

CHILD ABUSE AND NEGLECT IN MONTANA COURTS:



WHAT ATTORNEYS NEED TO KNOW

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1

WHEN DO CHILD ABUSE/NEGLECT CONCERNS ARISE?

- Families under stress:
 - Divorce (dissolution of marriage) Sometimes legitimate concerns. Other times fears run amok. Can be hard for attorneys to tell the difference.
 - Poverty, other chronic family system stressors
 - Trauma/Crisis
 - Family dysfunction, sometimes multigenerational
- Criminal law:
 - Drug abuse (meth use = overwhelming majority of cases)
 - Family violence (often correlated with drug or alcohol abuse)
 - Other criminal acts
- Other areas: Education/child care, medical care, religious settings, sports

2

KEY LEGAL CONCEPTS

- "A parent's right to the care and custody of a child is a fundamental liberty interest that must be protected by fundamentally fair procedures." *In re D.B.*, 2007 MT 246 ¶ 17
- "A child's best interests take precedence over parental rights." *In re E.K.*, 2001 MT 279, ¶ 33; *In re C.J.K.*, 2005 MT 67, ¶ 14; *et. al.*
- See also *Montana Constitution*, Article II, section 15. Rights of persons not adults.
- Constitutional rights to due process of law
- Title 41, Chapter 3, Montana Code Annotated
- MCA Titles 40 (family law), 42 (adoption), 45 (crimes), 50 (Health and Safety) 52 (family services), 53 (social services and institutions), and 72 (chapter 5, guardianship) come into play in some cases.

3

MONTANA POLICY

- MCA §41-3-101. Declaration of policy
 - (7) "In implementing the policy of this section, the child's health and safety are of paramount concern."
 - (1)(b) "achieve these purposes in a family environment and preserve the unity and welfare of the family whenever possible"
 - (1)(d) "A child is entitled to assert the child's constitutional rights"
 - (1)(e) "all children have a right to a healthy and safe childhood in a permanent placement"

4

ALPHABET SOUP

- CAN = Child Abuse or Neglect
- CFSD = Child and Family Services Division of DPHHS
 - (former acronyms include DFS = Department of Family Services)
- CPS = Child Protective Services
- CSED = Child Support Enforcement Division
- DN = Dependent/Neglect, i.e. child abuse or neglect
- DPHHS = Montana Department of Public Health and Human Services (aka "the Department")
- YINC = Youth in Need of Care

5

ATTORNEY DUTIES

- Attorneys are NOT mandatory reporters. (MCA §41-3-201)
- **However**, attorneys (or anyone else) who report child abuse or neglect are "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." (MCA § 41-3-203)
- Montana Attorney Rules of Professional Conduct Rule 1.6:
 - (a) A lawyer shall not reveal information relating to the representation of a client...unless...the disclosure is permitted by paragraph (b).
 - (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm...
- **Therefore**, attorneys may report child abuse and neglect.

6

MANDATORY REPORTERS

- Who are mandatory reporters? MCA §41-3-201 (1)
- Legal standard: MCA §41-3-201(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** ...”
- “... report the matter promptly to the department of public health and human services.”
- Law enforcement may also be called, when in doubt, call both.
- NEVER advise a mandatory reporter not to report!
(except—obviously—gross negligence, bad faith, malicious purpose or false reports)
- Warn employers to NEVER require anyone to “get permission” before reporting:
- **41-3-207. Penalty for failure to report.** (1) Any person, official, or institution required by law 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 such failure or prevention.
- (2) Any person or official required by law 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 doing so is guilty of a misdemeanor.

7

PROTECTION OF REPORTERS

- Anyone may report, not only mandatory reporters, “if the person knows or has reasonable cause to suspect that a child is abused or neglected.” (MCA §41-3-201(4))
- Anonymous reports must result in independent, corroborative, and attributable information within 48 hours.
- Reporters generally protected from liability. (MCA §41-3-203)
- Reporter identity must be kept confidential by the Department. (MCA §41-3-205(3)(h))
- Unauthorized disclosure can be charged as a misdemeanor. (MCA §41-3-205(1))
- BUT:
 - If a reporter testifies in court, status as a reporter could be disclosed.
 - If a criminal case is opened, different laws may apply.
 - Redacted reports may provide enough clues to identify reporter.

8

WHEN IN DOUBT, REPORT!

Centralized intake hotline:
1-866-820-5437 (KIDS)

9

GUIDELINES FOR COUNSEL IN NON-DN CASES

- Reporting child abuse or neglect can have lifetime consequences for all involved.
- A report and any subsequent case follows the child and CPS will look at BOTH parents.
- CPS action will take precedence over a family law case and override any existing parenting arrangement.
- If one parent has protective capacity, CPS often will not get involved, or they may ask for a voluntary agreement and recommend changes in a parenting plan. Once a DN case is filed, the case follows the child and technically there is no longer a "non-offending parent"; *In re K.B.* 2016 MT 73
- In family law matters, parents in conflict may need to be reminded that Sub-optimal parenting is not the same as statutory abuse or neglect.

10

CPS INVESTIGATIONS MCA §41-3-202. ACTION ON REPORTING

- CPS has a right of access to children in medical facilities
- CPS may interview children at school without parents present
- CPS may ask law enforcement for assistance
- The 4th and 5th Amendments do apply, but lack of cooperation can become cause to file in District Court
- Written report must be completed within 60 days
- Report can be provided to family upon request
- CPS may seek emergency protection of the child
- Criminal matters do not toll a DN case (MCA §41-3-103)

11

THE DEPENDENT/NEGLECT (DN) CASE

• When might Child Protective Services (CPS) file a case in District Court?

