arguments in child welfare cases are often fact-based. Nonetheless, attorneys should ground their arguments in statutory, regulatory and common law. These sources of law exist in each jurisdiction, as well as in federal law. Additionally, law from other jurisdictions can be used to sway a court in the client's favor. An attorney who has a firm grasp of the law, and who is willing to do legal research on an individual case, may have more credibility before the court. At times, competent representation requires advancing legal arguments that are not yet accepted in the jurisdiction. Attorneys should be mindful to preserve issues for appellate review by making a record even if the argument is unlikely to prevail at the trial level

26. Engage in case planning and advocate for appropriate social services using a multidisciplinary approach to representation when available.

Action: The parent's attorney must advocate for the client both in and out of court. The parent's attorney should know about the social, mental health, substance abuse treatment and other services that are available to parents and families in the jurisdiction in which the attorney practices so the attorney can advocate effectively for the client to receive these services. The attorney should ask the client if the client wishes to engage in services. If so, the attorney must determine whether the client has access to the necessary services to overcome the issues that led to the case.

The attorney should actively engage in case planning, including attending major case meetings, to ensure the client asks for and receives the needed services. The attorney should also ensure the client does not agree to undesired services that are beyond the scope of the case. A major case meeting is one in which the attorney or client believes the attorney will be needed to provide advice or one in which a major decision on legal steps, such as a change in the child's permanency goal, will be made. The attorney should be available to accompany the client to important meetings with service providers as needed.

The services in which the client is involved must be tailored to the client's needs, and not merely hurdles over which the client must jump (e.g., if the client is taking parenting classes, the classes must be relevant to the underlying issue in the case).

Whenever possible, the parent's attorney should engage or involve a social worker as part of the parent's "team" to help determine an appropriate case plan, evaluate social services suggested for the client, and act as a liaison and advocate for the client with the service providers.

When necessary, the parent's attorney should seek court orders to force the child welfare agency to provide services or visitation to the client. The attorney may need to ask the court to enforce previously entered orders that the agency did not comply with in a reasonable period. The attorney should consider whether the child's representative (lawyer, GAL or CASA) might be an ally on service and visitation issues. If so, the attorney should solicit the child's representative's assistance and work together in making requests to the agency and the court.

Commentary: For a parent to succeed in a child welfare case the parent must receive and cooperate with social services. It is therefore necessary that the parent's attorney does whatever possible to obtain appropriate services for the client, and then counsel the client about participating in such services. Examples of services common to child welfare cases include:

- Evaluations
- Family preservation or reunification services
- Medical and mental health care
- Drug and alcohol treatment
- Domestic violence prevention, intervention or treatment

- Parenting education
- Education and job training
- Housing
- Child care
- Funds for public transportation so the client can attend services

27. Aggressively advocate for regular visitation in a family-friendly setting.

Action: The parent's attorney should advocate for an effective visiting plan and counsel the parent on the importance of regular contact with the child. Preservation of parent-child bonds through regular visitation is essential to any reunification effort. Courts and child welfare agencies may need to be pushed to develop visiting plans that best fit the needs of the individual family. Factors to consider in visiting plans include:

- Frequency
- Length
- Location
- Supervision
- Types of activities
- Visit coaching – having someone at the visit who could model effective parenting skills

Commentary: Consistent, high quality visitation is one of the best predictors of successful reunification between a parent and child. Often visits are arranged in settings that are uncomfortable and inhibiting for families. It is important that the parent's attorney seek a visitation order that will allow the best possible visitation. Effort should be made to have visits be unsupervised or at the lowest possible level of supervision. Families are often more comfortable when relatives, family friends, clergy or other community members are recruited to supervise visits rather than caseworkers. Attorneys should advocate for visits to occur in the most family-friendly locations possible, such as in the family's home, parks, libraries, restaurants, places of worship or other community venues.

28. With the client's permission, and when appropriate, engage in settlement negotiations and mediation to resolve the case.

Action: The parent's attorney should, when appropriate, participate in settlement negotiations to promptly resolve the case, keeping in mind the effect of continuances and delays on the client's goals. Parents' attorneys should be trained in mediation and negotiation skills and be comfortable resolving cases outside a courtroom setting when consistent with the client's position. When authorized to do so by the client, the parent's attorney should share information about services in which the parent is engaged and provide copies of favorable reports from service providers. This information may impact settlement discussions. The attorney must communicate all settlement offers to the client and discuss their advantages and disadvantages. It is the client's decision whether to settle. The attorney must be willing to try the case and not compromise solely to avoid the hearing. The attorney should use mediation resources when available.

Commentary: Negotiation and mediation often result in a detailed agreement among parties about actions the participants must take. Generally, when agreements have been thoroughly discussed and negotiated, all parties, including the parents, feel as if they had a say in the decision and are, therefore, more willing to adhere to a plan. Mediation can resolve a specific conflict in a case, even if it does not result in an agreement about the entire case. Negotiated settlements generally happen more quickly than full hearings and therefore move a case along swiftly. The attorney should discuss all aspects of proposed settlements with the parent, including all legal effects of admissions or agreements. The attorney should advise the client about the chances of prevailing if the matter proceeds to trial and any potential negative impact associated with contesting the allegations. The final decision regarding settlement must be the client's.

A written, enforceable agreement should result from any settlement, so all parties are clear about their rights and obligations. The parent's attorney should ensure agreements accurately reflect the understandings of the parties. The parent's attorney should schedule a hearing if promises made to the parent are not kept.

29. Thoroughly prepare the client to testify at the hearing.

Action: When having the client testify will benefit the case or when the client wishes to testify, the parent's attorney should thoroughly prepare the client. The attorney should discuss and practice the questions that the attorney will ask the client, as well as the types of questions the client should expect opposing counsel to ask. The parent's attorney should help the parent think through the best way to present information, familiarize the parent with the court setting, and offer guidance on logistical issues such as how to get to court on time and appropriate court attire.

Commentary: Testifying in court can be intimidating. For a parent whose family is the focus of the proceeding, the court experience is even scarier. The parent's attorney should be attuned to the client's comfort level about the hearing, and ability to testify in the case. The attorney should spend time explaining the process and the testimony itself to the client. The attorney should provide the client with a written list of questions that the attorney will ask, if this will help the client.

30. Identify, locate and prepare all witnesses.

Action: The parent's attorney, in consultation with the parent, should develop a witness list well before a hearing. The attorney should not assume the agency will call a witness, even if the witness is named on the agency's witness list. The attorney should, when possible, contact the potential witnesses to determine if they can provide helpful testimony.

When appropriate, witnesses should be informed that a subpoena is on its way. The attorney should also ensure the subpoena is served. The attorney should subpoena potential agency witnesses (e.g., a previous caseworker) who have favorable information about the client.

The attorney should set aside time to fully prepare all witnesses in person before the hearing. The attorney should remind the witnesses about the court date.

Commentary: Preparation is the key to successfully resolving a case, either in negotiation or trial. The attorney should plan as early as possible for the case and make arrangements accordingly. Witnesses may have direct knowledge of the allegations against the parent. They may be service providers working with the parent, or individuals from the community who could testify generally about the family's strengths.

When appropriate, the parent's attorney should consider working with other parties who share the parent's position (such as the child's representative) when creating a witness list, issuing subpoenas, and preparing witnesses. Doctors, nurses, teachers, therapists, and other potential witnesses have busy schedules and need advance warning about the date and time of the hearing.

Witnesses are often nervous about testifying in court. Attorneys should prepare them thoroughly so they feel comfortable with the process. Preparation will generally include rehearsing the specific questions and answers expected on direct and anticipating the questions and answers that might arise on cross-examination. Attorneys should provide written questions for those witnesses who need them.

31. Identify, secure, prepare and qualify expert witness when needed. When permissible, interview opposing counsel's experts.

Action: Often a case requires multiple experts in different roles, such as experts in medicine, mental health treatment, drug and alcohol treatment, or social work. Experts may be needed for ongoing case consultation in addition to providing testimony at trial. The attorney should consider whether the opposing party is calling expert witnesses and determine whether the parent needs to call any experts.

When expert testimony is required, the attorney should identify the qualified experts and seek necessary funds to retain them in a timely manner. The attorney should subpoena the witnesses, giving them as much advanced notice of the court date as possible. As is true for all witnesses, the attorney should spend as much time as possible preparing the expert witnesses for the hearing. The attorney should be competent in qualifying expert witnesses.

When opposing counsel plans to call expert witnesses, the parent's attorney should file expert interrogatories, depose the witnesses or interview the witnesses in advance, depending on the jurisdiction's rules on attorney work product. The attorney should do whatever is necessary to learn what the opposing expert witnesses will say about the client during the hearing.

Commentary: By contacting opposing counsel's expert witnesses in advance, the parent's attorney will know what evidence will be presented against the client and whether the

expert has any favorable information that might be elicited on cross-examination. The attorney will be able to discuss the issues with the client, prepare a defense and call experts on behalf of the client, if appropriate. Conversely, if the attorney does not talk to the opposing expert in advance, the attorney could be surprised by the evidence and unable to represent the client competently.

Hearings

32. Attend and prepare for all hearings, including pretrial conferences.

Action: The parent's attorney must prepare for, and attend all hearings and participate in all telephone and other conferences with the court.

Commentary: For the parent to have a fair chance during the hearing, the attorney must be prepared and present in court. Participating in pretrial proceedings may improve case resolution for the parent. Counsel's failure to participate in the proceedings in which all other parties are represented may disadvantage the parent. Therefore, the parent's attorney should be actively involved in this stage. Other than in extraordinary circumstances, attorneys must appear for all court appearances on time. In many jurisdictions, if an attorney arrives to court late, or not at all, the case will receive a long continuance. This does not serve the client and does not instill confidence in the attorney. If an attorney has a conflict with another courtroom appearance, the attorney should notify the court and other parties and request a short continuance. The parent's attorney should not have another attorney stand in to represent the client in a substantive hearing, especially if the other attorney is unfamiliar with the client or case.

33. Prepare and make all appropriate motions and evidentiary objections.

Action: The parent's attorney should make appropriate motions and evidentiary objections to advance the client's position during the hearing. If necessary, the attorney should file briefs in support of the client's position on motions and evidentiary issues. The parent's attorney should always be aware of preserving legal issues for appeal.

Commentary: It is essential that parents' attorneys understand the applicable rules of evidence and all court rules and procedures. The attorney must be willing and able to make appropriate motions, objections, and arguments (e.g., objecting to the qualification of expert witnesses or raising the issue of the child welfare agency's lack of reasonable efforts).

34. Present and cross-examine witnesses, prepare and present exhibits.

Action: The parent's attorney must be able to present witnesses effectively to advance the client's position. Witnesses must be prepared in advance and the attorney should know what evidence will be presented through the witnesses. The attorney must also be skilled at cross-examining opposing parties' witnesses. The attorney must know how to offer documents, photos and physical objects into evidence.

At each hearing the attorney should keep the case theory in mind, advocate for the child to return home and for appropriate services, if that is the client's position, and request that the court state its expectations of all parties.

Commentary: Becoming a strong courtroom attorney takes practice and attention to detail. The attorney must be sure to learn the rules about presenting witnesses, impeaching testimony, and entering evidence. The attorney should seek out training in trial skills and observe more experienced trial attorneys to learn from them. Even if the parent's attorney is more seasoned, effective direct and cross-examination require careful preparation. The attorney must know the relevant records well enough to be able to impeach adverse witnesses and bring out in both direct and cross examinations any information that would support the parent's position. Seasoned attorneys may wish to consult with other experienced attorneys about complex cases. Presenting and cross-examining witnesses are skills with which the parent's attorney must be comfortable.

35. In jurisdictions in which a jury trial is possible, actively participate in jury selection and drafting jury instructions.

Commentary: Several jurisdictions around the country afford parties in child welfare cases the right to a jury trial at the adjudicatory or termination of parental rights stages. Parents' attorneys in those jurisdictions should be skilled at choosing an appropriate jury, drafting jury instructions that are favorable to the client's position, and trying the case before jurors who may not be familiar with child abuse and neglect issues.

36. Request closed proceedings (or a cleared courtroom) in appropriate cases.

Action: The parent's attorney should be aware of who is in the courtroom during a hearing, and should request the courtroom be cleared of individuals not related to the case when appropriate. The attorney should be attuned to the client's comfort level with people outside of the case hearing about the client's family. The attorney should also be aware of whether the case is one in which there is media attention. Confidential information should not be discussed in front of the media or others without the express permission of the client.

Commentary: In many courts, even if they have a "closed court" policy, attorneys, caseworkers, and witnesses on other cases listed that day may be waiting in the courtroom. These individuals may make the client uncomfortable, and the parent's attorney should request that the judge remove them from the courtroom. Even in an "open court" jurisdiction, there may be cases, or portions of cases, that outsiders should not be permitted to hear. The parent's attorney must be attuned to this issue, and make appropriate requests of the judge.

37. Request the opportunity to make opening and closing arguments.

Action: When permitted by the judge, the parent's attorney should make opening and closing arguments to best present the parent's attorney's theory of the.

Commentary: In many child abuse and neglect proceedings, attorneys waive the opportunity to make opening and closing arguments. However, these arguments can help shape the way the judge views the case, and therefore can help the client. Argument may be especially critical, for example, in complicated cases when information from expert witnesses should be highlighted for the judge, in hearings that take place over a number of days, or when there are several children and the agency is requesting different services or permanency goals for each of them. Making opening and closing argument is particularly important if the case is being heard by a jury.

38. Prepare proposed findings of fact, conclusions of law and orders when they will be used in the court's decision or may otherwise benefit the client.

Action: Proposed findings of fact, conclusions of law, and orders should be prepared before a hearing. When the judge is prepared to enter a ruling, the judge can use the proposed findings or amend them as needed.

Commentary: By preparing proposed findings of fact and conclusions of law, the parent's attorney frames the case and ruling for the judge. This may result in orders that are more favorable to the parent, preserve appellate issues, and help the attorney clarify desired outcomes before a hearing begins. The attorney should offer to provide the judge with proposed findings and orders in electronic format. If an opposing party prepared the order, the parent's attorney should review it for accuracy before the order is submitted for the judge's signature.

Post Hearings/Appeals

39. Review court orders to ensure accuracy and clarity and review with client.

Action: After the hearing, the parent's attorney should review the written order to ensure it reflects the court's verbal order. If the order is incorrect, the attorney should take whatever steps are necessary to correct it. Once the order is final, the parent's attorney should provide the client with a copy of the order and should review the order with the client to ensure the client understands it. If the client is unhappy with the order, the attorney should counsel the client about any options to appeal or request rehearing on the order, but should explain that the order is in effect unless a stay or other relief is secured. The attorney should counsel the client on the potential consequences of failing to comply with a court order.

Commentary: The parent may be angry about being involved in the child welfare system, and a court order that is not in the parent's favor could add stress and frustration. It is essential that the parent's attorney take time, either immediately after the hearing or at a meeting soon after the court date, to discuss the hearing and the outcome with the client. The attorney should counsel the client about all options, including appeal (see below).

Regardless of whether an appeal is appropriate, the attorney should counsel the parent about potential consequences of not complying with the order.

40. Take reasonable steps to ensure the client complies with court orders and to determine whether the case needs to be brought back to court.

Action: The parent's attorney should answer the parent's questions about obligations under the order and periodically check with the client to determine the client's progress in implementing the order. If the client is attempting to comply with the order but other parties, such as the child welfare agency, are not meeting their responsibilities, the parent's attorney should approach the other party and seek assistance on behalf of the client. If necessary, the attorney should bring the case back to court to review the order and the other party's noncompliance or take other steps to ensure that appropriate social services are available to the client.

Commentary: The parent's attorney should play an active role in assisting the client in complying with court orders and obtaining visitation and any other social services. The attorney should speak with the client regularly about progress and any difficulties the client is encountering while trying to comply with the court order or service plan. When the child welfare agency does not offer appropriate services, the attorney should consider making referrals to social service providers and, when possible, retaining a social worker to assist the client. The drafting committee of these standards recommends such an interdisciplinary model of practice.

41. Consider and discuss the possibility of appeal with the client.[19]

Action: The parent's attorney should consider and discuss with the client the possibility of appeal when a court's ruling is contrary to the client's position or interests. The attorney should counsel the client on the likelihood of success on appeal and potential consequences of an appeal. In most jurisdictions, the decision whether to appeal is the client's as long as a non-frivolous legal basis for appeal exists. Depending on rules in the attorney's jurisdiction, the attorney should also consider filing an extraordinary writ or motions for other post-hearing relief.

Commentary: When discussing the possibility of an appeal, the attorney should explain both the positive and negative effects of an appeal, including how the appeal could affect the parent's goals. For instance, an appeal could delay the case for a long time. This could negatively impact both the parent and the child.

42. If the client decides to appeal, timely and thoroughly file the necessary post-hearing motions and paperwork related to the appeal and closely follow the jurisdiction's Rules of Appellate Procedure.

Action: The parent's attorney should carefully review his or her obligations under the state's Rules of Appellate Procedure. The attorney should timely file all paperwork, including a notice of appeal and requests for stays of the trial court order, transcript, and

case file. If another party has filed an appeal, the parent's attorney should explain the appeals process to the parent and ensure that responsive papers are filed timely.

The appellate brief should be clear, concise, and comprehensive and also timely filed. The brief should reflect all relevant case law and present the best legal arguments available in state and federal law for the client's position. The brief should include novel legal arguments if there is a chance of developing favorable law in support of the parent's claim.

In jurisdictions in which a different attorney from the trial attorney handles the appeal, the trial attorney should take all steps necessary to facilitate appointing appellate counsel and work with the new attorney to identify appropriate issues for appeal. The attorney who handled the trial may have insight beyond what a new attorney could obtain by reading the trial transcript.

If appellate counsel differs from the trial attorney, the appellate attorney should meet with the client as soon as possible. At the initial meeting, appellate counsel should determine the client's position and goals in the appeal. Appellate counsel should not be bound by the determinations of the client's position and goals made by trial counsel and should independently determine his or her client's position and goals on appeal.

If oral arguments are scheduled, the attorney should be prepared, organized, and direct. Appellate counsel should inform the client of the date, time and place scheduled for oral argument of the appeal upon receiving notice from the appellate court. Oral argument of the appeal on behalf of the client should not be waived, absent the express approval of the client, unless doing so would benefit the client. For example, in some jurisdictions appellate counsel may file a reply brief instead of oral argument. The attorney should weigh the pros and cons of each option.

Commentary: Appellate skills differ from the skills most trial attorneys use daily. The parent's attorney may wish to seek training on appellate practice and guidance from an experienced appellate advocate when drafting the brief and preparing for argument. An appeal can have a significant impact on the trial judge who heard the case and trial courts throughout the state, as well as the individual client and family.

43. Request an expedited appeal, when feasible, and file all necessary paperwork while the appeal is pending.

Action: If the state court allows, the attorney in a child welfare matter should always consider requesting an expedited appeal. In this request, the attorney should provide information about why the case should be expedited, such as any special characteristics about the child and why delay would harm the relationship between the parent and child.

44. Communicate the results of the appeal and its implications to the client.

Action: The parent's attorney should communicate the result of the appeal and its implications, and provide the client with a copy of the appellate decision. If, as a result of the appeal, the attorney needs to file any motions with the trial court, the attorney should do so.

Obligations of Attorney Managers[20]

Attorney Managers are urged to:

1. **Clarify attorney roles and expectations.**

Action: The attorney manager must ensure that staff attorneys understand their role in representing clients and the expectations of the attorney manager concerning all staff duties. In addition to in-office obligations staff attorneys may attend meetings, conferences, and trainings. The attorney may need to attend child welfare agency or service provider meetings with clients. The manager should articulate these duties at the beginning of and consistently during the attorney's employment. The manager should emphasize the attorney's duties toward the client, and obligations to comply with practice standards.

Commentary: All employees want to know what is expected of them; one can only do a high quality job when the person knows the parameters and expectations of the position. Therefore, the attorney manager must consistently inform staff of those expectations. Otherwise, the staff attorney is set up to fail. The work of representing parents is too important, and too difficult, to be handled by people who do not understand their role and lack clear expectations. These attorneys need the full support of supervisors and attorney managers to perform their highest quality work.

2. **Determine and set reasonable caseloads for attorneys.**[21]

Action: An attorney manager should determine reasonable caseloads for parents' attorneys and monitor them to ensure the maximum is not exceeded. Consider a caseload/workload study, review written materials about such studies, or look into caseload sizes in similar counties to accurately determine ideal attorney caseloads. When assessing the appropriate number of cases, remember to account for all attorney obligations, case difficulty, time required to prepare a case thoroughly, support staff assistance, travel time, experience level of attorneys, and available time (excluding vacation, holidays, sick leave, training and other non-case-related activity). If the attorney manager carries a caseload, the number of cases should reflect the time the individual spends on management duties.

Commentary: High caseload is considered a major barrier to quality representation and a source of high attorney turnover. It is essential to decide what a reasonable caseload is in your jurisdiction. How attorneys define cases and attorney obligations vary from place-to-place, but having a manageable caseload is crucial. The standards drafting committee recommended a caseload of no more than 50-100 cases depending on what the attorney can handle competently and fulfill these standards. The type of practice the attorney has,

e.g., whether the attorney is part of a multidisciplinary representation team also has an impact on the appropriate caseload size. It is part of the attorney manager's job to advocate for adequate funding and to alert individuals in positions of authority when attorneys are regularly asked to take caseloads that exceed local standards.

3. Advocate for competitive salaries for staff attorneys.

Action: Attorney managers should advocate for attorney salaries that are competitive with other government and court appointed attorneys in the jurisdiction. To recruit and retain experienced attorneys, salaries must compare favorably with similarly situated attorneys.

Commentary: While resources are scarce, parents' attorneys deserve to be paid a competitive wage. They will likely not stay in their position nor be motivated to work hard without a reasonable salary. High attorney turnover may decrease when attorneys are paid well. Parents' rights to effective assistance of counsel may be compromised if parents' attorneys are not adequately compensated.

4. Develop a system for the continuity of representation.

Action: The attorney manager should develop a case assignment system that fosters ownership and involvement in the case by the parent's attorney. The office can have a one-attorney: one-case (vertical representation) policy in which an attorney follows the case from initial filing through permanency and handles all aspects of the case. Alternatively, the cases may be assigned to a group of attorneys who handle all aspects of a case as a team and are all assigned to one judge. If a team approach is adopted, it is critical to establish mechanisms to aid communication about cases and promote accountability.

The attorney manager should also hire social workers, paralegals and/or parent advocates (parents familiar with the child welfare system because they were involved in the system and successfully reunited with their child), who should be "teamed" with the attorneys. These individuals can assist the attorney or attorney team with helping clients access services and information between hearings, and help the attorney organize and monitor the case.

Commentary: Parents' attorneys can provide the best representation for the client when they know a case and are invested in its outcome. Continuity of representation is critical for attorneys and parents to develop the trust that is essential to high quality representation. Additionally, having attorneys who are assigned to particular cases decreases delays because the attorney does not need to learn the case each time it is scheduled for court, but rather has extensive knowledge of the case history. The attorney also has the opportunity to monitor action on the case between court hearings. This system also makes it easier for the attorney manager to track how cases are handled. Whatever system is adopted, the manager must be clear about which attorney has

responsibility for the case preparation, monitoring, and advocacy required throughout the case.

5. Provide attorneys with training and education opportunities regarding the special issues that arise in the client population.

Action: The attorney manager must ensure that each attorney has opportunities to participate in training and education programs. When a new attorney is hired, the attorney manager should assess that attorney's level of experience and readiness to handle cases. The attorney manager should develop an internal training program that pairs the new attorney with an experienced "attorney mentor." The new attorney should be required to: 1) observe each type of court proceeding (and mediation if available in the jurisdiction), 2) second-chair each type of proceeding, 3) try each type of case with the mentor second-chairing, and 4) try each type of proceeding on his or her own, with the mentor available to assist, before the attorney can begin handling cases alone.

Additionally, each attorney should attend at least 20 hours of relevant training before beginning, and at least15 hours of relevant training every year after. Training should include general legal topics such as evidence and trial skills, and child welfare-specific topics that are related to the client population the office is representing, such as:

- Relevant state, federal and case law, procedures and rules
- Available community resources
- State and federal benefit programs affecting parties in the child welfare system (e.g., SSI, SSA, Medicaid, UCCJEA)
- Federal Indian Law including the Indian Child Welfare Act and state law related to Native Americans
- Understanding mental illness
- Substance abuse issues (including assessment, treatment alternatives, confidentiality, impact of different drugs)
- Legal permanency options
- Reasonable efforts
- Termination of parental rights law
- Child development
- Legal ethics related to parent representation
- Negotiation strategies and techniques
- Protection orders/how domestic violence impacts parties in the child welfare system
- Appellate advocacy
- Immigration law in child welfare cases
- Education law in child welfare cases
- Basic principles of attachment theory
- Sexual abuse
- Dynamics of physical abuse and neglect
  - Shaken Baby Syndrome

  - Broken bones
  - Burns
  - Failure To Thrive
  - Munchausen's Syndrome by Proxy
- Domestic relations law

Commentary: Parents' attorneys should be encouraged to learn as much as possible and participate in conferences and trainings to expand their understanding of child welfare developments. While parents' attorneys often lack extra time to attend conferences, the knowledge they gain will be invaluable. The philosophy of the office should stress the need for ongoing learning and professional growth. The attorney manager should require the attorneys to attend an achievable number of hours of training that will match the training needs of the attorneys. The court and Court Improvement Program[22] may be able to defray costs of attorney training or may sponsor multidisciplinary training that parents' attorneys should be encouraged to attend. Similarly, state and local bar associations, area law schools or local Child Law Institutes may offer education opportunities. Attorneys should have access to professional publications to stay current on the law and promising practices in child welfare. Child welfare attorneys benefit from the ability to strategize and share information and experiences with each other. Managers should foster opportunities for attorneys to support each other, discuss cases, and brainstorm regarding systemic issues and solutions.

6. Establish a regular supervision schedule.

Action: Attorney managers should ensure that staff attorneys meet regularly (at least once every two weeks) with supervising attorneys to discuss individual cases as well as any issues the attorney is encountering with the court, child welfare agency, service providers or others. The supervising attorney should help the staff attorney work through any difficulties the attorney is encountering in managing a caseload. Supervising attorneys should regularly observe the staff attorneys in court and be prepared to offer constructive criticism as needed. The supervising attorney should create an atmosphere in which the staff attorney is comfortable asking for help and sharing ideas.

Commentary: Parents' attorneys function best when they can learn, feel supported, and manage their cases with the understanding that their supervisors will assist as needed. By creating this office environment, the attorney manager invests in training high quality attorneys and results in long-term retention. Strong supervision helps attorneys avoid the burnout that could accompany the stressful work of representing parents in child welfare cases.

7. Create a brief and forms bank.

Action: Develop standard briefs, memoranda of law and forms that attorneys can use, so they do not "reinvent the wheel" for each new project. For example, there could be sample discovery request forms, motions, notices of appeal, and petitions. Similarly, memoranda of law and appellate briefs follow patterns that the attorneys could use,

although these should always be tailored to the specific case. These forms and briefs should be available on the computer and in hard copy and should be centrally maintained. They should also be well indexed for accessibility and updated as needed.

8. Ensure the office has quality technical and support staff as well as adequate equipment, library materials, and computer programs to support its operations.

Action: The attorney manager should advocate for high quality technical and staff support. The office should employ qualified legal assistants or paralegals and administrative assistants to help the attorneys. The attorney manager should create detailed job descriptions for these staff members to ensure they are providing necessary assistance. For instance, a qualified legal assistant can help: research, draft petitions, schedule and prepare witnesses and more.

The attorney manager should ensure attorneys have access to working equipment, a user-friendly library conducive to research, and computer programs for word processing, conducting research (Westlaw or Lexis/Nexis), caseload and calendar management, Internet access, and other supports that make the attorney's job easier and enhances client representation.

Commentary: By employing qualified staff, the attorneys will be free to perform tasks essential to quality representation. The attorneys must at least have access to a good quality computer, voice mail, fax machine, and copier to get the work done efficiently and with as little stress as possible

9. Develop and follow a recruiting and hiring practice focused on hiring highly qualified candidates.

Action: The attorney manager should hire the best attorneys possible. The attorney manager should form a hiring committee made up of managing and line attorneys and possibly a client or former client of the office. Desired qualities of a new attorney should be determined, focusing on educational and professional achievements; experience and commitment to representing parents and to the child welfare field; interpersonal skills; diversity and the needs of the office; writing and verbal skills; second language skills; and ability to handle pressure. Widely advertising the position will draw a wider candidate pool. The hiring committee should set clear criteria for screening candidates before interviews and should conduct thorough interviews and post-interview discussions to choose the candidate with the best skills and strongest commitment. Reference checks should be completed before extending an offer.

Commentary: Hiring high quality attorneys raises the level of representation and the level of services parents in the jurisdiction receive. The parent attorney's job is complicated and stressful. There are many tasks to complete in a short time. It is often difficult to connect with, build trust and represent the parent. New attorneys must be aware of these challenges and be willing and able to overcome them. Efforts should be made to recruit staff who reflect the racial, ethnic, and cultural backgrounds of the clients. It is

particularly important to have staff who can communicate with the clients in their first languages, whenever possible.

10. Develop and implement an attorney evaluation process.

Action: The attorney manager should develop an evaluation system that focuses on consistency, constructive criticism, and improvement. Some factors to evaluate include: communicating with the client, preparation and trial skills, working with clients and other professionals, complying with practice standards, and ability to work within a team. During the evaluation process, the attorney manager should consider:

- observing the attorney in court;
- reviewing the attorney's files;
- talking with colleagues and clients, when appropriate, about the attorney's performance;
- having the attorney fill out a self-evaluation; and;
- meeting in person with the attorney.

Where areas of concern are noted, the evaluation process should identify and document specific steps to address areas needing improvement.

Commentary: A solid attorney evaluation process helps attorneys know what they should be working on, management's priorities, their strengths and areas for improvement. A positive process supports attorneys in their positions, empowers them to improve and reduces burnout.

11. Work actively with other stakeholders to improve the child welfare system, including court procedures.

Action: The attorney manager should participate, or designate someone from the staff to participate, in multidisciplinary committees within the jurisdiction that are focused on improving the local child welfare system. Examples of such committees include: addressing issues of disproportional representation of minorities in foster care, improving services for incarcerated parents, allowing parents pre-petition representation, drafting court rules and procedures, drafting protocols about outreach to missing parents and relatives, removing permanency barriers and delays, and accessing community-based services for parents and children. Similarly, the attorney manager should participate in, and strongly encourage staff participation in, multidisciplinary training.

Commentary: Working on systemic change with all stakeholders in the jurisdiction is one way to serve the parents the office represents as well as their children. Active participation of parents' attorneys ensures that projects and procedures are equitably developed, protect parents' interests, and the attorneys are more likely to work on them over the long term. Collaboration can, and generally does, benefit all stakeholders.

Role of the Court:

The court is urged to:

1. Recognize the importance of the parent attorney's role.

Commentary: The judge sets the tone in the courtroom. Therefore, it is very important that the judge respects all parties, including the parents and parents' counsel. Representing parents is difficult and emotional work, but essential to ensuring justice is delivered in child abuse and neglect cases. When competent attorneys advocate for parent clients, the judge's job becomes easier. The judge is assured that the parties are presenting all relevant evidence, and the judge can make a well-reasoned decision that protects the parents' rights. Also, by respecting and understanding the parent attorney's role, the judge sets an example for others.

2. Establish uniform standards of representation for parents' attorneys.

Commentary: By establishing uniform representation rules or standards, the judge can put the parents' attorneys in the jurisdiction on notice that a certain level of representation will be required for the attorney to continue to receive appointments. The rules or standards should be jurisdiction specific, but should include the elements of these standards.

3. Ensure the attorneys who are appointed to represent parents in abuse and neglect cases are qualified, well-trained, and held accountable for practice that complies with these standards.

Commentary: Once the standards are established, the court must hold all parents' attorneys accountable to them. A system should be developed that would delineate when an attorney would be removed from a case for failure to comply with the standards, and what actions, or inactions, would result in the attorney's removal from the appointment list (or a court recommendation to an attorney manager that an attorney be disciplined within the parent attorney office). The court should encourage attorneys to participate in educational opportunities, and the judge should not appoint attorneys who have failed to meet the minimum annual training requirements set out in the rules or standards.

4. Ensure appointments are made when a case first comes before the court, or before the first hearing, and last until the case has been dismissed from the court's jurisdiction.

Commentary: The parent is disadvantaged in a child abuse and neglect case if not represented by a competent attorney throughout the life of the case. The attorney can explain the case to the parent, counsel the parent on how best to achieve the parent's goals with respect to the child, and assist the parent access necessary services. In most child welfare cases, the parent cannot afford an attorney and requires the court to appoint one. The court should make every effort to obtain an attorney for that parent as early in the case as feasible – preferably before the case comes to court for the first time or at the first hearing. In jurisdictions in which parents only obtain counsel for the termination of

parental rights hearing, the parent has little chance of prevailing. A family that may have been reunified if the parent had appropriate legal support is separated forever.

5. Ensure parents' attorneys receive fair compensation.

Commentary: While resources are scarce, parents' attorneys deserve a competitive wage. They should receive the same wage as other government and court-appointed attorneys for other parties in the child abuse and neglect case. Parents' rights to effective assistance of counsel may be compromised if parents' attorneys are not adequately compensated. In most jurisdictions, the court sets the attorneys' fees and individual judges can recommend to court administration that parents' attorneys should be well compensated.

6. Ensure timely payment of fees and costs for attorneys.

Commentary: Often judges must sign fee petitions and approve payment of costs for attorneys. The judges should do so promptly so parents' attorneys can focus on representing clients, not worrying about being paid.

7. Provide interpreters, investigators and other specialists needed by the attorneys to competently represent clients. Ensure attorneys are reimbursed for supporting costs, such as use of experts, investigation services, interpreters, etc.

Commentary: Attorneys can not provide competent representation for parents without using certain specialists. For instance, if the client speaks a language different from the attorney, the attorney must have access to interpreters for attorney/client meetings. Interpreter costs should not be deducted from the attorney's compensation. A parent should be permitted to use an expert of the parent's choosing in some contested cases. If the expert charges a fee, the court should reimburse that fee separate and apart from what the court is paying the attorney.

8. Ensure that attorneys who are receiving appointments carry a reasonable caseload that would allow them to provide competent representation for each of their clients.

Commentary: The maximum allowable caseload should be included in local standards of practice for parents' attorneys. This committee recommends no more than 50-100 cases for full time attorneys, depending on the type of practice the attorney has and whether the attorney is able to provide each client with representation that follows these standards. Once this number has been established, the court should not appoint an attorney to cases once the attorney has reached the maximum level. Attorneys can only do high quality work for a limited number of clients, and each client deserves the attorney's full attention. Of course, the caseload decision is closely tied to adequate compensation. If paid appropriately, the attorney will have less incentive to overextend and accept a large number of cases.

9. Ensure all parties, including the parent's attorney, receive copies of court orders and other documentation.

Commentary: The court should have a system to ensure all parties receive necessary documentation in a timely manner. If the parent and parent attorney do not have the final court order, they do not know what is expected of them and of the other parties. If the child welfare agency, for example, is ordered to provide the parent with a certain service within two weeks, the parent's attorney must know that. After two weeks, if the service has not been provided, the attorney will want to follow up with the court. In some jurisdictions, copies of court orders are handed to each party before they leave the courtroom. This is an ideal situation, and if it is not feasible, the court should determine what other distribution method will work.

10. Provide contact information between clients and attorneys.

Commentary: Often parties in child welfare cases are difficult to locate or contact. Some parents lack telephones. The court can help promote contact between the attorney and parent by providing contact information to both individuals.

11. Ensure child welfare cases are heard promptly with a view towards timely decision making and thorough review of issues.

Commentary: Judges should attempt to schedule hearings and make decisions quickly. Allotted court time should be long enough for the judge to thoroughly review the case and conduct a meaningful hearing.

When possible, judges should schedule hearings for times-certain to avoid delaying attorneys unnecessarily in court. When attorneys are asked to wait through the rest of the morning calendar for one brief review hearing, limited dollars are spent to keep the attorney waiting in hallways, rather than completing an independent investigation, or researching alternative placement or treatment options.

Judges should avoid delays in decision making. Delays in decision making can impact visitation, reunification and even emotional closure when needed. If a parent does not know what the judge expects, the parent may lack direction or motivation to engage in services.

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Their input was essential to this project, and their willingness to assist was extraordinary.

[1] Model Rules of Professional Conduct 1.1 (Competence).

[2] The National Association of Counsel for Children is accredited by the American Bar Association to certify attorneys as specialists in Child Welfare Law. The Certification Program is open to attorneys who represent children, parents, or agencies in child welfare proceedings.
[3] Model Rule 1.3 (Diligence).
[4] Model Rule 1.4 (Communication).
[5] Model Rule 2.1 (Advisor).
[6] Model Rule 1.2 (Scope of Representation and Allocation of Authority).
[7] Model Rule 1.6 (Confidentiality of Information).
[8] Model Rule 1.4 Communication
[9] Id.
[10] Id.
[11] Model Rules 1.7 (Conflict of Interest: Current Client); 1.8 (Conflict of Interest: Current Clients: Specific Rules); 1.9 (Duties to Former Clients).
[12] Renne, Jennifer L. Chapter 4, page 49, "Handling Conflicts of Interest," *Legal Ethics in Child Welfare Cases.* Washington, DC: American Bar Association, 2004.
[13] Model Rule 1.3 (Diligence).
[14] Model Rules 1.1 (Competence); 1.3 (Diligence).
[15] Model Rule 1.4 (Communication).
[16] Model Rules 1.1 (Competence); 1.3 (Diligence).
[17] Id.
[18] Id.
[19] Model Rule 3.1 (Meritorious Claims and Contentions).
[20] Model Rule 5.1 (Responsibility of Partners, Managers and Supervisory Lawyers).
[21] Model Rule 1.1 (Competence).
[22] The Court Improvement Program (CIP) is a federal grant to each state's (as well as the District of Columbia and Puerto Rico) supreme court. The funds must be used to improve child abuse and neglect courts. States vary in how they allocate the dollars, but funds are often used for training, benchbooks, pilot projects, model courts and information technology systems for the courts.

III. Practice Standards
b. Representation of Children in Dependent/Neglect Cases

Section XXII, Representation of Children in Dependent/Neglect Cases

XXII. REPRESENTATION OF CHILDREN IN DEPENDENT/NEGLECT CASES (EXPRESSED WISHES)

GOALS:

A. To actively and professionally advocate for children who are the subject of actions under the Child Abuse and Neglect laws of Montana and afford them every legal opportunity to state their expressed wishes in the case and to protect their due process rights.

B. To serve the stated interest of the client and be independent from the court and other participants in the litigation, including the client's parents or guardians, and be unprejudiced and uncompromised in representing the client. Attorneys representing children shall comply with the general standards for public defenders as well as specific standards.

C. To exercise independent and professional judgment in carrying out the duties and to participate fully in the case on behalf of the child. Attorneys representing a client subject to Child Abuse and Neglect law proceedings shall comply with the general standards for public defenders providing representation of an adult charged with violations, as well as the specific Standards contained herein.

D. To recognize that children are at a critical stage of development and that skilled juvenile advocacy will positively impact the course of clients' lives through holistic representation.

E. PARTICIPATION IN PROCEEDINGS - It is a goal that each child who is the subject of an abuse and neglect proceeding has the right to attend and fully participate in all hearings related to his or her case.

Practice Standards

September 26, 2018

Section XXII, Representation of Children in Dependent/Neglect Cases

1. DEFINITIONS:

A. Abuse and neglect proceeding: a court proceeding under Title 41, Chapter 3, Part 4, MCA for the protection of a child from abuse or neglect or a court proceeding under Title 41, Chapter 3, Part 6, MCA in which termination of parental rights is at issue. These proceedings include:

a. Abuse;
b. Neglect
c. Child in voluntary placement in state care;
d. Termination of parental rights;
e. Permanency hearings; and
f. Post termination of parental rights through adoption or other permanency proceeding.

B. Best interest advocate: an individual, not functioning or intended to function as the child's lawyer, appointed by the court to assist the court in determining the best interests of the child.

C. Child: any person under the age of 18.

D. Child's lawyer (or lawyer for the children): a lawyer who provides legal services for a child and who owes the same duties, including undivided loyalty, confidentiality and competent representation, to the child as is due an adult client.

E. Developmental level: a measure of the ability to communicate and understand others, taking into account such factors as age, mental capacity, level of education, cultural background, and degree of language acquisition.

Section XXII, Representation of Children in Dependent/Neglect Cases

2. TRAINING:

A. To be eligible for assignment to represent children in these court proceedings, counsel shall demonstrate proficiency or receive training in representing children including training in the Indian Child Welfare Act.

B. Counsel shall be knowledgeable in the following areas:

a. Legislation and case law on abuse and neglect, termination of parental rights, and adoption of children, including those with special needs;
b. Child and adolescent development;
c. Child welfare and family preservation services available in the community and the problems they are designed to address;
d. Services and treatment options for youth both locally and statewide;
e. Services the State will and won't routinely pay for;
f. The structure and functioning of Child and Family Services of the Department of Public Health and Human Services;
g. Local experts who can provide attorneys with consultation and testimony on the reasonableness and appropriateness of efforts to maintain or return the child to the home;
h. Local and state experts who can provide attorneys with consultation and testimony of the special needs of Indian children and cultural differences;
i. Basic knowledge of brain development and the effect of trauma on brain development;
j. Basic knowledge of mental health issues;
k. Substance abuse issues;
l. Special education laws, rights and remedies;
m. School related issues including school disciplinary procedures, zero tolerance policies, and IEP's; and
n. Basic knowledge of disability issues and rights. (from OPD Standards for parents and juveniles)

Section XXII, Representation of Children in Dependent/Neglect Cases

3. **REPEALED**

Section XXII, Representation of Children in Dependent/Neglect Cases

4. DUTIES OF CHILD'S LAWYER AND SCOPE OF REPRESENTATION:

A. A child's lawyer shall participate in any proceeding concerning the child with the same rights and obligations as any other lawyer for a party to the proceeding.

B. The duties of a child's lawyer include, but are not limited to:

a. Meeting with the child prior to each hearing and for at least one in-person meeting every quarter;

b. Taking all steps reasonably necessary to represent the client in the proceeding, including but not limited to: interviewing and counseling the client, preparing a case theory and strategy, preparing for and participating in negotiations and hearings, drafting and submitting motions, memoranda and orders, and such other steps as established by the applicable standards of practice for lawyers acting on behalf of children in this jurisdiction;

c. Prior to every hearing, investigating and taking necessary legal action regarding the child's medical, mental health, social, education, and overall well-being;

d. Visiting the home, residence, or any prospective residence of the child, including each time the placement is changed;

e. Reviewing and accepting or declining, after consultation with the client, any proposed stipulation for an order affecting the child and explaining to the court the basis for any opposition;

f. Taking action the lawyer considers appropriate to expedite the proceeding and the resolution of contested issues;

g. Where appropriate, after consultation with the client, discussing the possibility of settlement or the use of alternative forms of dispute resolution and participating in such processes to the extent permitted under the law of this state;

h. Where appropriate and consistent with both confidentiality and the child's legal interests, consulting with the best interests advocate;

i. Seeking court orders or taking any other necessary steps in accordance with the child's direction to ensure that the child's health, mental health, educational, developmental, cultural and placement needs are met; and

j. Representing the child in all proceedings affecting the issues before the court, including, where appropriate, proceedings following parental termination or relinquishment, and hearings on appeal or referring the child's case to the appropriate appellate counsel as provided for by/mandated by law.

C. When the child is capable of directing the representation by expressing his or her objectives, the child's lawyer shall maintain a normal client-lawyer relationship with the child in accordance with the rules of professional conduct. In a developmentally appropriate manner, the lawyer shall elicit the child's wishes and advise the child as to options.

