

Child and Family Services Policy Manual: Legal Procedure
Termination of the Parent-Child Legal Relationship/Permanent Legal Custody

Termination of the Parent-Child Relationship	<p>If a court determines that the continuation of the parent-child legal relationship is not in the child's best interests, the parent-child legal relationship may be terminated. The termination of the parent-child legal relationship is to be used in those situations when a court has first determined that a child is abused or neglected. If the permanent plan for the child is adoption, the court must terminate the parental rights of the child's mother and all fathers (e.g., legal, birth, putative).</p> <p>NOTE: If as a result of sexual intercourse without consent a child is born, the offender who has been convicted of an offense under this section, and who is the biological parent of the child resulting from the sexual intercourse without consent, forfeits all parental and custodial rights to the child if the provisions of 46-1-401 have been followed." 45-5-503, MCA</p> <p>Termination of only one parent's rights does not negatively affect the parental rights of the other parent. If the rights of only one parent are terminated, custody of the child reverts to the other parent. (<u>In the Matter of J.B.</u>, 278 Mont. 160, 923 P.2d 1096, 1996.) Therefore, the child protection specialist should assess whether terminating the parent-child legal relationship as to one parent and not the other parent is in the child's best interests. In addition, the child protection specialist should consult with the supervisor and the county attorney in making this determination.</p>
Evidentiary Standards	<p>For a non-ICWA case, the facts upon which the termination of the parent-child relationship is terminated must be established by clear and convincing evidence. If there is a reasonable belief the child may be an Indian child, the ICWA must be followed. To terminate parental rights on an Indian child, the evidence must show, 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. The tribe must be notified of the pending legal proceedings. Use DocGen D200, <u>Request for Verification of Status</u>, to request enrollment information, and DocGen D105, <u>Notification of Judicial Proceedings</u>, to notify the child's tribe of pending court action.</p>
County Attorney Action	<p>The county attorney files the petition for termination of the parent-child legal relationship. The petition must contain the factual basis for the request to terminate the parent-child legal relationship. The county attorney also arranges for the court</p>

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hearing and subpoenas the necessary persons and documents. The child protection specialist may be asked to supply a potential witness list.

The child protection specialist must file all affidavits supporting the petition for termination of parental rights 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 division or the judge recommends against it.

Service of Process

Each parent named in the petition must be served with a copy of the petition for termination of the parent-child legal relationship. If the parent(s) cannot be personally served, the parent(s) must be served by publication. If the parent(s) cannot be located or identified, the child protection specialist must submit an affidavit to the county attorney stating that, after due diligence, the parent(s) cannot be located or identified. The affidavit must contain a description of the diligent efforts made by the child protection specialist to locate or identify the parent(s). The affidavit constitutes support for filing a request with the court for an order for service by publication.

Before a termination of the parent-child relationship may be ordered, the court must determine whether or not the proper procedure was followed relating to service of process.

**Petition to Terminate
Parent-Child Legal
Relationship Required**

Under certain circumstances, the filing of a petition to terminate the parent-child legal relationship is required. The child protection specialist must request and the county attorney must file a petition to terminate parental rights to the child in the following situations **unless an exception to this requirement applies:**

1. If a child has been in foster care under the physical custody of the state for 15 of the most recent 22 months or if the court has determined that preservation or reunification services need not be provided, a petition to terminate the parent-child legal relationship must be filed unless an exception applies. If the child was placed under a voluntary parental agreement, the time the child

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was in care under the parental agreement is included in the total time used to calculate 15 of the most recent 22 months.

2. If a hearing results in a finding of abandonment, a petition to terminate the parent-child legal relationship must be filed within **60** days of the finding.
3. A petition to terminate the parent-child legal relationship must be filed within **60** days of the finding if a hearing results in a finding that the parent has subjected the child to any of the following circumstances:
 - a. subjected a child to aggravated circumstances, including but not limited to abandonment, torture, chronic abuse, or sexual abuse or chronic, severe neglect;
 - 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.

Exceptions to filing a Petition to Terminate the Parent-Child Legal Relationship

An exception to the requirement to file a petition to terminate the parent-child legal relationship can be made if one of the following applies to the child or the child's parents:

- a. the child is being cared for by a relative;
- b. the Department has not provided services considered necessary for the safe return of the child to the child's home; or
- c. the Department has documented a compelling reason why filing a termination petition would not

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be in the best interests of the child.

