

Child and Family Services Policy Manual: Legal Procedure Temporary Legal Custody

Legal Basis

When a child protection specialist conducts an investigation and determines that the child has been abused, neglected, or abandoned, the facts of the case may warrant initially filing a petition which, if granted, would affect the legal rights of the parent to the child. In this situation, the county attorney may immediately file a petition for temporary legal custody. Under temporary legal custody, the facts must establish by a preponderance of the evidence, that a child has been or is being abused, neglected, or abandoned.

If the child protection specialist has placed the child in a protective placement and the evidence establishes that the child is abused or neglected, the initial petition filed by the county attorney will be a combination petition for immediate protection and emergency protective services and temporary legal custody.

The court cannot grant the Department temporary legal custody absent an adjudication of the child as a youth in need of care (See Section 301-2, Required Judicial Hearings).

Rights

Temporary legal custody means the legal status created by an order of the court that gives a person or agency the right and responsibility for the care, custody and control of a child on a temporary basis.

A transfer of legal custody from the parents to the Department means the Department assumes the parental responsibility for the day-to-day care, maintenance and supervision of the child. A transfer of temporary legal custody is time-limited and provides the agency with substantial authority to determine and provide for the needs of the child.

Because the parents' rights have not been terminated, they retain a legal relationship to the child and should be involved in decision-making regarding the child.

Unless the parents' consent is obtained, a court order shall be obtained to authorize the agency the right to consent to medical, dental and/or psychological care and any long-distance or out-of-state travel of the child(ren). If emergency medical treatment is required and the child protection specialist has no court order or parental consent, the child protection specialist should consult with the attending physician in the hospital emergency room.

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Other Uses

In addition to the use of temporary legal custody (to assure that the parent is working on a court-ordered treatment plan designed to address the issues which led to placement and work toward reunification), a petition for temporary legal custody may be filed and the court may grant temporary legal custody in two additional limited situations. The child protection specialist should consult with the supervisor and county attorney when considering the use of temporary legal custody under the following circumstances.

- 1) Temporary legal custody may be used in very limited situations when it is not in the best interest of the child to terminate the parental rights, e.g., where a teenager cannot live at home but has an established relationship with his or her parents, or where an older child cannot be placed adoptively and has a foster family willing to make a long-term commitment to the youth. However, temporary legal custody can only be granted for six-month periods. Therefore, if the above situation exists and the youth has not reached his/her majority, a petition should be filed for long-term custody if long term custody is appropriate for the youth. (See Section 302-5, Long-Term Custody). If the youth is not in a stable placement, the temporary legal custody must be extended every six months.

- 2) Temporary legal custody may also be used in very limited situations when the child may remain safely in the home with services and the child protection specialist determines it is in the child's best interests that the parents have a court-ordered treatment plan identifying the services required for the child's safety. The granting of temporary legal custody to the department does allow the child to remain in the home if the child protection specialist has determined the child's safety can be protected.

Child protection specialist
Prior Authorization

The child protection specialist must obtain oral approval from a child protection specialist supervisor before seeking a petition for temporary legal custody.

Condition Precedent

Before the child protection specialist can request that the County Attorney file a petition for temporary legal custody, the child protection specialist must have substantiated either abuse

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or neglect or substantiated risk of harm. The condition precedent for temporary legal custody is that the child protection specialist has evidence/facts to demonstrate that it is more probable than not that the child abuse or neglect **actually** occurred or more probable than not that a substantial risk of harm to the child exists.

CAPS

Indian Child

If it is reasonably believed the child may be an Indian child, the ICWA policy must be followed. The tribe must be notified of the pending legal proceedings. Use DocGen D200, Request for Verification of Status to request enrollment information, and DocGen D105, Notification of Judicial Proceedings to notify the child's tribe of pending court action.

Request County
Attorney to File

The child protection specialist prepares the affidavit, which is forwarded to the county attorney with a request that s/he file a petition for temporary legal custody.

NOTE: If the child protection specialist determines the facts of the case support a request for a finding that reunification services should not be required, the child protection specialist can request that the county attorney also file a petition for a determination that preservation or reunification services need not be provided (See Section 302-7). If the court determines that reasonable efforts to reunite the child with his/her parents are not necessary, a permanency hearing must be held within 30 days of that determination. (See Section 301-2, Required Judicial Hearings)

The affidavit in support of a petition for temporary legal custody is similar in format to that of the affidavit used to obtain an order for immediate protection and emergency protective services. The affidavit briefly reviews the factual history of the agency's involvement with the family and outlines the contacts with the family, the remedial services offered to the family and the proposed plan for family reunification (if any). The affidavit should reflect the factual chronology of the agency's intervention with the family. The affidavit should also contain information to inform the court of the facts to support the child protection specialist's assessment of the parent(s) progress in addressing the behaviors which resulted in the agency's involvement with the case.