D. The child's lawyer shall determine whether the child has diminished capacity pursuant to the Model Rules of Professional Conduct (Rule 1.14). In making the determination, the lawyer should consult the child and may consult other individuals or entities that can provide the child's lawyer with the information and assistance necessary to determine the child's ability to direct the representation.

a. When a child client has diminished capacity, the child's lawyer shall make a good faith effort to determine the child's needs and wishes. The lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the child. During a temporary period or on a particular issue where a normal client-lawyer relationship is not reasonably possible to maintain, the child's lawyer shall make a substituted judgment determination which includes determining what the child would decide if he or she were capable of making an adequately considered decision, and representing the child in accordance with that determination. The lawyer should take direction from the child as the child develops the capacity to direct the lawyer. The lawyer shall advise the court of the determination of diminished capacity and any subsequent change in that determination.
b. When the child's lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the child and, in appropriate cases, seeking the appointment of a best interest advocate or investigator to make an independent recommendation to the court with respect to the best interests of the child.
c. When taking protective action, the lawyer is impliedly authorized under Model Rule 1.6(a) to reveal information about the child, but only to the extent reasonably necessary to protect the child's interests. Information relating to the representation of a child with diminished capacity is protected by Rule 1.6 and Rule 1.14 of the Montana Rules of Professional Conduct.

AMERICAN BAR ASSOCIATION
STANDARDS OF PRACTICE FOR LAWYERS
WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES
Approved by the American Bar Association House of Delegates, February 5, 1996

PREFACE

All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continues. These Abuse and Neglect Standards are meant to apply when a lawyer is appointed for a child in any legal action based on: (a) a petition filed for protection of the child; (b) a request to a court to change legal custody, visitation, or guardianship based on allegations of child abuse or neglect based on sufficient cause; or (c) an action to terminate parental rights.

These Standards apply only to lawyers and take the position that although a lawyer *may* accept appointment in the dual capacity of a "lawyer/guardian ad litem," the lawyer's primary duty must still be focused on the protection of the legal rights of the child client. The lawyer/guardian ad litem should therefore perform all the functions of a "child's attorney," except as otherwise noted.

These Standards build upon the ABA-approved JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES (1979) which include important directions for lawyers representing children in juvenile court matters generally, but do not contain sufficient guidance to aid lawyers representing children in abuse and neglect cases. These Abuse and Neglect Standards are also intended to help implement a series of ABA-approved policy resolutions (in Appendix) on the importance of legal representation and the improvement of lawyer practice in child protection cases.

In support of having lawyers play an active role in child abuse and neglect cases, in August 1995 the ABA endorsed a set of RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES produced by the National Council of Juvenile and Family Court Judges. The RESOURCE GUIDELINES stress the importance of quality representation provided by competent and diligent lawyers by supporting: 1) the approach of vigorous representation of child clients; and 2) the actions that courts should take to help assure such representation.

These Standards contain two parts. Part I addresses the specific roles and responsibilities of a lawyer appointed to represent a child in an abuse and neglect case. Part II provides a set of standards for judicial administrators and trial judges to assure high quality legal representation.

PART I– STANDARDS FOR THE CHILD'S ATTORNEY

A. DEFINITIONS

A-1. The Child's Attorney. The term "child's attorney" means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.

Commentary

These Standards explicitly recognize that the child is a separate individual with potentially discrete and independent views. To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position. Consequently, the child's attorney owes traditional duties to the child as client consistent with ER 1.14(a) of the Model Rules of Professional Conduct. In all but the exceptional case, such as with a preverbal child, the child's attorney will maintain this traditional relationship with the child/client. As with any client, the child's attorney may counsel against the pursuit of a particular position sought by the child. The child's attorney should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients. Therefore, the child's attorney should ensure that the decision the child ultimately makes reflects his or her actual position.

A-2. Lawyer Appointed as Guardian Ad Litem. A lawyer appointed as "guardian ad litem" for a child is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences.

Commentary

In some jurisdictions the lawyer may be appointed as guardian ad litem. These Standards, however, express a clear preference for the appointment as the "child's attorney." These Standards address the lawyer's obligations to the child as client.

A lawyer appointed as guardian ad litem is almost inevitably expected to perform legal functions on behalf of the child. Where the local law permits, the lawyer is expected to act in the dual role of guardian ad litem and lawyer of record. The chief distinguishing factor between the roles is the manner and method to be followed in determining the legal position to be advocated. While a guardian ad litem should take the child's point of view into account, the child's preferences are not binding, irrespective of the child's age and the ability or willingness of the child to express preferences. Moreover, in many states, a guardian ad litem may be required by statute or custom to perform specific tasks, such as submitting a report or testifying as a fact or expert witness. These tasks are not part of functioning as a "lawyer."

These Standards do not apply to nonlawyers when such persons are appointed as guardians ad litem or as "court appointed special advocates" (CASA). The nonlawyer guardian ad litem cannot and should not be expected to perform any legal functions on behalf of a child.

A-3. Developmentally Appropriate. "Developmentally appropriate" means that the child's attorney should ensure the child's ability to provide client-based directions by structuring all communications to account for the individual child's age, level of education, cultural context, and degree of language acquisition.

Commentary

The lawyer has an obligation to explain clearly, precisely, and in terms the client can understand the meaning and consequences of action. See DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977). A child client may not understand the legal terminology and for a variety of reasons may choose a particular course of action without fully appreciating the implications. With a child the potential for not understanding may be even greater. Therefore, the child's attorney has additional obligations based on the child's age, level of education, and degree of language acquisition. There is also the possibility that because of a particular child's developmental limitations, the lawyer may not completely understand the child's responses. Therefore, the child's attorney must learn how to ask developmentally appropriate questions and how to interpret the child's responses. See ANNE GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE (ABA Center on Children and the Law 1994). *The child's attorney may work with social workers or other professionals to assess a child's developmental abilities and to facilitate communication.*

B. GENERAL AUTHORITY AND DUTIES

B-1. Basic Obligations. The child's attorney should:

(1) Obtain copies of all pleadings and relevant notices;
(2) Participate in depositions, negotiations, discovery, pretrial conferences, and hearings;
(3) Inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child and the child's family;
(4) Attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child;
(5) Counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the lawyer's role, and what to expect in the legal process;
(6) Develop a theory and strategy of the case to implement at hearings, including factual and legal issues; and
(7) Identify appropriate family and professional resources for the child.

Commentary

The child's attorney should not be merely a fact-finder, but rather, should zealously advocate a position on behalf of the child. (The same is true for the guardian ad litem, although the position to be advocated may be different). In furtherance of that advocacy, the child's attorney must be adequately prepared prior to hearings. The lawyer's presence at and active participation in all hearings is absolutely critical. See, RESOURCE GUIDELINES, at 23.

Although the child's position may overlap with the position of one or both parents, third-party caretakers, or a state agency, the child's attorney should be prepared to participate fully in any proceedings and not merely defer to the other parties. Any identity of position should be based on the merits of the position, and not a mere endorsement of another party's position.

While subsection (4) recognizes that delays are usually harmful, there may be some circumstances when delay may be beneficial. Section (7) contemplates that the child's attorney will identify counseling, educational and health services, substance abuse programs for the child and other family members, housing and other forms of material assistance for which the child may qualify under law. The lawyer can also identify family members, friends, neighbors, or teachers with whom the child feels it is important to maintain contact; mentoring programs, such as Big Brother/Big Sister; recreational opportunities that develop social skills and self-esteem; educational support programs; and volunteer opportunities which can enhance a child's self-esteem.

B-2. Conflict Situations. (1) If a lawyer appointed as guardian ad litem determines that there is a conflict caused by performing both roles of guardian ad litem and child's attorney, the lawyer should continue to perform as the child's attorney and withdraw as guardian ad litem. The lawyer should request appointment of a guardian ad litem without revealing the basis for the request.

(2) If a lawyer is appointed as a "child's attorney" for siblings, there may also be a conflict which could require that the lawyer decline representation or withdraw from representing all of the children.

Commentary

The primary conflict that arises between the two roles is when the child's expressed preferences differ from what the lawyer deems to be in the child's best interests. As a practical matter, when the lawyer has established a trusting relationship with the child, most conflicts can be avoided. While the lawyer should be careful not to apply undue pressure to a child, the lawyer's advice and guidance can often persuade the child to change an imprudent position or to identify alternative choices if the child's first choice is denied by the court.

The lawyer-client role involves a confidential relationship with privileged communications, while a

guardian ad litem-client role may not be confidential. Compare Alaska Bar Assoc. Ethics Op. #854 (1985) (lawyer-client privilege does not apply when the lawyer is appointed to be child's guardian ad litem) with Bentley v. Bentley, 448 N.Y.S.2d 559 (App. Div. 1982) (communication between minor children and guardian ad litem in divorce custody case is entitled to lawyer-client privilege). Because the child has a right to confidentiality and advocacy of his or her position, the child's attorney can never abandon this role. Once a lawyer has a lawyer-client relationship with a minor, he or she cannot and should not assume any other role for the child, especially as guardian ad litem. When the roles cannot be reconciled, another person must assume the guardian ad litem role. See Arizona State Bar Committee on Rules of Professional Conduct, Opinion No. 86-13 (1986).

B-3. Client Under Disability. The child's attorney should determine whether the child is "under a disability" pursuant to the Model Rules of Professional Conduct or the Model Code of Professional Responsibility with respect to each issue in which the child is called upon to direct the representation.

Commentary

These Standards do not accept the idea that children of certain ages are "impaired," "disabled," "incompetent," or lack capacity to determine their position in litigation. Further, these Standards reject the concept that any disability must be globally determined.

Rather, disability is contextual, incremental, and may be intermittent. The child's ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another. This Standard relies on empirical knowledge about competencies with respect to both adults and children. See, e.g., ALLEN E. BUCHANAN & DAN W. BROCK, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING 217 (1989).

B-4. Client Preferences. The child's attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child, and provide guidance. The child's attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation.

Commentary

The lawyer has a duty to explain to the child in a developmentally appropriate way such information as will assist the child in having maximum input in determination of the particular position at issue. The lawyer should inform the child of the relevant facts and applicable laws and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings. The lawyer may express an opinion concerning the likelihood of the court or other parties accepting particular positions. The lawyer may inform the child of an expert's recommendations germane to the issue.

As in any other lawyer/client relationship, the lawyer may express his or her assessment of the case, the best position for the child to take, and the reasons underlying such recommendation. A child, however, may agree with the lawyer for inappropriate reasons. A lawyer must remain aware of the power dynamics inherent in adult/child relationships. Therefore, the lawyer needs to understand what the child knows and what factors are influencing the child's decision. The lawyer should attempt to determine from the child's opinion and reasoning what factors have been most influential or have been confusing or glided over by the child when deciding the best time to express his or her assessment of the case.

Consistent with the rules of confidentiality and with sensitivity to the child's privacy, the lawyer should consult with the child's therapist and other experts and obtain appropriate records. For example, a child's therapist may help the child to understand why an expressed position is dangerous, foolish, or not in the child's best interests. The therapist might also assist the lawyer in understanding the child's perspective, priorities, and individual needs. Similarly, significant persons in the child's life may educate the lawyer about the child's needs, priorities, and previous experiences.

The lawyer for the child has dual fiduciary duties to the child which must be balanced. On one hand, the lawyer has a duty to ensure that the child client is given the information necessary to make an informed decision, including advice and guidance. On the other hand, the lawyer has a duty not to overbear the will of the child. While the lawyer may attempt to persuade the child to accept a particular position, the lawyer may not advocate a position contrary to the child's expressed position except as provided by these Abuse and Neglect Standards or the Code of Professional Responsibility.

While the child is entitled to determine the overall objectives to be pursued, the child's attorney, as any adult's lawyer, may make certain decisions with respect to the manner of achieving those objectives, particularly with respect to procedural matters. These Abuse and Neglect Standards do not require the lawyer to consult with the child on matters which would not require consultation with an adult client. Further, the Standards do not require the child's attorney to discuss with the child issues for which it is not feasible to obtain the child's direction because of the child's developmental limitations, as with an infant or preverbal child.

(1) To the extent that a child cannot express a preference, the child's attorney shall make a good faith effort to determine the child's wishes and advocate accordingly or request appointment of a guardian ad litem.

Commentary

There are circumstances in which a child is unable to express a position, as in the case of a preverbal child, or may not be capable of understanding the legal or factual issues involved. Under such circumstances, the child's attorney should continue to represent the child's legal interests and request appointment of a guardian ad litem. This limitation distinguishes the scope of independent decision-making of the child's attorney and a person acting as guardian ad litem.

(2) To the extent that a child does not or will not express a preference about particular issues, the child's attorney should determine and advocate the child's legal interests.

Commentary

The child's failure to express a position is distinguishable from a directive that the lawyer not take a position with respect to certain issues. The child may have no opinion with respect to a particular issue, or may delegate the decision-making authority. For example, the child may not want to assume the responsibility of expressing a position because of loyalty conflicts or the desire not to hurt one of the other parties. The lawyer should clarify with the child whether the child wants the lawyer to take a position or remain silent with respect to that issue or wants the preference expressed only if the parent or other party is out of the courtroom. The lawyer is then bound by the child's directive. The position taken by the lawyer should not contradict or undermine other issues about which the child has expressed a preference.

(3) If the child's attorney determines that the child's expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer's opinion of what would be in the child's interests), the lawyer may request appointment of a separate guardian ad litem and continue to represent the child's expressed preference, unless the child's position is prohibited by law or without any factual foundation. The child's attorney shall not reveal the basis of the request for appointment of a guardian ad litem which would compromise the child's position.

Commentary

One of the most difficult ethical issues for lawyers representing children occurs when the child is able to express a position and does so, but the lawyer believes that the position chosen is wholly inappropriate or could result in serious injury to the child. This is particularly likely to happen with respect to an abused child whose home is unsafe, but who desires to remain or return home. A child may desire to live in a dangerous situation because it is all he or she knows, because of a feeling of blame or of responsibility to take care of the parents, or because of threats. The child may choose to deal with a known situation rather than risk the unknown world of a

foster home or other out-of-home placement.

In most cases the ethical conflict involved in asserting a position which would seriously endanger the child, especially by disclosure of privileged information, can be resolved through the lawyer's counseling function. If the lawyer has taken the time to establish rapport with the child and gain that child's trust, it is likely that the lawyer will be able to persuade the child to abandon a dangerous position or at least identify an alternate course.

If the child cannot be persuaded, the lawyer has a duty to safeguard the child's interests by requesting appointment of a guardian ad litem, who will be charged with advocating the child's best interests without being bound by the child's direction. As a practical matter, this may not adequately protect the child if the danger to the child was revealed only in a confidential disclosure to the lawyer, because the guardian ad litem may never learn of the disclosed danger.

Confidentiality is abrogated for various professionals by mandatory child abuse reporting laws. Some states abrogate lawyer-client privilege by mandating reports. States which do not abrogate the privilege may permit reports notwithstanding professional privileges. The policy considerations underlying abrogation apply to lawyers where there is a substantial danger of serious injury or death. Under such circumstances, the lawyer must take the minimum steps which would be necessary to ensure the child's safety, respecting and following the child's direction to the greatest extent possible consistent with the child's safety and ethical rules.

The lawyer may never counsel a client or assist a client in conduct the lawyer knows is criminal or fraudulent. See ER 1.2(d), Model Rules of Professional Conduct, DR 7-102(A)(7), Model Code of Professional Responsibility. Further, existing ethical rules requires the lawyer to disclose confidential information to the extent necessary to prevent the client from committing a criminal act likely to result in death or substantial bodily harm, see ER 1.6(b), Model Rules of Professional Conduct, and permits the lawyer to reveal the intention of the client to commit a crime. See ER 1.6(c), Model Rules of Professional Conduct, DR 4-101(C)(3), Model Code of Professional Responsibility. While child abuse, including sexual abuse, are crimes, the child is presumably the victim, rather than the perpetrator of those crimes. Therefore, disclosure of confidences is designed to protect the client, rather than to protect a third party from the client. Where the child is in grave danger of serious injury or death, the child's safety must be the paramount concern.

The lawyer is not bound to pursue the client's objectives through means not permitted by law and ethical rules. See DR-7-101(A)(1), Model Code of Professional Responsibility. Further, lawyers may be subject personally to sanctions for taking positions that are not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

B-5. Child's Interests. The determination of the child's legal interests should be based on objective criteria as set forth in the law that are related to the purposes of the proceedings. The criteria should address the child's specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive or detrimental alternatives available.

Commentary

A lawyer who is required to determine the child's interests is functioning in a nontraditional role by determining the position to be advocated independently of the client. The lawyer should base the position, however, on objective criteria concerning the child's needs and interests, and not merely on the lawyer's personal values, philosophies, and experiences. The child's various needs and interests may be in conflict and must be weighed against each other. Even nonverbal children can communicate their needs and interests through their behaviors and developmental levels. See generally JAMES GARBARINO & FRANCES M. STOTT, WHAT CHILDREN CAN TELL US: ELICITING, INTERPRETING, AND EVALUATING CRITICAL INFORMATION FROM CHILDREN (1992). The lawyer may seek the advice and consultation of experts and other knowledgeable people in both determining and weighing such needs and interests.

A child's legal interests may include basic physical and emotional needs, such as safety, shelter, food, and clothing. Such needs should be assessed in light of the child's vulnerability, dependence upon others, available external resources, and the degree of risk. A child needs family affiliation and stability of placement. The child's developmental level, including his or her sense of time, is relevant to an assessment of need. For example, a very young child may be less able to tolerate separation from a primary caretaker than an older child, and if separation is necessary, more frequent visitation than is ordinarily provided may be necessary.

In general, a child prefers to live with known people, to continue normal activities, and to avoid moving. To that end, the child's attorney should determine whether relatives, friends, neighbors, or other people known to the child are appropriate and available as placement resources. The lawyer must determine the child's feelings about the proposed caretaker, however, because familiarity does not automatically confer positive regard. Further, the lawyer may need to balance competing stability interests, such as living with a relative in another town versus living in a foster home in the same neighborhood. The individual child's needs will influence this balancing task.

In general, a child needs decisions about the custodial environment to be made quickly. Therefore, if the child must be removed from the home, it is generally in the child's best interests to have rehabilitative or reunification services offered to the family quickly. On the other hand, if it appears that reunification will be unlikely, it is generally in the child's best interests to move quickly toward an alternative permanent plan. Delay and indecision are rarely in a child's best interests.

In addition to the general needs and interests of children, individual children have particular needs, and the lawyer must determine the child client's individual needs. There are few rules which apply across the board to all children under all circumstances.

C. ACTIONS TO BE TAKEN

C-1. Meet With Child. Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the child's attorney should visit with the child prior to court hearings and when apprised of emergencies or significant events impacting on the child.

Commentary

Meeting with the child is important before court hearings and case reviews. In addition, changes in placement, school suspensions, in-patient hospitalizations, and other similar changes warrant meeting again with the child. Such in-person meetings allow the lawyer to explain to the child what is happening, what alternatives might be available, and what will happen next. This also allows the lawyer to assess the child's circumstances, often leading to a greater understanding of the case, which may lead to more creative solutions in the child's interest. A lawyer can learn a great deal from meeting with child clients, including a preverbal child. See, e.g., JAMES GARBARINO, ET AL, WHAT CHILDREN CAN TELL US: ELICITING, INTERPRETING, AND EVALUATING CRITICAL INFORMATION FROM CHILDREN (1992).

C-2. Investigate. To support the client's position, the child's attorney should conduct thorough, continuing, and independent investigations and discovery which may include, but should not be limited to:

(1) Reviewing the child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case;

Commentary

Thorough, independent investigation of cases, at every stage of the proceedings, is a key aspect of providing competent representation to children. See, RESOURCE GUIDELINES, AT 23. The lawyer may need to use subpoenas or other discovery or motion procedures to obtain the relevant records, especially those records which

pertain to the other parties. In some jurisdictions the statute or the order appointing the lawyer for the child includes provision for obtaining certain records.

(2) Reviewing the court files of the child and siblings, case-related records of the social service agency and other service providers;

Commentary

Another key aspect of representing children is the review of all documents submitted to the court as well as relevant agency case files and law enforcement reports. See, RESOURCE GUIDELINES, at 23. Other relevant files that should be reviewed include those concerning child protective services, developmental disabilities, juvenile delinquency, mental health, and educational agencies. These records can provide a more complete context for the current problems of the child and family. Information in the files may suggest additional professionals and lay witnesses who should be contacted and may reveal alternate potential placements and services.

(3) Contacting lawyers for other parties and nonlawyer guardians ad litem or court-appointed special advocates (CASA) for background information;

Commentary

The other parties' lawyers may have information not included in any of the available records. Further, they can provide information on their respective clients' perspectives. The CASA is typically charged with performing an independent factual investigation, getting to know the child, and speaking up to the court on the child's "best interests." Volunteer CASAs may have more time to perform their functions than the child's attorney and can often provide a great deal of information to assist the child's attorney. Where there appears to be role conflict or confusion over the involvement of both a child's attorney and CASA in the same case, there should be joint efforts to clarify and define mutual responsibilities. See, RESOURCE GUIDELINES, at 24.

(4) Contacting and meeting with the parents/legal guardians/caretakers of the child, with permission of their lawyer;

Commentary

Such contact generally should include visiting the home, which will give the lawyer additional information about the child's custodial circumstances.

(5) Obtaining necessary authorizations for the release of information;

Commentary

If the relevant statute or order appointing the lawyer for the child does not provide explicit authorization for the lawyer's obtaining necessary records, the lawyer should attempt to obtain authorizations for release of information from the agency and from the parents, with their lawyer's consent. Even if it is not required, an older child should be asked to sign authorizations for release of his or her own records, because such a request demonstrates the lawyer's respect for the client's authority over information.

(6) Interviewing individuals involved with the child, including school personnel, child welfare case workers, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;

Commentary

In some jurisdictions the child's attorney is permitted free access to agency case workers. In others, contact with the case worker must be arranged through the agency's lawyer.

(7) Reviewing relevant photographs, video or audio tapes and other evidence; and

Commentary

It is essential that the lawyer review the evidence personally, rather than relying on other parties' or counsel's descriptions and characterizations of the evidence.

(8) Attending treatment, placement, administrative hearings, other proceedings involving legal issues, and school case conferences or staffings concerning the child as needed.

Commentary

While some courts will not authorize compensation for the child's attorney to attend such collateral meetings, such attendance is often very important. The child's attorney can present the child's perspective at such meetings, as well as gather information necessary to proper representation. In some cases the child's attorney can be pivotal in achieving a negotiated settlement of all or some issues. The child's attorney may not need to attend collateral meetings if another person involved in the case, such as a social worker who works the lawyer, can get the information or present the child's perspective.

C-3. File Pleadings. The child's attorney should file petitions, motions, responses or objections as necessary to represent the child. Relief requested may include, but is not limited to:

(1) A mental or physical examination of a party or the child;
(2) A parenting, custody or visitation evaluation;
(3) An increase, decrease, or termination of contact or visitation;
(4) Restraining or enjoining a change of placement;
(5) Contempt for non-compliance with a court order;
(6) Termination of the parent-child relationship;
(7) Child support;
(8) A protective order concerning the child's privileged communications or tangible or intangible property;
(9) Request services for child or family; and
(10) Dismissal of petitions or motions.

Commentary

Filing and arguing necessary motions is an essential part of the role of a child's attorney. See, RESOURCE GUIDELINES, at 23. Unless the lawyer is serving in a role which explicitly precludes the filing of pleadings, the lawyer should file any appropriate pleadings on behalf of the child, including responses to the pleadings of the other parties. The filing of such pleadings can ensure that appropriate issues are properly before the court and can expedite the court's consideration of issues important to the child's interests. In some jurisdictions, guardians ad litem are not permitted to file pleadings, in which case it should be clear to the lawyer that he or she is not the "child's attorney" as defined in these Standards.

C-4. Request Services. Consistent with the child's wishes, the child's attorney should seek appropriate services (by court order if necessary) to access entitlements, to protect the child's interests and to implement a service plan. These services may include, but not be limited to:

(1) Family preservation-related prevention or reunification services;
(2) Sibling and family visitation;
(3) Child support;
(4) Domestic violence prevention, intervention, and treatment;
(5) Medical and mental health care;
(6) Drug and alcohol treatment;
(7) Parenting education;
(8) Semi-independent and independent living services;

(9) Long-term foster care;
(10) Termination of parental rights action;
(11) Adoption services;
(12) Education;
(13) Recreational or social services; and
(14) Housing.

Commentary

The lawyer should request appropriate services even if there is no hearing scheduled. Such requests may be made to the agency or treatment providers, or if such informal methods are unsuccessful, the lawyer should file a motion to bring the matter before the court. In some cases the child's attorney should file collateral actions, such as petitions for termination of parental rights, if such an action would advance the child's interest and is legally permitted and justified. Different resources are available in different localities.

C-5. Child With Special Needs. Consistent with the child's wishes, the child's attorney should assure that a child with special needs receives appropriate services to address the physical, mental, or developmental disabilities. These services may include, but should not be limited to:

(1) Special education and related services;
(2) Supplemental security income (SSI) to help support needed services;
(3) Therapeutic foster or group home care; and
(4) Residential/in-patient and out-patient psychiatric treatment.

Commentary

There are many services available from extra-judicial, as well as judicial, sources for children with special needs. The child's attorney should be familiar with these other services and how to assure their availability for the client. See generally, THOMAS A. JACOBS, CHILDREN & THE LAW: RIGHTS & OBLIGATIONS (1995); LEGAL RIGHTS OF CHILDREN (2d ed. Donald T. Kramer, ed., 1994).

C-6. Negotiate Settlements. The child's attorney should participate in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child. The child's attorney should use suitable mediation resources.

Commentary

Particularly in contentious cases, the child's attorney may effectively assist negotiations of the parties and their lawyers by focusing on the needs of the child. If a parent is legally represented, it is unethical for the child's attorney to negotiate with a parent directly without the consent of the parent's lawyer. Because the court is likely to resolve at least some parts of the dispute in question based on the best interests of the child, the child's attorney is in a pivotal position in negotiation.

Settlement frequently obtains at least short term relief for all parties involved and is often the best resolution of a case. The child's attorney, however, should not become merely a facilitator to the parties' reaching a negotiated settlement. As developmentally appropriate, the child's attorney should consult the child prior to any settlement becoming binding.

D. HEARINGS

D-1. Court Appearances. The child's attorney should attend all hearings and participate in all telephone or other conferences with the court unless a particular hearing involves issues completely unrelated to the child.

D-2. Client Explanation. The child's attorney should explain to the client, in a developmentally appropriate manner, what is expected to happen before, during and after each hearing.

D-3. Motions and Objections. The child's attorney should make appropriate motions, including motions *in limine* and evidentiary objections, to advance the child's position at trial or during other hearings. If necessary, the child's attorney should file briefs in support of evidentiary issues. Further, during all hearings, the child's attorney should preserve legal issues for appeal, as appropriate.

D-4. Presentation of Evidence. The child's attorney should present and cross examine witnesses, offer exhibits, and provide independent evidence as necessary.

Commentary

The child's position may overlap with the positions of one or both parents, third-party caretakers, or a child protection agency. Nevertheless, the child's attorney should be prepared to participate fully in every hearing and not merely defer to the other parties. Any identity of position should be based on the merits of the position (consistent with Standard B-6), and not a mere endorsement of another party's position.

D-5. Child at Hearing. In most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify.

Commentary

A child has the right to meaningful participation in the case, which generally includes the child's presence at significant court hearings. Further, the child's presence underscores for the judge that the child is a real party in interest in the case. It may be necessary to obtain a court order or writ of habeas corpus ad testificandum to secure the child's attendance at the hearing.

A decision to exclude the child from the hearing should be made based on a particularized determination that the child does not want to attend, is too young to sit through the hearing, would be severely traumatized by such attendance, or for other good reason would be better served by nonattendance. There may be other extraordinary reasons for the child's non-attendance. The lawyer should consult the child, therapist, caretaker, or any other knowledgeable person in determining the effect on the child of being present at the hearing. In some jurisdictions the court requires an affirmative waiver of the child's presence if the child will not attend. Even a child who is too young to sit through the hearing may benefit from seeing the courtroom and meeting, or at least seeing, the judge who will be making the decisions. The lawyer should provide the court with any required notice that the child will be present. Concerns about the child being exposed to certain parts of the evidence may be addressed by the child's temporary exclusion from the court room during the taking of that evidence, rather than by excluding the child from the entire hearing.

The lawyer should ensure that the state/ custodian meets its obligation to transport the child to and from the hearing. Similarly, the lawyer should ensure the presence of someone to accompany the child any time the child is temporarily absent from the hearing.

D-6. Whether Child Should Testify. The child's attorney should decide whether to call the child as a witness. The decision should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and

withstand possible cross-examination. Ultimately, the child's attorney is bound by the child's direction concerning testifying.

Commentary

There are no blanket rules regarding a child's testimony. While testifying is undoubtedly traumatic for many children, it is therapeutic and empowering for others. Therefore, the decision about the child's testifying should be made individually, based on the circumstances of the individual child and the individual case. The child's therapist, if any, should be consulted both with respect to the decision itself and assistance with preparation. In the absence of compelling reasons, a child who has a strong desire to testify should be called to do so. See ANN M. HARALAMBIE, THE CHILD'S LAWYER: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES ch. 4 (1993). If the child should not wish to testify or would be harmed by being forced to testify, the lawyer should seek a stipulation of the parties not to call the child as a witness or seek a protective order from the court. If the child is compelled to testify, the lawyer should seek to minimize the adverse consequences by seeking any appropriate accommodations permitted by local law, such as having the testimony taken informally, in chambers, without presence of the parents. See JOHN E.B. MYERS, 2 EVIDENCE IN CHILD ABUSE AND NEGLECT CASES ch. 8 (1992). The child should know whether the in-chambers testimony will be shared with others, such as parents who might be excluded from chambers, before agreeing to this forum. The lawyer should also prepare the child for the possibility that the judge may render a decision against the child's wishes which will not be the child's fault.

D-7. Child Witness. The child's attorney should prepare the child to testify. This should include familiarizing the child with the courtroom, court procedures, and what to expect during direct and cross-examination and ensuring that testifying will cause minimum harm to the child.

Commentary

The lawyer's preparation of the child to testify should include attention to the child's developmental needs and abilities as well as to accommodations which should be made by the court and other lawyers. The lawyer should seek any necessary assistance from the court, including location of the testimony (in chambers, at a small table etc.), determination of who will be present, and restrictions on the manner and phrasing of questions posed to the child.

The accuracy of children's testimony is enhanced when they feel comfortable. See, generally, Karen Saywitz, Children in Court: Principles of Child Development for Judicial Application, in A JUDICIAL PRIMER ON CHILD SEXUAL ABUSE 15 (Josephine Bulkley & Claire Sandt, eds., 1994). Courts have permitted support persons to be present in the courtroom, sometimes even with the child sitting on the person's lap to testify. Because child abuse and neglect cases are often closed to the public, special permission may be necessary to enable such persons to be present during hearings. Further, where the rule sequestering witnesses has been invoked, the order of witnesses may need to be changed or an exemption granted where the support person also will be a witness. The child should be asked whether he or she would like someone to be present, and if so, whom the child prefers. Typical support persons include parents, relatives, therapists, Court Appointed Special Advocates (CASA), social workers, victim-witness advocates, and members of the clergy. For some, presence of the child's attorney provides sufficient support.

D-8. Questioning the Child. The child's attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.

Commentary

The phrasing of questions should take into consideration the law and research regarding children's testimony, memory, and suggestibility. See generally, Karen Saywitz, supra D -7; CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY (Gail S. Goodman & Bette L. Bottoms, eds. 1993); ANN HARALAMBIE, 2 HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES 24.09v24.22 (2nd ed. 1993); MYERS,

supra D-6, at Vol. 1, ch 2; Ellen Matthews & Karen Saywitz, *Child Victim Witness Manual*, 12/1 C.J.E.R.J. 40 (1992).

The information a child gives in interviews and during testimony is often misleading because the adults have not understood how to ask children developmentally appropriate questions and how to interpret their answers properly. See WALKER, SUPRA, A-3 Commentary. The child's attorney must become skilled at recognizing the child's developmental limitations. It may be appropriate to present expert testimony on the issue and even to have an expert present during a young child's testimony to point out any developmentally inappropriate phrasing.

D-9. Challenges to Child's Testimony/Statements. The child's competency to testify, or the reliability of the child's testimony or out-of-court statements, may be called into question. The child's attorney should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child.

Commentary

Many jurisdictions have abolished presumptive ages of competency. See HARALAMBIE, SUPRA D-8 AT 24.17. The jurisdictions which have rejected presumptive ages for testimonial competency have applied more flexible, case-by-case analyses. See Louis I. Parley, Representing Children in Custody Litigation, 11 J. AM. ACAD. MATRIM. LAW. 45, 48 (Winter 1993). Competency to testify involves the abilities to perceive and relate.

If necessary, the child's attorney should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child on those bases. See generally, Karen Saywitz, supra D-8 at 15; CHILD VICTIMS, SUPRA D-8; Haralambie, supra D-8; J. MYERS, SUPRA D-8; Matthews & Saywitz, supra D-8.

D-10. Jury Selection. In those states in which a jury trial is possible, the child's attorney should participate in jury selection and drafting jury instructions.

D-11. Conclusion of Hearing. If appropriate, the child's attorney should make a closing argument, and provide proposed findings of fact and conclusions of law. The child's attorney should ensure that a written order is entered.

Commentary

One of the values of having a trained child's attorney is such a lawyer can often present creative alternative solutions to the court. Further, the child's attorney is able to argue the child's interests from the child's perspective, keeping the case focused on the child's needs and the effect of various dispositions on the child.

D-12. Expanded Scope of Representation. The child's attorney may request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. For example:

(1) Child support;
(2) Delinquency or status offender matters;
(3) SSI and other public benefits;
(4) Custody;
(5) Guardianship;
(6) Paternity;
(7) Personal injury;
(8) School/education issues, especially for a child with disabilities;
(9) Mental health proceedings;
(10) Termination of parental rights; and

(11) Adoption.

Commentary

The child's interests may be served through proceedings not connected with the case in which the child's attorney is participating. In such cases the lawyer may be able to secure assistance for the child by filing or participating in other actions. See, e.g., In re Appeal in Pima County Juvenile Action No. S-113432, 872 P.2d 1240 (Ariz. Ct. App. 1994). With an older child or a child with involved parents, the child's attorney may not need court authority to pursue other services. For instance, federal law allows the parent to control special education. A Unified Child and Family Court Model would allow for consistency of representation between related court proceedings, such as mental health or juvenile justice.

D-13. Obligations after Disposition. The child's attorney should seek to ensure continued representation of the child at all further hearings, including at administrative or judicial actions that result in changes to the child's placement or services, so long as the court maintains its jurisdiction.

Commentary

Representing a child should reflect the passage of time and the changing needs of the child. The bulk of the child's attorney's work often comes after the initial hearing, including ongoing permanency planning issues, six month reviews, case plan reviews, issues of termination, and so forth. The average length of stay in foster care is over five years in some jurisdictions. Often a child's case workers, therapists, other service providers or even placements change while the case is still pending. Different judges may hear various phases of the case. The child's attorney may be the only source of continuity for the child. Such continuity not only provides the child with a stable point of contact, but also may represent the institutional memory of case facts and procedural history for the agency and court. The child's attorney should stay in touch with the child, third party caretakers, case workers, and service providers throughout the term of appointment to ensure that the child's needs are met and that the case moves quickly to an appropriate resolution.

Generally it is preferable for the lawyer to remain involved so long as the case is pending to enable the child's interest to be addressed from the child's perspective at all stages. Like the JUVENILE JUSTICE STANDARDS, these ABUSE AND NEGLECT STANDARDS require ongoing appointment and active representation as long as the court retains jurisdiction over the child. To the extent that these are separate proceedings in some jurisdictions, the child's attorney should seek reappointment. Where reappointment is not feasible, the child's attorney should provide records and information about the case and cooperate with the successor to ensure continuity of representation.

E. POST-HEARING

E-1. Review of Court's Order. The child's attorney should review all written orders to ensure that they conform with the court's verbal orders and statutorily required findings and notices.

E-2. Communicate Order to Child. The child's attorney should discuss the order and its consequences with the child.

Commentary

The child is entitled to understand what the court has done and what that means to the child, at least with respect to those portions of the order that directly affect the child. Children may assume that orders are final and not subject to change. Therefore, the lawyer should explain whether the order may be modified at another hearing, or whether the actions of the parties may affect how the order is carried out. For example, an order may permit the agency to return the child to the parent if certain goals are accomplished.

E-3. Implementation. The child's attorney should monitor the implementation of the court's orders and communicate

to the responsible agency and, if necessary, the court, any non-compliance.

Commentary

The lawyer should ensure that services are provided and that the court's orders are implemented in a complete and timely fashion. In order to address problems with implementation, the lawyer should stay in touch with the child, case worker, third party caretakers, and service providers between review hearings. The lawyer should consider filing any necessary motions, including those for civil or criminal contempt, to compel implementation. See, RESOURCE GUIDELINES, at 23.

F. APPEAL

F-1. Decision to Appeal. The child's attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If after such consultation, the child wishes to appeal the order, and the appeal has merit, the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.

Commentary

The lawyer should explain to the child not only the legal possibility of an appeal, but also the ramifications of filing an appeal, including the potential for delaying implementation of services or placement options. The lawyer should also explain whether the trial court's orders will be stayed pending appeal and what the agency and trial court may do pending a final decision.

F-2. Withdrawal. If the child's attorney determines that an appeal would be frivolous or that he or she lacks the necessary experience or expertise to handle the appeal, the lawyer should notify the court and seek to be discharged or replaced.

F-3. Participation in Appeal. The child's attorney should participate in an appeal filed by another party unless discharged.

Commentary

The child's attorney should take a position in any appeal filed by the parent, agency, or other party. In some jurisdictions, the lawyer's appointment does not include representation on appeal. If the child's interests are affected by the issues raised in the appeal, the lawyer should seek an appointment on appeal or seek appointment of appellate counsel to represent the child's position in the appeal.

F-4. Conclusion of Appeal. When the decision is received, the child's attorney should explain the outcome of the case to the child.

Commentary

As with other court decisions, the lawyer should explain in terms the child can understand the nature and consequences of the appellate decision. In addition, the lawyer should explain whether there are further appellate remedies and what more, if anything, will be done in the trial court following the decision.

F-5. Cessation of Representation. The child's attorney should discuss the end of the legal representation and determine what contacts, if any, the child's attorney and the child will continue to have.

Commentary

When the representation ends, the child's lawyer should explain in a developmentally appropriate manner why the representation is ending and how the child can obtain assistance in the future should it become necessary. It is important for there to be closure between the child and the lawyer.

PART II– ENHANCING THE JUDICIAL ROLE IN CHILD REPRESENTATION

PREFACE

Enhancing the legal representation provided by court-appointed lawyers for children has long been a special concern of the American Bar Association [*see, e.g.,* JUVENILE JUSTICE STANDARDS RELATING TO *COUNSEL FOR PRIVATE PARTIES* (1979); ABA Policy Resolutions on Representation of Children (Appendix). Yet, no matter how carefully a bar association, legislature, or court defines the duties of lawyers representing children, practice will only improve if judicial administrators and trial judges play a stronger role in the selection, training, oversight, and prompt payment of court-appointed lawyers in child abuse/neglect and child custody/visitation cases.

The importance of the court's role in helping assure competent representation of children is noted in the JUVENILE JUSTICE STANDARDS RELATING TO COURT ORGANIZATION AND ADMINISTRATION (1980) which state in the Commentary to 3.4D that effective representation of parties is "essential" and that the presiding judge of a court "might need to use his or her position to achieve" it. In its RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES (1995), the National Council of Juvenile and Family Court Judges stated, "Juvenile and family courts should take active steps to ensure that the parties in child abuse and neglect cases have access to competent representation. . . ." In jurisdictions which engage nonlawyers to represent a child's interests, the court should ensure they have access to legal representation.

These Abuse and Neglect Standards, like the RESOURCE GUIDELINES, recognize that the courts have a great ability to influence positively the quality of counsel through setting judicial prerequisites for lawyer appointments including requirements for experience and training, imposing sanctions for violation of standards (such as terminating a lawyer's appointment to represent a specific child, denying further appointments, or even fines or referrals to the state bar committee for professional responsibility). The following Standards are intended to assist the judiciary in using its authority to accomplish the goal of quality representation for all children before the court in abuse/neglect related proceedings.

G. THE COURT'S ROLE IN STRUCTURING CHILD REPRESENTATION

G-1. Assuring Independence of the Child's Attorney. The child's attorney should be independent from the court, court services, the parties, and the state.

Commentary

To help assure that the child's attorney is not compromised in his or her independent action, these Standards propose that the child's lawyer be independent from other participants in the litigation. "Independence" does not mean that a lawyer may not receive payment from a court, a government entity (e.g., program funding from social services or justice agencies), or even from a parent, relative, or other adult so long as the lawyer retains the full authority for independent action. For ethical conflict reasons, however, lawyers should never accept compensation as retained counsel for the child from a parent accused of abusing or neglecting the child. The child's attorney should not prejudge the case. The concept of independence includes being free from prejudice and other limitations to uncompromised representation.

JUVENILE JUSTICE STANDARD *2.1(d) states that plans for providing counsel for children "must be designed to guarantee the professional independence of counsel and the integrity of the lawyer-client relationship." The Commentary strongly asserts there is "no justification for . . . judicial preference" to compromise a lawyer's relationship with the child client and notes the "willingness of some judges to direct lawyers' performance and thereby compromise their independence."*

G-2. Establishing Uniform Representation Rules. The administrative office for the state trial, family, or juvenile court system should cause to be published and disseminated to all relevant courts a set of uniform,

written rules and procedures for court-appointed lawyers for minor children.

Commentary

Although uniform rules of court to govern the processing of various types of child-related judicial proceedings have become common, it is still rare for those rules to address comprehensively the manner and scope of representation for children. Many lawyers representing children are unclear as to the court's expectations. Courts in different communities, or even judges within the same court, may have differing views regarding the manner of child representation. These Standards promote statewide uniformity by calling for written publication and distribution of state rules and procedures for the child's attorney.

G-3. Enhancing Lawyer Relationships with Other Court Connected Personnel. Courts that operate or utilize Court Appointed Special Advocate (CASA) and other nonlawyer guardians ad litem, and courts that administer nonjudicial foster care review bodies, should assure that these programs and the individuals performing those roles are trained to understand the role of the child's attorney. There needs to be effective coordination of their efforts with the activities of the child's attorney, and they need to involve the child's attorney in their work. The court should require that reports from agencies be prepared and presented to the parties in a timely fashion.

Commentary

Many courts now regularly involve nonlawyer advocates for children in various capacities. Some courts also operate programs that, outside of the courtroom, review the status of children in foster care or other out-of-home placements. It is critical that these activities are appropriately linked to the work of the child's attorney, and that the cour through training, policies, and protocols helps assure that those performing the nonlegal tasks (1) understand the importance and elements of the role of the child's attorney, and (2) work cooperatively with such lawyers. The court should keep abreast of all the different representatives involved with the child, the attorney, social worker for government or private agency, CASA volunteer, guardian ad litem, school mediator, counselors, etc.

H. THE COURT'S ROLE IN APPOINTING THE CHILD'S ATTORNEY

H-1. Timing of Appointments. The child's attorney should be appointed immediately after the earliest of:

(1) The involuntary removal of the child for placement due to allegations of neglect, abuse or abandonment;
(2) The filing of a petition alleging child abuse and neglect, for review of foster care placement, or for termination of parental rights; or
(3) Allegations of child maltreatment, based upon sufficient cause, are made by a party in the context of proceedings that were not originally initiated by a petition alleging child maltreatment.