Compelling Reason to not file the Petition to Terminate the Parent-Child Legal Relationship

Compelling reasons for not filing a petition to terminate the parent-child legal relationship 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;
- c. The child is in a therapeutic placement which is longer than 15 months and cannot return home until s/he completes the treatment program;
- d. Adoption is not the appropriate permanency goal for the child because:
 - 1) the child is an older teen who specifically requests that emancipation be established as his/her permanency plan;
 - 2) a significant bond exists between parent and child but the parent is unable to care for the child because of an emotional or physical disability, no adoptive family is open to continued parental contact, and the child's foster parents have committed to raising him/her to the age of majority and to facilitating visitation with the parent; or
 - 3) the child's tribe has identified another planned permanent living arrangement for the child;
- e. The child is an unaccompanied refugee minor; or
- f. There are international legal obligations or compelling foreign policy reasons that would preclude terminating parental rights.

Compelling Reason must be Case Specific

The "compelling reason" not to file a petition to terminate the parent-child legal relationship must be determined on the individual facts of each case. When the compelling reason is

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because the Montana statutory circumstances to terminate the parent-child legal relationship do not exist the child protection specialist must immediately modify the case plan to work toward meeting those statutory requirements if termination of the parent-child legal relationship is in the child's best interests.

Statutory Basis for Continued Placement

A statutory basis for continuing foster care and agency involvement must exist for the child to remain in care beyond 15 months. Therefore, if the child's circumstances meet one of the exceptions to filing a petition to terminate the parent-child legal relationship, evidence must support and the court must grant one of the following:

- Temporary Legal Custody (for a maximum of two six-month periods;
- Long-term Custody if the child is in a Planned Permanent Living Arrangement; or
- Dismiss the petition.

Exceptions Report filed with Court or Administrative Review Panel

If a child has been in foster care for 15 of the most recent 22 months and a petition to terminate parental rights regarding that child has not been filed with the court, the child protection specialist must 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. The review panel is the Foster Care Review Committee.

Circumstances upon which a Termination of the Parent-Child Legal Relationship may be based

Under Montana's child abuse and neglect statutes, a court may terminate the parent-child legal relationship if any of the following circumstances exist:

1. the parents have relinquished the child;
2. the child has been abandoned;
3. the parent is convicted of a felony in which sexual intercourse occurred and as a result of the sexual intercourse the child is born;
4. the parent 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

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- result of the sexual intercourse the child is born;
5. the parent has subjected a child to any of the following circumstances:
 - a. subjected a child to aggravated circumstances, including but not limited to abandonment, torture, chronic abuse, or sexual abuse or chronic, severe neglect;
 - 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;
 6. the putative father meets any of the applicable criteria [See Section 302-7 or Mont. Code Ann. § 41-3-423];
 7. the child is adjudicated a youth in need of care **and both** of the following exist:
 - a. an appropriate treatment plan that has been approved by the court has not been complied with or has not been successful; and
 - b. the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time.

Termination Upon Relinquishment

If a parent or both parents wish to relinquish their parental rights, an order terminating their rights should be obtained based upon the relinquishment. See 303-2 regarding relinquishment and birth parent counseling. ICWA procedures must be followed for the relinquishment of an Indian child.

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Parents' Rights	For the child to be legally free for adoption, the parental rights to the child of both mother and father must be legally terminated.
Presumption of Paternity	When a child is born within 300 days after the marriage is terminated by annulment, declaration of invalidity, divorce, separation, or the mother's death, the former husband is considered the legal father and his rights must be addressed in any court proceeding.
Unmarried Parent Determine Parentage	<p>If the biological father's identity and/or residency is unknown, the child protection specialist shall obtain the following information from the mother:</p> <ul style="list-style-type: none"> • whether she was married at the time of conception of the child or at anytime thereafter; • whether she was cohabiting with a man at the time of the conception or birth of the child; • whether she has received support payments or promises of support from possible fathers with respect to the child or in connection with her pregnancy; and • whether any man has formally or informally acknowledged his possible paternity of the child.
Putative (Alleged) Father	<p>The "maybe" father of a child born to an unmarried mother, who is named by the mother as the father or is otherwise believed to be the father and who has not acknowledged his paternity, is considered a putative or alleged father.</p> <p>In special limited circumstances a putative father's rights may be terminated for unfitness, failure to establish a legal parental or substantial relationship, or an irrevocable waiver of parental rights, as cited above. See Section 303-2, Relinquishment/Birth Parent Counseling.</p> <p>The putative father shall be informed of his rights and responsibilities regarding the child. He must be served with a legal notice of the place, time and nature of all custody hearings. If the father is unknown, or cannot be located, the child protection specialist submits an affidavit to the county attorney which states that, after due diligence, the putative father cannot be identified or located. The affidavit must state</p>

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the diligent efforts made by the child protection specialist to identify, locate, and personally serve the individual.