- Emergency protective services are needed
- Severe abuse or neglect of child
- Endangering the welfare of children MCA §45-5-622 (this includes methamphetamine exposure)
- High risk of harm to the child (abuse or neglect)
- Abandonment
- Failure to cooperate with investigation
- Failure of voluntary efforts
- Failure of reasonable efforts

CPS policy manual: <http://dphhs.mt.gov/CFSD/cfsdmanual>

12

THE DEPENDENT/NEGLECT (DN) CASE

- Almost all parts of a CPS case are governed by statute, most Montana caselaw deals with termination of parental rights.
- Definitions, privacy, funding, and timelines governed by both state and federal statutes.
- Not following federal law can result in loss of funding to state agencies.
- Statutory timelines are particularly important; children are not to be left languishing in the system.

13

THE DEPENDENT/NEGLECT (DN) CASE

MCA § 41-3-425. Right to counsel:

- OPD shall assign counsel for parents
- Separate attorney for each parent
- Children must have an attorney or a CASA/GAL (2) (b), may have both
- CASA/GAL may also have separate counsel (4)
- “When appropriate, the court may appoint the office of state public defender to assign counsel for any child or youth”(3) (no age restriction)

14

KEY STATUTES

DN cases are civil proceedings

- MCA §41-3-102. Definitions
- MCA §41-3-205. Confidentiality -- Disclosure Exceptions
- MCA §41-3-301 and -427. Emergency protective services
- MCA §41-3-422–446 Abuse or Neglect Proceedings
(this is an extremely complex chapter)
- MCA §41-3-601 et. seq. Parent-Child Legal Relationship Termination
- **Indian Child Welfare Act (ICWA)**: 25 U.S.C. §§ 1901-1963; 25 C.F.R. Part 23, applies through proceedings if the child is an Indian Child as defined by state and federal statute; in Montana, this includes the Little Shell.
- “We are cognizant of our responsibility to promote and protect the unique cultures of our state for all future generations of Montanans.”*In re M.E.M.*, 195 Mont. 329, 333 (1981)

15

FEDERAL LAWS THAT AFFECT DN CASES:

- Adoption and Safe Families Act (ASFA) 42 U.S.C. §§ 620-628 and 670-679; 45 C.F.R. 1355, 1356, 1357
- Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5106a
- Indian Child Welfare Act (ICWA) 25 U.S.C. §§ 1901-1963; 25 C.F.R. Part 23
- Health Insurance Portability and Accountability Act of 1996 (HIPAA), P. L. 104-192 § 264, 42 U.S.C. § 1320d-2 (in relevant part); 45 C.F.R. Parts 160, 162, 164
- Title IV-B and IV-E of the Social Security Act, also SSI, SSA, Medicaid
- Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272, 42 U.S.C. §§ 620 - 628 and 670 - 679
- 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 the Placement of Children (ICPC) (technically an interstate compact rather than a federal law)
- Foster Care Independence Program (FCIP), 42 U.S.C. § 677
- Yet more, including but not limited to: Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1412, 1417; Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; Public Health Act, 42 U.S.C. Sec. 290dd-2 and 42 C.F.R. Part 2.

16

BURDEN OF PROOF

- **Reasonable Cause standard:**
 - Removal
 - Emergency Protective Services
- **Preponderance of Evidence:**
 - Adjudication as a Youth in Need of Care (non-ICWA)
- **Clear & Convincing Evidence:**
 - Termination (non-ICWA)
 - ICWA Adjudication
- **Beyond a Reasonable Doubt:**
 - Criminal conviction standard: ICWA Termination

17

STAGES OF A CASE

- The Department usually has to make reasonable efforts to prevent removal and to reunify families when separated by the state. MCA §41-3-423
- ICWA cases require “active efforts.”
- A determination may be made that preservation or reunification services need not be provided. (Except ICWA cases) Requires clear and convincing evidence and specific findings. MCA §41-3-423 (2)

18

STAGES OF A CASE

- Petition MCA §41-3-422 May combine requested relief
- Emergency Protective Services MCA §41-3-427
- Show Cause hearing MCA §41-3-432
 - Reasonable efforts MCA §41-3-423
 - Temporary Investigative Authority: 90 days MCA §41-3-433
- Adjudication MCA §41-3-437
 - MUST have YINC finding before proceeding further. "The adjudication of a child as a youth in need of care is a threshold requirement without which a court may not grant temporary legal custody, order a court ordered treatment plan, or terminate a person's parental rights under the statute." *In re B.N.Y.* 2003 MT 241, ¶22

19

STAGES OF A CASE

- Disposition MCA §41-3-438: Court has broad powers
- Usually Department is granted Temporary Legal Custody (TLC) MCA §41-3-442, review every 6 months, extensions allowable.
- Treatment Plan is ordered for parents MCA §41-3-443,
 - Parents must fully comply with their treatment plan. *In re D.F.*, 2007 MT 147
 - Even if a parent technically completes all of the tasks in a treatment plan, it is not successfully completed unless the parent "effectuates the purposes for which the plan [was] designed." *In re I.B.*, 2011 MT 82, ¶ 27
- Permanency hearings 12 month deadline MCA §41-3-445 and federal IV-E funding

20

STAGES OF A CASE

- Termination (TPR): MCA §41-3-604 Rebuttable presumption if in foster care 15 of 22 months or if reasonable efforts not required.
 - Adoption
 - Permanent Guardianship
- Placement is within discretion of the court and in best interest of the child. *In re B.W.S.*, 2016 MT 340
- Dismissal: MCA §41-3-424(1) *must occur if*:
 - a child is reunited with the child's parents and returned home;
 - the child remains in the home for a minimum of 6 months with no additional confirmed reports of child abuse or neglect; and
 - issues that led to department intervention have been resolved and that no reason exists for further department intervention or monitoring.

21