Commentary

These ABUSE AND NEGLECT STANDARDS take the position that courts must assure the appointment of a lawyer for a child as soon as practical (ideally, on the day the court first has jurisdiction over the case, and hopefully, no later than the next business day). The three situations are described separately because:

(1) A court may authorize, or otherwise learn of, a child's removal from home prior to the time a formal petition is instituted. Lawyer representation of (and, ideally, contact with) the child prior to the initial court hearing following removal (which in some cases may be several days) is important to protect the child's interests;

(2) Once a petition has been filed by a government agency (or, where authorized, by a hospital or other agency with child protection responsibilities), for any reason related to a child's need for protection, the child should have prompt access to a lawyer; and

(3) There are cases (such as custody, visitation, and guardianship disputes and family-related abductions of children) where allegations, with sufficient cause, of serious physical abuse, sexual molestation, or severe neglect of a child are presented to the court not by a government agency (i.e., child protective services) but by a parent, guardian, or other relative. The need of a child for competent, independent representation by a lawyer is just as great in situation (3) as with cases in areas (1) and (2).

H-2. Entry of Compensation Orders. At the time the court appoints a child's attorney, it should enter a written order addressing compensation and expense costs for that lawyer, unless these are otherwise formally provided for by agreement or contract with the court, or through another government agency.

Commentary

Compensation and expense reimbursement of individual lawyers should be addressed in a specific written court order is based on a need for all lawyers representing maltreated children to have a uniform understanding of how they will be paid. Commentary to Section 2.1(b) of the JUVENILE JUSTICE STANDARDS observes that it is common for court-appointed lawyers to be confused about the availability of reimbursement of expenses for case-related work.

H-3. Immediate Provision of Access. Unless otherwise provided for, the court should upon appointment of a child's attorney, enter an order authorizing that lawyer access between the child and the lawyer and to all privileged information regarding the child, without the necessity of a further release. The authorization should include, but not be limited to: social services, psychiatric, psychological treatment, drug and alcohol treatment, medical, evaluation, law enforcement, and school records.

Commentary

Because many service providers do not understand or recognize the nature of the role of the lawyer for the child or that person's importance in the court proceeding, these Standards call for the routine use of a written court order that clarifies the lawyers right to contact with their child client and perusal of child-related records. Parents, other caretakers, or government social service agencies should not unreasonably interfere with a lawyer's ability to have face-to-face contact with the child client nor to obtain relevant information about the child's social services, education, mental health, etc. Such interference disrupts the lawyer's ability to control the representation and undermines his or her independence as the child's legal representative.

H-4. Lawyer Eligibility for and Method of Appointment. Where the court makes individual appointment of counsel, unless impractical, before making the appointment, the court should determine that the lawyer has been trained in representation of children and skilled in litigation (or is working under the supervision of an lawyer who is skilled in litigation). Whenever possible, the trial judge should ensure that the child's attorney has had sufficient training in child advocacy and is familiar with these Standards. The trial judge should also ensure that (unless there is specific reason to appoint a specific lawyer because of their special qualifications related to the case, or where a lawyer's current caseload would prevent them from adequately handling the case) individual lawyers are appointed from the ranks of eligible members of the bar under a fair, systematic, and sequential appointment plan.

Commentary

The JUVENILE JUSTICE STANDARDS 2.2(c) provides that where counsel is assigned by the court, this lawyer should be drawn from "an adequate pool of competent attorneys." In general, such competency can only be gained through relevant continuing legal education and practice-related experience. Those Standards also promote the use of a rational court appointment process drawing from the ranks of qualified lawyers. The Abuse and Neglect Standards reject the concept of ad hoc appointments of counsel that are made without regard to prior training or practice.

H-5. Permitting Child to Retain a Lawyer. The court should permit the child to be represented by a retained private lawyer if it determines that this lawyer is the child's independent choice, and such counsel should be substituted for the appointed lawyer. A person with a legitimate interest in the child's welfare may retain private counsel for the child and/or pay for such representation, and that person should be permitted to serve as the child's attorney, subject to approval of the court. Such approval should not be given if the child opposes the lawyer's representation or if the court determines that there will be a conflict of interest. The court should make it clear that the person paying for the retained lawyer does not have the right to direct the representation of the child or to receive privileged information about the case from the lawyer.

Commentary

Although such representation is rare, there are situations where a child, or someone acting on a child's behalf, seeks out legal representation and wishes that this lawyer, rather than one appointed by the court under the normal appointment process, be recognized as the sole legal representative of the child. Sometimes, judges have refused to accept the formal appearances filed by such retained lawyers. These Standards propose to permit, under carefully scrutinized conditions, the substitution of a court-appointed lawyer with the retained counsel for a child.

I. THE COURT'S ROLE IN LAWYER TRAINING

I-1. Judicial Involvement in Lawyer Training. Trial judges who are regularly involved in child-related matters should participate in training for the child's attorney conducted by the courts, the bar, or any other group.

Commentary

JUVENILE JUSTICE STANDARDS 2.1 indicates that it is the responsibility of the courts (among others) to ensure that competent counsel are available to represent children before the courts. That Standard further suggests that lawyers should "be encouraged" to qualify themselves for participation in child-related cases "through formal training." The Abuse and Neglect Standards go further by suggesting that judges should personally take part in educational programs, whether or not the court conducts them. The National Council of Juvenile and Family Court Judges has suggested that courts can play in important role in training lawyers in child abuse and neglect cases, and that judges and judicial officers can volunteer to provide training and publications for continuing legal education seminars. See, RESOURCE GUIDELINES, at 22.

I-2. Content of Lawyer Training. The appropriate state administrative office of the trial, family, or juvenile courts should provide educational programs, live or on tape, on the role of a child's attorney. At a minimum, the requisite training should include:

(1) Information about relevant federal and state laws and agency regulations;
(2) Information about relevant court decisions and court rules;
(3) Overview of the court process and key personnel in child-related litigation;
(4) Description of applicable guidelines and standards for representation;
(5) Focus on child development, needs, and abilities;
(6) Information on the multidisciplinary input required in child-related cases, including information on local experts who can provide consultation and testimony on the reasonableness and appropriateness of efforts made to safely maintain the child in his or her home;
(7) Information concerning family dynamics and dysfunction including substance abuse, and the use of kinship care;
(8) Information on accessible child welfare, family preservation, medical, educational, and mental health resources for child clients and their families, including placement, evaluation/diagnostic, and treatment services; the structure of agencies providing such services as well as provisions and constraints related to agency payment for services; and
(9) Provision of written material (e.g., representation manuals, checklists, sample forms), including

listings of useful material available from other sources.

Commentary

The ABUSE AND NEGLECT STANDARDS take the position that it is not enough that judges mandate the training of lawyers, or that judges participate in such training. Rather, they call upon the courts to play a key role in training by actually sponsoring (e.g., funding) training opportunities. The pivotal nature of the judiciary's role in educating lawyers means that courts may, on appropriate occasions, stop the hearing of cases on days when training is held so that both lawyers and judges may freely attend without docket conflicts. The required elements of training are based on a review of well-regarded lawyer training offered throughout the country, RESOURCE GUIDELINES, and many existing manuals that help guide lawyers in representing children.

I-3. Continuing Training for Lawyers. The court system should also assure that there are periodic opportunities for lawyers who have taken the "basic" training to receive continuing and "new developments" training.

Commentary

Many courts and judicial organizations recognize that rapid changes occur because of new federal and state legislation, appellate court decisions, systemic reforms, and responses to professional literature. Continuing education opportunities are critical to maintain a high level of performance. These Standards call for courts to afford these "advanced" or "periodic" training to lawyers who represent children in abuse and neglect related cases.

I-4. Provision of Mentorship Opportunities. Courts should provide individual court-appointed lawyers who are new to child representation the opportunity to practice under the guidance of a senior lawyer mentor.

Commentary

In addition to training, particularly for lawyers who work as sole practitioners or in firms that do not specialize in child representation, courts can provide a useful mechanism to help educate new lawyers for children by pairing them with more experienced advocates. One specific thing courts can do is to provide lawyers new to representing children with the opportunity to be assisted by more experienced lawyers in their jurisdiction. Some courts actually require lawyers to "second chair" cases before taking an appointment to a child abuse or neglect case. See, RESOURCE GUIDELINES, at 22.

J. THE COURT'S ROLE IN LAWYER COMPENSATION

J-1. Assuring Adequate Compensation. A child's attorney should receive adequate and timely compensation throughout the term of appointment that reflects the complexity of the case and includes both in court and out-of-court preparation, participation in case reviews and post-dispositional hearings, and involvement in appeals. To the extent that the court arranges for child representation through contract or agreement with a program in which lawyers represent children, the court should assure that the rate of payment for these legal services is commensurate with the fees paid to equivalently experienced individual court-appointed lawyers who have similar qualifications and responsibilities.

Commentary

JUVENILE JUSTICE STANDARDS 2.1(b) recognize that lawyers for children should be entitled to reasonable compensation for both time and services performed "according to prevailing professional standards," which takes into account the "skill required to perform...properly," and which considers the need for the lawyer to perform both counseling and resource identification/evaluation activities. The RESOURCE GUIDELINES, at 22, state that it is "necessary to provide reasonable compensation" for improved lawyer representation of children and that where necessary judges should "urge state legislatures and local governing bodies to provide sufficient funding" for quality legal representation.

Because some courts currently compensate lawyers only for time spent in court at the adjudicative or initial disposition stage of cases, these Standards clarify that compensation is to be provided for out-of-court preparation time, as well as for the lawyer's involvement in case reviews and appeals. "Out-of-court preparation" may include, for example, a lawyer's participation in social services or school case conferences relating to the client.

These Standards also call for the level of compensation where lawyers are working under contract with the court to provide child representation to be comparable with what experienced individual counsel would receive from the court. Although courts may, and are encouraged to, seek high quality child representation through enlistment of special children's law offices, law firms, and other programs, the motive should not be a significantly different (i.e., lower) level of financial compensation for the lawyers who provide the representation.

J-2. Supporting Associated Costs. The child's attorney should have access to (or be provided with reimbursement for experts, investigative services, paralegals, research costs, and other services, such as copying medical records, long distance phone calls, service of process, and transcripts of hearings as requested.

Commentary

The ABUSE AND NEGLECT STANDARDS expand upon JUVENILE JUSTICE STANDARDS *2.1(c) which recognizes that a child's attorney should have access to "investigatory, expert and other nonlegal services" as a fundamental part of providing competent representation.*

J-3. Reviewing Payment Requests. The trial judge should review requests for compensation for reasonableness based upon the complexity of the case and the hours expended.

Commentary

These Standards implicitly reject the practice of judges arbitrarily "cutting down" the size of lawyer requests for compensation and would limit a judge's ability to reduce the amount of a per/case payment request from a child's attorney unless the request is deemed unreasonable based upon two factors: case complexity and time spent.

J-4. Keeping Compensation Levels Uniform. Each state should set a uniform level of compensation for lawyers appointed by the courts to represent children. Any per/hour level of compensation should be the same for all representation of children in all types of child abuse and neglect-related proceedings.

Commentary

These Standards implicitly reject the concept (and practice) of different courts within a state paying different levels of compensation for lawyers representing children. They call for a uniform approach, established on a statewide basis, towards the setting of payment guidelines.

K. THE COURT'S ROLE IN RECORD ACCESS BY LAWYERS

K-1. Authorizing Lawyer Access. The court should enter an order in child abuse and neglect cases authorizing the child's attorney access to all privileged information regarding the child, without the necessity for a further release.

Commentary

This Standard requires uniform judicial assistance to remove a common barrier to effective representation, i.e., administrative denial of access to significant records concerning the child. The language supports the universal issuance of broadly-worded court orders that grant a child's attorney full access to information (from individuals) or records (from agencies) concerning the child.

K-2. Providing Broad Scope Orders. The authorization order granting the child's attorney access to records should include social services, psychiatric, psychological treatment, drug and alcohol treatment, medical, evaluation, law enforcement, school, and other records relevant to the case.

Commentary

This Standard further elaborates upon the universal application that the court's access order should be given, by listing examples of the most common agency records that should be covered by the court order.

L. THE COURT'S ROLE IN ASSURING REASONABLE LAWYER CASELOADS

L-1. Controlling Lawyer Caseloads. Trial court judges should control the size of court-appointed caseloads of individual lawyers representing children, the caseloads of government agency-funded lawyers for children, or court contracts/agreements with lawyers for such representation. Courts should take steps to assure that lawyers appointed to represent children, or lawyers otherwise providing such representation, do not have such a large open number of cases that they are unable to abide by Part I of these Standards.

Commentary

THE ABUSE AND NEGLECT STANDARDS go further than JUVENILE JUSTICE STANDARD *2.2(b) which recognize the "responsibility of every defender office to ensure that its personnel can offer prompt, full, and effective counseling and representation to each (child) client" and that it "should not accept more assignments than its staff can adequately discharge" by specifically calling upon the courts to help keep lawyer caseloads from getting out of control. The Commentary to 2.2.(b) indicates that: Caseloads must not be exceeded where to do so would "compel lawyers to forego the extensive fact investigation required in both contested and uncontested cases, or to be less than scrupulously careful in preparation for trial, or to forego legal research necessary to develop a theory of representation." We would add: "...or to monitor the implementation of court orders and agency case plans in order to help assure permanency for the child."*

L-2. Taking Supportive Caseload Actions. If judges or court administrators become aware that individual lawyers are close to, or exceeding, the levels suggested in these Standards, they should take one or more of the following steps:

(1) Expand, with the aid of the bar and children's advocacy groups, the size of the list from which appointments are made;
(2) Alert relevant government or private agency administrators that their lawyers have an excessive caseload problem;
(3) Recruit law firms or special child advocacy law programs to engage in child representation;
(4) Review any court contracts/agreements for child representation and amend them accordingly, so that additional lawyers can be compensated for case representation time; and
(5) Alert state judicial, executive, and legislative branch leaders that excessive caseloads jeopardize the ability of lawyers to competently represent children pursuant to state-approved guidelines, and seek funds for increasing the number of lawyers available to represent children.

Commentary

This Standard provides courts with a range of possible actions when individual lawyer caseloads appear to be inappropriately high.

APPENDIX

Previous American Bar Association Policies Related to Legal Representation of Abused and Neglected Children

GUARDIANS AD LITEM
FEBRUARY 1992

BE IT RESOLVED, that the American Bar Association urges:

(1) Every state and territory to meet the full intent of the Federal Child Abuse Prevention and Treatment Act, whereby every child in the United States who is the subject of a civil child protection related judicial proceedings will be represented at all stages of these proceedings by a fully-trained, monitored, and evaluated guardian ad litem in addition to appointed legal counsel.

(2) That state, territory and local bar associations and law schools become involved in setting standards of practice for such guardians ad litem, clarify the ethical responsibilities of these individuals and establish minimum ethical performance requirements for their work, and provide comprehensive multidisciplinary training for all who serve as such guardians ad litem.

(3) That in every state and territory, where judges are given discretion to appoint a guardian ad litem in private child custody and visitation related proceedings, the bench and bar jointly develop guidelines to aid judges in determining when such an appointment is necessary to protect the best interests of the child.

COURT-APPOINTED SPECIAL ADVOCATES
AUGUST 1989

BE IT RESOLVED, that the American Bar Association endorses the concept of utilizing carefully selected, well trained lay volunteers, Court Appointed Special Advocates, in addition to providing attorney representation, in dependency proceedings to assist the court in determining what is in the best interests of abused and neglected children.

BE IT FURTHER RESOLVED, that the American Bar Association encourages its members to support the development of CASA programs in their communities.

COUNSEL FOR CHILDREN ENHANCEMENT
FEBRUARY 1987

BE IT RESOLVED, that the American Bar Association requests State and local bar associations to determine the extent to which statutory law and court rules in their States guarantee the right to counsel for children in juvenile court proceedings; and

BE IT FURTHER RESOLVED, that State and local bar associations are urged to actively participate and support amendments to the statutory law and court rules in their State to bring them in to compliance with the Institute of Judicial Administration/American Bar Association Standards Relating to Counsel for Private Parties; and

BE IT FURTHER RESOLVED, that State and local bar associations are requested to ascertain the extent to which, irrespective of the language in their State statutory laws and court rules, counsel is in fact provided for children in juvenile court proceedings and the extent to which the quality of representation is consistent with the standards and policies of the American Bar Association; and

BE IT FURTHER RESOLVED, that State and local bar associations are urged to actively support programs of training and education to ensure that lawyers practicing in juvenile court are aware of the American Bar Association's standards relating to representation of children and provide advocacy which meets those standards.

BAR ASSOCIATION AND ATTORNEY ACTION
FEBRUARY 1984

BE IT RESOLVED, that the American Bar Association urges the members of the legal profession, as well as state and local bar associations, to respond to the needs of children by directing attention to issues affecting children including, but not limited to: ... (7) establishment of guardian ad litem programs.

BAR AND ATTORNEY INVOLVEMENT IN CHILD PROTECTION CASES
AUGUST 1981

BE IT RESOLVED, that the American Bar Association encourages individual attorneys and state and local bar organizations to work more actively to improve the handling of cases involving abused and neglected children as well as children in foster care. Specifically, attorneys should form appropriate committees and groups within the bar to ... work to assure quality legal representation for children....

JUVENILE JUSTICE STANDARDS
FEBRUARY 1979

BE IT RESOLVED, that the American Bar Association adopt (the volume of the) Standards for Juvenile Justice (entitled) Counsel for Private Parties...

III. Practice Standards
c. Representation of CASA/GAL in Dependent/Neglect Cases

Section XXIII, Representation of CASA/GAL in Dependent/Neglect Cases

Note: OPD is currently not responsible for providing representation in these cases.

XXIII. REPRESENTATION OF COURT APPOINTED SPECIAL ADVOCATES AND GUARDIANS AD LITEM IN DEPENDENT/NEGLECT CASES

GOALS:

A. To actively, professionally advocate for the court appointed special advocate (CASA) or guardian *ad litem* (GAL) appointed to represent the best interest of the child in an abuse/neglect (DN) proceeding.

B. To serve expressed wishes of the CASA/GAL and be independent from other participants in the litigation, including the child's parents or guardians, and the child's attorney, in representing the CASA/GAL.

C. To exercise professional judgment in carrying out the duties assigned and to participate fully in the case on behalf of the CASA/GAL.

D. To recognize that children are at a critical stage of development and that skilled advocacy on behalf of the CASA/GAL will positively impact the course of the child's life.

Practice Standards

September 26, 2018

Section XXIII, Representation of CASA/GAL in Dependent/Neglect Cases

Note: OPD is currently not responsible for providing representation in these cases.

1. TRAINING:

A. To be eligible for assignment to represent CASA/GAL in these court proceedings, counsel shall complete all training required of CASA/GAL, or the equivalent of such training in the form of experience and/or other training as is acceptable to OPD.

B. In addition, counsel shall complete training devoted to the Indian Child Welfare Act.

C. Counsel shall be knowledgeable in the following areas:

a. Legislation and case law on abuse and neglect, termination of parental rights, and adoption of children including those with special needs;
b. Child and adolescent development;
c. Child welfare and family preservation services available in the community and the problems they are designed to address;
d. Services and treatment options for youth both locally and statewide;
e. Services the State will and won't routinely pay for;
f. The structure and functioning of Child and Family Services of the Department of Public Health and Human Services;
g. Local experts who can provide attorneys with consultation and testimony on the reasonableness and appropriateness of efforts to maintain or return the child to the home;
h. Local and state experts who can provide attorneys with consultation and testimony of the special needs of Indian children and cultural differences;
i. Basic knowledge of brain development and the effect of trauma on brain development
j. Basic knowledge of mental health issues;
k. Substance abuse issues;
l. Special education laws, rights and remedies;
m. School related issued including school disciplinary procedures, zero tolerance policies, and IEPs; and
n. Basic knowledge of disability rights and issues.

D. Case Load

a. In order for OPD to effectively monitor the assignment of DN cases, counsel for CASA/GAL has an affirmative duty to promptly notify OPD any time counsel's case load is excessive and/or affecting counsel's ability to provide appropriate legal representation.

Section XXIII, Representation of CASA/GAL in Dependent/Neglect Cases

Note: OPD is currently not responsible for providing representation in these cases.

2. CASE PREPARATION:

A. Duties of Counsel for CASA/GAL and Scope of Representation

a. Counsel for a CASA/GAL shall participate in any proceeding concerning the child and which involves the CASA/GAL with the same rights and obligations as any other attorney for a party to the proceeding.

b. The duties of counsel for a CASA/GAL include, but are not limited to:

i. Taking all steps reasonably necessary to represent the CASA/GAL in the proceeding, including but not limited to: preparing for and participating in negotiations and hearings, drafting and submitting motions, memoranda and orders, and such other steps as established by the applicable standards of practice for attorneys acting on behalf of CASA/GAL in this jurisdiction;

ii. Communicating with the CASA/GAL prior to each hearing; and

iii. Representing the CASA/GAL in all proceedings affecting the issues before the court.

B. Following appointment counsel shall actively represent the CASA/GAL at all stages of the proceeding. When counsel becomes aware of the assignment, counsel shall communicate with the CASA/GAL as soon as possible and sufficiently before any scheduled hearing or proceeding, including the show cause hearing, to permit effective preparation.

C. Counsel shall maintain the attorney-client privilege with the understanding that counsel represents the CASA/GAL alone and not the youth, his/her parents or guardians, or the Department of Public Health and Human Services. The potential for a conflict of interest should be clearly recognized and acknowledged. Counsel should inform all parties that he/she is counsel for the CASA/GAL and that in the event of a disagreement between a child, parent or guardian, or the Department of Public Health and Human Services, and the CASA/GAL, counsel is required to serve exclusively the interest of the CASA/GAL.

D. The Montana Rules of Professional Conduct govern the obligations of counsel for a CASA/GAL

Section XXIII, Representation of CASA/GAL in Dependent/Neglect Cases

Note: OPD is currently not responsible for providing representation in these cases.

E. Duration of Appointment:
   a. Counsel for a CASA/GAL shall continue to represent the CASA/GAL at all stages of the proceeding, until appropriately discharged, or the case is dismissed and/or the youth at issue has aged out of the DN process.

F. Counsel for CASA/GAL may not waive child's right to counsel at any court proceedings.

Section XXIII, Representation of CASA/GAL in Dependent/Neglect Cases

Note: OPD is currently not responsible for providing representation in these cases.

3. HANDLING THE CASE:

A. Counsel for a CASA/GAL should seek the most expedient and timely resolution of the proceeding possible while providing effective advocacy for the CASA/GAL. Counsel should avoid seeking continuances unless it is necessary to effectively advocate for the CASA/GAL.

B. Counsel shall be familiar with the applicable court rules and rules of evidence.

C. In preparation for any hearing counsel shall:

a. Review the petition and all other evidence;
b. Be fully informed of the rules of evidence, court rules, and the law with relation to all stages of the hearing process; be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the hearing.
c. Be aware of the substantive and procedural law regarding the preservation of legal error for appellate review;
d. Preserve confidentiality in accordance with law.
e. Prepare the CASA/GAL for the proceeding, explain the issues involved, and the review the alternatives open to the judge;
f. Review all statements, documents, reports , and documentary evidence, including medical records, if any, and discuss these documents with the CASA/GAL;
g. Familiarize himself/herself with relevant law; and,
h. Interview all witnesses, favorable and adverse as directed by the CASA/GAL.

D. During any proceedings, counsel shall, when it furthers the position and recommendations of the CASA/GAL and is a necessary part of that representation:

a. Examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence;
b. Offer evidence favorable to the CASA/GAL's case, if available; and,
c. Determine whether an expert is needed to assist in preparation of the CASA/GAL's case.

E. If counsel withdraws from representation at any time during the legal process, counsel shall make reasonable efforts to ensure that the CASA/GAL has replacement legal representation by filing a notice of withdrawal with the applicable court and moving that court to appoint new replacement counsel.

F. Counsel for CASA/GAL may not engage in ex parte contact with the court except as authorized by the applicable rules of professional conduct, court order, or other law.

Section XXIII, Representation of CASA/GAL in Dependent/Neglect Cases

Note: OPD is currently not responsible for providing representation in these cases.

4. ATTORNEY WORK PRODUCT AND TESTIMONY:

A. Except as provided otherwise by the Montana Rules of Professional Conduct, court order, or statute counsel for a CASA / GAL shall not surrender to any party work product developed during the appointment absent consent by the CASA/GAL;

B. Counsel shall also ensure, whenever necessary and possible, that the CASA/GAL is present and available to provide testimony and/or be subject to cross-examination during the hearings.

IV. Memorandums, Articles, and Research

IV. Memorandums, Articles, and Research

a. Trauma Caused by Separation

Trauma Caused by Separation of Children from Parents

A Tool to Help Lawyers

This tool was created by the Children's Rights Litigation Committee of the American Bar Association Section of Litigation. Thank you to everyone who contributed to this document including DLA Piper LLP (US); Andrew Cohen, Dir. of Appellate Panel, Massachusetts Committee for Public Counsel Services, Children & Family Law Division, and Aylin Corapcioglu and Mariel Smith, Legal Interns, Massachusetts Committee for Public Counsel Services, Children & Family Law Division; and Krista Ellis, former legal intern, American Bar Association Center on Children and the Law

Information is up to date as of May 2019. To share information to be added to this tool or provide feedback, please contact cathy.krebs@americanbar.org

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I. EXECUTIVE SUMMARY

This memorandum provides a summary of extensive research detailing the grave consequences that result when a child is separated from his or her parent(s).

Part II sets forth talking points for use by trial and appellate lawyers during oral argument. These talking points distill the key themes and conclusions of the clinical and legal research set out in the balance of this memorandum.

Part III begins with a review of the clinical literature concerning the well-documented psychological and physical effects of removal generally. These resources find that the negative effects of removal often far outweigh the harm allegedly inflicted on the child by his or her parent. Part III next reviews relevant case law and legal journal articles applying these clinical findings in cases involving removal or attempted removal. Because one of the original driving forces behind development of this memorandum was the federal government's policy of separating children from their parents at the border, the cases summarized in this memorandum generally concern challenges to that policy. The courts rely heavily on literature from the scientific and medical communities describing the negative effects of parent-child separation.

Part IV reviews literature discussing the effects of placement into foster care, which concludes that those effects are negative and substantial. The memorandum then reviews literature that may serve as a resource for parents facing a removal or who have already lost their children. Some of this literature provides guidance on healthy and effective parenting strategies; other literature addresses the potential benefits of post-removal visitation, mental health counseling, and other social services. Though not particularly useful for a memorandum of law in opposition to a removal petition, these resources may be helpful in counseling the client on practical actions he or she might take to protect the relationship with his or her child.

Part V reviews literature regarding the physical effects of "toxic stress," which is prevalent among children who are removed from the parental home.

Finally, Part VI of the memorandum provides a listing of available additional resources assessing the effects of removal, including studies on the outcomes for children removed from the parental home and the long-term effects of the trauma that results from removal.

II. TALKING POINTS FOR TRIAL AND APPELLATE LAWYERS

Set forth below is a list of key talking points intended for potential use in oral argument before a trial or appellate court to encourage the court to consider how separating children from their family causes them significant trauma. Lawyers can use this research to encourage courts to weigh the risks of remaining at home with the proven harm from separation from family.

- Although the courts, at the time of initial removal, must focus on harm, risk, and the best interests of the child in the home, they cannot properly assess those factors without considering the scientifically established damage caused by removal from primary caretakers. (Gambril & Shlonsky 2001).

- Several cases, relying on the scientific research and expert testimony, acknowledge that children's physical and mental health are seriously damaged by separation from primary caretakers. See, e.g., Ms. L. v. U.S. Immigration & Customs Enforcement, 310 F.Supp. 3d 1133, 1147 (S.D.Cal. 2018); Nolasco v. U.S. Immigration & Customs Enforcement, 319 F.Supp. 3d 491, 503 (D.D.C. 2018); M.G.U. v. Nielsen, 325 F.Supp. 3d 111, 122 (D.D.C.2018); Nicholson v. Williams, 203 F.Supp. 2d 153, 198-99 (E.D.N.Y. 2002).

A. Harm from Removal

Clinical research shows that:

- Children who are removed are "overwhelmed with feelings of abandonment, rejection, worthlessness, guilt, and helplessness." (Folman, 1998).
- Separation floods stress hormones throughout the child's brain and body, leading to:
  - difficulty sleeping, developmental regression, heart disease, hypertension, obesity, diabetes, and decreased longevity. (Goydarzi 2018; Eck 2018; Carnes 2018)
  - permanent architectural changes in the brain, including lower IQs. (Wan 2018)
  - depression, more suicide attempts, and more problems with alcohol abuse and gambling. (Wan 2018; Goydarzi 2018; Eck 2018; Carnes 2018).
- Children generally suffer worse outcomes when removed than if they had been allowed to remain in marginal homes. In studies of similarly situated children (those with social services involvement facing possible removal), children who were, in fact, removed (compared to those remaining at home):
  - have two to three times higher delinquency rates. (Ryan & Testa 2005; Doyle 2007; Doyle 2008; Lowenstein 2018)
  - have higher teen birth rates. (Doyle 2007)
  - have lower earnings as adults. (Doyle 2007)
  - are two to three times more likely to enter the criminal justice system as adults. (Doyle 2008)
  - are twice as likely to have learning disabilities and developmental delays. (Lowenstein 2018)

- are six times more likely to have behavioral problems. (Lowenstein 2018)
- as adults, are more likely to have substance-related disorders, psychotic or bipolar disorders, and depression and anxiety disorders. (Côté et al. 2018)
- as adults, have arrest rates two to three times higher, and are more likely to have criminal convictions for violent offenses. (Doyle 2008; Côté et al. 2018)

- Studies of youth and children who have experienced maltreatment found that:
  - maltreated youth who are placed in out-of-home care had a higher risk of criminal behavior (as both juveniles or adults) compared to maltreated youth who remain at home. (Yoon, Bender & Park 2018)
  - children who experience out-of-home placement due to maltreatment have an over 1.5 times higher risk of mortality between the ages of 20-56 compared to children who experience maltreatment but remain at home. (Gao, Brannstrom & Almquist 2017)
- Studies examining the outcomes for individuals placed in foster care as children found that:
  - more than half of the individuals in one of the studies had clinical levels of at least one mental health problem, and 20% of the individuals in that study had three or more mental health problems, both of which are substantially higher than those of the general population in the same age range as the sample. (Northwest Foster Care Alumni Study 2005)
  - foster children have been shown to have higher rates of health problems than other poor children receiving Medicaid. (Trivedi 2019)
  - 68% of the studied children had not been vaccinated for mumps; 36% had not received vaccination for measles; and 23% had not received protection from diphtheria, tetanus and pertussis. (Trivedi 2019)
  - an estimated 12% received no routine healthcare, 34% received no immunizations, and 32% had at least some identified health needs that were not met. (Trivedi 2019)
  - foster children experience poorer sexual health outcomes, engage in sexual behavior at a younger age, and are more likely to engage in riskier sexual behavior than their peers in the general population (Trivedi 2019)
  - post-traumatic stress disorder (PTSD) rates for individuals in one of the studies was up to twice as high as for U.S. war veterans. (Northwest Foster Care Alumni Study 2005)
  - completion rates for post-secondary education among foster care alumni were dramatically lower than the general population. (Northwest Foster Care Alumni Study 2005)

III. HARM RESULTING FROM SEPARATION OF PARENT AND CHILD

A. Introduction

This section of the memorandum explores three areas of research concerning the harms visited upon children as a result of forced removal from their parents. First, this section reviews the scientific literature discussing the general effects of removal on the child. As these resources indicate, the short- and long-term effects on the child's mental and physical well-being are often devastating. These effects include severe anxiety, depression, PTSD, and toxic stress (reviewed separately in Part V below). Separation can also result in delays in cognitive development. Further, the child may suffer physical harm that is manifested as a result of stress-induced releases of hormones that impact brain and organ function. Second, this section summarizes key court decisions and law journal articles that recognize the deleterious effects of parent-child separation. With respect to the case law, this memorandum focuses principally on decisions concerning the challenges to the government's policy of parent-child separation at the border. Those decisions recognize that even temporary separation can result in irreparable and grave harm. The law journal articles similarly build on and adopt the findings of the scientific community and advocate for the courts' careful exercise of their discretion in child removal cases. Third, and finally, this section analyzes research specifically addressing the negative impact of placement into foster care and the negative effects associated with living in foster care.

B. Scientific Research on the Effects of Removal from Parents Generally

- Allison Eck, Psychological Damage Inflicted by Parent-Child Separation is Deep, Long-Lasting, NOVA Next (June 20, 2018), http://www.pbs.org/wgbh/nova/next/body/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting/?utm_source=FBPAGE&utm_medium=social&utm_term=20180620&utm_content=1603761016&linkId=53285432&utm_source=FBPAGE&utm_medium=social&utm_term=20180623&utm_content=1608267756&linkId=53391996

  In response to the separation of families at the border in 2018, this article explores the harm that can result when a child is removed from his or her parents. Citing statements released by the scientific community in response to current events, the article focuses on the devastating effects for both child and parent. The article quotes Erin C. Dunn, a social and psychiatric epidemiologist at Massachusetts General Hospital's Center, who states that, "The scientific evidence against separating children from families is crystal clear," and "[w]e all know it is bad for children to be separated from caregivers." The article details the harm that can result from the "monsoon of stress hormones… flood[ing] the brain and body," noting potential increased risks of developing heart disease, diabetes, and even certain forms of cancer. Quoting Carmen Rosa Norona, Child Trauma Clinical Services and Training Lead of Boston Medical Center's Child Witness to Violence Project, the article states that even when children are in the care of parents who may not be able to meet their needs, they "still organize their behaviors and thinking around these relationships and go to great lengths to maintain them."

- Sara Goydarzi, Separating Families May Cause Lifelong Health Damage, Scientific American (June 2018), https://www.scientificamerican.com/article/separating-families-may-cause-lifelong-health-damage/.

  This article documents the potential long-term effects of family separation on children. The article includes an interview with Alan Shapiro, Assistant Clinical Professor of Pediatrics at Albert Einstein College of Medicine, in which he examines the various acute and long-term harms caused by family separation. According to Shapiro, separation can impact children in various ways, including developmental regression, difficulty sleeping, depression, and acute stress. Dr. Shapiro also notes that "[t]he younger you are when you're exposed to stress . . . , the more likely you will have negative health outcomes caused by dysregulation of stress response." That dysregulated stress response, in turn, "leads to architectural changes in the brain—which means that in the future children might end up with serious learning, developmental and health problems." Pointing to the results of a 17,000-patient study called Adverse Child Experiences ("ACEs"), Dr. Shapiro further asserts that family separation may also lead to long-term chronic medical conditions like cardiovascular disease, hypertension, obesity, and decreased longevity.

- National Center for Missing & Exploited Children key facts (2017), https://web.archive.org/web/20181016212108/http:/www.missingkids.org/KeyFacts.

  Separating a child from their parents and putting them into the care of social services can increase a child's risk of becoming a runaway and a victim of child sex trafficking. "Of the nearly 25,000 runaways reported to NCMEC in 2017, one in seven were likely victims of child sex trafficking. Of those, 88 percent were in the care of social services when they went missing."

- Kimberly Howard et al., Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families, 13 Attachment & Human Development 5 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3115616/.

  This study examines the impact of early mother-child separation on both maternal parenting and later child development through the lens of attachment theory, which generally posits "that caregivers must be present and accessible in order for their children to become attached to them." The study defines separation broadly as *any* separation from the mother that lasts one week or more within the child's first two years of life. The study concludes that any such separation—even those occurring for innocuous reasons—can "result in distress for a young child who lacks the cognitive abilities to understand the continuity of maternal availability." The study's findings were based on observations of 2,080 predominantly poor families collected over a period of five years. Controlling for baseline family characteristics and indicators of family instability, the study found that the separation of mother and child was related to higher levels of child negativity toward mothers (at age 3) and aggression (at ages 3 and 5).

- Marcia McNutt, Statement on Harmful Consequences of Separating Families at the U.S. Border, National Academies of Sciences Engineering Medicine (June 20, 2018),

http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=06202018&_ga=2.2927672.960183307.1530129958-713614449.1530129958.

This statement deals primarily with the separation of immigrant families at the border, but bases its conclusions on research concerning the effects of the removal of children from their parents more generally. Relying on a comprehensive study by the National Academies of Sciences, Engineering, and Medicine ("NASEM"), the statement asserts that family separation "jeopardize[s] the short- and long-term health and well-being of the children involved." The statement further notes NASEM's finding that in light of the complex interactions among genetic, biological, psychological, and social processes during child development, family disruption can "hinder health development and increase[] the risk of future disorders."

This statement points the reader in the direction of several key resources:

1. NASEM, Parenting Matters: Supporting Parents of Children Ages 0-8 (2016), https://www.nap.edu/read/21868/chapter/2

2. Nat'l Res. Council & Inst. of Med., Preventing Mental Emotional, and Behavior Disorders Among Young People: Progress and Possibilities, Ch. 4 (2009), https://www.nap.edu/read/12480/chapter/7#74

3. Nat'l Res. Council & Inst. of Med., From Neurons to Neighborhoods: The Science of Early Childhood Development, Ch. 20 (2000), https://www.nap.edu/read/9824/chapter/20#387

4. Inst. of Med., Reducing Suicide: A National Imperative, Exec. Summ. (2002), https://www.nap.edu/read/10398/chapter/2

- NOVA PBS Official, Inside the Brains of Children Separated from Parents, YouTube (June 25, 2018), https://www.youtube.com/watch?v=bwpcn8sRtqg&feature=youtu.be.

This short informational film provides a summary of the neurological processes that occur when a child is separated from her parents. Through visual aids, the film demonstrates how stress from separation can impact a child's brain within the first few minutes of removal. According to psychologists Karlen Lyons-Ruth and Robin Deutsch, even very brief separations are stressful for infants and young children because cortisol (a stress hormone) floods the brain and begins to damage brain cells. Additionally, the over-activation of the amygdala, the portion of the brain responsible for fight-or-flight instincts, can compromise the child's ability to evaluate risks and make good decisions. The ability to form an attachment with a reliable and consistent caregiver is fundamental to a child's cognitive and social development. Time is very important when dealing with young children because deterioration of this attachment can take place very quickly; even a few weeks away from a parent is an enormous amount of time for an infant.

- William Wan, What Separation from Parents Does to Children: 'The Effect is Catastrophic', Washington Post (June 18, 2018), https://www.washingtonpost.com/national/health-science/what-separation-from-parents-

does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019fcfe4_story.html?noredirect=on&utm_term=.cf5ca597dc72

This article discusses generally the research on child-parent separation that "is driving pediatricians, psychologists, and other health experts to vehemently oppose the Trump administration's new border crossing policy." The cross-cultural research presented provides insight into the physical and psychological impact of child-parent separation in a wide range of circumstances. Of particular interest is the discussion of Charles Nelson's research, which studied the neurological development of children in Romanian orphanages.

A pediatrics professor at Harvard Medical School, Nelson found that the children "separated from their parents at a young age had much less white matter, which is largely made up of fibers that transmit information throughout the brain, as well as much less gray matter, which contains brain-cell bodies that process information and solve problems." Nelson also noted that children who were separated from their parents within the first two years of their life scored significantly lower on IQ tests later in life and their fight-or-flight response system appeared "permanently broken." The article also references research on aboriginal children removed from their parents in Australia who, when compared to children who remained with their parents, were "nearly twice as likely to be arrested or criminally charged as adults, 60 percent more likely to have alcohol-abuse problems, and more than twice as likely to struggle with gambling." As the article notes, it is the duration of this damage that is the most troubling aspect of separating parents and children: "Unlike other parts of the body, most cells in the brain cannot renew or repair themselves."

- The Science of Childhood Trauma and Family Separation: A Discussion of Short – and Long-Term Effects, Cynthia García Coll, Ph.D; Gabriela Livas Stein, Ph.D; Nim Tottenham, Ph.D; D, Youtube (June 28, 2018) https://www.youtube.com/watch?v=9-34LJoM1HY&t=3s

This webinar focuses primarily on the issue of separation in the immigration context, but also generally discusses the impact of separation on children. Of particular relevance here, Dr. Nim Tottenham details the neuroscientific tools used to show the changes that occur when children experience trauma. She explains that when humans, as a species, experience a major threat to survival, "we activate threat systems in our bodies" like the amygdala. She elaborates, noting "when we keep activating stress hormones and circuits, it is harder and harder to shut them off – particularly for children." Dr. Tottenham also posits that as a species, we are conditioned to expect parental buffering to take care of our needs. Thus, children who have experienced trauma need immediate remediation. But for traumatized children who have been separated from their parents, the major stress buffering system is removed at the very time when it is needed most—i.e., while the brain is undergoing a period of serious development.

This Webinar also discusses the long-term distress created by separation even after families are reunited. There is tremendous injury inflicted upon the family unit and parents. For both parents and children, separation leads to increased risks of depression, difficulty with social functioning, attachment issues, and PTSD.

- Stephanie Carnes, *The Trauma of Family Separation Will Haunt Children for Decades*, HUFFINGTON POST, June 22, 2018, (https://www.huffingtonpost.com/entry/opinion-carnes-family-separation-trauma_us_5b2bf535e4b00295f15a96b2).

  Exposure to trauma in childhood can both stunt cognitive development and alter the structure of a young brain in profound ways. Thanks to the groundbreaking Adverse Childhood Experiences Study, conducted by Kaiser Permanente and the Centers for Disease Control and Prevention, we know that exposure to traumatic events in childhood is strongly correlated with increased risk of suicide attempts, drug addiction, depression, chronic obstructive pulmonary disease, heart disease and liver disease. More detailed information about the study can be found in "Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults," published in the *American Journal of Preventive Medicine* in 1998, Volume 14, pages 245–258.

- J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child (1973). https://www.jstor.org/stable/1121526?seq=1#page_scan_tab_contents

  This book is cited frequently in law review articles and appears to be a leading authority on the potential harms associated with removal of a child from the parental home. A full version of the book does not appear to be available online for free, though it is available on Amazon for around $15.

C. Relevant Case Law and Law Journal Articles

1. Case Law

- Ms. L. v. U.S. Immigration & Customs Enforcement, 310 F. Supp. 3d 1133 (S.D. Cal. 2018)

  In a decision entering a preliminary class-wide injunction with respect to ICE's practice of separating the minor children of parents detained for illegally crossing the border, the court discussed the harms associated with forced parent-child separations in considerable detail. Drawing from an amicus brief submitted by the Children's Defense Fund, the court posited that "there is ample evidence that separating children from their mothers or fathers leads to serious, negative consequences to children's health and development."[1] Id. at 1146. The disruption that forced separations "put[] children at increased risk for both physical and mental illness . . . . And the psychological distress, anxiety, and depression associated with separation from a parent would follow the children well after the immediate period of separation—even after eventual reunification with a parent or other family." Id. at 1147. The court pointed to other evidence establishing "that separating children from parents is a highly destabilizing, traumatic experience that has long term consequences on child well-being, safety, and development." Id. The court continued:

[1] The amicus brief contains a wealth of information and cites to a number of helpful resources. It is discussed immediately below.

> Separation from family leaves children more vulnerable to exploitation and abuse, no matter what the care setting. In addition, traumatic separation from parents creates toxic stress in children and adolescents that can profoundly impact their development. Strong scientific evidence shows that toxic stress disrupts the development of brain architecture and other organ systems, and increases the risk for stress-related disease and cognitive impairment well into adult years. Studies have shown that children who experience such traumatic events can suffer from symptoms of anxiety and PTSD, have poorer behavioral and educational outcomes, and experience higher rates of poverty and food insecurity.

Id. The court determined that the evidence "conclusively shows that Plaintiffs and the class members are likely to suffer irreparable injury if a preliminary injunction does not issue."