With the exception of the affidavit filed in support of the initial

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petition in a child abuse or neglect proceeding (which must be completed 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 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.

Contrary to the Welfare

If this affidavit is the first affidavit submitted to the court on the case, 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 interests.

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

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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.

County Attorney Action

The county attorney prepares the Petition for Temporary Legal Custody and other supporting documentation and files the documents with the court.

Child Protection Specialist Action

The child protection specialist should meet with the county attorney prior to the court hearing to discuss the testimony the child protection specialist will give in court.

Preparing for Court Hearing

The child protection specialist may also be responsible for meeting with the state's witnesses and preparing them for the court hearing. The child protection specialist should advise the witnesses as to what will take place at the hearing, the types of questions that might be asked, and generally what is expected of the witness.

The court may permit testimony by telephone, videoconference, or other audio/audiovisual means at any time during an abuse/neglect proceeding.

Court Action - Required Findings

If a child is found to be a youth in need of care, the court may grant temporary legal custody 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 detriment to the child's physical or psychological well-being; and
- b) unless there is a finding that reasonable efforts are not required as allowed by statute, that 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.

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NOTE: The granting of temporary legal custody to the Division allows the child protection specialist 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.

If the order granting temporary legal custody is the initial court order sanctioning the child's removal from the home, the order must contain 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.

If the hearing for granting temporary legal custody is the first hearing held after the child's removal from the home and if the hearing is held within 60 days of the child's removal, the order granting temporary legal custody must contain explicit documentation regarding the specific efforts made by the department to prevent the placement and must state that the determination regarding reasonable efforts to prevent placement was based on the facts of the case on a case-by-case basis.

If the judge grants the agency temporary legal custody, it may be in effect for no longer than six months with the option of six-month extension(s). The child protection specialist is responsible for keeping track of the court order's expiration date, evaluating the case and making a recommendation to the county attorney as to any further legal action that may be needed. It is strongly suggested that the next hearing date be scheduled while the parties are in the courtroom to avoid future conflicts and meet the time limit.

Temporary Legal Custody - expiration of order

Before the expiration of a 6 month order of temporary legal custody, the county attorney shall petition for:

1. an extension of temporary legal custody, not to exceed 6 months; or
2. termination of the parent-child legal relationship and either:
 - a) permanent legal custody with the right of adoption; or
 - b) appointment of a guardian;

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3. long-term custody when the child is in a planned permanent living arrangement;
4. appointment of a guardian; or
5. dismissal.

Continuance or Extension of Order for Temporary Legal Custody

The court may continue an order for temporary legal custody pending a hearing on a petition provided for above.

The court may extend an order for temporary legal custody for a period of six months upon a showing that:

- 1) additional time is necessary for the parent or guardian to successfully complete a treatment plan; or
- 2) continuation of temporary legal custody is necessary because of the child's individual circumstances.

If an extension of temporary legal custody is granted, the court shall state:

- 1) the reasons why the child was not returned home; and
- 2) the conditions upon which the child may be returned home.

The court must specifically find that the extension is in the child's best interests.

NOTE: The court may also order placement of the child with the noncustodial parent at the extension of temporary legal custody.

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

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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.

Child Support Enforcement

Child Protection Specialist Action

The child protection specialist may request the county attorney to seek an order of financial support in all cases where the parents have an ability to pay for care. See Section 404-1.

CAPS

To ensure compliance with state and federal requirements mandating certain hearings and reviews within strict time frames after court determinations, after each court hearing (including continuances), the child protection specialist must enter all court detail on CRTD as soon as possible. Information entered includes petition date, court hearing date, begin and end dates of the court order, court event, court disposition (including determinations made from the bench prior to receiving the written court order), parties to the action, and whether or not a court order was 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 a 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 twelve month 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.

Documentation

Child Protection Specialist

Copies of the following documents shall be in the county files:

- Affidavit
- Petition and supporting documents
- Court Order

References

Mont. Code Ann. § 41-3-422.
 Mont. Code Ann. § 41-3-437.
 Mont. Code Ann. § 41-3-424.
 Mont. Code Ann. § 41-3-442.
 Mont. Code Ann. § 41-3-445.
 45 CFR 1356.21.
 Indian Child Welfare Act, 25 U.S.C. 1901 et seq.

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