

Child and Family Services Policy Manual: Legal Procedure
Child Abuse and Neglect Petitions
General Requirements/Overview

Background

Whenever the Department intervenes with a family and removes a child from the parental home, a legal basis must exist for the removal and for the continued foster care placement. Filing a child abuse and neglect petition initiates the judicial process whereby the Department receives judicial approval of the Department's actions regarding the individual child. The type of relief granted by the court depends on the type of petition filed.

NOTE: With the exception of the affidavit filed in support of the initial petition in a child abuse or neglect proceeding (which must be submitted to the county attorney within 2 working days to assure the petition is filed within 5 working days of the removal), the Child Protection Specialist must file all affidavits supporting petition 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 must provide a copy of the affidavit to the parents, if possible, within 2 working days of the emergency removal.

The Child Protection Specialist must file all reports required for permanency hearings or status hearings no less than 5 working days prior to the scheduled hearing. The report must be filed with either the office of the attorney representing the department or with the court depending on the established local protocol.

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.

Child Abuse and Neglect Petitions - Types

The types of child abuse and neglect petitions, the relief granted under each petition, and the evidentiary standard for each relief:

- a) **Petition for Immediate Protection and Emergency Protective Services** - filed when the Child Protection Specialist must make an emergency removal of the child from the parent's home. An ex parte order of immediate

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protection is issued upon filing the petition and additional reliefs may be granted after the show cause hearing.

Evidentiary standard: Non-ICWA case when a child is placed in foster care: Probable cause that the child has been or is at risk of abuse, neglect, or abandonment. ICWA case when a child is placed in foster care: 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.

- b) **Petition for Temporary Investigative Authority** - specifically limited to investigation. When the court grants this petition the Department has judicial authority to conduct an in-depth investigation into the child's situation.

Evidentiary standard: Probable cause that the child has been or is at risk of abuse, neglect, or abandonment. ICWA case when a child is placed in foster care: 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.

- c) **Petition for Temporary Legal Custody** - filed when the Child Protection Specialist determines the child is or has been abused, neglected, or abandoned. An award of Temporary Legal Custody to the Department temporarily transfers legal custody of the child from the parent(s) to the Department. A petition for Temporary Legal Custody may be the initial petition filed in a case.

Evidentiary standard: Preponderance of the evidence establishes that the child is or has been abused, neglected or abandoned. ICWA case when a child is placed in foster care: 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.

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- d) **Petition for Long-term Custody** – filed when other, more permanent options, are not appropriate for the child or not in the child's best interests. For the court to approve long-term custody, specific statutory requirements must be met including the requirement that the child must be placed in a planned permanent living arrangement.

Evidentiary standard: Preponderance of the evidence establishes that the specific statutory requirements are met.

- e) **Petition for Termination of the Parent-Child Legal Relationship** - filed when continuation of the parent-child relationship is not in the child's best interests and the statutory requirements are met. After termination of the parent-child relationship custody of the child is permanently transferred from the parents to the Department.

Evidentiary standard: Non-ICWA case: Clear and convincing evidence that the statutory requirement upon which the relief was requested has been met. ICWA case: Evidence 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.

- f) **Petition for Appointment of a Guardian** - guardianship is one option for permanency. The court may appoint a guardian when specific statutory requirements are met. A guardian may be appointed for a child for whom parental rights have not been terminated and for a child for whom parental rights have been terminated. The best interests of the child test is applied to guardianships.

Evidentiary standard: Not established by statute.

- g) **Petition for A Determination that Preservation or Reunification Services Need Not be Provided** - the Child Protection Specialist will request this relief when Child Protection Specialist determines one of the

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statutorily required conditions exists and that services to prevent the removal or services to reunite the child will not be successful.

Evidentiary standard: Clear and convincing evidence that one of the statutorily required conditions is present in the case.

NOTE: This petition may not be filed in a case if the child who is the subject of the proceeding is an Indian child as defined by ICWA.

Modification of or Combining Relief Request ed

A petition which requests any combination of the types of relief request can be filed. The petition may be modified for different relief at any time within the discretion of the court.

Child Protection Specialist Affidavit

Each petition filed must be accompanied by an affidavit by the Child Protection Specialist alleging that the child appears to have been abused, neglected, or abandoned. The affidavit must also state the facts which form the basis for the petition.