- Children's Defense Fund – Amicus Brief

> The amicus brief referenced above is packed with information regarding the effects of child separation. The brief also includes a compilation of the laws in every state governing the circumstances under which a child may be separated from his or her parents. The brief asserts that those laws "reflect the universal belief that a child should remain with her parent unless doing so would be severely detrimental to the child's welfare, and, even then, separation should be a last resort. Id. at 7. Further, the brief points to the standards espoused by the Council on Accreditation, an international human service accrediting organization, affirming that "it is in a child's best interest to remain with her parent whenever possible." Id. at 9-10.

- Jacinto-Castanon de Nolasco v. U.S. Immigration & Customs Enforcement, 319 F. Supp. 3d 491 (D.D.C. 2018)

In this case, the court also recognized "the profound and long-term consequences that separation can have on a child's well-being." Id. at 503. Relying on the same authority as the Ms. L. court, the court noted the American Academy of Pediatrics' research indicating that "[t]he psychological distress, anxiety, and depression associated with separation from a parent would follow the children well after the immediate period of separation – even after the eventual reunification with a parent or other family." Id. The effects of separation can be so extreme in some circumstances that the "children may experience high rates of PTSD, anxiety, depression, and suicidal ideation, in addition to developmental delays or poor psychological adjustment." Id. The court accordingly concluded that the plaintiffs had established that they would suffer irreparable harm absent an injunction. Id.

- M.G.U. v. Nielsen, 325 F. Supp. 3d 111 (D.D.C. 2018)

> The same court relied on essentially the same medical findings, emphasizing that separation may result in "toxic stress, a form of extreme and repetitive stress that adversely affects brain development," a concept discussed

more fully below, and that the effects can be devastating and long lasting. Id. at 122.

- Nicholson v. Williams, 203 F. Supp. 2d 153 (E.D.N.Y. 2002) (subsequent history before Second Circuit and N.Y. Court of Appeals follows).

This was an action brought by mothers individually and on behalf of their children in which the mothers alleged that they were separated from their children because the New York City Administration for Child Services ("ACS") determined that the children had been neglected solely due to their observance of domestic violence against their mothers. The plaintiffs alleged that these separations violated both the substantive due process rights of mothers and children and their procedural due process rights. In considering the plaintiffs' claims, the court relied in part on expert testimony regarding the harm that occurs as a result of child-parent separation. Noting that "attachment between parent and child forms the basis of who we are as humans" and that the continuity of "that attachment is essential to a child's natural development," 203 F. Supp. 2d at 198-99, plaintiffs' experts testified that removal of children from parents results in:

- fear and anxiety;
- diminished sense of stability and self;
- despair accompanied by hyper-vigilant looking, waiting, and hoping for parents' return; and
- heightened sense of self-blame.

Id. at 199. The experts also noted that "another serious implication of removal is that it introduces children to the foster system which can be much more dangerous and debilitating than the home situation." Such dangers include:

- risk of additional exposure to domestic violence;
- increased risk of abuse and child fatality;
- lack of adequate medical care; and
- disruption of contact with community, school, and siblings.

- Nicholson v. Scoppetta, 344 F.3d 154 (2d Cir. 2003).

On appeal, the Second Circuit held that the District Court had not abused its discretion in concluding that, in some instances, removals based solely on the child's exposure to domestic violence suffered by mother may raise serious questions of federal constitutional law. However, given the strong preference for avoiding unnecessary constitutional adjudication, the Second Circuit certified the matter to the Court of Appeals of New York to be resolved under state statutory law.

- Nicholson v. Scoppetta, 3 N.Y.3d 357 (2004).

The New York Court of Appeals held that far more was required to find neglect and justify the removal than a showing that the parent had been a victim of domestic

violence. According to the Court, the plain language of the statute and its legislative history demonstrate that "a blanket presumption favoring removal was never intended." Rather, it concluded, "a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal" and it "must balance that risk against the harm removal may bring" to determine factually which course is in the child's best interests. Id. at 378. For New York-specific cases, the cases applying this standard will be particularly relevant. Because this memorandum is focused on identifying relevant authority discussing the general harms associated with removal, those cases are not discussed here.

2. Law Journal Articles and Related Materials

- Shanta Trivedi, The Harm of Child Removal, 43 New York University Review of Law & Social Change 523 (2019), https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2087&context=all_fac.

This article explores how the child welfare system's goal of protecting children would be better served if all involved parties utilized information about the harm of removal when making decisions. Trivedi notes that this includes passing legislation, allocating funding, considering removals, and lawyers advocating for clients in an effort to keep their families together. Id. At 526. Trivedi argues that all potential harms of removal should be considered and weighed against the risks of remaining in the home before deciding whether removal is in the child' best interest. Id. The article considers harm caused by parent/child separation (including anxiety and attachment disorders), the trauma of actually being removed from the home, the grief and confusion surrounding removal and "the unstable nature and high rates of abuse in the foster system." Id. at 523 Trivedi notes that removing "minority children from their communities inflicts additional distinct trauma…" as removal affects "their sense of identity and cultural belonging." Id. at 540

The Adoption and Safe Families Act of 1977 ("ASFA") based removal decisions on "the child's health and safety" being "the paramount concern." However, this requirement, along with coinciding societal factors, lead to an increase in removal rates. Trivedi focuses on the ineffectiveness of the ASFA's undefined requirement that "reasonable efforts" be made before children are removed. While Trivedi agrees "reasonable efforts should be required in all cases," only a few states have offered guidance on the language. Id. 558 Most jurisdictions do not require courts to consider the harm of removing a child from home when deciding whether to do so. New Mexico is the only state that "identifies the harm of removal as a specific factor in the reasonable efforts inquiry." New York and the District of Columbia are the only jurisdictions that *overtly require* government officials to consider the harm of removal in their substantive removal statutes." The District of Columbia affirmatively requires such consideration in its substantive removal statute. Id. 566-567 According to Trivedi, existing laws can be improved (for instance, a "statute that simply codifies New York's case law") and reforms can be implemented within the existing child welfare framework at state and federal levels to better protect children from harm.

- Vivek Sankaran, Easy Come, Easy Go: The Plight of Children Who Spend Less Than 30 Days in Foster Care, 19 U. Pa. J. L. & Soc. Change 207-37 (2016), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2850&context=artiles.

  In this article, Sankaran explores the plight of "short stayers," children who spend less than 30 days in the foster care system. According to Sankaran, "removing children—even abused and neglected children—from the custody of their parents harms them emotionally, developmentally, and socially." Citing the work of Joseph Doyle, Sankaran calls attention to the increased severity and frequency of these problems for children removed to foster care compared to similar children who have remained in the home. Presenting a more "child-centered narrative," he calls for the harm caused by removal to be balanced with the other factors traditionally considered by the courts (e.g., the interests of parents and child welfare agencies). Ultimately, Sankaran argues that "juvenile courts are failing to use two tools—the federal reasonable efforts requirement and the early appointment of parents' counsel—to prevent the unnecessary entry of children into foster care." According to Sankaran, the federal government "must acknowledge the problem of short stayers by utilizing data related to children who may unnecessarily enter foster care in the Child and Family Services Review, the accountability process used to assess state compliance with federal child welfare requirements."

- Vivek Sankaran, Christopher Church & Monique Mitchell, A Cure Worse than the Disease? The Impact on Children and Their Families, 102 Marq. L. Rev. 1163 (2019)

  This article focuses on how parents and children interacting with the child welfare system experience the removal process and analyzes the gaps and emergent issues in practice, research, and policy related to child removal. The article establishes the case for why child welfare professionals should be alarmed about the process by which children are removed from their parents and placed in foster care, details the profound trauma removal inflicts on children and their parents and haphazard nature of the removal process, revealing the fact that far too many children are likely unnecessarily removed from their parents. The article concludes with specific policy and practice recommendations aimed at curbing child welfare's reliance on removal to foster care as its predominant safety intervention such as requiring a timely emergency hearing following an emergency removal to evaluate such removal and narrowing the parties that can remove children from their parents without a court order.

- David Pimentel, Protecting the Free-Range Kid: Recalibrating Parents' Rights and the Best Interest of the Child, 38 Cardozo L. Rev. 1 (2016)

  Focusing more on the impact on the parents' rights as a result of temporary removal and the importance of legal representation of the parents from the beginning, Pimentel argues that "even a temporary removal is an enormous imposition on parents' constitutionally protected interests . . . ." Id. at 52. Noting that "[o]nce removed, it can be very difficult to obtain the return of the children to their parents," he concludes that

"parents' rights to the care, custody, and control of their children can be meaningfully protected only if the parents can keep custody of their kids from the outset." Id. at 52-53.

- Developing a Trauma-Informed Child Welfare System, Children's Bureau (May 2015), https://www.childwelfare.gov/pubPDFs/trauma_informed.pdf

  This brief discusses "the steps that may be necessary to create a child welfare system that is more sensitive and responsive to trauma." According to the National Child Traumatic Stress Network, a trauma-informed system "is one in which all parties involved recognize and respond to the impact of traumatic stress on those who have contact with the system, including children, caregivers, and service providers." Trauma-informed practices, the brief argues, are better able to address children's safety, permanency, and well-being needs. The brief provides an overview of trauma and its effects and then focuses on the primary areas of consideration in the child welfare process (workforce development, screening and assessment, data systems, evidence-based and evidence-informed treatments, and funding).

- Rebecca Bonagura, Redefining the Baseline: Reasonable Efforts, Family Preservation, and Parenting Foster Children in New York, 18 Colum. J. Gender & L. 175 (2008)

  Bonagura asserts that "[r]emoval and placement in foster care may have a worse impact on the child than neglect . . . . Just as neglect can contribute to cognitive, social, and emotional problems, removal may also cause emotional problems by disrupting a child's ability to bond with his or her caregiver." Id. at 196.

- Theo Liebmann, What's Missing from Foster Care Reform?: The Need for Comprehensive, Realistic, and Compassionate Removal Standards, 28 Hamline J. Pub. L. & Pol'y 141 (2006).

  Liebmann argues that in order to protect children from the perils of the foster care system, "we must examine the outdated and short-sighted standards nearly every state currently uses to justify initially removing children from their parents." Liebmann contends that the exclusive focus on the harm caused by parents fails to acknowledge that placement in foster care, even temporarily, poses a risk of harm to children. Specifically, Liebmann highlights data regarding the poor outcomes for many foster children with respect to education and financial well-being as well as mental, emotional, and physical harm (e.g., separation anxiety, depression). According to Liebmann, applying Grambrill and Shlonsky's comprehensive risk assessment analysis (see annotation above) to the legal process "would add a critical second step to judicial determinations at temporary removal hearings and offer a whole new level of protection to the children at issue." Under this assessment, in order to determine placement of the child, the judge would weigh the risks of *remaining* in the home against the risks of harm to the child if she were *removed* from the home, and select the least detrimental alternative.

- Sonja Starr & Lea Brilmayer, Family Separation as a Violation of International Law, 21 Berkeley J. Int'l L. 213 (2003)

Though addressed in the context of international law, the authors recognize that "[c]hild removals are frequently traumatic for all concerned." Id. at 272. The authors specifically address temporary removals, emphasizing that they "may cause lasting harm to the children and to the stability of the family relationship . . . ." Id. They go on to criticize the "too-hasty resort to removal any time a child's well-being is at all in doubt—a practice that, indeed, is the official policy of many child protective services agencies." Id.

- Andrea Charlow, Race, Poverty, and Neglect, 28 Wm. Mitchell L. Rev. 763 (2001)

Discussing the adverse effects of removal on children, Charlow notes that "[c]hildren in foster care exhibit high rates of emotional, behavioral and developmental problems." Id. at 782. She ties into this concept attachment theory's (discussed supra at p. 1) recognition of "the need for children to bond with their adult care-givers in order them to develop self-esteem." Id. Charlow concludes that "the negative effect of removal likely outweighs any intellectual impairment that may have been caused by neglect." Id. at 783.

- Eileen Gambrill & Aron Shlonsky, Need for Comprehensive Risk Management Systems in Child Welfare, 23 Child & Youth Servs. Rev. 79 (2001).

This article advocates for the use of a more "comprehensive risk assessment" analysis by child welfare professionals prior to removal. While this study is targeted specifically at social workers and child welfare professionals, it provides insight into the various factors that should be balanced in determining whether removal is in the best interest of the child. The study suggests that the current focus on the harm posed by parents "ignores a host of other factors that may influence risk to children." Instead, the study calls for an assessment that extends beyond the posed threat to children by their parents to include risks presented by foster parents, child welfare staff, and service providers and agency procedures. The study concludes, "[i]f we are concerned about risk to children, we should make efforts to identify and minimize *all* sources of risk."

- Joseph Goldstein et al., Best Interests of the Child: The Least Detrimental Alternative (1996).

This book explores the principles that should guide courts in determining the fate of children involved in child welfare proceedings. The book presents a child-centric approach to child welfare and calls upon readers to "'put [themselves] in a child's skin'--the infant, the toddler, the preschooler, the schoolchild, or the teenager—as you consider what ought to be the guiding principles." According to the authors, the "least detrimental alternative" in such cases is the continuity of the child's relationship with his or her caregiver. The book provides various guiding questions for the "professional participant in the child placement process" (e.g., judges, lawyers, social workers, psychiatrists, other experts) in an effort to recognize the "boundaries of their knowledge and of their authority to act, the boundaries between their personal and professional beliefs, and the boundaries between the profession and parental roles." Of particular interest is the emphasis on the time period sufficient to disrupt the psychological child-parent relationship. Noting the unique temporal abilities of young children, the authors contend

that "[f]or children under the age of five years, an absence of parents for more than two months is intolerable." For younger school-age children, an absence of six months or more may be similarly detrimental.

- Joseph Goldstein, Medical Care for the Child at Risk: On State Supervention of Parental Autonomy, 86 Yale L.J. 645 (1977)

  This article explores the importance of the rights to parental autonomy and family privacy, and "the reciprocal liberty interest of parent and child in the familial bond between them, noting that they require "no greater justification than that they comport with each state's fundamental constitutional commitment to individual freedom and human dignity." *Id.* at 649. Goldstein further advocates "for a policy of minimum state intervention" into the parent-child relationship because of the law's inability "to deal on an individual basis with the consequences of its decisions or to act with the deliberate speed required by a child's sense of time and essential his well-being." *Id.* at 650. Moreover, the fact that parents are imperfect and may sometimes take actions against their child's interests does not justify greater intervention—it justifies less. *Id.* Indeed, there is no evidence "that the state necessarily can or will do better." *Id.* at 650-51.

- Michael S. Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623 (1976)

  Among other things, this article walks through the harms associated with removal from the family home. Wald argues that "there is substantial evidence that coercive intervention often is harmful, not benevolent, to both children and parents. Because children are strongly attached to their parents, even 'bad' parents, intervention that disrupts the parent-child relationship can be extremely damaging to the child." *Id.* at 639-40. For that reason, he argues that the courts' discretion to decide removal issues should be strictly limited "by defining in advance those harms justifying intervention and the steps that may be taken to alleviate the harm . . . ." *Id.* at 640.

- Michael Wald, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 Stan. L. Rev. 985 (1975)

  Wald advances similar arguments to those he advanced in the article immediately above. He notes that "[i]t is well recognized by psychiatrists that 'so far as the child's emotions are concerned, interference with [parental] tie[s], whether to a 'fit' or 'unfit' psychological parent, is extremely painful.'" Id. at 993-94 (quoting J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child 20 (1973)). For that reason, "[r]emoving a child from his family may cause serious psychological damage—damage more serious than the harm intervention is supposed to prevent." Id. at 994. And even after the child is placed in a foster home—and the initial damage already done—the child is "frequently subjected to numerous moves, each destroying the continuity and stability needed to help a child achieve stable emotional development." Id. That conclusion segues neatly into the next topic, which concerns the adverse effects often associated with a child's removal into foster care.

D. The Effects of Removal into Foster Care

- Laura Bauer and Judy L. Thomas, Throwaway Kids, The Kansas City Star (2019) https://www.kansascity.com/news/special-reports/article238206754.html

This six-part investigative series examine the outcomes for children taken into foster care. The series looked at a variety of outcomes, including educational outcomes and rates of homelessness, and found that the United States sends more foster children to prison than to college. The series also examined the research illustrating how frequent moves in foster care impact the brain. Articles contain interviews with former foster youth and a series of videos.

- Joseph J. Doyle, Jr., Child Protection and Child Outcomes: Measuring the Effects of Foster Care, 97 Am. Econ. Rev. 1583 (2007).

Examining removal decisions that were "on the margins," this study found that children who remained at home had better long-term well-being outcomes than children who were removed and placed in foster care. The study tracked at least 15,000 children between 1990 and 2002 and in order to avoid results attributable to family background, extreme cases of abuse or neglect were screened out and instead, "on the margins" cases were used. The study defines "on the margins" decisions as instances where there was disagreement by child protection investigators as to whether removal was necessary. By using the removal tendencies of investigators as an instrumental-variable (i.e., a variable that induces change in the explanatory variable but has no effect on the dependent variable), the study identifies the effects of foster care placement on child outcomes for school-aged children.

This study provided the first "viable, empirical evidence of the benefits of keeping kids with their families," and "confirms what experience and observation tell us: Kids who can remain in their homes do better than in foster care." (quote from http://usatoday30.usatoday.com/news/nation/2007-07-02-foster-study_N.htm). Ultimately, the study found higher delinquency rates, higher teen birth rates, and lower earnings among children removed to foster care as compared to similarly situated children who remained at home.

- Joseph J. Doyle, Jr., Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care, 116 J. of Political Econ. 4 (2008), http://www.mit.edu/~jjdoyle/doyle_jpe_aug08.pdf

Using the assumption that child protection cases are effectively randomized to investigators, this follow-up study explores an additional outcome: adult crime. According to the study, children "on the margins" of placement in foster care who are subsequently placed demonstrate "arrest propensities that are two to three times higher compared to investigated children who remained with their parents." Moreover, this study importantly notes that while the "removal from abusive parents may protect children from further abuse and reduce the likelihood of criminal activity as adults," at

the same time, "the removal of children from their parents is thought to be traumatic and *may lead to worse adult outcomes*" (emphasis added). This study also notes that "[i]n terms of criminal justice involvement, nearly 20 percent of the U.S. prison population under the age of 30, and 25 percent of these prisoners with prior convictions, report spending part of their youth in foster care."

- Joseph J. Doyle, Jr., Causal Effects of Foster Care: An Instrumental-Variables Approach, 35 Child. & Youth Servs. Rev. 1143 (2013).

This follow-up study uses instrumental-variables to estimate the causal effects of foster care on short- and long-term outcomes. Again examining children "on the margins," the study focuses on two outcomes: juvenile delinquency later in life, and emergency healthcare usage in the year following a report of abuse. According to the study, "placing children in foster care increases their likelihood of becoming delinquent during adolescence and requiring emergency healthcare in the short term."

- Lowenstein, Kate. Shutting Down the Trauma to Prison Pipeline Early, Appropriate Care for Child-Welfare Involved Youth, 2018. Citizens for Juvenile Justice, https://static1.squarespace.com/static/58ea378e414fb5fae5ba06c7/t/5b47615e6d2a733141a2d965/1531404642856/FINAL+TraumaToPrisonReport.pdf

This project explores the number of children entering the foster care system and the resulting foster-care-to-prison pipeline in Massachusetts. The project found that children placed in foster care are three times more likely than similarly situated children who remained with their families to be juvenile justice-involved. Additionally, national and Massachusetts data show that "placement instability—when a child is moved through multiple out-of-home placements—is a key risk factor for later juvenile justice system involvement." The project also discusses a survey of the sources of PTSD among foster care alumni, which revealed that "many of the alumni identified the initial home removal itself as a trauma and also considered being returned home as an additional "placement" as it involved having to re-create relationships." Finally, this project also provided that behavioral problems were "six times more likely among children who spent time in foster care" and that foster youth have a "three times greater risk for ADHD diagnosis, and are twice as likely to have learning disabilities and developmental delays than children not in foster care."

The project then provides various recommendations in response to the numerous detrimental effects of foster care previously discussed, namely:

1) Invest in promising practices and program models to prevent child removal and safely promote family stabilization. DCF's services budget under invests in in-home and reunification services. The Federal Family First Act presents an opportunity for additional funding to safely prevent out-of-home removals.

2) Recent research found that opioid-dependent newborns who remain with their moms have fewer hospital stays (4-5 days compared to 22-23 days) and fewer infants needed medication assisted withdrawal treatment (14% compared to 98%).

Parent's service plans, however, may conflict with this promising clinical treatment unless service plans begin to adapt to evolving yet proven science.

3) Early recognition of behavioral problems stemming from exposure to trauma should result in an investment in interventions that promote positive youth development, to better prevent the intensification of the problems and the poor outcomes associated with them. Early efforts to develop a child's skills, self-esteem, and positive investments in their futures include consistent involvement with positive, trusted adults and with positive pro-social community activities.

- Rosalind D. Folman, "I Was Tooken": How Children Experience Removal from Their Parents Preliminary to Placement in Foster Care, 2 Adoption Quarterly 2 (1998).

This paper presents the results of a qualitative study of the removal experiences of 90 inner-city children (aged 8-14) who entered foster care in middle childhood due to abuse and/or neglect. Using attachment theory to interpret the children's narratives, the paper demonstrates a "progression of traumatizing events ensuing from the placement process." The paper focuses only on the "crisis period" of the fostering process—i.e., "the day the child is initially removed from his/her parents." According to the paper, separation from a caregiver "is severely threatening for the child, irrespective of the quality of the child's experience with the parent." As a result, the day of placement "constitutes a crisis for children because everything in their lives changes and the children are overwhelmed with feelings of abandonment, rejection, worthlessness, guilt, and helplessness." The findings suggest that these feelings were intertwined with an overwhelming sense of loss. Recalling the day of his removal, one child stated: "I thought that they [the police officer] was gonna take me to where they lived. Bein in a policeman's house would be fun, but not fun without being with my parents cause I love em." When asked where he thought he was going, another child simply responded: "Away from my mother… I was going to leave my mother for good."

- Catherine R. Lawrence et al., Impact of Foster Care on Development, 18 Dev. & Psychopathology 57 (2006).

This study examines that relationship between foster care placement and the development of behavioral problems. The study followed 189 children and families at risk because of poverty and associated factors. Comparisons were made among three groups: (1) children who experienced foster care; (2) children who were maltreated but remained in the home; and (3) children who had not experienced foster care or maltreatment despite similar at-risk demographic characteristics. The impact of foster placement was evaluated immediately following release from care and at several points later in development. Controlling for developmental adaptation and social economic status prior to placement, "the results support a general view that foster care may lead to an increase in behavior problems that continue after exiting the system" (71). The study highlights several factors that may account for the increase in problematic behavior, including foster care as an intervention that can expose its recipients to difficult developmental challenges and the lack of comprehensive psychological services offered to foster children.

- Joseph P. Ryan & Mark F. Testa, Child Maltreatment and Juvenile Delinquency: Investigating the Role of Placement and Placement Instability, 27 Child. & Youth Servs. Rev. 227 (2005), https://www-sciencedirect-com.ezproxy.bu.edu/science/article/pii/S0190740904002026

  This study explores the correlation between the increased risk of maltreated children engaging in delinquent behavior and the use of substitute care placement and placement instability. While removing children from high-risk environments should decrease the risk of delinquency, the study concluded that "children in placement are more likely to be delinquent." According to the study, "16% of children placed into substitute care experience at least one delinquency petition compared to 7% of all maltreatment victims who are not removed from their family." One possible explanation for this increase in deviant behavior, the study argues, is that "multiple placements after substitute care further depletes a child's stock of social capital, which weakens social attachments and social controls."

- Côté SM, Orri M, Marttila M, Ristikari T. Out-of-home placement in early childhood and psychiatric diagnoses and criminal convictions in young adulthood: a population-based propensity score-matched study. *Lancet Child Adolesc Health* 2018; published online July 25. https://www.researchgate.net/profile/Sylvana_Cote/publication/326652825_Out-of-home_placement_in_early_childhood_and_psychiatric_diagnoses_and_criminal_convictions_in_young_adulthood_a_population-based_propensity_score-matched_study/links/5b75d16a45851546c90a380b/Out-of-home-placement-in-early-childhood-and-psychiatric-diagnoses-and-criminal-convictions-in-young-adulthood-a-population-based-propensity-score-matched-study.pdf

  Researchers conducted a population-wide longitudinal study using the 1987 Finnish Birth Cohort, which collects data from child welfare, medical, and criminal registers for those born in Finland in 1987. The study aimed to "compare the rates of psychiatric diagnoses and criminal convictions in young adulthood (ages 18–25 years) among children who were first placed at ages 2–6 years with those of children who were not placed and who had similar sociodemographic and family characteristics."

  Using this novel propensity score matching approach, the findings of study showed:

  > Of 54,814 individuals included in analyses, 388 (1%) were placed out of home at ages 2 to 6 years, for whom 386 were assigned matched controls. At ages 18 to 25 years, those who had been placed out of home had a greater risk compared with never-placed controls for substance-related disorders (odds ratio [OR], 2.10; 95% CI, 1.27-3.48), psychotic or bipolar disorders (OR, 3.98; 95% CI, 1.80-8.80), depression and anxiety disorders (OR, 2.15; 95% CI, 1.46-3.18), neurodevelopmental disorders (OR, 3.59; 95% CI, 1.17-11.02), or other mental disorders (OR, 2.06; 95% CI, 1.25-3.39). Additionally, those who had been placed as children were more likely to use psychotropic medication (OR, 1.96, 95% CI,

1.38-2.80) and to have higher rates of criminal convictions for violent (OR, 2.43; 95% CI, 1.61-3.68) and property (OR, 1.86; 95% CI, 1.17-2.97) offenses.

This data demonstrates that preschool children placed out-of-home are at risk of adverse outcomes as adults – more than twice that of individuals who were never placed out-of-home – even accounting for their initial circumstances.

- National Scientific Council on the Developing Child. (2012). The Science of Neglect: The Persistent Absence of Responsive Care Disrupts the Developing Brain: Working Paper 12. http://www.developingchild.harvard.edu

  This working paper examines children reared in institutions. It explains that "young children who live in such settings experience little more than transient serve and return interactions. Frequent staff rotations mean that infants are cared for by many different people, making it extremely difficult to develop meaningful relationships with any single caregiver." In such circumstances, "although basic needs for food, warmth, shelter, and medical care may be met (thereby avoiding most legal definitions of neglect), the setting itself may still be a precipitant of severe psychosocial deprivation for the youngest inhabitants."

  Institutionally-reared children also show differences "in the neural reactions that occur as an individual is processing information, such as looking at faces to identify different emotions." These findings indicate "impairments in the way the brain interprets such input and are consistent with behavioral observations that neglected children struggle to correctly recognize different emotions in others."

  Finally, "[w]hen compared with children who have been victimized by overt physical maltreatment, young children who experienced prolonged periods of neglect exhibit more severe cognitive impairments, language deficits, academic problems, withdrawn behavior, and problems with peer interaction. This suggests that sustained disruption of serve and return interactions in early relationships may be more damaging to the developing architecture of the brain than physical trauma."

- Carlo Schuengel et al., Children with Disrupted Attachment Histories: Interventions and Psychophysiological Indices of Effects, 26 Child & Adolescent Psychiatry & Mental Health 3 (2009), https://dio.org/10.1186?1753-2000-3-26

  This study asserts that while a child may be more physically secure if removed from the home in certain circumstances, they may not necessarily be more emotionally secure. Young children, "who may not yet have had the opportunity to develop secondary attachment relationships," are particularly at risk, since they "may lose the only source of security and comfort they had, however fallible or limited it was." Discussing psychobiological propositions alongside attachment theory, this study demonstrates the hidden physiological responses to child-parent separation. By examining HPA-axis activity (activity within the hypothalamus, pituitary gland, and adrenal glands that controls reactions to stress), the study suggests that foster children show more reactivity within systems facilitating fight-or-flight behaviors than social engagement. These results increased in foster children with atypical attachment behavior. If children must be placed

out of the home, the study argues, "more is needed than a physically safe family." According to the study, well-designed intervention aimed at foster parents "may nudge back psychophysiological parameters within the normative range."

- Michelle R. VanTieghem and Nim Tottenham, Neurobiological Programming of Early Life Stress: Functional Development of Amygdala-Prefrontal Circuitry and Vulnerability for Stress-Related Psychopathology, Springer International Publishing Switzerland 2017 Curr. Topics Behav. Neurosci. DOI 10.1007/7854_2016_42 http://docs.wixstatic.com/ugd/f0bac7_13e118065ecf478fa7a9b1932f0758f7.pdf

  This paper discusses "role of emotion regulation circuitry implicated in stress related psychopathology from a developmental and transdiagnostic perspective." Of note, this paper explains that "[i]n accordance with studies in adult Early Life Stress (ELS) samples, children and adolescents with a history of early adversity also show enhanced amygdala reactivity to emotional stimuli. Previously institutionalized (PI) youth with a history of institutional care exhibit heightened amygdala reactivity to threat-related facial expressions across childhood and adolescence." Further, this paper explains that "[i]n a cross-sectional study from early childhood to late adolescence, PI youth showed an atypical trajectory of age-related changes in threat-related amygdala-mPFC connectivity relative to comparison youth, such that PI youth exhibited more mature (i.e., adult-like) connectivity at younger ages. Youth with trauma exposure also show atypical amygdala-prefrontal function in response to emotional distractors, with weaker negative connectivity between the amygdala and pregenual ACC (pgACC) relative to comparison youth." This is to say that exposure to childhood trauma creates lasting impacts, but so, too, does institutionalized care.

  When discussing the importance of caregivers, this paper notes that:

  > Evidence across species has shown that caregivers regulate emotional and neurobiological development. In rodent pups, maternal presence has transient effects on cortisol release and amygdala function, such that maternal presence blocks stress reactivity and fear learning during the early stage of rat pup development. Similar social buffering effects have been identified in humans; parent availability reduces cortisol response to social stress and enhances emotion regulation abilities in children. Moreover, parental stimuli can induce transient changes in functional connectivity of amygdala-mPFC circuitry, and these neurobiological changes predict the degree of parental buffering of children's emotion regulation abilities. Together, these findings provide a plausible neurobiological mechanism through which caregivers can directly influence neuro-affective functioning during development.

  Altogether, these findings provide further insight into the "neuro-developmental mechanisms underlying the emergence of adversity-related emotional disorders and facilitate the development of targeted interventions that can ameliorate risk for psychopathology in youth exposed to early life stress."

- Renee Schneider et al., What Happens to Youth Removed From Parental Care?: Health and Economic Outcomes for Women with a History of Out-of-Home Placement, 31

Child. & Youth Servs. Rev. 440 (2009), https://s3.amazonaws.com/academia.edu.documents/44083072/What_happens_to_youth_removed_from_paren20160324-25611-1dflv7u.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1531767464&Signature=psL6xfEc0Oxk0I7V8qmq42Ia12s%3D&response-content-disposition=inline%3B%20filename%3DWhat_happens_to_youth_removed_from_paren.pdf

This study used data from the *California Women's Health Survey* to examine the mental and physical health problems, low educational attainment, and economic adversity for women ages 18 and older with and without a history of out-of-home placement. The study defined "out-of-home placement" as any removal from the parents' or caregivers' home by the state or county. Surveying 368 women with a history of out-of-home placement and 9240 women without, the study found that "history of out-of-home placement was associated with mental health problems, poor subjective health, smoking, obesity, low educational attainment, living in poverty, and use of public assistance in adulthood." The study contends that overall, these findings "underscore the need for greater access to mental health and social services for youth in out-of-home placement to improve their long-term health and economic well-being."

- *Evidence Base for Avoiding Family Separation in Child Welfare Practice: An Analysis of Current Research.* Alia, July 2019.

This report provides an overview of recent research and social science literature related to the impact of out-of-home placement (or placement into foster care) and family separation on the wellbeing of children who have experienced maltreatment. The research and literature reviewed address two main issues, namely, (i) the impact of out-of-home placement on the wellbeing of children who have been maltreated and (ii) the impact of placement in foster care with a kin versus placement in foster care with strangers on the wellbeing of children who must be removed from their biological parents. Although existing research show the negative physical, mental, behavioral, and social outcomes for children who experience out-of-home placement, one criticism of a majority of such research is that they do not isolate the impact of the out-of-home placement from the impact of the maltreatment that led to the out-of-home placement, raising the question of whether the negative outcomes are a result of being removed from one's family or are a result of the maltreatment experienced prior to the removal. This report reviews research within the last 15 years that address such criticism by using more advanced statistical methods to isolate the specific impacts of out-of-home placement on various measures of child wellbeing. Although the research is still emerging, the results thus far indicate that that out-of-home placements (i) cause additional harms to children who have experienced maltreatment in terms of increased risk of juvenile and adult criminal behavior, Reactive Attachment Disorder, and early mortality and (ii) provide little to no measurable benefits to children who have experienced maltreatment, in terms of cognitive and language outcomes, academic achievement, mental health outcomes, behavior problems and suicide risk. Further (and as discussed in Part IV below), in cases where children must be removed from their biological parent, the research indicate that children placed with kin

have better outcomes than those placed with non-kin in terms of greater placement stability, fewer emotional and behavioral problems during placement, lower incidence of Reactive Attachment Disorder and more connections to their biological and socio-cultural communities.

IV. RESOURCES FOR PARENTS AND CHILDREN FACING REMOVAL

A. Introduction

In this section, we first review studies that may serve as resources for parents faced with removal of their children or related domestic disputes. Such resources include studies focused on identifying healthy and effective parenting techniques, potential avenues by which a separated biological parent may at least be able to obtain visitation rights, and the effective use of mental health and other social services. Also discussed are resources advocating for kinship placement—i.e., in the event of removal, the children are placed with a relative. Studies show that placement with a relative results in more positive outcomes than does placement into foster care. Thus, even if a court were to find that removal from the parental home is appropriate, the parents could argue that the child should be placed with close relatives with whom they already have a relationship, rather than with a stranger.

B. Removal Resources Generally

- U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Administration on Children, Youth and Families, Family Time and visitation for children and youth in out-of-home care, Information Memorandum (2020), https://www.americanbar.org/content/dam/aba/administrative/child_law/cb-familytimeim.pdf

This information memorandum provides information on research, best practices, resources and recommendations for providing children and youth in out-of-home care safe, meaningful and high frequency family time that strengthens the family, expedites reunification and improves parent and child wellbeing outcomes. The memorandum emphasizes the importance of family time and visitation in reducing the trauma of removal and placement of children in out-of-home care, maintaining the integrity of the parent-child relationship, healthy sibling relationships and overall child and family well-being.

- Vivian L. Gadsden et al. eds., Parenting Matters: Supporting Parents of Children Ages 0-8 (2016), https://www.nap.edu/read/21868/chapter/1.

Noting that decades of research have demonstrated that the parent-child dyad and the environment of the family are "the foundation of children's well-being and healthy development," the study focuses on supporting parents with children under the age of eight. In particular, the study seeks "to provide a roadmap for the future of parenting and family support policies, practices, and research in the United States." According to the study, children who do not become securely attached to a primary caregiver (e.g., due to

maltreatment or separation) may develop insecure behaviors in childhood and potentially suffer adverse outcomes later in life, such as mental health disorders and disruption in other social and emotional development. In an effort to facilitate healthy attachment, the study explores parenting-related knowledge, attitudes, and practices that are associated with improved developmental outcomes for children and provides guidance for the development of parenting-related programs, policies, and initiatives. Such recommendations include how to effectively utilize existing platforms and properly scale parenting programming to reduce the harm of removal.

In its chapter on parenting knowledge, the study identifies "several parenting practices that are associated with improvements in" physical health and safety and emotional, behavioral, social, and cognitive competence:

- Contingent responsiveness (serve and return);
- Showing warmth and sensitivity;
- Routines and reduced household chaos
- Shared book reading and talking to children
- Practices related to promoting children's health and safety—in particular, receipt of prenatal care, breastfeeding, vaccination, ensuring children's adequate nutrition and physical activity, monitoring, and household/vehicle safety; and
- Use of appropriate (less harsh) discipline.

- Lenore M. McWey et al., The Impact of Continued Contact with Biological Parents upon the Mental Health of Children in Foster Care, 32 Child. & Youth Servs. Rev. 10, 1338 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2928481/pdf/nihms205361.pdf

  Guided by attachment theory, this study examines the impact of contact with biological parents on depression and externalizing problems (i.e., aggressive and delinquent behavior) in children in foster care. Controlling for gender differences and exposure to violence, the study surveyed 362 children who were subjects of abuse or neglect between October 1999 and December 2000. The study highlights many of the purported benefits of visitation between children in foster care and their biological parents (e.g., maintenance of family ties, lessened grief, increased overall well-being). While foster parents often challenge the benefit of visitation by reporting that visitation results in problematic behavior of the children, the study found that "more frequent contact with the biological mother was marginally associated with lower levels of depression and significantly associated with lower externalizing problem behaviors."

- Renee Schneider et al., What Happens to Youth Removed From Parental Care?: Health and Economic Outcomes for Women with a History of Out-of-Home Placement, 31 Child. & Youth Servs. Rev. 440 (2009), https://s3.amazonaws.com/academia.edu.documents/44083072/What_happens_to_youth_removed_from_paren20160324-25611-1dflv7u.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1531767464

&Signature=psL6xfEc0Oxk0I7V8qmq42Ia12s%3D&response-content-disposition=inline%3B%20filename%3DWhat_happens_to_youth_removed_from_paren.pdf

Exploring the relationship between out-of-home placement and mental and physical health problems and educational attainment, this study posits the need for "greater access to mental health care and social services for youth in out-of-home placement to improve their long-term health and economic well-being." According to the study, routine screening for mental health problems and early intervention and prevention efforts should be targeted to youth in or transitioning to out-of-care placement. (See Removal into Foster Care for full annotation).

- Aubyn C. Stahmer et al., Developmental and Behavioral Needs and Service Use for Young Children in Child Welfare, 116 Pediatrics 4, 891 (2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1550707/

This paper seeks to "determine the level of developmental and behavioral need in young children entering child welfare [and] estimate early intervention services use." Collecting data on 2,813 children under the age of 6 for whom possible abuse or neglect was investigated, the study analyzed developmental and behavioral needs across five domains: cognition, behavior, communication, social, and adaptive functioning. The study found that across age groups, approximately half of young children in child welfare had developmental or behavioral problems that would qualify them for early intervention services. The study found, however, that over the course of year, less than one quarter of young children in contact with child welfare received any developmental or behavioral intervention. The study also notes that, although serious developmental and behavioral problems are as frequent among children that remain home as those that are removed, children remaining home are much less likely to receive early intervention services. From a societal prospective, the study contends, "contact with [child welfare] represents an opportunity to identify children who are likely to be at substantial risk for poor long-term developmental trajectories," and access to early intervention services should be increased whether the child remains in the home or is removed.

- Children with Traumatic Separation: Information for Professionals, National Child Traumatic Stress Network, https://www.nctsn.org/sites/default/files/resources//children_with_traumatic_separation_professionals.pdf.

The NCTSN provides a variety of tips for working with children experiencing traumatic separation, including allowing the child to have memorabilia (e.g., pictures, objects from a previous home, a scrapbook) to preserve positive memories of and stay connected to the absent caregiver and coordinating outside resources and referrals to whom the child can turn when needing comfort.

C. Kinship Placement

- Deborah Cromer, Through No Fault of Their Own: Reasserting a Child's Right to Family Connectedness in the Child Welfare System, 41 Family L. Quarterly 181 (2007).

This essay explores "the statutory and public policy frameworks that guide state intervention in the parent-child relationship, and the negative outcomes resulting from removal of at-risk children from the family. Cromer suggests that even when families are dangerous or unhealthy, children "often experience[] separation from a primary caregiver as a threat to survival." As an alternative, the essay proposes that "public policy should demand a refocus of the child welfare system on family connectedness." Detailing the success of relative-care initiatives across the United States (e.g. Alemeda County's StepUp Project), the essay notes several benefits of relative care:

- connecting with a person the child knows and trusts;
- creating a network of connected, caring support from family even if the child cannot be reunited with biological parents;
- reinforcing the child's personal and cultural identity;
- encouraging families to cultivate and rely their own resources and strengths; and
- saving the state significant costs.

- Atalia Mosek & Leah Adler, The Self-Concept of Adolescent Girls in Non-Relative versus Kin Foster Care, 44 Int'l Soc. Work 149 (2011)

In an effort to determine the "least detrimental placement" for maltreated children, this study collected data on the "self-concept" of adolescent girls cared for by kin versus non-relative foster parents in Israel. The study defines "self-concept" as "an organizing system of traits and ambitions that a person relates to [herself], and according to which [she] manages [her] life." The study included adolescent girls (aged 12-18) placed in foster care for four years or more in the north of Israel. Of this sample, 18 girls were with non-relative foster care and 20 were with kinship foster parents. Using a questionnaire that measured 5 dimensions of the self (i.e. psychological self, social self, sexual self, family self, and coping self), the study found that adolescents who grow up in kinship care have a more positive self-concept than those adolescents growing up in non-relative foster care. According to the study, "[i]t is the feeling of stability and permanency perceived by adolescents who stay with kin that contribute to their inner self-assurance, in comparison with adolescents staying with non-relative families." Adolescents placed with kin report greater closeness with the foster family and fewer tensions between the foster family and biological family.

- Femke Vanschoonlandt et al., Kinship and Non-Kinship Foster Care: Differences in Contact with Parents and Foster Child's Mental Health Problems, 34 Child. & Youth Servs. Rev. 1533 (2012).

This study compares two aspects of out-of-home kinship placements and out-of-home non-kinship placements: contact with and attitude of parents and mental health of the foster children. Following 186 foster children (aged 3-18) in the Flemish child welfare system, the study found that while non-kinship placements fare better on aspects of contact with and attitudes of parents, children in kinship placements had significantly

fewer behavioral problems and lower levels of mental health problems. The study found that in non-kinship foster placements there was a 50% chance of severe behavioral problems compared to only a 35% chance in kinship placements. According to the study, the better psychosocial functioning of kinship foster children is usually explained by "the protective effect of cultural and family preservation" because "*living with relative may reinforce the sense of identity and self-esteem that flows from knowing the family history and culture*" (emphasis in original). Notably, the study found that the number of previous out-of-home placements played a greater role in behavioral problems than the type of placement. In this regard, the results confirm the importance of stability for foster child well-being.

- *Evidence Base for Avoiding Family Separation in Child Welfare Practice: An Analysis of Current Research.* Alia, July 2019.

As previously mentioned (supra at pp. 22-23), the research and literature reviewed by this report, in addition to studying the impact of out-of-home placement on the wellbeing of children who have been maltreated, also studied the impact of placement in foster care with a kin versus placement in foster care with strangers on the wellbeing of children who must be removed from their biological parents. Discussed in the report is a 2005 study of 214 children (aged 4-13) in state custody that found that those in kinship placement had fewer emotional and behavioral problems than those placed with non-kin. A different study - a systematic review that included 102 quasi-experimental studies examining the impacts of kinship versus non-kin placements - found that children in non-kin foster care were two times more likely to experience mental illness as compared to children in kinship.

V. THE EFFECTS OF TOXIC STRESS IN CHILDREN

A. Introduction

This section includes resources discussing the physical effects visited upon children as a result of "toxic stress," which can result from "strong, frequent, and/or prolonged adversity . . . without adequate adult support." Center on the Developing Child, Harvard University, Toxic Stress, https://developingchild.harvard.edu/science/key-concepts/toxic-stress/ (also linked below). Toxic stress "can disrupt the development of brain architecture and other organ systems, and increase the risk for stress-related disease and cognitive impairment, well into the adult years." Id. As noted in some of the resources discussed in Part II supra, parent-child separation places the child at significant risk of developing toxic stress. The research below, therefore, may be grafted onto the discussion of the harmful effects of removal generally when preparing a submission to a court in opposition to the government's removal attempt.

B. Relevant Research

- Laura Santhanam, *How the Toxic Stress of Family Separation Can Harm a Child*, PBS, June 28, 2018, (https://www.pbs.org/newshour/health/how-the-toxic-stress-of-family-separation-can-harm-a-child).

