

CHILD ABUSE - Authority of the Department of Social and Rehabilitation Services to prevent the withholding of medical treatment for infants;

HOSPITALS - Authority of the Department of Social and Rehabilitation Services to prevent the withholding of medical treatment for infants;

SOCIAL AND REHABILITATION SERVICES, DEPARTMENT OF - Authority to prevent the withholding of medical treatment for infants;

MONTANA CODE ANNOTATED - Sections 41-3-102, 41-3-401 to 41-3-404, 41-3-406;

MONTANA LAWS OF 1985 - Chapter 626, section 1.

HELD: The Department of Social and Rehabilitation Services has authority to initiate legal proceedings to prevent the withholding of medically indicated treatment for disabled infants with life-threatening conditions.

23 September 1986

Dave Lewis, Director
Department of Social and
Rehabilitation Services
Room 301, SRS Building
111 Sanders
Helena MT 59620

Dear Mr. Lewis:

You have asked my opinion on the following question:

Does the Department of Social and Rehabilitation Services have the authority under Montana statutes to pursue any legal remedies, including the authority to initiate legal proceedings, as may be necessary to prevent the withholding of medically indicated treatment from disabled infants with life-threatening conditions?

I have reviewed the statutory framework and concluded that the Department clearly has this authority. My analysis and reasoning follow.

In 1985 the Montana child abuse, neglect, and dependency statutes were amended to include provision for the treatment of infants faced with life-threatening conditions from whom medical treatment is withheld for any reason. 1985 Mont. Laws, ch. 626, § 1. These amendments added two definitions to the prior statutory scheme. "Adequate health care" was redefined to include "the prevention of the withholding of medically indicated treatment, permitted or authorized under state law." § 41-3-102(4), MCA. A new subsection (5) was added defining "withholding of medically indicated treatment." This definition, with its several qualifications, is set out below:

"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 all such conditions. However, 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:

- (a) the infant is chronically and irreversibly comatose;
- (b) the provision of such treatment would:
 - (i) merely prolong dying;
 - (ii) not be effective in ameliorating or correcting all of the infant's life-threatening conditions; or
 - (iii) otherwise be futile in terms of the survival of the infant; or
- (c) the provision of such treatment would be virtually futile in terms of the survival of

the infant and the treatment itself under such circumstances would be inhumane. For purposes of this subsection, "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 over 1 year of age.

§ 41-3-102(5), MCA. These 1985 changes have the effect of broadening the scope of the term "abused or neglected child" under Montana law. Thus, under section 41-3-102(2), MCA, an abused child is one whose health is threatened with harm by the acts of a parent or some other person responsible for his welfare. Harm is defined to include, inter alia, the failure to provide adequate health care. § 41-3-102(3)(c), MCA. Your opinion request essentially asks whether the State has authority to legally proceed to protect the right of an infant who is alleged to be an "abused or neglected child" because of its parents' refusal to provide or authorize suitable medical treatment.

Since infants fitting the statutory definition are now considered abused or neglected children, the Department is provided with a wide panoply of statutory procedures by which it can provide medical protection. First, the Department through its attorney may file a petition for temporary investigative authority and protective services. § 41-3-402, MCA. Upon proper proof the petition allows a district court to issue an order "granting such relief as may be required for the immediate protection of the youth." § 41-3-403(1)(a), MCA. Specifically the court may order that (1) the infant undergo a medical evaluation (§ 41-3-403(2)(b), MCA), (2) it be placed in a medical facility for protection (§ 41-3-403(2)(d), MCA), or (3) the parents provide necessary services (§ 41-3-403(2)(e), MCA). While these particular sections were drafted primarily with the abused adolescent in mind, the terms unquestionably include the subject of your concern--a premature or disabled infant immediately in need of sophisticated medical technology.

Second, the Department may, in lieu of proceeding under section 41-3-402, MCA, file an abuse, neglect, and dependency petition pursuant to section 41-3-401, MCA. Such a petition may seek a broad range of relief including (1) temporary investigative authority and protective services, (2) temporary legal custody, (3) termination of parent-child legal relationship, and/or (4) any other relief consistent with the child's best interests. § 41-3-401(10), MCA. Adjudicatory and dispositional hearings are thereafter held on the petition. §§ 41-3-404, 41-3-406, MCA. While the precise nature of the relief sought in the petition and ordered by the district court will depend on the particular facts, there is no dispute that a proceeding initiated under section 41-3-401, MCA, can result in the Department's being granted the authority to control future medical decisions concerning the child.

In summary, under present dependency and neglect statutes, the Department is vested with broad authority to initiate legal proceedings to compel medical treatment of disabled infants. The relief available in such proceedings is very broad and will, of course, be determined on the basis of the specific circumstances present.

THEREFORE, IT IS MY OPINION:

The Department of Social and Rehabilitation Services has authority to initiate legal proceedings to prevent the withholding of medically indicated treatment for disabled infants with life-threatening conditions.

Very truly yours,

MIKE GREELY
Attorney General