The county attorney will file the affidavit with the court along with a request for an order for service of process by publication. The clerk of court or the judge will issue an order for the service to be made upon the putative father by publication.

Intent to Place an Infant Adoptively

When a mother plans to relinquish her child immediately after birth (3 days, 10 days if ICWA case), to expedite the adoptive placement, the mother may file a petition with the court indicating her intention to place an expected child for adoption. Upon the filing of such a petition, the court shall issue a notice of intent to release a child for adoption. The notice **must** be served on the putative father at least 20 days before the expected birth of the child. The putative father may or may not declare his interest in the child to the court prior to the child's birth, but the putative father's rights must always be addressed by the court prior to granting permanent custody to the Department.

Putative Father Registry

In all cases, prior to a hearing to terminate the parent-child legal relationship, the child protection specialist must submit a written request to the DPHHS Vital Statistics Bureau (P.O. Box 4210, 111 N. Sanders, Rm 209, Helena, MT 59624) inquiring as to whether any man has asserted his interest in the child by registering with the putative father registry.

The request should include as much information as is available on the child and mother, including:

- their legal names and any other names that the child or mother is known to use;
- their birthdates; and
- their social security numbers.

Within five working days of the date that a request for a search of the putative father registry is received, the Bureau of Vital Statistics will search the registry and send a notarized affidavit to the child protection specialist documenting the results of the search. If any registrations are on file, certified copies of the registrations will be sent to the child protection specialist. If

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there is a birth certificate on file, or if the birth record shows a father's name and there is an acknowledgment of paternity on file, this information will be also be sent to the child protection specialist.

Father Need Not be Named

The child protection specialist must provide the notarized affidavit regarding the search of the putative father registry and any acknowledgments of paternity to the county attorney or the attorney representing the Department so these documents can be filed in support of the petition for termination of parental rights.

The Bureau of Vital Statistics does not currently charge the Department a fee for conducting a search of the putative father registry.

The mother may not be compelled to testify to or divulge the identity of the biological father or putative father.

In the event the birth mother is unable or chooses not to provide identification of the biological father or his last known address, the child protection specialist must inform the mother that it may be necessary to summon the father by publication and should explain that the failure to notify the father and terminate his rights could allow the father to come back into court at a later time to seek custody.

Abandonment

Abandonment occurs when a parent leaves a child under circumstances that make it reasonable to believe that the parent does not intend to resume care of the child in the future, or when a parent willfully surrenders physical custody of the child for a period of six months without manifesting to the child or custodian a firm intention to resume physical custody or to make permanent arrangements for the child or when the parent voluntarily surrenders a newborn who is no more than 30 days old to an emergency services provider.

It can also be established if the identity of the parent is unknown for a period of 90 days and reasonable efforts to identify and locate the parent has failed.

In cases of abandonment, a treatment plan is not necessary prior to termination of parental rights. It is necessary, however, to serve or meet the legal requirements documenting attempts

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to personally serve the parent with notice of the proceeding.

NOTE: When the Department has received permanent legal custody of a child based on abandonment, the child protection specialist must give priority to a member of the child's extended family if:

- an extended family member has requested that the abandoned child be placed with him/her;
- if such a placement is in the child's best interests; and
- the child protection specialist has determined that the extended family member is qualified to receive and care for the abandoned child.

Termination Based Upon Failed Treatment Plan

Most terminations of parental rights not based upon relinquishment or abandonment require that the Department must have tried to reunite the family by the preparation and implementation of a written treatment plan which has been approved by the court. (Treatment plans are discussed in more detail in Section 303-1, Treatment Plan/Stipulation.)

If the treatment plan fails and termination of the parent-child legal relationship is in the best interests of the child, the Department shall seek to terminate parental rights and an award of permanent legal custody.

To terminate the parental rights and obtain permanent legal custody, it is necessary to present clear and convincing evidence to the court that:

- the parent failed to comply with the court-approved treatment plan or that the plan was unsuccessful **and**
- the conduct or condition of the parent, which renders them unfit, is unlikely to change within a reasonable time.

NOTE: Termination is possible even if the parent completed the treatment plan if there are other extenuating circumstances that merit termination of parental rights.)

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Before the court can consider whether or not the conduct/condition of the parents is likely to change, the court must make one of the following findings:

1. that continuation of the parent-child legal relationship will likely result in continued abuse or neglect; **or**
2. that the conduct or the condition of the parents renders the parents unfit, unable, or unwilling to give the child adequate parental care.

The court may consider a variety of factors in making the determination that the conduct or condition of the parents is unlikely to change. In considering these factors, the court must give primary consideration to the physical, mental, and emotional conditions and needs of the child.