Excerpt:
In a situation where children are separated from their parents for a long period of time, they remain on high alert, and their bodies endure prolonged and severe toxic stress as a result. *See* Harvard University Center on the Developing Child – Toxic Stress

Excerpt:
When a child is primed to experience fear and anxiety, those emotions can superimpose themselves onto how the child interacts with another person, even if that person wants to nurture and love the child. This condition is called Reactive Attachment Disorder, and it can start as early as infancy if a child's basic needs aren't met by a parent or caregiver, preventing a healthy bond from forming between them. *See* Mayo Clinic's Reactive Attachment Disorder Research

Excerpt:
Toxic stress is more subtle than a broken bone or distended stomach, but it can leave permanent mark on a child's brain and can "create a weak foundation for later learning, behavior, and health," according to a 2012 study published in the journal Pediatrics that explored how adversity and toxic stress in early childhood can manifest itself throughout a child's life. After a long period of sustained toxic stress, a child who had seemed inconsolable may become quiet, dull or withdrawn. That doesn't mean they have adjusted to what's going on, those symptoms emerge because their cortisol levels are depressed and their stress levels are blunted. *See* American Academy of Pediatrics News & Journal Gateway, The Lifelong Effects of Early Childhood Adversity and Toxic Stress, (2012).

- Hillary A. Franke, Toxic Stress: Effects, Prevention and Treatment, 1 Child. 3, 390 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4928741/.

  In this article, Franke summarizes the findings in recent studies on toxic stress and childhood adversity that followed the American Academy of Pediatrics Policy Report on the effects of toxic stress. Childhood toxic stress, Franke explains, is defined as "severe, prolonged, or repetitive adversity with a lack of the necessary nurturance or support of a caregiver to prevent an abnormal stress response." Children who experience toxic stress are at risk for long-term adverse health effects including maladaptive coping skills, poor stress management, unhealthy lifestyles, mental illness and physical disease." According to Franke, "[f]actors that place a child at risk of maltreatment overlap those with risk of toxic stress" (e.g., social isolation, poverty, non-biological relative living in the home, depression). However, if primary preventative measures are taken during early development, appropriate stress responses to adversity may result. Positive factors for child maltreatment (e.g., structured school environment, positive family changes, presence of a caring and supportive adult) may also reduce the risk of toxic stress. An integrative approach to prevention and treatment of toxic stress, Franke argues, "necessitates individual, community and national focus."

- Alexander C. McFarlane, Long-Term Costs of Traumatic Stress: Intertwined Physical and Psychological Consequences, 9 World Psychiatry 1, 3 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2816923/.

  This paper explores the delayed, long-term physical and psychological effects of traumatic stress. Understanding that the effects of stress need to be considered as a major environmental challenge that places an individual's physical and psychological health at risk, this paper focuses on the development and impact of delayed PTSD as a result of subsequent adverse experiences. While the paper does not deal specifically with child separation, the focus on the impact of stressful environments following a traumatic experience speaks to the layered traumatic experiences many children experience following removal and provides insight into necessary treatment approaches. According to the paper, the majority of people who develop PTSD do not originally meet the diagnostic criteria of the disorder; rather, it is only with the passage of time that the symptoms become sufficiently severe to warrant a clinical diagnosis. This delayed form of PTSD demonstrates "how a traumatic experience can apparently lie dormant within an individual only to become manifest at some point in the future." The paper explores the various physical and psychological symptoms that may develop in association with delayed PTSD (e.g., cardiovascular problems, obesity, morbidity) and proposes treatment that emphasizes addressing underlying psychophysiology in the early periods following exposure to adversity.

- Jack P. Shonkoff & Committee on Psychological Aspects of Child and Family Health et al., Lifelong Effects of Early Childhood Adversity and Toxic Stress, 129 Pediatrics 232 (2012).

  This report presents an ecobiodevelopmental (EBD) framework that demonstrates how toxic stress "can leave a lasting signature on the genetic predispositions that affect emerging brain architecture and long-term health." Recognizing development as "nature dancing with nurture" rather than "nature vs. nurture," an EBD framework examines "how early experiences affect when, how, and to what degree different genes are actually activated." This framework provides insight into the well-documented relationship between child adversity and adult health impairment. Although moderate levels of stress are essential to survival, toxic stress describes prolonged exposure to excessively high levels of stress hormones that leads to chronic "wear and tear" on bodily systems, including the brain. According to this report, alleviating toxic stress in childhood could reduce persistent health disparities associated with poverty, discrimination, or maltreatment. Ultimately, the report proposes "a new role for pediatricians to promote the development and implementation of science-based strategies to reduce toxic stress in early childhood."

- Excessive Stress Disrupts the Architecture of the Developing Brain, Harvard U. Center on the Developing Child: National Scientific Council on the Developing Child (Jan. 2014), https://developingchild.harvard.edu/wp-content/uploads/2005/05/Stress_Disrupts_Architecture_Developing_Brain-1.pdf.

  Extensive research shows that healthy development can be derailed by excessive or prolonged activation of stress response systems in the body and the brain. This paper

suggests that policies affecting young children generally do not reflect awareness of the degree to which very early exposure to stressful experiences and environments can affect the architecture of the brain, the body's stress response systems, and a host of health outcomes later in life. Because a child's ability to cope with stress has consequences for mental and physical health throughout life, this paper suggests that "understanding the nature and severity of different types of stress responses to early adverse experiences can help us make better judgments about the need for interventions that reduce the risk of later negative impacts." The paper focuses on the neurological effect of toxic stress that occurs when children lack a supportive caregiver to act as a buffering agent. According to the paper, the quality of early care and education that young children receive outside the home also plays an important role in whether they experience toxic stress.

VI. ADDITIONAL RESOURCES

Resources exhibiting that separation causes trauma:

- Maslow's Hierarchy of Needs
- Pediatrician Henry Dwight Chapin's study of institutionalized infants
- John Bowlby's Attachment Theory
- Psychiatrist Charles Nelson's Bucharest Project, a study of Romanian Orphanages: American Psychological Association – the lasting impact of neglect
- Research on "Aboriginal Children in Australia"
- AJPH – A publication of the American Public Health Association - Left Too Early: The Effects of Age at Separation from Parents on Chinese Rural Children's Symptoms of Anxiety and Depression.
- Focusing on the trauma of transitioning into foster care – Monique Mitchell, The Neglected Transition: Building a Relational Home for Children Entering Foster Care (Oxford University Press, 2016) (preview available)
- NOVA PBS Official, Inside the Brains of Children Separated from Parents, YouTube (June 25, 2018), https://www.youtube.com/watch?v=bwpcn8sRtqg&feature=youtu.be.
- Kansas City Star, Taken Into Foster Care, through the eyes of a Child, YouTube (January 3, 2020), https://www.youtube.com/watch?v=Gb8BGKqVVZM&list=PL02VuT_SObZIXSLG1bcMzQtdna30mfpqB&index=1&fbclid=IwAR3MfFPDmlLPQ46Nm4QNNdaPOxkjEqfbZKwUn7_iar41F8XbvSTd6aiHv2g

Studies on the long-term effects of trauma:

- Kaiser Permanente and the Centers for Disease Control and Prevention's Adverse Childhood Experiences Study
- Comorbidity and Continuity of Psychiatric Disorders in Youth After Detention: a Prospective Longitudinal Study
- Brain Development: Harvard University Center on the Developing Child – Toxic Stress

- Long-Term Effect of Toxic Stress on Child: American Academy of Pediatrics News & Journal Gateway, The Lifelong Effects of Early Childhood Adversity and Toxic Stress, (2012).
- Emotional Toll: Mayo Clinic's Reactive Attachment Disorder Research

Resources on family separation and trauma developed by the National Child Traumatic Stress Network (NCTSN):

- Traumatic Separation and Refugee and Immigrant Children: Tips for Current Caregivers
- Key Points: Traumatic Separation and Refugee and Immigrant Children
- NCTSN Resources Related to Traumatic Separation and Refugee and Immigrant Trauma

Studies conducted to assess child outcomes when removed from primary caregivers:

- Mental and Physical Health of Children in Foster Care by the American Academy of Pediatrics (2016)
- The importance of visitation and contact with family:
  - Information Packet Parent-Child Visiting, National Resources Center for Family-Centered Practice and Permanency Planning at the Hunter College School of Social Work (2008)
- The younger the child and the longer the period of uncertainty and separation from the primary caregiver, the greater the risk of emotional and developmental harm to the child.
  - Developmental Issues for Young Children in Foster Care by the American Academy of Pediatrics Committee on Early Childhood, Adoption and Dependent Care (2000)
  - Visitation with Infants and Toddlers in Foster Care: What Judges and Attorneys Need to Know by the American Bar Association (2007)
  - Mental Health Assessments for Infants and Toddlers by the American Bar Association in Child Law Practice (Vol. 24 No.9) 129-139 (2005)
- Improving Family Foster Care: Findings from the Northwest Foster Care Alumni Study (2005) by Casey Family Programs
- Separation may lead to mental health disorders – Parenting Matters: Supporting Parents of Children Ages 0-8 (2016) by The National Academies: Sciences, Engineering, & Medicines
- Family disruption can hinder healthy development and increase risk of future disorders – Preventing Mental, Emotional, and Behavioral Disorders Among Young People: Progress and Possibilities (2009) by The National Academies: Sciences, Engineering, & Medicine

Guide to assist attorneys in child welfare practice:

- Child Safety: A Guide for Judges and Attorneys by the American Bar Association
- Martin Guggenheim and Vivek S. Sankaran, Representing Parents in Child Welfare: Advice and Guidance for Family Defenders (2015) (available for purchase)

V. Montana Resources
b. Drug Use and Parenting

NAPW MEMORANDUM TO FILE

RE: Parental Drug Use in Child Welfare Cases
January 29, 2021

National Advocates for Pregnant Women (NAPW) is a nonprofit that works to ensure the health and rights of pregnant and parenting women. Frequently, this requires NAPW to bring robust, peer-reviewed scientific research and medical expertise to courts and legal systems in order to combat biases, assumptions, and misinformation about the risks of prenatal drug exposure or parents who use controlled substances.[1]

The reputable, peer-reviewed scientific research on the subject and legal authorities agree that a person can use illicit, controlled substances—and even have a dependency problem—and still adequately parent their child.[2] In fact, contrary to common stigma, most people who use both legal and illegal substances are functioning, contributing members of society.[3] For example, despite popular, negative beliefs about the impacts of drug use on a person's ability to work, scholars have found "many individuals who use drugs are capable of and do hold regular employment without diminished performance or capabilities.[4] Mistaken media coverage and bias drives the assumption that a pregnant person or parent who uses an illegal drug or who has a

[1] The peer-reviewed research indicates that parents of infants who were substance-exposed in utero are no more likely to maltreat their children than other parents; the research indicating that those parents posed increased risk of maltreating their children improperly included subsequent substance-exposed-infant allegations, which accounted for almost all allegations against those parents. Brenda D. Smith et al., *The risk of subsequent maltreatment allegations in families with substance-exposed infants*, 26 Child Abuse & Neglect 97 (2002). *See also infra* note 16.
[2] *See*, *e.g.*, Susan Boyd, *Gendered drug policy*, 68 Int'l J. of Drug Policy 109 (2019) ("Research findings conclude that many women who use illegal drugs are adequate parents and, like non-drug using parents, adopt strategies to mitigate harm… [M]ost drug use is unproblematic…"[2]); Olsen, et al., *Contraception, punishment and women who use drugs*, BMC Womens Health, 2014 Jan 9;14:5, doi: 10.1186/1472-6874-14-5 ("Women's drug use should not automatically be associated with an inability to make informed health care choices or to care for children."); Hepburn, *Drug use in pregnancy*, Br J Hosp Med. 1993 Jan 6-19;49(1):51-5. PMID: 8431726. ("This research contributes to filling this gap in information by describing the regular, loving family lives of people who face significant challenges in parenting, including regular use of illicit drugs. Although their lives and relationships do not always conform to mainstream standards, they practice ways of keeping children safe and loved that are rarely documented."); Am. Bar Ass'n, Foster Care Project, Nat'l Legal Resource Center for Child Advocacy & Protection, *Foster Children in the Courts* 206 (Mark Hardin ed., 1983) (many parents "suffer from drug or alcohol dependence yet remain fit to care for a child. An alcohol or drug dependent parent becomes unfit only if the dependency results in mistreatment of the child, or in a failure to provide the ordinary care required for all children.").
[3] National Surveys on Drug Use and Health (NSDUHs), 2008 to 2010 (revised March 2012) and 2011 to 2012 (an annual survey sponsored by the Substance Abuse and Mental Health Services Administration (SAMHSA)) (a majority of "adults with Substance Use Disorders (SUDs) are employed full time."); Richardson, L., & Epp, S., *Addiction, employment and the return to work*, in I. Z. Schultz, & R. J. Gatchel (Eds.), Handbook of return to work (2016) (pp. 667-692) ("Research indicates that most people who use both legal and illegal substances are employed.").
[4] *Addiction, employment and the return to work*, at 684.

substance use disorder is more likely to abuse or neglect her or his child than one who does not; that assumption is not supported by peer-reviewed evidence that meets the minimum requirements for scientific rigor.[5] Courts are obligated to look past commonly held beliefs about drug use and parenting. Courts are required to consider only admissible, peer-reviewed social science research to support generalizations regarding the relationship between parental drug use and the ability or inability to parent safely, or likelihood of abuse or harm. In other words, courts are required to base decisions on facts—not on imagination, conjecture, or presumption.

A positive drug test does not, of itself, demonstrate harm or a substantial risk of harm.[6] As the United States Department of Justice explains, "Drug tests detect drug use but not impairment."[7] A positive drug test cannot determine whether a person occasionally uses a drug, is addicted, suffers any physical or emotional disability from that addiction, or is more or less likely, if they are parents, to abuse or neglect their children.[8]

In fact, substance use disorder (SUD) and substance misuse are clearly differentiated from mere use. SUD is "a medical illness caused by repeated misuse of a substance or

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[5] *See* note 1. Also, the source most often cited for the claim that drug use increases the likelihood of abuse is a self-published report which was not subject to peer review: National Center on Addiction and Substance Abuse at Columbia University (CASA), *No Safe Haven: Children of Substance-Abusing Parents* (1999), *available at* http://www.casacolumbia.org/articlefiles/379-No%20Safe%20Haven.pdf. Its major publicized finding, that children whose parents abuse drugs and alcohol are three times more likely to be physically or sexually assaulted and more than four times more likely to be neglected than are children of parents who are not substance abusers, was based on what amounted to an opinion survey of people working in the child welfare field. *Id.* at ii. But not only did this survey fail to qualify as reliable scientific evidence, the report itself noted that those who were surveyed were the least qualified to draw conclusions about causation and associations because few had any training in issues concerning drug use and addiction. *Id.* at 5. Moreover, the appendix to the CASA Report acknowledged that it did not rely on reliable data. *Id.* at 165. *See also* David J. Hanson, *The Center on Addiction and Substance Abuse: A Center for Alcohol Statistics Abuse?*, http://alcoholfacts.org/CASAAlcoholStatisticsAbuse.html (challenging the quality and value of research from the Center and noting its refusal to submit its work to peer review).

[6] *See*, *e.g.*, Movement for Family Power, *Whatever They Do, I'm Her Comfort, I'm Her Protector: How the Foster System Has Become Ground Zero for the U.S. Drug War*, at 30 (June 2020) (hereinafter "Ground Zero Report"), bit.ly/groundzeroreport; Center for Substance Abuse Treatment, *Drug Testing in Child Welfare: Practice and Policy Considerations*, HHS Pub. No. (SMA) 10-4556 Rockville, MD: Substance Abuse and Mental Health Services Administration, 2010 at page 1 ("A drug test alone cannot determine the existence or absence of a substance use disorder. In addition, drug tests do not provide sufficient information for substantiating allegations of child abuse or neglect or for making decisions about the disposition of a case.").

[7] U.S. Dept. of Justice, *Drugs, Crime, and the Justice System: A National Report from the Bureau of Justice Statistics* 119 (1992).

[8] *Id.*; *see also* Boyd, *supra* note 2 (2018) ("Drug use in and of itself does not equal risk, nor is it the only factor that shapes family life — neoliberal social and economic policies also reproduce social inequality and other social ills (like drug laws, homelessness and inadequate wages and social benefits) that make parenting difficult for families.").

substances."[9] Substance misuse is "[t]he use of any substance in a manner, situation, amount, or frequency that can cause harm to users or to those around them."[10] According to the DSM-5, the authority on diagnosing mental disorders, SUDs are characterized by "clinically significant impairments in health, social function, and impaired control over substance use and are diagnosed through assessing cognitive, behavioral, and psychological symptoms."[11] Where someone uses a substance but does not have clinically significant impairments in health or social function, or impaired control over substance use, they would not qualify as having a substance use disorder, and would not elicit the associated concerns about impaired social engagement, including parenting.[12]

"[L]eading medical organizations agree that a positive drug test should not be construed as child abuse or neglect" and that policing on the basis of a positive drug test "poses serious threats to people's health … [by] erod[ing] trust in the medical system, making people less likely to seek help when they need it."[13] To the contrary, the current best practice for treating substance-exposed newborns is to keep the newborn and mother together because that improves medical outcomes, decreases length of hospital stay, and improves psychosocial outcomes.[14] Furthermore, punitive action against these parents is counterproductive and in fact harms both

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[9] Substance Abuse and Mental Health Services Administration (SAMHSA), an agency of the U.S. Department of Health and Human Services, *Treatment Improvement Protocol 39: Substance Use Disorder Treatment and Family Therapy* (2020), p. 5.

[10] *Id.* at 4.

[11] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-5") (2013).

[12] *See also* Micol Parolin, et al., *Attachment Theory and Maternal Drug Addiction: The Contribution to Parenting Interventions*, Frontiers in Psychiatry 2016; 7:152, doi: 10.3389/fpsyt.2016.00152, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5004230/#B57 ("By contrast, empirical evidence attests the drug addiction does not fully or always compromise parenting, and a healthy caregiving relationship can be preserved despite the psychopathological condition; in fact, addiction, as other disorders, and parenting are two partially independent domains and each one can be attributable to a host of factors.")

[13] American College of Obstetricians and Gynecologists, Opposition to Criminalization of Individuals During Pregnancy and Pospartum Period (2020), https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period.

[14] *See*, *e.g.*, Kathryn Dee L. MacMillan, MD, et al., *Association of Rooming-in With Outcomes for Neonatal Abstinence Syndrome, A Systematic Review and Meta-analysis*, JAMA Pediatr. 2018; doi: 10.1001/jamapediatrics.2017.515 available at https://jamanetwork.com/journals/jamapediatrics/fullarticle/2672042; Matthew R. Grossman, MD, et al., *An Initiative to Improve the Quality of Care of Infants with Neonatal Abstinence Syndrome*, Pediatrics May 2017, e20163360, available at http://pediatrics.aappublications.org/content/early/2017/05/16/peds.2016-3360; Ronald R. Abrahams, et al., *Rooming-in compared with standard care for newborns of mothers using methadone or heroin*, Can. Fam. Physician 2007 Oct.; 53(10): 1722-1730, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2231437/.

the baby and the parents.[15] Older children also experience improved social and medical outcomes when kept with their parents,[16] and their development is harmed by separation from their parents and time in foster care.[17] Furthermore, potential risk to older children is severely diminished as compared with newborns, as children have greater ability to self-protect than a newborn.

Other states have recognized that a positive toxicology or even ongoing use of an illicit substance are not the same as harm and are insufficient bases to separate a parent and child, and certainly insufficient bases to terminate the legal relationship between parent and child. In New York, the law recognizes that there are many degrees of parental drug and alcohol use and abuse, and not all require treatment or support an inference that the parent has harmed their children or placed them at imminent risk of harm.[18] The highest New York court affirms there has to be both an actual or imminent risk of harm to the child present in the case, and that imminent risk of harm must be "clearly attributable" to the parent's misuse in order to find neglect and set the

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[15] *See*, *e.g.*, Laura J. Faherty, et al., *Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy with Rates of Neonatal Abstinence Syndrome*, JAMA Network Open, Nov. 2019, doi: 10.1001/jamanetworkopen.2019.14078, https://www.researchgate.net/publication/337238977_Association_of_Punitive_and_Reporting_State_Policies_Related_to_Substance_Use_in_Pregnancy_With_Rates_of_Neonatal_Abstinence_Syndrome; Daisy Goodman, DNP, MPH, et al., *It's Time to Support, Rather Than Punish, Pregnant Women With Substance Use Disorder*, 2019, https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2755302.

[16] Susan M. Snyder, et al., *Do Physical Abuse, Depression, and Parental Substance Use Influence Patterns of Substance Use Among Child Welfare Involved Youth?*, 50 Substance Use Misuse 2, 1 (2015) ("Among child welfare-involved youth a key protective factor that buffers against substance use is living with biological parents"); Doyle, Joseph, *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, American Economic Review, 97 (5): 1583-1610 (2007) (showing that children on the margin of placement fare better when left at home than placed in foster system); *Ground Zero Report* at 36 ("Separation from parents causes children acute short- and long-term adverse health consequences, as was widely covered in the news media during the family separation crisis at the border. It disrupts the child's bond to their primary caregiver, literally affecting brain architecture and triggering a proliferation of toxic stress. Studies and life experience show that this is just as much true for children who have been maltreated as those who have not. The social science literature is beginning to document the effects on parents, showing a host of negative health consequences which include suicidality, depression, anxiety, post-traumatic stress disorder, postpartum depression and premature mortality. Alongside these health outcomes, research also points to heightened social disadvantages, including loss of housing, employment, income and social support, and increased stigma. As noted in a recent report to the United Nations Special Rapporteur on Violence Against Women, these outcomes 'compound societal disadvantages already faced by these mothers prior to removal of their children, further escalating systemic disregard and health/social inequities for mothers and creating significant barriers to rebuilding their lives and families.'") (citations omitted).

[17] Catherine R. Lawrence, et al., *The impact of foster care on development*, 18 Development and Psychopathology (2006); Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, Pediatrics, Volume 138, Issue 5 (Nov. 2016), available at https://pediatrics.aappublications.org/content/138/5/e20161118 (showing association between increased mental health issues and child placement in the foster system); Joseph J. Doyle, Causal effects of foster care: An instrumental-variables approach, 35:7 Children Youth Services Review 1143 (2013), available at https://www.sciencedirect.com/science/article/pii/S0190740911000983?via%3Dihub (suggests placement in foster care increases the likelihood of emergency health episodes).

[18] Besharov, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 1012 [1998 Ed.].

stage for termination.[19] "A positive toxicology… does not prove that the child has been physically, mentally or emotionally impaired, or that he is in imminent danger of becoming impaired in a manner clearly attributable to the parent's failure to exercise the requisite degree of care" and so is insufficient to support a finding of neglect.[20] Furthermore, the courts are clear that assumptions about risk presented by parental drug use are not sufficient to make the requisite showing that there is actual risk of harm, or that risk is clearly attributable to the parent's use.[21] "[S]ince the purpose of the statute is to protect children from serious harm or potential harm the statutory test is a minimum degree of care 'not maximum, not best, not ideal and the failure [of the parent, to exercise a minimum degree of care] must be actual, not threatened.'"[22] While someone might think it is not ideal for a parent to use a substance, that is insufficient to justify the state's intervention in the family's life or separation of parent and child.

Similarly, courts in California have repeatedly reversed findings of neglect based on parental drug use where there was no evidence establishing a connection between such use and an actual or a substantial risk of harm to the children.[23] In *Destiny S.*, regarding an 11-year-old happy, healthy child with some tardy school attendance and a mother who tested positive for marijuana and methamphetamine, the appellate division explicitly stated, "the use of marijuana without more does not bring a minor within the jurisdiction of the dependency court… **The same is true with respect to the use of hard drugs.**"[24] The court found there was no evidence of a substantial risk of imminent physical harm or illness and therefore no basis to exercise any jurisdiction over this family.

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[19] Family Court Act § 1012(h); *Nicholson v. Scopetta*, 3 N.Y.3d 357, 369 (2004); *see also*, *e.g.*, *In re Linda E.*, 143 A.D.2d 904 (2d Dep't l988).

[20] *In re Dante M.*, 87 N.Y.2d 73, 78-79 (1995) (overturning a finding of neglect based solely on a positive toxicology at birth); *see also In re Delanie S.*, 165 A.D.3d 1639, 1639 (4th Dep't 2018) ("[T]he mere use of illicit drugs is insufficient to support a finding of neglect.").

[21] *In re Smith Jones Children*, 950 N.Y.S.2d 491, 2012 N.Y. Misc. LEXIS 639, *34 (Kings Cnt'y Fam. Ct. 2012) (noting "[a] presumption of risk cannot be used as a substitute for proof that the alleged harm or risk of harm to the child is 'clearly attributable' to the parent's misconduct" and dismissing the neglect petition) (citing *Dante M.*, 87 N.Y.2d at 78-79; *In re Afton C.*, 17 N.Y.3d 1, 10 (2011); *Nicholson*, 3 N.Y.3d at 368, 371, 375).

[22] *Smith Jones*, at *26 (citing *Nicholson*, 3 N.Y.3d at 370).

[23] *See*, *e.g.*, *In re David M.*, 134 Cal. App. 4th 822, 827-833, 36 Cal. Rptr. 3d 411, 414-418 (Cal. App. 4th Dist. 2005) (rejecting finding of neglect where mother used marijuana and parents had mental illness and/or disability, and children were loved, healthy and well-cared for); Jennifer A. v. Superior Court, 117 Cal. App. 4th 1322, 1333-1347, 12 Cal. Rptr. 3d 572 (Cal. App. 4th Dist. 2004) (rejected order terminating reunification services where mother was sufficient parent, there was no evidence linking the mother's marijuana or alcohol use to her parenting skills or judgment, and there was no evidence of clinical substance abuse, no testimony from a medical professional and no report of a clinical evaluation establishing a pattern of substance abuse leading to clinically significant impairment or distress).

[24] *In re Destiny S.*, 210 Cal. App. 4th 999 (4th Dist. 2012).

In *Rebecca C.*, the appellate court was even more explicit, that even where the mother used methamphetamine regularly and was found to have a substance abuse problem—not mere use—in this case her use did not place the child at risk and therefore there was no basis for the court to exercise jurisdiction over this family.[25] Furthermore, the court rejected the state's argument that, inherently, a child cared for by a parent under the influence of methamphetamine was at risk.

> [That argument] excises out of the dependency statutes the elements of causation and harm. In other words, DCFS essentially argues that, when a parent engages in substance abuse, dependency court jurisdiction is proper. This is not what the dependency law provides. Further, if DCFS's position were accepted, it would essentially mean that physical harm to a child is *presumed* from a parent's substance abuse under the dependency statutes, and that it is a parent's burden to prove a negative, i.e., the *absence* of harm. Again, this is not what the dependency law provides."[26]

The court therefore overturned the trial level disposition, ended the courts' jurisdiction over the family, and allowed the preteen to remain with her mother.

Similarly, in New Jersey, in the absence of evidence of actual impairment to the child, there must be evidence of imminent danger or substantial risk of harm. [27] Absent such a showing, mere use of cocaine was insufficient to support a finding of abuse or neglect.[28]

As the Movement for Family Power's research[29] and the research[30] and journalism[31] of many others show, the foster system does not reliably or consistently predict whether and when a child is at serious risk of harm on account of their caretaker's drug use. However, removal and even termination of parental rights based solely on prenatal exposure is widespread; typically, the decision to remove a child is not dictated by law, policy, or scientific or legal evidence, but

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[25] *In re Rebecca C.*, 228 Cal. App. 4th 720 (Cal. App. 2d Dist. 2014).
[26] *Id.* at 728.
[27] *New Jersey Dep't of Children & Families, Div. of Youth & Family Servs. v. A.L.*, 213 N.J. 1, 22, 59 A.3d 576, 588 (2013).
[28] *Id.*
[29] *Ground Zero Report* at 30.
[30] *See*, *e.g.*, Hornby Zeller Associates, Inc., *Analysis of the Rise in Arkansas' Foster Care Population* (2017) (finding that many judges ordered a child removed from his or her parents when any illegal drug use on the parents' part was detected and caseworkers often tried to anticipate the court's decision, acting against their own judgment, and removing more children as a result).
[31] *See*, *e.g.*, the extensive writing and social media activity of Dinah Ortiz and Elizabeth Brico.

rather by hyper-local practice.[32] "[J]udges' subjective views of drug use and child rearing influence their daily decision-making so much so that one parent can lose custody of their child because of evidence of drug use in one courtroom, and next door the same circumstances will result in a service plan and supervision. There is no real effort to differentiate between drug use and drug misuse, or to conduct a fact specific inquiry into whether or how a parent's drug use is affecting their child rearing."[33]

There is no medical or scientific consensus that drug use alone—including ongoing use—provides a permissible or even logical basis for the termination of a parent-child bond. The child welfare system exists to protect children from caregivers who are unable to provide a minimum degree of care to their children, not to dictate ideal parenting or punish families for parents' undesirable behavior. The courts must demand credible, specific, sufficient evidence that the individual parent in question is unable to care for their child and places their child at actual, imminent risk of harm because of their drug use before considering a finding of neglect, and certainly before considering termination. A termination of the parent-child bond based on mere use is contrary to the purpose of the child welfare system—to protect children from serious harm or potential harm—and unnecessary and unjustified termination immeasurably hurts the children and families the system should protect.

Please direct questions to Samantha Lee, Staff Attorney, sbl@advocatesforpregnantwomen.org

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[32] *Ground Zero Rpoert* at 31; *see also*, *e.g.*, Roxanna Asgarian, *Drug Testing the Whole Family*, The Imprint (June 21, 2020), https://imprintnews.org/child-welfare-2/drug-testing-the-whole-family/44583.

[33] *Ground Zero Report* at 31.

International Centre on Human Rights and Drug Policy

UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER

UNAIDS

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International GUIDELINES on HUMAN RIGHTS and DRUG POLICY

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1.3 Protection in the context of parental drug dependence

Every child has the right to such care and protection as is necessary for their well-being, including where the child's parents use drugs or are drug dependent.

In accordance with this right, States shall:

i. Ensure that the best interests of the child are a primary consideration in decisions regarding their care, including in the context of parental drug dependence.

In addition, States should:

ii. Ensure that a parent's drug use or dependency is never the sole justification for removing a child from parental care or for preventing reunification. Efforts should be directed primarily towards enabling the child to remain in or return to the care of their parents, including by assisting drug-dependent parents in carrying out their child care responsibilities.

1.4 Protection from exploitation in the illicit drug trade

Children have the right to protection from exploitation, including in the illicit drug trade. States shall take appropriate measures to protect children from exploitation in the illicit drug trade through preventative and remedial measures.

In accordance with this right, States should:

i. Prioritise addressing the root causes of involvement in the drug trade, including poverty and social marginalisation.

ii. Clearly define exploitation, ensuring that children's participation in the rural cultivation of illicit drug crops through tradition or poverty is not wrongly treated as exploitation without specific evidence of such exploitation taking place.

iii. Avoid treating as criminals children who have been exploited in the drug trade.

2. Women

Women have the right to enjoy human rights and fundamental freedoms on a non-discriminatory basis in all fields of life on the basis of equality with men. This right applies to women who use drugs and women who are involved in the drug trade or dependent on illicit drug economies.

In accordance with these rights, States shall:

i. Take all appropriate measures, including legislative, administrative, social, and educational measures, to prevent, mitigate, and remediate any disproportionate or otherwise discriminatory impact on women as a result of drug laws, policies, and practices, particularly where aggravated effects result from intersecting forms of discrimination.

To facilitate the above, States should:

ii. Obtain and disseminate age- and sex-disaggregated data on drug use and related harms and on the nature of women's involvement in the illicit drug trade, including involvement in the criminal justice system as a result of allegedly using drugs or being involved in drug-related crime.

IV. Memorandums, Articles, and Research
c. Other

Kids in Care: Analysis of Population Trends and Management Processes in Montana's Foster Care System (DPHHS, Dec. 2021)
Accessible at
https://leg.mt.gov/content/Committees/Administration/audit/2021-22/Meetings/Jan-2022/19P-01.pdf

V. Other Resources

2013

Montana Dependency and Neglect Best Practice Manual

Developed in Cooperation with the
Montana Uniform Dependency and
Neglect Workgroup

Prepared by Nick Aemisegger, Jr., J.D., on behalf of the
Montana Uniform Dependency and Neglect Workgroup

Table of Contents

Introduction

INTRODUCTION

Establishing the Need for a Best Practice Manual

In 2009, the Montana Supreme Court, through its Court Assessment Program, provided funding to establish a Uniform Dependency and Neglect Workgroup (DN Workgroup). The DN Workgroup is a multi-disciplinary team established for the express purpose of increasing collaboration among stakeholders in DN cases, improving the quality of professional practice statewide, and conserving limited judicial resources. Since its inception, one of the primary goals of the DN Workgroup was to develop and distribute a DN Best Practice Manual designed specifically for Montana.

At around the same time the DN Workgroup was established, the American Bar Association released a publication entitled, *Child Safety, a Guide for Judges and Attorneys* (*Child Safety Guide*), co-authored by Therese Roe Lund, MSSW, and Jennifer Renne, JD. The *Child Safety Guide* drew on nationally accepted best practice standards to develop a framework within which judges and attorneys could make informed decisions regarding child safety. This framework can be especially helpful in determining when it is appropriate to remove children from their home, and when it is safe to return them. The *Child Safety Guide* has been widely distributed and utilized in training sessions and conferences throughout Montana since its release.

In early 2012, the Montana Division of Child and Family Services (CFS) implemented the Safety Assessment and Management System (SAMS). The SAMS model essentially provides a vehicle by which the decision making process identified in the *Child Safety Guide* can be implemented in the field. SAMS accomplishes this feat by employing both a short-term present danger assessment, as well as a subsequent, more comprehensive family functioning assessment designed to give CFS workers the tools necessary to make objective, timely, and informed decisions regarding child safety.

Purpose of the Best Practice Manual

This manual is intended to provide much needed relief to judges, attorneys, CFS workers, GALs and CASA volunteers who are struggling with the challenge of incorporating an improved framework for making child safety decisions into a judicial process guided and directed by a cumbersome – and at times disjointed – set of Montana statutes. In addition, this manual seeks to eliminate much of the confusion surrounding the competing functions of child attorney and GAL/CASA volunteer by clearly defining their respective roles and responsibilities.

It should be noted, however, that this manual is NOT intended to establish or identify minimum practice standards for judges, attorneys, CFS workers, GALs/CASA volunteers, or any other participant. Such standards, to the extent they exist, are better left to those agencies or entities responsible for overseeing individual participants. Rather, this manual is designed to readily identify best practices and to encourage

participants to utilize them whenever possible. It should be noted that recognized best practice standards are meant to supplement – and not supplant – existing Montana law. As a practical matter, any decision made by a judge in a DN case will be guided and directed by the best interest of the child. Because best practice standards and stated Montana law and policy both seek to advance the best interest of children, the two should seldom, if ever, conflict.

In addition to identifying best practices, this manual was also designed to bring much needed simplicity and clarity to a cumbersome and complex process. It seeks to accomplish this by first dividing the "average" DN case into logical and digestible "critical stages," then, with respect to each stage, by succinctly describing the purpose, process to be followed, and respective roles of the relevant parties. The author was careful to provide extensive footnotes to enable the reader to determine the source of each provision (i.e., whether the provision is related to a statute or a standard). Furthermore, in order to allow the reader to easily differentiate between provisions which are required by Montana law and those which are recognized and encouraged best practice standards, the author employs mandatory language (i.e., must) with regard to the former and precatory language (i.e., should) with regard to the latter.

Development of the Best Practice Manual

Prior to developing this manual, the author travelled throughout Montana and conducted structured interviews with over 20 district court judges in order to determine current practice standards. Attorneys, CPS workers, GALs and CASA volunteers were likewise interviewed. It became apparent during the interview process that many courts had already implemented some of the practices suggested by the *Child Safety Guide*. Furthermore, additional practices were identified which helped inform and shape some of the recommendations contained in this manual.[1]

Prior to finalizing this manual, draft copies were shared with the DN Workgroup as well as stakeholders throughout Montana. The author owes a debt of gratitude to those who sacrificed their time and energy to carefully review this manual and provide much needed feedback. This manual has been greatly improved as a result of their efforts.

[1] As indicated above, extensive footnotes have been included to identify the source of recommendations contained in this manual.

1) Initial Petition[2] by CFS Seeking Emergency Protective Services[3]

Purpose: The court must determine whether sufficient facts are contained in the supporting affidavit to justify the grant of emergency protective services pending a show cause hearing.[4]

Key Issue: ***Legal Standard*** – An order granting emergency protective services must issue if the supporting affidavit demonstrates **probable cause[5] that the child was at imminent risk of harm.[6] The affidavit should further establish that the action taken by CFS was reasonably necessary to avert the specific injury, as required by applicable federal law.**[7]

Timeline: 1) The CFS worker must submit an affidavit to the attorney for the State within two working days of removal.[8]

2) The State attorney must file the initial petition within 5 working days of receiving the affidavit from the CFS worker.[9]

3) If the court grants emergency protective services, the court must schedule a show cause hearing within 20 days from the date on which the initial petition was **filed**.[10]

Imminent or Apparent Risk of Harm?

The identification and application of a consistent standard governing the forced removal of children in Montana proved troublesome due to the cumbersome and disjointed nature of the statutes governing DN cases in Montana. This issue provides perhaps the best example of the difficulties inherent in deciphering Montana's abuse and neglect statutes.

The problem is best illustrated as follows: On one hand, Montana statutory policy unequivocally provides that there can be no forced removal unless CFS has "reasonable

[2] A request for emergency protective services typically accompanies an initial petition filed by CFS. However, it is possible for CFS to file an initial petition which does not seek emergency protective services. See MCA § 41-3-422(1)(a) for other available options.

[3] Pursuant to MCA § 41-3-301, CFS is required to seek emergency protective services whenever it removes a child from the custody of a parent. If CFS has removed a child and the petition does not request emergency protective services, the petition is defective.

[4] MCA § 41-3-301.

[5] MCA § 41-3-422(5)(a)(i).

[6] MCA §§ 41-3-101(1)(c) and 301(1).

[7] *Mueller v. Auker*, 576 F.3d 979, 991-992 (9th Cir. Idaho 2009) and *Springer v. Placer County*, 338 Fed. Appx. 587, 590 (9th Cir. Cal. 2009).

[8] MCA § 41-3-301(6).

[9] *Ibid.*

[10] MCA § 41-3-432(1).

Appointments: Immediately upon granting emergency protective services, the court should order the following appointments:

1) *Attorney for Each Child* – One attorney may be appointed to represent siblings if no conflict of interest is indicated.[11]

2) *Attorney for Each Parent.*[12]

3) *Guardian Ad Litem for Children*.[13] Where CASA volunteers are available, a CASA volunteer should be appointed as the GAL. Appointing a CASA as a GAL is important because Montana does not have a statute authorizing CASAs to serve as an agent of the court.

ICWA: ***Emergency Removal*** – ICWA allows the emergency removal of an Indian child in accordance with applicable State law provided that 1) such removal is **necessary to prevent imminent physical damage or harm** to the child; 2) the emergency **placement terminates** immediately **when such removal is no longer necessary to prevent imminent physical damage or harm** to the child, and 3) the **State expeditiously initiates a child custody proceeding**, transfers the Indian child to the jurisdiction of his tribe, or restores the child to his parent or Indian custodian.[14]

Elevated Legal Standard – If the case is subject to ICWA,[15] the supporting affidavit must satisfy the elevated standard of

cause to suspect that the child is at imminent risk of harm."[1] On the other hand, the statute governing emergency removal ostensibly allows CFS to remove a child if it has "reason to believe any child is in … apparent danger of harm."[2] Another factor that invites confusion is Montana's definition of child abuse which includes the relatively low standard of failing "to provide cleanliness and general supervision."[3] This is significant because, as a practical matter, a finding of abuse often results in the court granting CFS authority to place the child where it sees fit.[4]

Many pages could be written attempting to interpret these competing statutes *in pari materia*, but the Fourteenth Amendment to the United States Constitution renders such an exercise meaningless. Under the Fourteenth Amendment, a forced removal cannot occur absent "reasonable

[11] MCA §§ 41-3-425(2)(b) & (3)(b) and the 2011 American Bar Association Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (ABA Model Act) § 3.
[12] MCA § 41-3-425(2)(a).
[13] MCA § 41-3-112(1).
[14] 25 USC § 1922.
[15] The case is subject to ICWA if it involves an Indian child, defined as a child who is either enrolled in a federally recognized Indian tribe or is eligible for enrollment and is the biological child of a member of an Indian tribe. 25 USC § 1903(4).

establishing **clear and convincing evidence** of immediate danger.[16]

Appointment of Counsel – Montana expressly authorizes payment for representation required by ICWA. In addition to the appointments above, ICWA requires **legal representation for the "Indian custodian."** The Indian custodian is defined as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child."[17]

Caution: ***Imminent Risk of Harm*** – It is the stated policy of Montana to ensure that there is no forced removal of a child from the family based solely on an allegation of abuse or neglect unless CFS has reasonable cause to suspect that the child is at imminent risk of harm.[18]

Next: ***Show Cause Hearing*** – The show cause hearing must be scheduled within 20 days from the date on which the initial petition was **filed**.[19]

ROLES AND RESPONSIBILITIES

Judge: ***Mediation*** – Consider setting a court-ordered mediation prior to the show cause hearing. This may not be necessary in areas where parties routinely communicate and negotiate appropriate resolutions prior to the hearing. However, in areas where communication is problematic, mediation can prevent the prospect of often cumbersome and unnecessary "initial negotiations" occurring in open court at the initial hearing. The mediation can be

cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury."[5] Furthermore, under the federal standard, the "mere 'possibility' of danger is not enough. If it were, officers would always be justified in seizing a child without a court order whenever there was suspicion that the child might have been abused."[6] Because federal law in this area is clearly established, any CFS worker who removes a child in Montana without reasonable cause to believe that the child is at imminent risk of serious harm will subject both himself and CFS to the possibility of civil damages under 42 USC § 1983.

It is worth noting that the *Child Safety Guide* is consistent with federal law and stated Montana policy in this area, in that it presupposes an "imminent harm" standard when addressing child safety decisions, such as removal and

[16] MCA § 41-3-427(1)(b).
[17] MCA § 41-3-425(2)(c) and 25 USC §§ 1903(6) & 1912(b).
[18] MCA § 41-3-101(1)(c).
[19] MCA § 41-3-432(1).

informal, without either the court or a facilitator present. There is tremendous value in bringing the parties together prior to the initial hearing to identify areas of agreement.[20]

CFS Worker: 1) ***Conditions for Return*** – Ensure that the supporting affidavit contains clear, specific and objective reasons an in-home safety plan is not feasible. This information is critical for assisting the court in developing meaningful conditions for return.

2) ***Family Identification Meeting*** – If the child has not been placed with a relative, schedule a meeting with known family members in order to locate a suitable family placement. This meeting should occur within 48 hours of removal.

3) ***CFS Assessments in Lieu of Traditional Affidavit*** – Current CFS policy requires completion of a present danger assessment/plan prior to removal, followed by a comprehensive family functioning assessment within 60 days of removal.[21] To avoid duplication of efforts on the part of the CFS worker, and to ensure that all parties receive the full benefit of the investigation, the CFS worker should consider filing the present danger assessment/plan with the initial petition, in lieu of the traditional affidavit. Once the family functioning assessment has been completed, this document should be filed as a supplemental report. Whenever the above referenced documents are filed with the court, they should be attached to an affidavit which incorporates the documents by reference and attests to the accuracy of the facts contained in them.

reunification.[7] Because Montana statutory policy, established federal law, and the *Child Safety Guide* all adhere to the "imminent harm" standard, this standard is assumed and asserted throughout this manual.