With the exception of the affidavit filed in support of the initial petition in a child abuse or neglect proceeding (which must be submitted to the county attorney within 2 working days to assure the petition is filed within 5 working days of the removal), the Child Protection Specialist must file all affidavits supporting petition 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 must provide a copy of the initial 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.

Service of Process

The parents, guardian, or other person having legal custody of the child named in the petition, must be served personally with a copy of the initial petition and a petition to terminate the parent-child legal relationship at least five working days before

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the date set for hearing. **Note: Child Protection Specialists (or other Division staff) *may not* personally serve the petition.**

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. If service is by certified mail, the county attorney or Child Protection Specialist must receive a return receipt signed by the person to whom the notice was mailed for 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.

The initial petition and the petition to terminate parental rights may be served by publication if s/he cannot be served personally.

If personal service cannot be made upon the parents, etc., the court shall appoint an attorney to represent the unavailable party when, in the opinion of the court, the interests of justice require.

Required Notice

During the pendency of a child abuse and neglect proceeding, specific notices are required. The required notices are:

- a) A separate notice to the court stating any statutory time deadline for a hearing, along with the Child Protection Specialist's affidavit, must accompany the petition at the time of filing the petition with the district court.
- b) If the Child Protection Specialist makes an emergency placement, the Child Protection Specialist must provide the parents with notice of the removal, the reason for removal, information regarding the show cause hearing, and the purpose of the show cause hearing, and notice that the parent, etc having physical custody of the child may have a support person present during in-person meetings.
- c) The Child Protection Specialist must provide a copy of the initial affidavit to the parents, if possible, within 2 working days of the emergency removal.

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- d) County attorney must give legal notice of all judicial proceedings to foster parent(s), preadoptive parent(s) or relative(s) caring for the child;
- e) Service by the appropriate authority of a child abuse and neglect petition must be accompanied by a written notice advising the child's parent, etc., of the following:
- the right to request the appointment of counsel if the person is indigent or if appointment of counsel is required under ICWA (if applicable);
 - the right to contest the allegations in the petition; and
 - the time lines for hearings and determinations required under Title 41, chapter 3.
- f) If appropriate, orders issued under Title 41, chapter 3, must contain a notice provision advising a child's parent, etc., of the following:
- In a TIA, the parent, etc having physical custody of the child may have a support person present during in-person meetings
 - the court is required 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, whichever comes first;
 - if the child is 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

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- completion of a treatment plan does not guarantee the return of a child.
- g) Treatment plans submitted to the court for approval must contain a notice provision advising parents of the following:
- time lines for hearings and determinations required under Title 41, chapter 3;
 - the state is required 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, whichever comes first;
 - if a child is 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
 - completion of a treatment plan does not guarantee the return of a child and completion of the plan without a change in behavior that caused removal in the first instance may result in termination of parental rights.

Required Judicial Findings

During the pendency of a child abuse and neglect proceeding, the court is required to make findings at specified phases of the proceeding.

Those findings are:

- a) Immediate protection and emergency protective services:
- 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

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the child or that an out-of-home placement is in the child's best interests; and

- 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.

b) Show cause hearing:

- After the show cause hearing, the court shall make written findings on issues including but not limited to:
 - whether the child should be returned home immediately if there was an emergency removal, remain in temporary out-of-home care, or be removed from the home;
 - why continuation of the child in the home would be contrary to the child's best interests and welfare if removal is ordered or continuation of removal is ordered;
 - 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;
 - financial support of the child; and
 - whether another hearing is needed and, if so, the date and time of the next 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.

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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.
- c) Adjudication:
- 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:
 - which allegations of the petition have been proved or admitted, if any;

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- whether there is a legal basis for continued court and Department intervention; and
 - 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) Temporary Legal Custody:
- The court may grant Temporary Legal Custody if the court finds by a preponderance of the evidence that:
 - 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**
 - unless there is a finding that reasonable efforts are not required, 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.
 - If an extension of Temporary Legal Custody is granted, the court shall specifically find that an extension is in the child's best interests.
- e) Permanency hearing:
- The court shall make findings on whether the permanency plan is in the best interests of the child; and
 - whether the Department has made reasonable efforts to finalize the plan.