Factors which the court will consider in these cases include but are not limited to:

- emotional illness, mental illness or mental deficiency of the parent of such duration or nature as to render the parent unlikely to meet the needs of the child within a reasonable time;
- history of violent behavior by a parent;
- excessive use of intoxicating liquor, narcotics or dangerous drugs which affects the parents' ability to care for the child; and
- present, judicially-ordered, long-term confinement of the parent.

**Termination
Without Treatment
Plan**

A treatment plan is not required if:

- two medical doctors or clinical psychologists submit testimony that the parent cannot assume the role of parent within a reasonable time; or
- 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

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developmental, cognitive, and psychological needs.

(Incarceration alone is not sufficient to forego a treatment plan. There must be testimony or evidence that reunification does not meet the best interests of the child, e.g., length of incarceration and age of child or lack of appropriate programs for inmate); or

- the death or serious bodily injury of a child caused by abuse or neglect by the parent has occurred; or
- the parents have relinquished the child pursuant to Mont. Code Ann. § 42-2-402 and 42-2-412; or
- the child has been abandoned by the parents as set forth in Mont. Code Ann. § 41-3-102(1); or
- 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; or
- the parent has subjected a child to any of the applicable circumstances set forth in Mont. Code Ann. § 41-3-423(2); or
- the putative father meets any of the criteria listed in Mont. Code Ann. § 41-3-423(3).

Legal Status of Child if Court does not Order Termination

If the district 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. This means that if the court does not grant the petition for termination of parental rights and the court order does not address the legal status of the child or does not dismiss the department's action and return the child to the parent(s), the department shall have temporary legal custody of the child until the court issues an order addressing the legal status of the child.

Permanent Legal Custody

Permanent legal custody is the legal status created by order of the court after the parental rights of both the **mother and father** have been terminated. Permanent legal custody grants permanent responsibility for care, custody and control of the

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child to a person or agency. The person or agency granted permanent legal custody of the child assumes all rights and responsibilities of a parent for the child.

Use

It is appropriate to request permanent legal custody of a child who cannot return home and who the Department expects to place for adoption.

NOTE: For children who cannot return home but cannot be placed for adoption, see Section 302-5, Long term custody or Section 302-4, Guardianship.

**Child Protection
Specialist Action**
Completed DPHHS-
CFS-107

Any child for whom the Department plans to petition the court for termination of the parent-child legal relationship and permanent custody shall have a completed DPHHS-CFS-107 prior to filing of the petition. The social history may be the only information regarding the birth family that the child has access to later in life. After involuntary court action against the parents, the opportunity to gather relevant family history may be lost.

The child protection specialist should work with the family in gathering the information to complete Part 1, Child's Social and Medical History; Parts 2A, Birth Mother's Social and Medical History, and Part 3A Birth Father's Social and Medical History as soon as the child is placed in out-of-home care. A completed form provides useful information to health care providers and the foster family, as well as to the child in later years.

The case file must contain a notation signed by the supervisor that the supervisor has reviewed the necessary documentation and approved filing for permanent custody.

Documentation includes:

- affidavit documenting agency involvement and parents failed treatment plan, if applicable, or other reasons why permanent custody is appropriate;
- DPHHS-CFS-107, Birth Family Social and Medical History;
- verification of birth counseling or waiver;

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- notarized copy of each relinquishment, if applicable;
- court-approved treatment plan, if applicable;
- a copy of death certificate if parent is deceased;
- copy of certified birth certificate for each child; and
- ICWA Form 250 for each child (See Section 305-1 for the mandated procedures regarding Indian children).

**Developing the
Permanent
Placement Plan**

As soon as possible after need for an adoptive home is identified, the permanency team, or in areas where such a team is not available, the child's child protection specialist, the child protection specialist's supervisor, the family resource specialist, the family resource specialist supervisor, a representative of the child's tribe if the child is Indian as defined by the Indian Child Welfare Act, and the permanency planning specialist should review the child's circumstances and needs and determine what action is necessary to identify an adoptive family and place the child adoptively. Both in-state and out-of-state permanent placement options shall be identified and considered and the child must be consulted, in an age-appropriate manner, regarding the proposed permanency or transition plan. This plan must be presented to the court at the 12 month permanency hearing. See Section 301-2, Required Judicial Hearings.

Adoption Referral

The child's child protection specialist must provide a written adoption referral packet to a family resource specialist or family resource specialist supervisor. See Section 603-1, The Child's Adoption Referral and Circulation.