To be clear, this is not to say that CFS can only intervene in cases where imminent harm is present. To the contrary, CFS can and should intervene in cases where child abuse and neglect is present, even in the absence of imminent harm. However, in accordance with clearly established federal law and nationally recognized best practices, CFS should not forcefully remove a child, nor should a court endorse a forced removal, absent reasonable cause to believe imminent harm is present.

For those cases where imminent harm is not present, CFS has other alternatives available, including voluntary service agreements and temporary investigative authority. In addition, it may be possible for

[20] MCA § 41-3-422(12).
[21] CFS Policy Manual § 202-3.

State Attorney: ***Consultation*** – Be available to the CFS worker for consultation prior to filing the petition. Ensure that the affidavit contains sufficient facts to support the requested relief.

CFS to obtain a court-ordered treatment plan together with temporary investigative authority in cases where imminent harm is not present. To do so, CFS would need to request a treatment plan that does not include placement authority.

[1] MCA § 41-3-101(1)(c).
[2] MCA § 41-3-301(1).
[3] MCA § 41-3-102(20).
[4] MCA § 41-3-442(3).
[5] *Mueller v. Auker*, 576 F.3d 979, 991-992 (9th Cir. Idaho 2009).
[6] *Tenenbaum v. Williams*, 193 F.3d 581, 593-594 (2d Cir. N.Y. 1999).
[7] *Child Safety Guide* at 2 ("For a child to be unsafe, the consequences must be severe and imminent.").

2) Show Cause Hearing

Purpose: To provide the parties an opportunity to challenge the court's initial probable cause finding, based on the supporting affidavit, **that the child was in imminent danger of harm.[22] The parties can further challenge whether the action taken by CFS was reasonably necessary to avert the specific injury, as required by applicable federal law.**[23] In addition, the court must determine 1) if the child should be returned home immediately, 2) why continuation of the child in the home would be contrary to the child's best interests, and 3) whether CFS has made reasonable efforts to avoid protective placement of the child.[24]

Key Issues: 1) ***Child Safety*** – Ensuring child safety is the court's primary goal. Objective, reliable, and timely information is necessary to enable the court to achieve this objective. At a minimum, the court **should have answers to the following six questions**[25] in order to make informed decisions regarding child safety:

a) What is the nature and extent of the maltreatment?
b) What circumstances accompany the maltreatment?
c) How does the child function day-to-day?
d) How does the parent discipline the child?
e) What are the overall parenting practices?
f) How does the parent manage his own life?

The child is **NOT** safe when 1) threats of danger exist within the family **and** 2) a child is vulnerable to such threats **and** 3) the parents have insufficient protective capacities to manage or control the threats.[26]

2) ***Visitation*** – When removal occurs, an appropriate visitation schedule should be established. Furthermore, disputes involving visitation should be addressed at the show cause hearing. The following factors[27] should be considered when establishing a visitation schedule:

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[22] MCA §§ 41-3-101(1)(c) and 301(1).
[23] *Mueller v. Auker*, 576 F.3d 979, 991-992 (9th Cir. Idaho 2009) and *Springer v. Placer County*, 338 Fed. Appx. 587, 590 (9th Cir. Cal. 2009).
[24] MCA § 41-3-432.
[25] 2009 American Bar Association *Child Safety Guide for Judges and Attorneys* (*Child Safety Guide*), 3.
[26] *Child Safety Guide* at 2.
[27] *Child Safety Guide* at 33-34.

a) Immediate and frequent contact between child and parent should be established to help maintain the child's identity and reduce trauma.
b) Cookie-cutter visitation plans (the same frequency, location, and level of supervision) should be avoided because they often place needless restrictions on parent-child contact, and miss opportunities to achieve safety expediently.
c) Where possible, visits should take place in the foster home providing a more natural setting and allowing the foster parent to model parenting techniques.
d) Frequency or length of visits should not be used as punishment or reward, but is a right of all family members unless child safety is jeopardized.
e) Other contacts should be authorized where appropriate, including phone calls, letters, email, text messaging, attending church, school and other appointments together.

The **visitation schedule should be established based on the best interests of the child and not resources available to CFS.** Although the court is required to consider CFS resources when ordering examinations, evaluations, or counseling during adjudication[28] and disposition[29] proceedings, there is no similar requirement regarding visitation, and, in any event, no such limitation exists at the show cause hearing.

3) ***Conditions for Return*** – If the child is not returned home, the court should establish minimum expectations or conditions for the child to return home. Clearly identifying conditions for return is important because parents being confused about what they must do or accomplish creates barriers to the child's safe and timely return and ultimately leads to lower rates of reunification.[30] The following factors[31] should be considered when establishing conditions for return:

a) Determine exactly why an in-home safety plan was originally determined to be insufficient, unfeasible or unsustainable.
b) Do not wait until the family is able to completely protect the child on its own before returning the child home. Threats do not have to be eradicated – they need to be

[28] MCA § 41-3-437(b)(ii).
[29] MCA § 41-3-438(g) & (h).
[30] *Child Safety Guide* at 33-34.
[31] *Child Safety Guide* at 34-38.

controlled – before children can be reunified with families.

c) Threats can be controlled by specifying people, behaviors, and circumstances (including alternatives and options) that, if in place and active would resolve why an in-home safety plan was insufficient.
d) Include as a condition for return that the family agree to a court-ordered in-home safety plan.

4) ***Continuances*** – Continuances may be granted only upon a **showing of substantial injustice**.[32] If continued, the court is required to issue an order with an appropriate remedy that considers the best interests of the child. Although parties may stipulate that grounds for a continuance exist,[33] the court is nonetheless **obligated to DENY a request** unless proceeding with the hearing would result in substantial injustice.

5) ***Stipulations*** – It is common for parties to stipulate to emergency protective services at the show cause hearing. In addition, parties often stipulate that 1) a child is a youth in need of care and 2) the disposition requested by CFS, usually Temporary Legal Custody or Temporary Investigative Authority, is appropriate.[34] The latter two stipulations negate the need for separate adjudication or disposition hearings. **If the parties stipulate to disposition, the court should set the matter for a review hearing within 30-60 days of the show cause hearing, depending upon the complexity of the case.**[35]

6) ***Child Hearsay*** – Hearsay evidence from children who are the subject of the petition may be presented at the show cause hearing.[36]

7) ***Show Cause and Adjudication: Bifurcation Required*** – Although it is typically not appropriate to conduct the show cause and adjudication hearings on the same day,[37] on those rare occasions when it is, the hearings must be bifurcated and the issue of probable cause addressed first. **If the court affirms probable cause, then adjudication can be considered by the court.**

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[32] MCA § 41-3-432(1)(c).
[33] MCA § 41-3-434(4).
[34] MCA § 41-3-434.
[35] Recommendation derived from judge interviews.
[36] MCA § 41-3-432(3).
[37] Conducting a contested adjudication hearing immediately after the show cause hearing is discouraged. See below, Section 4, *Timing of Adjudication Hearing*, p. 26.

Parties should be aware that the child hearsay exception does not apply to the adjudication proceeding.

8) ***Privileges Limited*** – Privileges related to the **examination or treatment of the child do not apply** to child abuse or neglect proceedings. However, the **attorney-client and mediation privileges do apply**.[38]

Bench Cards: The following ABA *Child Safety Guide* Bench Cards, located at the back of this manual, should be consulted:

a) Family Information – Six Safety Questions (p 74)
b) Threats of Danger (p 76)
c) Child Vulnerability (p 77)
d) Protective Capacities (p 78)
e) Child Safety Decision Tree (p 81)
f) Actions and Services to Control Threats of Danger (p 82)
g) Reasonable Efforts to Prevent Removal – In-Home Safety Plans (p 84)
h) Determining Visitation (p 85)
i) Conditions for Returning Child (p 86)

ICWA: ***Elevated Legal Standard*** – If the case is subject to ICWA,[39] CFS must satisfy the elevated standard of establishing by **clear and convincing evidence** that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[40]

Active Efforts – Whenever **CFS seeks to effect a foster care placement**, it must present evidence[41] sufficient to satisfy the court that **active efforts** have been made to **provide remedial services and rehabilitative programs** designed to **prevent the breakup of the Indian family** and that these efforts have proved unsuccessful.[42]

Expert Testimony – Expert testimony is **required whenever CFS seeks to effect a foster care placement**.[43] Expert testimony should not be viewed as a mere "technical requirement" which can

[38] MCA § 41-3-437(5).
[39] The case is subject to ICWA if it involves an Indian child, defined as a child who is either enrolled in a federally recognized Indian tribe or is eligible for enrollment and is the biological child of a member of an Indian tribe. 25 USC § 1903(4).
[40] 25 USC § 1912(e).
[41] ICWA does not designate a legal standard by which this evidence must be established.
[42] 25 USC § 1912(d).
[43] 25 USC § 1912(e).

be satisfied by the same expert for every case. Rather, expert testimony is intended to aid the parties and the court in fulfilling ICWA's larger purpose of educating state courts of tribal cultural and social standards, thereby allowing the court to make a more informed decision and adhere to the spirit and intent of the act.[44] To this end, **CFS must always attempt to locate an expert who can speak to tribal-specific social and cultural norms and practices, including family organization and childrearing practices**.[45] A list of tribal-specific experts can be found at the following CFS Internet address: http://www.dphhs.mt.gov/cfsd/icwa/expertwitnesses.shtml.

Placement Preference – When locating an appropriate **foster care or pre-adoptive** placement for an Indian child, absent good cause to the contrary, preference shall be given to: [46]

a) a member of the Indian child's extended family;
b) a foster home licensed, approved, or specified by the Indian child's tribe;
c) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
d) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Timeline: 1) The court must schedule a show cause hearing within 20 days from the date on which the initial petition was **filed**.[47]

2) If the court has not addressed adjudication at the show cause hearing, either through a stipulation or a contested hearing, then the court must schedule an adjudication hearing within 90 days of the show cause hearing.[48]

Next: 1) ***Review Hearing*** – Review hearings should be scheduled every **30-60 days** in order to assess the current status of the child's vulnerability and the parent's protective capacities.[49]

[44] 2007 Native American Rights Fund, *A Guide to the Indian Child Welfare Act* (*ICWA Guide*), p. 47.
[45] *ICWA Guide* at 113. To justify a foster care placement, 25 USC § 1912(e) specifically requires a finding by an expert that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."
[46] 25 USC § 1915(b).
[47] MCA § 41-3-432(1).
[48] MCA § 41-3-437(1)
[49] Recommendation derived from judge interviews.

2) ***Adjudication Hearing*** – If the court has not addressed adjudication at the show cause hearing, either through a stipulation or a contested hearing, then the court must schedule an adjudication hearing within 90 days of the show cause hearing.[50]

ROLES AND RESPONSIBILITIES

Judge: 1) ***Explain Purpose*** – Inform the parties that the purpose of the proceeding is to **ensure the safety**[51] of the child and

a) **preserve the unity and welfare of the family** whenever possible;[52]
b) protect the child's right to **a healthy and safe childhood** in a **permanent placement**;[53]
c) when removal occurs, protect the child's right to maintain **ethnic, cultural, and religious heritage** whenever appropriate;[54] and
d) when removal occurs**, place the child** with the **noncustodial parent or another relative**, provided the proposed custodian **has not been convicted of a crime involving serious harm to children**.[55]

2) ***ICWA Inquiry*** – Specifically ask the parties whether there is any indication that an Indian child is involved.[56] If so, ensure compliance with ICWA.

3) ***ICWA Notice*** – If the case is subject to ICWA, ensure that CFS has **notified the parent, Indian custodian, and Indian child's tribe** of the proceeding.[57] Pursuant to ICWA, the **hearing cannot be held until 10 days after receipt of the notice**.[58] Determine if the recipients have indicated any intent to intervene[59] or initiate transfer proceedings.[60]

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[50] MCA § 41-3-437(1)
[51] MCA § 41-3-101(1)(a) and 45 CFR § 1356.21(b).
[52] MCA § 41-3-101(1)(b) and 45 CFR § 1356.21(b).
[53] MCA § 41-3-101(1)(e).
[54] MCA § 41-3-101(1)(f).
[55] MCA § 41-3-101(3).
[56] The case is subject to ICWA if it involves an Indian child, defined as a child who is either enrolled in a federally recognized Indian tribe or is eligible for enrollment and is the biological child of a member of an Indian tribe. 25 USC § 1903(4).
[57] MCA § 41-3-432(4).
[58] 25 USC § 1912(a).
[59] 25 USC § 1911(c).
[60] 25 USC § 1911(b).

4) ***Probable Cause Determination*** – Reconsider the court's initial probable cause determination in light of evidence presented.

5) ***Return of Child*** – Determine whether the child can be safely returned home using the questions and criteria outlined above.

6) ***Reasonable Efforts*** – Make an express finding of whether CFS made reasonable efforts to prevent removal of the child. The court should **postpone the hearing** if it cannot make an **informed** decision based on the information presented. It is critical that the court make a fully informed decision at this stage of the proceedings. A finding of "no reasonable efforts" at this stage will **permanently disqualify CFS from receiving federal funds for foster care throughout the life of the case**.[61] Conversely, a premature decision to uphold a removal **could unnecessarily disrupt the bond between parent and child for an extended period of time.** A postponed show cause hearing should be rescheduled as soon as possible, but a "judicial determination" on the issue of reasonable efforts must be made no later than 60 days from date of removal.[62]

7) ***Child Participation*** – If the child is not present, verify that the child's attorney has met with his client and has notified him of his right to participate in the proceedings.[63]

8) ***Review Hearing*** – Set a review hearing within 30-60 days of the show cause hearing, depending on the complexity of the case.[64] The Review Hearing can be combined with other hearings.

CFS Worker: ***Safety Plan*** – Provide the State attorney with a copy of the Safety Plan prior to the show cause hearing. Be prepared to clearly articulate why an in-home safety plan was not feasible and what must occur to ensure the safe return of the child.

GAL/CASA: 1) ***Investigation and Report*** – Meet with the child, the child's caregiver, and all pertinent parties (e.g., teachers, family members, service providers, etc.) regarding the child's safety, well-being and permanency prior to the show cause hearing. If required as a matter of local policy, ordered by the court, or otherwise deemed necessary by the GAL/CASA, submit a written report to the court and parties of record prior to the show cause hearing. Advocate for the child's best interest, not necessarily his expressed interest.

[61] 45 CFR §§ 1356.21(b)(1)(ii) and (d)(2).
[62] 45 CFR § 1356.21(b)(1).
[63] ABA Model Act § 9(c).
[64] Recommendation derived from judge interviews.

Inform the court when taking a position contrary to the child's expressed interest.

2) ***Appointment of Counsel*** – The court may appoint counsel for a GAL/CASA.[65] A request for appointment may be appropriate in cases where the GAL/CASA is not aligned with one of the other parties and therefore requires greater assistance in framing his position and effectively presenting it to the court.

Child Attorney: 1) ***Client Meeting***. Meet with each client prior to the show cause hearing. Explain the nature of the proceeding and the attorney's role in a developmentally appropriate fashion.

2) ***Advocacy***. The attorney should determine and advocate for the child's **expressed interest**. The attorney should counsel the child in a developmentally appropriate manner, but **the attorney should not substitute his judgment in place of the child's**. Despite the fact that the "expressed interest" standard has long been a minimum requirement for child practitioners in accordance with national best practice standards, the Montana Supreme Court has nonetheless held that a child's attorney may, under limited circumstances, take a position contrary to his client's expressed wishes.[66] Again, this practice is not mandated, and in keeping with prevalent national best practice standards, should be avoided.

3) ***File Timely Request for Contested Hearing*** – In order to preserve the child's right to a contested show cause hearing, the attorney **must file a request** for a contested hearing **within 10 days following service of the initial petition**.[67] This notice must be filed whenever the **child disputes** either the **veracity of the supporting affidavit** or the **material facts** contained within it.

4) ***Conflict Determination***. If representing multiple siblings, determine if a conflict exists. The attorney must resolve any identified conflict immediately in accordance with the Montana Rules of Professional Conduct. This will typically require, at a

[65] MCA § 47-1-104(4)(a)(iii).

[66] ABA Model Act § 7(c). As explained in the comments to § 7(c), "[t]he lawyer-client relationship for the child's lawyer is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to provide independent advice. Client direction requires the lawyer to abide by the client's decision about the objectives of the representation. In order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed wishes. Moreover, providing the child with an independent and client-directed lawyer ensures that the child's legal rights and interests are adequately protected." *But see In re K.H. and K.M.*, 2012 MT 175 (expressly allowing, but not requiring, counsel for the child to advocate against his client's expressed wishes in limited circumstances).

[67] MCA § 41-3-427(1)(d).

minimum, seeking an order from the court appointing separate counsel.[68]

5) ***Diminished Capacity***. If the client lacks capacity to direct representation, inform the court of the incapacity, including why the attorney believes the child lacks capacity,[69] then advocate for the child using the "substituted judgment" standard.[70]

6) ***Courtroom Participation***. Inform the child of his right to attend and fully participate in the proceeding. Facilitate age appropriate participation in accordance with § 9 of the ABA Model Act. Continue the matter if the child is not present, unless the child has made an informed decision to waive his appearance.[71]

State Attorney: 1) ***Family Preservation*** – The State attorney needs to carefully balance his obligation to establish a basis for removal with the reality that parents and the State must work together to achieve family unity after the hearing is over. To this end, the State attorney should not seek to "destroy" the parents in the course of presenting his case.[72] Evidence regarding parental deficiencies should be elicited objectively and without malice. Likewise, emphasis should be placed on steps the State will take in order to remedy safety concerns and unify the family as quickly as possible.

2) ***Safety Plan*** – Ensure that all of the parties have a copy of the Safety Plan prior to the show cause hearing. The safety plan will assist the court in making an informed decision regarding child safety. Furthermore, the safety plan will be reviewed at future hearings to monitor progress and assess whether the child can be safely returned.

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[68] ABA Model Act § 3(c).

[69] ABA Model Act §§ 7(d) & (e). As explained in the comments to § 7(e), "[l]awyers should be careful not to conclude that the child suffers diminished capacity from a client's insistence upon a course of action that the lawyer considers unwise or at variance with lawyer's view. … Criteria for determining diminished capacity include the child's developmental stage, cognitive ability, emotional and mental development, ability to communicate, ability to understand consequences, consistency of the child's decisions, strength of wishes and opinions of others, including social workers, therapists, teachers, family members or a hired expert. … A child may have the ability to make certain decisions, but not others. A child with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the child's own well-being such as sibling visits, kinship visits and school choice and should continue to direct counsel in those areas in which he or she does have capacity. The lawyer should continue to assess the child's capacity as it may change over time."

[70] ABA Model Act § 7(d). A substituted judgment determination is not the same as determining the child's best interests. As explained in the comments to § 7(d), "determination of a child's best interests remains solely the province of the court. [A substituted judgment determination] involves determining what the child would decide if he or she were able to make an adequately considered decision. A lawyer should determine the child's position based on objective facts and information, not personal beliefs."

[71] ABA Model Act §§ 9(d) and (e).

[72] Recommendation derived from judge interviews.

Parent Attorney: 1) ***Initial Meeting*** – The parent's attorney should meet with his client within 72 hours of the appointment.

2) ***File Timely Request for Contested Hearing*** – In order to preserve the parent's right to a contested show cause hearing, the attorney **must file a request** for a contested hearing **within 10 days following service of the initial petition**.[73] This notice must be filed whenever the **parent disputes** either the **veracity of the supporting affidavit** or the **material facts** contained within it.

3) ***Child Placement*** – The appropriateness of the child's current placement should be discussed at the initial meeting. The parent should be advised that, generally speaking, children placed with family members have a higher rate of reunification. It should also be noted that placement with a family member provides a per se exception to the requirement that CFS seek termination if the child has been in foster care for 15 of the most recent 22 months.[74] The latter point is especially important to parents who will likely require chemical dependency treatment. **Disputes regarding placement should be addressed at the show cause hearing.**

4) ***Collaboration*** – The parent's attorney should, with few exceptions, counsel his client to interact with CFS in a collaborative fashion. Such an approach is critical for, among other things, identifying and quickly addressing legitimate safety concerns in order to promote timely reunification.[75] One notable exception exists where a parent faces criminal prosecution for alleged abuse or neglect. In such cases, the parent's attorney should discuss ways in which collaboration can occur without compromising the parent's rights in his criminal case. It is equally important for the attorney to work in a collaborative fashion with CFS to advance his client's case. This includes, but is not limited to, assisting in the preparation of an appropriate treatment plan, attending family group decision making meetings, and the like.

[73] MCA § 41-3-427(1)(d).
[74] MCA § 41-3-604(1)(a).
[75] Recommendation derived from judge interviews.

3) Temporary Investigative Authority

Purpose: A grant of authority from the court authorizing CFS to conduct an investigation into allegations of child abuse, neglect or abandonment. The grant of authority lasts no more than 90 days.[76]

Key Issues: 1) ***Filing Typically Includes Request for Emergency Protective Services*** – Although not required, a petition for temporary investigative authority will typically include a request for emergency protective services. This is because a grant of temporary investigative authority, standing alone, does not allow CFS to make decisions regarding the child's care and placement.

2) ***Treatment Plan*** – The court has the authority to order a treatment plan in cases where the parent has admitted the allegations contained in the petition.[77] Because the treatment plan statute grants CFS the authority to make placement decisions (i.e., remove the child),[78] unless placement authority is removed from the treatment plan, any admissions by the parent must necessarily involve imminent danger of harm to the child.[79]

3) ***Adjudicatory and Disposition Hearings NOT Authorized*** – A show cause hearing is the only hearing required for temporary investigative authority.[80] Adjudicatory and disposition hearings are neither required nor authorized.

Why TIA?

During the interview process, the judges were surprisingly consistent in identifying the importance of developing and nurturing a collaborative approach among the parties as a key to improving outcomes for both children and families. However, many cases are initiated in a way that makes collaboration between the parties difficult, if not impossible. This is because most cases are initiated by a request for adjudication rather than a request for temporary investigative authority. The difference between the two approaches, from the perspective of the parents, is massive.

In cases involving temporary investigative

[76] MCA § 41-3-433.
[77] MCA § 41-3-443(1)(a).
[78] MCA § 41-3-443(3)(f).
[79] MCA §§ 41-3-101(1)(c) and 301(1), *Mueller v. Auker*, 576 F.3d 979, 991-992 (9th Cir. Idaho 2009) and *Springer v. Placer County*, 338 Fed. Appx. 587, 590 (9th Cir. Cal. 2009). This will not pose a problem in the vast majority of cases since petitions for temporary investigative authority are invariably combined with requests for emergency protective services, and because the latter request requires a finding that the child was in imminent danger of harm. As noted, however, even in cases where imminent harm is not present, CFS could very likely obtain a court-ordered treatment plan by expressly excluding placement authority from the terms of the requested plan.

4) ***Benefits of Temporary Investigative Authority*** – Though not appropriate for every case, seeking temporary investigative authority can be beneficial for a variety of reasons, including but not limited to the following:

a) ***Facilitates Cooperation*** – parents are less threatened by temporary investigative authority because a continuing investigation affords parents the opportunity to prove they can parent their children. As a result, it is easier and more natural for CFS to come alongside the parents and work with them to achieve its goal of protecting children while maintaining family unity. By contrast, when CFS immediately seeks adjudication, the parents are typically hurt, embarrassed and defensive. In many cases, parents are consumed with establishing their "innocence" and choose to spend their time and energy fighting CFS rather than cooperating.

b) ***Finish Investigation*** – because CFS has recently moved to a model that requires a more comprehensive initial investigation,[81] temporary investigative authority will allow CFS to complete its full investigation prior to deciding whether adjudication is warranted. As indicated above, this will also place CFS in a better

authority, CFS is essentially telling the parents that they are waiting to make a final decision on how to proceed until they are able to complete a comprehensive investigation. This provides an incredible incentive for the parents to work with CFS to "prove" that they can responsibly parent their children. It also provides incentive for the parties to stipulate at the initial hearing, if for no other reason than to possibly avoid the negative consequences, both legal and emotional, that can result from an adjudication hearing.

By contrast, an immediate request for an adjudication hearing has a tendency to place the parties in an adversarial position – one that many parents and CFS workers maintain throughout the life of the case. An additional advantage of initiating a case through a petition for investigative authority is that it virtually guarantees that the family functioning assessment will be

[80] MCA § 41-3-432(1)(a).

[81] Under its current policy, CFS is not required to complete its investigation until 60 days after the alleged abuse was reported. *See* CFS Policy Manual § 202-3. Since the show cause hearing must be held within 20 days of removal, CFS will not have time to complete its investigation and notify the parties of its results prior to the hearing.

posture to work with the parents immediately after the initial filing.

c) ***Smoother Transition to Temporary Legal Custody*** – in cases where temporary legal custody is indicated, parents should better understand the need for continued intervention. A relationship should be established with CFS and the parents cannot complain that they were not given an opportunity to prove themselves.

d) ***Alternative to Contested Adjudication*** – parents will often stipulate to temporary investigative authority in lieu of proceeding to a contested adjudication hearing. This result can expedite the transition to a more collaborative approach to parenting. Furthermore, amending the petition to allow for temporary investigative authority in lieu of adjudication can take place instantaneously in open court or at any time through a written amendment,[82] thus allowing tremendous flexibility in negotiating resolutions.

completed prior to adjudication, in the event an adjudication hearing is necessary. This will ensure that the judge has the benefit of a comprehensive investigation prior to making decisions that will profoundly affect both children and their families. Of course, not all cases are appropriate for temporary investigative authority. Depending on the circumstances of a given case, it may very well be appropriate for CFS to move directly to temporary legal custody or even termination.

One possible downside to temporary investigative authority is that, historically speaking, it has lacked formal oversight by either CFS or the court. In the past, this had led to a lack of accountability, and in many cases, a corresponding lack of progress. To guard against this dynamic, it is recommended that the court approve a treatment plan and conduct review hearings during the 90-day investigatory term.

ROLES AND RESPONSIBILITIES

Judge: 1) ***Treatment Plan*** – In cases where the parents have admitted the allegations, review and approve the treatment plan at the show cause hearing, if possible. If a treatment plan has not been prepared, require CFS to prepare a treatment plan within 10 days and set a review hearing 20 days from the show cause hearing for the purpose of approving the treatment plan.

[82] MCA § 41-3-422(1)(b).

2) ***Ensure Compliance with Show Cause Requirements*** – In all other respects, ensure compliance with the show cause requirements contained in this manual, Section 2, above.

CFS Worker: ***Treatment Plan*** – Prepare a treatment plan for presentation at the show cause hearing. If the parents do not admit the allegations, the document can nonetheless be used to communicate expectations and recommendations. Regardless, the parents will have incentive to adhere to the treatment plan to demonstrate competence and potentially avoid adjudication.

Parent Attorney: ***Explain Benefits*** – Counsel the parent regarding the benefits of temporary investigative authority, as indicated above. Note that temporary investigative authority gives the parent an opportunity to avoid the **negative consequences of an adjudication**, such as a) the corresponding **report of abuse** being deemed **"substantiated"** by CFS,[83] b) **inability to obtain a job** in a variety of **occupations involving children**,[84] and c) **disclosure of information** related to substantiated reports of abuse to certain **employers or volunteer organizations**.[85]

[83] If the court makes a finding that the child is a youth in need of care, whether based on a stipulation or a contested hearing, the underlying child abuse report is deemed substantiated pursuant to ARM § 37.47.615(1)(b). Even if the court makes no such finding, CFS can and often does send a "substantiation letter" to parents who are the subject of a child abuse investigation. The parents have 30 days after the date the letter was mailed by CFS to request a fair hearing. *See* ARM § 37.47.610.

[84] A substantiated report of child abuse or neglect will make it IMPOSSIBLE to operate or be employed by 1) a youth care facility, such as a group home or therapeutic foster home, as indicated by ARM §§ 37.97.115(1)(e) & 37.97.140(6); 2) an outdoor behavioral program, as indicated by §§ 37.98.304(2)(e) & 37.98.406(3)(a); and 3) an adoption agency, as indicated by ARM § 37.93.204(1)(c). Furthermore, a substantiated report will make it extremely difficult, though technically not impossible, to operate or be employed by 1) a day care facility, as indicated by ARM §§ 37.95.108(9)(d), 37.95.176(2)(e) & (3)(d) ; and 2) a foster care home, as indicated by ARM §§ 37.51.210(1) & 37.51.216(2)(f).

[85] MCA § 41-3-205(3)(o) and ARM § 37.47.608 authorize CFS to disclose "information that indicates a risk to children" to prospective employers or volunteer organizations who make a written request to CFS. CFS can only disclose information if the job or volunteer opportunity involves the possibility of unsupervised contact with children. Current CFS policy authorizes disclosure of substantiated reports of child abuse. *See* CFS Policy Manual § 506-1.

4) " Youth in Need o f Care" Adjudication Hearing

Purpose: To determine, by a preponderance of the evidence, whether a child meets the definition of a **"youth in need of care."**[86] A child is a "youth in need of care" if a court determines, **after a hearing**, that a child has been **abused, neglected or abandoned**.[87] A child has been abused, neglected or abandoned if any of the following apply:

a) ***Abandonment*** – the child has been abandoned as demonstrated by **1)** the child being left under circumstances that indicate the parent does not intend to resume care of the child; **2)** willful surrender of a child for 6 months without indicating a firm intention to resume custody or make permanent legal arrangements; **3)** the parent is unknown and has been unknown for at least 90 days despite reasonable efforts to locate; and **4)** the voluntary surrender of a child no more than 30 days old to an emergency services provider pursuant to MCA § 40-6-402. ***Caution:*** *abandonment is* ***not demonstrated*** *by voluntary surrender due solely to inability to access publicly funded services.*[88]

b) ***Physical Abuse*** – indicated when a person commits or allows another to commit[89] an intentional act, omission, or gross negligence resulting in substantial skin bruising, internal bleeding, substantial injury to skin, subdural hematoma, burns, bone fractures, extreme pain, permanent or temporary disfigurement, impairment of any bodily organ or function, or death.[90] **Substantial risk** of physical abuse will support a "youth in need of care" finding.[91]

c) ***Physical Neglect*** – indicated when a person acts in a manner, or allows another to act in a manner[92] that results in a failure to provide basic necessities, including appropriate and adequate nutrition, protective shelter from the elements, and appropriate clothing related to weather conditions, or failure to provide cleanliness and general

[86] MCA § 41-3-437(2).
[87] MCA § 41-3-102(34).
[88] MCA § 41-3-102(1).
[89] MCA § 41-3-102(21)(a)(i).
[90] MCA § 41-3-102(19).
[91] MCA §§ 41-3-102(7)(a)(ii) and 102(21)(a)(i).
[92] MCA § 41-3-102(21)(a)(i).

supervision, or both, or exposing or allowing the child to be exposed to an unreasonable physical or psychological risk to the child.[93] ***Caution:*** *failure to provide food, clothing, shelter, education, or health care constitutes physical neglect* ***ONLY IF*** *the parent is financially able to provide these necessities or has been offered financial or other reasonable means to do so.*[94] ***Caution:*** *the term* ***does not*** *include a child not receiving* ***supervision solely because of parental inability to control the child's behavior****.*[95] **Substantial risk** of physical neglect will support a "youth in need of care" finding.[96]

d) ***Psychological Abuse or Neglect*** – indicated when a person acts in a manner, or allows another to act in a manner[97] that results in severe maltreatment through acts or omissions that are injurious to the child's emotional, intellectual, or psychological capacity to function, including the commission of acts of violence against another person residing in the child's home. However**, it is not psychological abuse or neglect** if an individual, who is himself a victim, fails to prevent abuse against another victim.[98] **Substantial risk** of psychological abuse or neglect will support a "youth in need of care" finding.[99]

e) ***Lack of Provision*** – indicated when a person causes **malnutrition** or a **failure to thrive** or otherwise fails to supply the child with adequate **food** or fails to supply **clothing, shelter, education**, or adequate **health care**, **though financially able to do so or offered financial or other reasonable means to do so**.[100] ***Caution:*** *failure to provide adequate health care solely on the basis of religious beliefs* ***DOES NOT*** *constitute child abuse or neglect.*[101]

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[93] MCA § 41-3-102(20).

[94] MCA § 41-3-102(21)(a)(iv) supplies this limitation for these specific necessities. See "Lack of Provision," below. Where two statutes deal with the same subject matter, the specific prevails over the general. *Boyd v. Zurich Am. Ins. Co.*, 2010 MT 52, ¶ 21.

[95] MCA § 41-3-102(21)(b).

[96] MCA §§ 41-3-102(7)(a)(ii) and 102(21)(a)(i).

[97] MCA § 41-3-102(21)(a)(i).

[98] MCA § 41-3-102(23).

[99] MCA §§ 41-3-102(7)(a)(ii) & 102(21)(a)(i).

[100] MCA § 41-3-102(21)(a)(iv). *See also* MCA § 41-3-102(4) (defining "adequate health care") and § 102(33) (defining "withholding of medically indicated treatment").

[101] MCA § 41-3-102(4)(b).

f) ***Sexual Abuse*** – indicated when a person commits or allows another person to commit any of the following offenses against a child: **sexual assault, sexual intercourse without consent, indecent exposure, deviate sexual conduct, sexual abuse, ritual abuse, or incest**, as described in Title 45, chapter 5.[102] ***Caution:*** *does not include necessary touching of an infant's or toddler's genital area while attending to the sanitary or health care needs of that infant or toddler.*[103]

g) ***Sexual Exploitation*** – indicated when a person allows, permits or encourages a child to engage in a prostitution offense, as described in MCA §§ 45-5-601 through 45-5-603, or allows, permits, or encourages sexual abuse of children as described in MCA § 45-5-625.[104]

h) ***Inducing False Report*** – indicated when a person induces or attempts to induce a child to give a false report that he or another child has been abused by a parent or another person responsible for the child's welfare.[105]

i) ***Exposure to Unreasonable Risk*** – indicated when a person exposes or allows the child to be exposed to an unreasonable risk to the child's health or welfare by failing to intervene or eliminate the risk.[106]

Key Issues: 1) ***Dismissal Required*** – If the court finds that the child is **NOT a youth in need of care**, the petition must be dismissed and any orders involving emergency protective services or the show cause hearing must be vacated.[107]

2) ***Required Determinations*** – At the conclusion of the hearing, if the court find that a child meets the definition of a youth in need of care, the court must **a) establish facts that resulted in CFS intervention**, and **b) determine the nature of abuse and/or neglect**.[108]

3) ***Required Evidence*** – The court is required to hear evidence on **a)** the **residence of the child**, **b) paternity**, if in question, **c)**

[102] MCA §§ 41-3-102(21)(a)(ii) and 102(27)(a).
[103] MCA § 41-3-102(27)(b).
[104] MCA §§ 41-3-102(21)(a)(ii) and 102(28).
[105] MCA § 41-3-102(21)(a)(iii).
[106] MCA § 41-3-102(21)(a)(v).
[107] MCA § 41-3-437(a).
[108] MCA § 41-3-437(2).

whereabouts of the parents, guardian, or nearest adult relative, and **d)** any other **evidence** the court considers **relevant in determining the status of the child**.[109]

4) ***Abandonment Evidence*** – In cases involving abandonment, the court is **required to consider evidence offered by any interested person with regard to any of the following**:[110]

a) the extent to which the child has been cared for by someone other than the child's parents;
b) whether the parents placed or allowed their child to stay with another person for the care of their child, and, if so, then:
    i) the intent of the parties with regard to the placement,
    ii) stability provided in residence, schooling, and activities outside of the home, and
    ii) the circumstances that led to the placement, including whether the placement occurred as the result of an order of protection or a conviction for partner or family member assault.

5) ***Privileges Limited*** – Privileges related to the **examination or treatment of the child do not apply** to child abuse or neglect proceedings. However, the **attorney-client and mediation privileges do apply**.[111]

6) ***Timing of Adjudication Hearing*** – The court is required to make an informed decision regarding the "nature of the abuse and neglect" at the adjudication hearing.[112] At a minimum, the court should receive the results of the initial investigation conducted by CFS prior to making this determination.[113] As a matter of policy, CFS will typically not complete its initial investigation until after the show cause hearing.[114] As a result, in the vast majority of cases, the **adjudication hearing should NOT be held immediately after the show cause hearing.**

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[109] MCA § 41-3-437(3).
[110] MCA § 41-3-437(4).
[111] MCA § 41-3-437(5).
[112] MCA § 41-3-437(2).
[113] The need and desire for this information was established during judge interviews. Furthermore, providing objective, relevant, and reliable information early in the process is important to allow all of the parties an opportunity to make informed decisions.
[114] Under its current policy, CFS is not required to complete its investigation until 60 days after the alleged abuse was reported. *See* CFS Policy Manual § 202-3. Since the show cause hearing must be held within 20 days of removal, CFS will not have time to complete its investigation and notify the parties of its results prior to the hearing.

7) ***Continuances*** – Continuances may be granted a) upon **stipulation** by the parties, b) to address **newly discovered evidence**, c) to manage **unavoidable delays** or d) as needed for **unforeseen personal emergencies**.[115]

8) ***Stipulations*** – Parties often stipulate to **a youth in need of care designation** at the adjudication hearing. If the parties stipulate, it is important for **the parties to identify which facts are uncontested** in order to provide a basis to support a youth in need of care designation. These facts will guide disposition, development of a treatment plan, periodic review and possible termination.[116] The parties may also **stipulate to disposition** at the adjudication hearing.

9) ***Temporary Dispositional Order Pending Hearing*** – If disposition is not determined at the adjudication hearing, the court should **enter a temporary dispositional order**.[117] In fashioning an appropriate order, the court should adhere to the following principles:

a) Because Montana policy and federal law[118] allow removal only if the child is at imminent risk of harm, the **child should be returned to his parents as soon as the threat of danger is controlled**.[119]
b) Refer to the sections above on **Child Safety, Visitation, and Conditions for Return,**[120] to guide the development of the temporary dispositional order.

Bench Cards: The following ABA *Child Safety Guide* Bench Cards, located at the back of this manual, should be consulted:

a) Family Information – Six Safety Questions (p 74)
b) Threats of Danger (p 76)
c) Child Vulnerability (p 77)
d) Protective Capacities (p 78)
e) Child Safety Decision Tree (p 81)
f) Actions and Services to Control Threats of Danger (p 82)
g) Reasonable Efforts to Prevent Removal – In-Home Safety Plans (p 84)

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[115] MCA § 41-3-437(1).
[116] MCA § 41-3-437(2).
[117] MCA §§ 41-3-437(6)(b) and (7)(b).
[118] MCA §§ 41-3-101(1)(c) and 301(1), *Mueller v. Auker*, 576 F.3d 979, 991-992 (9th Cir. Idaho 2009) and *Springer v. Placer County*, 338 Fed. Appx. 587, 590 (9th Cir. Cal. 2009).
[119] *Child Safety Guide* at 36.
[120] See above, pp. 9-11.

h) Determining Visitation (p 85)
i) Conditions for Returning Child (p 86)

Next: 1) ***Disposition Hearing*** – If the court **has not addressed disposition** at the adjudication hearing, either through a stipulation or a contested hearing, then the court must schedule a **disposition hearing within 20 days after an adjudication order** has been entered.[121] The court should advise the State to have the **treatment plan prepared and distributed 10 days prior to the disposition hearing.** The treatment plan should also be addressed at the disposition hearing.

2) ***Review Hearing*** – If **disposition has been addressed** at the adjudication hearing, the court should schedule a **review hearing within 30-60 days**, depending on the complexity of the case, in order to assess the current status of the child's vulnerability and the parent's protective capacities. The court should advise the State to have the **treatment plan prepared and distributed 10 days prior to the review hearing.** The treatment plan should also be addressed at the review hearing.[122]

ROLES AND RESPONSIBILITIES

Judge: 1) ***Required Findings*** – The court **must** include in its order **a)** which **allegations** of the petition have been **proved or admitted**, **b)** whether there is a **legal basis** for continued **court and CFS intervention**, and **c)** whether CFS has **made reasonable efforts to avoid protective placement** of the child or to make it possible to safely return the child to the child's home.

2) ***Optional Findings*** – The court **may** include in its order **a)** terms for **visitation, support, and other intrafamily communication** pending disposition, **b)** completion of **examinations, evaluations, or counseling** of the child or parents in preparation for the disposition hearing, funds permitting, **c)** requirement that CFC **evaluate the noncustodial parent or relatives** as possible caretakers, **d)** requirement that **the perpetrator** of the alleged child abuse or neglect be **removed from the home**, and **e)** requirement that CFS continue efforts to **notify noncustodial parents**.

[121] MCA § 41-3-438(1). The 20 days begins running from the date of the oral pronouncement, typically given from the bench on the day of the adjudicatory hearing. See MCA § 41-3-438(2)(c). If there is no oral pronouncement, the 20 days begins running from the date of the written order.
[122] Recommendation derived from judge interviews.

3) ***Only Proven or Admitted Facts in Order*** – Ensure that only **facts** which have been **admitted or determined by the court** after a contested hearing are **included in the resulting order**. It is important that only those facts which have been verified are relied upon to guide disposition, development of a treatment plan, periodic review and possible termination.[123]

4) ***Investigations for Disposition Hearing*** – Determine if any investigations are needed in anticipation of the disposition hearing. **Order any necessary investigations** and require any resulting **reports to be provided** to the parties at least **5 working days prior to the disposition hearing**.[124]

5) ***Bifurcate Hearings*** – As indicated under *Timing of Adjudication Hearing*, above, it would be unusual to conduct an **adjudication** hearing immediately after a **show cause** hearing. Nonetheless, if these hearings are conducted one after another, the hearings **must be bifurcated** and the issue of probable cause addressed first.[125] Likewise, **when allowed**,[126] the **adjudication and disposition hearings must be bifurcated** because hearsay is allowed at the disposition hearing but not the adjudication hearing.[127]

6) ***Return of Child*** – Determine whether the child can be safely returned home using the criteria set forth in the **Child Safety and Conditions for Return** sections, above. **[128]**

7) ***Child Participation*** – If the child is not present, verify that the child's attorney has met with his client and has notified him of his right to participate in the proceedings.[129]

CFS Worker: ***Treatment Plan*** – If the court adjudicates the child as a youth in need of care, prepare an appropriate treatment plan and share it with the parties at least 10 days before the disposition hearing or the next review hearing, whichever occurs first. In either event, the treatment plan should be approved by the Court within 30 days of the adjudication hearing.[130]

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[123] MCA § 41-3-437(2).
[124] MCA §§ 41-3-437(6)(b) and 438(2)(b)(i).
[125] See above, *Show Cause and Adjudication: Bifurcation Required*, p. 11.
[126] The disposition hearing can be held immediately after the adjudication hearing only if 1) all required reports are available and have been provided to the parties at least 5 working days in advance of the hearing, and 2) the judge has an opportunity to review the reports after the adjudication hearing. MCA § 41-3-438(2)(b).
[127] MCA § 41-3-438(2)(a).
[128] See above, pp. 9-11.
[129] ABA Model Act § 9(c).
[130] Recommendation derived from judge interviews.

GAL/CASA: 1) ***Investigation and Report*** – Meet with the child, the child's caregiver, and all pertinent parties (e.g., teachers, family members, service providers, etc.) regarding the child's safety, well-being and permanency prior to the adjudicatory hearing. If required as a matter of local policy, ordered by the court, or otherwise deemed necessary by the GAL/CASA, submit a written report to the court and parties of record prior to the hearing. Advocate for the child's best interest, not necessarily his expressed interest. Inform the court when taking a position contrary to the child's expressed interest.

2) ***Appointment of Counsel*** – The court may appoint counsel for a GAL/CASA.[131] A request for appointment may be appropriate in cases where the GAL/CASA is not aligned with one of the other parties and therefore requires greater assistance in framing his position and effectively presenting it to the court.

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Child Attorney: 1) ***Client Meeting***. Meet with each client prior to the adjudicatory hearing. Explain the nature of the proceeding and the attorney's role in a developmentally appropriate fashion.