Note: In the permanency plan order, the court must also indicate whether the child has been consulted, in

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an age-appropriate manner, by the court regarding the proposed permanency or transition plan and may also note whether an out-of-state placement (if applicable) is appropriate and in the best interests of the child.

Statutory Time Frames

The Child Abuse and Neglect statute contains specific time frames with which the Child Protection Specialist, county attorney, and court must comply during the life of an abuse/neglect action.

- a) An affidavit by the Child Protection Specialist must be submitted to the county attorney within 2 working days of the emergency placement. An abuse and neglect petition must be filed within 5 working days, excluding weekends and holidays of emergency placement of a child.
- b) A copy of the initial affidavit must be provided to the parents, if possible, within 2 working days of the emergency removal.
- c) A show cause hearing must be held within **20** days, including weekends and holidays, of the filing of the initial petition.

NOTE: 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 Mont. Code Ann. § 41/3/402 within 10 days following service of the petition and affidavit.

NOTE: The initial hearing for an ICWA case may not be held prior to 10 days after receipt of the notice of the hearing and ICWA provides for an extension of an additional 20 days upon request by the parent or the tribe.

- d) An order for Temporary Investigative Authority may not be for longer than 90 days and cannot be extended beyond 90 days.
- e) An adjudicatory hearing must be held within 90 days of a show cause hearing.

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- f) A dispositional hearing must be held within 20 days of the adjudicatory hearing (unless the adjudicatory hearing is a bifurcated hearing).
- g) The dispositional hearing may be held immediately after the adjudicatory hearing if all required reports are available and have been received by all parties or their attorneys at least five working days in advance of the hearing.
- h) An order for Temporary Legal Custody can be in effect no longer than six months. An extension of Temporary Legal Custody may not exceed six months. **Note:** Multiple six-month extensions of Temporary Legal Custody may be approved if the court makes the required findings.
- i) A permanency hearing must be held:
 - within 30 days of a determination that reasonable efforts to provide preservation or reunification services are not necessary;
 - no later than 12 months after the initial court finding that the child has been subjected to abuse/neglect; or 12 months after the child's first 60 days of removal from the home, whichever comes first; and
 - within 12 months of the initial permanency hearing and every 12 months thereafter until the child is in a permanent placement of either adoption or guardianship.

Placement Requirements

The Child Abuse and Neglect statute contains provisions governing the placement of child in out-of-home care.

- a) Whenever a child is placed in out-of-home care, the Child Protection Specialist must consider the noncustodial parent as a placement option.
- b) Whenever a child is placed in out-of-home care and the noncustodial parent is not a placement option, the Child Protection Specialist must consider a member of the

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child's extended family as a placement option. After the noncustodial parent, extended family is the first placement preference for ICWA cases.

- c) If an extended family member requests custody of a child at the dispositional hearing or at the permanency hearing and, after investigation conducted in accordance with Policy 402-4, the Child Protection Specialist does not recommend placement with a relative, the department must provide the reasons in writing to the court.
- d) The role of the court in determining a child's placement is to resolve conflicts between the parties if a dispute arises – if no conflict regarding the child's placement exists between the parties, the court cannot order a placement other than the placement proposed by the Department – the court is not considered a party to the action.
- e) When a child is adjudicated a youth in need of care based on **abandonment** or if the Department is awarded Temporary or Permanent Legal Custody of an **abandoned** child and the child is not placed with his/her noncustodial parent, placement priority shall be given to a member of the child's extended family if such placement is in the child's best interests.

If the department denies the request to place a child adjudicated based on abandonment with the child's extended family, the department must provide the family member who requested placement a written statement of the reasons for the denial.

- f) When the court appoints a guardian for an **abandoned** child, placement priority may be given to a member of the child's extended family if such placement is in the child's best interest.
- g) Placement with a fit and willing relative may be considered a permanent placement for a child.
- h) If the child who is to subject of the proceeding is an Indian child as defined by ICWA, the ICWA placement

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preferences for foster care and adoption must be followed.

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.

References

Mont. Code Ann. § 41-3-101.
Mont. Code Ann. § 41-3-301.
Mont. Code Ann. §§ 41-3-422, 423 and 427.
Mont. Code Ann. § 41-3-424.
Mont. Code Ann. §§ 41-3-432, 433, 437, 438, and 439.
Mont. Code Ann. §§ 41-3-440, 442, 443, 444, and 445.

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Rev. 10/11