Circulation

States may not deny or delay the placement of a child for adoption when an approved family is available outside of the jurisdiction with responsibility for the child, including out-of-state placement options. In **ALL** instances in which a prospective adoptive home has not been identified **within 30 days** of the date the permanent custody hearing is completed, the Child's Adoptive Profile Information must be circulated. Circulation within DPHHS and to other licensed adoption agencies is required. Circulation should be completed by the assigned family resource specialist. If the foster parent(s) have been determined to be an appropriate adoptive family for the child, it

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is not necessary to circulate the child's history. See Section 603-1, The Child's Adoption Referral and Circulation, for requirements of Treasure Book and AdoptUSKids, the national website (www.AdoptUSKids.org) for web site referrals.

The Child's Adoptive Profile Information will be sent to all family resource specialists and permanency planning specialists and/or appropriate Tribal agencies via hard copies or agency E-mail using the E-mail address of *adoption list* and/or *tribal adoption list*. If the child protection specialist wants to have verification that the information was sent to tribal agencies to demonstrate compliance with ICWA, the Child's Adoptive Profile Information should be sent by certified mail. At the same time, a hard copy may be sent to the licensed adoption agencies listed below:

- Catholic Social Services
PO Box 907
Helena, Montana 59624
Phone: (406) 442-4130
- Lutheran Social Services
2429 Mission Way
Billings, MT 59105
Phone: (406) 245-9949
- A New Arrival, Inc.
PO Box 445
204 South Main St.
Twin Bridges, MT 59754
(406) 684-5312
- Family Based Services
Intermountain
3240 Dredge Dr.
Helena, MT 59602
(406) 457-4845
- Dan Fox Foster Care and Adoption Program
Youth Homes
Missoula Office:
515 S. Reserve St., Suite 5
Missoula, MT 59801
(406) 543-7792

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Helena Office:
619 N. Last Chance Gulch
Helena, MT 59601
(406) 443-4730

Court Action

When permanent legal custody is sought, the child must be adjudicated as a youth in need of care. The child must have a court-appointed guardian ad litem. The court may appoint counsel for any indigent parent(s) who request counsel at any stage in the judicial proceeding. The court must appoint counsel for indigent parents upon the filing of a petition for termination of the parent-child legal relationship. If an Indian child is involved in the court proceedings, the parents must be appointed an attorney when the initial petition is filed. (See 305-1, Indian Child Welfare Act)

After a hearing on the petition for termination of the parent-child relationship, the court must find, established by clear and convincing evidence, that the statutory requirements have been met. The court must also find that termination of the parent-child legal relationship is in the best interests of the child.

Based on the evidence presented during the hearing, the court will issue Findings of Fact, Conclusions of Law and an Order. In the order, the court will terminate the parent-child legal relationship and:

1. grant permanent legal custody with the right to consent to adoption to:
 - a. the Department;
 - b. a licensed child placing agency; or
 - c. to another individual who has been approved by the Department and has received consent to transfer of custody from the Department or licensed child placing agency that has custody of the child; or
2. grant permanent legal custody to the Department with the right to petition for appointment of a guardian.

Following the

When the court terminates parental rights and grants

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Hearing

permanent legal custody to the Department, the child protection specialist should ensure that the following documents are in the file:

- two certified copies of the petition;
- two certified copies of Finding of Facts, Conclusions of Law and Order;
- a certified birth certificate of the child;
- DPHHS-CFS-107, Birth Family Social and Medical History; and
- DPHHS-CFS-083, completed and signed by the child protection specialist.

(Refer to Section 603-7, Post Placement Evaluation, for information regarding documents to be sent to the central office if the child will be adopted.)

CAPS

After the court hearing (including continuances), the child protection specialist should enter the information on CRTD screen. Necessary information to complete this screen includes petition date, hearing date, begin and end dates of court order (end date would be the child's 18th birthday), court event (PLC), court dispositions (termination of parental rights, permanent legal custody, right to place adoptively, etc.), whether or not the court order was received, and parties to the action. Once a disposition has been entered and confirmed (SHIFT F4), the event, disposition, and dates are not modifiable.

Details of the Review Hearing should be entered on CRTD.

References

Mont. Code Ann. §§ 41-3-422 and 41-3-445.
 Mont. Code Ann. §§ 41-3-601 through 612.
 Mont. Code Ann. §§ 42-2-401 through 422.
 Mont. Code Ann. §§ 42-2-501 through 503.
 Mont. Code Ann. §§ 42-2-601 through 620.
 Indian Child Welfare Act, 25 U.S.C. 1901 et seq.
 42 U.S.C. 670 Sec. 470 and 471.
 45 CFR 1356.21.

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Rev. 09/13
Rev. 09/14
Rev. 06/15
Rev. 08/15