2) ***Advocacy***. The attorney should determine and advocate for the child's **expressed interest**. The attorney should counsel the child in a developmentally appropriate manner, but **the attorney should not substitute his judgment in place of the child's**. Despite the fact that the "expressed interest" standard has long been a minimum requirement for child practitioners in accordance with national best practice standards, the Montana Supreme Court has nonetheless held that a child's attorney may, under limited circumstances, take a position contrary to his client's expressed wishes.[132] Again, this practice is not mandated, and in keeping with prevalent national best practice standards, should be avoided.

3) ***Conflict Determination***. If representing multiple siblings, determine if a conflict exists. The attorney must resolve any identified conflict immediately in accordance with the Montana Rules of Professional Conduct. This will typically require, at a

[131] MCA § 47-1-104(4)(a)(iii).

[132] ABA Model Act § 7(c). As explained in the comments to § 7(c), "[t]he lawyer-client relationship for the child's lawyer is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to provide independent advice. Client direction requires the lawyer to abide by the client's decision about the objectives of the representation. In order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed wishes. Moreover, providing the child with an independent and client-directed lawyer ensures that the child's legal rights and interests are adequately protected." *But see In re K.H. and K.M.*, 2012 MT 175 (expressly allowing, but not requiring, counsel for the child to advocate against his client's expressed wishes in limited circumstances).

minimum, seeking an order from the court appointing separate counsel.[133]

4) ***Diminished Capacity***. If the client lacks capacity to direct representation, inform the court of the incapacity, including why the attorney believes the child lacks capacity,[134] then advocate for the child using the "substituted judgment" standard.[135]

5) ***Courtroom Participation***. Inform the child of his right to attend and fully participate in the proceeding. Facilitate age appropriate participation in accordance with § 9 of the ABA Model Act. Continue the matter if the child is not present, unless the child has made an informed decision to waive his appearance.[136]

State Attorney: 1) ***Partial Admissions*** – If a parent makes partial admissions, ensure that the facts admitted are sufficient to enable CFS to address issues of concern. Since only admitted or proven facts can be used to guide disposition and development of a treatment plan,[137] it is important to elicit admissions relevant to areas of concern. If a parent is unwilling to admit facts deemed necessary by CFS, the State attorney may have to present testimony to establish the existence of additional facts.

2) ***Family Preservation*** – Because CFS and the State attorney need to work with the parent to achieve family unity after the hearing is over, the State attorney should not seek to "destroy" the parents in the course of presenting his case.[138] Evidence regarding parental deficiencies should be elicited objectively and without malice. Likewise, emphasis should be placed on steps the State

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[133] ABA Model Act § 3(c).

[134] ABA Model Act §§ 7(d) & (e). As explained in the comments to § 7(e), "[l]awyers should be careful not to conclude that the child suffers diminished capacity from a client's insistence upon a course of action that the lawyer considers unwise or at variance with lawyer's view. … Criteria for determining diminished capacity include the child's developmental stage, cognitive ability, emotional and mental development, ability to communicate, ability to understand consequences, consistency of the child's decisions, strength of wishes and opinions of others, including social workers, therapists, teachers, family members or a hired expert. … A child may have the ability to make certain decisions, but not others. A child with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the child's own well-being such as sibling visits, kinship visits and school choice and should continue to direct counsel in those areas in which he or she does have capacity. The lawyer should continue to assess the child's capacity as it may change over time."

[135] ABA Model Act § 7(d). A substituted judgment determination is not the same as determining the child's best interests. As explained in the comments to § 7(d), "determination of a child's best interests remains solely the province of the court. [A substituted judgment determination] involves determining what the child would decide if he or she were able to make an adequately considered decision. A lawyer should determine the child's position based on objective facts and information, not personal beliefs."

[136] ABA Model Act §§ 9(d) and (e).

[137] MCA § 41-3-437(2).

[138] Recommendation derived from judge interviews.

will take in order to remedy safety concerns and unify the family as quickly as possible.

Parent Attorney: 1) ***Consequences of Youth in Need of Care Determination*** – Explain the consequences of a determination by the court that the child is a youth in need of care. At a minimum, the parent should understand that a youth in need of care determination will result in a) the corresponding **report of abuse** being deemed **"substantiated"** by CFS,[139] b) **inability to obtain a job** in a variety of **occupations involving children**,[140] and c) **disclosure of information** related to substantiated reports of abuse to certain **employers or volunteer organizations**.[141]

2) ***Return of Child*** – Determine if the parent wants the child to return home. If the child's return is viable, advocate for the child's return home using the criteria contained in the sections above on **Child Safety and Conditions for Return.** Explain how any threats of danger have been controlled or eradicated.

3) ***Collaboration*** – The parent's attorney should, with few exceptions, counsel his client to interact with CFS in a collaborative fashion. Such an approach is critical for, among other things, identifying and quickly addressing legitimate safety concerns in order to promote timely reunification.[142] One notable exception exists where a parent faces criminal prosecution for alleged abuse or neglect. In such cases, the parent's attorney should discuss ways in which collaboration can occur without compromising the parent's rights in his criminal case. It is equally important for the attorney to work in a collaborative fashion with CFS to advance his client's case. This includes, but is not limited to, assisting in the

[139] If the court makes a finding that the child is a youth in need of care, whether based on a stipulation or a contested hearing, the underlying child abuse report is deemed substantiated pursuant to ARM § 37.47.615(1)(b). Even if the court makes no such finding, CFS can and often does send a "substantiation letter" to parents who are the subject of a child abuse investigation. The parents have 30 days after the date the letter was mailed by CFS to request a fair hearing. *See* ARM § 37.47.610.

[140] A substantiated report of child abuse or neglect will make it IMPOSSIBLE to operate or be employed by 1) a youth care facility, such as a group home or therapeutic foster home, as indicated by ARM §§ 37.97.115(1)(e) & 37.97.140(6); 2) an outdoor behavioral program, as indicated by §§ 37.98.304(2)(e) & 37.98.406(3)(a); and 3) an adoption agency, as indicated by ARM § 37.93.204(1)(c). Furthermore, a substantiated report will make it extremely difficult, though technically not impossible, to operate or be employed by 1) a day care facility, as indicated by ARM §§ 37.95.108(9)(d), 37.95.176(2)(e) & (3)(d) ; and 2) a foster care home, as indicated by ARM §§ 37.51.210(1) & 37.51.216(2)(f).

[141] MCA § 41-3-205(3)(o) and ARM § 37.47.608 authorize CFS to disclose "information that indicates a risk to children" to prospective employers or volunteer organizations who make a written request to CFS. CFS can only disclose information if the job or volunteer opportunity involves the possibility of unsupervised contact with children. Current CFS policy authorizes disclosure of substantiated reports of child abuse. *See* CFS Policy Manual § 506-1.

[142] Recommendation derived from judge interviews.

preparation of an appropriate treatment plan, attending family group decision making meetings, and the like.

5) Disposition Hearing

Purpose: In every case in which the **court enters an adjudicatory order**, the court must **protect the welfare of the child** by choosing an **appropriate disposition** for the child. Unless stipulated by the parties, the disposition hearing must be held **within 20 days after an adjudication order** has been entered.[143] The court is not required to grant CFS the specific disposition it is requesting (e.g., temporary legal custody). Instead, **the court must independently choose the best disposition** for the child from the following list of options:[144]

a) ***Parental Custody*** – allow the child to stay with his parents subject to conditions prescribed by the court.[145]
b) **Evaluate Noncustodial Parent** – require CFS to evaluate the noncustodial parent as a possible caretaker.[146] Reconvene the parties to conclude the disposition hearing as soon as possible, but no later than 20 days from the date of the request.
c) ***Noncustodial Parent*** – place the child with the noncustodial parent, superseding any existing custodial order, and do one of the following:
   i) **keep the proceeding open** pending completion of a **treatment plan** by the custodial parent;[147] or
   ii) **dismiss the proceeding** with no further obligation on the part of CFS to provide services.[148]
d) ***Emancipation*** – grant an order of limited emancipation to a child who is 16 years of age or older.[149]
e) ***Temporary Legal Custody*** – the court may transfer legal custody **only upon a finding**, by a preponderance of the evidence, that 1) **dismissing the petition** would create a **substantial risk of harm** to the child or would be a **detriment to the child's physical or psychological well-being**, and 2) **reasonable services** have been provided **to prevent the removal** of the child or to make it **possible for the child to safely return home**.[150] If both

[143] MCA § 41-3-438(1). The 20 days begins running from the date of the oral pronouncement, typically given from the bench on the day of the adjudicatory hearing. See MCA § 41-3-438(2)(c). If there is no oral pronouncement, the 20 days begins running from the date of the written order.
[144] MCA § 41-3-438(3).
[145] MCA § 41-3-438(3)(a).
[146] MCA § 41-3-438(3)(b).
[147] MCA § 41-3-438(3)(c).
[148] MCA § 41-3-438(3)(d).
[149] MCA § 41-3-438(3)(e).
[150] MCA § 41-3-442(1).

findings are present, the court may transfer temporary legal custody for up to 6 months[151] to any of the following:
i) CFS;
ii) a licensed child-placement agency; or
iii) a nonparent relative or other individual who has been evaluated and recommended by CFS.

Key Issues: 1) ***Child Safety*** – As always, the court should place primary focus on the child's safety. When determining whether the child can be returned home or placed with the noncustodial parent or relative, the court should look to **the following six questions:**[152]

a) What is the nature and extent of the maltreatment?
b) What circumstances accompany the maltreatment?
c) How does the child function day-to-day?
d) How does the parent discipline the child?
e) What are the overall parenting practices?
f) How does the parent manage his own life?

The child is **NOT** safe when 1) threats of danger exist within the family **and** 2) a child is vulnerable to such threats **and** 3) the parents have insufficient protective capacities to manage or control the threats.[153]

2) ***Conditions for Return*** – If the child is not returned home, the court should establish minimum expectations or conditions. The following factors[154] should be considered when establishing conditions for return:

a) Determine exactly why an in-home safety plan was originally determined to be insufficient, unfeasible or unsustainable.
b) Do not wait until the family is able to completely protect the child on its own before returning the child home. Threats do not have to be eradicated – they need to be **controlled** – before children can be reunified with families.
c) Threats can be controlled by specifying people, behaviors, and circumstances (including alternatives and options) that, if in place and active would resolve why an in-home safety plan was insufficient.

[151] MCA § 41-3-442(2).
[152] *Child Safety Guide* at 3.
[153] *Child Safety Guide* at 2.
[154] *Child Safety Guide* at 34-38.

d) Include as a condition for return that the family agree to a court-ordered in-home safety plan.

3) ***Visitation*** – If the child cannot be returned home safely, then the court should fashion an appropriate visitation schedule. Furthermore, any disputes involving visitation should be addressed at the disposition hearing. The following factors[155] should be considered when establishing a visitation schedule:

a) Immediate and frequent contact between child and parent should be established to help maintain the child's identity and reduce trauma.
b) Cookie-cutter visitation plans (the same frequency, location, and level of supervision) should be avoided because they often place needless restrictions on parent-child contact, and miss opportunities to achieve safety expediently.
c) Where possible, visits should take place in the foster home providing a more natural setting and allowing the foster parent to model parenting techniques.
d) Frequency or length of visits should not be used as punishment or reward, but is a right of all family members unless child safety is jeopardized.
e) Other contacts should be authorized where appropriate, including phone calls, letters, email, text messaging, attending church, school and other appointments together.

The **visitation schedule should be established based on the best interests of the child and not resources available to CFS.** Although the court is required to consider CFS resources when ordering examinations, evaluations, or counseling during adjudication[156] and disposition[157] proceedings, there is no similar requirement regarding visitation.

4) ***Treatment Provisions*** – The court has broad authority to "do what is necessary to give effect to the final disposition."[158] This includes, but is not limited to, ordering medical and psychological evaluations, treatment and counseling. Treatment services, however, are subject to funding availability by CFS.[159]

[155] *Child Safety Guide* at 33-34.
[156] MCA § 41-3-437(b)(ii).
[157] MCA § 41-3-438(g) & (h).
[158] MCA § 41-3-438(3)(g).
[159] MCA §§ 41-3-438(g) and (h).

5) ***Abandonment*** – In cases involving an abandoned child, if the court considers ordering **temporary legal custody**, the court **must consider transferring legal custody of the child to a relative** unless the court transfers legal custody to CFS or a noncustodial parent.[160]

6) ***Hearsay*** – Hearsay evidence is admissible at the disposition hearing.[161]

7) ***Privileges Limited*** – Privileges related to the **examination or treatment of the child do not apply** to child abuse or neglect proceedings. However, the **attorney-client and mediation privileges do apply**.[162]

8) ***Continuances*** – Continuances may be granted a) upon **stipulation** by the parties, b) to address **newly discovered evidence**, c) to manage **unavoidable delays** or d) as needed for **unforeseen personal emergencies**.[163]

9) ***Stipulations*** – Parties may stipulate to disposition at or before the disposition hearing.

10) ***Treatment Plan*** – Whenever possible, the treatment plan should be reviewed and approved at or before the disposition hearing.

Bench Cards: The following ABA *Child Safety Guide* Bench Cards, located at the back of this manual, should be consulted:

a) Family Information – Six Safety Questions (p 74)
b) Threats of Danger (p 76)
c) Child Vulnerability (p 77)
d) Protective Capacities (p 78)
e) Child Safety Decision Tree (p 81)
f) Actions and Services to Control Threats of Danger (p 82)
g) Reasonable Efforts to Prevent Removal – In-Home Safety Plans (p 84)
h) Determining Visitation (p 85)
i) Conditions for Returning Child (p 86)

[160] MCA § 41-3-438(4).
[161] MCA § 41-3-438(2)(a).
[162] MCA § 41-3-437(5).
[163] MCA § 41-3-438(1).

ICWA: 1) ***Elevated Legal Standard*** – If the case is subject to ICWA, CFS must satisfy the elevated standard of establishing by **clear and convincing evidence** that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[164]

2) ***Active Efforts*** – Whenever **CFS seeks to effect a foster care placement**, it must present evidence[165] sufficient to satisfy the court that **active efforts** have been made to **provide remedial services and rehabilitative programs** designed to **prevent the breakup of the Indian family** and that these efforts have proved unsuccessful.[166]

3) ***Expert Testimony*** – Expert testimony is **required whenever CFS seeks to effect a foster care placement**.[167] Expert testimony should not be viewed as a mere "technical requirement" which can be satisfied by the same expert for every case. Rather, expert testimony is intended to aid the parties and the court in fulfilling ICWA's larger purpose of educating state courts of tribal cultural and social standards, thereby allowing the court to make a more informed decision and adhere to the spirit and intent of the act.[168] To this end, **CFS should always seek to locate an expert who can speak to tribal-specific social and cultural norms and practices, including family organization and childrearing practices**.[169] A list of tribal-specific experts can be found at the following CFS Internet address: http://www.dphhs.mt.gov/cfsd/icwa/expertwitnesses.shtml.

4) ***Placement Preference*** – When locating an appropriate **foster care or pre-adoptive** placement for an Indian child, absent good cause to the contrary, preference shall be given to:[170]

a) a member of the Indian child's extended family;
b) a foster home licensed, approved, or specified by the Indian child's tribe;
c) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

[164] 25 USC § 1912(e).
[165] ICWA does not designate a legal standard by which this evidence must be established.
[166] 25 USC § 1912(d).
[167] 25 USC § 1912(e).
[168] *ICWA Guide* at 47.
[169] *ICWA Guide* at 113. To justify a foster care placement, 25 USC § 1912(e) specifically requires a finding by an expert that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."
[170] 25 USC § 1915(b).

d) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Next: ***Review Hearing*** – The court should schedule a **review hearing within 30-60 days**, depending on the complexity of the case, in order to assess the current status of the child's vulnerability and the parent's protective capacities. The treatment plan should have been submitted and approved by this time. If not, the court should advise the State to have the **treatment plan prepared and distributed to the parties with 10 days. The review hearing should then be scheduled within 15-20 days to expedite review, approval and implementation of the treatment plan.**[171]

ROLES AND RESPONSIBILITIES

Judge: 1) ***Investigations for Disposition Hearing*** – Ensure that **any necessary investigations** have been completed and that any resulting **reports were provided** to the parties at least **5 working days prior to the disposition hearing**.[172]

2) ***Bifurcate Hearings*** – If allowed to occur on the same day,[173] the **adjudication and disposition hearings must be bifurcated** because hearsay is allowed at the disposition hearing but not the adjudication hearing.[174]

3) ***Return of Child*** – Determine whether the child can be safely returned home using the criteria contained in the sections above on **Child Safety and Conditions for Return.**

4) ***Child Participation*** – If the child is not present, verify that the child's attorney has met with his client and has notified him of his right to participate in the proceedings.[175]

CFS Worker: ***Treatment Plan*** – Prepare an appropriate treatment plan and share it with the parties at least 10 days before the disposition hearing.

[171] Recommendation derived from judge interviews.
[172] MCA §§ 41-3-437(6)(b) and 438(2)(b)(i).
[173] The disposition hearing can be held immediately after the adjudication hearing only if 1) all required reports are available and have been provided to the parties at least 5 working days in advance of the hearing, and 2) the judge has an opportunity to review the reports after the adjudication hearing. MCA § 41-3-438(2)(b).
[174] MCA § 41-3-438(2)(a).
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GAL/CASA: 1) ***Investigation and Report*** – Meet with the child, the child's caregiver, and all pertinent parties (e.g., teachers, family members, service providers, etc.) regarding the child's safety, well-being and permanency prior to the disposition hearing. If required as a matter of local policy, ordered by the court, or otherwise deemed necessary by the GAL/CASA, submit a written report to the court and parties of record prior to the hearing. Advocate for the child's best interest, not necessarily his expressed interest. Inform the court when taking a position contrary to the child's expressed interest.

2) ***Propose Alternate Disposition*** – Consider the various options available to the court. Determine if an alternate disposition is in the best interest of the child. If so, conduct an investigation to determine if the alternate disposition is viable. If viable, advocate for the alternate disposition.

3) ***Return of Child*** – Determine if it is in the child's best interest to return home. If so, advocate for the child's return home using the criteria contained in the sections above on **Child Safety and Conditions for Return.** Explain how any threats of danger have been controlled or eradicated.

4) ***Appointment of Counsel*** – The court may appoint counsel for a GAL/CASA.[176] A request for appointment may be appropriate in cases where the GAL/CASA is not aligned with one of the other parties and therefore requires greater assistance in framing his position and effectively presenting it to the court.

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Child Attorney: 1) ***Client Meeting***. Meet with each client prior to the disposition hearing. Explain the nature of the proceeding and the attorney's role in a developmentally appropriate fashion.

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[176] MCA § 47-1-104(4)(a)(iii).

wishes.[177] Again, this practice is not mandated, and in keeping with prevalent national best practice standards, should be avoided.

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[177] ABA Model Act § 7(c). As explained in the comments to § 7(c), "[t]he lawyer-client relationship for the child's lawyer is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to provide independent advice. Client direction requires the lawyer to abide by the client's decision about the objectives of the representation. In order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed wishes. Moreover, providing the child with an independent and client-directed lawyer ensures that the child's legal rights and interests are adequately protected." *But see In re K.H. and K.M.*, 2012 MT 175 (expressly allowing, but not requiring, counsel for the child to advocate against his client's expressed wishes in limited circumstances).

[178] ABA Model Act § 3(c).

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State Attorney: ***Family Preservation*** – Because CFS needs to work with the parent to achieve family unity after the hearing is over, the State attorney should not seek to "destroy" the parents in the course of presenting his case.[182] Evidence regarding parental deficiencies should be elicited objectively and without malice. Likewise, emphasis should be placed on steps the State will take in order to remedy safety concerns and unify the family as quickly as possible.

Parent Attorney: 1) ***Propose Alternate Disposition*** – Advise the parent of the various options available to the court. If the parent wishes to seek an alternate disposition, conduct an investigation to determine if the proposed disposition is viable. If viable, advocate for the alternate disposition.

2) ***Return of Child*** – Determine if the parent wants the child to return home. If the child's return is viable, advocate for the child's return home using the criteria contained in the sections above on **Child Safety and Conditions for Return.** Explain how any threats of danger have been controlled or eradicated.

3) ***Collaboration*** – The parent's attorney should, with few exceptions, counsel his client to interact with CFS in a collaborative fashion. Such an approach is critical for, among other things, identifying and quickly addressing legitimate safety concerns in order to promote timely reunification.[183] One notable exception exists where a parent faces criminal prosecution for alleged abuse or neglect. In such cases, the parent's attorney should discuss ways in which collaboration can occur without compromising the parent's rights in his criminal case. It is equally important for the attorney to work in a collaborative fashion with CFS to advance his client's case. This includes, but is not limited to, assisting in the preparation of an appropriate treatment plan, attending family group decision making meetings, and the like.

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province of the court. [A substituted judgment determination] involves determining what the child would decide if he or she were able to make an adequately considered decision. A lawyer should determine the child's position based on objective facts and information, not personal beliefs."

[181] ABA Model Act §§ 9(d) and (e).

[182] Recommendation derived from judge interviews.

[183] Recommendation derived from judge interviews.

6) Treatment Plan Approval

Purpose: The treatment plan should contain a **logical strategy for addressing the reasons the court became involved**: threats of danger to the child and parent's insufficient protective capacity. The treatment plan **outcome should be a home environment with no threats of danger or at least sufficient protective capacities to manage such threats**. [184]

Key Issues: 1) ***Court-Ordered Treatment Plan*** – The court may order a treatment plan if **a)** the parties **admit the allegations of an abuse and neglect petition** or **b)** if the parties have **stipulated** or the court has **adjudicated** the child as a **youth in need of care**.[185]

2) ***Mandatory Provisions*** – Each treatment plan is required to contain the following provisions:[186]

a) **identification** of the problems or conditions that resulted in **abuse or neglect**;
b) if the child has been removed**, conditions** or requirements that must be met for the **safe return of the child**;
c) **treatment goals** and objectives for each condition in the plan;
d) estimated **time necessary to complete treatment** objectives; and
e) **signature** of parent or guardian unless plan is ordered by the court.

3) ***Optional Provisions*** – A treatment plan may, but is not required to contain the following provisions:[187]

a) **right of entry** into the child's home to assess compliance;
b) requirement of the child or the child's parent or guardian to obtain **medical or psychiatric diagnosis and treatment**;
c) requirement of the child or the child's parent or guardian to obtain **psychological treatment or counseling**;
d) requirement of the child or the child's parent or guardian to obtain and follow through with **alcohol or substance abuse evaluation and counseling**, if necessary;

[184] *Child Safety Guide* at 39-40.
[185] MCA § 41-3-443(1).
[186] MCA § 41-3-443(2).
[187] MCA § 41-3-443(3).

e) requirement of the child or the child's parent or guardian to be **restricted from associating** with or contacting any **individual who may be the subject of a CFS investigation**;
f) requirement that the **child be placed in temporary medical or out-of-home care**; or
g) requirement that the parent, guardian, **furnish services that the court may designate**.

4) ***Modification Requires Court Order*** – The treatment plan cannot be modified or terminated without court approval.[188]

Bench Card: The following ABA *Child Safety Guide* Bench Card, located at the back of this manual, should be consulted:

a) Increasing the Treatment Plan's Likelihood for Success (p 87)

ROLES AND RESPONSIBILITIES

Judge: ***Evaluation Questions*** – The court should ask the following questions to determine the sufficiency of the treatment plan:[189]

a) Does the plan include goals or tasks **addressing changes in behaviors, commitments, and attitudes** related to safety?
b) Does the **plan follow logically from the threats** and gaps in protective capacities in the home?
c) Does the **treatment plan duplicate the safety plan**? If so, one or both is not fulfilling its purpose.
d) Does the plan **target issues that influence threats** of danger?
e) How do the **parents react to the plan**?
f) Does the plan focus on **reducing threats without also increasing protective capacities**?

Other Parties: Be prepared to **1)** address **disputed provisions**, **2)** respond to the **judge's questions**, and **3)** identify and **address deficiencies** that could not be resolved prior to the treatment plan hearing.

[188] MCA § 41-3-443(4).
[189] *Child Safety Guide* at 40.

7) Review Hearing

Purpose: Assess the current status of **the child's vulnerability** and the **parent's protective capacities**. Determine the continuing necessity for and **appropriateness of the placement**, the extent of compliance with the **treatment plan**, and the **extent of progress** which has been made toward alleviating or mitigating the causes necessitating the placement.[190]

Key Issues: ***Recurring Issues*** – The following issues[191] should be addressed at each review hearing:

a) Whether the safety plan and treatment plans are sufficient;[192]
b) Whether services, actions, tasks and responsibilities are being carried out according to plan;
c) Whether parents and others are participating according to commitments made in both plans;
d) Whether progress is occurring;
e) Whether conditions for return have been met; and
f) Whether the safety plan or treatment plan must be modified or revised.

Next: ***Review Hearing*** – The court should schedule the next **review hearing within 30-60 days.**[193]

Bench Cards: The following ABA *Child Safety Guide* Bench Cards, located at the back of this manual, should be consulted:

a) Family Information – Six Safety Questions (p 74)
b) Threats of Danger (p 76)
c) Child Vulnerability (p 77)
d) Protective Capacities (p 78)
e) Child Safety Decision Tree (p 81)
f) Actions and Services to Control Threats of Danger (p 82)
g) Reasonable Efforts to Prevent Removal – In-Home Safety Plans (p 84)
h) Determining Visitation (p 85)
i) Conditions for Returning Child (p 86)

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[190] 42 U.S.C. § 675(5)(B) and *Child Safety Guide* at 43-44.
[191] *Child Safety Guide* at 43.
[192] The safety and treatment plans differ in that the safety plan addresses what needs to happen immediately to control threats in order for the child to safely return home, while the treatment plan addresses what must change over time in order to enable the parents to provide a safe environment for their children without monitoring by CFS (i.e., dismissal of the case). See *Child Safety Guide* at 39.
[193] Recommendation derived from judge interviews.

j) Increasing Treatment Plan's Likelihood for Success (p 87)
k) Determining Whether to Reunify (p 88)

ROLES AND RESPONSIBILITIES

Judge: 1) ***Review Questions*** – The court should ask the following questions at each review hearing:[194]

a) **What do the parties know about child safety issues**, including progress under the treatment plan? Can the parties provide **current information**, free of bias, with regard to the following **six safety questions:**[195]
   i) What is the **nature and extent** of the **maltreatment**?
   ii) What **circumstances accompany the maltreatment**?
   iii) How does the **child function** day-to-day?
   iv) How does the **parent discipline** the child?
   v) What are the overall **parenting practices**?
   vi) How does the **parent manage his own life**?

   Recall that the child is **NOT** safe when 1) threats of danger exist within the family **and** 2) a child is vulnerable to such threats **and** 3) the parents have insufficient protective capacities to manage or control the threats. [196]

b) What is the status of **threats of danger** and have **additional threats** emerged?

c) What is the status of **parent protective capacities**?
   i) Have the parents demonstrated **enhanced capacity**?
   ii) Will parents protect **without intervention**?
   iii) Has there been any change in **willingness, awareness, and ability** to protect the child from threats of danger?
   iv) The court should collect information regarding **each protective capacity** identified in the **treatment plan**.

d) Are there **differences of opinion** among the parties? **Resist** relying on the most **"credentialed" expert** – challenge **parties** to **reconcile differences** of opinion and **consider** their **rationales.**

e) Have **conditions for return** been met?

[194] *Child Safety Guide* at 43-44.
[195] *Child Safety Guide* at 3.
[196] *Child Safety Guide* at 2.

i) This questions **should be asked** regardless of how well treatment is progressing is or is not progressing.
ii) **Resist "raising the bar"** by having higher standards for returning the child than removing the child.
iii) Is an **in-home safety plan now sufficient**, feasible, and sustainable **until the parent is able to protect the child without help**?

f) Can the in-home safety **plan be revised to be less intrusive**?

g) If there has been **little progress**, consider the following:
i) Does the **treatment plan** contain the **right strategies**?
ii) Are the services and/or the **providers appropriate for the task**?
iii) Does the **parent want the same changes** as the other parties?
iv) Consider how long it will take for the conditions for return to be met – and **how long it is reasonable** to continue **working on the reunification** goal.

2) ***Child Participation*** – If the child is not present, verify that the child's attorney has met with his client and has notified him of his right to participate in the proceedings.[197]

Other Parties: Be prepared to **1)** respond to the **judge's questions,** and **2)** address **disputed issues**, including disputes over **visitation**.

[197] ABA Model Act § 9(c).

8) Extension of Temporary Legal Custody

Purpose: In cases where temporary legal custody has been ordered, the state attorney must **file a petition prior to the expiration of temporary legal custody** seeking one of the following:[198]

a) ***Extension of Temporary Legal Custody*** – an extension of temporary legal custody, **not to exceed 6 months**, upon a showing that:
   i) **additional time** is necessary for the parent or guardian to successfully **complete a treatment plan**; or
   ii) **continuation** of temporary legal custody is necessary because of the **child's individual circumstances**.

b) ***Placement with Noncustodial Parent*** – continued **placement with the noncustodial parent**, superseding any existing custodial order.

c) ***Termination of Parental Rights*** – termination of the parent-child relationship and:
   i) **permanent legal custody** with the **right of adoption**;
   ii) **permanent placement** with the **noncustodial parent**, superseding any existing custodial order;
   iii) appointment of a **guardian** pursuant to MCA § 41-3-607.

d) ***Long-Term Custody*** – long-term custody when the child is in a **planned permanent living arrangement** pursuant to MCA § 41-3-445.

e) ***Guardianship*** – appointment of a guardian pursuant to MCA § 41-3-444.

f) ***Dismissal***.

Key Issue: ***Adopt Review Hearing Protocol*** – The court should utilize the review hearing protocol, Section 7, above, to determine the current status of the parties before proceeding with a determination on the petition.

ICWA: 1) ***Elevated Legal Standard*** – If the case is subject to ICWA, CFS must satisfy the elevated standard of establishing by **clear and convincing evidence** that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[199]

[198] MCA § 41-3-442(4).
[199] 25 USC § 1912(e).

2) ***Active Efforts*** – Whenever **CFS seeks to effect a foster care placement**, it must present evidence[200] sufficient to satisfy the court that **active efforts** have been made to **provide remedial services and rehabilitative programs** designed to **prevent the breakup of the Indian family** and that these efforts have proved unsuccessful.[201]

3) ***Expert Testimony*** – Expert testimony is **required whenever CFS seeks to effect a foster care placement**.[202] Expert testimony should not be viewed as a mere "technical requirement" which can be satisfied by the same expert for every case. Rather, expert testimony is intended to aid the parties and the court in fulfilling ICWA's larger purpose of educating state courts of tribal cultural and social standards, thereby allowing the court to make a more informed decision and adhere to the spirit and intent of the act.[203] To this end, **CFS should always seek to locate an expert who can speak to tribal-specific social and cultural norms and practices, including family organization and childrearing practices**.[204] A list of tribal-specific experts can be found at the following CFS Internet address: http://www.dphhs.mt.gov/cfsd/icwa/expertwitnesses.shtml.

4) ***Placement Preference*** – When locating an appropriate **foster care or pre-adoptive** placement for an Indian child, absent good cause to the contrary, preference shall be given to: [205]

a) a member of the Indian child's extended family;
b) a foster home licensed, approved, or specified by the Indian child's tribe;
c) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
d) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Next: ***Review Hearing*** – The court should schedule a **review hearing within 30-60 days.**[206]

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[200] ICWA does not designate a legal standard by which this evidence must be established.
[201] 25 USC § 1912(d).
[202] 25 USC § 1912(e).
[203] *ICWA Guide* at 47.
[204] *ICWA Guide* at 113. To justify a foster care placement, 25 USC § 1912(e) specifically requires a finding by an expert that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."
[205] 25 USC § 1915(b).
[206] Recommendation derived from judge interviews.

Judge: 1) ***Review Hearing Questions*** – Utilize the questions recommended for review hearings, Section 7, above, to determine the current status of the parties.

2) ***Invite Amendment to Petition*** – If, based on the evidence presented, the court believes that the **child** would be **better served by a disposition different from the relief requested by the state** attorney, the court should **consider inviting the state attorney to amend the petition** to allow for a different outcome.[207]

3) ***Required Findings*** - If the court **grants an extension of temporary legal custody**, the court shall 1) indicate **why the child was not returned home**, 2) the **conditions** upon which the **child may be returned home**, 3) specifically find that an **extension of temporary legal custody is in the child's best interest**,[208] and 4) project a **likely date** by which the **child** may be **returned home or placed for adoption** or legal guardianship.[209]

4) ***Child Participation*** – If the child is not present, verify that the child's attorney has met with his client and has notified him of his right to participate in the proceedings.[210]

GAL/CASA: ***Investigation and Report*** – Meet with the child, the child's caregiver, and all pertinent parties (e.g., teachers, family members, service providers, etc.) regarding the child's safety, well-being and permanency prior to the hearing. If required as a matter of local policy, ordered by the court, or otherwise deemed necessary by the GAL/CASA, submit a written report to the court and parties of record prior to the hearing. Advocate for the child's best interest, not necessarily his expressed interest. Inform the court when taking a position contrary to the child's expressed interest.

Child Attorney: 1) ***Client Meeting***. Meet with each client prior to the hearing. Explain the nature of the proceeding and the attorney's role in a developmentally appropriate fashion.

2) ***Advocacy***. The attorney should determine and advocate for the child's **expressed interest**. The attorney should counsel the child in a developmentally appropriate manner, but **the attorney should**

[207] MCA § 41-3-422(1)(b).
[208] MCA § 41-3-442(6).
[209] 42 USC § 675(5)(B).
[210] ABA Model Act § 9(c).

not substitute his judgment in place of the child's. Despite the fact that the "expressed interest" standard has long been a minimum requirement for child practitioners in accordance with national best practice standards, the Montana Supreme Court has nonetheless held that a child's attorney may, under limited circumstances, take a position contrary to his client's expressed wishes.[211] Again, this practice is not mandated, and in keeping with prevalent national best practice standards, should be avoided.

3) ***Propose Alternate Disposition*** – Advise the parent of the various options available under MCA § 41-3-442(4). If the child wishes to seek an alternate disposition, conduct an investigation to determine if the proposed disposition is viable. If viable, advocate for the alternate disposition.

4) ***Conflict Determination***. If representing multiple siblings, determine if a conflict exists. The attorney must resolve any identified conflict immediately in accordance with the Montana Rules of Professional Conduct. This will typically require, at a minimum, seeking an order from the court appointing separate counsel.[212]

5) ***Diminished Capacity***. If the client lacks capacity to direct representation, inform the court of the incapacity, including why the attorney believes the child lacks capacity,[213] then advocate for the child using the "substituted judgment" standard.[214]

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[211] ABA Model Act § 7(c). As explained in the comments to § 7(c), "[t]he lawyer-client relationship for the child's lawyer is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to provide independent advice. Client direction requires the lawyer to abide by the client's decision about the objectives of the representation. In order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed wishes. Moreover, providing the child with an independent and client-directed lawyer ensures that the child's legal rights and interests are adequately protected." *But see In re K.H. and K.M.*, 2012 MT 175 (expressly allowing, but not requiring, counsel for the child to advocate against his client's expressed wishes in limited circumstances).

[212] ABA Model Act § 3(c).

[213] ABA Model Act §§ 7(d) & (e). As explained in the comments to § 7(e), "[l]awyers should be careful not to conclude that the child suffers diminished capacity from a client's insistence upon a course of action that the lawyer considers unwise or at variance with lawyer's view. … Criteria for determining diminished capacity include the child's developmental stage, cognitive ability, emotional and mental development, ability to communicate, ability to understand consequences, consistency of the child's decisions, strength of wishes and opinions of others, including social workers, therapists, teachers, family members or a hired expert. … A child may have the ability to make certain decisions, but not others. A child with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the child's own well-being such as sibling visits, kinship visits and school choice and should continue to direct counsel in those areas in which he or she does have capacity. The lawyer should continue to assess the child's capacity as it may change over time."

[214] ABA Model Act § 7(d). A substituted judgment determination is not the same as determining the child's best interests. As explained in the comments to § 7(d), "determination of a child's best interests remains solely the

6) ***Courtroom Participation***. Inform the child of his right to attend and fully participate in the proceeding. Facilitate age appropriate participation in accordance with § 9 of the ABA Model Act. Continue the matter if the child is not present, unless the child has made an informed decision to waive his appearance.[215]

State Attorney: 1) ***Include Mandatory Language in Order*** – Ensure that the order prepared for the court includes the mandatory language referenced in "Required Findings", above.

2) ***File Petition Prior to Expiration*** – Ensure that the petition to extend or otherwise modify temporary legal custody is filed prior to expiration of the original order.[216] Ask the court to extend the terms of the original order until such time as the court rules on the petition.[217]

3) ***Family Preservation*** – Because CFS and the State attorney need to work with the parent to achieve family unity after the hearing is over, the State attorney should not seek to "destroy" the parents in the course of presenting his case.[218] Evidence regarding parental deficiencies should be elicited objectively and without malice. Likewise, emphasis should be placed on steps the State will take in order to remedy safety concerns and unify the family as quickly as possible.

Parent Attorney: 1) ***Propose Alternate Disposition*** – Advise the parent of the various options available under MCA § 41-3-442(4). If the parent wishes to seek an alternate disposition, conduct an investigation to determine if the proposed disposition is viable. If viable, advocate for the alternate disposition.

2) ***Collaboration*** – The parent's attorney should, with few exceptions, counsel his client to interact with CFS in a collaborative fashion. Such an approach is critical for, among other things, identifying and quickly addressing legitimate safety concerns in order to promote timely reunification.[219] One notable exception exists where a parent faces criminal prosecution for alleged abuse

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province of the court. [A substituted judgment determination] involves determining what the child would decide if he or she were able to make an adequately considered decision. A lawyer should determine the child's position based on objective facts and information, not personal beliefs."

[215] ABA Model Act §§ 9(d) and (e).

[216] MCA § 41-3-442(4).

[217] MCA § 41-3-442(5).

[218] Recommendation derived from judge interviews.

[219] Recommendation derived from judge interviews.

or neglect. In such cases, the parent's attorney should discuss ways in which collaboration can occur without compromising the parent's rights in his criminal case. It is equally important for the attorney to work in a collaborative fashion with CFS to advance his client's case. This includes, but is not limited to, assisting in the preparation of an appropriate treatment plan, attending family group decision making meetings, and the like.

9) Petition to Terminate Parental Rights

Purpose: **Determine if termination** of parental rights is **warranted**. The court may terminate parental rights upon a finding established by **clear and convincing evidence** that:[220]

a) ***Relinquishment*** – the parent has **relinquished his rights** to the child pursuant to MCA §§ 42-2-402 and 412;
b) ***Abandonment*** – the parent has **abandoned the child**;
c) ***Rape*** – the parent **is convicted of sexual intercourse without consent** and a child was born as a result of his criminal conduct;
d) ***Serious Crimes and Abuse*** – the parent has **subjected the child** to any of the following:[221]
   i) **aggravated circumstances**, including but not limited to abandonment, torture, chronic abuse, or sexual abuse or chronic, severe neglect of a child;
   ii) committed, aided, abetted, attempted, conspired, or solicited **deliberate or mitigated deliberate homicide of a child**;
   iii) committed **aggravated assault against a child**;
   iv) committed **neglect of a child** that resulted in **serious bodily injury or death**; or
   v) had **parental rights to the child's sibling or other child of the parent involuntarily terminated** and the **circumstances** related to the termination of parental rights are **relevant to the parent's ability to adequately care for the child at issue**.
e) ***Neglect by Putative Father*** – the **putative father** has **failed** to do any of the following:[222]
   i) contribute to the **support of the child** for an aggregate **period of 1 year**, although able to do so; or
   ii) establish a **substantial relationship** with the child. A substantial relationship is demonstrated by:
      (1) either **visiting the child at least monthly** when physically and financially able to do so; or
      (2) having **regular contact with the child** or with the person or agency having the care and custody of the child when physically and financially able to do so; and
      (3) manifesting an ability and **willingness to assume legal and physical custody** of the child if the

[220] MCA § 41-3-609(1).
[221] MCA §§ 41-3-609(1)(d) and 423(2)(a)-(e).
[222] MCA §§ 41-3-609(1)(e) and 423(3)(a)-(c).

child was not in the physical custody of the other parent.

iii) **register with the putative father registry** pursuant to Title 42, chapter 2, part 2, and the person **has not been**
   (1) **adjudicated in Montana** to be the **father of the child** for the purposes of **child support**; or
   (2) recorded **on the child's birth certificate** as the child's father.

f) ***Failed Treatment Plan*** – the child is an **adjudicated youth in need of care** and both of the following exist:
   i) an **appropriate treatment plan** that has been approved by the court has **not been complied with** by the parents **or has not been successful**; **and**
   ii) the conduct **or condition of the parents rendering them unfit is unlikely to change within a reasonable time**.[223]

Key Issues: 1) ***Adopt Review Hearing Protocol*** – The court should utilize the review hearing protocol, Section 7, above, to determine the current status of the parties before proceeding with a determination on the petition.

2) ***When Termination of Parental Rights Required*** – Except as provided in ¶ 3, below, a **petition to terminate** parental rights **must be filed:**

a) if the child has been in **foster care** under the physical custody of the state for **15 months of the most recent 22 months**; or
b) if the court has found **that reasonable efforts to reunify are not required** pursuant to MCA § 41-3-423.[224]

3) ***Exceptions to Requirement to Terminate Parental Rights*** – Even if the conditions referenced in ¶ 2, above, exist, CFS is NOT required to file a petition to terminate parental rights if:

a) the **child** is being **cared for by a relative**;
b) **CFS has not provided the services necessary** for the safe return of the child;

[223] See MCA §§ 41-3-609(2)-(3) for factors to consider when determining whether the parent's conduct or condition is unlikely to change within a reasonable time. These factors also address the corresponding needs of the child.
[224] MCA § 41-3-604(1).

c) CFS presents a **compelling reason for not filing** a petition to terminate. Compelling reasons not to file include, but are not limited to the following:
   i) there are **insufficient grounds** for filing a petition;
   ii) adequate documentation demonstrates that filing a petition is **not the appropriate plan** and not in the best interests of the child.[225]

4) ***Filing Required if Exception Applies*** – If CFS chooses NOT to file a petition to terminate in accordance with ¶ 3, above, then **CFS must instead file** either **a)** a petition for an **extension of temporary legal custody** pursuant to MCA § 41-3-438, **b)** a petition for **long-term custody** pursuant to MCA § 41-3-445, or **c)** a petition to **dismiss**.[226]

5) ***Options if Parental Rights Terminated*** – If termination of parental rights is ordered, the court may:

a) **Transfer Custody for Adoption** – transfer **permanent legal custody** of the child, with the **right to consent to adoption**, to i) **CFS**, ii) a **child-placing agency**, or iii) **another individual** approved by CFS; or
b) **Transfer Custody for Guardianship** – transfer permanent legal custody of the child **to CFS** with the right to **petition for appointment of a guardian** pursuant to MCA § 41-3-444.[227]

6) ***Guardian ad Litem Required*** – The court **must appoint a guardian ad litem** to advocate for the **child's best interest** prior to conducting a termination hearing. Likewise, if a **parent is a minor**, the **minor parent must have a guardian ad litem** appointed to advocate for the minor parent's best interest prior to a termination hearing.[228]

ICWA: 1) ***Elevated Legal Standard*** – If the case is subject to ICWA, CFS must satisfy the elevated standard of establishing **beyond a reasonable doubt** that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[229]

[225] MCA §§ 41-3-604(1) and (2).
[226] MCA § 41-3-604(5).
[227] MCA § 41-3-607(2).
[228] MCA § 41-3-607(4).
[229] 25 USC § 1912(f).

2) ***Active Efforts*** – Whenever **CFS seeks to effect termination of parental rights**, it must present evidence[230] sufficient to satisfy the court that **active efforts** have been made to **provide remedial services and rehabilitative programs** designed to **prevent the breakup of the Indian family** and that these efforts have proved unsuccessful.[231]

3) ***Expert Testimony*** – Expert testimony is **required whenever CFS seeks to effect termination** of parental rights. [232] Expert testimony should not be viewed as a mere "technical requirement" which can be satisfied by the same expert for every case. Rather, expert testimony is intended to aid the parties and the court in fulfilling ICWA's larger purpose of educating state courts of tribal cultural and social standards, thereby allowing a court to make a more informed decision and adhere to the spirit and intent of the act.[233] To this end, **CFS should always seek to locate an expert who can speak to tribal-specific social and cultural norms and practices, including family organization and childrearing practices**.[234] A list of tribal-specific experts can be found at the following CFS Internet address: http://www.dphhs.mt.gov/cfsd/icwa/expertwitnesses.shtml.

4) ***Placement Preference*** – When locating an appropriate **foster care or pre-adoptive** placement for an Indian child, absent good cause to the contrary, preference shall be given to: [235]

a) a member of the Indian child's extended family;
b) a foster home licensed, approved, or specified by the Indian child's tribe;
c) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
d) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Next: ***Review Hearing*** – If the court **does not terminate parental rights**, the court should schedule a **review hearing within 30-60 days.**[236]

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[230] ICWA does not designate a legal standard by which this evidence must be established.
[231] 25 USC § 1912(d).
[232] 25 USC § 1912(f).
[233] *ICWA Guide* at 47.
[234] *ICWA Guide* at 113. To justify a foster care placement, 25 USC § 1912(f) specifically requires a finding by an expert that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."
[235] 25 USC § 1915(b).
[236] Recommendation derived from judge interviews.

Judge: 1) ***Review Hearing Questions*** – Utilize the questions recommended for review hearings, Section 7, above, to determine the current status of the parties.

2) ***Child Participation*** – If the child is not present, verify that the child's attorney has met with his client and has notified him of his right to participate in the proceedings.[237]

GAL/CASA: 1) ***Investigation and Report*** – Meet with the child, the child's caregiver, and all pertinent parties (e.g., teachers, family members, service providers, etc.) regarding the child's safety, well-being and permanency prior to the termination hearing. If required as a matter of local policy, ordered by the court, or otherwise deemed necessary by the GAL/CASA, submit a written report to the court and parties of record prior to the hearing. Advocate for the child's best interest, not necessarily his expressed interest. Inform the court when taking a position contrary to the child's expressed interest.

2) ***Propose Alternate Disposition*** – Consider the various options available to the court. Determine if an alternate disposition is in the best interest of the child. If so, conduct an investigation to determine if the alternate disposition is viable. If viable, advocate for the alternate disposition.

3) ***Appointment of Counsel*** – The court may appoint counsel for a GAL/CASA.[238] A request for appointment may be appropriate in cases where the GAL/CASA is not aligned with one of the other parties and therefore requires greater assistance in framing his position and effectively presenting it to the court.

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Child Attorney: 1) ***Client Meeting***. Meet with each client prior to the termination hearing. Explain the nature of the proceeding and the attorney's role in a developmentally appropriate fashion.

2) ***Advocacy***. The attorney should determine and advocate for the child's **expressed interest**. The attorney should counsel the child in a developmentally appropriate manner, but **the attorney should not substitute his judgment in place of the child's**. Despite the fact that the "expressed interest" standard has long been a minimum requirement for child practitioners in accordance with

[237] ABA Model Act § 9(c).
[238] MCA § 47-1-104(4)(a)(iii).

national best practice standards, the Montana Supreme Court has nonetheless held that a child's attorney may, under limited circumstances, take a position contrary to his client's expressed wishes.[239] Again, this practice is not mandated, and in keeping with prevalent national best practice standards, should be avoided.

3) ***Propose Alternate Disposition*** – Advise the child of the various options available to the court. If the child wishes to seek an alternate disposition, conduct an investigation to determine if the proposed disposition is viable. If viable, advocate for the alternate disposition.

4) ***Conflict Determination***. If representing multiple siblings, determine if a conflict exists. The attorney must resolve any identified conflict immediately in accordance with the Montana Rules of Professional Conduct. This will typically require, at a minimum, seeking an order from the court appointing separate counsel.[240]

5) ***Diminished Capacity***. If the client lacks capacity to direct representation, inform the court of the incapacity, including why the attorney believes the child lacks capacity,[241] then advocate for the child using the "substituted judgment" standard.[242]

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[239] ABA Model Act § 7(c). As explained in the comments to § 7(c), "[t]he lawyer-client relationship for the child's lawyer is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to provide independent advice. Client direction requires the lawyer to abide by the client's decision about the objectives of the representation. In order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed wishes. Moreover, providing the child with an independent and client-directed lawyer ensures that the child's legal rights and interests are adequately protected." *But see In re K.H. and K.M.*, 2012 MT 175 (expressly allowing, but not requiring, counsel for the child to advocate against his client's expressed wishes in limited circumstances).

[240] ABA Model Act § 3(c).

[241] ABA Model Act §§ 7(d) & (e). As explained in the comments to § 7(e), "[l]awyers should be careful not to conclude that the child suffers diminished capacity from a client's insistence upon a course of action that the lawyer considers unwise or at variance with lawyer's view. … Criteria for determining diminished capacity include the child's developmental stage, cognitive ability, emotional and mental development, ability to communicate, ability to understand consequences, consistency of the child's decisions, strength of wishes and opinions of others, including social workers, therapists, teachers, family members or a hired expert. … A child may have the ability to make certain decisions, but not others. A child with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the child's own well-being such as sibling visits, kinship visits and school choice and should continue to direct counsel in those areas in which he or she does have capacity. The lawyer should continue to assess the child's capacity as it may change over time."

[242] ABA Model Act § 7(d). A substituted judgment determination is not the same as determining the child's best interests. As explained in the comments to § 7(d), "determination of a child's best interests remains solely the province of the court. [A substituted judgment determination] involves determining what the child would decide if he or she were able to make an adequately considered decision. A lawyer should determine the child's position based on objective facts and information, not personal beliefs."

6) ***Courtroom Participation***. Inform the child of his right to attend and fully participate in the proceeding. Facilitate age appropriate participation in accordance with § 9 of the ABA Model Act. Continue the matter if the child is not present, unless the child has made an informed decision to waive his appearance.[243]

Parent Attorney: ***Propose Alternate Disposition*** – Advise the parent of the various options available to the court. If the parent wishes to seek an alternate disposition, conduct an investigation to determine if the proposed disposition is viable. If viable, advocate for the alternate disposition.

[243] ABA Model Act §§ 9(d) and (e).

10) Permanency Hearing

Purpose: To ensure**, at least annually**, that CFS is making **reasonable efforts to finalize a permanency plan** for the child.[244]

Key Issues: 1) ***Adopt Review Hearing Protocol*** – If the **parent's rights have not been terminated**, the court should utilize the review hearing protocol, Section 7, above, to determine the current status of the parties before proceeding with a determination on the petition.

2) ***Permanency Options*** – Permanency options include, but are not necessarily limited to,[245] the following:[246]

a) **reunification** of the child with the child's parent or guardian;
b) permanent placement of the child with the **noncustodial parent**, superseding any existing custodial order;
c) adoption;
d) appointment of a **guardian** pursuant to MCA § 41-3-444; or
e) **long-term custody** if the child is in a **planned permanent living arrangement** and if it is established by a preponderance of the evidence, which is reflected in specific findings by the court, that:
   (i) the child is being cared for by a **fit and willing relative**;
   (ii) the child has an **emotional or mental handicap** that is so severe that the child cannot function in a family setting and the best interests of the child are served by placement in a residential or group setting;
   (iii) the child is **at least 16 years of age** and is participating in an independent living program and that termination of parental rights is not in the best interests of the child;
   (iv) the **child's parent is incarcerated** and circumstances, including placement of the child and continued, frequent contact with the parent, indicate that it **would not be in the best interests of the child to terminate parental rights of that parent**; or
   (v) the child meets the following criteria:
      (A) the child has been **adjudicated a youth in need of care**;

[244] MCA § 41-3-445(1)(a) and 45 CFR § 1356.21(b)(2).
[245] See MCA § 41-3-445(7).
[246] MCA § 41-3-445(8).

(B) **CFS has made reasonable efforts** to reunite the parent and child, **further efforts by CFS would likely be unproductive**, and **reunification** of the child with the parent or guardian would be **contrary to the best interests** of the child;
(C) there is a **judicial finding** that **other more permanent placement options** for the child have been **considered and found to be inappropriate** or not to be in the best interests of the child; and
(D) the child has been in a placement in which the **foster parent or relative** has **committed to the long-term care** and to a relationship with the child, and it is in the best interests of the child to remain in that placement.

3) ***Timing of Hearing*** – A permanency hearing must be held by the court[247] at the following intervals:[248]

a) within **30 days** of a determination that **reasonable efforts** to provide preservation or reunification services are **not necessary** under MCA §§ 41-3-423, 438(6), or 442(1); or
b) no later than **12 months** after the child was **adjudicated a youth in need of care** or **12 months after the child's first 60 days of removal**, whichever comes first, and **every 12 months thereafter.**

4) ***Hearing Not Required*** - A permanency hearing is not required if the proceeding has been **dismissed**, the child was **not removed from the home**, the child has been **returned to the child's parent or guardian**, or the child has **been legally adopted or appointed a legal guardian.**[249]

5) ***Combined with Other Hearings*** – The permanency hearing may be combined with other required hearings.[250]

6) ***Family Request for Custody*** – If a member of the child's **extended family requests custody** of the child, CFS must **determine if the placement is in the best interests of the child**. CFS shall indicate any reasons for denial to the court. In turn, if the

[247] Subject to the court's approval, and absent an objection from the parties, a foster care review committee is authorized to conduct this hearing on behalf of the court and submit a recommendation to the court for approval. MCA § 41-3-445.
[248] MCA § 41-3-445(1)(a).
[249] MCA § 41-3-445(1)(b).
[250] MCA § 41-3-445(1)(c).

court accepts CFS's recommendation for denial, the **court shall explain the reasons** for the denial to the denied family members, to the extent confidentiality laws allow. Furthermore, the court shall **include the reasons for denial in its court order if requested to do so by the denied family members**.[251]

ICWA: 1) ***Elevated Legal Standard*** – If the case is subject to ICWA, CFS must satisfy the elevated standard of establishing by **clear and convincing evidence** that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[252]

2) ***Active Efforts*** – Whenever **CFS seeks to effect a foster care placement**, it must present evidence[253] sufficient to satisfy the court that **active efforts** have been made to **provide remedial services and rehabilitative programs** designed to **prevent the breakup of the Indian family** and that these efforts have proved unsuccessful.[254]

3) ***Expert Testimony*** – Expert testimony is **required whenever CFS seeks to effect a foster care placement**.[255] Expert testimony should not be viewed as a mere "technical requirement" which can be satisfied by the same expert for every case. Rather, expert testimony is intended to aid the parties and the court in fulfilling ICWA's larger purpose of educating state courts of tribal cultural and social standards, thereby allowing the court to make a more informed decision and adhere to the spirit and intent of the act.[256] To this end, **CFS should always seek to locate an expert who can speak to tribal-specific social and cultural norms and practices, including family organization and childrearing practices**.[257] A list of tribal-specific experts can be found at the following CFS Internet address: http://www.dphhs.mt.gov/cfsd/icwa/expertwitnesses.shtml.

4) ***Placement Preference*** – When locating an appropriate **foster care or pre-adoptive** placement for an Indian child, absent good cause to the contrary, preference shall be given to: [258]

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[251] MCA § 41-3-445(5)(a).
[252] 25 USC § 1912(e).
[253] ICWA does not designate a legal standard by which this evidence must be established.
[254] 25 USC § 1912(d).
[255] 25 USC § 1912(e).
[256] *ICWA Guide* at 47.
[257] *ICWA Guide* at 113. To justify a foster care placement, 25 USC § 1912(e) specifically requires a finding by an expert that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."
[258] 25 USC § 1915(b).

a) a member of the Indian child's extended family;
b) a foster home licensed, approved, or specified by the Indian child's tribe;
c) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
d) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Next: ***Review Hearing*** – If the parent's rights have not been terminated, the court should schedule a **review hearing within 30-60 days.**[259]

ROLES AND RESPONSIBILITIES

Judge: 1) ***Review Hearing Questions*** – If **parental rights have not been terminated**, utilize the questions recommended for review hearings, Section 7, above, to determine the current status of the parties.

2) ***Required Findings*** – The court shall approve a specific permanency plan and make written findings on:[260]

a) whether the **permanency plan** is in the **best interests of the child**;
b) whether CFS has made **reasonable efforts to finalize the plan**;
c) **other necessary steps** that CFS is required to take to effectuate the terms of the plan; and
d) In cases involving **multiple siblings**, specific **findings must issue for each child**.[261]

3) ***Timing of Order*** – The court's order must be issued **within 20 days** after the permanency hearing.[262]

4) ***Child Consultation*** – The court is **required to consult**, in an age-appropriate manner, **with the child** regarding the proposed permanency or transition plan for the child.[263]

[259] Recommendation derived from judge interviews.
[260] MCA § 41-3-445(6).
[261] MCA § 41-3-445(1)(d).
[262] MCA § 41-3-445(5)(a).
[263] MCA § 41-3-445(4).

CFS Worker: ***Required Report*** – At least **3 days prior to the hearing**, CFS must submit a report to the court indicating **efforts to effectuate the permanency plan** for the child, address the **options for the child's permanent placement**, examine the **reasons for excluding higher priority options**, and set forth the **proposed plan to carry out the placement decision**, including specific times for achieving the plan.[264]

GAL/CASA: 1) ***Investigation and Report*** – Meet with the child, the child's caregiver, and all pertinent parties (e.g., teachers, family members, service providers, etc.) regarding the child's safety, well-being and permanency prior to the permanency hearing. If required as a matter of local policy, ordered by the court, or otherwise deemed necessary by the GAL/CASA, submit a written report to the court and parties of record prior to the hearing. Advocate for the child's best interest, not necessarily his expressed interest. Inform the court when taking a position contrary to the child's expressed interest.

2) ***Propose Alternate Disposition*** – Consider the various options available to the court. Determine if an alternate disposition is in the best interest of the child. If so, conduct an investigation to determine if the alternate disposition is viable. If viable, advocate for the alternate disposition.

3) ***Appointment of Counsel*** – The court may appoint counsel for a GAL/CASA.[265] A request for appointment may be appropriate in cases where the GAL/CASA is not aligned with one of the other parties and therefore requires greater assistance in framing his position and effectively presenting it to the court.

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Child Attorney: 1) ***Client Meeting***. Meet with each client prior to the permanency hearing. Explain the nature of the proceeding and the attorney's role in a developmentally appropriate fashion.

2) ***Advocacy***. The attorney should determine and advocate for the child's **expressed interest**. The attorney should counsel the child in a developmentally appropriate manner, but **the attorney should not substitute his judgment in place of the child's**. Despite the fact that the "expressed interest" standard has long been a minimum requirement for child practitioners in accordance with national best practice standards, the Montana Supreme Court has nonetheless held that a child's attorney may, under limited circumstances, take a position contrary to his client's expressed

[264] MCA § 41-3-445(2).
[265] MCA § 47-1-104(4)(a)(iii).

wishes.[266] Again, this practice is not mandated, and in keeping with prevalent national best practice standards, should be avoided.

3) ***Propose Alternate Disposition*** – Advise the child of the various options available to the court. If the child wishes to seek an alternate disposition, conduct an investigation to determine if the proposed disposition is viable. If viable, advocate for the alternate disposition.

4) ***Conflict Determination***. If representing multiple siblings, determine if a conflict exists. The attorney must resolve any identified conflict immediately in accordance with the Montana Rules of Professional Conduct. This will typically require, at a minimum, seeking an order from the court appointing separate counsel.[267]

5) ***Diminished Capacity***. If the client lacks capacity to direct representation, inform the court of the incapacity, including why the attorney believes the child lacks capacity,[268] then advocate for the child using the "substituted judgment" standard.[269]

6) ***Courtroom Participation***. Inform the child of his right to attend and fully participate in the proceeding. Facilitate age appropriate

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[266] ABA Model Act § 7(c). As explained in the comments to § 7(c), "[t]he lawyer-client relationship for the child's lawyer is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to provide independent advice. Client direction requires the lawyer to abide by the client's decision about the objectives of the representation. In order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed wishes. Moreover, providing the child with an independent and client-directed lawyer ensures that the child's legal rights and interests are adequately protected." *But see In re K.H. and K.M.*, 2012 MT 175 (expressly allowing, but not requiring, counsel for the child to advocate against his client's expressed wishes in limited circumstances).

[267] ABA Model Act § 3(c).

[268] ABA Model Act §§ 7(d) & (e). As explained in the comments to § 7(e), "[l]awyers should be careful not to conclude that the child suffers diminished capacity from a client's insistence upon a course of action that the lawyer considers unwise or at variance with lawyer's view. … Criteria for determining diminished capacity include the child's developmental stage, cognitive ability, emotional and mental development, ability to communicate, ability to understand consequences, consistency of the child's decisions, strength of wishes and opinions of others, including social workers, therapists, teachers, family members or a hired expert. … A child may have the ability to make certain decisions, but not others. A child with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the child's own well-being such as sibling visits, kinship visits and school choice and should continue to direct counsel in those areas in which he or she does have capacity. The lawyer should continue to assess the child's capacity as it may change over time."

[269] ABA Model Act § 7(d). A substituted judgment determination is not the same as determining the child's best interests. As explained in the comments to § 7(d), "determination of a child's best interests remains solely the province of the court. [A substituted judgment determination] involves determining what the child would decide if he or she were able to make an adequately considered decision. A lawyer should determine the child's position based on objective facts and information, not personal beliefs."

participation in accordance with § 9 of the ABA Model Act. Continue the matter if the child is not present, unless the child has made an informed decision to waive his appearance.[270]

Parent Attorney: ***Propose Alternate Disposition*** – Advise the parent of the various options available to the court. If the parent wishes to seek an alternate disposition, conduct an investigation to determine if the proposed disposition is viable. If viable, advocate for the alternate disposition.

[270] ABA Model Act §§ 9(d) and (e).

11) ABA *Child Safety Guide* Bench Cards

Bench Card A. Family Information – Six Safety Questions

A body of knowledge that is more comprehensive than the incident of maltreatment must be known about the family. This body of knowledge must include the extent of maltreatment, the surrounding circumstances, child functioning, adult functioning, parenting and discipline. The following are six background questions that should guide safety in each case. The answers will help the court assess threats of danger, child vulnerability, and protective capacities. The information will later help judges decide what to do about an unsafe child.

1 - What is the nature and extent of the maltreatment?

- Type of maltreatment
- Severity of the maltreatment, results, injuries
- Maltreatment history, similar incidents
- Describing events, what happened, hitting, pushing
- Describing emotional and physical symptoms
- Identifying child and maltreating parent

2 - What circumstances accompany the maltreatment?

- How long maltreatment has been occurring
- Parental intent concerning the maltreatment
- Whether parent was impaired by substance use, or was otherwise out-of-control when maltreatment occurred
- How parent explains maltreatment and family conditions
- Does parent acknowledge maltreatment, what is parent's attitude?
- Other problems connected with the maltreatment such as mental health problems

3 - How does the child function day-to-day?

- Capacity for attachment (close emotional relationships with parents and siblings)
- General mood and temperament
- Intellectual functioning
- Communication and social skills
- Expressions of emotions/feelings
- Behavior
- Peer relations
- School performance
- Independence
- Motor skills
- Physical and mental health

4 – How does the parent discipline the child?

- Disciplinary methods
- Concept and purpose of discipline

- Context in which discipline occurs, is the parent is impaired by drugs or alcohol when administering discipline
- Cultural practices

5 - What are overall parenting practices?

- Reasons for being a parent
- Satisfaction in being a parent
- Knowledge and skill in parenting and child development
- Parent expectations and empathy for child
- Decision-making in parenting practices
- Parenting style
- History of parenting behavior
- Protectiveness
- Cultural context for parenting approach

6 - How does the parent manage his own life?

- Communication and social skills
- Coping and stress management
- Self-control
- Problem-solving
- Judgment and decision-making
- Independence
- Home and financial management
- Employment
- Community involvement
- Rationality
- Self-care and self-preservation
- Substance use, abuse, addiction
- Mental health
- Physical health and capacity
- Functioning within cultural norms

Definitions

Safe child:

Vulnerable children are safe when there are no threats of danger within the family *or* when the parents possess sufficient protective capacity to manage any threats.

Unsafe child:

Children are unsafe when:
- threats of danger exist within the family *and*
- children are vulnerable to such threats, *and*
- parents have insufficient protective capacities to manage or control threats.

Bench Card B. Threats of Danger

A threat of danger is a specific family situation or behavior, emotion, motive, perception or capacity of a family member. The body of knowledge gained from Bench Card A is applied to specific criteria for what constitutes an impending threat of danger:

- Specific and observable;
- Out-of-control;
- Immediate
- Severe consequences

- No adult in the home is routinely performing basic and essential parenting duties and responsibilities.
- The family lacks sufficient resources, such as food and shelter, to meet the child's needs.
- One or both parents lack parenting knowledge, skills, and motivation necessary to assure a child's basic needs are met.
- One or both parents' behavior is violent and/or they are behaving dangerously.
- One or both parents' behavior is dangerously impulsive or they will not/cannot control their behavior.
- Parents' perceptions of a child are extremely negative.
- One or both parents' are threatening to severely harm a child, are fearful they will maltreat the child and/or request placement.
- One or both parents intend(ed) to seriously hurt the child.
- Parents largely reject CPS intervention; refuse access to a child; and/or the parents may flee.
- Parent refuses and/or fails to meet child's exceptional needs that do/can result in severe consequences to the child.
- The child's living arrangements seriously endanger the child's physical health.
- A child has serious physical injuries or serious physical symptoms from maltreatment and parents are unwilling or unable to arrange or provide care.
- A child shows serious emotional symptoms requiring immediate help and/or lacks behavioral control, or exhibits self-destructive behavior and parents are unwilling or unable to arrange or provide care.
- A child is profoundly fearful of the home situation or people within the home.
- Parents cannot, will not or do not explain a child's injuries or threatening family conditions.

Bench Card C. Child Vulnerability

A child is vulnerable when they lack the capacity to self-protect. This non-exhaustive list are issues that determine or increase a child's vulnerability:

- A child lacks capacity to self-protect
- A child is susceptible to harm based on size, mobility, social/emotional state
- Young children (generally 0-6 years of age)
- A child has physical or mental developmental disabilities
- A child is isolated from the community
- A child lacks the ability to anticipate and judge presence of danger
- A child consciously or unknowingly provokes or stimulates threats and reactions
- A child is in poor physical health, has limited physical capacity, is frail
- Physical frailty and potential physical harm from future maltreatment
- Emotional vulnerability of the child
- Impact of prior maltreatment
- Feelings toward the parent – attachment, fear, insecurity or security
- Ability to attach and vulnerability to future separations
- Ability to articulate problems and danger

Questions the judge can ask.

- Has the child demonstrated self-protection by responding to these threats? (Self-protection, means recognizing danger and acting to secure safety for one's self; it is not calling 911, CPS, or the school *after* an event.)
- Besides defending herself from threats, can the child care for her own basic needs?
- How does the judge find this child *not vulnerable* given the threats?
- Is vulnerability of all children, not just the victim, considered?
- Are there issues preventing this child from self-protecting?
- What plan would this child carry out to protect himself from threats?
- Can the child describe how she will know a threatening situation is developing, rather than recognizing it once it is happening?
- What has been learned about this child's functioning? How comprehensive is the information? How much time did the worker or other parties talk to the child about self-protecting? Is there information about this family and the way threats operate arguing against the child self-protecting?
- Are there ways the child behaves and responds, that escalate the threats to the child?

Bench Card D. Protective Capacities

Cognitive Protective Capacities

Cognitive protective capacity refers to knowledge, understanding, and perceptions contributing to protective vigilance. Although this aspect of protective capacities has some relationship to intellectual or cognitive functioning, parents with low intellectual functioning can still protect their children. This has to do with the parent recognizing she is responsible for her child, and recognizing clues or alerts that danger is pending.

Cognitive protective capacities can be demonstrated when the parent:

- articulates a plan to protect the child
- is aligned with the child
- has adequate knowledge to fulfill care-giving responsibilities and tasks
- is reality oriented; perceives reality accurately
- has accurate perceptions of the child
- understands his/her protective role
- is self-aware as a caregiver

Behavioral Protective Capacities

Behavioral protective capacity refers to *actions, activities, and performance* that result in protective vigilance. Behavioral aspects show it is not enough to know what must be done, or recognize what might be dangerous to a child; the parent must *act*.

Behavioral protective capacities can be demonstrated when the parent:

- is physically able
- has a history of protecting others
- acts to correct problems or challenges
- demonstrates impulse control
- demonstrates adequate skill to fulfill care-giving responsibilities
- possesses adequate energy
- sets aside her/his needs in favor of a child
- is adaptive and assertive
- uses resources necessary to meet the child's basic needs

Emotional Protective Capacities

Emotional protective capacity refers to *feelings, attitudes and identification* with the child and motivation resulting in protective vigilance. Two issues influence the strength of emotional protective capacity: the attachment between parent and child, and the parent's own emotional strength.

Emotional protective capacities can be demonstrated when the parent:

- is able to meet own emotional needs
- is emotionally able to intervene to protect the child
- realizes the child cannot produce gratification and self-esteem for the parent
- is tolerant as a parent
- displays concern for the child and the child's experience and is intent on emotionally protecting the child

- has a strong bond with the child, knows a parent's first priority is well-being of the child
- expresses love, empathy and sensitivity toward the child; experiences specific empathy with the child's perspective and feelings

Questions the judge can ask:

- Has the parent demonstrated the ability to protect the child in the past under similar circumstances and family conditions? ***(Behavioral Protective Capacity)***
- Has the parent arranged for the child to not be left alone with the adult/parent maltreater or source of danger? (This could include having another adult present aware of the protective concerns and able to protect the child). ***(Cognitive and Behavioral Protective Capacity)***
- Is the parent intellectually, emotionally and physically able to protect the child given the threats? ***(Cognitive, Behavioral and Emotional Protective Capacity)***
- Is the parent free from needs which might affect the child's safety such as severe depression, lack of impulse control, or medical needs? ***(Behavioral and Emotional Protective Capacity)***
- Does the parent have resources to meet the child's basic needs in light of the other changes the court is expecting from the family? ***(Behavioral Protective Capacity)***
- Is the parent cooperating with the caseworker's efforts to provide services and assess family needs? ***(Cognitive and Behavioral Protective Capacity)***
- Does the parent display concern for the child's experience? Is the parent intent on emotionally protecting the child? ***(Emotional Protective Capacity)***
- Can the caregiver specifically articulate a feasible, realistic plan to protect the child, such as the maltreating adult leaving when a situation escalates, calling the police in the event the restraining order is violated, etc.? ***(Cognitive Protective Capacity)***
- Does the caregiver believe the child's report of maltreatment and is he/she supportive of the child? ***(Emotional Protective Capacity)***
- Is the caregiver capable of understanding the specific threat to the child and the need to protect? ***(Cognitive Protective Capacity)***
- Has the caregiver asked the maltreating adult to leave the household (if applicable)? ***(Behavioral Protective Capacity)***
- Does the caregiver have adequate knowledge and skill to fulfill parenting responsibilities and tasks? (This may involve considering the caregiver's ability to meet any exceptional needs that the child might have). ***(Cognitive and Behavioral Protective Capacity)***

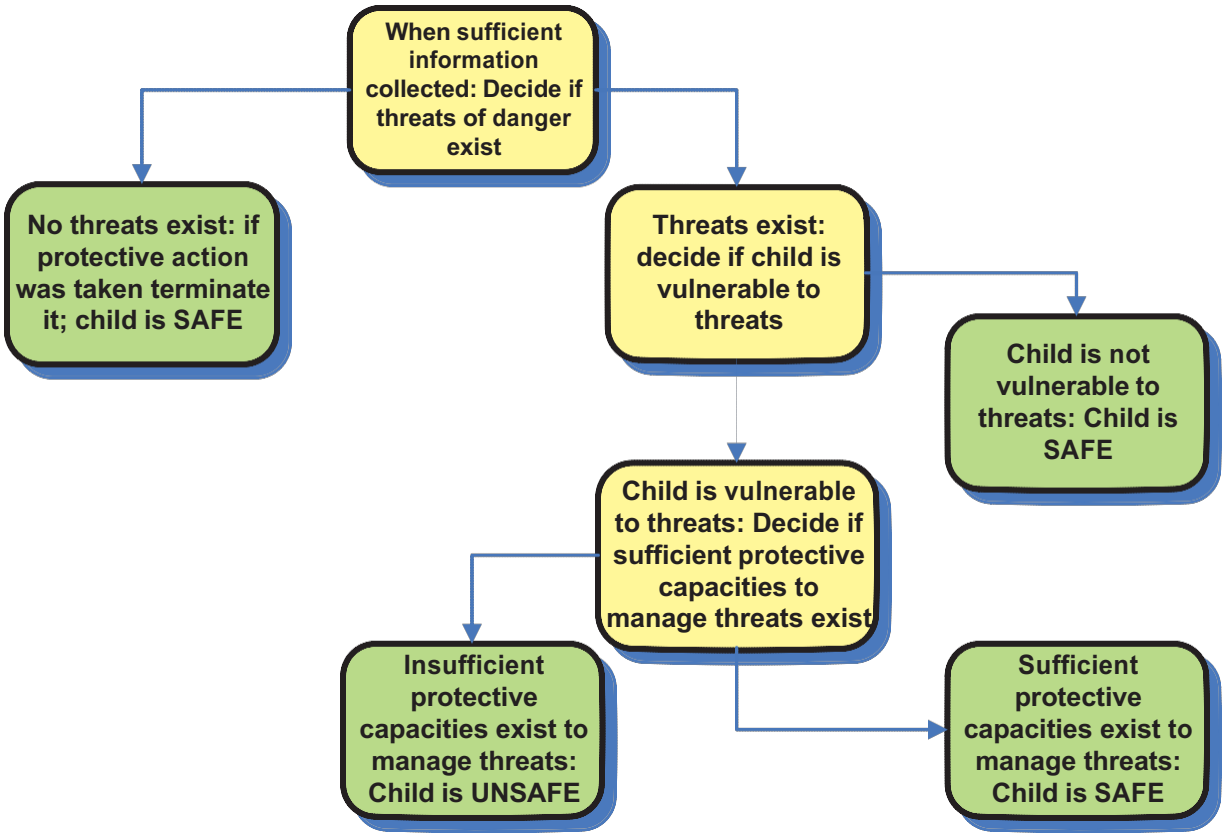
- Is the caregiver emotionally able to carry out a plan and/or to intervene to protect the child (caregiver is not incapacitated by fear of maltreating adult)? ***(Behavioral and Emotional Protective Capacity)***

- Do the caregiver and child have a strong bond and does the caregiver demonstrate clearly that the number one priority is the safety and well-being of the child? ***(Behavioral and Emotional Protective Capacity)***

- Even if the caregiver is having a difficult time believing the other adult would maltreat the child, does he or she describe the child as believable and trustworthy? ***(Emotional Protective Capacity)***

- Does the caregiver believe that the problems of the family (including current CPS and court involvement) are not the child's fault or responsibility? ***(Cognitive and Emotional Protective Capacity)***

Bench Card E. Child Safety Decision Tree



Bench Card F. Actions and Services to Control Threats of Danger

Actions or Services to Control or Manage Threatening Behavior
The purpose of a safety plan is *only to control* the behavior or the source of the threat. Understanding and correcting such behavior is a treatment plan goal, but not the goal of the safety plan. The court should consider including these actions and strategies in the court order.

- In-home health care
- Supervision and monitoring
- Stress reduction
- Out-patient or in-patient medical treatment
- Substance abuse intervention, detoxification
- Emergency medical care
- Emergency mental health care

Actions or Services that will Manage Crises
Crisis management aims to halt a crisis, return a family to a state of calm, and to solve problems that fuel threats of danger. Appropriate crisis management handles precipitating events or sudden conditions that immobilize parents' capacity to protect and care for children. Examples include:

- Crisis intervention
- Counseling
- Resource acquisition , obtaining financial help; help with basic parenting tasks

Actions or Services Providing Social Support
These services may be useful with young, inexperienced parents failing to meet basic protective responsibilities; anxious or emotionally immobilized parents; parents needing encouragement and support; parents overwhelmed with parenting responsibilities; and developmentally disabled parents. Services or actions include:

- Friendly visitor
- Basic parenting assistance and teaching
- Homemaker services
- Home management
- Supervision and monitoring
- Social support
- In-home babysitting

Actions or Services that Can Briefly Separate Parent and Child
Separation is a temporary action ranging from one hour to a weekend to several days. Separation may involve hourly babysitting, temporary out-of-home placement or both. Besides ensuring child safety, separation may provide respite for parents and children. Separating creates alternatives to family routine, scheduling, and daily pressures. Separation also can serve a supervisory or oversight function. Examples:

- Planned parental absence from home
- Respite care
- Day care
- After school care
- Planned activities for the children
- Short term out-of-home placement of child: weekends; several days; few weeks
- Extended foster care

Actions or Services to Provide Resources (Practical Benefits the Family Might Otherwise Be Unable to Afford)
These actions and services provide unaffordable practical help to the family, without it the child's safety is threatened.

- Resource acquisition ,obtaining financial help, help with basic parenting tasks
- Transportation services, might alleviate a threat
- Employment assistance
- Housing assistance

Bench Card G. Reasonable Efforts to Prevent Removal: In-home Safety Plans

Determining whether there were reasonable efforts to prevent placement goes beyond identifying relevant information (the 6 questions) and considering the types of information discussed above (i.e., threats of danger, vulnerability and protective capacities) to determine whether the child is safe.

Instead, the court now must focus on what should have been and actually was done to control those threats. The question becomes: *was the actual in-home or out-of-home safety plan (or some combination) the least intrusive approach that was needed to keep the child safe?* This analysis begins with the judge getting answers to the questions in this checklist, and determining whether the child can be kept safe with an in-home safety plan, and if so, some key components of the plan.

- ☐ Once threats are identified and the child is vulnerable, determine if the family can protect the child. Does the family possess sufficient protective capacity?

If the family's protective capacities are insufficient, determine what will protect the child by examining how and when threats emerge.

- ☐ Does each threat happen every day? Different times of day? Is there any pattern or are they unpredictable?
- ☐ How long have these threats been occurring? Will it be easier or harder to control or manage threatening behavior with a long family history?
- ☐ Does anything specific trigger the threat or accompany the threat, such as pay day, alcohol use, or migraine?

Is an in-home safety plan sufficient to control the threats, in view of when and how the threats of danger emerge?

- ☐ Are the parents living in the home, or do they disappear occasionally?
- ☐ Are the parents willing to cooperate with an in-home plan? How are we gauging "cooperation?"
- ☐ Is the household predictable enough that actions will eliminate or manage threat of danger?

(If the answer to any of these questions is "no," then an in-home safety plan may not be appropriate)

What actions or services are required for an in-home safety plan to control the threats of danger to the child?

- ☐ How often and long would services be needed (for example, separation: after-school daycare two times per week, from 3 pm to 6 pm)?
- ☐ Are providers available to carry out services at appropriate times, frequency and duration?
- ☐ Are the people carrying out the in-home the safety plan aware, committed, and reliable?
- ☐ Are safety plan providers able to sustain the intense effort until the parent can protect without support?

Bench Card H. Determining Visitation

- Organize visits to occasionally allow parents to learn or model the protective capacities they lack. Can visit length and location help make this happen?

- Arrange visits so CPS or another service provider can evaluate whether parents' protective capacities are improving. Can visit length and location help with this?

- Reasons visits may or may not be supervised are based on:

__ Threats of danger: some threats may be more difficult to manage without supervision than others. Unmanageable threats may include violence, child's intense fears, premeditated harm, extreme negative perception of the child, and likelihood of fleeing with the child.

__ The volatility of the threat and how difficult it would be to manage without supervision. Analyze volatility by considering when and how the threats emerge, parent's impulsivity, whether home environment is unpredictable, or safety could be maintained only through 24 hour in-home help.

__ Whether significant information is lacking about the parent, due to parent unwillingness or other obstacles.

__ Whether parents or children's functioning deteriorating during visits. If so, threats of danger must be reconsidered

- Is allowable contact spelled out, including email, text messages, and phone?

- Is there reason *not* to include parents at appointments, school, and church events?

- Are the requirements and logistics for visits and contacts provided in writing to parents and other visitation participants? Are they clear to *all,* not just legal parties?

- Are participants clear that visits will not be used as punishment or reward?

- Set dates when visitation terms and contacts will be reconsidered.

Bench Card I: Conditions for Returning Child

The judge should expect CPS and the legal parties to use the following process to identify the conditions for return to include in the court's order. (The following builds on the decision process needed to determine whether to remove a child from home, as discussed in Chapter 6.)

- Carefully review *exactly* why an in-home safety plan was originally determined to be insufficient, unfeasible or unsustainable.

- Ask the following questions regarding each threat of danger (including any new threats that may have emerged):
  - How does the threat emerge, including its intensity, frequency, duration, etc?
  - Can it be controlled with the children in the home and, if so, how?
  - Can anyone substitute for the parent within the home to provide sufficient protective capacity to assure control of the threat of danger?

- Based on the answers to the above questions, discuss what is needed to control threats of danger. Referring to the analysis that led to the original decision that an in-home safety plan would not work, identify what circumstances must be different. Answer the following questions (discussed more fully in Chapter 6):
  - Were the parents' capacity, attitude, awareness, etc factors in the original decision that an in-home safety plan would be insufficient?
  - Do any of these factors need to change before the child can return home with an effective in-home safety plan?
  - What is the potential for other threatening parents or persons leaving home?

- Specify the acceptable people, behaviors, situations, and circumstances (including alternatives and options) that, if in place and active, would resolve the reasons an in-home safety plan was originally determined to be insufficient.

- Always include as a condition for return that the family agree to a court-ordered in-home safety plan.

Bench Card J. Increasing the Treatment Plan's Likelihood for Success
(with focus on safety issues)

- **Does the treatment plan include goals or tasks addressing changes** in behaviors, commitments, and attitudes related to safety? Listing services people must attend, directing them to "follow all treatment recommendations," does not allow the court to measure progress, only to measure attendance or participation.

  An example: "Alan will demonstrate an ability and willingness to delay his own needs to provide food, supervision, and attention for his daughter Kayla."

- **Does the treatment plan follow logically from the threats** and gaps in protective capacities in the home? Be precise when detailing a treatment plan's strategy, and specify what must change.

- **Does the treatment plan duplicate the safety plan**? If yes, one plan (or both) is not fulfilling its purpose. A treatment plan does not replace the safety plan, nor is it a duplicate. These plans work concurrently. The treatment plan works on changing things so the parents, in time, can keep their child safe without the court intervening; while the safety plan, in or out-of-home, helps control things now so the child stays safe from threats.

- **Does the treatment plan target issues that influence threats of danger?** Does it target conditions interfering with parent protective capacity? Some parents must deal with their own experiences of being victimized to develop protective capacities. Some mental health issues make a parent so ill-prepared for being protective that those issues must be addressed first. A treatment plan calling for the parent to "learn about child development" will fail if it does not address these crucial problems.

- **How do parents react to the treatment plan?** An experienced judge knows how to gauge a parent's hope, fear, or remorse.

- **Does the treatment plan focus on reducing threats without also increasing protective capacities?** The family has the best chance for success if they reduce threats *and* increase protective capacity. Compare the benefits of a) having a single mother end her live-in relationship with her boyfriend who physically abused her and her child; and b) helping that mother develop her alertness to danger and willingness to put her child first. If the first succeeds, one threat is eliminated. If the second succeeds, future threats will be managed by the mother. Both strategies can be in the treatment plan. Focusing solely on reducing threats, while more obvious, will likely limit long-term success.

Bench Card K. Determining Whether to Reunify

While deciding whether to reunify, the judge requires the following information:

- The status of the original threats of danger and any newly emerged threats
- The nature, quality, and length of visits between child and parent. (By the time reunification is considered, visits should have been frequent, consistent, and unsupervised).
- Specific information about changes in parent behavior, attitudes, motivation, and interactions. (This has little to do with how many service sessions parents attended).
- Parental willingness and capacity to support reunification and an in-home safety plan. (Note this has *nothing* to do with gaining parental promises to control situations already determined out-of-control).
- Information and observations from the out-of-home care provider. (What are patterns of child or parent behavior before, during, and after visits, or changes in the child since placement that will influence reunification's success)?
- The preparation given the out-of home care provider to support reunification. (The natural loss experienced by the provider if reunification occurs does not rule out the value of their information; consider how their support or lack of it will influence reunification).
- Progress noted by providers; opinions of providers regarding reunification; recommendations from providers about what is needed for the in-home safety plan to be sufficient. (Scrutinize differences of opinion; resist relying on one party, or the person with the most credentials; sort through turf wars and personality conflicts).
- The recommendation and its justification from the CPS worker. (The worker should not be relying solely on "the recommendations of Dr. X"—demand that the worker make a recommendation and explain how he/she arrived at the recommendation).
- The specifics of a reunification plan, including: (A reunification *plan* means that even if the court orders reunification, it must happen with preparation, not at 6 pm tonight. Neither should it wait until the end of the school semester or some other lengthy timeframe.)
    - The changes to the visitation schedule, how will visits increase and still be used to keep measuring and building confidence in the reunification decision?
    - Involvement as appropriate of the extended family
    - Involvement of the out-of-home care provider, foster parent
    - Specific time frames
    - The plan to prepare the child; who will talk to the child? Who will a discuss emotions, such as what will be missed in the placement home and other important issues to the child?
    - The plan to prepare the family and the home for child's return. (There are unspoken issues the parent may feel guilty about raising, or worried that they may be misinterpreted as not being ready. There also must be a plan (who, when) for discussing and solving practical issues such as

school or transportation and emotional issues such as fear or anxiety. Do not assume the therapist will do this. Get specifics on how these important topics will be resolved).

- The specifics of the in-home safety plan: actions, frequency, providers, and roles. (Details are required: who will do what, when, and for how long).

- The role and responsibility for active safety plan management by the CPS worker; reunification is the most dangerous time for the child. (The court should be alert; often agency and service providers now see this family as successful so contact slows. Order specifics of how the safety plan will be aggressively supervised).

ICWA – Active Efforts

***In re B.Y. & R.*, 2018 MT 309 (Active Efforts)**

ICWA requires proof beyond a reasonable doubt that a state seeking termination of parental rights to an Indian child has made "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts were unsuccessful, *In re D.E.*, n.2 (citing 25 U.S.C. § 1912(d)). Active efforts prior to removal must be proven by clear and convincing evidence. *In re G.S.*, 2002 MT 245, ¶ 33, 312 Mont. 108, 59 P.3d 1063. Non-ICWA cases are subject to § 41-3-423, MCA, which requires the Department to make "reasonable efforts."

Federal regulation requires courts to ensure "active efforts" were made:

> (a) Prior to ordering an involuntary foster-care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.
>
> (b) Active efforts must be documented in detail in the record.

25 CFR 23.120, *accord* 25 USCS § 1912(d). Thus, the district court must document [**6] in detail in the record how active efforts have been made by clear and convincing evidence prior to removal and beyond a reasonable doubt prior to termination. Federal regulations specifically define "active efforts":

> Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:
>
> (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the [**7] most desirable goal;
>
> (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
>
> (3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
>
> (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;
>
> (5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;
>
> (6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
(8) Identifying [**8] community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
(9) Monitoring progress and participation in services;
(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
(11) Providing post-reunification services and monitoring.

25 CFR 23.2.